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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ford Motor Company,)	No. CV-02-1100-PCT-PGR
)	
Plaintiff,)	ORDER
)	
vs.)	
)	
)	
Joe R. Todocheene and Mary)	
Todocheene, as the surviving)	
natural parents of Esther)	
Todocheene, deceased; Tribal)	
Court in and for the Navajo)	
Nation; and the Honorable)	
Leroy S. Bedonie,)	
)	
Defendants.)	
)	

This is an action for declaratory and injunctive relief filed by plaintiff Ford Motor Company (hereinafter "Ford") against defendants Joe and Mary Todocheene as the surviving natural parents of Esther Todocheene (hereinafter "Todocheenes"), the District Courts of the Navajo Nation (hereinafter "tribal court") and the Honorable Leroy S. Bedonie, a tribal court judge of the Navajo Nation¹ (hereinafter "Judge Bedonie"). The

¹ Appearing on behalf of the Navajo Nation District Court and Judge Bedonie is Marcelino Gomez, from the Navajo Nation Department of Justice. Mr. Gomez was careful to point out at oral argument that he represents the court of the Navajo Nation, and is not appearing to defend the specific decisions of the court.

(M)

1 Complaint alleges that Judge Bedonie, as a sitting judge, on
2 behalf of the District Courts of the Navajo Nation, exceeded the
3 limits of the court's jurisdiction in a tribal court action
4 involving the Todocheenes as plaintiffs and Ford as a defendant.
5 Pending before this Court is Ford's Motion for Preliminary
6 Injunction.

7 **FACTUAL HISTORY**

8 On June 8, 1998, Esther Todocheene (hereinafter "the
9 decedent"), while employed as a law enforcement officer with the
10 Navajo Department of Public Safety (hereinafter "Navajo DPS"),
11 was involved in a one car motor vehicle accident which occurred
12 on the Navajo reservation. She was driving a Navajo DPS Ford
13 Expedition.

14 The accident occurred on a dirt road on Navajo land in
15 the state of Utah². As presented to this Court, the road is a
16 reservation road maintained by the Navajo Nation. There is no
17 federal or state right-of-way, nor is it on non-Indian fee land.
18 The parties do not contest this characterization of the road's
19 status.

20 When the incident occurred, the Ford Expedition rolled and
21 the decedent was ejected from the car. She was fatally injured.
22 The exact cause of the roll-over and ejection are in dispute.
23 Ford claims the decedent was not wearing her seatbelt at the time
24 the vehicle rolled. The Todocheenes contend that the Ford

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27 ² Although the accident actually occurred in Utah, Ford explains this
28 matter was filed in the District of Arizona because the underlying tribal court
action was filed in a Navajo tribal court located in Arizona.

1 Expedition was defective and, in particular, the seatbelt was not
2 working properly.

3 **PROCEDURAL HISTORY**

4 On April 21, 2000, the Todocheenes filed a product liability
5 lawsuit against Ford in the Tuba City Division of the Navajo
6 Tribal Court. The Complaint alleges the Ford Expedition driven
7 by decedent was defective and unreasonably dangerous in design or
8 manufacture. The Ford Expedition was designed and manufactured
9 by Ford in Michigan.

10 On June 13, 2000, Ford filed an Answer to the Complaint in
11 tribal court denying the Expedition was defective and
12 unreasonably dangerous in design or manufacture. In addition,
13 the Answer alleged the tribal court lacked both subject matter
14 and personal jurisdiction over the claims against Ford.

15 On May 25, 2000, Ford improperly removed the tribal court
16 action to federal court on the basis of diversity. The matter
17 was assigned to the Honorable Earl H. Carroll, United States
18 District Court Judge, District of Arizona. On June 13, 2000, the
19 Todocheenes filed a Motion to Dismiss the matter from federal
20 court arguing the federal court lacked subject matter
21 jurisdiction.

22 On June 27, 2000, the tribal court transferred the action
23 from the Tuba City Judicial District to the Kayenta Judicial
24 District, where it remains pending before Judge Bedonie.³

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27 ³ It is unclear to this Court if the transfer occurred pursuant to motion
28 or *sua sponte* as this Court does not have the entire tribal court record before
it.

1 While the matter was pending before Judge Carroll, Ford
2 filed a Motion to Dismiss in tribal court for lack of subject
3 matter and personal jurisdiction on November 21, 2000.⁴ While
4 the Motion to Dismiss was pending in tribal court, Judge Carroll
5 issued an Order remanding the case to tribal court on December
6 20, 2000. Judge Carroll reasoned removal was improper because 28
7 U.S.C. § 1441(a), the basis for Ford's removal, is not applicable
8 to tribal courts - only state courts.

9 On January 9, 2001, Judge Bedonie issued an Order denying
10 Ford's Motion to Dismiss. Judge Bedonie concluded Ford submitted
11 itself to tribal court jurisdiction by filing an Answer in Navajo
12 Tribal Court.

13 Subsequently, the United States Supreme Court rendered an
14 opinion in *Nevada v. Hicks*. 533 U.S. 353, 121 S.Ct. 2304 (2001).
15 Ford believed *Hicks* "conclusively shows that this court [tribal
16 court] may not exercise jurisdiction over Ford." Accordingly,
17 Ford moved for reconsideration of its Motion to Dismiss, relying
18 on the *Hicks* decision.

19 On May 16, 2002, Judge Bedonie denied Ford's Motion for
20 Reconsideration. Relying on the Navajo Nation Code, he stated
21 that the tribal court had subject matter jurisdiction "over tort
22 cases pursuant to its 'Courts and Procedure' statute that focuses
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26 ⁴ The Court notes that the matter was transferred to a different district
27 within the tribal court system and Ford filed its Motion to Dismiss in tribal
28 court after the matter had been removed but before it had been remanded. It is
uncertain how Ford sought to dismiss an action in tribal court, which Ford
removed and was pending in federal court. What was left for the tribal court
to dismiss? Similarly, it would seem there was no case for the tribal court to
transfer.

1 on damages for injuries."⁵ Further, the tribal court asserted
2 that the Navajo Long-Arm Civil Jurisdiction and Service of
3 Process Act conferred jurisdiction.⁶ More specifically, Judge
4 Bedonie held,

5 Although this Court [tribal court] asserts
6 jurisdiction over Ford based on the contacts
7 with Ford's subsidiary, Ford Credit, anyone
8 in the chain of distribution, from parts
9 manufacturer to retailer, is liable in
10 products liability suits. In this case, Ford
11 Credit is an agent of Ford and, thus, they
12 are the same company.

13 Judge Bedonie aptly noted that this was a "case of first
14 impression" recognizing the absence of federal statutory and case
15 law limiting tribal civil jurisdiction over "non-Indians" on
16 reservation lands that are not fee lands or rights-of-way.

17 Ford filed a Verified Complaint for injunctive and
18 declaratory relief in this Court on June 13, 2002. Ford's
19 Complaint seeks a restraining order against the Todocheenes,
20 Judge Bedonie, and the District Courts of the Navajo Nation until
21 this Court declares whether or not the tribal court has
22 jurisdiction to hear the Todocheenes' lawsuit. Initially, Ford
23 argued that because Judge Bedonie had scheduled a Pretrial
24 Conference, a trial date might be imminent and trying the matter
25 would cause irreparable harm.

26 ⁵ The statute upon which Judge Bedonie relies does not reference subject
27 matter jurisdiction. Nation Code tit. 7 § 701 (A)-(D). Rather § 701 addresses
28 the form and content of civil judgments. "In all civil cases, judgment shall
consist of. . . ." Nation Code tit. 7 § 701(A) (1995).

29 ⁶ Judge Bedonie relied on the recently passed Long-Arm Civil Jurisdiction
and Service of Process Act. Nation Code tit. 7 § 253(a)(C)(4). The Tribal
Council passed this statute on or about January 24, 2001. Neither the statute
nor Judge Bedonie mention retroactivity even though the tribal court lawsuit was
filed on April 21, 2000.

