No. _____

IN THE

Supreme Court of the United States

JAMES SMITH,
Petitioner,

v.

SALISH KOOTENAI COLLEGE, A MONTANA CORPORATION, AND THE COURT OF APPEALS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an Indian tribe have civil subject-matter jurisdiction over a tribal nonmember in a tort dispute arising from a traffic accident on a public highway, and if not, does a tribal nonmember nevertheless consent to the jurisdiction of the tribal court by filing a cross-claim after being named as a defendant in the tort action?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals *en banc* panel split 8/3 (App., *infra*, 1a - 31a), entered on January 10, 2006, is reported at 434 F.3d 1127 (9th Cir. 2006).

The Order of the court of appeals (App.32a) vacating the three judge panel unanimous decision and granting *en banc* review on May 13, 2005, is reported at 407 F.3d 1267 (9th Cir. 2005).

The opinion of the court of appeals unanimous three judge panel (App. 33a - 50a) entered on August 6, 2004, is reported at 378 F.3d 1048 (9th Cir. 2004).

The opinion and order of the United States District Court for the District of Montana (App. 51a - 62a) entered March 7, 2003, is unreported.

The opinion of the Court of Appeals of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation (App. 63a - 81a) entered on February 17, 2003, is unreported.

The decision of the Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation (App. 82a - 87a) entered on April 6, 2001, is unreported.

JURISDICTION

The opinion of the court of appeals was issued on January 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The decision of the Ninth Circuit in this case holds, for the first time, that the mere act of filing a cross-claim creates tribal court subject-matter jurisdiction where it would not otherwise exist. The following facts give rise to this exceptional decision.

The Flathead Reservation, located in northwest Montana, is home to the Confederated Salish and Kootenai Tribes. Salish Kootenai College ("SKC") is a Montana corporation that operates in and around the Flathead reservation, offering a variety of courses to tribal members and nonmembers.[1]

In the spring of 1997, James Smith ("Smith"), a citizen of Oregon, was enrolled at SKC as a student in a heavy equipment operator training program. Smith is a Native American and a member of the Umatilla Tribe in Oregon, but he is not a member of the Confederated Salish and Kootenai Tribes. On May 12, 1997, Smith was driving an SKC-owned dump truck as a part of the course in which he was

[1] According to the Ninth Circuit majority opinion, approximately 26% of the SKC students are "affiliated with Confederated Salish and Kootenai" Tribes, i.e., one-third of the three-quarters of the students which are affiliated with some Indian tribe.

enrolled. He proceeded on U.S. Highway 93, which is a public highway within the Flathead Reservation.[2] Two fellow students accompanied Smith as passengers in the truck. Both of these individuals were enrolled members of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

As the vehicle traveled down the public highway, its right rear main leaf spring broke, and the truck veered sharply left. Smith tried to maintain control, but the truck rolled. One passenger was killed, while Smith and the other passenger were seriously injured.

The procedural history leading to this petition is protracted. The injured passenger and the estate of the deceased passenger brought suits against Smith and SKC in tribal court.[3] SKC filed a cross-claim against Smith and at the same time pled

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[2] U.S. Highway 93 is the primary public transportation artery connecting the major cities in western Montana. It travels from Montana's Idaho border at Lost Trial Pass in the south to Canada in the north. It bisects the Flathead Reservation, over 80 miles.

[3] The estate of the deceased brought suit first (on September 1, 1999) and included claims for wrongful death against Smith, SKC, and the Confederated Salish and Kootenai Tribes of the Flathead Reservation. The estate named the Tribes on the express theory that SKC was a tribal "entity." In its Answer to the Complaint SKC denied it was a tribal entity. The Tribes were dismissed by stipulation after the president of SKC filed an affidavit stating that other than authorizing incorporation and the appointment and removal of members of the Board of Directors, "The Tribes have no other connection or involvement with the ownership or operation of the College or its officers, agents or employees. The Tribe provides no funding to the College. Except as a sovereign governmental entity, the Tribe does not control or have responsibility for the operations of the College or its officers, agents or employees." Attached to the affidavit, among other things, were the certificate of incorporation and the articles of incorporation showing that SKC is a Montana corporation. (App. 140a ¶ 6.)

as an affirmative defense that the tribal court lacked subject-matter jurisdiction over SKC.[4] Finally, Smith filed his own cross-claim against SKC. The tribal court consolidated the cases and scheduled trial for August 28, 2000.

In July 2000, all claims were settled except Smith's cross-claim against SKC. This was almost three months after the applicable statute of limitation had run for Smith to file his injury claim in another court.[5] On August 16, 2000, the tribal court moved the trial date back four weeks to September 25, 2000, and on September 7, 2000, realigned the parties, naming Smith as plaintiff and SKC as defendant. Without the court addressing the question of subject-matter jurisdiction, Smith's claim went to a jury, which returned a verdict in favor of SKC.

Smith then sought post-judgment relief with the tribal trial court on the theory that the tribal court lacked jurisdiction over his claim. After the trial court failed to rule, he filed an appeal of the judgment with the tribal appeals court, which remanded to the trial court to determine jurisdiction. The trial court determined that it had jurisdiction, and on April 30, 2001, Smith again filed an appeal with the tribal appeals court. After his second tribal court appeal had languished for a year, Smith filed a

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[4] App. 176a ln 14.

