Nos. 09-17349 & 09-17357 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WATER WHEEL CAMP RECREATIONAL AREA, Inc.,
Plaintiff-Cross-Appellant, and

ROBERT JOHNSON,
Plaintiff-Appellee

v.

GARY LaRANCE, in his official capacity as Chief and Presiding Judge of the Colorado River Indian Tribes Tribal Court, and

JOLENE MARSHALL, in her official capacity as Clerk of the Colorado River Indian Tribes Tribal Court

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court for the District of Arizona
United States District Judge David G. Campbell (No. 2:08-cv-00474)

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF TRIBAL DEFENDANTS-APPELLANTS

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STATEMENT OF INTEREST

The Colorado River Indian Tribes ("CRIT") are a federally-recognized tribe operating under a Constitution and By-Laws approved by the Secretary of the Interior under the Indian Reorganization Act, 25 U.S.C. § 476. CRIT resides on the Colorado River Indian Reservation (the "Reservation"), established by Congress in 1865, 13 Stat. 559 (March 3, 1865), and subsequently expanded by executive order. *See* Charles J. Kappler, Indian Affairs: Laws and Treaties, Vol. I, 803-804 (1904) (orders of Nov. 22, 1873, Nov. 16, 1874, and May 15, 1876); Kappler, Vol. IV, 1001 (1929) (order of Nov. 22, 1915). All "unallotted lands of the . . . Reservation . . . are . . . tribal property held in trust by the United States for the use and benefit of [CRIT]." Pub. L. 88-302, 78 Stat. 188, 189 (1964).

In 1973, the United States brought suit, on behalf of CRIT, in the United States District Court for the Central District of California, against Bert and Barbara Denham, to quiet title to federal and Reservation lands occupied by the Denhams on the west side of the Colorado River in Riverside County, California.[1] In March 1975, in furtherance of a settlement of the suit, the court issued a stipulated judgment, declaring the United States to be the owner of the lands, including

[1]Most of the Reservation is east of the Colorado River in Arizona. The CRIT tribal government is headquartered in Parker, Arizona.

disputed lots held "in trust for [CRIT]." ER[2] 284-286. In accordance with the settlement, and with the approval of the Department of the Interior Bureau of Indian Affairs ("BIA"), CRIT issued a 32-year lease to plaintiff and cross-appellant Water Wheel Camp Recreational Area, Inc., ("Water Wheel") – a corporation owned by the Denhams – for the development and operation of a recreational facility (including a trailer park, campground, and marina) on a 26-acre portion of the Reservation lands. ER 219-252. When the lease expired in 2007, Water Wheel and its current owner, plaintiff-appellee Robert Johnson, refused to vacate. The present case concerns the jurisdiction of the CRIT Tribal Court to order eviction and award damages for unpaid rent and the unlawful holdover.

The United States recognizes Indian tribes as "sovereign[s]," 25 U.S.C. §§ 476(h), 3601(3), with the right of self-government and "authority to establish their own . . . tribal justice systems" for the "adjudication of disputes affecting personal and property rights." 25 U.S.C. §§ 3601(4)-(5). The United States files this *amicus* brief in accordance with the federal policy to support tribal self-government, tribal courts, and tribal control over Indian-owned lands. Consent of the parties is not required. Fed. R. App. P. 29(a).

[2] "ER" citations are to the Excerpts of Record filed by Appellants/Cross-Appellees.

STATEMENT OF THE CASE

A. Leasing Act and Regulations

Under the Indian Long-Term Leasing Act ("Leasing Act"), tribal trust lands "may be leased *by the Indian owners*, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes . . ." 25 U.S.C. § 415(a) (emphasis added). Congress granted the Secretary authority to "prescribe[]" "terms and regulations" for such leases, *id.*, and the Secretary has promulgated such regulations. *See* 25 C.F.R § 162.100 *et seq*. (general requirements); § 162.600 *et seq*. (non-agricultural leases). The regulations govern lease-approval (as delegated to BIA), *id.*, §§ 162.103(a), 162.104(d), 162.604(a), and establish various federal enforcement powers, including the authority to recover possession, on behalf of Indian landowners, if a party takes "possession . . . without a lease," *id.*, § 162.106(a), and the authority to cancel a lease for uncured violations. *Id.*, §§ 162.618, 619.

The BIA's lease-approval and enforcement powers (unlike other regulatory powers) cannot be assigned to tribes through contracts or compacts that permit the tribes to administer federal programs under the Indian Self-Determination and Education Assistance Act. *Id.*, § 162.110. The Leasing Act and implementing regulations thus enable the BIA to carry out the United States' fiduciary and trust

obligations to protect tribes in their dealings with third parties. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 368-9 (1968) (federal restrictions on Indian leasing are "incidents of the promises made by the United States in various treaties to protect Indian land.")

