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

and ROBERT JOHNSON,

Plaintiff / Appellee,

v.

GARY LaRANCE, in his official capacity as Chief and Presiding Judge of the Colorado River Indian Tribal Court, and JOLENE MARSHALL, in her capacity as Clerk of the Colorado River Indian Tribal Court,

Appellants / Cross-Appellees.

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

RESPONSE BRIEF OF APPELLEE AND CROSS-APPELLANT'S PRINCIPAL BRIEF

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ATTACHMENT RELATING TO EXTENSION OF TIME FOR FILING

On May 21, 2010, the Clerk of the 9th Circuit granted Appellee's / Cross Appellant's telephonic request for a 14-day extension of time for filing Appelle's Response Brief and Cross-Appellants Principle Brief pursuant to 9th Cir. R. 31-2.2(a). Per the Clerk's request, a letter was sent to opposing counsel advising them of said extension. See attached document.

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May 21, 2010

Via Internet Transmission

Tim Vollmann, Esquire
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Re: *Water Wheel Camp Recreational Area, et a. v. LaRance, et al.*,
In The United States Court of Appeals for the Ninth Circuit
Case Nos. 09-17349 and 09-17357
New Briefing Schedule

Dear Mr. Vollmann:

Pursuant to our telephone conversation on the above listed date, I am writing to inform you that the Clerk of the Court (Extension Clerk) for the Ninth Circuit has granted my request for a 14 day extension of time in which to file Appellees' Response/Cross Appellants' Principal Brief (see 9th Cir.R.31-2.2(a)). Consequently, the following is the revised Briefing Schedule to the above-listed case:

Appellees' (Plaintiffs'/Cross-Appellants) Principal/Response Brief (Brief #2)	June 28, 2010
Appellants' Reply/Response Brief (Brief #3)	July 28, 2010
Appellees' Optional Reply Brief (Brief #4)	Aug.11, 2010[1]

A copy of this correspondence will be attached to Appellees' Principle/Response Brief, as required by the Clerk of the Court. Should you have any questions regarding this revised Briefing Schedule please do not hesitate to contact me.

Very truly yours,

Dennis J. Whittlesey

DJW/sll

DC 35609-1 154599

[1] Due 14 days following service of Appellants' Reply/Response Brief.

CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES PURSUANT TO RULE 28-2.1

The undersigned counsel of record certifies as follows:

A. Parties

The Parties to this case are Appellee Robert Johnson and Cross Appellant Water Wheel Camp Recreational Area, Inc. Appellants / Cross Appellees are Gary LaRance, in his official capacity as Chief and Presiding Judge of the Colorado River Indian Tribal Court, and Jolene Marshall, in her capacity as Clerk of the Colorado River Indian Tribal Court.

B. Ruling Under Review

Appellee and Cross Appellant seek review of the Order issued on September 23, 2009 by the United States District for the District of Arizona (Civil Action Number CV-08-0474-PHX-DGC).

C. Related Cases Pursuant to Cir. R. 28-6

The only case related to this appeal is the matter appealed herein.

D. Certificate Pursuant to FRAP 26.1

Cross Appellant Water Wheel Camp Recreational Area, Inc. is a non-Indian California corporation with all shares being owned by non-Indians and its principal place of business in Blythe, California.

s/Dennis J. Whittlesey

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record certifies as follows:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 16,311 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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GLOSSARY OF ABBREVIATIONS

25 *CFR*	25 *C.F.R.* Part 131 (renumbered Part 162)
CRIT	Colorado River Indian Tribes
District Court	United States District Court for the District of Arizona
ER	Excerpts of Record
Eviction Ordinance	Colorado River Indian Tribes Property Code, Ordinance 04-06, Article I Evictions (October 12, 2006).
Johnson	Robert Johnson, CEO of Water Wheel Camp Recreational Area, Inc.
Lease	July 7, 1975, Lease between Colorado River Indian Tribes and Water Wheel Camp Recreational Area, Inc.
Lessee	Water Wheel
Lessor	CRIT
SER	Supplemental Excerpts of Record
Tribal Court	Colorado River Indian Tribes' Tribal Court
Tribal Court Parties	Chief Judge Gary LaRance and Chief Clerk Jolene Marshall
Water Wheel	Water Wheel Camp Recreational Area, Inc.

JURISDICTIONAL STATEMENT

Water Wheel Camp Recreational Area, Inc. ("Water Wheel") and Robert Johnson ("Johnson") filed litigation in the U.S. District Court for the District of Arizona on March 11, 2008, seeking declaratory and injunctive relief that the Tribal Court of the Colorado River Indian Tribes ("CRIT") lacked subject matter jurisdiction over them in an eviction action. At issue was their occupancy of a leasehold on federal land claimed by CRIT to be within the Colorado River Indian Reservation. Although CRIT is an Arizona tribe, the land at issue is within the State of California. The Defendants – Appellants/Cross-Appellees before this Court – were the Chief Judge and Chief Clerk of the CRIT Tribal Court (herein known as the "Tribal Court Parties").

The basis for jurisdiction in the District Court was federal question jurisdiction pursuant to 28 U.S.C. § 1331.

This is an appeal from a final Order of the District Court and this Court has jurisdiction pursuant to 28 U.S.C. § 1291. The final District Court Order was entered on September 23, 2009, and the Tribal Court Parties timely filed their Notice of Appeal on October 22, 2009, from that portion of the Order which granted relief to Plaintiff Robert Johnson. On October 23, 2009, Water Wheel filed a Notice of Appeal (the "cross-appeal") from that portion of the District Court's Order which denied relief to Water Wheel.

Both the appeal and the cross-appeal are from a final order of the District Court disposing of all parties' claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW BY APPELLEE AND CROSS-APPELLANT

1. Whether the District Court correctly held that the Tribal Court Parties failed to meet their burden to establish that they had personal jurisdiction over Appellee Robert Johnson under the law of *Montana v. United States* and its progeny.

2. Whether the District Court properly accepted and considered the two Declarations filed by Johnson.

3. Whether the District Court correctly ruled that an "inherent tribal exclusionary power" did not provide the Tribal Court with personal jurisdiction over Johnson in the action before it.

4. Whether the District Court erred in ruling that the CRIT Tribal Court had jurisdiction over Cross Appellant Water Wheel in an eviction action under the CRIT Eviction Ordinance, which was not in existence when the Lease at issue was executed and to which Water Wheel had never consented in writing despite the Lease's provision that written consent was a precondition to applicability of such a tribal law.

5. Whether the District Court erred in ruling that the Lease allowed CRIT to prosecute the eviction of the tenant in the absence of the tenant's

insolvency or bankruptcy, wherein the tenant's insolvency or bankruptcy was a precondition to CRIT's right of prosecution.

STATEMENT OF THE CASE

This matter is before the Court on cross appeals from the District Court decision concluding that the CRIT Tribal Court had jurisdiction over an eviction action against Water Wheel, a non-Indian California corporation, but did not have jurisdiction over Johnson, the non-Indian President and CEO of Water Wheel. Specifically at issue was whether the corporation and Johnson were subject to Tribal Court jurisdiction as a matter of law as articulated in the seminal case of *Montana v. United States,* 450 U.S. 544 (1981). The Tribal Court Parties are challenging the District Court's conclusion that there was no Tribal Court jurisdiction over Johnson as an individual, and Water Wheel is challenging the District Court's conclusion that Water Wheel was subject to Tribal Court jurisdiction in an action seeking eviction from Water Wheel's leasehold property.

The resolution of the case below, as well as in this Court, turns on whether Water Wheel and/or Johnson **consented** to Tribal Court jurisdiction through the corporation's execution of a federal lease for land claimed by CRIT to be within its reservation, so as to trigger the first exception of *Montana* providing for tribal court jurisdiction over nonmembers. The first exception provides that there must be a "consensual relationship" through which the nonmembers have consented to

the jurisdiction claimed. Simply stated, this case involves the interpretation of a federal Lease between the United States (although CRIT is identified as the Lessor) and Water Wheel.

This is a **simple case** involving the extent to which a corporate lessee consented to tribal jurisdiction. Its resolution involves an examination of facts and application of the law set forth in *Montana* and its progeny. Despite the limited nature of this matter and its careful presentation to the District Court, the United States has filed an *amicus curiae* brief offering its views for this Court's consideration. With this sudden – and unexpected – attention[1], one would assume that some monumental principle of law is here at issue, when in fact the only matter at issue is an interpretation of the terms of a single federal Lease (1) prescribing procedures for dispute resolution and (2) with which Johnson was involved solely in his capacity as a Water Wheel corporate official. Any *amicus curiae* participation is both misplaced and inappropriate to the case before this Court. The facts are clear, the issues discrete and applicable law is well-established that there is no Tribal Court jurisdiction over Johnson or Water Wheel. There is no "cause" here for which legal argument from *amici* need be considered.

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[1] In addition to the United States' filing, three additional *amicus curiae* briefs have been proposed through motion for this Court's consideration. As of the date of this filing, no action on those motions has been taken by the Merits Panel of this Court.

The Lease ostensibly expired, although Water Wheel's long-pending 25 *C.F.R.* appeal (which has, to date, been wholly-ignored by the United States) has asserted otherwise. Regardless of the Lease status, CRIT undertook to evict the tenant corporation from the leasehold property through its Tribal Court rather than invoking the Lease-dictated process authorizing the Secretary of the Interior – and only the Secretary of the Interior – to pursue eviction pursuant to federal regulations. Indeed, an essential legal protection afforded the Lessee is the integrity of due process guaranteed by federal law and those regulations but not in tribal courts.

The question is not whether Water Wheel can be prosecuted for eviction from the leasehold for cause, but rather what party can prosecute that eviction and in what forum. The answer is the United States through fair and lawful administrative processes within the Department of the Interior, and not CRIT seeking the certainty of the "home court advantage" of its Tribal Court.

As for Johnson, it is clear, and as adjudicated in the District Court, that all of his actions throughout the relevant time were undertaken in his capacity as an agent of Water Wheel. Indeed, this was conceded in the District Court by counsel for the Tribal Court Parties. It strains credulity for that same counsel to now argue that Johnson somehow was simultaneously acting in an individual capacity. That

assertion is not supported by the record, it was repudiated by counsel's own statements and it was properly rejected by the District Court.

SUMMARY OF ARGUMENT

The District Court correctly found that Johnson did not consent to Tribal Court jurisdiction under the applicable *Montana* exception, which requires a "consensual relationship" between Johnson and CRIT. ER 22.

Montana and its progeny have established the general rule that absent express authorization by federal statute or treaty (neither of which is present here), "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the Tribe," unless the parties seeking to invoke Tribal Court jurisdiction can meet their heavy burden to demonstrate that either of two limited exceptions apply. *Montana,* 450 U.S. at 565. To this end, a tribal court may exercise civil jurisdiction over a non-Indian where (1) the non-Indian has entered into a "consensual relationship" with the Tribe or (2) the non-Indian's conduct "threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." *Id.* 565-66.

The District Court correctly noted that the Tribal Court Parties argued below that "*Montana*'s first exception – the consensual relationship exception – applied to both Water Wheel and Robert Johnson." ER 5, *ll.* 10 - 11. The Court further noted that the Tribal Court Parties presented "no argument with respect to the second

exception," and stated that it "therefore will confine its analysis to the first *Montana* exception." *Id.* at *ll.* 11 - 15.

