IN THE CROW COURT OF APPEALS

IN AND FOR THE CROW INDIAN RESERVATION

CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-241

HEATHER LONG WARRIOR,
Plaintiff/Appellant,

vs.

MICHAEL BOXX,
Defendant/Appellee.

Decision entered on March 9, 2000

[Cite as 2000 CROW 2]

Before Stewart, J., Gros Ventre, J., and Watt, J.

ORDER STAYING PROCEEDINGS

¶1 This is an appeal by plaintiff Heather Long Warrior from the Order of the Crow Tribal Court (Yellowtail, S.J.), entered on July 30, 1999, granting defendant Michael Boxx's motion to dismiss for lack of subject matter jurisdiction.

¶2 Following dismissal by the Crow Tribal Court, the U.S. District Court initially dismissed as moot Mr. Boxx's Federal-court challenge to Tribal court jurisdiction. *Boxx v. Long Warrior*, CV 98-183-BLG-JDS (Order dismissing without prejudice, Aug. 19, 1999). However, recognizing that this matter was now before this court on appeal, the District Court on December 10, 1999, vacated its previous order and affirmatively held that the Crow Tribal Court lacked jurisdiction to decide this case. The District Court also permanently enjoined Ms. Long Warrior from proceeding with this case in Crow Tribal Court.

¶3 Based on the U.S. District Court's order, Appellee Boxx has moved for dismissal of this appeal. Appellant Long Warrior has responded by advising that she intends to appeal the U.S. District Court's decision, and that we should instead stay further proceedings in this appeal pending a final decision of the Federal courts.

¶4 As explained below, this case presents a substantially different set of jurisdictional facts from those in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and the other authority on which the Tribal Court and the District Court relied. In view of those differences, we believe that there is a substantial question as to whether the U.S. District Court's order prematurely preempted this court's review of the jurisdictional issue, as it did in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).[1] Although the District Court's order prevents this court from having the benefit of further briefing on Appellee's dismissal motion, it does not require dismissal of this appeal. Therefore, in order to preserve the Crow Tribal Courts' opportunity to fully review the factual and legal bases for this challenge to our jurisdiction, we must deny Appellee's motion to dismiss, and stay further proceedings pending Federal appellate review of the District Court's ruling.

Exceptions to the Tribal Court Exhaustion Rule

¶5 The Court's principal holding in *National Farmers* was that the Federal courts have federal-question jurisdiction over a challenge to Tribal court jurisdiction, but as a matter of comity, should refrain from exercising that jurisdiction until after the parties "have exhausted their remedies in the Tribal Court system." *National Farmers*, 471 U.S. at 857. At the same time, the Court recognized that there would be certain exceptions to this "prudential" exhaustion rule, where Tribal jurisdiction is asserted in bad faith or to harass, "or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Id*. at 856 n.21.

¶6 None of these exceptions apply to the present case. There has been no assertion that the Crow Tribal member plaintiff suing the defendant for injuries she sustained while riding in his pickup on the Crow Reservation has proceeded in "bad faith" or for purposes of harassment simply because she brought her action in the Crow Tribal Court. Nor have the parties or the trial courts identified any treaty or Act of Congress that expressly prohibits the Tribal Court from exercising the Crow Tribe's inherent sovereignty by assuming jurisdiction of this action. And the Tribal Court's thoughtful opinion and holding that it lacked jurisdiction demonstrates that adequate opportunities exist for the defendant to challenge jurisdiction in the Tribal courts, so the "futility" exception cannot apply in this case.

¶7 However, the *Strate* decision apparently brought a particular class of cases within the exceptions to the exhaustion rule by declaring in a footnote:

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. . . . Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement . . . must give way, for it would serve no purpose other than delay.

Strate, 520 U.S. at 459-60 n.14 (citations omitted). Thus, in order to determine whether the exhaustion rule applies in this case, it will be necessary to determine whether it is "an action such as this one" within the meaning of the above-quoted footnote in *Strate*.

Facts and Proceedings Below

¶8 The Tribal Court made its jurisdictional determination based on stipulated facts. This case arose from single-vehicle rollover accident that occurred in 1996 within the Crow Reservation on the "Ok-E-Beh Road." That road lies on a right-of-way granted to the United States of America across Crow Trust Allotment No. 699 (Rides Horse, deceased). The plaintiff, who seeks recovery for injuries allegedly sustained as a passenger in the vehicle, is a member of the Crow Tribe. The defendant, who was allegedly the owner and driver of the pickup at the time of the accident, is a non-member who was employed by the National Park Service at the Big Horn Canyon National Recreation Area.

¶9 Because of the important jurisdictional issue, and without objection, the Tribal Court allowed the Crow Tribe to intervene as a party pursuant to Rule 8(f)(2) of the Crow Rules of Civil Procedure. The Tribe has not filed a notice of appeal in this case.