[5] See three year statute of limitation (App. 171a) and related discussion at pages 18 and 19 of this Petition.

complaint in federal district court. This complaint sought:

- an injunction against tribal court on the ground it lacked subject-matter jurisdiction,
- damages against SKC for his injuries, and
- for the first time, damages against SKC for spoliation of evidence.[6]

On February 17, 2003, (22 months after filing his second appeal in tribal court) the tribal appellate court issued an opinion affirming the tribal trial court. On March 7, 2003, the federal district court issued its order on jurisdiction. The district court concluded that federal courts have jurisdiction under 28 U.S.C. § 1331 to consider the question of tribal jurisdiction: it held that the tribal court had jurisdiction and dismissed Smith's claims. Smith appealed the judgment of the district court. A three judge panel of the court of appeals reversed the district court and ruled unanimously that the tribal court lacked jurisdiction over Smith's claims.

At the outset, the three judge panel observed: "We consider an issue of increasing importance to the federal courts and to non-tribal members who live or work in or around Native American reservations."[7] It held as follows:

We conclude that, because Smith is a non-member of the confederated

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[6] SKC does not dispute that Smith's spoliation claim was raised for the first time in federal court. Smith did not learn of the spoliation until midway through the tribal court trial. The court of appeals three judge panel mistakenly indicated that the spoliation claim was brought in tribal court. This claim has never been heard by any court.

[7] App. 34a.

> Salish and Kootenai Tribes of the Flathead Reservation, the tribal courts could only exercise civil jurisdiction over Smith if one of the two *Montana* exceptions applies. Because neither exception applies, we hold that the tribal court lacked civil jurisdiction over Smith's claims against SKC. We reverse and remand the case for the district court to consider Smith's claims on their merits.[8]

The appeals court vacated that opinion and granted *en banc* review.[9] In its decision affirming the lower court, the divided *en banc* panel wrote:

> We hold that a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered a "consensual relationship" with the tribe within the meaning of *Montana*.[10]

Judge Gould wrote the dissent. "Smith's filing of the cross-claim," he wrote, "does not establish the relationship necessary to invoke the first [*Montana*] exception because a party seeking to invoke tribal court jurisdiction must point not to a 'consensual' court proceeding, but to 'another *private consensual* relationship.' *Hicks*, 533 U.S. at 359 n.3."[11]

Judge Gould characterized the majorities "new doctrinal course" as "imaginative jurisprudence" which confuses subject-matter with personal jurisdiction. He laments,

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[8] App. 50a.

[9] App. 32a.

[10] App. 22a - 23a.

[11] App. 26a - 27a.

"But I cannot avoid concluding that here the majority sails on its own course through uncharted waters, rather than the secure channels of *Montana*, *Strate*, and *Hicks* that have been marked by the Supreme Court."[12]

Judge Gould concludes:

> It would be wrong to think that tribal jurisdiction over nonmembers on tort claims is a necessary incident of tribal sovereignty. Neither of the *Montana* exceptions, as construed by binding Supreme Court precedent, applies to the situation here and, therefore, the exercise of tribal jurisdiction over nonmember Smith was not correct. I respectfully dissent, believing that we are bound by *Montana* and its progeny to reverse the judgment of the district court. [13]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case contravenes the principles firmly established by the Court in *Montana* (1981),[14] and *Strate* (1997)[15] governing tribal authority over non-Indians. This Court applies the *Montana* framework "without distinguishing between nonmember plaintiffs and nonmember defendants." *Hicks*

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[12] App. 30a.

[13] App. 31a.

[14] *Montana v. United States*, 450 U.S. 544 (1981).

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

(2001).[16] Conversely, the circuit claims that tribal subject-matter jurisdiction turns on whether the nonmember is a plaintiff or defendant and that *Williams* (1959)[17] is a doctrine independent of *Montana* which requires this result.

Starting with this erroneous premise, the circuit holds that by filing a cross-claim against a tribal member, a nonmember enters into a "consensual relationship" with the tribe within the meaning of *Montana*. By holding that court proceedings instituted years after a traffic accident create subject-matter jurisdiction, the lower court's decision injects great uncertainty into tribal regulation of all nonmember conduct on and around reservations throughout the country. Almost every dispute raises the possibility of competing claims. Only after the Ninth Circuit decision does this possibility threaten to create tribal subject-matter jurisdiction depending upon whether the nonmember is designated plaintiff or defendant at the end of litigation.

The disagreement within the Ninth Circuit on this issue is reflective of a broader conflict among federal courts. The approach to tribal subject-matter jurisdiction over tribal nonmembers taken by the circuit majority opinion here is in conflict with that of two other circuit courts. Both the Eighth Circuit and the Tenth Circuit require nonmember plaintiffs to file claims against tribal members in tribal court first, and

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[16] *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001).