1 This Court heard arguments on the Motion for Temporary
2 Restraining Order on June 18, 2002 and declined to enter a
3 restraining order at that time. An impending Pretrial Conference
4 with no specific trial date set in tribal court, was insufficient
5 to warrant a finding of irreparable harm under Ninth Circuit
6 precedent. See *Arcamuzi v. Continental Air Lines, Inc.* 819 F.2d
7 935 (9th Cir. 1987). In addition, sufficient likelihood of
8 success on the merits was questionable since Ford acknowledged it
9 did not exhaust tribal court remedies. The matter was scheduled
10 for a hearing on the Motion for Preliminary Injunction and the
11 parties were given an opportunity to fully brief the issues
12 presented. On July 12, 2002 a hearing on the Motion for
13 Preliminary Injunction took place and the matter was taken under
14 advisement. The following sets forth the Court's opinion on the
15 Motion for Preliminary Injunction.

16 **DISCUSSION**

17 **A. Standard Governing Preliminary Injunctive Relief**

18 In determining whether to grant preliminary injunctive
19 relief, the Ninth Circuit traditionally considers: (1) the
20 likelihood of success on the merits; (2) the possibility of
21 irreversible injury absent an injunction; (3) the balance of
22 harms; and (4) where appropriate, the public interest. See
23 *United States v. Nutri-cology Inc.*, 982 F.2d 394, 398 (9th Cir.
24 1992); see also *United States v. Odessa Union Warehouse Co-op.*,
25 833 F.2d 172, 174 (9th Cir. 1987); *Caribbean Marine Serv. Co. v.*
26 *Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (a court must
27 consider public interest in balancing hardships when public
28 interest might be affected.)

1 More recently, the Ninth Circuit has narrowed the
2 traditional test for preliminary injunctive relief and only
3 requires a party to demonstrate either (1) a combination of
4 probable success on the merits and the possibility of irreparable
5 harm, or (2) that serious questions are raised and the balance of
6 hardships tips in its favor. See *Arcamuzi v. Continental*
7 *Airlines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987). "These two
8 formulations represent two points on a sliding scale in which the
9 required degree of irreparable harm increases as the probability
10 of success decreases." *Oakland Tribune, Inc. v. Chronicle*
11 *Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

12 In rendering its decision, this Court has given great weight
13 to the public interest in addition to considering the likelihood
14 of success on the merits and the possibility of irreparable harm.

15 **B. District Court Jurisdiction**

16 There are three primary means for initiating federal court
17 actions over controversies involving tribes and their members
18 which arise in Indian country: federal question jurisdiction
19 under 28 U.S.C. § 1331; diversity jurisdiction under 28 U.S.C. §
20 1332; and 28 U.S.C. § 1362 which is only available to Indian
21 tribes.⁷ Ford's Complaint asserts jurisdiction on the basis of
22 28 U.S.C. §§ 1331, 1332, 1343 and 2201.

23 This Court has jurisdiction pursuant to § 1331. See
24 *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852,
25 105 S. Ct. 2447, 2451 (1985). "[T]he question whether an Indian
26 tribe retains the power to compel a non-Indian property owner to

27 _____
28 ⁷ Ford does not assert jurisdiction under 28 U.S.C. § 1362, as it only
applies to tribes acting as plaintiffs.

1 submit to the civil jurisdiction of a tribal court is one that
2 must be answered by reference to federal law and is a 'federal
3 question' under § 1331. *Id*; see also *Strate v. A-1 Contractors*,
4 520 U.S. 438, 448, 117 S. Ct. 1404, 1411 (1997).

5 **C. Tribal Court Jurisdiction**

6 As will be more fully discussed below, the *Hicks* Court
7 specifically left "open the question of tribal-court jurisdiction
8 over nonmember defendants in general." 533 U.S. 353, 358 n. 2,
9 121 S.Ct. 2304, 2309 n. 2 (2001). Since the Supreme Court left
10 that particular question open, this Court must now determine if
11 Ford, a nonmember of the Navajo Nation, should be subject to the
12 jurisdiction of the District Courts of the Navajo Nation.

13 Assessing tribal court jurisdiction in this case is a
14 complicated process. In undertaking this task, this Court will
15 initially provide a summary of the relevant case law. Next, the
16 Court will provide an analysis under the jurisdictional
17 exceptions set forth in *Montana v United States*. 450 U.S. 544,
18 101 S.Ct. 1245 (1981). Finally, the Court will address the issue
19 of exhaustion as it relates to this case.

20 1. *Governing Case Law*

21 The United States Supreme Court has repeatedly recognized
22 the federal government's long-standing policy of encouraging
23 tribal self-government. See e.g. *Iowa Mutual Ins. Co. v.*
24 *LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987); *Three Affiliated*
25 *Tribes v. World Engineering*, 476 U.S. 877, 890, 106 S.Ct. 2305,
26 2313 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138
27 n. 5, 102 S.Ct. 894, 902, n. 5 (1982); *Williams v. Lee*, 358 U.S.
28 217, 220-21, 79 S.Ct. 269, 270-71 (1959). This policy is

1 intended to reflect the Indian tribes' sovereignty over both
2 their members and their territory to the extent that sovereignty
3 has not been withdrawn by federal statute or treaty. See *Iowa*
4 *Mutual*, 480 U.S. at 14, 107 S.Ct. at 975. Congress has not
5 enacted any federal statute nor is a treaty in place dictating
6 the appropriate forum for adjudicating matters involving civil
7 disputes between Indians and non-Indians in Indian Country.

8 Thus, whether a tribal court has the power to exercise
9 civil-subject matter jurisdiction over non-Indians is not
10 automatically foreclosed. See *Nevada v. Hicks*, 533 U.S. 353,
11 358, n. 2, 121 S.Ct. 2304, 2309, n. 2 (2001); see also *National*
12 *Farmers Union*, 471 U.S. at 855-66, 105 S.Ct. at 2453. The
13 existence and scope of a tribal court's jurisdiction requires an
14 in-depth examination of tribal sovereignty, the extent to which
15 that sovereignty has been altered, divested, or diminished, in
16 addition to a detailed study of relevant statutes, Executive
17 Branch policy as embodied in treaties and elsewhere, and
18 administrative and judicial decisions. *National Farmers Union*,
19 471 U.S. at 855-56, 105 S.Ct. at 2453-54.

20 *Montana v. United States* is the landmark case addressing
21 tribal civil jurisdiction over nonmembers. 450 U.S. 544, 101
22 S.Ct. 1245 (1981). *Montana* involved, in part, a claim by the
23 United States and the Crow Tribe that the tribe possessed
24 exclusive jurisdiction within its reservation to regulate
25 nonmember hunting and fishing on nonmember owned fee lands. 450
26 U.S. at 547, 101 S.Ct. at 1249. Finding no express treaty or
27 statutory right to such regulatory authority, the Supreme Court
28 cited *Oliphant v. Suquamish Indian Tribe*, for the "general

1 proposition that the inherent sovereign powers of an Indian tribe
2 do not extend to the activities of nonmembers of the tribe." *Id.*
3 at 565, 101 S.Ct. at 1258, citing, *Oliphant v. Suquamish Indian*
4 *Tribe*, 435 U.S. 191, 98 S.Ct. 1011 (1978). The Supreme Court,
5 however, identified two possible exceptions to the "general
6 proposition": (1) "[a] tribe may regulate, through taxation,
7 licensing, or other means, the activities of nonmembers who enter
8 into consensual relationships with the tribe or its members,
9 through commercial dealing, contracts, leases, or other
10 arrangements"; and (2) "[a] tribe may also retain inherent power
11 to exercise civil authority over the conduct of non-Indians on
12 fee lands within its reservation when that conduct threatens or
13 has some direct effect on the political integrity, the economic
14 security, or the health or welfare of the tribe." *Id.* at 565-66,
15 101 S.Ct. at 1258-59.

16 Ultimately, the Court held that neither of the two
17 exceptions applied to the facts presented in *Montana*, and the
18 tribe lacked the authority to regulate hunting and fishing by
19 non-Indians on land within the tribe's reservations owned in fee
20 simple by non-Indians. *See id.*

21 In *National Farmers Union v. Crow Tribe*, a Crow Indian minor
22 was struck by a motorcycle in the parking lot of a school located
23 within the Crow Indian Reservation but on land owned by the State
24 of Montana. 471 U.S. 845, 847-48, 105 S.Ct. 2447, 2449 (1985).
25 The plaintiff initiated a lawsuit in the Crow Tribal Court
26 against the school district, a political subdivision of the
27 State. *See id.* Default was entered pursuant to the rules of the
28 tribal court, and a judgment was entered against the school

1 district. See *National Farmers Union Ins. Co.*, 471 U.S. at 847-
2 48, 105 S.Ct. at 2449.