The District Court then examined the Lease and the actions of Water Wheel and Johnson in the context of the Tribal Court Parties' invocation of jurisdiction, and found that Water Wheel had consented to Tribal Court jurisdiction (ER 15) but Johnson had not (ER 22).

As to Johnson, the District Court correctly held that the Tribal Court Parties failed to meet their burden of showing that there was a lawful basis for Tribal Court jurisdiction over him under *Montana*. In the course of this deliberation, the Court properly considered, *inter alia*, two Declarations filed by Johnson in support of the action pending before the District Court. Those Declarations were not contradicted by any finding of the Tribal Court (although the Declarations were filed prior to the trial and final decision in that court) or by the Tribal Court Parties (who were fully aware of the existence and content of both of those sworn statements of fact during the briefing and arguments before Judge Campbell) during the District Court action. ER 16-17.

The District Court also properly rejected the Tribal Court Parties' contention that Johnson somehow consented (through his actions) to be personally subject to Tribal Court jurisdiction; finding that no referenced action of Johnson was taken in his individual capacity, but rather his actions were exclusively in his capacity as an

executive and agent of the Water Wheel corporation. ER 18, *ll.* 9 – 12. In short, there was no consensual relationship between the individual Robert Johnson and CRIT pursuant to which *Montana*'s first exception could be invoked, and the District Court held so.

Finally, the District Court properly determined that CRIT's inherent exclusionary power is constrained by *Montana*, and thus does not provide an independent basis for Tribal Court jurisdiction. That is, because the relevant facts demonstrated that there was no Tribal Court jurisdiction over Johnson under *Montana*, there is likewise no Tribal Court jurisdiction pursuant to CRIT's inherent exclusionary power. ER 21.

As for Water Wheel, the invocation of Tribal Court jurisdiction, which was erroneously confirmed by the District Court, was pursuant to the CRIT Eviction Ordinance. That Ordinance was not enacted until October 12, 2006, some 31 years subsequent to execution of the Lease on May 15, 1975. ER 225. Section 34 of the Lease Addendum specifically provided that after-enacted tribal laws such as the Eviction Ordinance would not be applicable to Water Wheel "unless consented to in writing by the lessee." ER 249. It is undisputed that Water Wheel never consented to the applicability of the CRIT Eviction Ordinance, either in writing or otherwise.

The District Court also erred in concluding that CRIT could prosecute the eviction against Water Wheel. The Court's conclusion was in direct contravention of Lease Addendum Section 21, which expressly provided that litigation could be maintained by the United States – but not CRIT – in the case of a default of any Lease provisions. ER 243 – 246. While that same section did authorize CRIT to take certain actions upon occurrence of a Lease default, the trigger for that authorization was Water Wheel's insolvency, bankruptcy, or financial distress, which the corporation has never experienced. Thus, the District Court wrongly relied on a Lease provision which contained an express condition precedent which was here non-existent.

I. APPELLEE'S ARGUMENT: NO TRIBAL COURT JURISDICTION OVER ROBERT JOHNSON

A. Standards of Review Applicable to *Montana* Arguments With Respect to Johnson

Whether a tribal court has jurisdiction over a nonmember pursuant to *Montana*'s exceptions is a federal legal question which federal courts review *de novo*. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990). A tribal court's factual findings are reviewed for clear error. *Id.* at 1313. As such, the question of whether *Montana*'s general rule prohibiting tribal court jurisdiction over a nonmember applies to Johnson is a federal legal question which this Court reviews *de novo*. Pursuant to *Montana*, this Court should begin its analysis with

the presumption that CRIT does not have jurisdiction over Johnson (a nonmember). *See*, discussion, *infra*, at I. B. Starting with that presumption, this Court would next evaluate whether *Montana*'s first exception applies in this case and, if so, to what extent the Tribe may regulate Johnson's conduct. In order for this Court to find that CRIT's assertion of jurisdiction over Johnson was proper, it must **first** find (with the burden of proof resting on the Tribal Court Parties) that Johnson entered into a personal "consensual relationship" sufficient to trigger *Montana*'s first exception. *Id.*

The question of whether Johnson had a personal "consensual relationship" with CRIT is a mixed question of fact and law, but the inquiry into whether the nature of Johnson's contacts with CRIT were sufficient to form a personal "consensual relationship" is "essentially factual." *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002). Where the application of the law to the facts of a particular case requires this Court to conduct an inquiry that is essentially factual, this Court reviews for clear error. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002).

Accordingly, this Court should review the District Court's finding that Johnson did not have a personal consensual relationship with the Tribe for clear error. Unless this Court has "a definite and firm conviction that a mistake has been made," this Court must uphold the District Court's finding that Johnson did not

have a consensual relationship with the Tribe. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (appellate court must uphold decision so long as district court's account of "the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though . . . it would have weighed the evidence differently").

If this Court concludes that the District Court committed clear error and that Johnson had a personal consensual relationship with the Tribe, then this Court could apply that factual finding to *Montana* and find its first exception was triggered by that relationship. However, this Court would still need to evaluate whether that consensual relationship supports the Tribe's assertion of Tribal Court jurisdiction over Johnson with regard to the specific claims asserted in the Tribal Court. *See Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000) ("[e]ven with the presence of a consensual relationship, however, the first exception in *Montana* does not grant a tribe unlimited regulatory and adjudicative jurisdiction over a nonmember"). And, in that event, the extent of Tribal Court jurisdiction over a nonmember is a question of federal law which this Court should review *de novo*.

B. The District Court Correctly Held that the Tribal Court Parties Failed to Meet Their Burden to Establish that *Montana* Provided a Lawful Basis for Tribal Court Jurisdiction Over Johnson.[2]

During oral argument, counsel for the Tribal Court Parties explained his theory as to why Johnson should be found subject to Tribal Court jurisdiction despite the evidence that every action taken by him was in his capacity as an executive and agent of Water Wheel. ER 71 - 72. In support of this argument, counsel cited to Lease Addendum Section 34, which provides that the corporate lessee and its employees and agents were to abide by all [tribal] laws. ER 72, *ll.* 5 - 8. However, counsel did not reconcile his argument with Section 34's additional requirement that the lessee must provide written consent to be subject to after-enacted laws as a precondition to their applicability to the lessee. ER 249, *ll.* 15 - 20. With that, the District Court initiated the following discussion:

> THE COURT: Let me ask you a couple of questions on that.
>
> Speaking hypothetically for a moment, let's assume Peabody Coal enters into a lease with the Navajo Tribe for a big coal mine and **a vice-president of Peabody** goes repeatedly to the reservation to deal with the Tribe on matters related to that, goes there in its capacity as vice-president.
>
> Do those actions of the vice-president on behalf of the corporation create a consensual relationship between

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[2] The arguments herein were preserved by Johnson for appeal in Docket No. 50 at 7-14; Docket No. 67 at 5-27 and during oral argument (ER 30-55, 76-80).

> the vice-president individually and the Tribe that would subject the vice-president to jurisdiction over him personally in Tribal Court? ER 71 – 72 (emphasis supplied).
>
> MR. VOLLMANN: Jurisdiction, yes. Whether there would be liability is another matter. But I believe **if the language of Section 34 were there**, yes, that would be a [personal] consensual relationship. ER 72, *ll.* 5 - 9 (emphasis supplied).

Counsel went on to emphasize his belief that, in the District Court's hypothetical, Peabody Coal officials acting solely in "their capacity as agents" can be personally sued in the Tribal Court. ER 72 - 73. The District Court continued to press the issue, and counsel for the Tribal Court Parties attempted to inject an issue now being argued here that Water Wheel is purportedly in corporate trespass, an asserted fact which counsel argued in turn establishes Tribal Court jurisdiction over Johnson personally:

> MR. VOLLMAN: And if [Peabody Coal] is in trespass, as an agent of the corporation [the corporate vice president] can be sued because he's responsible for that trespass.
>
> THE COURT: And you say that the Tribal Court then has jurisdiction not only over the corporation but over him personally.
>
> MR. VOLLMANN: Yes, under paragraph 34.
>
> THE COURT: Do you have any authority to support that?

> MR. VOLLMANN: I do not; just the language of the lease. ER 74, *ll.* 10 – 20.

This discussion emphasizes the reality of the Tribal Court Parties' case against Johnson personally: it is the product of a novel, unprecedented and unsupported notion that a corporate official can be **personally** sued in a tribal court for actions exclusively taken as an executive or agent of the corporation. The District Court carefully considered and correctly rejected this argument. ER 15-18.

Nevertheless, the Tribal Court Parties continue to insist that there is a general presumption that civil jurisdiction over the activities of non-Indians "lies in the tribal courts . . . . " Appellants' Br. at 12 (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)). There is no such presumption. To the contrary, the general presumption is that the inherent powers of an Indian tribe **do not** extend tribal court jurisdiction to nonmembers. *See Montana*, 450 U.S. at 565. Indeed, as recently as 2008, the Supreme Court reaffirmed the general rule that "tribes . . . do not possess authority over non-Indians who come within their borders." *Plains Commerce Bank v. Long*, 128 S. Ct. 2709, 2718-19 (2008). This axiom flows from the fact that Indian tribes, by virtue of their incorporation into the United States, have been divested of some aspects of their sovereign power. *Id.* at 2719 ("tribes have, by virtue of their incorporation into the American republic, lost the right of governing . . . persons within their limits except themselves") (additional citation and quotations omitted). With respect to matters in which tribes have been

implicitly divested of sovereignty, the Supreme Court has stated that they are those that "involve the relations between an Indian tribe and nonmembers of the tribe." *See, e.g., United States v. Wheeler*, 435 U.S. 313, 326 (1978).

It is accurate to say that tribes do retain authority to exercise "**some forms** of civil jurisdiction over [nonmembers] on their reservations." *Montana,* 450 U.S. at 565 (emphasis added). To this end, *Montana* defined the two **limited** exceptions to the general rule precluding tribal jurisdiction over nonmembers. *See Plains Commerce Bank,* 128 S. Ct. at 2720. First, a tribal court may exercise civil jurisdiction over a nonmember where the nonmember has entered into a "consensual relationship" with the tribe. *Montana,* 450 U.S. at 565. Second, a tribal court may exercise jurisdiction over a nonmember where the nonmember's conduct "threatens or has a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." *Id.* at 565 - 66.

Despite the Tribal Court Parties' attempts to broaden the scope of the exceptions – and, therefore, broaden the scope of the Tribal Court's jurisdiction – it is important to note that *Montana*'s exceptions have been repeatedly recognized as narrow. *Plains Commerce Bank*, 128 S. Ct. at 2720 (stating that the exceptions are "limited ones . . . and cannot be construed in a manner that would swallow . . . or severely shrink" *Montana*'s general rule).