¶10 The Tribal Court held that "the right-of-way in question is the equivalent of alienated fee land[,]" relying on *Strate* and subsequent cases from the Ninth Circuit and the U.S. District Court. *Long Warrior v. Boxx,* No. CV-97-241, Findings of Fact, Conclusions of Law, and Order Granting Defendant's Rule 7 Motion to Dismiss (Crow Tribal Court, July 31, 1999) at page 7. Based on that holding, the Court went on to analyze the two exceptions under *Montana v. United States*, 450 U.S. 544 (1981), and found that neither applied. Thus, following the approach outlined in *Strate*, the Tribal Court concluded that it lacked jurisdiction.

¶11 In its Order of December 10, 1999, the U.S. District Court found that "[f]or exhaustion purposes this case is virtually indistinguishable from *Strate*, *Wilson,* and *Austin's Express*[.]" *Boxx v. Long Warrior, supra,* slip op. at page 3. Based on those same authorities, the District Court went on to hold that the right-of-way was "the equivalent of nonmember fee land," and that neither of the Montana exceptions applied. *Id.*, slip op. at 3-6.

¶12 On the record before us, this court respectfully disagrees with the conclusions of the Tribal Court and the U.S. District Court.

The Federal Road Right-of-Way

¶13 First, this court has reservations about whether *Strate* and related authorities compel a holding that the road right-of-way in this case is equivalent to non-Indian fee land for jurisdictional purposes. The road on which the accident occurred is owned and maintained by the United States. None of the authorities on which the trial courts relied involved a Tribal member injured on a federal road. Rather, the accident in *Strate* involved two non-members, and occurred on a public highway right-of-way granted to and maintained by the State of North Dakota. The express holding in *Strate* was that "tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question." *Strate*, 520 U.S. at 442 (emphasis added); *see also, id* at 459 ("a commonplace state highway accident"). The Supreme Court has recently acknowledged that "*Strate* dealt with claims against nonmembers arising on state highways [.]" *El Paso Natural Gas Co. v. Neztsosie*, 119 S. Ct. 1430, 1436 n.4 (1999) (emphasis added).

¶14 The Ninth Circuit case that extended *Strate* to accidents involving Tribal members arose on the Blackfeet Reservation within a highway right-of-way granted to and maintained

by the State of Montana. *Wilson v. Marchington*, 127 F.3d 805, 813-14 (9th Cir. 1997) ("this case mirrors the facts of *Strate* almost precisely"). The same is true of *Austin's Express, Inc. v. Arneson*, 996 F.Supp. 1269 (D. Mont. 1998), which involved a Crow pedestrian killed on Interstate 90 within the Crow Reservation. *See also, Montana v. King*, 191 F.3d 1108 (9th Cir., 1999) (Fort Belknap Community's TERO ordinance did not apply to State employees carrying out State's sovereign responsibilities to maintain a State highway on the Reservation).

¶15 Distinguishing its holding with respect to state highways, the Supreme Court in *Strate* specifically stated that it expressed no view "on the governing law or proper forum when an accident occurs on a tribal road within a reservation." *Strate*, 520 U.S. at 442 (emphasis added). The *Strate* Court did not comment about jurisdiction or applicable law when an accident occurs on an exclusively federal road within a reservation.

¶16 The Supreme Court's most recent guidance on Tribal jurisdiction over reservation lands conveyed to the United States was in *South Dakota v. Bourland*, 508 U.S. 679 (1993). In *Bourland*, the Supreme Court held that the Government's taking from the Cheyenne River Sioux Tribe of the area comprising the Oahe Dam and Reservoir Project abrogated the Tribe's right to regulate non-member hunting and fishing within the takings areas. *Id*. at 691, 697. The Court reached its conclusion primarily by analyzing the Acts of Congress that authorized the takings. *Id*. at 689-91. However, the *Bourland* opinion left open the possibility that federal regulations governing the area in question may recognize or authorize a Tribal right to regulate non-member activity. *Id*. at 691; *see also, id*. at 704 (Blackmun, J., dissenting).

¶17 In the present case, the litigants and the Tribal Court have not addressed the issue of whether the Acts of Congress authorizing the taking of a right-of-way for the Yellowtail Dam, and creating the Bighorn Canyon National Recreation Area, apply in any way to the Ok-E-Beh Road. If they do apply, directly or by implication, *National Farmers* compels a "careful examination . . . conducted in the first instance in the Tribal Court itself" of (1) whether these Acts evidence a retention or abrogation of Tribal civil adjudicatory jurisdiction over accidents involving non-members on a federal road serving the recreation area, or (2) the extent to which Tribal jurisdiction of this action is pre-empted as being inconsistent with the purposes of the Acts, or with any other federal purpose served by the road.