3 Subsequently, the school district filed a verified Complaint
4 and a Motion for Temporary Restraining Order in the District
5 Court for the District of Montana. See *id.* The Complaint named
6 as defendants the Crow Tribe of Indians, the Tribal Council, the
7 Tribal Court, judges of the court, and the Chairman of the Tribal
8 Council. See *id.* It described the entry of default judgment,
9 alleged that a writ of execution might issue on the following day
10 and it asserted that a seizure of school property would cause
11 irreparable injury to the school district. See *id.* The district
12 court issued a restraining order preventing the tribal defendants
13 "from attempting to assert jurisdiction over plaintiffs [the
14 school district] or issuing writs of execution," until otherwise
15 ordered by the district court. See *id.*

16 After the temporary restraining order expired, a hearing was
17 held on defendant's Motion to Dismiss and plaintiff's Motion for
18 Preliminary Injunction. See *National Farmers Union*, 471 U.S. at
19 848, 105 S.Ct. at 2450. Subsequently, a permanent injunction was
20 entered and enjoined the tribal defendants against any execution
21 of the tribal court judgment. See *id.* The district court
22 reasoned that the Crow Tribal Court lacked subject matter
23 jurisdiction over the tort that was the basis for the default
24 judgment. See *id.*

25 On appeal, the Ninth Circuit, without reaching the merits of
26 whether the tribal court had jurisdiction, concluded that the
27 district court's exercise of jurisdiction could not be supported
28

1 on any constitutional, statutory, or common-law ground and
2 reversed. *See id.*

3 Ultimately, the United States Supreme Court held that "the
4 question [of] whether an Indian tribe retains the power to compel
5 a non-Indian property owner to submit to the civil jurisdiction
6 of a tribal court is one that must be answered by reference to
7 federal law and is a 'federal question' under § 1331." *National*
8 *Farmers Union Ins. Co.*, 471 U.S. at 852, 105 S.Ct. at 2451.
9 Essentially, the Supreme Court reasoned that because the school
10 district argued "federal law has divested the Tribe of this
11 aspect of sovereignty, it is federal law in which they rely as a
12 basis for the asserted right of freedom from the Tribal Court
13 interference." *Id.* at 853, 105 S.Ct. at 2452. The Supreme Court
14 noted the district court "correctly concluded that a federal
15 court may determine under § 1331 whether a tribal court has
16 exceeded the lawful limits of its jurisdiction." *Id.*

17 While the Supreme Court recognized that the district court
18 properly considered the matter under § 1331, it reversed the
19 judgment because the school district failed to exhaust its tribal
20 court remedies. *See id.* at 856, 105 S.Ct. at 2454.

21 We believe that examination should be
22 conducted in the first instance in the Tribal
23 Court itself . . . Moreover, the orderly
24 administration of justice in the federal
25 court will be served by allowing a full
26 record to be developed in the Tribal Court
27 before either the merits or any question
28 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

1 tribal court remedies, moreover, will
2 encourage tribal courts to explain to the
3 parties the precise basis for accepting
4 jurisdiction, and will also provide other
5 courts with the benefit of their expertise in
6 such matter in the event of further judicial
7 review.

8 *National Farmers Union Ins. Co.*, 471 U.S. at 856-57, 105 S.Ct. at
9 2454.

10 The *National Union* Court noted three instances where
11 exhaustion is not mandatory: "where an assertion of tribal
12 jurisdiction is motivated by a desire to harass or is conducted
13 in bad faith, . . . or where the action is patently violative of
14 express jurisdictional prohibitions, or where exhaustion would be
15 futile because of the lack of an adequate opportunity to
16 challenge the court's jurisdiction." *Id*; see also *Burlington v.*
17 *Northern Railroad Co., v. Red Wolf*, 106 F.3d 868 (9th Cir.
18 1997) (refusing to apply the futility exception with respect to a
19 claim that federal district court possessed authority to enter
20 preliminary injunction against execution of a \$250 million
21 judgment pending exhaustion of tribal court appeal remedies where
22 tribal court has not ruled conclusively on bond amount after
23 remand from tribal appeals court).

24 Two years after *National Farmers Union*, the United States
25 Supreme Court decided *Iowa Mutual Ins. Co. v. LaPlante*. 480 U.S.
26 9, 107 S.Ct. 971 (1987). In *Iowa Mutual*, an insurer brought an
27 action seeking a declaration that it had no duty to defend or
28 indemnify an insured with respect to an incident which was the
subject of a suit against the insurer in tribal court. 480 U.S.
at 11, 107 S.Ct. at 973. The underlying tribal court litigation
alleged bad faith against Iowa Mutual.

1 The precise issue before the Supreme Court in *Iowa Mutual*
2 was whether a federal court may exercise diversity jurisdiction
3 before the tribal court system has an opportunity to determine
4 its own jurisdiction. See *id.* at 11, 107 S.Ct. at 973-74. The
5 Supreme Court extended the holding in *National Farmers Union* -
6 that exhaustion of tribal court remedies was necessary prior to
7 federal judicial review - to matters where diversity jurisdiction
8 is alleged. "Although petitioner alleges that federal
9 jurisdiction in this case is based on diversity of citizenship,
10 rather than the existence of a federal question, the exhaustion
11 rule announced in *National Farmers Union* applies here as well."
12 *id.* at 15, 107 S.Ct. at 976.

13 The Supreme Court reasoned that in diversity cases, as well
14 as federal-question cases, unconditional access to the federal
15 forum without exhaustion would place it in direct competition
16 with the tribal court, thereby impairing the latter's authority
17 over reservation affairs. See *id.* at 16, 107 S.Ct. at 976; see
18 also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct.
19 1670, 1677. "Until appellate review is complete the . . .
20 [tribal courts] have not had a full opportunity to evaluate the
21 claim and federal courts should not intervene." *Id.* at 17, 107
22 S.Ct. at 977.

23 The *Iowa Mutual* Court recognized that the importance of
24 tribal authority over the activities of non-Indians on
25 reservation lands "is an important part of tribal sovereignty
26 and, as such, civil jurisdiction over such activities lies
27 presumptively with the tribal court unless limited by a specific
28 treaty or federal statute." *Id.* at 18, 107 S.Ct. at 977.

1 Following *Iowa Mutual*, the Supreme Court was presented with
2 the question of whether a tribal court had jurisdiction over a
3 motor vehicle accident between two non-members on a state highway
4 that ran through the reservation. See *Strate v. A-1 Contractors*,
5 520 U.S. 438, 117 S.Ct. 1404 (1997). The factual basis for
6 tribal court jurisdiction is somewhat convoluted. It appears
7 that neither driver was a tribal member, but one of the drivers
8 was a widow of a deceased tribal member and had five adult
9 children who were also members.

10 The district court dismissed the action relying on *National*
11 *Farmers Union* and *Iowa Mutual*, determining that the tribal court
12 had civil jurisdiction over the complaint. See *id.* The Eighth
13 Circuit, sitting *en banc*, reversed, concluding that *Montana v.*
14 *United States* was the controlling precedent and that under
15 *Montana*, the tribal court lacked subject matter jurisdiction.
16 See *id.*

17 The United States Supreme Court, applying the civil-
18 regulatory jurisdiction standards developed under *Montana*,
19 concluded that adjudicatory jurisdiction was absent because the
20 incident occurred on nontribal lands and involved nonmembers.
21 See *id.* at 442, 117 S.Ct. at 1407-08. The Court noted, however,
22 the outcome might be different if there was a specific statute or
23 treaty authorizing tribal jurisdiction in such situations. See
24 *id.*

25 Most importantly, the Court stressed that its application of
26 *Montana* was based, in large part, on the fact that the incident
27 occurred on nonmember land. See *Strate*, 520 U.S. at 454-56, 117
28 S.Ct. at 1413-14. "We can readily agree . . . that tribes retain

1 considerable control over nonmember conduct on tribal land. . .
2 [H]owever, the right-of-way North Dakota acquired for the State's
3 highway renders the 6.59 mile stretch equivalent, for nonmember
4 governance purposes, to alienated, non-Indian land." *Id.*

5 The Court specifically left open the question of whether
6 tribal court could be an appropriate forum for nonmembers,
7 assuming the accident had occurred on tribal land. *See id.* "We
8 express no view on the governing law or proper forum when an
9 accident occurs on a tribal road within a reservation." *Id.*

10 In addition, *Strate* emphasized that *National Farmers* and
11 *Iowa Mutual* enunciate the exhaustion requirement as a "prudential
12 rule," and is not jurisdictional. *Strate*, 520 U.S. at 453, 117
13 S.Ct. at 1413.