To bolster their case, the Tribal Court Parties contend that where, as here, the leasehold is located within CRIT's reservation, that fact is dispositive in determining whether the Tribal Court has jurisdiction over nonmember Johnson. Appellants' Br. at 13. As authority, they cite *Nevada v. Hicks*, 533 U.S. 353 (2001), for the proposition that tribal ownership "may sometimes be a dispositive factor" when considering tribal regulation of nonmembers. But the Tribal Court Parties fail to explain that the *Hicks* court was merely confirming that there is an **absolute** lack of tribal jurisdiction over nonmembers when the case concerns land **not owned by the tribe**. *Hicks*, 533 U.S. at 360. Indeed, the *Hick*s court explained that while "the absence of tribal ownership has been virtually conclusive of absence of tribal civil jurisdiction with one minor exception," (*id.*) the inverse is **not necessarily true** (despite the Tribal Court Parties' suggestion to the contrary). In fact, *Hicks* specifically held that the "general rule of *Montana* [that tribes are without authority over nonmembers] applies to **both Indian and non-Indian land**." *Id.* (emphasis added).

As noted above, whether a nonmember's conduct occurred on land that is not owned by the tribe is a relevant factor, but this Court has made clear that the membership status of the unconsenting party is **the primary consideration** for any judicial review of tribal court jurisdiction over nonmembers. *Phillip Morris U.S.A., Inc. v. King Mountain Tobacco Co., Inc.*, 552 F.3d 1098, 1102 (9th Cir.

2009) ("[i]t is the membership status of the unconsenting party, not the status of the real property, that counts as the primary jurisdictional fact") (quoting *Hicks*, 533 U.S. at 382); *see also, Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1131 (9th Cir. 2006) ("[t]he Court has repeatedly demonstrated its concern that tribal courts not require [nonmembers] to defend themselves against ordinary claims in an unfamiliar court"). The importance of this rule is demonstrated by the fact that the Supreme Court has consistently rejected claims of tribal jurisdiction over nonmembers, **even when the activity at issue occurred on tribal lands**. *Salish Kootenai*, 434 F.3d at 1132.

Thus, the fact that the leasehold is located on the reservation is inapposite to the *Montana* analysis in this case. In order to prevail, the party asserting tribal court jurisdiction over a nonmember must prove that a *Montana* exception applies, even if that conduct took place on the reservation. *See Hicks*, 533 U.S. at 360 (concluding that "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers" and stating that "the general rule of *Montana* applies to both Indian and non-Indian land"). And the District Court correctly followed this rule when finding that the Tribal Court Parties failed to meet their heavy burden of showing that Johnson had entered into a qualifying consensual relationship with the Tribe sufficient to support Tribal Court

jurisdiction. ER 18, *ll.* 1-12 (discussing the lack of a consensual relationship); *Id.* at *ll.* 13-16 (concluding Tribal Court Parties failed to meet burden).

1. The District Court properly found that the Tribal Court was without jurisdiction over Johnson because he never entered into a "consensual relationship" with the Tribe sufficient to qualify for *Montana*'s "first exception."

The District Court correctly found that the Tribal Court Parties failed to meet their burden of showing that Johnson entered into a qualifying consensual relationship pursuant to *Montana* and, therefore, the Tribal Court was without jurisdiction to render a $4 million dollar judgment against him **personally**.

The Tribal Court Parties now argue that the District Court's ruling as to Johnson was in error, and they propose a number of theories in support of that contention. The crux of their argument is, however, that the Court improperly narrowed the *Montana* exception so as to "require nothing less than an explicit agreement on the part of Robert Johnson to subject himself to tribal jurisdiction." Appellants' Br. at 25. For a number of reasons, the Tribal Court Parties are wrong.

First, the District Court correctly recognized that *Montana*'s "consensual relationship" exception provides that tribes 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. " ER 4 – 5, *ll.* 21 – 3 (emphasis added). The Court further recognized that tribal laws and regulations may be imposed on nonmembers

"only if the nonmember has consented, either **expressly**, or by his actions. " ER 17, *l.* 23. At the same time, the Court acknowledged that the *Montana* exceptions are "limited" and "should not be construed broadly." ER 18, *ll.* 13-14 (citing *Plains Commerce Bank*, 128 S. Ct. at 2720). Applying these standards, the District Court correctly held that the Tribal Court Parties failed to overcome the presumption against Tribal Court jurisdiction because they did not meet their burden of showing that Johnson **personally** – and not Water Wheel – entered into a consensual relationship with the Tribe. *See* ER 18, *ll*. 14-16; ER 22, *ll*. 2-3.

At the outset, the Tribal Court Parties contend that the District Court held that "a nonmember who has maintained a commercial relationship with the tribe . . . may not be subjected to tribal court jurisdiction in an action pertaining to that commercial relationship unless the tribal court finds that the nonmember has voluntarily submitted to the tribe's adjudicatory authority." Appellants' Br. at 18. This argument mischaracterizes the District Court's ruling and is at odds with the nature of the consensual relationship exception.

The District Court understood that in order for the *Montana* exception to apply (and therefore begin a discussion of the potential scope of the Tribe's adjudicatory authority), there first must be a qualifying consensual relationship between Johnson and the Tribe. ER 17, *ll.* 19 – 20 ("a nonmember may not be subjected 'to tribal regulatory authority without the commensurate consent'")

(citing *Plains Commerce Bank,* 128 S. Ct. at 2724). Without the requisite consensual relationship, there could never be Tribal Court jurisdiction over Johnson pursuant to *Montana*'s first exception. *Id*., *ll*. 22-23 (tribal "laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or through his actions"). As such, the District Court conducted an evaluation of whether Johnson personally, as an individual, entered into a qualifying consensual relationship with the Tribe and concluded that he did not. ER 15-18.

The District Court stated that *Montana*'s consensual relationship exception "must stem from commercial dealings, contracts, leases or other arrangements" (ER 5), noting that a lease is one of the "classic examples" of a consensual relationship. ER 6, *ll.* 5-6. Although this dispute involves a lease, Johnson himself was not party to it. ER 16 at n. 14. Moreover, there is no evidence in the Tribal Court record to support its finding that Johnson personally was a party to the Lease. *Id*.; ER 225 (Lease identifies "Water Wheel" as Lessee). In fact, in the Tribal Court's January 15, 2008 Order denying Water Wheel and Robert Johnson's Motions to Dismiss for Lack of Jurisdiction, Tribal Court Judge LaRance found that:

> **Water Wheel is the Lessee** under the Lease . . . Bert Denham, acting as President of the corporation signed the Lease on behalf of Water Wheel in 1975 and then transferred his interest in Water Wheel to Johnson in 1981

> . . . **[and] Johnson did not sign the Lease**. ER 291 (emphasis added).

Notwithstanding Judge LaRance's initial finding, he later (inexplicably) reversed his own finding and ruled that Johnson was "in fact a party to the Lease" – a finding that is unsupported by any evidence in the Tribal Court record or anywhere else. *See* ER 266 ("all the above findings of fact . . . establish that Robert Johnson is in fact a party to the Lease"). *But see* ER 16 at n. 14 (District Court rejecting Tribal Court's finding).

To the contrary, and as noted by the District Court, the uncontroverted evidence is that the Lease was executed before Johnson acquired the company and he never signed the Lease or any amendment thereto. ER 16 at n.14. Accordingly, the District Court correctly found that the Lessee is Water Wheel – not Johnson – (ER 16, *ll.* 19) and rejected the Tribal Court's finding to the contrary as clearly erroneous. *Id*. at n. 14. As such, the Lease does not and cannot give rise to a consensual relationship between Johnson and the Tribe.

Since Johnson was not a party to the Lease or any other contract with CRIT, in order to fall within *Montana*'s first exception, he must have entered into some "other arrangement" with the Tribe. *Hicks*, 533 U.S. at 359 n.3 (*Montana*'s reference to "other arrangements . . . clearly [means] another *private consensual* relationship"). Thus, the Tribal Court Parties argument must be that Johnson implicitly, through his actions, entered into some "other arrangement" and thereby

entered into a personal consensual relationship with the Tribe. The District Court resolved this issue when it correctly found that Johnson's "largely involuntary dealings" (ER 17, *ll*. 14-15) with CRIT were insufficient to show that "Johnson personally chose to enter into a consensual relationship with the Tribe." ER 18 *ll.* 1-4.

The Tribal Court Parties take issue with the District Court's use of the term "voluntary." Appellants' Br. at 22. Nothing in *Montana,* they claim, requires a nonmember's "personal consent" to tribal court jurisdiction based upon the nonmember's understanding that he or she is being subjected to tribal jurisdiction. Appellants' Br. at 21. The Tribal Court Parties mischaracterize the Court's holding and, for that reason, their argument misses the mark.

The District Court's finding in this regard did not go to whether Johnson voluntarily agreed to Tribal Court jurisdiction *per se*, but whether he voluntarily entered into a consensual relationship with the Tribe. This concept follows from *Montana*'s consensual relationship test, which presumes that a nonmember has consented to be subject to certain aspects of tribal authority by virtue of having entered into a "consensual relationship" with a tribe. To be sure, a nonmember may enter into such a relationship with a tribe either expressly, or implicitly through his actions. However, that does not mean that a nonmember may be deemed to have entered into a **consensual** relationship (of the qualifying kind)

with a tribe without taking any voluntary action to enter into a relationship that could be reasonably interpreted to cause a tribe to have authority over him.

With that in mind, it is useful to consider the meaning of the word "consent". Black's Law Dictionary defines "consent" as:

> [a]greement, approval, or permission as to some act or purpose, esp[ecially] given voluntarily by a competent person.

Blacks Law Dictionary 130 (2d Pocket ed. 2001). It follows then, that Johnson, as an individual separate and apart from Water Wheel, must have taken some action, especially a voluntary action,[3] that would constitute an agreement to enter into a relationship with the Tribe (or approval of that relationship), sufficient to subject him to Tribal regulation (in this case, civil tort adjudication).

Indeed, this Court has implied that a relationship must be both **consensual** (or voluntary) and of a commercial nature. In *Boxx v. Long Warrior*, this Court held that "[u]nder *Montana*'s first exception, a relationship is of the qualifying kind if it is **both** consensual **and** entered into through commercial dealing, contracts, leases or arrangements." *Boxx v. Long Warrior*, 2001 U.S. App. LEXIS 24917, *9 (9th Cir. 2001) (emphasis added). It is therefore relevant that Johnson – in his

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[3] *Cf. Penn v. United States*, 335 F.3d 786, 790 (8th Cir. 2003) ("[a] tribe's civil jurisdiction over nonmembers is limited but is broadest with respect to nonmembers who **voluntarily involve** themselves with tribal activities") (emphasis added).

capacity as an individual apart from his role as a corporate official or agent – was not choosing his actions freely and/or voluntarily because he was (1) acting in his capacity as President and on behalf of Water Wheel (not as Robert Johnson)[4] and (2) forced to interact with CRIT on behalf of Water Wheel, even though the Lease nowhere provided that he would be required to do so.

To that point, as the District Court correctly noted, Johnson purchased Water Wheel with the understanding that he would be dealing with the County of Riverside and the State of California with respect to building matters (business activities dictated by Lease Addendum Paragraph 5), would be dealing with Southern California Edison with respect to power (business activity dictated by Lease Addendum Paragraph 14), and would make rent payments to the Bureau of Indian Affairs (in accordance with Lease Section IV). ER 16, SER 17-19. It is undisputed that the parties never agreed, and Water Wheel never consented, to amend the Lease at any point after Johnson's purchase of Water Wheel. ER 16 n.14.