However, except as necessary for such purpose, the Leasing Act and implementing regulations do not preempt tribal sovereignty over tribal lands.[3] To the contrary, the regulations state that "[t]ribal laws generally apply to land under the jurisdiction of the tribe enacting such laws, except to the extent that those tribal laws are inconsistent with these regulations or other applicable federal law," 25 C.F.R. § 162.109(b), and that duly enacted tribal laws may "supersed[e] or modif[y]" the federal regulations, with notice to the Secretary, as long as the laws do not "violate a federal statute or judicial decision, or conflict with [the Secretary's] general trust responsibility." *Id.* BIA's objective, under the leasing regulations, is to "promote tribal control and self-determination over tribal land." *Id.*, § 162.107(b). The regulations allow deference to tribes or individual Indian landowners in lease enforcement matters. *See, e.g., id.*, § 162.619(a)(3) (BIA to "consult" with tribe and determine, *inter alia*, whether the "Indian landowners

[3] Courts will find federal preemption of inherent tribal sovereignty only where there is a "clear indication[] of legislative intent." *Merrion v. Jicarilla Tribe*, 455 U.S. 130, 149 (1982).

wish to invoke any remedies available to them under the lease"); *see also* *Poafpybitty*, 390 U.S. at 368-375 (statutory and regulatory restrictions on leasing do not preempt tribal enforcement actions).

B. Water Wheel Lease

In July 1975, CRIT, as "owner" and "Lessor," issued a lease to Water Wheel for the development and operation of a "recreational facility," including a "convenience store," "trailer park," and "marina," on 26 acres of land along the Colorado River in Riverside County, California. ER 221-22 (Arts. I, III). The lease called for: (1) a "guaranteed minimum" rental payment of $100 per acre per year for the first 25 years of the lease, and (2) contingent payments, based on specified percentages of gross receipts from business operations. ER 222-23 (Art. IV). The lease stated that the guaranteed minimum rental would be renegotiate[d]" before the twenty-sixth year of the lease to reflect, from that point forward, the "then current fair annual rental." *Id.*

The lease stated a fixed 32-year term, ER 222 (Art. II), without any express or implied right of renewal. The lease stated that any "holding over" by Water Wheel after expiration "shall not constitute a renewal or extension or give the Lessee any rights hereunder in or to the leased premises." ER 247 (Add. Art. 23).

The lease required Water Wheel "to remove all removable property" [4] prior to lease expiration, *id.*, and "to peaceably and *without legal process* deliver up the possession of the leased premises" upon lease expiration. ER 249 (Add. Art. 29) (emphasis added).

In accordance with requirements of the Leasing Act, CRIT issued the lease on a form prepared by BIA and with BIA's written approval. ER 221, 225, 227. The lease also reserved certain enforcement authorities for the Secretary.[5] The lease stated that Water Wheel's obligations would be "to the United States *as well as the owner of the land* [CRIT]." ER 248 (Add. Art. 26) (emphasis added). The lease also gave the Secretary power to take various actions in the event of a "default" by Water Wheel, including the power to "enter and remove" Water Wheel and "terminate" the lease (prior to lease expiration), without judicial process. ER 243-44 (Add. Art. 21).

[4] Buildings and improvements were to become CRIT property, at CRIT's option, upon lease expiration. ER 232-33 (Add. Art. 6).

[5] The Secretary's "[e]xercise of . . . power" to approve a contract involving Indian property "does not necessarily involve the assumption of contractual obligations [or rights] by the government." *United States v. Algoma Lumber Co.*, 305 U.S. 415, 421 (1939).

In reserving these powers to the Secretary, the lease did not waive CRIT's inherent enforcement powers.[6] Among other things, the lease expressly acknowledged CRIT's right to bring judicial enforcement actions, stating that CRIT would be entitled to reasonable attorneys' fees in any action "brought by the *Lessor* in unlawful detainer for rent or any sums of money due under this lease, or to enforce performance of any of the covenants and conditions of this lease." ER 247 (Add. Art. 22) (emphasis added). The lease contained no forum selection clause for such actions. Further, the lease specifically required Water Wheel and its "employees" and "agents" to "abide by all laws, regulations, and ordinances of the Colorado River Tribes now in force and effect, *or that may be hereafter in force and effect*," with the sole exception of future-enacted laws that have the effect of "changing or altering the *express* provisions and conditions of the lease." ER 249 (Add. Art. 34) (emphasis added).

[6] A tribe's express agreement not to regulate matters under a lease or contract or to resolve disputes exclusively in a non-tribal forum will be enforced. *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1135 (9th Cir. 1995). However, such waivers will be found only if there is a "clear and unmistakable surrender" of sovereign powers. *Merrion*, 455 U.S. at 148.

C. CRIT Tribal Ordinances

By tribal ordinance, CRIT established a tribal court system (Tribal Court and Tribal Court of Appeals) with jurisdiction, *inter alia*, over "any person who . . . uses or possesses any property within the Reservation for any civil cause of action arising from such . . . use or possession." CRIT Law & Order Code, § 101.c.[7] By separate ordinance, CRIT enacted a Property Code, that provides a cause of action for the eviction of any person who

> [o]ccup[ies] . . . any premises without permission or agreement, following any reasonable demand by a person in authority over the premises to leave, including where a lease has expired . . . or where the person to be evicted entered . . . without permission . . .

CRIT Property Code § 1-301(a) (D.Ct. Docket No. 50, Ex. F at 5). Under the Property Code, the Tribal Court may award "actual damages" and attorneys' fees to a prevailing plaintiff, in addition to issuing an order or eviction. *Id.*, § 1-316(a), (b), (i) (D.Ct. Docket No. 50, Ex. F at 12).