¶18 Also, as in *Bourland*, 508 U.S. at 696-697, any federal regulations governing the road, and the United States' own interpretation and position on Tribal jurisdiction in the road right-of-way, were not fully presented or argued to the Tribal Court (nor were they addressed by the District Court). As described more fully in this court's recent decision in *Rose v. Adams*, Civ. App. No. 95-27 (Crow Court of Appeals, Dec. 30, 2000), slip op. at 10-15, the traditional test for implicit divestiture of a Tribe's inherent authorities to govern the Reservation is an overriding Federal interest. Whether to assert that interest, or to describe its interest as proprietor of the right-of-way under *Strate* (and in the context of its trusteeship of the remaining interest in the land on behalf of the Tribal owners), we believe that the Government's legal position on jurisdiction over the conduct in question is relevant, and should be more fully developed in this case.[2]

The Consensual Relationship Test

¶19 If further analysis showed that the federal road where the accident occurred is equivalent to the state highway in *Strate* for jurisdictional purposes, the Tribal Court would

nevertheless have jurisdiction if the action arose out of a qualifying "consensual relationship with the tribe or its members" under *Montana v. United States*, 450 U.S. 544, 565 (1981). We disagree with the Tribal Court, slip op. at 8, that such a "consensual relationship" is necessarily confined to "commercial" dealings.

¶20 Except in *Strate*, the Supreme Court has not yet elaborated on how this first *Montana* exception applies in cases challenging Tribal jurisdiction to regulate, through the civil tort adjudicatory process, nonmembers' conduct in their private relations with Tribal members. The Ninth Circuit has avoided characterizing *Montana's* "consensual relationship" as a "commercial" relationship for purposes of determining jurisdiction in an individual tort action. *See County of Lewis v. Allen*, 141 F. 3d 1385, 1391 ("commercial relationships entered into by the nonmember in order to obtain some benefit from the tribe or tribal member"), *withdrawn and revised en banc*, 163 F. 3d 509, 515 (9th Cir. 1998) (declining to extend the consensual relationship exception to an inter-governmental law enforcement agreement). We are therefore not persuaded that *Montana* and *Strate* foreclose further inquiry into the connection between a consensual social relationship and the defendant's allegedly tortious conduct for the purpose of determining Tribal court jurisdiction.

¶21 We also disagree with the District Court, slip op. at 5, that this case "falls squarely within the purview of *Strate*, *Wilson*, and *Austin's Express*" with regard to the consensual relationship criterion for Tribal court jurisdiction. The factual circumstances in this case are quite different from those in *Strate*, *Wilson*, and *Austin's Express*. In all three of those cases, there was no relationship at all between the plaintiff and the defendant prior to the accident – the only thing the parties had in common was being on the highway at the same place at the same time. In *Wilson* and *Austin's Express*, the nonmember defendants did not have any contacts of any kind with the Tribes or other Tribal members, because the only reason they were on the Reservation was to pass through it on the state highway.

¶22 In *Strate*, both parties had some Tribal connections. The owner of the truck had a construction subcontract with the Tribes, and the injured plaintiff was the widow of a Tribal member. However, the Court explained that the consensual relationship exception did not apply because the nonmember plaintiff "was not a party to the subcontract, and the [T]ribes were strangers to the accident." *Strate*, 520 U.S. at 457 (quoting the Eighth Circuit's en banc opinion, 76 F.3d at 940).

¶23 Unlike *Strate*, the present case cannot be said to be "distinctly non-tribal in nature." *Id.* Both of the parties in the Tribal Court action were also parties to the Tribal consensual relationship, and the injured Tribal-member party was certainly no stranger to the accident.

¶24 Moreover, it seems to us that the relevant legal test is whether the conduct being regulated by the Tribal Court's maintenance of jurisdiction in this case proximately arose out of the consensual relationship (and not vice versa as the U.S. District Court stated it, slip op. at 5, although it may not matter in this case). At a minimum, the parties mutually consented to going for a ride together in Mr. Boxx's pickup. In consenting to take the plaintiff for a ride as his social guest, the defendant assumed a common-law duty to use reasonable care in operating his vehicle. Ms. Long Warrior's action is premised upon Mr. Boxx's alleged breach of that duty. The nonmember conduct being regulated, i.e., the operation of a motor vehicle on the Reservation with a Tribal-member licensee as a passenger, arose directly from the consensual social relationship. However fleeting the consensual social relationship between the parties in this case, as reflected on the stipulated record, it appears to have been sufficient to give rise to the alleged tortious conduct, which

may itself have occurred in a mere instant.

