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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Rolling Frito-Lay Sales LP,

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CV 11-1361-PHX-FJM

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Plaintiff,

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ORDER

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vs.

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Rebecca Stover; David Montiel dba On-
Auk-Mor Trade Center; Auk Mor; Salt
River Pima-Maricopa Indian Community
Court,

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Defendants.

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The court has before it defendant Stover's motion to dismiss for lack of jurisdiction (doc. 13), plaintiff's combined response to Stover's motion to dismiss and Stover's cross motion for summary judgment (doc. 21), and Stover's reply to plaintiff's combined response to the motion to dismiss and Stover's cross motion for summary judgment (doc. 22). We also have before us plaintiff's motion for summary judgment (doc. 7), Stover's response and cross-motion for summary judgment (doc. 14), and plaintiff's reply (doc. 18). Next, we have plaintiff's motion to strike Stover's response to plaintiff's statement of facts in support of its motion for summary judgment (doc. 17), and Stover's notice of errata and motion to amend her response to plaintiff's statement of facts (doc. 20). Finally, we have defendants Montiel and the On-Auk-Mor Trade Center's motion to dismiss for lack of jurisdiction (doc. 23), plaintiff's response (doc. 24), and Montiel and On-Auk-Mor's reply (doc. 25). It does not

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1 appear that the Salt River Pima-Maricopa Indian Community Court has been served, and it
2 has not appeared in these proceedings.

3 **I. Background**

4 The facts are undisputed. The On-Auk-Mor Trade Center ("On-Auk-Mor") is owned
5 by defendant Montiel and located on the Salt River Pima-Maricopa Indian Reservation.
6 Montiel is a tribal member. Plaintiff, a non-Indian limited partnership, provides products to
7 On-Auk-Mor for sale. Defendant Rebecca Stover, a non-Indian, visited On-Auk-Mor,
8 slipped on one of plaintiff's boxes, fell, and was injured.

9 Stover filed an action in the Superior Court of Arizona in Maricopa County against
10 plaintiff, Montiel, and On-Auk-Mor on May 14, 2010. In August 2010, the Superior Court
11 dismissed all claims against Montiel and On-Auk-Mor because, as tribal members, they were
12 not subject to state jurisdiction. Much later, in April 2011, the Superior Court dismissed
13 Stover's claim against plaintiff without prejudice for lack of prosecution. It is unclear why
14 Stover abandoned her claim against plaintiff in a court which clearly had jurisdiction. Stover
15 brought an action in tribal court against plaintiff, where only special tribal advocates are
16 permitted to appear.

17 Plaintiff filed this action, seeking, among other things, to enjoin Stover from
18 proceeding against plaintiff in tribal court.

19 **II. Stover's Motion to Dismiss**

20 Stover moves to dismiss for lack of jurisdiction and contends that the tribe has
21 jurisdiction over her claims against plaintiff. She also contends that principles of comity
22 require us to dismiss or abstain because of the action in tribal court. Plaintiff contends that
23 the tribal court has no jurisdiction over an action brought by a non-Indian against a non-
24 Indian. Plaintiff also contends that the issue is clear enough such that exhaustion is not
25 required.

26 "[W]hether a tribal court has adjudicative authority over nonmembers is a federal
27 question." Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., 554 U.S. 316,