D. CRIT's Tribal Court Action

Johnson purchased all interest in Water Wheel and became its chief executive officer in the 1980s. ER 7, 147. Around 2000, before the twenty-sixth year of the lease, CRIT and Johnson attempted but failed to negotiate an adjusted

[7] CRIT laws are available at http://www.crit-nsn.gov/crit_contents/ordinances/).

"guaranteed minimum" rental (based on fair market value) as called for by the lease. ER 2, 113. Johnson subsequently refused to pay increased rents demanded by CRIT. ER 114-117. When the lease expired in July 2007, Johnson refused to vacate the leasehold, and instead continued to operate the business. ER 2, 110, 117-118. Accordingly, CRIT brought an action against Johnson and Water Wheel in CRIT Tribal Court, seeking: (1) an order of eviction; (2) damages for intentional interference with CRIT's rights to utilize the property, (3) unpaid rent (including rent due under the lease provisions requiring fair market rental); and (4) attorneys' fees. ER 304-309. The Tribal Court took jurisdiction (ER 261-268, 288-297), and ultimately granted the requested relief. ER 108-123. Johnson and Water Wheel appealed to the Tribal Court of Appeals, which affirmed in all relevant respects. ER157-215.

F. District Court Decision

In addition to appearing in Tribal Court to defend against CRIT's claims, Johnson and Water Wheel filed the present action in federal district court, alleging the absence of Tribal Court jurisdiction, and asking the district court to enjoin the Tribal Court judge and clerk from adjudicating CRIT's claims. ER 351-361. The district court denied Johnson and Water Wheel's request for a temporary restraining order, citing colorable jurisdiction and the need to exhaust tribal court remedies. ER 216-17, 278-282. After the Tribal Court issued its judgment and the

Tribal Court of Appeals affirmed, the district court took up the jurisdictional challenges and held that the Tribal Court had jurisdiction over Water Wheel but not over Johnson personally. ER 1-23. The district court ordered the Tribal Court to vacate the judgment against Johnson and to "cease any litigation concerning [him] personally." ER 23. The Tribal Court officials appealed. ER 104-106. Water Wheel cross-appealed the finding of Tribal Court jurisdiction over the corporation. ER 101-103.

SUMMARY OF ARGUMENT

The district court correctly held that the Tribal Court had inherent jurisdiction to order Water Wheel's eviction and hold the company liable for unpaid rent and damages resulting from Water Wheel's refusal to vacate the leasehold. Water Wheel voluntarily entered a long-term lease and commercial relationship with CRIT for the possession of tribal land. CRIT's Tribal Court claims arose directly out of this relationship. The Tribal Court's exercise of jurisdiction over Water Wheel thus falls squarely within the "consensual relationship" exception of *United States v. Montana* and within CRIT's inherent authority to manage tribal lands.

The district court erred, however, in holding that the Tribal Court lacked inherent jurisdiction over Johnson. Contrary to the district court's determination,

Johnson's relationship with CRIT was no less "consensual" than Water Wheel's, for purposes of tribal jurisdiction. When acquiring Water Wheel, Johnson voluntarily assumed all rights and obligations under the lease and he personally directed the company's subsequent operations on the leasehold. Johnson's subjective understanding of the relationship is immaterial. Moreover, the district court erred in determining that a consensual relationship – akin to the lease relationship – was necessary to trigger tribal authority to evict and to award damages for unauthorized possession. Tribes possess inherent power to exclude nonmembers from tribal land and the incidental authority to regulate nonmember use of the land. Voluntary entry onto tribal land is sufficient to trigger this jurisdiction.

ARGUMENT

I. TRIBES POSSESS SOVEREIGN AUTHORITY TO REGULATE NONMEMBER USE OF TRIBAL LANDS

A. *Montana* Confirmed Tribal Authority to Regulate Nonmember Use of Tribal Lands

"For nearly two centuries," federal law has "recognized Indian tribes as 'distinct, independent political communities,'" *Plains Commerce Bank v. Long Family Land And Cattle*, --- U.S. ---, 128 S.Ct. 2709, 2718 (2008) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)), "qualified to exercise many of the

powers and prerogatives of self-government." *Id.* (citing *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978)). Because tribes operate within and subject to the sovereignty of the United States, tribal sovereignty . . . "is of a unique and limited character." *Wheeler*, 435 U.S. at 323. Nevertheless, tribes retain all attributes of sovereignty that have not been "divested . . . by federal law" or by "necessary implication of their dependent status." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980); *see also State of Montana v. Gilham*, 133 F.3d 1133, 1137 (9th Cir. 1998). This sovereignty includes the fundamental power to "manage[e] tribal land." *Plains Commerce*, 128 S.Ct. at 2,723 (citing *Worcester*, 31 U.S. at 561).

The "pathmarking case concerning tribal civil authority over nonmembers" is the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848 (9th Cir. 2009) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997)). In *Montana*, the Supreme Court declared, as a "general proposition," that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. However, *Montana* also affirmed several important exceptions. *Id.* at 557, 565-66.