14 Most recently, in *Nevada v. Hicks*, the United States Supreme
15 Court was again faced with the exhaustion issue. 533 U.S. 353,
16 121 S.Ct. 2304 (2001). *Hicks* presented the question of whether a
17 tribal court may assert jurisdiction over "civil claims against
18 state officials who entered tribal land to execute a search
19 warrant against a tribe member suspected of having violated state
20 law outside the reservation." *Id.* at 355, 121 S.Ct. at 2308.

21 The *Hicks* Court concluded that tribal authority to regulate
22 state officers in executing process related to the violation, off
23 the reservation, of state laws is not essential to tribal self-
24 government or internal relations. *See Hicks*, 533 U.S. at 364,
25 121 S.Ct. at 2213. The Court reasoned that the State's interest
26 in execution of process considerably outweighed any interest the
27 tribe might have.

28

1 The Supreme Court was very specific in limiting the *Hicks*
2 holding. 533 U.S. at 358 n. 2. "Our holding in this case is
3 *limited* to the question of tribal-court jurisdiction over state
4 *officers enforcing state law. We leave open the question of*
5 *tribal-court jurisdiction over nonmember defendants in general."*
6 *Id.* (Emphasis added).

7 Importantly, the *Hicks* Court reiterates the *Strate* holding,
8 noting adherence to the exhaustion requirement is not necessary
9 when it is "clear" that the tribal court lacks jurisdiction. 533
10 U.S. 353, 369, 121 S.Ct. at 2315.

11 In *Allstate v. Stump*, the Ninth Circuit held subject matter
12 jurisdiction must be "plainly" lacking before the district court
13 can conclude that exhaustion is not required. See *Allstate v.*
14 *Stump*, 191 F.3d 1071, 1072 (9th Cir. 1999). The underlying
15 dispute in *Allstate* involved the estates of deceased members of
16 an Indian tribe and an off-reservation insurer over the insurer's
17 alleged bad faith denial of insurance coverage for a fatal
18 automobile accident. See *id.* The *Allstate* accident occurred on
19 a road maintained by the tribe and located on tribal land. See
20 *id.* *Allstate* filed a declaratory judgment action in district
21 court to challenge tribal court jurisdiction over the estates'
22 suit against *Allstate* for failure to settle. See *id.*

23 The district court held the tribal court had jurisdiction
24 and entered judgment for the defendants' estates. See *id.* The
25 Ninth Circuit determined that there was a genuine dispute over
26 whether or not the claim arose on or off the reservation.
27 Namely, it was unclear if the claim arose on the reservation,
28 where the accident occurred and the insureds resided, or off the

1 reservation, where the insurer was located. *See id.* Thus,
2 because it was not plain that the tribal court lacked
3 jurisdiction, exhaustion was required. *See id.* The district
4 court was ordered to stay the action until the matter was
5 exhausted. *See id.*

6 At oral argument in the matter before this Court, Ford
7 strongly urged the Court to adopt the Eighth Circuit's reasoning
8 in *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*. 133 F.3d
9 1087 (8th Cir. 1998). In *Hornell Brewing*, Hornell brought an
10 action against the tribal court, tribal judge and descendants of
11 Indian spiritual and political leaders, asserting that tribal
12 court lacked jurisdiction over descendants' claim challenging the
13 use of the leader's name, Crazy Horse, in the manufacture, sale,
14 and distribution of malt liquor. *See id.* at 1089.

15 The United States District Court for the District of South
16 Dakota remanded to tribal court for further proceedings as to
17 personal and subject matter jurisdiction and enjoined the tribal
18 court from proceeding on the merits. *See id.* All parties
19 appealed. The Eighth Circuit ultimately held that the breweries'
20 manufacture, sale, and distribution of malt liquor did not occur
21 on the reservation land, and tribal court thus did not have
22 jurisdiction over the suit. Moreover, the Eighth Circuit held
23 the advertisement of liquor on the Internet was not a basis for
24 tribal court jurisdiction. *See id.* at 1093-94. Finally, the
25 Court concluded that there was no need for further exhaustion
26 and vacated the remand. *See id.* While the Eighth Circuit case
27 is informative, this Court is bound by the authority provided by
28

1 the United States Supreme Court and the Ninth Circuit Court of
2 Appeals.

3 On August 14, 2002, the Ninth Circuit issued an opinion in
4 *McDonald v. Means*.⁸ No. Civ. 99-39166, 2002 WL 1963262 (9th Cir.
5 Aug. 14, 2002). The litigation arises from an accident on Route
6 5, a Bureau of Indian Affairs (hereinafter "BIA") road within the
7 Northern Cheyenne Indian Reservation in Big Horn County, Montana.
8 *McDonald*, 2002 WL 1963262, at *1. Means, a member of the
9 Cheyenne Tribe, was injured when his car struck a horse that had
10 wandered onto Route 5. See *id.* The horse was owned by McDonald,
11 who operated a ranching operation on land he owns in fee within
12 the exterior boundaries of the Northern Cheyenne Reservation.
13 See *id.* McDonald was not a member of the Cheyenne Tribe but was
14 an enrolled member of the Ogalala Sioux Tribe. See *id.*

15 The action was filed in tribal court alleging that McDonald
16 was negligent in permitting his horse to trespass onto Route 5.
17 See *id.* McDonald filed suit in the United States District Court,
18 District of Montana, challenging the tribal court's jurisdiction.
19 See *id.* The district court granted summary judgment in favor of
20 McDonald holding that the tribe lacked jurisdiction, enjoined
21 Means from pursuing the matter in tribal court, and rejected the
22 tribe's Motion to Intervene. See *id.* Means appealed the grant
23 of summary judgment, and the Ninth Circuit reversed.⁹ The tribe
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26 ⁸ The opinion in *McDonald* was issued after oral argument in this matter had
27 taken place. The parties were permitted to provide limited supplemental briefing
28 on the application of *McDonald*.

⁹ Since the issuance of the *McDonald* opinion a Petition for Rehearing has
been filed.

1 appealed the district court's denial of its Motion to Intervene
2 and the Court affirmed.¹⁰ See *id.*

3 The primary issue presented in *McDonald* was whether BIA
4 roads, like the state highway considered in *Strate*, are non-
5 Indian fee land subject to the *Montana* rule. See *id.* at *1. The
6 Ninth Circuit concluded that "BIA roads constitute tribal roads
7 not subject to *Strate*, and that the BIA right-of-way did not
8 extinguish the Tribe's gatekeeping rights to the extent necessary
9 to bar tribal court jurisdiction under *Montana*." See *id.* The
10 Ninth Circuit reasoned that *Strate* was not applicable since the
11 road's status as a BIA road was equal to that of an Indian
12 reservation road. See *id.* at *2.

13 Having concluded that Route 5 fell outside the "direct
14 scope" of *Strate*, the Ninth Circuit nonetheless considered
15 whether the facts supported tribal jurisdiction under the general
16 *Montana* rule - that tribes lack authority over the conduct of
17 nonmembers on non-Indian fee land within a reservation. See *id.*
18 The Ninth Circuit determined the facts supported tribal court
19 jurisdiction noting that *Montana* referred to the conduct of
20 nonmembers on non-Indian fee land within a reservation and "Route
21 5 [could not] be considered non-Indian fee land." See *id.* at *3.
22 In making this determination, the Ninth Circuit reasoned that the
23 BIA holds a fiduciary relationship to Indian tribes, and its
24 management of tribal right-of-way is subject to the same
25 fiduciary duties. See *id.*

26 _____
27 ¹⁰ In the matter before this Court, the Navajo Nation District Court was
28 named as a defendant, but not the Navajo Nation. Accordingly, the Ninth
Circuit's discussion of intervention is irrelevant to the issues before this
Court and it will not be addressed.