Nevertheless, and contrary to the Lease, Johnson was later directed by the BIA to make rental payments directly to the Tribe. ER 147, ¶ 5. In his capacity as President of Water Wheel, Johnson did so. The Tribe later unilaterally assumed

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[4] *See CFTC v. Weintraub*, 471 U.S. 343, 348 (1985) ("[a]s an inanimate entity, a corporation must act through agents").

the duties of Riverside County with respect to building and inspection matters. Water Wheel never consented to the Tribe's assumption of the duties assigned to Riverside County pursuant to the Lease. ER 148. But Johnson, as President of Water Wheel, was later forced to deal with the Tribe as to such matters. ER 148-152. The Tribe also assumed the duty to provide electrical service to Water Wheel, causing Southern California Edison to refuse to energize any additional portions of the Water Wheel leasehold without approval from the Tribe. ER 148. Although the Lease provided that Southern California Edison would provide electrical services, Johnson, in his capacity as President of Water Wheel, was forced to interact with the Tribe to obtain electricity. *Id.*

To reiterate, Water Wheel never consented to any amendment of the Lease, but Johnson in his capacity as President of Water Wheel nonetheless was forced to deal with the Tribe's unilateral assumption of duties that were otherwise assigned pursuant to the Lease (to which Johnson is not even a party). It is important to note that the Tribal Court Parties admit that "the Lease is a self-imposed limitation on the Tribes' ability to exercise [its] power to exclude [and thus regulate] nonmembers." ER 56 – 57, *ll.* 25 - 4. Despite this admission, they attempt to utilize the Tribe's extra-legal and unilateral assumption of duties with respect to Water Wheel's leasehold as the basis for their claim that the corporation's President consented to personal jurisdiction. Setting aside the fact that Johnson only

interacted with the Tribe in his capacity as President of Water Wheel, each and every instance of CRIT-Johnson contact cited by the Tribal Court Parties relates to the development, improvement and/or maintenance of **Water Wheel**. *Cf. Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 655 (2001) (finding that a nonmember "has not consented to the Tribes' adjudicatory authority" simply by virtue of his presence within a reservation and his "actual or potential receipt of tribal police, fire, and medical services"). Indeed, the instances of contact and interaction with the Tribe occurred as a result of the Tribe's assumption of duties otherwise assigned to the County, the State and/or Southern California Edison. SER 26- 67 (evidencing same); SER 16 -25.

Moreover, even if it could be shown that Johnson entered into a consensual relationship with the Tribe, *Montana* does not grant the Tribe unlimited regulatory or adjudicative authority over a nonmember.[5] *See Plains Commerce Bank*, 128 S. Ct. at 2721 (additional citations omitted). Indeed, *Montana* only permits tribal regulation of nonmembers to the extent "necessary to **protect tribal self-**

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[5] In *Montana*, the Court distinguished between powers retained by tribes (*i.e.*, self government and controlling internal relations) and those that have been divested. With respect to a tribe's power over self government and/or internal tribal relations, the Supreme Court has stated that such powers involve "only the relations among members of a tribe." *See Montana*, 450 U.S. at 563-64 (finding that determinations of membership as well as criminal jurisdiction over members, domestic relations between members and rules of inheritance for members are included among those powers).

government or to_control internal relations." *Hicks*, 533 U.S. at 359 (noting that anything more would be "inconsistent with the dependent status of the tribes.") (emphasis added). A Tribal Court tort suit resulting in a $4 million judgment against Johnson personally at best goes well beyond any tribal interest in self-government and certainly does not affect tribal internal relations. For this reason alone, the Tribal Court's assertion of jurisdiction over Johnson personally must fail.

As the Supreme Court reaffirmed in *Plains Commerce Bank*, "when it comes to tribal regulatory authority, it is not in for a penny, in for a pound." *Plains Commerce Bank*, 128 S. Ct. at 2724-25. In *Plains Commerce Bank*, the Supreme Court held that the Cheyenne River Sioux Tribal Court lacked jurisdiction to award damages against an off-reservation bank (the "Bank") in a suit brought by a tribal member-owned company (the "Longs"). 128 S.Ct. at 2726. The Longs alleged that the Bank discriminated against tribal members with respect to the sale of fee land within the reservation. *Id.* at 2720. In conducting its jurisdictional analysis, the Supreme Court recognized that the Bank had a "lengthy on-reservation commercial relationships" with the Longs. *Id.* at 2724-25. However, with respect to *Montana*'s consensual relationship analysis, the Court only considered the specific transaction at issue:

> The Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions . . . there is no reason the Bank should have anticipated that its general business dealings with [the Longs] would permit the Tribe to regulate the Bank's sale of land it owned in fee simple. *Id*. at 2725.

Similarly, CRIT points to Water Wheel's lengthy commercial relationship with the Tribe but can identify no such transactions with Johnson personally. Instead, the Tribal Court merely relied on Johnson's contacts with the Tribe on behalf of Water Wheel and broadly imputed those transactions to Johnson. Like the Bank in *Plains Commerce*, Johnson had "no reason to anticipate that [his] general business dealings with [the Tribe as the President of Water Wheel] would permit" the Tribe to assert civil adjudicatory authority over him personally and award against Johnson $4 million in tort damages. *See Id.* (notwithstanding Bank's significant tribal contacts, tribal court tort suit still unforeseeable).

Accordingly, the District Court correctly held that Johnson's general contact with the Tribe did not equate to consent to Tribal Court jurisdiction. ER 18, *ll*. 1-16 ("[s]uch an understanding by Johnson cannot fairly be characterized as his personal consent to the tribe's jurisdiction").

2. The "second exception" of *Montana* was not raised by the Defendants below and was, therefore, properly excluded from the District Court's analysis.

The Tribal Court Parties did not present an argument in the District Court based on *Montana*'s "second exception," yet they propose to raise it now on appeal.

The District Court noted that the Tribal Court Parties "contend that *Montana*'s first exception – the consensual relationship exception – applies to both Water Wheel and Robert Johnson." ER 5, *ll.* 10 - 11. The Court went on to observe that the Tribal Court Parties "advance no argument with respect to the second exception; they do not contend that Plaintiffs' conduct threatens or has a direct effect on the political integrity, economic security, health, or welfare of the [T]ribe." *Id.* Accordingly, the Court properly limited its analysis to *Montana*'s first exception. The Tribal Court Parties should not now be permitted to raise here an argument based on *Montana*'s second exception.

Although it is beyond dispute that they now are raising *Montana*'s second exception for the first time, the Tribal Court Parties nonetheless argue that the District Court "inaccurately" found that they did not present this argument. Appellants' Br. at 43 n.4. Faced with the total absence of any second exception argument in any of their pleadings below, the Tribal Court Parties assert that they raised the argument by virtue of their reliance on the Tribal Court record in support of their jurisdictional arguments. *Id.* But not even that record validates the

assertion that the issue was even presented to, let alone considered by, the Tribal Court.

The CRIT Court of Appeals decision apparently includes **a single sentence** mentioning the second exception, and that statement now is cited as the basis for the Tribal Court Parties' current claim that arguments as to the second exception were preserved below. *Id.* The absurdity of this argument is underscored by the fact that they utterly failed to discuss it in the District Court. Their eleventh-hour attempt to raise this issue via an apparently newly-discovered, single statement in the CRIT Appellate Court record must not be countenanced.

This Court should reject any argument regarding *Montana*'s second exception as without foundation, and having been waived, following a long-standing rule that it "will not consider arguments that are raised for the first time on appeal." *Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir. 2007) (quoting *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999)).

Although this general rule is subject to several exceptions, none of them apply in this case. To that point, this Court will consider a new issue only if: (1) there are exceptional circumstances why the issue was not raised in the trial court; (2) the new issue arose during the pendancy of the appeal due to a change in the law; or (3) the issue presented is a pure question of law and the opposing party will

suffer no prejudice as a result of the failure to raise the issue below. *Raich,* 500 F.3d at 868.

Here, the Tribal Court Parties nowhere state (because they cannot) that there were "exceptional circumstances" regarding their failure to raise *Montana*'s second exception. There are no new issues in this case, and *Montana* was decided nearly 30 years prior to this litigation. In addition, the issue of Tribal Court jurisdiction over Johnson is a mixed question of fact and law, a truism essentially conceded by the Tribal Court Parties' own filings. Appellants' Br. at 31. What is more, Johnson would be subjected to extreme prejudice if the Tribal Court Parties are permitted to raise *Montana*'s "second exception" at this time, given that there is no factual record supporting its application to this case. *See Raich*, 500 F.3d at 868 ("[the Court] assesses prejudice to a party by asking whether the party is in a different position than it would have been absent the alleged deficiency").

Because the Tribal Court Parties previously never claimed that *Montana*'s second exception applied (a claim for which they bear the burden of proof), Johnson presented no argument regarding the second exception (although he could and would have) and offered no evidence (although he could and would have) specifically aimed to rebut such an argument. All of the parties to this appeal are limited to and bound by the factual record developed by the District Court. Yet, the Tribal Court Parties surprisingly argue that this Court should evaluate new

claims based on a factual record which is silent as to this issue, with the further suggestion that this Court should evaluate the issue without "the benefit of the District Court's prior analysis." *Raich*, 500 F.3d. at 868 n. 18.

Accordingly, this Court should reject the Tribal Court Parties' attempt to "sandbag[] their opponents with new arguments on appeal," and refuse to consider any arguments regarding *Montana*'s second exception. *Id.* (quoting *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004)).

3. Even if the issue had been raised below, *Montana*'s "second exception" does not apply to this case.

Should this Court consider the Tribal Court Parties' arguments as to *Montana*'s second exception despite their failure to raise them in the District Court, it is nonetheless clear that the second exception does not apply to this case. "*Montana*'s second exception can be misperceived" but "[t]he second exception is only triggered by nonmember conduct that directly threatens the Indian tribe; it does not broadly permit the exercise of civil authority whenever it might be considered necessary to self-government." *Phillip Morris USA, Inc..,* 569 F.3d at 943) (citing *Atkinson*, 532 U.S. at 657 n. 12). As this Court explained in *County of Lewis v. Allen*, the key to the application of *Montana*'s second exception is understanding that:

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

163 F.3d 509, 515 (9th Cir. 1998) (citing *Montana*, 450 U.S. at 564) (additional citation and internal quotations omitted). Thus, in order to trigger *Montana*'s second exception, the nonmember conduct must impact one of the areas identified above.

However, not just **any** impact on those retained tribal powers is sufficient. Indeed, the Supreme Court has stated that in order for *Montana*'s second exception to apply, the nonmember conduct at issue must "imperil the subsistence of the tribal community." *Plains Commerce Bank*, 128 S. Ct. at 2726. Even then, "the elevated threshold [necessary] for application of the second *Montana* exception suggests that [the] tribal power [asserted over the nonmember] must be **necessary to avert catastrophic consequences**." *Id.* (emphasis added). Indeed, this Court has recognized that in order to "invoke the second *Montana* exception, the impact must be **demonstrably serious** and **must imperil** the political integrity, the economic security, or the health and welfare of the tribe." *Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997) (emphasis added).