The principal issue in *Montana* was the "narrow" question whether a tribe had authority "to regulate hunting and fishing by non-Indians on [reservation]

lands . . . owned in fee simple by non-Indians." *Id.* at 547, 557. "Thanks to the Indian General Allotment Act of 1887 . . . , there are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes." *Plains Commerce*, 128 S.Ct. at 2719. These are lands within Indian reservations, but over which tribes can no longer "assert a landowner's right to occupy and exclude." *Strate*, 520 U.S. at 456; *see also Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 653 (2001) (noting distinction between tribal territory and tribal lands). *Montana* held that, "because the [t]ribe[s]. . . lost the right of absolute use and occupation of lands . . . conveyed [under the General Allotment Act], . . . tribe[s] no longer ha[v]e the incidental power to regulate the use of [such] lands by non-Indians." *South Dakota v. Bourland*, 508 U.S. 679, 688 (1993).

In so doing, however, *Montana* articulated two exceptions allowing tribal civil jurisdiction over nonmembers "*even* on non-Indian fee lands." *Montana*, 450 U.S. at 565 (emphasis added). In particular, (1) "[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," and (2) a tribe may regulate "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." *Id.* at 565-66. These exceptions are founded

not on the power to exclude (which no longer exists as to non-Indian fee lands), but on the tribes' inherent power to "protect tribal self-government" or "control internal relations." *Id.* at 564.

In addition to articulating these exceptions independent of land ownership, *Montana* summarily affirmed the tribe's authority to regulate nonmember use of tribally-owned lands. *Id.* at 557. In particular, the Supreme Court "readily agree[d]" with this Court's holding that the tribe could "prohibit nonmembers from hunting or fishing on land belonging to the [t]ribe or held in trust by the [t]ribe" and could regulate nonmember hunting or fishing on such lands, as "condition[s] [on] their entry." *Id.* at 557. In so holding, this Court followed *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976). *See United States v. State of Montana*, 604 F.2d 1162, 1165-1170 (9th Cir. 1979). *Quechan Tribe* held that a tribe's "inherent power to exclude non-members" from tribal land includes the rights "to determine who may enter . . . , to define the conditions upon which they may enter, to prescribe rules of conduct, [and] to expel those who enter . . . without proper authority . . . or who violate tribal . . . laws." 531 F.2d at 411.

B. *Montana* Did Not Limit Tribal Power to Exclude Nonmembers from Tribally-Owned Lands

Contrary to the district court's analysis (ER 19-21), neither this Court nor the Supreme Court has repudiated the inherent power to exclude as an independent basis for tribal jurisdiction over nonmembers. The district court cited *Plains Commerce*, 128 S.Ct. 2709, *Strate*, 520 U.S. 438, and *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985) as "compel[ling]" the rule that a "tribe's power to exclude nonmembers [from tribal lands] must be exercised within the *Montana* framework," *i.e.*, in the district court's view, only through the two *Montana* exceptions devised to apply "even on non-Indian fee lands." ER 21. This misreads *Montana* and subsequent precedent.

As the Supreme Court recently explained, *Montana* and its progeny "made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." *Plains Commerce*, 128 S.Ct. at 2719. *Montana* recognized "two exceptions to *this* principle," *i.e.*, the principle or "general rule" that tribes have "'no authority . . . to regulate the use of *fee* land.'" *Id.* (quoting *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 430 (1989) (opinion of White, J.)) (emphasis added). *Montana*'s two exceptions were not directed toward tribally-owned lands, *see Montana*, 450 U.S. at 565, and did not alter the longstanding rule that *Montana* took for granted, *id.* at 557, *viz.*, that

tribes have the "power to exclude nonmembers entirely or to condition their presence on [tribal lands]." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (citing *Montana*).

Shortly after deciding *Montana*, the Supreme Court decided *Merrion v. Jicarilla Tribe*, in which the Court reiterated that nonmembers on tribal land are "subject to the tribe's power to exclude" and the "lesser power to place conditions on entry." 455 U.S. 130, 144-145 (1982); *see also Duro v. Reina*, 495 U.S. 676, 696-97 (1990) ("The tribes also possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands"); *Worcester*, 31 U.S. at 561 (nonmembers may enter Indian land only "with the assent of the [tribes] themselves"). Most recently, in *Plains Commerce*, the Court confirmed that tribal sovereignty "centers on the land held by the tribe" as well as "tribal members within the reservation," 128 S.Ct. at 2721, and that tribes retain "sovereign interests" in "managing tribal land," *id.* at 2723 (citing *Worcester*)," in addition to the sovereign interests in "protecting tribal self-government" and "controlling internal relations." *Id.* at 2723 (citing *Montana*, 450 U.S. at 564); *see also id.* at 2724 (tribes have "inherent sovereign authority to *set conditions on entry*, preserve tribal self-government, [and] control internal relations") (emphasis added); *Strate*, 520 U.S. at 454 & n. 8 ("tribes retain considerable control over nonmember conduct on tribal land").