1 *McDonald* is distinguishable from the case before this Court
2 for two essential reasons. First, the Ninth Circuit relies
3 exclusively on the land status of the road as the determinative
4 factor in rendering its decision. See *id.* at *1-*4. In this
5 matter the status of the land, while not insignificant, is not
6 considerably important. The case before this Court involves an
7 automobile accident, but the underlying cause of action is
8 product liability.

9 Assuming this Court strictly applied *McDonald*, all product
10 liability torts, in fact all litigation, would be subject to
11 tribal court jurisdiction if the injury occurred on Indian land -
12 and solely because it occurred on Indian land. This is
13 problematic because any manufacturer, or any individual, would be
14 subject to litigation in tribal court simply because the injury
15 occurred on Indian land. Yet, if the same product were in use
16 but the land happened to be non-Indian fee land, then the
17 jurisdictional outcome might be different.

18 Second, *McDonald's* horse "wandered" onto Route 5 from
19 *McDonald's* fee land located within the boundaries of the Cheyenne
20 reservation. See *id.* at 11932. Without examining the law
21 governing livestock, it is foreseeable that trespass will occur
22 under these circumstances such that the tribe, as a whole, has a
23 significant interest in exercising its sovereignty with respect
24 to keeping livestock off the public, tribal roads.

25 2. *The Montana Exceptions*

26 As noted above, there are two sources of tribal court
27 jurisdiction against nonmembers. Either positive law, by way of
28 statute or treaty, or through the inherent sovereignty of the

1 tribe. *Montana*, 450 U.S. at 564, 101 S.Ct. at 1257. The parties
2 concede there are no statutes or treaties governing the
3 jurisdictional questions in this case. Accordingly, this Court
4 must analyze the facts as they relate to jurisdiction based on
5 the inherent sovereignty of the tribe.

6 This Court begins with the general rule that tribal courts
7 do not generally have jurisdiction over nonmembers. See *Montana*,
8 450 U.S. at 565, 101 S.Ct. at 1258. The Supreme Court in *Montana*
9 explained, however, that tribes retain the power to regulate "the
10 activities of nonmembers who enter consensual relationships with
11 the tribe or its members, through commercial dealing, contracts,
12 leases, or other arrangements." 450 U.S. at 565. The Court
13 stated that tribes "may also retain inherent power to exercise
14 civil authority over the conduct of non-Indians on fee lands
15 within its reservation when that conduct threatens or has some
16 direct effect on the political integrity, the economic security,
17 or the health or welfare of the tribe." *Id.* at 566.

18 a. Consensual Relations

19 The Todocheenes argue that Ford entered into a consensual
20 relationship with the tribe because the allegedly defective
21 seatbelt caused the injury on the Navajo Reservation and Ford
22 Credit financed the tribe's bulk-purchase of vehicles six times
23 since 1990.¹¹ The Todocheenes contend that Ford Credit committed

24 _____
25 ¹¹ Apparently, Judge Bedonie was unable to find any consensual relationship
26 between Ford Motor Company and the Todocheenes noting that Ford does not have any
27 dealerships, offices or real estate within the Navajo reservation. Accordingly,
28 he relied on the relationship between Ford Motor Credit, a wholly-owned
subsidiary of Ford Motor Company, and Ford Motor Company, the manufacturer of the
Expedition and defendant in the tribal court case. Judge Bedonie found that
because Ford Motor Credit has "continuously conducted business on the Reservation
and engaged in contractual relations with the Tribe and its members. . .engaged

1 specific activities in an effort to solicit the tribe's business.
2 Namely, Ford engaged in a competitive bidding process and
3 provided tax-exempt financing to the tribe to encourage the bulk
4 purchasing of vehicles. Judge Bedonie noted, "[t]hese activities
5 resulted in the lease-sale contracts that underlie the consensual
6 relationship between the tribe and Ford."

7 The contracts provide that Ford Credit loan the tribe the
8 money to purchase the vehicles and that, until such time as the
9 tribe pays off the loan, Ford Credit has a security interest in
10 said vehicles. For the 1996 bulk-purchase, which included the
11 Ford Expedition involved in the decedent's accident, Ford Credit
12 had a security interest in those vehicles until the loan was paid
13 in full in April 2001.

14 In addition, the Todocheenes heavily rely on the forum
15 selection clause contained in the Ford Credit contracts to
16 support tribal court jurisdiction. These contracts provide that
17 "actions which arise out of this Lease or out of the transaction
18 it represents shall be brought in the courts of the Navajo
19 Nation." Essentially, the Todocheenes contend that by entering
20 into automobile financing contracts with the tribe, Ford should
21 be deemed to have constructively agreed to submit to the
22 jurisdiction of the tribal court for any tort claims arising out
23 of its presence on the reservation.

24

25

26 _____
26 in activities to solicit the Tribe's business. . . provided tax-exempt financing
27 to the Tribe for its bulk-purchases" it is the "alter ego" of Ford Motor Company.
27 Therefore, Judge Bedonie concludes, the tribal court may attribute the
28 subsidiary's contacts (Ford Motor Credit) to the parent Corporation (Ford Motor
28 Company) to establish that Ford Motor Company consented to tribal court
jurisdiction.

1 Ford argues this concept of consent to tribal court
2 jurisdiction is vastly overbroad. *Montana's* consensual
3 relationship exception requires that there be a nexus between the
4 regulation imposed by the Indian tribe and the consensual
5 relationship itself. See *Atkinson Trading Co.*, 532 U.S. 645,
6 656, 121 S.Ct. 1825, 1833 (2001). Taken to its logical
7 conclusion, this concept could subject anyone who entered the
8 boundaries of the reservation to tribal court jurisdiction for
9 any type of claim on the ground that their very presence on the
10 reservation represented constructive consent to any foreseeable
11 lawsuit. Arguably, such an exception would swallow the basic
12 rule established in *Montana* that tribes ordinarily will not have
13 jurisdiction over the activities of non-Indians.

14 The *Strate* Court identifies several cases which fall within
15 the consensual relationship exception. *Strate*, 520 U.S. at 457,
16 117 S.Ct. at 1415. The cases serve as an indication of the "type
17 of activities the Court had in mind" when applying the first
18 exception: *Williams*, 358 U.S. at 223, 79 S.Ct. at 272 (declaring
19 tribal jurisdiction exclusive over lawsuits arising out of
20 on-reservation sales transaction between nonmember plaintiff and
21 member defendants); *Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct.
22 712, (1904) (upholding tribal permit tax on nonmember-owned
23 livestock within boundaries of the Chickasaw Nation); *Buster v.*
24 *Wright*, 135 F. 947, 950 (8th Cir. 1905) (upholding Tribe's permit
25 tax on nonmembers for the privilege of conducting business within
26 Tribe's borders; court characterized as "inherent" the Tribe's
27 "authority ... to prescribe the terms upon which noncitizens may
28 transact business within its borders"); *Confederated Tribes of*

1 the Colville Reservation v. Washington, 447 U.S. 134, 152-154,
2 100 S.Ct. 2069, 2080-2082 (1980) (tribal authority to tax
3 on-reservation cigarette sales to nonmembers "is a fundamental
4 attribute of sovereignty which the tribes retain unless divested
5 of it by federal law or necessary implication of their dependent
6 status"). Measured against these cases, a products liability
7 case involving a single car roll-over and an allegedly defective
8 seatbelt presents a questionable consensual relationship at best.

9 To the extent that tribal jurisdiction can be conferred by
10 consent, it should be real consent. A non-Indian who enters into
11 a contract with the tribe or a member of the tribe that
12 specifically provides for submission to tribal court jurisdiction
13 should be bound by that agreement. But without such explicit
14 consent, the mere fact that a non-Indian was on the reservation,
15 or a manufacturer's product was in use, is not enough to confer
16 jurisdiction in the tribal courts over all conceivable claims
17 arising out of the non-Indian's presence on the reservation.