[17] *Williams v. Lee*, 358 U.S. 217 (1959).

exhaust tribal remedies; this with assurance that such filing, and the exhaustion process, will not be construed to create tribal court subject-matter jurisdiction. See *Brown* (10th Cir. 1988)[18] and *Weeks* (8th Cir. 1986).[19]

The question of tribal court civil subject-matter jurisdiction over a tribal nonmember in a tort dispute arising from a traffic accident on a public highway is an important one. The inquiry is controlled by *Montana* as articulated in *Strate* and *Hicks*. Likewise, the exhaustion doctrine enunciated in *National Farmers Union* (1985)[20] and *Iowa Mutual* (1987)[21] plays a fundamental role in the prudential interrelationships between the tribes and tribal nonmembers across the nation. The Ninth Circuit decision at issue here conflicts with *Montana*, *Strate*, and *Hicks*, and it distorts the exhaustion doctrine. Specifically, it dictates that the act of exhausting one's remedies in the tribal court system operates to establish subject-matter jurisdiction where it would not otherwise exist. This decision threatens a broad and profoundly distorting impact upon the Supreme Court's jurisprudence as it is utilized by the Ninth Circuit. Thus, the decision warrants review by this Court.

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[18] *Brown v. Washoe Hous. Auth.*, 835 F.2d 1327 (10th Cir. 1988).

[19] *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986).

[20] *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

[21] *Iowa Mutual Ins. Co. v. Laplante*, 480 U.S. 9 (1987).

I. The Ninth Circuit's decision undermines *Montana*, *Strate*, and *Hicks*.

The court of appeals' decision disregards this Court's fully articulated framework determining tribal authority over a nonmember's tort dispute arising from a traffic accident on a public highway. In its place, the lower court, adopted an unprecedented standard which generates uncertainty by dictating that tribal court has "subject-matter" jurisdiction over some but not all claims arising from a one-vehicle traffic accident.

A. The circuit court majority erroneously refused to accept that the *Montana* framework applies to civil actions involving tribal nonmembers without limitation.

The court of appeals' most fundamental mistake was its refusal to accept that the *Montana* framework applies to civil actions involving tribal nonmembers without limitation.

In *Montana* the Court established the fundamental framework for determining whether a tribal court has jurisdiction over a claim involving a nonmember of the tribe. Under *Montana*, tribal courts are presumed to lack jurisdiction over lawsuits involving nonmembers unless one of two specified exceptions applies:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through

> commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

The court of appeals asserted that the operation of the *Montana* framework depends on whether the nonmember party is a plaintiff or defendant. Specifically, the lower court majority claims that *Williams* (1959)[22] provides for tribal subject-matter jurisdiction whenever a nonmember plaintiff seeks affirmative relief in tribal court against a member defendant. The dissent correctly concludes that:

> This reasoning cannot be reconciled with the holding of *Montana* and the fundamental change it wrought in determining whether tribal courts have jurisdiction over all claims involving nonmembers. The plain language of *Montana* indicates that its framework applies to legal actions involving "nonmembers" **without limitation**, and this analysis has been repeated in subsequent Supreme Court cases.[23] [Emphasis added.]

The court of appeals treats *Williams* as an independent jurisdictional doctrine. In so doing, it fails to appreciate this Court's use of *Williams* to illustrate examples of the *Montana* framework. This Court's illustrative use of *Williams* makes clear that it is not an independent jurisdictional doctrine, and therefore applies to nonmembers,

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[22] *Williams v. Lee*, 358 U.S. 217 (1959).

[23] App. 25a-26a.

whether plaintiff or defendant. If this were not clear enough, this Court has expressly stated that in *Strate* it applied the *Montana* framework "without distinguishing between nonmember plaintiffs and nonmember defendants." *Hicks* (2001).[24]

Tribal jurisdiction is not "better explained by history than by logic."[25] Rather it is explained by both history and logic. It starts with a recognition of the limited nature of tribal sovereignty. "[T]hrough their original incorporation into the United States . . . tribes have lost many of the attributes of sovereignty." *Montana* (1981).[26] As dependent sovereigns, tribes have substantial authority over their own members, but they do not have similar authority over nonmembers: The "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana* (1981).[27] Thus, "In the main ..., 'the inherent sovereign powers of an Indian tribe' – those powers a tribe enjoys apart from express provision by treaty or statute – 'do not extend to the activities of

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[24] *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001).

[25] App. 5a. (*Smith* majority opinion.)

[26] *Montana*, 450 U.S. at 563.

[27] *Montana*, 450 U.S. at 564.

nonmembers of the tribe.'" *Strate* (1997). [28]

The lower court's reliance on *Williams* as an exception to the *Montana* framework misses the broad scope of *Montana* while at the same time ignoring the direct and unequivocal recent pronouncements of this Court considering the jurisdiction of tribal courts. The lower court dissent succinctly explains:

> Whatever tension there may be between the language of *Williams* and the framework that the Supreme Court set forth in *Montana*, the Court itself has indicated that *Williams* is to be understood and interpreted as a part of the *Montana* framework, rather than a doctrine entirely separate from it. *See Montana*, 450 U.S. at 565-566 (citing *Williams* as an example of both exceptions).

B. The court of appeals misapplied the "consensual relationship" exception and in the process created an indefensible conflict between the exhaustion of tribal remedies and the ultimate determination of jurisdiction.

i. A court proceeding is not a "consensual relationship" within the meaning of *Montana*.