To be sure, the Supreme Court has also stated that *Montana*'s "general rule" (that tribes lack jurisdiction over nonmembers) "applies to both Indian and non-Indian land," and that land status is "only one factor to consider." *Nevada v. Hicks*, 533 U.S. 353, 359-360 (2001). Citing overriding State interests in the matter of executing process, *Hicks* held that tribes lack authority to regulate (or adjudicate the alleged tort liability of) "state officers" who "execut[e] process," on tribal lands, "related to the violation, off reservation, of state laws." 358-365, 370-371. *Hicks* thus demonstrates that tribes do not possess authority to regulate any and all nonmember conduct on tribal land, by virtue of land ownership alone. *Id.*

However, *Hicks* arose in a limited context. Moreover, there is a difference between asserting civil jurisdiction generally over nonmember conduct that happens to occur on tribal land, *see id.* at 356-7, and regulating property use itself. *See, e.g.*, *Merrion*, 455 U.S. at 135-36 (tribal severance tax on minerals withdrawn from tribal lands). A tribal law or order that goes beyond a tribe's interests in "managing tribal land," *see Plains Commerce*, 128 S.Ct. at 2723 – *e.g.*, a resolution that excludes a nonmember from a reservation as a whole (as opposed to tribally-owned lands) or that regulates nonmember activities unrelated to use of tribal property – would need to be founded, through the *Montana* exceptions, upon a tribes' broader interests in "protecting self-government" or "preserving internal relations." *Id.*; *see also*, *e.g.*, *Hardin*, 779 F.2d at 479 (applying *Montana*

exceptions to uphold tribal order excluding nonmember from reservation based on nonmember's theft conviction). But as *Montana* itself illustrates, when a tribe takes specific action to exclude nonmembers from tribal lands or to establish conditions for nonmember use or possession of tribal lands, land status is dispositive of tribal sovereign authority. *See Montana*, 450 U.S. at 557; *see also Merrion*, 455 U.S. at 137-148.

Indeed, this Court has recently held that land status might be "dispositive" of tribal court jurisdiction over claims seeking not to exclude, but to impose damages for violations of regulations arising from the power to exclude. *See Elliott*, 566 F.3d at 850. *Elliot* concerned an action against a nonmember for natural resources damages resulting from an alleged trespass and negligent conduct on tribal land. *Id.* at 849-850. Noting that the action involved tribal regulations that "stem[med] from the tribe's 'right to occupy and exclude,'" this Court concluded : (1) that the "tribe's ownership of the land" might be "dispositive" of tribal court jurisdiction to enforce the regulations against the nonmember defendant, without need to "appl[y] the two *Montana* exceptions," *id.* at 850 (citing *Hicks*, 533 U.S. at 370), and (2) that the tribe had made a "compelling argument" under the *Montana* exceptions

in any event. *Id.* While not a final jurisdictional ruling,[8] *Elliot* demonstrates that the power to exclude is a distinct source of authority over nonmembers – in addition to the two *Montana* exceptions applicable "even on non-Indian fee lands" – and that all three of these rules modify *Montana*'s "general proposition" against jurisdiction over nonmembers. *Id.*

Alternatively, if *Montana* exceptions are deemed to be the exclusive basis for tribal jurisdiction over nonmembers, they must be interpreted as fully encompassing the power to exclude and coincident power to regulate nonmember use of tribal lands, which are firmly established in Supreme Court precedent, including *Montana* itself. *See* 450 U.S. at 557. Stated differently, the view that *Montana*'s exceptions are exclusive can be reconciled with case law on the power to exclude, *see, e.g.*, *Merrion*, 455 U.S. at 146-148, only if nonmember use of tribal land is deemed, as a matter of law: (1) to create a "consensual relationship" under *Montana*'s first exception, and/or (2) to "direct[ly] effect . . . the political integrity, the economic security, or the health or welfare of the tribe" for purposes of *Montana*'s second exception.

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[8] *Elliot* required the exhaustion of tribal-court remedies, because the alleged absence of tribal jurisdiction was not "plain." *Id.* at 846-48; *see also National Farmers Union Ins. Cos. v. Crow Tribe of Indians*. 471 U.S. 845, 856-57 (1985) (exhaustion requirement).

II. THE TRIBAL COURT HAD JURISDICTION OVER WATER WHEEL

There is no dispute that Water Wheel voluntarily entered a long-term lease for commercial operations on CRIT tribal land,[9] and that CRIT's claims in Tribal Court arose directly out of Water Wheel's business operations under the lease and Water Wheel's failure to vacate the leasehold when the lease expired. *See Phillip Morris USA, Inc. v. King Mountain Tobacco Company, Inc.*, 569 F.3d 932, 941-942 (9th Cir. 2009) (tribal jurisdiction depends on "nexus" between assertion of sovereignty and consensual relationship). Accordingly, the present case implicated both: (1) CRIT's authority to "regulate" the activities of a nonmember who entered