18 That ought to be particularly true in this case, where the
19 contract between Ford Motor Credit and the tribe contained an
20 exclusive forum selection clause related only to disputes
21 connected to the lease and financing contract. Ford Motor
22 Company can hardly be deemed to have consented to tribal court
23 jurisdiction over any foreseeable tort claims arising out of the
24 use of Ford vehicles on the reservation simply because Ford Motor
25 Credit agreed to litigate lease/financing disputes in tribal

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1 court.¹² This lawsuit is wholly unrelated to the financing and
2 lease agreement between Ford Motor Credit and the tribe. No part
3 of the agreement is relevant to the Todocheenes' *prima facie* case
4 or to Ford's defenses.

5 b. Tribal Self-Government

6 The second *Montana* exception may provide a basis for
7 tribal courts to exercise jurisdiction over nonmembers where the
8 conduct of nonmembers "threatens or has some direct effect on the
9 political integrity, the economic security, or the health or
10 welfare of the tribe." *Montana*, 450 U.S. at 566, 101 S.Ct. at
11 1258. The argument that jurisdiction over tort claims is
12 necessary to preserve political integrity of the tribe as
13 sovereigns would permit tribal courts to assume jurisdiction over
14 any claim raised by reservation residents. Similarly, the claim
15 that jurisdiction must be recognized in order to enable the
16 tribes to protect the health and welfare of their members would
17 allow a tribe to exercise civil jurisdiction over virtually any
18 tort claim, simply by asserting an interest in discouraging
19 negligent and other wrongful conduct on the reservation.¹³

20

21 ¹² Assume the forum selection clause of a financing agreement applied to
22 all tort actions; in all Ford Credit financing and lease agreements, Ford could
23 select Michigan as the appropriate forum. Thus, anytime Ford was named in a tort
action and Ford Motor Credit was determined the alter ego of Ford Motor Company,
plaintiffs would be required to file suit in Michigan.

24 ¹³ Arguably, this argument could be used to allow tribal courts to assume
25 jurisdiction over non-Indians who have never even set foot on the reservation.
26 Under the Navajo Nation Long-Arm Civil Jurisdiction and Service of Process Act,
27 the tribal court has jurisdiction over off-reservation activities that have an
28 impact on the reservation. "A court of the Navajo Nation may exercise personal
and subject matter jurisdiction over any non-member who consents to jurisdiction
by . . . any action or inaction which causes injury which affects the health,
welfare, or safety of the Navajo Nation or any of its members, or any other act
which constitutes the assumption of tribal relations and the resulting express
or implied consent to jurisdiction." Nation Code tit. 7 § 253a(C).

1 If the second *Montana* exception is to be applied at all to
2 the question of the scope of tribal court jurisdiction, it should
3 be applied narrowly to ensure that tribal court jurisdiction is,
4 in fact, permitted only in those rare cases where the particular
5 conduct in question has a substantial impact on the tribe as a
6 whole. Automobile accidents and products liability claims, by
7 their very nature, do not meet this standard because such
8 litigation impacts only the individuals involved and not the
9 tribe as a whole.

10 Even in situations where an effect can be found on the tribe
11 as a whole, that does not necessarily give the tribe the power to
12 adjudicate claims against a non-Indian. Most tortious acts are
13 already covered by the common law, and remedies are available in
14 state and federal court for breach of those duties. Members are
15 protected by existing state laws and state remedies. Thus, it is
16 not necessary to provide a forum for claims against non-Indians
17 in order to protect the health or welfare of tribal members as a
18 whole or the tribe's interest in tribal self-government.

19 Ford requests this Court consider *Atkinson Trading Co. Inc.*
20 *v. Shirley*. 532 U.S. 645, 121 S.Ct. 1825 (2001). *Atkinson*
21 involved a non-Indian proprietor of a hotel located on non-Indian
22 fee land within the boundaries of the Navajo Reservation. 532
23 U.S. at 647, 121 S.Ct. at 129. *Atkinson* brought suit in tribal
24 court challenging the Navajo Nation's authority to impose a tax
25 on his business. See *id.* *Atkinson's* challenge under *Montana* was
26 rejected by both the Navajo Tax Commission and the Navajo Supreme
27 Court. See *id.* *Atkinson* then sought relief in the United
28 States District Court for the District of New Mexico. See *id.*

1 The district court also upheld the tax. A divided panel of the
2 Tenth Circuit affirmed. 210 F.3d 1247 (2000).

3 The Supreme Court held that the tribe's imposition of the
4 hotel occupancy tax on non-Indian fee land was invalid. The
5 Court determined the consensual relationship must stem from the
6 commercial dealing, contracts, leases, or other arrangements, and
7 that a nonmember's actual or potential receipt of tribal police,
8 fire, and medical services did not create a sufficient
9 connection. See *Atkinson*, 532 U.S. at 655, 121 S.Ct. at 1833.
10 If it did, the Court noted, the exception would swallow the rule
11 because all non-Indian fee lands within a reservation benefit, to
12 some extent, from the advantages offered by the Indian tribe.
13 See *id.*

14 Moreover, the *Atkinson* Court declined to apply the second
15 *Montana* exception. See *id.* at 657, 121 S.Ct. at 1834. The Court
16 failed to see how the operation of a hotel on non-Indian fee land
17 "threatens or has some direct effect on the political integrity,
18 the economic security, or the health or welfare of the tribe."
19 *Id.*

20 Ford argues that if the Supreme Court in *Atkinson* determined
21 the collection of a hotel occupancy tax imposed by the tribe does
22 not have a direct effect on the tribes economic security or
23 political integrity, then certainly an individual tort action has
24 no such effect. See *id.* at 653-59, 121 S.Ct. at 1832-35.

25 There may be rare situations where state and federal court
26 remedies are insufficient to protect a strong tribal interest
27 against a non-Indian's allegedly tortious activity. However, a
28 single vehicle roll-over underlying a products liability lawsuit

1 does not require a unique tribal court remedy and is not likely
2 to be the type of conduct that the Supreme Court intended to fall
3 within the second *Montana* exception as it does not threaten or
4 have a sufficiently adverse effect on the political integrity,
5 the economic security, or the health or welfare of the tribe as a
6 whole.

7 To hold otherwise could create a tumultuous situation where
8 tribal courts would be able to regulate the conduct of
9 non-Indians by, among other things, developing their own
10 individual tort systems and law in deciding liability and
11 imposing damages for such claims. In fact, Judge Bedonie,
12 in his May 16, 2002, Order denying Ford's Motion for
13 Reconsideration, opines that "Navajo Courts should synthesize
14 Navajo Custom Law with due process to enhance Navajo Culture when
15 interpreting the NNBR [Navajo Nation Bill of Rights] and the ICRA
16 [Indian Civil Rights Act]." Judge Bedonie emphasizes this point,
17 by referring to the Navajo coyote stories, and, specifically, the
18 story of Coyote and Skunk, as an illustration of how Navajo due
19 process comports with federal law.¹⁴

21
22 ¹⁴ In his Order, Judge Bedonie states that, "[i]n the story of Coyote and
23 Skunk, Coyote and Skunk conspired and killed prairie dogs for food. They buried
24 the food to cook it. In an attempt to get all the food for himself and cheat
25 Skunk, Coyote suggested a running contest to determine each's share. Skunk
26 agreed to the contest knowing Coyote's intent. Coyote allowed Skunk a lead start
27 as Skunk had shorter legs. When Skunk was out of Coyote's sight, Skunk hid,
28 allowing Coyote to pass by without being seen. Skunk went back and took all the
food for himself. When Coyote came back to get the food for himself, he found
Skunk up high on a rock with all the food. Coyote begged to reestablish good
relations to get some of the food, but Skunk refused. Skunk did not give Coyote
the opportunity for a fair contest because Coyote attempted to cheat Skunk in the
first place. Because of these events, *Doo hwona'adlo'da - Haahaneeh!* (One should
not be deceptive or he will lose!). If one does not play fair, he will lose."
Judge Bedonie then states that this type of analysis allows the tribal court to
consider "all parties equally as relatives" therefore, comporting with due
process.