The court of appeals also erred profoundly in its application of *Montana*'s consensual relationship exception. Analyzing this exception through its erroneous *Williams* filter, the court of appeals held "a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his

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[28] *Strate*, 520 U.S. at 445-46. (quoting *Montana*, 450 U.S. at 565 (1981)).

claims, entered a 'consensual relationship' with the tribe within the meaning of *Montana*."[29] No other court has interpreted *Montana* in this manner.

The dissent correctly observes that *Montana*'s consensual relationship exception requires a "*private consensual* relationship," not a court proceeding.[30] This Court has never suggested that a court proceeding might satisfy *Montana*'s consensual relationship exception. Instead, this Court has consistently illustrated this exception with a variety of consensual economic relationships.[31] The court of appeals reliance on *Williams* to support its conclusion is misguided. Indeed, this Court in *Hicks* explains that *Williams* is an example of the type of "private commercial actors" who enter into "consensual relationships," which may permit tribal jurisdiction under the first *Montana* exception.[32] In *Williams* the plaintiff "was on the Reservation and the transaction with an Indian took place there."[33] Specifically, the plaintiff owned a store

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[29] App. 22a - 23a.

[30] App. 26a - 27a.

[31] *See* e.g., *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (holding that a tribe may tax members entering the reservation to engage in economic activity); *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904) (allowing a tribal permit tax on nonmember-owned livestock within the reservation); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (allowing a tribal permit tax on nonmembers seeking to conduct business within the reservation).

[32] *Hicks*, 533 U.S. at 372.

[33] *Williams*, 358 U.S. at 223.

on the reservation, sold goods to the tribal member defendants on credit, and sued, in state court, to collect the debt.[34] In his dissent, Judge Gould notes that "Smith does not have any of the attributes of a 'private commercial actor' and the filing of a cross-claim is not a 'private consensual relationship' as the Supreme Court has interpreted the first exception."[35]

The court of appeals' confusion of a cross-claim with the "private consensual relationship" required by the first *Montana* exception requires clarification from the Court. Vehicle travel through reservations on public highways is pervasive and increasing as populations increase. Tort claims are inevitable. Orderly resolution of these claims is too important to both tribes and tribal nonmembers to allow subject-matter jurisdiction of such claims to be determined by the filing of a cross-claim, and then only because the cross-claim remains after other claims settle. Moreover, the standard proposed by the court of appeals would, by its terms, apply to *all* claims in tribal court, not simply traffic accidents. It thereby contains the potential to disrupt nonmember conduct in a variety of contexts. This egregious failure to follow the established framework of this Court should be addressed immediately.

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[34] *Williams*, 358 U.S. at 217-18.

[35] App. 27a.

ii. The exhaustion of tribal remedies can never impact the ultimate determination of tribal court jurisdiction.

The court of appeals brushes past this Court's exhaustion doctrine with one footnote. Specifically, it states:

> [1] Ordinarily, so long as there is a "colorable question" whether a tribal court has subject matter jurisdiction, federal courts will stay or dismiss an action in federal court "to permit a tribal court to determine in the first instance whether it has the power to exercise subject-matter jurisdiction in a *civil* dispute between Indians and non-Indians that arises on an Indian reservation." *Stock W. Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992) (en banc); see *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) ("Exhaustion of tribal court remedies . . . will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise . . . ."). The district court did not issue its decision until Smith had exhausted his appeals in the Confederated Salish and Kootenai tribal courts.[36]

The court of appeals has made no attempt to analyze or reconcile the effect of its newly announced standard with this Court's longstanding exhaustion requirement. The circuit's new standard creates an indefensible conflict between the exhaustion of tribal remedies and the ultimate determination of jurisdiction.

Here, Smith was summoned into tribal court as a defendant by the surviving passenger and the deceased passenger's estate; both tribal members. Under the

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[36] App. 7a.

mandate of both *National Farmers Union* (1985)[37] and *Iowa Mutual* (1987)[38] Smith could not seek redress in federal court before tribal court remedies were exhausted.

In *National Farmers Union* this Court said that the petitioners, which were challenging tribal court jurisdiction, should "have exhausted the remedies available to them in the tribal court system" before a federal court considered "any relief."[39] Under controlling law, Smith had no option but to proceed in tribal court, notwithstanding the fact that SKC is a Montana corporation and had already challenged the jurisdiction of the tribal court. He did not "choose to appear in tribal court," as the circuit majority claims. [40] Smith's filing of a cross-claim against SKC does nothing to change this. His cross-claim arose out of the same one-vehicle rollover which triggered each of the claims and cross-claims in the action.

The appeals court majority tacitly concedes that Smith was required to remain in tribal court until all the other claims had settled. Referring to the time critical in its analysis in July 2000, when all claims were settled except Smith's cross-claim against SKC, the appeals court remarks, "Rather than withdrawing his cross-claim and filing

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[37] *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

[38] *Iowa Mutual Ins. Co. v. Laplante*, 480 U.S. 9 (1987).

[39] *National Farmers Union*, 471 U.S. at 857.