[9] Citing historic disputes over the status of Reservation lands west of the Colorado River, *see generally Arizona v. California*, 460 U.S. 605, 631 (1983), Johnson and Water Wheel argued below that the subject parcel lies on federal land outside the Reservation. However, Johnson and Water Wheel abandoned this argument before final judgment, ER 3-4, and, in any event, it lacks merit. In a 1969 order, the Secretary determined the lands to be within the Reservation. *Arizona*, 460 U.S. at 631. Although the Supreme Court found this determination insufficient for purposes of a water-rights adjudication between the States, *id.* at 636, the Court did not question the finality of quiet-title judgments obtained on individual parcels. *Id.* at 636, n. 26. Johnson and Water Wheel came into possession of the subject lands as a result of such a judgment and are thus estopped from challenging CRIT's ownership. Moreover, the Secretary's determination of Indian title is not subject to third-party challenge. *See* 28 U.S.C. § 2409a; *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139, 144 (9th Cir. 1987).

a "consensual relationship" with the Tribe, *Montana*, 450 U.S. at 566, and (2) CRIT's "power to exclude" nonmembers from tribal lands and "place conditions on entry" and use. *Merrion*, 455 U.S. at 144-145. Under a straightforward application of these precedents, CRIT possessed inherent authority to regulate Water Wheel's conduct under the lease and Water Wheel's use and occupancy of tribal land. *Id.*

CRIT's authority to *regulate* Water Wheel's conduct entails authority to *adjudicate* CRIT's eviction and damage claims. Although the Supreme Court and this Court have expressly reserved judgment on the question whether tribal adjudicatory jurisdiction is coextensive with regulatory jurisdiction, *see Hicks*, 533 U.S. at 358 & n. 2; *Phillip Morris*, 569 F.3d at 940, the Courts have presumed that tribes may exercise adjudicatory jurisdiction over matters they have authority to regulate. *See Plains Commerce*, 128 S.Ct. at 2,728 (Ginsburg, J., concurring) (stating presumption); *Phillip Morris*, 569 F.3d at 941-942 (describing *Montana* as "controlling" tribal court jurisdiction).

This presumption reflects the common source and overlapping aspects of a tribe's legislative and adjudicate powers. As described *supra*, CRIT's Tribal Court action against Water Wheel and Johnson has its origin in the tribal ordinances establishing the Tribal Court and Property Code. Generally speaking, the Tribal Court's exercise of jurisdiction under duly enacted tribal ordinances represents an

instance of "regulat[ing]" the conduct of nonmembers by "other means," *i.e.*, *via* an instrument of sovereignty other than "taxation" or "licensing." *Montana*, 450 U.S. at 565. An ordinance requiring nonmember lessees to submit to tribal court jurisdiction over lease disputes is not distinguishable from an ordinance imposing a severance tax on nonmember mineral lessees (in addition to rents and royalties already owed under existing leases). *See Merrion*, 455 U.S. at 144-145. As the Supreme Court stated in *Merrion*, a "nonmember who enters the jurisdiction of the tribe [is] subject to the risk that the tribe will . . . exercise its sovereign powers." *Id.* This principle holds for any valid exercise of sovereign authority, whether a tribe acts through an elected council, an appointed court, or other duly empowered official.[10] Accordingly, the district court properly affirmed the Tribal Court's jurisdiction over CRIT's claims against Water Wheel.

[10] For example, in *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), the Supreme Court addressed a tribal court tort action arising from nonmember uranium mining on tribal land. *Id.*, at 482, n. 4. While finding the claims subject to federal-court "removal" under provisions of the Price Anderson Act, *id.* at 483-488, the Supreme Court subsequently expressed "little doubt" about "tribal court . . . jurisdiction over such tort claims," but for the statutory removal provisions. *Hicks*, 533 U.S. at 368.

III. THE TRIBAL COURT HAD JURISDICTION OVER JOHNSON

The district court erred, however, in distinguishing CRIT's claims against Johnson. The district court found: (1) that CRIT failed to "present evidence sufficient to show that Johnson personally entered into a consensual relationship with [CRIT]," and (2) that CRIT was required to show such a relationship (*i.e.*, a relationship akin to the Water Wheel lease) before the Tribal Court could exercise jurisdiction over CRIT's claim for eviction and damages. Neither holding survives scrutiny.

A. Johnson Entered A Consensual Relationship With CRIT

1. Johnson's Subjective Intent is Irrelevant

In finding that Johnson did not enter a "consensual relationship" with CRIT for purposes of the *Montana* exception, the district court relied on the fact that Johnson did not sign the Water Wheel lease, and on Johnson's sworn statements that the Denhams advised him, when he acquired Water Wheel, that BIA would collect rents, that the County of Riverside, California would supervise building permits, and that Southern California Edison would supply electric power. ER 16. Based on these representations, the district court found that Johnson acquired the business on the belief that "he would be dealing largely" with these non-tribal entities and that his subsequent dealings with CRIT were "largely involuntary." ER 16-17.

When conducting this analysis, the district court properly looked for proof of a voluntary relationship between Johnson and CRIT (ER 15-18), as distinguished from proof that Johnson specifically consented to tribal court jurisdiction. To meet *Montana*'s "consensual relationship" exception, it is enough for a tribe to show that the nonmember voluntarily engaged in a commercial transaction or other consensual relationship with the tribe or tribal member on a tribal reservation. *See Montana*, 450 U.S. at 565-66. A tribe need not show that a nonmember specifically consented to the taxation, tribal-court jurisdiction, or other exercise of sovereign power at issue. *See Merrion*, 455 U.S. at 147 ("Indian sovereignty is not conditioned on the assent of a nonmember"); *see also Plains Commerce*, 128 S.Ct. at 2724 (nonmember may consent "expressly or by his actions").

