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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON

8 RICHARD FRY,

9 Plaintiff,

10 v.

11 COLVILLE TRIBAL COURT OF THE  
12 CONFEDERATED TRIBES OF THE  
13 COLVILLE RESERVATION, a  
14 federally recognized Indian  
15 Tribe, and LAWRENCE FRY,

16 Defendants.

NO. CV-07-0178-EFS

**ORDER DENYING PLAINTIFF'S  
MOTION FOR TEMPORARY  
RESTRAINING ORDER AND  
DISMISSING ACTION**

17 On June 5, 2007, the Court held a hearing in the above-captioned  
18 matter. Aaron Lowe appeared telephonically on behalf of Plaintiff  
19 Richard Fry, Robert Simeone appeared telephonically on behalf of  
20 Defendant Lawrence Fry, and Timothy Woolsey and James Bellis appeared  
21 telephonically on behalf of Defendant Colville Tribal Court. Before the  
22 Court was Plaintiff's Motion for Temporary Restraining Order and Order  
23 to Show Cause Why Preliminary Injunction Should Not Be Issued (Ct. Rec.  
24 1). At the conclusion of the hearing, the Court took Plaintiff's motion  
25 under advisement. After hearing oral argument and reviewing submitted  
26 material and relevant authority, the Court is fully informed and hereby  
denies Plaintiff's motion, finds that jurisdiction lies with the tribal

1 court and therefore dismisses the instant action for lack of  
2 jurisdiction.

### 3 **I. Background**

4 This case arises out of a contract dispute between Lawrence Fry, a  
5 member of the Colville Tribe, and his son Richard Fry, a nonmember of the  
6 Colville Tribe. In 2001, Lawrence Fry filed an action in the Colville  
7 Tribal Court for unjust enrichment, forcible detainer, and partnership  
8 accounting (Ct. Rec. 6-2). During the course of the litigation, Richard  
9 Fry filed a counterclaim, moved for an order finding Lawrence Fry in  
10 contempt, and obtained an order requiring Lawrence Fry to turn over  
11 vehicles. The tribal court action was initially settled by the parties'  
12 agreement to a stipulated judgment which included a clause maintaining  
13 jurisdiction in the tribal court for purposes of enforcement. *Id.* The  
14 stipulated judgment was intended to resolve the contract dispute between  
15 the Frys and provided for disposal of a significant amount of personal  
16 property as well as a fee parcel of land within the boundaries of the  
17 reservation owned by Richard Fry, the nonmember.

18 Defendants allege that Richard Fry failed to fulfill the promises  
19 contained in the stipulated judgment (Ct. Rec. 6 at 3). Between October  
20 8, 2002, when the stipulated judgment was signed, and the filing of the  
21 instant action in federal court, the parties were involved in extensive  
22 tribal court litigation regarding the stipulated judgment, including an  
23 action by Lawrence Fry seeking enforcement of the stipulated judgment,  
24 motions for reconsideration and an appeal by Richard Fry, and most  
25 recently, a motion to dismiss for lack of subject matter jurisdiction.  
26 Neither Richard Fry nor his counsel attended the hearing on the motion

1 to dismiss and the motion to dismiss was denied by the tribal court on  
2 January 24, 2007 (Ct. Rec. 6-2). Richard Fry did not appeal the tribal  
3 court's denial of his motion to dismiss.

4 After approximately six years of litigation in tribal court,  
5 including consent to a stipulated judgment by Richard Fry and his counsel  
6 and a number of enforcement actions regarding the stipulated judgment,  
7 Richard Fry now seeks a temporary restraining order from this Court  
8 preventing further action by the tribal court.

9 While Richard Fry seeks a temporary restraining order, the  
10 underlying issue is whether the tribal court can maintain jurisdiction  
11 over the action given Richard Fry's nonmember status. In order to avoid  
12 continued litigation in this matter, the Court hereby undertakes an  
13 analysis of the jurisdictional question.