1 324, 128 S. Ct. 2709, 2716 (2008). Thus, it is plain that we have subject matter jurisdiction
2 under 28 U.S.C. § 1331. Whether we should exercise that jurisdiction at this time is
3 dependent upon the clarity of the underlying claim and whether tribal exhaustion would serve
4 a purpose other than delay. Nevada v. Hicks, 533 U.S. 353, 369, 121 S. Ct. 2304, 2315
5 (2001). If it is clear that the tribal court has no jurisdiction, exhaustion would serve no
6 purpose other than delay. Id. See also Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14,
7 117 S. Ct. 1404, 1416 n.14 (1997) ("when tribal-court jurisdiction over an action such as this
8 one is challenged in federal court, the otherwise applicable exhaustion requirement must give
9 way, for it would serve no purpose other than delay.") (Internal citation omitted). Thus, in
10 order to determine whether plaintiff must first litigate its federal question in tribal court, we
11 must examine the merits. If it is plain that the tribal court is without jurisdiction, plaintiff
12 will be subjected to needless delay and expense for no countervailing purpose. Plaintiff
13 claims the federal right to be free of tribal jurisdiction. It would be anomalous indeed to
14 require plaintiff to first suffer the loss of the very right for which it seeks protection (to be
15 free of tribal jurisdiction) before affording an opportunity to protect its right.

16 To this day, the Supreme Court has "never held that a tribal court had jurisdiction over
17 a nonmember defendant." Hicks, 533 U.S. at 358 n.2, 121 S. Ct. at 2309 n.2. This speaks
18 volumes. We begin with Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S. Ct. 1011
19 (1978), which held that a tribal court has no criminal jurisdiction over a non-Indian because
20 that would be inconsistent with the tribe's status. The Court stated that the tribe's assertion
21 of authority over a non-Indian ignored the fact that there exists within the United States but
22 two sovereigns: the United States and the states. Id. at 211, 98 S. Ct. at 1022. And, in the
23 companion case of United States v. Wheeler, 435 U.S. 313, 98 S. Ct. 1079 (1978), the Court
24 acknowledged that the self-governing powers of tribes "involve only the relations among
25 members of a tribe" and that divestiture of sovereignty has occurred with respect to "the
26 relations between an Indian tribe and nonmembers of the tribe." Id. at 326, 98 S. Ct. at 1087-
27 88 (emphasis added).

1 This basic framework is not limited to criminal jurisdiction. The Court expressly
2 quoted and relied on Oliphant and Wheeler in addressing the civil regulatory power of a tribe
3 over non-Indians in Montana v. United States, 450 U.S. 544, 564, 101 S.Ct. 1245, 1257
4 (1981). The Court specifically stated that "[t]hrough Oliphant only determined inherent tribal
5 authority in criminal matters, the principles on which it relied support the general proposition
6 that the inherent sovereign powers of an Indian tribe do not extend to the activities of
7 nonmembers of the tribe." Id. at 565, 101 S.Ct. at 1258. The Court then acknowledged two
8 exceptions: "some forms of civil jurisdiction over non-Indians on their reservations, even on
9 non-Indian fee lands," (1) "who enter consensual relationships with the tribe or its members"
10 or (2) whose conduct "threatens or has some direct effect on the political integrity, the
11 economic security or the health or welfare of the tribe." Id. at 565-66, 101 S. Ct. at 1258
12 (emphasis added).

13 Relying on Water Wheel Camp Recreational Area, Inc. v. Larance, 642 F. 3d 802 (9th
14 Cir. 2011), Stover contends that the presumption against tribal jurisdiction and the Montana
15 exceptions apply only to fee patented land within the boundaries of a reservation. But this
16 contention cannot be squared with the Court's post-Montana decisions. In Strate, the Court
17 described Montana as "the pathmarking case concerning tribal civil authority over
18 nonmembers." 520 U.S. at 445, 117 S.Ct. at 1409. It could hardly be pathmarking if it did
19 not apply to tribal land within a reservation. And in Hicks, the Court stated that "Indian
20 tribes' regulatory authority over nonmembers is governed by the principles set forth in
21 Montana which we have called the 'pathmarking case' on the subject." 533 U.S. at 358, 121
22 S. Ct. at 2309 (internal citations omitted). The Court expressly rejected the contention that
23 because Hicks's home was on tribal land Montana was distinguishable. 533 U.S. at 359, 121
24 S. Ct. at 2310 (citation omitted). Indeed, the Court read the use of the word "reservation" in
25 Montana to imply "that the general rule of Montana applies to both Indian and non-Indian
26 land." Id. at 359-60, 121 S. Ct. at 2310.