1 Interpreting the second *Montana* exception consistent with
2 the *Todocheenes'*, the tribal court's and Judge Bedonie's argument
3 is directly contrary to the fundamental premise of the *Montana*
4 decision, which is that the tribes' status as dependent
5 sovereigns necessarily entails a sharp limitation on their
6 jurisdiction over nonmembers.

7 3. *Exhaustion*

8 As noted above, the Supreme Court favors exhaustion at the
9 tribal court level prior to seeking review in federal court.
10 *National Farmers Union*, 471 U.S. at 856, 105 S.Ct. at 2454. The
11 decisions in *National Farmers Union* and *Iowa Mutual* "describe an
12 exhaustion rule allowing tribal courts initially to respond to an
13 invocation of their jurisdiction." *Strate*, 520 U.S. at 448
14 (1997). The rule, however, is "not an unyielding requirement."
15 *Id.* at 449 n.7, 117 S.Ct. at 1411. "It is 'prudential,' not
16 jurisdictional." *Id.* at 451, 117 S.Ct. at 1412.

17 Moreover, *National Farmers Union* recognizes three exceptions
18 to the exhaustion requirement: (1) when tribal court jurisdiction
19 is motivated by a desire to harass or is conducted in bad faith;
20 (2) the action is patently violative of express jurisdictional
21 prohibitions; or (3) exhaustion would be futile because of the
22 lack of an adequate opportunity to challenge the court's
23 jurisdiction. See *Hicks*, 533 U.S. at 369, 121 S.Ct. at 2315.

24 In this case, the court is only concerned with the second
25 circumstance - whether the action is patently violative of
26 express jurisdictional prohibitions. The parties agree there are
27 no allegations of bad faith or harassment and the opportunity for
28 appeal is adequate.

1 The Todocheenes, Judge Bedonie, and the tribal court assert
2 relatively little argument with respect to the merits of the
3 jurisdictional issue. Instead, they focus primarily on
4 exhaustion and request the tribal court have a full opportunity
5 to address the issue in the first instance. They note that this
6 Court may undertake a review of the tribal court's determination
7 at a later time. Ford argues that the lack of jurisdiction in
8 tribal court is so abundantly clear that exhaustion is
9 unnecessary and would only serve to further delay the resolution
10 of this case.

11 Supreme Court precedent varies slightly in the terms used to
12 describe the degree to which the tribal court must lack
13 jurisdiction. As previously noted, *National Farmers Union*
14 requires that the action be "patently violative of express
15 jurisdictional prohibitions" in order to conclude exhaustion is
16 not necessary. 471 U.S. at 857 n. 21, 105 S.Ct. at 2454 n. 21.
17 (Emphasis added). *Strate* observed that once it is "plain that no
18 federal grant provides for tribal governance of nonmembers'
19 conduct . . . state or federal courts will be the only forums
20 competent to adjudicate those disputes . . . Therefore, . . . the
21 otherwise applicable exhaustion requirement . . . must give way.
22 . . ." 520 U.S. at 459 n. 14, 17 S.Ct. at 1416 n. 14. (Emphasis
23 added). In *Hicks*, the United States Supreme Court reasoned that
24 because "it is clear . . . that tribal courts lack jurisdiction
25 over state officials' . . . adherence to the exhaustion
26 requirement in such cases 'would serve no purpose other than
27 delay,' and is therefore unnecessary." 533 U.S. at 369, 121 S.Ct.
28 at 2315.

1 Ford has not sought any type of review beyond the trial
2 court level. At minimum, the Navajo Nation Code provides for a
3 discretionary petition for review with the Navajo Supreme Court.
4 Nation Code tit. 7 § 303 (1995). The Court is troubled that Ford
5 has not yet initiated any such review.

6 This Court recognizes that such a petition is discretionary
7 and the Navajo Supreme Court may decline review. A denial of
8 such a petition, while not providing any clear guidance to this
9 Court, might provide some insight as to whether the exhaustion
10 requirement is appropriate. For instance, the Navajo Supreme
11 Court would likely take the opportunity to address Judge
12 Bedonie's reliance on Ford Motor Credit as the alter ego of Ford
13 Motor Company and the scope of the Navajo Nation Long-Arm Civil
14 Jurisdiction and Process Act. In any event, Ford has not put
15 forth any effort in this regard.

16 Further, requiring Ford to seek discretionary review would
17 not result in any substantial hardship to Ford. Ford would not
18 be required to proceed to the completion of a costly trial but
19 would only incur fees associated with the filing and argument of
20 the petition - more than likely, nothing more than was incurred
21 in filing the instant Motion for Preliminary Injunction. Ford's
22 inaction begs the obvious question: If the lack of tribal court
23 jurisdiction is so clear-cut, then would it not be similarly
24 evident to the Navajo Supreme Court?

25 As an alternative, Ford could be required to seek appellate
26 review with the Navajo Supreme Court once judgment is entered.
27 Nation Code tit. 7 § 302. The matter is not yet ripe for
28

1 appellate review, however, the appellate process is the typical
2 method for exhaustion.

3 Requiring Ford to exhaust is not necessarily dispositive of
4 the issues presented. Assuming the Navajo Supreme Court upheld
5 the lower court's determination that the tribal court has
6 jurisdiction, Ford may still challenge the ruling in this Court.
7 *National Farmers Union*, 471 U.S. at 853, 105 S.Ct. at 2452.

8 While the Supreme Court has decided several cases over the
9 past few years dealing with tribal court jurisdiction and, in
10 particular, exhaustion of tribal court remedies, the facts
11 presented in this case do not fit squarely into any of the
12 aforementioned cases. The early cases favor exhaustion while the
13 more recent cases tend to find exceptions to the exhaustion
14 requirement. None of the cases cited by the parties or discussed
15 above is exactly on point.

16 Ultimately, however, this Court's review of the record and
17 relevant law reveals that exhaustion is unnecessary because
18 tribal court jurisdiction is clearly lacking under the *Montana*
19 analysis. It is well established that where the tribal court
20 plainly lacks jurisdiction, exhaustion serves no other purpose
21 than delay and is, therefore, unnecessary. *Nevada*, 533 U.S. at
22 369, 121 S.Ct. at 2315.

23 In making this determination, the Court focuses on the
24 general rule set forth in *Montana* - that tribe's generally lack
25 civil jurisdiction over nonmembers - while analyzing the
26 applicability of the consensual relationship and tribal
27 sovereignty exceptions to *Montana's* general rule.

28

1 The Todocheenes rely primarily on the forum selection clause
2 of the financing agreement between Ford Motor Credit and the
3 Navajo Nation wherein Ford Motor Credit consented to tribal court
4 jurisdiction for actions arising out to the lease and financing
5 agreements. Clearly, the forum selection clause of a
6 lease/financing contract does not confer jurisdiction of tort
7 actions to the tribal court.

8 The Expedition was sold to the Navajo Nation for use by its
9 Department of Public Safety. Assuming, in arguendo, the forum
10 selection clause did cover tort actions, the clause is part of an
11 agreement between Ford Motor Credit and the Navajo Nation as a
12 governmental entity, not the Todocheenes or the decedent. There
13 is no consensual relationship between Ford Motor Company or Ford
14 Motor Credit and the Todocheenes.

15 With respect to the second *Montana* test, this Court
16 concludes that tribal court jurisdiction over this action is not
17 necessary to preserve the tribe's sovereignty. Jurisdiction over
18 a single vehicle roll-over does not have a substantial impact on
19 the tribe as a whole since it is not a threat to the political
20 integrity, economic security, or health or welfare of the tribe.
21 *Montana*, 450 U.S. at 566, 101 S.Ct. at 1258.

22 **D. Injunctive Relief**

23 As noted above, this Court considers a combination of
24 probable success on the merits, possibility of irreparable harm,
25 and the public interest in determining the appropriateness of
26 injunctive relief. See *United States v. Nutri-cology, Inc.*, 982
27 F.2d at 398; see also *Arcamuzi*, 819 F.2d at 937. The success on
28 the merits and irreparable injury prongs of the preliminary

1 injunction standard tend to focus on the moving parties position.
2 It is recognized, however, that a district court must carefully
3 weigh the interests of all parties. See *Doran v. Salem Inn,*
4 *Inc.*, 422 U.S. 922, 931, 95 S.Ct. 2561, 2568 (1975).