However, in failing to find a consensual relationship between Johnson and CRIT, the district court improperly looked to Johnson's subjective understanding of his relationship with CRIT, rather than to the objective facts defining that relationship. As indicated by the Supreme Court's recent decision in *Plains Commerce*, tribal jurisdiction depends on what nonmembers "reasonably" should "anticipate" from their dealings with a tribe or tribal members on a reservation. 128 S.Ct. at 2,725. A nonmember's subjective misunderstanding regarding the

nature of a lease or other relationship with a tribe has no place in this (if any) jurisdictional inquiry.[11]

Viewed objectively, Johnson's relationship with CRIT is plainly consensual. First, it is undisputed that Johnson (with his wife) voluntarily purchased complete ownership of Water Wheel and thereby assumed all rights and obligations under the Water Wheel lease. ER 7. Johnson entered and occupied the leasehold solely under authority of the Water Wheel lease and not pursuant to any other claim of title or right. ER 7, 15-17.

Second, the Water Wheel lease is unambiguously a lease with CRIT for the possession of tribal land. Although the lease required BIA approval and provided a limited regulatory role to the County of Riverside,[12] the lease identified CRIT as "owner" and "Lessor" of the land, ER 221, 225, 248 (Add. Art. 26), and required

[11] As the Tribal Court officials observe (*Appellants' Principal Brief* at 25-31), the district court's reliance on personal declarations that Johnson failed to submit to the Tribal Court is in tension with the tribal-court exhaustion requirement and principles of comity. The district court's more fundamental error, however, was in determining (ER 18, n. 16) that a "factual finding of voluntariness" was necessary. What Johnson believed about the nature of the lease and lease relationship is not relevant; the relevant facts about the lease and lease relationship are undisputed.

[12] The lease required Water Wheel to submit to CRIT and BIA, prior to any building construction, "comprehensive plans and specifications . . . which have been approved by the State of California and Riverside County." ER232 (Add. Art. 5).

the Lessee, employees, and agents to "abide by all laws, regulations, and ordinances of the Colorado River Tribes now in force and effect, or that may be hereafter in force and effect," with the sole exception of future-enacted laws "changing or altering the *express* provisions and conditions of the lease." ER 249 (Add. Art. 34). These provisions gave notice of tribal ownership and the application of tribal law.

Third, there is no dispute that CRIT asserted sovereign authority over the leasehold during the term of the lease, and that Johnson continued his business operations in the face of CRIT's assertion of sovereign powers. Among other things, Johnson voluntarily met with tribal officials on building and safety, water, and lease administration issues on dozens of occasions. ER 15-16. At bottom, even if Johnson misunderstood CRIT's role when he acquired the business, Johnson's business operations, by any objective measure, were voluntary operations under a tribally-issued lease on tribally-owned lands.

2. Johnson's Decision to Operate as a Corporation Does Not Defeat Tribal Jurisdiction Over Him Personally

Although Johnson conducted his business operations through the Water Wheel corporation (acquired from the Denhams), this does not mean that Johnson himself never entered a consensual relationship with CRIT for purposes of the *Montana* exception. Whether Johnson should be held personally liable for unpaid

rent owed by his company, or for failing to vacate and continuing to operate his company after the lease's expiration, are merits issues not before this Court.[13] The question here is whether the Tribal Court had jurisdiction to adjudicate those issues.

As explained *supra*, CRIT's inherent authority to regulate Johnson's business operations on tribally-owned lands derives from the nature of his conduct, without regard to whether the operations were undertaken in the name of a corporation. Because CRIT may regulate the conduct, CRIT may determine – through the Tribal Court complaint and adjudication and as part of its regulatory powers – if and when such conduct gives rise to personal liability, *e.g.*, for failure to observe requisite corporate formalities or (as the Tribal Court determined here) failure to comply with court discovery orders relating to corporate records. ER 119-120, 193-207. This is especially true where, as here, all relevant corporate operations occurred on and in relation to tribal land. In short, because nonmembers become subject to tribal jurisdiction by virtue of their conduct and not their specific consent, *see Merrion*, 455 U.S. at 147, they cannot avoid personal

[13] Tribal court judgments are enforceable under comity principles. *See Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1140 (9th Cir. 2001); *Wilson v. Marchington*, 127 F.3d 805, 809-813 (9th Cir. 1997). Whether the Tribal Court's judgment against Johnson is enforceable in comity is also not before this Court.

liability for conduct within a tribe's jurisdiction simply by undertaking the conduct in the name of a corporate entity.

In the present case, Johnson voluntarily entered and personally maintained a preexisting lease relationship with CRIT. Accordingly, the CRIT Tribal Court had jurisdiction to adjudicate all claims "aris[ing] out of" that relationship, including the claims for eviction and contract and tort damages asserted by CRIT in this case. *See Phillip Morris*, 569 F.3d at 941.