27 The Court's most recent pronouncement leaves no ambiguity. The Court said that
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1 "tribes do not, as a general matter, possess authority over non-Indians who come within their
2 borders," Plains, 554 U.S. at 328, 128 S. Ct. at 2718, and that "the general rule [of Montana
3 and Oliphant] restricts tribal authority over nonmember activities taking place on the
4 reservation, and is particularly strong when the nonmember's activity occurs on land owned
5 in fee simple by non-Indians." Id. at 328, 128 S. Ct. at 2719 (emphasis added). If there were
6 any doubt about this, the Court then relied on Montana's general proposition to state that
7 "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are
8 'presumptively invalid.'" Id. at 330, 128 S. Ct. at 2720. Nor can a tribe's adjudicative
9 jurisdiction exceed its legislative jurisdiction. Id. Unless words are infinitely elastic, one
10 cannot limit Montana to the activities of non-Indians on fee patented land. This is so
11 because, as the Court noted, subjecting non-Indians to the jurisdiction of a tribal court
12 without their consent would subject them to an entity outside the Constitution. Id. at 337,
13 128 S. Ct. at 2724. Government with the consent of the governed is everything in America.

14 To the extent that the *per curiam* opinion in Water Wheel departs from Supreme Court
15 jurisprudence in the area of Federal Indian Law, we are constrained by the Supremacy
16 Clause, Art. VI, and Article III ("one supreme Court") to follow the Supreme Court. See
17 Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535, 103 S. Ct. 1343,
18 1344 (1983). We thus apply Montana to this case. Ironically, even if Montana did not apply
19 to reservation land, we would fall back on Oliphant and Wheeler to conclude that there is no
20 tribal court jurisdiction over non-Indians on reservation land. See Frederick J. Martone, Of
21 Power and Purpose, 54 Notre Dame L. Rev. 829, 836-38 (1979) (reviewing the application
22 of Oliphant and Wheeler in the civil context, concluding that these cases establish that Indian
23 tribes lack jurisdiction over non-Indians).

24 It is undisputed that plaintiff is a non-Indian limited partnership, and that Stover's
25 injuries occurred on the reservation. We are therefore presented with the classic Montana
26 query. Beginning with the presumption that the tribal court lacks jurisdiction over a non-
27 Indian's actions, we assess whether either of Montana's exceptions apply.

1 The first Montana exception approves tribal regulation "through taxation, licensing,
2 or other means" over a non-Indian's activities when the non-Indian has entered into a
3 "consensual relationship[] with the tribe or its members, through commercial dealing,
4 contracts, leases, or other arrangements." Montana, 450 U.S. at 565, 101 S. Ct. at 1258.
5 Plaintiff acknowledges that it agreed to and did deliver its products to the On-Auk-Mor for
6 sale. Although the exact nature of the relationship is unclear, we conclude that a consensual
7 relationship as defined in Montana is present between plaintiff and On-Auk-Mor, whether
8 or not a written contract exists. According to Stover, the existence of the consensual
9 relationship is all that is needed for the first Montana exception to apply. We disagree.
10 There is no consensual relationship between plaintiff and Stover.

11 The justifications for tribal jurisdiction must be considered when assessing whether
12 jurisdiction exists. This is because a tribal court's power is limited to that which is needed
13 to (1) protect self-government, and (2) "control internal relations." Id. at 564, 101 S. Ct. at
14 1258. The Montana exceptions emerge from the justifications for recognizing tribal power.

15 Put another way, certain forms of nonmember behavior, even on non-Indian
16 fee land, may sufficiently affect the tribe as to justify tribal oversight. While
17 tribes generally have no interest in regulating the conduct of nonmembers,
18 then, they may regulate nonmember behavior that implicates tribal governance
19 and internal relations. The regulations we have approved under Montana all
20 flow directly from these limited sovereign interests.