5 1. *Likelihood of Success on the Merits*

6 The requirement that Ford demonstrate likely success on the
7 merits is easy to grasp in principle - if Ford is to be granted
8 relief upon a preliminary review of its case, the case had better
9 look good.¹⁵ It becomes complicated when the Court must decide
10 how good Ford's case must be.

11 Success on the merits is somewhat arguable in this case
12 since there is no clear precedent for the issues presented. That
13 is not to say there is not significant authority in the area of
14 tribal court jurisdiction, there is; rather, the precedent is
15 very narrowly tailored to the facts of each individual case and
16 continually evades the underlying issue of civil jurisdiction as
17 to nonmember defendants. *Hicks*, 533 U.S. at 358 n. 2, 121 S.Ct.
18 at 2309 n.2.

19 In looking at the merits of this action however, the Court
20 finds Ford has demonstrated a sufficient likelihood of success.
21 Success is demonstrated by reference to the two *Montana* tests.
22 Ford cannot be deemed to have consented to tribal court
23 jurisdiction under the facts and arguments presented in this
24 case.

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26
27 ¹⁵ Joseph T. McLaughlin & Harmeet Dhillon, *Litigation and Administrative*
28 *Practice Court Handbook Series, Preliminary Injunctive Relief in the Federal*
Courts, 6 (Practicing Law Institute eds. 1996).

1 Further, the sovereignty of the tribe is not in jeopardy by
2 concluding the tribal court does not have jurisdiction. In
3 making this decision, this Court is not interfering with the
4 tribe's right to adjudicate matters between its members or
5 nonmembers who consent to tribal court jurisdiction; rather, this
6 Court is merely requiring adherence to *Montana* and its progeny.

7 2. *Irreparable Harm*

8 It is the threat of irreparable harm that provides the
9 situation its urgency. See *Weinberger v. Romero-Barcelo*, 456
10 U.S. 305, 312, 102 S.Ct. 1798, 1802 (1985). Simply stated, the
11 threat of irreparable harm renders the situation urgent because
12 it means a party is in danger of losing something irretrievable.
13 11A C. Wright, A. Miller & M. Kane, *Federal Practice and*
14 *Procedure* § 2948.1 p. 139 (2d ed. 1995).

15 Ford argues it will suffer irreparable harm if the tribal
16 court is not enjoined primarily because of the substantial costs
17 incurred defending a matter at trial and appealing an unfavorable
18 decision. This argument is not very compelling to this Court.
19 When balancing the economic hardship of Ford as weighed against
20 the Todocheenes, the scale is basically even. Certainly, Ford
21 will incur costs, potentially minimal if they were to seek
22 discretionary review, or substantial, if forced to proceed
23 through trial and an appeal; but this is basically equal to the
24 economic hardship of the Todocheenes'. The Todocheenes will most
25 likely have to refile the action in a different court or will
26 choose to challenge this Court's ruling at the Ninth Circuit.
27 Either way, both sides are likely to suffer some financial
28 repercussions.

1 Similarly, both parties have an equal interest in seeing the
2 matter quickly resolved. The Todocheenes certainly have waited
3 patiently for the resolution of this matter. Their daughter died
4 in June of 1998, and the action is just now ready to proceed to
5 trial in September, 2002.

6 On the other hand, because jurisdiction is so clearly
7 lacking, the Todocheenes may be forced to endure the process of
8 exhaustion, as well as subsequent review in this Court if
9 injunction did not issue, thereby unnecessarily delaying
10 adjudication. See *Nevada*, 533 U.S. at 369, 121 S.Ct. at 2315.

11 Ford has comparable timeliness concerns. Since tribal court
12 jurisdiction is so clearly lacking, Ford obviously has no
13 interest in delaying the adjudication of the matter by expending
14 time at trial and appealing any unfavorable judgment with the
15 Navajo court system.

16 3. *Public Interest*

17 The final, and perhaps most determinative factor considered
18 by the Court, is the public interest. In doing so, the court is
19 permitted to inquire whether there are policy considerations that
20 bear on whether an injunction should issue. Federal Practice and
21 Procedure § 2948.4 p. 200-01. Essentially, the Court must weigh
22 the public's interest in permitting the Navajo tribal court to
23 adjudicate any matter brought before it against the extension of
24 civil tribal court jurisdiction to non-consenting nonmembers.

25 "Indian tribes occupy a unique status under our law."
26 *National Farmers Union*, 471 U.S. at 850, 105 S.Ct. at 2451.
27 Early on, tribes exercised virtually unrestrained power over
28 their own members as well as those permitted to join tribal

1 communities. See *id.* "Today, however, the power of the Federal
2 Government over Indian tribes is plenary." *Id.* Federal law, be
3 it statute, treaty, administrative regulation, or judicial
4 decision, provides considerable protection for the individual,
5 territorial, and political rights of the tribes. See *id.*

6 Certainly, there are compelling arguments in favor of both
7 sides. The Navajo tribe certainly has a strong interest in
8 protecting its ability to adjudicate matters brought within its
9 own court system. Federal law generally supports this interest
10 with respect to members of the tribe. However, this interest is
11 restricted as it relates to nonmembers. See *Montana*, 450 U.S. at
12 565-66, 101 S.Ct. at 1258-59.

13 The fundamental argument is that tribes should have
14 jurisdiction over all claims brought within its tribal court
15 system, because if not, tribal sovereignty is adversely affected.
16 This is directly contrary to *Montana* and its progeny and not in
17 the public's best interest.

18 **CONCLUSION**

19 Congress has yet to provide any meaningful legislation
20 dealing with the issue of subject matter jurisdiction in tribal
21 court. As such, the federal courts have been left with the
22 enormous task of determining tribal court jurisdiction on a case-
23 by-case basis through constructing various tests and then,
24 similarly, carving out various exceptions. Analysis of this
25 particular case is rather complicated insofar as it does not
26 neatly fit into any one of the Supreme Court or Ninth Circuit
27 precedents related to tribal court jurisdiction.

28

1 This Court has determined that the *Montana* exceptions are
2 not applicable and applies its general rule. Ford Motor Company
3 did not consent to tribal court jurisdiction for tort claims by
4 virtue of Ford Motor Credit entering into lease/financing
5 agreements with the tribe. Moreover, a single vehicle roll-over
6 accident which prompted the pending products liability action
7 does not have a threatening or direct effect on the tribe's
8 political integrity, economic security, or the health or welfare
9 of the tribe. That having been said, this Court is left with the
10 issue of exhaustion.

11 Based on the above analysis, this Court has concluded that
12 exhaustion is not necessary since jurisdiction is so clearly
13 lacking it would only serve to unnecessarily delay the
14 adjudication of this matter.

15 IT IS ORDERED that Ford's Motion for Preliminary Injunction
16 **Doc. 3)** is GRANTED.

17 IT IS FURTHER ORDERED that defendants are enjoined from
18 prosecuting, taking any action or conducting any proceedings in
19 furtherance of *Joe and Mary Todocheene v. Ford Motor Company*,
20 Cause No. KY-CV-191-2000, the products liability action pending
21 in the District Courts of the Navajo Nation.

22 IT IS FURTHER ORDERED that bond is set in the amount of
23 \$20,000.00.

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25

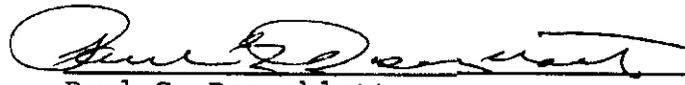
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1 IT IS FURTHER ORDERED that this matter is set for a Rule 16
2 Scheduling Conference on **Monday, October 28, 2002 at 1:30 p.m.**¹⁶

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4 DATED this 18th day of Sept., 2002.

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6 
7 Paul G. Rosenblatt
8 United States District Judge

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28 ¹⁶ The parties should be prepared to discuss whether the imposition of a permanent injunction is appropriate without further proceedings.