[40] App. 16a.

in another court, Smith elected to litigate the claim fully in tribal court."[41] At that stage, however, Smith was still bound by the exhaustion doctrine to exhaust his tribal remedies. Exhaustion requires tribal appellate review. "Until appellate review is complete, the . . . Tribal Courts have not had a full opportunity to evaluate the claim and the federal courts should not intervene." *Iowa Mutual* (1987).[42]

In *Iowa Mutual* this Court noted that the required tribal appellate review was not procedurally possible before a final decision on the merits. "Although the Blackfeet Tribal Code established a Court of Appeals, see ch 11 § 1, it does not allow interlocutory appeals from jurisdictional rulings. Accordingly, appellate review of the Tribal Court's jurisdiction can occur only after a decision on the merits."[43] The same is true of the Confederated Salish and Kootenai Tribes Laws Codified. See § 1-2-817 CSKT Laws Codified which allows appeal of only limited and specified interlocutory rulings, none of which apply to Smith.[44]

The exhaustion doctrine prevented Smith from "withdrawing his cross-claim and filing in another court." Likewise, he was prevented by the fact that the applicable

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[41] App. 4a.

[42] *Iowa Mutual*, 480 U.S. at 17.

[43] *Iowa Mutual*, 480 U.S. at 12.

[44] App. 170a, *available* at http://www.cskt.org/documents/laws-codified.pdf.

three year statute of limitations had expired. See § 27-2-204 M.C.A.[45] See also § 27-2-407 M.C.A., coined as the "saving statute," which permits filing in another court after the running of the statute, only if the original action is "terminated in any other manner than by voluntary discontinuance."[46]

Consequently, from the date he was summoned into tribal court, as the result of controlling law, Smith was destined to proceed through trial on the merits and appeal in tribal court before he could challenge tribal jurisdiction in federal court. On these facts, if he wanted to preserve his claim against SKC for catastrophic injuries, Smith's course was wholly outside his control. Yet, the court of appeals majority makes the remarkable suggestion that "Smith comes to this proceeding as the plaintiff, in full control of the forum in which he prosecutes his claims against SKC."[47] Based upon this faulty predicate, the court of appeals holds that by filing his cross-claim, Smith entered into a "consensual relationship" with the tribe within the meaning of *Montana*.[48]

The lower court's decision creates a catch-22 for Smith and other similarly

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[45] App. 171a.

[46] App. 172a.

[47] App. 17a.

[48] App. 23a.

situated individuals. Smith is required by the exhaustion doctrine to exhaust all his tribal remedies before filing in federal court. If he does so, however, he will be deemed to have consented to tribal court jurisdiction. Likewise, the appeals court suggests that he could avoid this result by voluntarily dismissing his cross-claim before trial in tribal court. Again though, if he does so, his claim is barred by the statute of limitation. These absurd results were not contemplated by this Court when it established the exhaustion doctrine, and they are not invited by any reasonable application of the doctrine.

Under any reasonable reading of the doctrine, the exhaustion of tribal remedies can never impact the ultimate determination of tribal court jurisdiction. Consequently, Smith's process through tribal court cannot be construed as a "consensual relationship" with the tribe within the meaning of *Montana*. The Ninth Circuit holding to the contrary is disruptive to long settled law and warrants immediate review.

C. The second *Montana* exception is inapplicable because tribal jurisdiction over nonmembers on tort claims is not necessary to protect tribal sovereignty.

The circuit court majority makes a passing suggestion that "Smith might fit within the second *Montana* exception, which allows for tribal jurisdiction where the conduct of a nonmember threatens or has some direct effect on the . . . economic

security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 566."[49] Although the lower court did not determine whether this exception actually applies, Smith addresses the issue here because, left unchallenged, the suggestion creates uncertainty and further erodes the *Montana* framework. This erosion and the suggestion of tribal subject-matter jurisdiction outside the heretofore clear parameters set by this Court has an unsettling impact on those living in and around reservations.

Simply put, the second *Montana* exception is inapplicable because tribal jurisdiction over nonmembers on tort claims is not necessary to protect tribal sovereignty. This Court has rejected the argument that allowing nonmembers access to tribal court for civil litigation purposes falls within the second *Montana* exception. *Strate* (1997).[50] ("Opening the Tribal Court for [a nonmember's] optional use is not necessary to protect tribal self-government. . . .") This explicit language is binding. Further, the illustrative cases employed by the Court to flesh out the second *Montana* exception are not comparable to Smith's tort cross-claim.

This Court has provided the "key" to proper application of the second exception:

> Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . . But [a tribe's inherent power

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[49] App. 15a - 16a.

[50] *Strate*, 520 U.S. at 459.

> does not reach] beyond what is necessary to protect tribal self-government or to control internal relations."[51]

Examples of situations and events that satisfy the second exception include adoption proceedings,[52] and a "claim by a non-Indian merchant seeking payment from tribe members for goods bought on credit at an on-reservation store."[53] The circuit errs in suggesting that Smith might fit within the second *Montana* exception. As a practical matter, Smith's pursuit of a remedy outside tribal court simply does not threaten the political integrity or sovereignty of the tribe in any way.[54] The lower court's suggestion, to the extent that it signals a willingness to act in accordance therewith, profoundly undermines the precise holding of *Strate*. This improperly expansive theory of tribal authority warrants review in its own right.

D. The limitation on tribal jurisdiction over nonmembers concerns subject-matter jurisdiction and cannot be waived.

The court of appeals incorrectly reasoned that Smith could waive the limitation on tribal jurisdiction over nonmembers. The dissent explains that tribal courts are courts of limited, not general, subject-matter jurisdiction. They presumptively lack

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[51] *Strate*, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 56) (alterations in original).