21 Plains, 554 U.S. at 335, 128 S. Ct. at 2723. Also important to the analysis is the notion of
22 consent. Non-Indian defendants, after all, are often United States citizens. See United States
23 v. Lara, 541 U.S. 193, 212, 124 S. Ct. 1628, 1640 (2004) (Kennedy, J., concurring); see also
24 Duro v. Reina, 495 U.S. 676, 692-94, 110 S. Ct. 2053, 2063-64 (1990) (superceded by statute
25 on other grounds). These defendants do not lose their citizenship or renounce its protections
26 simply by stepping foot on an Indian reservation. Non-Indians, by virtue of their non-
27 member status, do not play any role in tribal government and "have no say" in tribal laws and
28 regulations. Plains, 554 U.S. at 337, 128 S. Ct. at 2724. "Consequently, those laws and
regulations may be fairly imposed on nonmembers only if the nonmember has consented,

1 either expressly or by his actions." Id. But consent alone is not enough. "Even then, the
2 regulation must stem from the tribe's inherent sovereign authority to set conditions on entry,
3 preserve tribal self-government, or control internal relations." Id.

4 In Plains, the Court noted that a non-Indian defendant bank might have reasonably
5 thought that its commercial dealings with an Indian company "could trigger tribal authority
6 to regulate those transactions." Id. at 338, 128 S. Ct. at 2725. But Plains held there was "no
7 reason" that the bank should have thought that its business dealings would permit the tribe
8 to regulate the sale of bank-owned land. Id. Here, Stover's tort claim is unrelated to
9 plaintiff's consensual relationship with a tribe member to deliver items for sale to a tribal
10 store. There is no reason why a non-Indian company should reasonably have expected its
11 delivery of food to an Indian store would subject it to a negligence suit by a non-Indian
12 plaintiff governed not by United States law, but by tribal laws and procedures. To find
13 otherwise would expand tribal power over non-members beyond its recognized limits of that
14 necessary to preserve self-governance and control of internal relations.

15 Stover next argues that Montana's second exception applies. Tribal jurisdiction exists
16 when a non-Indian's conduct on reservation land "threatens or has some direct effect on the
17 political integrity, the economic security, or the health or welfare of the tribe." Montana,
18 450 U.S. at 566, 101 S. Ct. at 1258. The non-Indian's conduct must not only injure the tribe,
19 "it must 'imperil the subsistence' of the tribal community." Plains, 554 U.S. at 341, 128 S.
20 Ct. at 2726 (citation omitted). One commentator suggested that the assertion of tribal
21 jurisdiction would have to be "necessary to avert catastrophic consequences" in order for the
22 second exception to apply. Id. (citation omitted).

23 Stover argues that negligent conduct in leaving a box on the floor has a direct effect
24 on the political integrity of the Salt River Pima-Maricopa Tribe. According to Stover, "[t]he
25 Tribe's political integrity is threatened when a United States court undercuts the jurisdiction
26 and power of the Tribal Court system." Reply to Mot. to Dismiss at 5-6. But this argument
27 reflects an erroneous understanding of Indian Law and an unwillingness to accept the
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1 limitations imposed on tribal jurisdiction. An injury to a non-Indian caused by another non-
2 Indian cannot conceivably be called catastrophic for tribal self-government. To the contrary,
3 it does not affect the tribe at all.

4 Stover's argument that plaintiff's negligence affected the health and welfare of every
5 tribe member is equally incredible. Stover has not alleged that the errant box injured anyone
6 other than herself. And she has not alleged that plaintiff's mishandling of the box is part of
7 a pattern of negligent conduct on tribal land. Instead, an isolated instance of a non-Indian's
8 negligence that injured a non-Indian cannot seriously be said to imperil the health and
9 welfare of the tribe.