¶25 Thus, in this type of negligence action, a consensual relationship test that requires the nonmenber defendant to have engaged in substantial economic activity on the reservation, or with the plaintiff, seems particularly inappropriate. Otherwise, any non-member who comes onto the reservation without a business purpose, and commits an intentional or unintentional tort against a Tribal member, would never be answerable in a Tribal court civil action, if he makes sure to do it on non-Indian fee land.

¶26 Without the benefit of further briefing by the parties on this issue, this court declines to reach a holding on whether the consensual relationship in this case removes it from *Montana's* "main rule." However, based on the fundamental differences from the circumstances in *Strate* and its progeny, we believe that the question of whether a qualifying consensual relationship existed in this case precluded the District Court from assuming jurisdiction prior to the exhaustion of Tribal remedies.[3]

Conclusion

¶27 Our decision to stay rather than to dismiss these proceedings is based on our understanding of the exhaustion rule adopted nearly 15 years ago in *National Farmers*, a case involving injuries to a Crow youth that occurred within the Crow Reservation on non-Indian fee land owned by the State of Montana. The exhaustion rule recognizes that "a federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts," and is based on considerations of comity and "proper respect for tribal legal institutions." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 (1987). The exhaustion rule clearly extends to proceedings before this court: "At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Id.*, 480 U.S. at 17.

¶28 The Ninth Circuit has recently reaffirmed the vitality of the Tribal court exhaustion rule, even when the U.S. District Court had concluded that jurisdiction lay in the Tribal court. *Allstate Indemnity Co. v. Stump*, 994 F.Supp. 1217 (D. Mont. 1997), *vacated and remanded*, 191 F.3d 1071 (9th Cir. 1999), *amended* Sept. 13, 1999, *amended* Nov. 15, 1999. In that case, exhaustion of Tribal remedies was compelled because the circumstances were "nearly identical" to those in *Iowa Mutual*. *Stump*, slip op. at 11453 (bad faith claims against off-reservation insurer stemming from accident on Tribal road).

¶29 However, the District Court has not hesitated to intervene, and the Ninth Circuit has declined to enforce the exhaustion rule, in recent cases involving non-member defendants and arising on any kind of right-of-way within the Reservation, even when the circumstances were quite different than in *Strate*. *See, e.g., Burlington Northern Railroad Co. v. Red Wolf*, CV 96-17-BLG-JDS (D. Mont. 1998), *aff'd*, 196 F.3d 1059 (9th Cir. 1999), *amended* Jan. 6, 2000 (Tribal members killed on railroad right-of-way). In fact, evidencing how far we have strayed since *Strate*, if another case presenting the same facts as *National Farmers* were to arise on the Crow Reservation today, some of the recent precedent in this Circuit could readily applied to dispense with the exhaustion requirement. However, unless and until the Supreme Court overrules *National Farmers*, that is not the law of the land.

¶30 This court has enduring respect for the Federal courts as the most eloquent exponents of the Tribes' federally-recognized self-government powers, *Worcester v. Georgia*,

31 U.S. (6 Pet.) 515 (1832), *Williams v. Lee*, 358 U.S. 217 (1959), and as the final arbiters of Tribal court jurisdiction, *National Farmers*, *supra*. It is out of this respect that we are compelled to express our firm conviction that the District Court has erred by adopting too expansive an interpretation of the footnote in *Strate*. The resulting "unconditional access to the federal forum" threatens to place it "in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Iowa Mutual*, 480 U.S. at 16. We pray that such a result may yet be avoided by returning this case to Crow Tribal courts. Now, therefore,

¶31 IT IS HEREBY ORDERED that Appellee's motion to dismiss is **DENIED;** and

¶32 IT IS FURTHER ORDERED that all proceedings in this appeal, and any ancillary proceedings in the Tribal Court, are **STAYED** pending the conclusion of appellate proceedings in the Federal courts.

¶5	¶10	¶15	¶20	¶25	¶30	Endnotes

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Endnotes

[1] In that case, the Supreme Court enunciated several reasons for why a "careful examination" of Tribal Court jurisdiction "should be conducted in the first instance in the Tribal Court itself."

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

National Farmers , 471 U.S. at 856-57 (footnotes omitted).

[2] Thus, had proceedings in this appeal not been suspended by the Federal-court challenge, a remand to the Tribal Court would have been most appropriate in order to develop a record on any additional facts necessary to analyze the effect of the federal statutes, regulations, and agency legal interpretations on Tribal jurisdiction in this case. Alternatively, this court may, on its own motion, request *amicus curiae* briefs under Rule 11 of the Crow Rules of Appellate Procedure.

[3] Because the jurisdictional questions raised by the status of the land and the applicability of the consensual relationship test are sufficient to require exhaustion of Tribal remedies, this court does not express any opinion on the other bases for Tribal Court jurisdiction argued by the plaintiff below.

¶5	¶10	¶15	¶20	¶25	¶30	Endnotes