With respect to specific powers asserted by tribes over nonmembers, the Supreme Court has found that "the desire to assert and protect excessively claimed sovereignty" is not a sufficient interest to meet *Montana*'s second exception. *A-1 Contractors v. Strate*, 76 F.3d 930, 940 (8th Cir. 1996), *aff'd*, 520 U.S. 438, 459 (1997). Along the same line, this Court has held that "a suit in tribal court is not necessary to protect Indian tribes or members who may pursue their causes of action in state or federal court" and thus refused of find the second exception applicable. *County of Lewis*, 163 F.3d at 516.

The second *Montana* exception does not apply in this case because Johnson's conduct does not imperil the tribal community, and tribal adjudicatory authority over Johnson is unnecessary. To be sure, Johnson's conduct has never interfered with the Tribe's right to self government, and the Tribal Court Parties do not purport that it has. In fact, the tribal community continues peaceably to function notwithstanding the fact that the alleged "wrongful conduct" at issue has continued throughout this litigation.

The Tribal Court Parties can only point to an unsubstantiated statement of the Tribal Court of Appeals that a "trespass on tribal lands necessarily threatens the 'economic security' of the [T]ribe." Appellants' Br. at 43. This unsupported single sentence does not show a "demonstrably serious" impact on economic security or that Johnson's conduct "imperil[s]" the same. Indeed, the CRIT

Appellate Court language cited by the Tribal Court Parties appears to be nothing short of an attempt by the Tribal Court to invent an otherwise non-extant record in the event the federal courts later examined that record for evidence related to the second *Montana* exception. In any event, the Tribe's ability to litigate a civil tort suit against Johnson in Tribal Court is simply not necessary to protect the Tribe from "catastrophic consequences." In fact, the Tribal Court Parties have not pointed to *any* consequence of Johnson's conduct, let alone one that could possibly be characterized as "catastrophic."

Accordingly, this Court should reject any consideration of *Montana*'s second exception.

C. The District Court Properly Accepted and Considered the Two Declarations of Johnson.

1. The District Court's consideration of the Johnson Declarations was not a matter that the Tribal Court Parties preserved for appeal.

The Tribal Court Parties failed to preserve any objection to the two declarations of Robert Johnson (the "Johnson Declarations") as a matter for appeal. If the Tribal Court Parties opposed the District Court's consideration of the Johnson Declarations, they certainly had both the opportunity and the ability to raise, and have decided the pertinent objection.

The Johnson Declarations were filed with the District Court in support of Johnson's Motion for Temporary Restraining Order (ER 140-155) before either the

development of the Tribal Court record or the District Court litigation following exhaustion of tribal remedies. To be sure, the Tribal Court Parties' Response Memorandum filed in the District Court (Docket No. 59) notes that the Declarations "are not a matter of record in the Tribal Court proceedings and, thus, should not be relied upon by this Court, unless and until Plaintiffs can demonstrate that the Tribal Court's findings are 'clearly erroneous.'" *Id.* at pp 3-4. However, the Tribal Court Parties offered no further explanation, citation or argument to support that statement beyond a curious footnote (*Id.* at p. 3 n. 1), in which they "reserve the opportunity to file a motion and/or memorandum such as a Sur-reply to address the appropriateness of the Court's consideration of any particular piece of evidence."

The Tribal Court Parties never followed through on their footnote suggestion: (a) they never filed a Sur-reply; (b) they never moved to strike the Declarations; (c) they never formally objected to the Declarations being considered by the District Court; (d) they never cited any legal authority supporting the notion that the Declarations should not be considered; and (e) they never raised the issue at oral argument.

As such, this Court should not consider the Tribal Court Parties' argument regarding the admissibility and, therefore, the District Court's consideration of the Johnson Declarations because they failed to sufficiently raise their objection

below. *See generally* Appellants' Br. at 25-31 (arguing that the Johnson Declarations were improperly admitted as evidence by the District Court). Generally, appellate courts will not "hear an issue raised for the first time on appeal." *Arizona v. Components Inc.*, 66 F.3d 213, 217 (9th Cir. 1995). This Court has stated that "[a]lthough there is no bright-line rule to determine whether a matter has been raised below, a workable standard is that the argument must be raised sufficiently for the trial court to rule on it." *Id.* (finding issue was only referenced tangentially in footnote in the record from district court; issue did not appear in and was not ruled on in district court's opinion and, therefore, concluding issue was not "sufficiently raised" below).

The District Court did not rule on or even discuss the admissibility of the Johnson Declarations (let alone engage in the inquiry that the Tribal Court Parties now propose be done in this Court). The District Court simply stated that "[d]efendants have presented no evidence to contest Johnson's factual assertions" and "rely instead on the Tribal Court's factual findings." ER 17. The Declarations were uncontradicted.

If the Tribal Court Parties had wanted the Declarations excluded, they should have brought the matter before the District Court for a ruling as to their relevance / admissibility. Instead, they consciously elected to do nothing – a fact which is underscored by the Tribal Court Parties' failure to "to state where in the

record on appeal the issue was raised and ruled on" as required by 9th Circuit Rule 28-2.5. Indeed, they cannot do so because the Tribal Court Parties failed to raise their objection sufficiently for the District Court to rule on it. As such, this Court should not permit the Tribal Court Parties to pursue the issue here on appeal.

2. This Court should review the District Court's decision to consider the Johnson Declarations for abuse of discretion.

The Tribal Court Parties urge this Court to conduct a *de novo* review when evaluating the propriety of the District Court's decision to consider the Johnson Declarations as well as the Tribal Court findings of fact. Appellants' Br. at 25. In support of their argument, the Tribal Court Parties cite *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962, 970 (9th Cir. 2008), for the proposition that appellate courts conduct a *de novo* review of "whether [a] District Court had a basis for reviewing evidence outside of the [tribal court record]." Appellants' Br. at 25. *Cachil Dehe Band* stands for no such proposition. That decision contains no discussion regarding either tribal court jurisdiction or federal court review of the same. *Cachil Dehe Band*, 547 F.3d at 965 (affirming judgment dismissing tribe's claims for failure to negotiate gaming compact in good faith and reversing lower court's finding that absent tribes were indispensable parties).

While the Tribal Court Parties understandably attempt to define a standard of review they feel is the most favorable to their case, that standard is not appropriate for this Court's assessment of the District Court's decision to consider

the Johnson Declarations in addition to the Tribal Court record. The appropriate standard of review here is abuse of discretion. *See Brown v. Sierra Nevada Mem'l Miners Hosp.*, 849 F.2d 1186, 1189 (9th Cir. 1988) ("[t]his [C]ourt has stated that it reviews a district court's evidentiary decisions for an abuse of discretion").

The Tribal Court Parties argue that the District Court's reliance on the Johnson Declarations was erroneous because they were not "placed in evidence in the Tribal Court." Appellants' Br. at 26. They then assert that "reliance on the declaration . . . was reversible error" (Appellants' Br. at 27) without citing any authority for their proposition that district courts are without discretion to consider relevant evidence not included in the Tribal Court record. *But see* Fed. R. Evid. 402 ("[a]ll relevant evidence is admissible except as otherwise provided by the Constitution . . . by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court . . . .").

Admittedly, federal courts are to "show **some** deference to a tribal court's determination of its own jurisdiction," and tribal court **findings of fact** are reviewed for "clear error." Appellants' Br. at 27 (citing *FMC*, 905 F.2d at 1313) (emphasis added). But it does not follow that a district court's review of a tribal court's jurisdictional determination is, in every case, strictly limited to the tribal court's record. No known case holds otherwise. The existence and extent of tribal court jurisdiction is a federal question and federal courts are final arbiters of

federal law, *FMC*, 905 F.2d at 1314 and this means that they have discretion to exercise powers consistent with that role, including the right to make determinations regarding the consideration of relevant evidence. Since no federal law or precedent limited the District Court's review strictly to the record of the Tribal Court, its limited reliance on the evidence presented in the Johnson Declarations was reasonable[6] for a number of reasons. *Cf. Hunt v. Nat'l Broad. Co.*, 872 F.2d 289, 292 (9th Cir. 1989) (a district court only "abuses its discretion if it did not apply the correct legal standard . . . or if it misapprehended the underlying substantive law"). Accordingly, even if this Court determines that the issue was properly preserved, this Court should find that the District Court did not abuse its discretion when considering the Johnson Declarations. *Cf. Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000) ("decision of a trial court is reversed under the abuse of discretion standard only when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances").

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[6] *See*, discussion, *infra.*, at I.C.3.

3. The District Court did not require the Tribal Court to rebut the Declarations, but rather found that it improperly failed to consider whether Johnson voluntarily entered into a personal consensual relationship with the Tribe.

The Tribal Court Parties assert that the District Court "fault[ed] [Tribal Court] Judge LaRance for not making a 'factual finding of voluntariness,' (ER 18, n. 16) *i.e.* for not rebutting evidence which he had never seen." Appellants' Br. at 28. This argument is flawed for several reasons.

First, it is disingenuous for the Tribal Court Parties to claim that the Tribal Court Judge was unaware of the general content of the Johnson Declarations in light of the extensive evidence supporting Johnson's assertions which was presented to the Tribal Court.[7] But, more importantly, the District Court was not faulting the Tribal Court for failing to rebut the Declarations but rather for its failure to evaluate whether Johnson – not Water Wheel – **chose** (voluntarily) to

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[7] *See* ER 136 – 139 (correspondence from Tribal Court Record). Water Wheel's 25 CFR appeal and supporting documentation was filed as an Exhibit with the District Court. Docket No. 26-1. Correspondence between Water Wheel and CRIT was included and filed as documentation supporting the CFR appeal. SER 38-61. A number of the documents that were filed were also before the Tribal Court and (although not before the District Court as "Tribal Court Records," *per se*) were, in fact, included in the Tribal Court Record. *See* SER 38-40, 42-43, 46, 51, 54-61. The documents provide additional support for Johnson's assertions and indicate that the Tribal Court had notice of the substance of the Johnson Declarations.

enter into some "arrangement" with CRIT which would form the basis for a consensual relationship with the Tribe.

Indeed, even though the Declarations *per se* were not before the Tribal Court, it is beyond question that the Tribal Court Parties had general knowledge of the assertions made in the Johnson Declarations at all times relevant to this dispute. In fact, CRIT's Trial Brief in Tribal Court called attention to the subject matter of Johnson's assertions and argued that the Court should not consider those matters. SER 2-6. That brief stated:

> [Water Wheel and Johnson's] assertion that the Tribes improperly withheld permission to develop the Property in violation of the Lease is also irrelevant to the issues before the Court. Even if this assertion is correct . . . a breach of the lease by the Tribes has no bearing on whether the Defendants have minimum contacts with the jurisdiction or have entered into a consensual relationship with the Tribes. Thus, such information has no bearing on whether the Court may exercise personal or adjudicatory jurisdiction over Defendants.

Id. at 4 ("similarly . . . Defendants' '25 *CFR* appeal' before the IBIA does not tend to disprove Defendants' contacts with the jurisdiction or their relationship with the Tribes"). In addition, each and every letter of correspondence between Water Wheel and CRIT that was before the Tribal Court show Johnson's exclusive role as CEO, and the Tribe's assumption of duties otherwise assigned in the Lease. ER 75 (remarking that correspondence between CRIT and Johnson are, in fact, "all Water Wheel documents").