[52] *Fisher v. Dist. Ct. Of Sixteenth Judicial Dist. Of Mont.*, 424 U.S. 382, 387 (1976).

[53] *Strate*, 520 U.S. at 458 (describing the facts of *Williams*, 358 U.S. at 220.)

[54] *See Strate*, 520 U.S. at 459.

jurisdiction over claims involving nonmembers of the tribe. The dissent makes clear the error of the circuit majority:

> The majority also errs in holding that a party may waive lack of tribal court jurisdiction, much as a litigant in any court may waive lack of personal jurisdiction. The Supreme Court has rejected this reasoning, and has held that the "limitation on jurisdiction over nonmembers pertains to subject-matter, rather than merely personal, jurisdiction, since it turns upon whether the actions at issue in the litigation are regulable by the tribe." *Hicks*, 533 U.S. at 367 n. 8. It bears repeating that the Supreme Court's statement in footnote 8 of the majority opinion of *Hicks*, penned by Justice Scalia and joined by five other Justices, that *Strate*'s "limitation on jurisdiction over nonmembers" is a matter of "subject-matter, rather than personal, jurisdiction" is a holding of the Court, as the majority here indulges in "imaginative jurisprudence" with the effect to avoid the implications of this Supreme Court language and instead to chart a new doctrinal course.[54]

"Lack of subject-matter jurisdiction," writes Judge Gould, "whether in a federal court or in a tribal court, renders a judgment null and void, and a party may not escape from this long-established doctrine, by claiming that a consent can confer jurisdiction on a court."[55]

It is no surprise that the lower court's departure from "long-established doctrine" creates other problems which may not be readily apparent. Here, for example, there is no dispute that tribal court would never have jurisdiction over any claims by tribal

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[54] App. 29a - 30a.

[55] App. 30a.

members (the surviving passenger and the estate of the deceased passenger) against nonmember Smith. The new Ninth Circuit standard applies only to claims made by a nonmember plaintiff against a member defendant. Here, plaintiffs simply claimed that the driving of nonmember Smith on a public highway caused injury. Likewise, there is no dispute that tribal court would never have jurisdiction over the claims of Montana corporation SKC against nonmember Smith. These claims also arose out of Smith's driving on a public highway and resulting damage to the dump truck which rolled and indemnity claims for injury to the passengers.

Had the claims against Smith not settled, under the new Ninth Circuit standard, tribal court subject-matter jurisdiction would extend only to Smith's cross-claim. After the mandatory tribal court trial on the merits and tribal appellate review, the result of Smith's cross-claim would be final. Any judgments arising out of the claims against Smith would be void for lack of subject-matter jurisdiction.

The very real possibility of conflicting results with a second trial underscores the problem with a rule that creates tribal court subject-matter jurisdiction over some but not all claims arising out of a one-vehicle traffic accident. This splitting of claims would not occur with a straight-forward application of the *Montana* framework. It will only occur under the unprecedented and strained holding of the lower court which evaluates subject-matter jurisdiction based upon events which occur after the events

which are the subject of the litigation. It will only occur by interpreting the filing of a cross-claim as a waiver of the tribal court's lack of subject-matter jurisdiction. Yet, it is well-established that subject-matter jurisdiction cannot be waived.[56]

The Ninth Circuit majority has created a morass and this Court should not hesitate to review its decision to assure uniformity and predictability of tribal court jurisdiction.

II. The Ninth Circuit's decision conflicts with the decisions of other circuits.

In light of the Ninth Circuit's substantial departure from established law, it is not surprising that its decision conflicts, both in the standard applied and in the result reached, with decisions of other federal courts. As noted earlier in this Petition, both the Eighth Circuit and the Tenth Circuit require nonmember plaintiffs to file claims against tribal members in tribal court first even when there exists no first-filed tribal court action. *See Brown* (10th Cir. 1988)[57] and *Weeks* (8th Cir. 1986).[58] This, of course,

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[56] *See Insurance Corp. of Ireland, Ltd. v. Compangnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel to not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.") (Internal citations omitted.).

[57] *Brown v. Washoe Hous. Auth.*, 835 F.2d 1327 (10th Cir. 1988) (construction contract dispute).

[58] *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986). (construction contract dispute) See also *Reservation Tel. CO-OP v. Affiliated Tribes*, 76

requires the nonmember to either forgo the claim, or "knowingly" enter tribal court for the purpose of filing suit against a tribal member. Under the new Ninth Circuit standard, the nonmember, "by the act of filing his claims, enters into a 'consensual relationship' with the tribe within the meaning of *Montana*"[59] and thereby creates tribal subject-matter jurisdiction.

The nonmember plaintiff's filing of suit in tribal court in both the Eighth Circuit and the Tenth Circuit does not create tribal court subject-matter jurisdiction. Rather, it allows the tribal court "the first opportunity to evaluate the factual and legal basis for the challenge" to its jurisdiction,[60] and a "full opportunity" to consider the issues before them and "to rectify any errors."[61] as required by *National Farmers Union* (1985).