10 In sum, it is clear that Stover's allegations against plaintiff do not fall under either of
11 the two Montana exceptions. Because we hold that tribal jurisdiction is clearly lacking and
12 exhaustion would merely cause delay, plaintiff was not required to exhaust tribal court
13 remedies. Comity does not require deference to a court which has no jurisdiction. Stover's
14 motion to dismiss is denied.

15 **III. Plaintiff's Motion for Summary Judgment**

16 Plaintiff moves for summary judgment on its requested injunctive and declaratory
17 relief. In addition, plaintiff moves to strike Stover's responses to plaintiff's statement of facts,
18 arguing that Stover failed to comply with LRCiv 56.1(b). Stover moves to amend her
19 statement of facts, pointing out that plaintiff itself failed to comply with LRCiv 56.1(b) in
20 responding to Stover's statement of facts filed in support of her motion for summary
21 judgment. We note that both parties failed to comply with various aspects of LRCiv 56.1 in
22 their summary judgment briefings, including failing to reference specific admissible portions
23 of the record that support a fact and failing to support assertions in their memoranda of law
24 with citations to the specific paragraph in the statement of facts on which the parties relied.
25 Despite this non-compliance, the material facts are undisputed. Plaintiff's motion to strike
26 is denied and Stover's motion to amend her statement of facts is granted.

27 We turn to plaintiff's request for injunctive relief from the pending tribal court
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1 litigation. A party is entitled to permanent injunctive relief if it can show (1) an irreparable
2 injury; (2) an inadequate remedy at law to compensate the injury; (3) an injunction is
3 warranted after balancing the hardships between the parties; and (4) the public interest would
4 not be harmed by granting the injunction. eBay Inc. v. MercExchange, LLC, 547 U.S. 388,
5 391, 126 S. Ct. 1837, 1839 (2006). Stover does not dispute plaintiff's argument that it has
6 met all requirements for injunctive relief, but relies instead on her contention that the tribal
7 court has jurisdiction over her claim against plaintiff.

8 We conclude that all four requirements for permanent injunctive relief are met.
9 Plaintiff will continue to suffer irreparable harm if forced to litigate in tribal court. If
10 Stover's action against plaintiff proceeds in tribal court, plaintiff will be subjected to
11 litigation in a forum which does not have jurisdiction. Plaintiff will be required to present
12 its jurisdictional challenge at the tribal trial court level and possibly in appellate tribal
13 proceedings, and must retain specific tribal advocates to litigate. Plaintiff will be forced to
14 engage in potentially lengthy litigation, all to defend itself in a forum that lacks jurisdiction.
15 Plaintiff would then be required to bring another action in federal court, presenting the same
16 arguments it has already made here. Although plaintiff did not specifically address the
17 inadequacy of its remedy at law, we note that a damages action against Stover for suing
18 plaintiff in tribal court is not only inadequate, it is likely unavailable. Third, the balance of
19 hardships tips in plaintiff's favor. Granting an injunction will not prevent Stover from
20 pressing her claim against plaintiff in courts of competent jurisdiction. It will not prevent
21 Stover from continuing to prosecute her case against Montiel and On-Auk-Mor in tribal
22 court. It will simply remove plaintiff's burden of defending itself in an improper forum.
23 Finally, the public interest is not advanced by having a court that lacks jurisdiction determine
24 a party's legal rights. We therefore grant plaintiff's request for injunctive relief against
25 Stover.