Regardless of whether the evidence was (or was not) actually before the Tribal Court, the critical flaw in the Tribal Court's reasoning was that it failed to even recognize the fact that Johnson – not Water Wheel – must have taken some **personal** action in order to form a consensual relationship with the Tribe. ER 18. To this point, the District Court correctly found that "the Tribal Court decision merely recounted Johnson's contacts with the tribe [which were all as CEO of Water Wheel] and **did not address** the voluntariness of those contacts . . ." ER 18 n. 16; *see also* ER 18 *ll.* 15-16 ("Defendants have not presented evidence sufficient to show that Johnson personally entered into a consensual relationship with the tribe"). The Tribal Court Orders do not contain any finding regarding any voluntary action taken by Johnson **in his individual capacity** to form the basis of a consensual relationship with the Tribe. ER 18 n. 16 ("there is no finding of voluntariness to which the clearly erroneous standard can be applied"). Similarly, the Tribal Court record is utterly devoid of evidence regarding Johnson's **personal** contacts with CRIT. ER 18, *ll.* 1-4, 13-16. The absence of any such evidence coupled with the lack of Tribal Court findings regarding voluntary actions by Johnson, makes clear that the Tribal Court merely **assumed** that any contact he had with the Tribe was both voluntary and attributable to him as an individual (not as President of Water Wheel). But the Tribal Court's jurisdiction over Johnson could only be proper under *Montana*'s first exception if Johnson, himself, had a **personal**

consensual relationship with the tribe. *See Plains Commerce*, 128 S. Ct. at 2724 (nonmembers are not subject to tribal regulation absent the "commensurate consent").

It is relevant that the District Court looked at the Tribal Court record and observed that "CRIT does present three letters in which Johnson, acting on behalf of Water Wheel, proposed to the Tribe that additional commercial development be permitted on the property." ER 17 n. 15. But the Court then went on to note that none of the letters even suggest that Johnson, personally, voluntary entered into a consensual relationship with the Tribe; to the contrary, the Court properly concluded, Johnson was forced to deal with the Tribe in order to conduct the corporation's business. *Id.*; ER 15-16 (finding that the Tribal Court's findings of fact went to "Water Wheel's commercial dealings with CRIT" but not Johnson's). In addition, the District Court considered the terms of the Lease (which was before the Tribal Court) and noted that the Lease terms were consistent with Johnson's Declarations. ER 16, *l.* 8.

Despite the obvious lack of evidence regarding any personal consensual relationship between Johnson and the Tribe, the Tribal Court Judge nevertheless failed to identify, address or reconcile any of these issues when ordering that it had jurisdiction over Johnson. ER 264 - 267. In doing so, the Tribal Court committed a critical error by failing to consider whether Johnson had taken any voluntary

action so as to establish a personal consensual relationship with the Tribe. *Cf. Salish Kootenai*, 434 F.3d at 1138 (9th Cir. 2006) ("[s]imply entering into some kind of relationship with the tribes or their members does not give the tribal courts general license to adjudicate claims involving a nonmember"); *Atkinson Trading*, 532 U.S. at 656 (holding that "a nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another. . . .").

Given the Tribal Court's findings and record, the District Court exercised reasonable discretion in considering the Johnson Declarations in conjunction with the Tribal Court's factual findings as part of his review for clear error. ER 16 n. 14 (finding Tribal Court's ruling that Johnson was a party to the Lease was clearly erroneous). Furthermore, the District Court recognized that the Tribal Court Parties presented no evidence to rebut the critical facts stated in the Declarations. ER 17, *l.* 7 (Tribal Court Parties "presented no evidence to contest Johnson's factual assertions"); ER 16, *ll.* 19 – 21 (Declarations "provide support for Johnson's claim that *he* did not intentionally enter into a consensual relationship with the tribe"). With this careful review and assessment, the District Court then correctly found that Tribal Court was without jurisdiction over Johnson. *Cf. FMC*, 905 F.2d at 1313-14 (finding that tribal courts are given initial review of jurisdiction because federal courts may "benefit from [a tribal court's] expertise" but "federal courts have no obligation to follow that expertise").

4. The District Court properly exercised its discretion to consider the evidence necessary to determine that there was no Tribal Court jurisdiction over Johnson.

The Tribal Court Parties argue that the District Court's consideration of the Declarations was "erroneous" because Johnson was "offering evidence which could have first been presented in the Tribal Court." Appellant's Br. at 28. They then offer a theoretical question to dramatize their argument: "[W]hat would stop tribal court litigants from simply failing to appear and taking a default judgment, knowing that they have the opportunity in federal court to present new evidence in opposition to tribal court jurisdiction?" *Id.*

The question is irrelevant to this case. First, the well-reasoned discretion of a competent federal district court would stand in the way of such defendants. Second, and more importantly, that hypothetical activity is not what happened in this case. Johnson did not shun the tribal court process. ER 3 ("Plaintiff's exhausted their Tribal Court remedies . . . ."). The Tribe deposed Johnson. ER 135 (citing February 29, 2008 deposition of Robert Johnson); SER 69-71 (stipulating and agreeing to Johnson's deposition). Johnson testified at trial in Tribal Court. *See* ER 164-165 (CRIT Court of Appeals Opinion and Order, dated May 10, 2009, stating that "on June 4, 2008, the Tribal Court held a three day trial on the merits of the Complaint"). Johnson's attorney filed briefs and motions on his behalf. *See, for example*, SER 7-15 (Petition for Appeal). Johnson litigated his

case through both the Tribal Court and the Tribal Appellate Court. In short, Johnson exhausted his tribal remedies. ER 3.

Setting aside the specific facts of this case, this Court should also consider the consequences of accepting the Tribal Court Parties' theory regarding the proper scope of federal court evidentiary review. More specifically, this Court should consider the countervailing theoretical question: *What would stop a tribal court from refusing or erroneously failing to admit favorable evidence offered by a nonconsenting nonmember defendant, thereby forever foreclosing any federal court's opportunity to review that evidence simply because it was not included in the tribal court record?*

If the Tribal Court Parties' argument was the law, there would be a virtual prohibition of any federal court evaluation of evidence not included in a tribal court record, including evidence establishing beyond question that a tribal court was without jurisdiction over a nonmember as a matter of federal law. *See Hicks*, 533 U.S. at 358-59 (federal law provides that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers"). This Court should not open the door to application of a standard that would hamper (or even preclude) federal judicial review of tribal court jurisdiction over nonmembers.

It is also worth noting that the Tribal Court Parties' argument involves the **process and procedure** pursuant to which the District Court reached its decision,

and proposes that this Court should ignore facts going directly to whether the Tribal Court had jurisdiction over Johnson under *Montana*. If the Tribal Court was without jurisdiction over Johnson, then this Court must not deny him the Constitutional rights which are not applicable in the Tribal Court. *Plains Commerce Bank*, 128 S. Ct. at 2724 ("the Bill of Rights does not apply to tribes and because nonmembers have no say in the laws and regulations governing tribal territory, tribal laws and regulations may be applied only to nonmembers who have consented to tribal authority, expressly or by action"). Accordingly, even if this Court finds that the District Court abused its discretion in accepting the Johnson Declarations, it could be no more than a harmless error in route to the correct result;[8] in any event, neither the Tribal Court findings (or lack thereof) nor its record supports a finding of jurisdiction over Johnson. *Cf. Big Spring v. United States Bureau of Indian Affairs*, 767 F.2d 614, 616 (9th Cir. 1985) (appellate court

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[8] Even absent the Johnson Declarations, there is ample evidence of record (*e.g.,* Johnson was not a party to the Lease; extensive correspondence between Johnson and CRIT showing that Johnson engaged with CRIT exclusively pursuant to role as CEO of Water Wheel; and absence of any record evidence indicating Johnson had any contacts with CRIT other than as the Water Wheel CEO) to conclude that Johnson had no personal consensual relationship with CRIT. *Cf. Brown v. Sierra Nevada Mem'l Miners Hosp.*, 849 F.2d 1186, 1190 (9th Cir. 1988) (in order to "reverse on the basis of an evidentiary error," appellate court "must say more probably than not, the error tainted the judgment") (internal citations and quotations omitted).

"may affirm the district court on any ground supported by the record, even if the district court relied on different reasons").

D. The District Court Correctly Ruled That the Tribe's Inherent Exclusionary Power Did Not Provide the Tribal Court With Jurisdiction Over Johnson in the Action Before It.

The District Court correctly recognized that the Tribe's power to exclude nonmembers is necessarily constrained by *Montana*, and confirmed that the Tribe's power to exclude must be exercised within the context of *Montana*. ER 21. Here, because the Tribe failed to show that any *Montana* exception applied to Johnson as an individual, the power to exclude could not form the basis for jurisdiction over him personally. *Id.* at *ll.* 12 - 13.

In contrast, the Tribal Court Parties argue that the District Court's interpretation of relevant case law is wrong because they view Johnson as a trespasser on the leasehold, and because none of the authority relied upon by the District Court "involve[s] nonmember trespass on tribal lands. " Appellants' Br. at 38. In a somewhat circular argument, the Tribal Court Parties then argue that because the District Court improperly held that *Montana*'s first exception did not apply and because trespassers (by definition) could never be in a "consensual relationship" with the Tribe, the Court's decision with respect to the Tribe's power to exclude must be flawed. Appellants' Br. at 39-40.

The Tribal Court Parties' argument is directly contrary to the Supreme Court's specific identification of the basis for a tribe's "traditional and undisputed power to exclude persons from tribal land" as a form of "regulation [] approved under *Montana*" which flows from a tribe's retained sovereign interests. *Plains Commerce Bank*, 128 S. Ct. at 2723. The District Court cited this language and noted that *Plains Commerce Bank* later referenced the power to exclude as an example of the "sort of regulations [which] are permissible under *Montana*." ER 19, *l.* 24. Applying the law as articulated by the Supreme Court, the District Court thus found that the power to exclude was constrained by *Montana* and, in these circumstances, could only be exerted within the *Montana* framework.

The District Court's conclusions on this point are consistent with the dependant status of tribes, in that tribes retain only those powers which are "necessary to protect tribal self-government or to control internal relations." *Hicks*, 533 U.S. at 359 (noting that anything more would be "inconsistent with the dependent status of the tribes."). While the tribal power to exclude nonmembers may be a power retained by a tribe, *Montana* defines the situations in which a tribe may exercise such a retained (or inherent sovereign) power to regulate nonmember conduct, which is when one of the two *Montana* exceptions apply.

This Court has stated that "[o]utside of [*Montana*'s] two exceptions . . . [a tribe's] inherent sovereignty does not give [it] jurisdiction to regulate the activities

of nonmembers." *See Phillip Morris U.S.A.*, 552 F.3d at 938-39 ("[g]iven *Montana*'s general [rule] . . . efforts by a tribe to regulate nonmembers . . . are presumptively invalid") (quoting *Plains Commerce Bank*, 128 S. Ct. at 2720). Accordingly, even if the Tribe retains the power to regulate nonmember conduct by virtue of the power to exclude, it may do so **only within the context of *Montana***, and then **only to the extent necessary to protect self-government and internal relations**. *Cf. Plains Commerce Bank*, 128 S. Ct. at 2726 ("tribal jurisdiction . . . generally does not extend to nonmembers . . . [and] that bedrock principle does not vary depending on the desirability of a particular regulation").