After the plaintiff exhausts tribal court remedies, he is free to seek redress in federal court. If the federal court determines that tribal court had subject-matter jurisdiction, the tribal remedy will stand. If the federal court determines that tribal court lacked subject-matter jurisdiction, the tribal remedy will be void, plaintiff will

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F.3d 181 (8th Cir. 1996) (telephone CO-OPs challenge tribes possessory interest tax on telephone lines and rights-of-way).

[59] App. 23a.

[60] *National Farmers Union*, 471 at 856.

[61] *National Farmers Union*, 471 at 857.

have satisfied this Court's exhaustion requirement, and will be free to pursue his claim in a court with subject-matter jurisdiction. The federal court determination of tribal court subject-matter jurisdiction will be unaffected by whether plaintiff filed first in tribal court or in some other court.

The standard implemented by this Court and applied by the Eighth and Tenth Circuits irreconcilably conflicts with the newly announced Ninth Circuit standard.

The Ninth Circuit approach to tribal subject-matter jurisdiction has been problematic within the Ninth Circuit. This conflict is exemplified here by the split *en banc* panel which vacated the decision of the unanimous three judge panel. But the rift within the Ninth Circuit is even deeper than the present dispute.

In October 2002 a Ninth Circuit three judge panel split over the question of tribal court jurisdiction over a tribal nonmember. *McDonald* (9th Cir. 2002).[62] The *McDonald* action arose from an accident on a Bureau of Indian Affairs ("BIA") road within the Northern Cheyenne Indian Reservation in Montana. Kale Means, a member of the Cheyenne Tribe, was injured when his car struck a horse that had wandered onto the BIA road. The horse belonged to McDonald who operated a ranch on land he owned in fee within the exterior boundaries of the Cheyenne Reservation. McDonald was an enrolled member of the Oglala Sioux Tribe, but he was not a

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

member of the Northern Cheyenne Tribe.

Means filed suit for damages against McDonald in Cheyenne tribal court, alleging McDonald was negligent in allowing his horse to trespass on the BIA road. McDonald filed suit in federal district court challenging the tribal court's jurisdiction over the dispute. The district court held that the tribal court lacked jurisdiction. The split three judge panel reversed.

The Ninth Circuit majority concluded that the BIA road was a tribal road not subject to *Strate*. Beginning its analysis with *Williams* it held that the tribal court had jurisdiction over Means' suit against McDonald. The dissent reasoned that the majority had failed to properly consider McDonald's status as a nonmember of the tribe and the consequence of that status within the framework of *Montana*. The dissent states, "The majority establishes a presumption in favor of tribal civil jurisdiction over nonmembers in cases involving tribal land (land owned by the tribe within reservation boundaries). Maj. Op. At 12. This startling statement turns the Court's long-standing approach to tribal inherent authority on its head."[63] The dissent goes on to disparage the majority's reliance on *Williams* and to encourage reliance on *Montana*.

The majority also relies on Williams v. Lee, 358 U.S. 217

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[63] *McDonald v. Means*, 309 F.3d at 542.

> (1959), a case approaching its half-century birthday. Williams assumed without deciding that tribal courts have criminal and civil jurisdiction over anyone acting within reservation boundaries, not just on tribal land. Id. At 223. Because this assumption was cast aside long ago, it is hardly support for the majority's presumption theory. See Oliphant, 435 U.S. at 212; Montana, 450 U.S. at 566-567; Strate, 520 U.S. at 442.
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> Consequently, and contrary to the majority's position, no current authority from the Supreme Court or from any circuit court supports the view that the Montana rule does not apply to tribal land cases. In fact, the opposite is true. The recent Supreme Court decision of Nevada v. Hicks, 533 U.S. 353, 359-60 (2001) interpreted Montana to apply to tribal land cases. Specifically, the Supreme Court emphasized that Montana's caution that "Indian tribes retain inherent sovereignty over non-Indians on their reservations, even on non-Indian fee lands," 450 U.S. at 565, clearly implies "that the general rule of Montana applies to both Indian and non-Indian land." 533 U.S. at 359-60. Hicks thus clarified that "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." Id. at 360.[64]

Here, the lower court *en banc* majority cited *McDonald* as an example of how "[o]ur own cases, however, suggest that whether tribal courts may exercise jurisdiction over a nonmember defendant may turn on how the claims are related to tribal lands."[65]

In January 2005 another Ninth Circuit three judge panel split over the question

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[64] *McDonald v. Means*, 309 F.3d at 543.

[65] App. 9a.

of tribal court jurisdiction over a tribal nonmember. *Ford* (9th Cir. 2005).[66] The *Ford* action concerned "the extent to which a tribal court may exercise jurisdiction over a products liability action arising out of an accident occurring on tribal trust land."[67] This action is still pending in the Ninth Circuit on petition for rehearing *en banc*.

As with *Smith*, the *Ford* action arose out of a single vehicle traffic accident. Esther Todecheene, an on-duty law enforcement officer employed by the Navajo Department of Public Safety, died when her Ford Expedition patrol vehicle rolled over while she was driving on a dirt road within the Navajo Nation. Unlike *Smith*, the road is a reservation road, maintained by the Tribe. There is no federal or state right-of-way, and the road is not located on non-Indian fee land.[68]

> The Todecheenes sued Ford in Navajo tribal court alleging that the Ford Expedition, designed and manufactured in Michigan, was defective and unreasonably dangerous in design or manufacture. . . . Ford also challenged the tribal court's subject matter jurisdiction over the action . . .
>
> Ford Motor Credit Company (Ford Credit), Ford's wholly-owned subsidiary, financed the purchase of the Expedition driven by Todecheene, as well as six bulk-purchases of vehicles over an eight-year period. Considering this circumstance, the tribal court determined that the resultant lease-sale contracts created a consensual

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[66] *Ford Motor Co. v. Todecheene*, 394 F.3d 1170 (9th Cir. 2005).