26 Plaintiff seeks a declaration that (1) Stover's tort action against plaintiff be adjudicated
27 in this court; (2) Stover's claims against plaintiff are barred by res judicata; and (3) Stover's
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1 claims against plaintiff are barred by the two-year statute of limitations pursuant to A.R.S.
2 § 12-542. Under the Declaratory Judgment Act, a district court has discretion to decide
3 whether to maintain jurisdiction over a declaratory action. See 28 U.S.C. § 2201(a); Allstate
4 Ins. Co. v. Herron, 634 F.3d 1101, 1107 (9th Cir. 2011). Having adjudicated the one federal
5 question in this case - whether the tribal court has jurisdiction over Stover's claim - we are
6 left with plaintiff's request for declaratory relief concerning a state-law negligence claim. We
7 exercise our discretion and decline to maintain jurisdiction over the declaratory action. State
8 courts are the best place to adjudicate state law claims against non-Indian parties.

9 **IV. Stover's Cross-Motion for Summary Judgment**

10 Stover's cross-motion duplicates her motion to dismiss. Because we have already
11 concluded that the tribal court lacks jurisdiction over Stover's tort action against plaintiff,
12 Stover's cross-motion for summary judgment is denied.

13 **V. Montiel and On-Auk-Mor's Motion to Dismiss**

14 Montiel and On-Auk-Mor move for dismissal for lack of personal and subject matter
15 jurisdiction. They argue that because Montiel is a tribe member and owns the On-Auk-Mor
16 (where Stover was injured), the tribal court has jurisdiction over them. We agree that the
17 tribal court is the proper forum for Stover to assert her tort claims against Montiel and On-
18 Auk-Mor. See Plains, 554 U.S. at 327-28, 128 S. Ct. at 2718-19 (discussing tribal authority
19 to govern its own members' conduct). Thus, there is no reason for these defendants to be
20 present in this action, which is limited to plaintiff's objections to Stover's claims against
21 plaintiff in tribal court. Accordingly, we grant Montiel and On-Auk-Mor's motion to dismiss.

22 **VI. Salt River Pima-Maricopa Indian Community Court**

23 There is no evidence that the Salt River Pima-Maricopa Indian Community Court has
24 been served. Under Rule 4(m), Fed. R. Civ. P., a defendant must be served within 120 days
25 after the complaint is filed. This action was filed on July 8, 2011. The deadline for service
26 has passed and plaintiff has neither moved for an extension nor shown good cause for the
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1 failure to serve. We therefore dismiss the Salt River Pima-Maricopa Indian Community
2 Court from this action.

3 **VII. Conclusion**

4 **IT IS ORDERED DISMISSING** defendant Salt River Pima-Maricopa Indian
5 Community Court without prejudice.

6 **IT IS ORDERED DENYING** Stover's motion to dismiss for lack of jurisdiction (doc.
7 13).

8 **IT IS ORDERED DENYING** plaintiff's motion to strike (doc. 17).

9 **IT IS ORDERED GRANTING** Stover's motion to amend her statement of facts
10 (doc. 20).

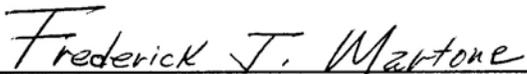
11 **IT IS ORDERED DENYING** Stover's cross-motion for summary judgment (doc.
12 14).

13 **IT IS ORDERED GRANTING** Montiel and On-Auk-Mor Trading Center's motion
14 to dismiss for lack of personal and subject matter jurisdiction (doc. 23).

15 **IT IS ORDERED GRANTING IN PART AND DENYING IN PART** plaintiff's
16 motion for summary judgment (doc. 7). Plaintiff's request for injunctive relief is
17 **GRANTED. IT IS ORDERED** that, except for voluntarily dismissing her complaint,
18 Rebecca Stover is permanently enjoined from prosecuting, taking action, or conducting any
19 proceedings against Rolling Frito-Lay Sales L.P. in tribal court, including Salt River Pima-
20 Maricopa Community Court Action C-11-0012. Plaintiff's requests for declaratory relief are
21 **DENIED** without prejudice.

22 Because we decline to exercise jurisdiction over plaintiff's declaratory action, this case
23 is at an end. The Clerk shall enter judgment.

24 DATED this 26th day of January, 2012.

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 Frederick J. Martone
28 United States District Judge