The District Court concluded that *Montana*'s first exception does not apply with respect to the Tribal Court action against Johnson, meaning that the Tribal Court had no jurisdiction over him. ER 21, *ll.* 12 – 14. Moreover, personal jurisdiction by virtue of the Tribe's power to exclude can only be exercised to the extent necessary to protect tribal self-government and internal relations. *Cf.* ER 21 (stating that "the power to exclude [could not] provide a basis for the broad imposition of damages, attorneys' fees and alter ego liability attempted in this case"). Clearly, the sweeping adjudicatory jurisdiction the Tribal Court claimed

over Johnson went well beyond any possible tribal interest in self-government or internal relations and, for that reason alone, must fail.[9]

II. CROSS-APPELLANT'S ARGUMENT: NO TRIBAL COURT JURISDICTION OVER WATER WHEEL

A. Standard of Review Applicable to *Montana* Arguments with Respect to Water Wheel.

As stated above, whether a tribal court has jurisdiction over a nonmember pursuant to *Montana*'s exceptions is a federal legal question which courts review *de novo*. *FMC*, 905 F.2d at 1314. However, unlike the argument with respect to whether Johnson had a consensual relationship with the Tribe (he did not) which requires an essentially factual inquiry, this Court's consideration of Water Wheel's relationship with the Tribe is purely a question of law. This Court should therefore review *de novo* the District Court's finding with respect to the proper scope of Tribal Court jurisdiction over Water Wheel.

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[9] This Court has stated that "[i]t is an open question whether a tribe's adjudicatory authority is equal to its regulatory authority. *Hicks*, 533 U.S. at 358. It is possible, therefore, that the tribe may have authority to regulate a nonmember's trespass and destruction of natural resources yet lack authority to hale the nonmember into tribal court. . . ." *Elliot v. White Mountain*, 566 F.3d 842, 850 n.5 (9th Cir. 2009)

B. The District Court Erred in Ruling that the CRIT Tribal Court Had Jurisdiction over Water Wheel Under the CRIT Eviction Ordinance Which Was Enacted Subsequent to the Lease Execution.[10]

In concluding that there was a consensual relationship between Water Wheel and CRIT, the District Court found it "compelling" that Water Wheel had occupied the leasehold under a 32-year lease and a three-year hold-over tenancy during the pendancy of the Tribal Court and District Court litigations. ER 6, *ll.* 3-12. The Court also cited as supporting evidence Water Wheel's other commercial activities, *e.g.*, operating a mobile home resort, convenience store, restaurant and marina. ER 6-7, *ll.* 19 - 2. None of this is disputed.

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[10] In its Brief Concerning the Lack of Tribal Court Jurisdiction Pursuant to the Rule of *Montana v. United States* (Docket No. 50), Water Wheel preserved these issues for appeal by arguing below that *Montana*'s first exception did not apply and the Tribe was, therefore, without jurisdiction over it. Docket No. 50 at pp. 7-14. More specifically, Water Wheel asserted that the terms of the Lease did not give rise to a consensual relationship with CRIT because Section 34 of the Lease prohibited the application of after-enacted tribal laws without Water Wheel's consent; that the Lease controls dispute resolution as well as any relationship between the Tribe and Water Wheel; and that, in conjunction with the Lease, Title 25 of the Code of Federal Regulations exclusively governs disputes arising under the Lease. *Id.* In their Response Memorandum in Opposition to Plaintiffs' Brief, the Tribal Court Parties' challenged Water Wheel to point to any "lease condition or provision which [was] changed or altered by the application of the CRIT eviction ordinance." Docket No. 59, p. 18. Water Wheel replied by presenting arguments with respect to each specific term of the Lease and the applicable 25 *CFR* Part 131 and 25 *CFR* 162 regulations, along with a detailed explanation of the effect of each relevant Lease provision. *See generally* Docket No. 67, pp. 8-24. Water Wheel also preserved these issues during oral argument (ER 30-55, 76-80).

Assuming, *arguendo*, that there has been a breach of the Lease provisions – specifically, Lease Addendum Section 23 – HOLDING OVER (ER 247) – the question then turns to whether the Tribal Court eviction action against Water Wheel was lawful under the lessee's consent **defined by the Lease**.

It is undisputed that CRIT filed an action in Tribal Court invoking an enforcement process created by the CRIT Eviction Ordinance. ER 300 – 350. It is also undisputed that the Ordinance was adopted 31 years after execution of the Lease. And, it is further undisputed that CRIT prosecuted the eviction action in Tribal Court without consulting with Water Wheel, or securing Water Wheel's written consent to the terms of the Ordinance.

The Eviction Ordinance purports to establish both the cause(s) of action against Water Wheel and Johnson and the Tribal Court's jurisdiction over them, despite the facts that the Ordinance (i) was enacted *after* the Lease was executed, (ii) was never consented to in writing by Water Wheel or Johnson, and (iii) is in direct conflict with 25 C.F.R. Part 162 (as well as its predecessor, 25 *C.F.R.* Part 131). *See, e.g.*, *Marlin D. Kuykendall v. Dir., Phoenix Area, BIA*, IBIA No. 80-24-A, 8 IBIA 76, 13-14 (1980) (opinion reinstated by *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1075 (9th Cir. 1983)). These tribal ordinances have the effect of both changing and altering Water Wheel's rights under the Lease. Most notably, they provide that Lease and property disputes *must be* adjudicated in the

CRIT Tribal Court. Eviction Ordinance, § 1-304. Water Wheel has never consented, in writing or otherwise, to be subject to CRIT's Property Code or Eviction Ordinance. Therefore, pursuant to Section 34 of the Lease Addendum, the tribal ordinances cannot be applicable to Water Wheel (or Johnson).

Should this Court conclude that CRIT's ordinances *do* apply to Water Wheel – despite the absence of written consent and their direct conflict with 25 *C.F.R.* Part 162 – the Court still must consider the fact that the ordinances necessarily would have the effect of modifying the agreed-upon terms of the Lease because they effectively would be replacing the traditional *and contracted for* dispute resolution procedures provided by Title 25 of the Code of Federal Regulations.

The Lease contains a specific provision for modifications: "any modification of or amendment . . . shall not be valid or binding . . . *until approved by the Secretary*." ER 249 (Lease Addendum Section 34) (emphasis supplied). It is undisputed that the Secretary has neither approved incorporation of the tribal ordinances into the Lease nor agreed that the Tribe – and not the Interior Department pursuant to 25 *C.F.R.* Part 131 (1975) and 25 C.F.R. Part 2 – has jurisdiction over disputes arising under the Lease.

In short, Water Wheel has not consented in writing to be subject to CRIT's Property Code, Eviction Ordinance or *any* procedure for resolving Lease disputes in the CRIT Tribal Court, and the Secretary has not approved either of those tribal

enactments. Accordingly, the Lease itself is the controlling document and it provides that disputes shall be resolved through Title 25 of the Code of Federal Regulations. They are not to be resolved in CRIT Tribal Court. *See generally Yavapai-Prescott*, *supra*.

By the Lease's own terms, the absence of Water Wheel's written consent to that newly-adopted tribal law precludes its applicability to the lessee. Lease Addendum Section 34 - RESERVATION LAWS AND ORDINANCES requires the lessee to abide by all tribal laws, regulations and ordinances **in effect at the time of the Lease execution**. ER 249. As noted above, the Lease was executed on May 15, 1975, and Section 34 specifically exempted the lessee from being subject to any subsequently-enacted tribal laws, regulations and ordinances which "have the effect of changing or altering the express provisions and conditions" of the Lease unless consented to "in writing." *Id.* at *ll.* 19-20. The obvious purpose of this Lease provision was to preclude the enactment and imposition of *ex post facto* tribal laws rewriting the Lease to include provisions to which Water Wheel never agreed. But here, the CRIT Eviction Ordinance decidedly changed and altered express provisions and conditions of the Lease, including establishing the Tribal Court as the forum for eviction litigation.

At its Preamble, the Lease states that it was entered into pursuant to the terms of 25 *C.F.R.* Part 131 (now 25 *C.F.R.* Part 162) ("25 *CFR*"). That regulation

(and its successor) establishes a process through which Water Wheel could appeal to the Secretary to contest actions or inactions of Department of the Interior employees concerning the Lease. And when faced with arbitrary actions and inaction of CRIT against Water Wheel perpetrated by CRIT officials with the knowledge and acquiescence of BIA officials, Water Wheel filed with the Department of the Interior such a 25 *CFR* appeal on May 10, 2001. SER 26-67. This formal administrative submission provided for in the Lease was never acted on by the BIA, and in fact is still pending. ER 17, *ll.* 3-6. The substance of that appeal is that Lease Addendum Section 5 entitled "PLANS AND DESIGNS" (ER 232) provides that Water Wheel shall have the right to provide a general plan and design for the "complete development of the entire leased premises." Water Wheel filed the appeal because CRIT arrogated to itself the review and approval role exclusively assigned by the Lease to the State of California and Riverside County, and then refused to approve any development proposals submitted by Water Wheel.

Water Wheel's 25 *CFR* appeal challenged the legality of BIA inaction in failing to require CRIT compliance with the applicable Lease provisions following CRIT's pronouncement to both the State of California and Riverside County that CRIT, and not the State and County, would be the exclusive party to review and approve all of Water Wheel's development plans and designs, directly

contradicting the specific provisions of Section 5 that the State and County would have that role. The appeal also raised the BIA's failure to protect Water Wheel's ability to secure electrical service through Southern California Edison Company, when CRIT directed the utility to cease dealing with Water Wheel contrary to the Lease. ER 147-148. The 25 *CFR* Appeal went exclusively to the BIA's failure – or even refusal – to protect Water Wheel's Lease-guaranteed rights to develop its leasehold. And CRIT's unlawful breaches of the Lease over many years were well-known to the BIA officials who simply ignored the facts**.** ER 147 – 152 (documenting the actions of CRIT to curtail all development by Water Wheel[11] and the failure of the BIA to take steps to insure that all Lease obligations are being satisfied); SER 68 (acknowledging Water Wheel's 25 *CFR* appeal).

In addition to guaranteeing the administrative process of the *CFR*, the Lease further specifically provided for legal action against the lessee when appropriate at Lease Addendum Section 21 entitled "DEFAULT." ER 243. This is the **only section** of the Lease authorizing enforcement and legal action against Water Wheel for breaches of the Lease, and it specifically reserves the right to pursue any legal

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[11] Water Wheel's ability to develop its leasehold was flatly terminated by CRIT in 2002. The tribal Building Inspector advised Water Wheel by letter dated April 4, 2002, that "the [CRIT] Tribal Council had [recently] denied your request to allow any new building Projects within Water Wheel Resort. Therefore, the Colorado River Indian Tribes Department of Building & Safety will not issue any Building Permits to you." SER 1.

action to the Secretary. Nowhere does Section 21 even suggest that CRIT has a right to commence any legal action against Water Wheel for disputes arising from a perceived default or breach, or even for eviction upon expiration of the Lease.