[67] *Ford Motor Co. v. Todecheene*, 394 F.3d at 1172.

[68] *Ford Motor Co. v. Todecheene*, 394 F.3d at 1172.

> relationship between Ford and the tribe.... Additionally, the court referenced the fact that Ford conducted advertising targeted toward residents of the Navajo reservation. The tribal court also determined that it had subject matter jurisdiction over the action under a tribal statute providing for money damages in tort cases. The court concluded that product liability and wrongful death claims fell within the ambit of the tribal statute, even though the tribal court had never decided a product liability claim.
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> Ford did not appeal the tribal court ruling. Instead it sought injunctive and declaratory relief in federal court to halt the tribal court proceeding. The district court issued the requested preliminary injunction, analyzing the tribal court's jurisdiction under Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). The district court also held that Ford was not required to exhaust tribal court remedies before challenging the tribal court's jurisdiction in federal court, because jurisdiction was plainly lacking and exhaustion would serve only to delay the proceedings.[70]

The *Ford* ruling came after the decision by the *Smith* three judge unanimous panel, but before it was vacated. The *Ford* majority cited to *Smith* favorably six times, quoting extensively the reasoning of the *Smith* three judge panel.

Unlike the *McDonald* majority, which began its analysis with *Williams*, the *Ford* majority began by recognizing that "[a]nalysis of Indian tribal court civil jurisdiction begins with *Montana v. United States*."[71] It affirmed the district court, holding that tribal court lacked subject-matter jurisdiction over the product liability claim against

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[70] *Ford Motor Co. v. Todecheene*, 394 F.3d at 1172-1173.

[71] *Ford Motor Co. v. Todecheene*, 394 F.3d at 1174.

Ford even though the rollover occurred on tribal land.

The *Ford* dissent states that "[t]he majority may not like our decision in *McDonald*, but it is bound by it. Because the majority fails to follow *McDonald*, I respectfully dissent."[71]

Given the divergence in approach between federal courts at the circuit level, the uncertainty created by two conflicting lines of authority is present here and now. For the benefit of all those who live or work on or around reservations, or have dealings with those who do, this Court should promptly resolve this intransigent split of authority.

CONCLUSION

The issue raised here clearly warrants Supreme Court review. The Ninth Circuit has substantially expanded tribal court jurisdiction by severely shrinking the landmark *Montana* rule. The authority of the tribes over nonmembers has proved controversial within the Ninth Circuit, where it has lead to split panels in *McDonald v. Means* (2002),[72] *Ford v. Todecheene* (2005),[73] and now a split *en banc* panel in *Smith*.

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[71] *Ford Motor Co. v. Todecheene*, 394 F.3d at 1183.

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

[73] *Ford Motor Co. v. Todecheene*, 394 F.3d 1170 (9th Cir. 2005).

The appeals court has redefined the legal analysis for determining jurisdiction of tribal courts over nonmembers and in the process has turned the exhaustion requirement into a vehicle which creates subject-matter jurisdiction where it would not otherwise exist. The Ninth Circuit's conclusion is contrary to the holdings of the Eighth and Tenth Circuits. Between them, the Circuits include a great number – probably the majority – of reservations in which these issues would be expected to arise.[74]

This petition presents legal issues of vital importance to the increasing number of tribal nonmembers who live or work in and around reservations. Smith has satisfied the rigorous requirements for exhaustion of tribal remedies. The dispositive facts are relatively clear: a tribal nonmember files a cross-claim after being named as a defendant in a tort action arising from a traffic accident on a public highway. These paradigmatic facts should permit the Court to analyze with clarity the scope of tribal subject-matter jurisdiction over tribal nonmembers.

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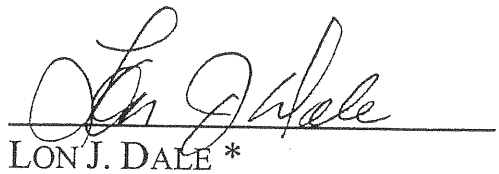
[74] According to 1990 census figures, 76.8% of Native Americans living on reservation and tribal trust lands live in States falling within the Ninth and Tenth Circuits. *See* Bureau of the Census, Racial Statistics Branch, Population Division, *American Indian and Alaska Native Areas* 10-21 (June 1991).

Because Indian reservations are concentrated in a few federal circuits, this Court has historically granted certiorari on Indian law issues based on a more limited experience in the courts of appeals. *See* Petition for Writ of Certiorari at 13-15, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (95-1872) (noting circuit split between Eighth and Ninth Circuits); Petition for Writ of Certiorari, *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473 (1999) (No. 98-6) (noting parallel decisions of Ninth and Tenth circuits).

The petition for a writ of certiorari should be granted.

Respectfully submitted this 10th day of April, 2006.



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