## 14 **II. Analysis and Conclusion**

### 15 A. Exhaustion in Tribal Court

16 Plaintiff Richard Fry seeks action by this Court based on an  
17 allegation of subject matter jurisdiction pursuant to 28 U.S.C. § 1331.  
18 However, the Supreme Court has consistently held that a determination of  
19 a tribal court's jurisdiction "should be conducted in the first instance  
20 in the Tribal Court itself." *Nat'l Farmers Union Ins. Co. v. Crow Tribe*  
21 *of Indians*, 471 U.S. 845, 856 (1985). The Court went on to explain that  
22 "[e]xhaustion of tribal court remedies . . . will encourage tribal courts  
23 to explain to the parties the precise basis for accepting jurisdiction,  
24 and will also provide other courts with the benefit of their expertise  
25 in such matters in the event of further judicial review." *Id.* at 857.  
26 "At a minimum, exhaustion of tribal remedies means that tribal *appellate*

1 courts must have the opportunity to review the determination of the lower  
2 tribal courts." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987)  
3 (emphasis added).

4 Here, Plaintiff Richard Fry failed to appear at the tribal court  
5 hearing on his own motion to dismiss based on lack of subject matter  
6 jurisdiction (Ct. Rec. 2 at 14). Plaintiff also failed to appeal the  
7 tribal court's order denying plaintiff's motion, thus denying the tribal  
8 appellate court the opportunity to review the lower court's determination  
9 of jurisdiction. Based on Plaintiff's own action, whether or not  
10 conducted in good faith, Plaintiff's tribal court remedies were never  
11 exhausted. Therefore, this Court is directed by Supreme Court precedent  
12 to stay its hand, and thus dismisses the instant action.

13 B. Jurisdiction Under the *Montana* Exceptions

14 In the alternative, assuming Plaintiff had exhausted tribal court  
15 remedies, this Court finds that the tribal court has jurisdiction over  
16 the execution of the stipulated judgment, barring this Court from  
17 exercising jurisdiction over the instant matter. "Indian tribes'  
18 regulatory authority over nonmembers is governed by the principles set  
19 forth in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67  
20 L.Ed.2d 493 (1981), which we have called the 'pathmarking case' on the  
21 subject." *Nevada v. Hicks*, 533 U.S. 353, 358 (2001).

22 Indian tribes retain inherent sovereign power to exercise some  
23 forms of civil jurisdiction over non-Indians on their  
24 reservations, even on non-Indian fee lands. A tribe may  
25 regulate, through taxation, licensing, or other means, the  
26 activities of nonmembers who enter consensual relationships  
with the tribe or its members, through commercial dealing,  
contracts, leases, or other arrangements. *Williams v. Lee*,  
supra, at 223, 79 S.Ct., at 272; *Morris v. Hitchcock*, 194 U.S.  
384, 24 S.Ct. 712, 48 L.Ed. 1030; *Buster v. Wright*, 135 F. 947,

1 950 (CA8); see *Washington v. Confederated Tribes of Colville*  
2 *Indian Reservation*, 447 U.S. 134, 152-154, 100 S.Ct. 2069,  
3 2080-2082, 65 L.Ed.2d 10. A tribe may also retain inherent  
4 power to exercise civil authority over the conduct of  
5 non-Indians on fee lands within its reservation when that  
6 conduct threatens or has some direct effect on the political  
7 integrity, the economic security, or the health or welfare of  
8 the tribe. See *Fisher v. District Court*, 424 U.S. 382, 386, 96  
9 S.Ct. 943, 946, 47 L.Ed.2d 106; *Williams v. Lee*, supra, at 220,  
10 79 S.Ct., at 270; *Montana Catholic Missions v. Missoula County*,  
11 200 U.S. 118, 128-129, 26 S.Ct. 197, 200-201, 50 L.Ed. 398;  
12 *Thomas v. Gay*, 169 U.S. 264, 273, 18 S.Ct. 340, 343, 42 L.Ed.  
13 740.

14 *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (footnotes  
15 omitted). This passage established the two exceptions to the "general  
16 proposition that the inherent sovereign powers of an Indian tribe do not  
17 extend to the activities of nonmembers of the tribe." *Id.* at 565.