Further, Section 21 strictly limits legal action arising from any default, including failure to comply with the Section 29 requirement that a lessee vacate the leasehold upon termination or expiration of the Lease. ER 11-14. The only remedy is at Section 21, and it restricts recourse for defaults to action taken by the Secretary, who shall first give notice to Water Wheel requiring some remedial action within a specified time, after which **only the Secretary** may either: (A) proceed **by suit or otherwise** to enforce any other provision of the Lease; or (B) **enter the premises and remove** the defaulting parties. ER 244. No provision of Section 21 is ambiguous and no provision even suggests there could be a predicate upon which CRIT could assert any right to initiate action for a default. The Secretary, **and only the Secretary**, has enforcement authority unless the lessee is insolvent or bankrupt.

When asked at oral argument by the District Court why CRIT did not follow Section 21 of the Lease and ask the Secretary to take action to deal with Water Wheel's purported breaches, rather than invoke the tribal Eviction Ordinance, counsel for the Tribal Court Parties responded simply that to have followed the

enforcement process dictated by the Lease provisions would have taken too much time: "the process is very ponderous." ER 67, l. 17.

"Too much time" is not a legal concept which justifies CRIT's going beyond the scope of Water Wheel's consent to the mechanism for prosecuting alleged Lease defaults. For the Lease to have any integrity, its provisions must control free of unilateral amendment or revocation action by CRIT. Yet, the Tribe took that action, the BIA did not intervene to insure the integrity of the Lease provisions, and the Tribal Court Parties rotely followed the tribal agenda. Strict compliance with the Lease would have left the Tribal Court **without jurisdiction** over Water Wheel to seek eviction in its own name. That right then rested, and still rests, with the Secretary.

The bottom line is that Water Wheel never consented to the Tribal Court jurisdiction over any eviction action. That jurisdiction was legislated by the CRIT Eviction Ordinance, an after-enacted tribal law to which Water Wheel did not consent in writing. There may be some forum in which CRIT could pursue an eviction, but it cannot be the Tribal Court because of the absence of consent to that court's jurisdiction. The District Court clearly considered that very point when it noted that Lease Addendum Section 21 states that the Secretary "may" bring legal

action to re-enter the leasehold (ER 13, *ll.* 9-11),[12] with the further observation that Lease Addendum Section 23 provides CRIT with a role in the eviction process by giving the Tribe a right to dispose of property of the lessee not removed at the time of leasehold vacation. *Id.* The Court then reached the ultimate conclusion that there was no tribal waiver of the "power to commence the Tribal Court action in 'unmistakable terms' as required by *Merrion* or in 'sufficiently clear contractual terms' as required by *Arizona Public Service,*" leading to his conclusion that the "Tribal Court's power has not been waived in the lease." ER 13-14, *ll.* 19 - 2.

The District Court's error is that it read Sections 21 and 23 as wholly independent of each other, although they – along with all of the Lease provisions – must be read *in pari materia*. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995) ("cardinal principle of contract construction [is] that a document should be read to give effect to all [of] its provisions and to render them consistent with each other"); *see also* Restatement (Second) of Contracts §202(2) and Comment d ("[a] writing is interpreted as a whole, and all writings that are part

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[12] The District Court stated that "paragraph 21 provides that the Secretary can bring an action for breach of the lease, but does not prohibit CRIT from doing so." ER 12. However, the District Court misreads the meaning of "may" in Section 21. While that language certainly suggests permissive options, the options do not concern who or what may enforce the Lease. The options to which the "may" language refer are the Secretary's enforcement options. The Secretary "may" sue or the Secretary "may" re-enter, but no entity or individual other than the Secretary has those options.

of the same transaction are interpreted together"). Only by reading each of those sections as independent of the other, could the District Court conclude that CRIT had the right to litigate an eviction in Tribal Court. And that was in error.

Finally, Water Wheel never claimed there was a "waiver" of Tribal Court power; rather, the issue before the District Court was whether there was a "Tribal Court power" in the first place. If there was no such power, then the determination that it was never waived is irrelevant.

C. The District Court Erred in Ruling that the Lease Allowed CRIT to Prosecute the Eviction of the Tenant in the Absence of the Tenant's Insolvency or Bankruptcy.

The only legal enforcement action the Lease allows CRIT is articulated at Lease Addendum Section 21, which states: "Any action taken or suffered by Lessee as a debtor **under any insolvency or bankruptcy act** shall constitute a breach of this lease. **In such event** the **Lessor and the Secretary**[13] shall have the options set forth in sub-Articles A and B above." (Emphasis added.) Articles A and B are discussed above, and they otherwise provide that **the Secretary** has the

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[13] The parties to the Lease obviously knew how to include both the "Lessor and the Secretary" when they desired to do so. *Cf.* Lease Addendum 21 at line 23 ("Lessor and the Secretary"), *and* line 26 ("Lessor or the Secretary"), *with* Lease Addendum 21 at line 2 ("the Secretary may either . . ."). ER 244 – 246, *ll.* 2 – 26. The Lessor's enforcement right was strictly limited to the case of a financially distressed lessee.

right in the case of a default to (A) proceed by suit or (B) re-enter the leasehold premises. CRIT may take action only in the event of insolvency or bankruptcy.

The District Court found at Section 22 entitled "ATTORNEY'S FEES" what it felt was a "savings clause" to the restricted opportunity for CRIT to be the enforcer. ER 12. That Section allows CRIT to recover reasonable attorney fees in an action "brought by the Lessor" in unlawful detainer for "rent or other sums of money due under the Lease." However, Section 22's entitlement to recover legal fees is a derivation of CRIT's participation in legal action which CRIT *otherwise can prosecute*. ER 247, *ll.* 2 – 6. Specific contractual provisions control over general provisions[14]. And thus, a general provision for recovery of attorney's fees cannot establish enforcement rights not otherwise authorized in the specific enforcement action. That right is limited to the Section 21 authority which arises when the lessee is insolvent or bankrupt. ER 243 – 246.

While the District Court went on to declare that Section 22 unlawful detainer actions are "different from the breach-of-lease actions addressed in [Section] 21," (ER 12), the statement is contrary to the Lease provisions and structure. The Court

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[14] Restatement (Second) of Contracts § 203(a),(c) and cmt. e (1981) ("specific terms and exact terms are given greater weight than general language" and "an interpretation which gives a reasonable, lawful and effective meaning to **all the terms** is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect") (emphasis added).

defined an action for unlawful detainer as "separate from a breach-of-contract claim" which seeks to recover a leasehold from a holdover tenant "after the lease has expired" (*Id.*), while dismissing the holdover provisions of Lease Section 29 (ER 248) entitled "DELIVERY OF PREMISES." This Section provides that a tenant commits to vacate the leasehold without legal process – a "covenant" to vacate upon expiration. A breach of a Lease covenant takes the matter back to Section 21 – DEFAULT, which specifically assigns **to the Secretary** the enforcement role for a "**breach** [of] any covenant of this lease." (Emphasis supplied.) ER 243 – 244, *ll.* 28 - 2**.**

The District Court goes on to note that CRIT asserted a tort claim in Tribal Court as part of the eviction, observing that Section 21 does not mention "tort claims that might arise from the landlord-tenant relationship," and nothing in Section 21 suggests that such a claim may be asserted by the Secretary. ER 13, *ll.* 5 - 11. Whether Water Wheel could be prosecuted by CRIT in Tribal Court for a tort claim is not the issue before this Court. The issue is whether the basic eviction action arising from a Lease default could be prosecuted in Tribal Court. The tort claims asserted in the Tribal Court were derivative of the basic eviction action. If CRIT had independent claims in tort against Water Wheel, unrelated to the Lease, the Tribal Court might have had jurisdiction to hear them. However, that is not this case.

The Lease says that the Secretary shall enforce the Lease, and the applicable regulations set forth the power and procedures for such enforcement. This enforcement scheme was designated in the Lease and never expanded by the parties to it. The Lease defines the processes to which Water Wheel consented. Tribes are not free to manufacture claims in a way to sidestep the careful limitations of *Montana* and its progeny. The District Court erred in endorsing Tribal Court jurisdiction for an eviction action to which Water Wheel did not consent by, figuratively, allowing the [tort claim] tail to wag the [eviction] dog.

Finally, the District Court cited Addendum Section 23 (ER 247, *ll.* 8 - 17) as the ultimate acceptance of Tribal Court jurisdiction when it quoted that section as providing that a holdover tenancy does not give the lessee any rights "hereunder or in or to the leased premises." ER 14, *ll.* 8 - 9. And the Court concluded that even if Water Wheel was not subject to Tribal Court jurisdiction while the Lease was in effect, Section 23 makes clear that such a right expired with expiration of the Lease term. *Id.* While this conclusion is at odds with repeated pronouncements of counsel for the Tribal Court Parties that the Lease controls this matter, it does not answer the basic question of the source of the Tribal Court jurisdiction in the first place. Again, CRIT may have some legal standing to pursue eviction of a holdover tenant, but such an action is not cognizable in Tribal Court unless the first exception to *Montana* is satisfied. And here it is not.

III. CONCLUSION

At the outset, this Brief stated that this case turns on whether Johnson and Water Wheel consented to CRIT Tribal Court eviction action jurisdiction which was legislated by the CRIT Eviction Ordinance some 31 years after the Water Wheel Lease was executed. The foregoing discussions validates that statement. The language of the Lease and undisputed facts make clear that neither Johnson nor Water Wheel ever consented to the jurisdiction established by that Ordinance. Thus, *Montana*'s first exception is not satisfied in this case.

The Tribal Court Parties and their putative *Amicus Curiae* colleagues would have this Court believe that at stake is nothing less than the integrity of the well-established law as to when non-members are subject to tribal jurisdiction. Such simply is beyond the reality of this case. This is a *Montana* case – nothing more and nothing less.

The District Court correctly ruled Johnson was not subject to Tribal Court jurisdiction because he conducted business on the leasehold solely in his capacity as President and Chief Executive Officer of Water Wheel. There was no evidence to the contrary.

At the same time, the District Court apparently felt that it had to find some way to justify Water Wheel's eviction from what the Court viewed as a holdover tenancy on the leasehold. It could only do so by (1) ignoring the strict enforcement

provisions of the Lease to which Water Wheel consented and (2) selectively applying some Lease provisions without reconciling them with other provisions at odds with the Court's application. As discussed above, those sections must be read in conjunction with each other and the District Court's ruling was error. In fact, enforcement of the Lease was exclusively assigned to the Secretary of the Interior with some very narrow exceptions which are not present in this case. If eviction of Water Wheel is appropriate, it can only be prosecuted by the Secretary pursuant to the Lease and the facts of this case. CRIT does not have that authority.

For the reasons stated herein, Appellee Robert Johnson respectfully requests this Honorable Court to affirm that portion of the District Court Order of September 23, 2009, which granted relief he sought against the Tribal Court Officials by ruling that the Tribal Court had no jurisdiction over Johnson in the eviction action before it.

For the reasons stated herein, Cross-Appellant Water Wheel respectfully requests this Honorable Court to reverse and vacate that portion of the District Court Order of September 23, 2009, which denied the relief it sought against the Tribal Court Officials by ruling that the Tribal Court did have jurisdiction over Water Wheel in the eviction action before it.

Dated this 28th day of June 2010

Respectfully submitted:

s/Dennis J. Whittlesey

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