B. CRIT Did Not Need to Show a Consensual Relationship (Beyond Voluntary Entry) To Evict Johnson

The district court also erred in concluding that CRIT needed to show a consensual relationship – akin to a lease relationship – to maintain the Tribal Court action to evict. In *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), the Supreme Court established a categorical rule that tribes lack *criminal* jurisdiction over non-Indians who trespass onto or commit offenses on tribal lands, a rule that *Duro* extended to all nonmembers (inclusive of non-member Indians).[14] *Duro*, 495 U.S. at 679. However, in determining that tribes generally no longer possess inherent power to "punish" nonmembers for on-reservation offenses, the Court was careful to observe that tribes retain their "traditional and undisputed power to exclude"

[14] Congress subsequently provided for tribal criminal jurisdiction over nonmember Indians. *Strate*, 520 U.S. at 445, n. 5 (citing 25 U.S.C. § 1301(2)).

nonmembers, including the power to physically "restrain" and "eject" nonmembers who "disturb public order." *Id.* at 696-97. The power to "eject" nonmembers who "disturb public order" necessarily entails the power to evict nonmembers who occupy or possess tribal lands without tribal authorization and who refuse to leave in the face of tribal demands to vacate.

Sovereign authority to evict does not derive from nonmember consent. *Merrion*, 455 U.S. at 147. Rather, tribal "assent" is the *sine qua non* of nonmember entry and use. *Plains Commerce*, 128 S.Ct. at 2723 (quoting *Worcester*, 31 U.S. at 561). Under the logic of *Montana* and *Duro*, a tribe may "eject" a nonmember found to be hunting or fishing on tribal land in violation of tribal law, whether or not the nonmember entered the land under a tribal license or agreement. *See Duro*, 495 U.S. at 697; *Montana*, 450 U.S. at 557. The same goes for any nonmember who takes occupancy or possession of tribal land, without tribal lease or license, for personal or business use.

As explained (pp. 14-18, *supra*), this sovereign power to exclude nonmembers who occupy tribal land without tribal authorization is independent of the *Montana* exception permitting tribal jurisdiction over nonmembers who enter "consensual relationships" with a tribe or tribal members on a reservation. *See Montana*, 450 U.S. at 557, 565-66. Alternatively, as also explained (p. 18, *supra*), if the power to exclude operates under the rubric of *Montana*'s "consensual

relationship" exception, any nonmember who voluntarily enters tribal land for business, recreational, or personal use enters a "consensual relationship" as a matter of law. This relationship triggers tribal authority to regulate the business, recreational, or personal use, whether or not the nonmember personally acknowledges the tribe's sovereignty over the land. *Id.*

In apparent recognition of the fundamental nature of CRIT's power to exclude nonmembers from tribal land, the district court limited its jurisdictional holding to CRIT's Tribal Court action. That is, because CRIT's suit "seeks to do much more" than evict Johnson, the district court determined that the Tribal Court's jurisdiction could not rest on the tribe's power to exclude. ER 21. And the court reserved judgment "on whether CRIT may exclude Johnson from tribal land" outside of the Tribal Court process. ER 21, n. 18.

This reasoning cannot stand. First, even if CRIT's inherent power to exclude does not (by itself) support Tribal Court jurisdiction to award damages against Johnson, it does not follow that the power to exclude is insufficient to support Tribal Court jurisdiction to order Johnson's eviction. CRIT's action for eviction is a distinct claim for relief and a specific exercise of the tribal power to exclude. There is no rationale for recognizing CRIT's power to "eject" nonmembers, *see Duro*, 495 U.S. at 697, yet denying CRIT's ability to utilize its Tribal Court in the exercise of such power. The sovereign power to exclude

nonmembers necessarily includes the prerogative to establish the process for exclusion.

Second, contrary to the district court's determination, the sovereign power to exclude does entail the power to award damages for unauthorized possession of tribal land. The obligation not to take possession of tribal land without a tribal lease or license is, in effect, a condition of nonmember use of the tribal land. Awarding actual damages, through civil judicial process, for violating conditions of entry is a manner of enforcing those conditions and is within the sovereign powers associated with the right to exclude. *See, e.g.*, *Elliot*, 566 F.3d at 849-850 (regulations relating to trespass and natural resource damage "stem" from power to exclude). As the Supreme Court explained in *Merrion*, the tribal power to exclude is more than a mere landowners' right, but includes the attributes of sovereignty. 455 U.S. at 145-46.

CONCLUSION

For the reasons stated herein, the district court's judgment enjoining the Tribal Court's jurisdiction over CRIT's claims against Appellee Johnson should be reversed and the district court's judgment upholding the Tribal Court's jurisdiction over CRIT's claims against Cross-Appellant Water Wheel should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

(Nos. 09-17349 & 09-17357 (consolidated))

I certify that:

a. Pursuant to Fed. R. App. P. 29(d), Fed. R. App. P. 32(a)(7)(C), and Ninth Circuit Rule 32-1, the attached *amicus* brief is:

Proportionately spaced, has a typeface of 14 points or more and contains **6,972** words (exclusive of the table of contents, table of authorities, and certificates of counsel) .

May 21, 2010 /s/

Date John L. Smeltzer

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2010, the foregoing Brief for the United States as Amicus Curiae in Support of Tribal Defendants-Appellants was filed with the CM/ECF system and served to the following:

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