#### 18 1. *The First Montana Exception*

19 With respect to the first exception, Plaintiff acknowledges that he  
20 has entered a consensual relationship with a member of the tribe through  
21 a contract, but contends that the tribe lacks jurisdiction because the  
22 tribe is not regulating his activity "through taxation, licensing, or  
23 other means." Plaintiff originally filed his request for a temporary  
24 restraining order based on his claim that the tribe might arrest  
25 Plaintiff pursuant to an arrest warrant issued based on a tribal court  
26 finding that Plaintiff was in contempt of the tribal court for failing  
to abide by the terms of the stipulated judgment entered in the tribal  
court. Therefore, analyzing this case in the context of the first  
*Montana* exception, the question before this Court is whether enforcement  
of a stipulated judgment fits within the definition of "other means" by  
which a tribe may exercise jurisdiction over a nonmember when that  
individual consensually contracts with a tribal member.

1 Arguing against jurisdiction, Plaintiff cites extensively to the  
2 Ninth Circuit's opinion in *Ford Motor Co. v. Todecheene*, 394 F.3d 1170  
3 (9th Cir. 2005), arguing that the phrase "or other means" should be  
4 narrowly construed, despite the fact that the Ninth Circuit's opinion in  
5 *Ford* has since been withdrawn. *Ford Motor Co. v. Todecheene*, 474 F.3d  
6 1196 (9th Cir. 2007), amended by *Ford Motor Co. v. Todecheene*, 488 F.3d  
7 1215 (9th Cir. 2007).

8 The Court finds that enforcement of a stipulated judgment signed by  
9 both parties which explicitly includes a jurisdictional clause, is a  
10 proper means for a tribe to regulate the activity of a nonmember who  
11 enters into a consensual contractual relationship with a tribal member.  
12 While enforcement of a such an agreement may not be similar to taxation  
13 or licensing, given Richard Fry's consent to tribal jurisdiction, such  
14 enforcement is a proper exercise of tribal jurisdiction.

## 15 2. *The Second Montana Exception*

16 While both parties analyzed this case in the context of the first  
17 *Montana* exception, this Court finds the second *Montana* exception more  
18 appropriate here. The second exception articulated in *Montana* holds that  
19 "[a] tribe may also retain inherent power to exercise civil authority  
20 over the conduct of non-Indians on fee lands within its reservation when  
21 that conduct threatens or has some direct effect on the political  
22 integrity, the economic security, or the health or welfare of the tribe."  
23 *Montana*, 450 U.S. at 566. Here, the tribe has found that it retains  
24 jurisdiction over the enforcement of a stipulated judgment, signed by  
25 both parties, which disposes of a significant amount of both personal and  
26 real property. Thus, while the underlying case involved a nonmember

1 defendant, once the nonmember defendant agreed to and signed the  
2 stipulated judgment including the clause holding that the tribal court  
3 retained jurisdiction over enforcement of the stipulated judgment, the  
4 nonmember defendant put the political integrity of the tribe and the  
5 tribal court at issue in any failure to abide by the terms of the  
6 judgment.

7 In 1959, the Supreme Court found that a state court lacked  
8 jurisdiction to hear a collection action filed by a non-Native American  
9 merchant against a Native American customer arising on tribal land.

10 *Williams v. Lee*, 358 U.S. 217 (1959). The Supreme Court found that

11 the exercise of state jurisdiction here would undermine the  
12 authority of the tribal courts over Reservation affairs and  
13 hence would infringe on the right of the Indians to govern  
14 themselves. It is immaterial that respondent is not an Indian.  
15 He was on the Reservation and the transaction with an Indian  
16 took place there.

17 *Id.* at 223. This opinion was cited favorably as an example of both  
18 exceptions listed in *Montana*. This Court finds the reasoning in *Williams*  
19 persuasive. In the instant case, any attempt to enforce the stipulated  
20 judgment in state or federal court would infringe upon tribal rights of  
21 self government.

22 As this Court has determined, based on the foregoing analysis, that  
23 the tribal court retains jurisdiction, this Court is without jurisdiction  
24 to hear the case. Therefore, Plaintiff's claim is dismissed based on a  
25 lack of subject matter jurisdiction.

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