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No. 07-35197

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDY V. ROBERTS,

Plaintiff-Appellant,

v.

JEFF HAGENER, Director, Montana Department of Fish, Wildlife & Parks;
VICTOR WORKMAN, TIM MULLIGAN, STEVE DOHERTY,
JOHN BRENDEN, and SHANE COLTON, Commissioners,
Montana Fish, Wildlife & Parks Commission;
MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS;
MONTANA FISH, WILDLIFE & PARKS COMMISSION;
BRIAN A. SCHWEITZER, Governor, State of Montana; and the
STATE OF MONTANA,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Montana, Civil Action No. CV-05-153-BLG-RFC
The Honorable Richard F. Cebull

APPELLANT'S REPLY BRIEF

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INTRODUCTION

This appeal represents both a facial and an as-applied challenge to Defendants-Appellees' (collectively, "the State's") hunting regulations governing big game hunting on fee lands within the exterior bounds of an Indian reservation. The regulation at issue provides: "Only tribal members are allowed to hunt big game on Indian Reservations, unless otherwise provided for by agreements between the State of Montana and Tribal Government." E.R. at 50. This regulation has remained in place in substantially the same form since at least 2002 and continues in place to the present day. *Montana v. Shook*, 67 P.3d 863, 865 (Mont. 2002) (the 2002 regulation provided: "Indian Reservations are limited to Tribal members only for big game hunting privileges unless otherwise provided from by agreements between the State of Montana and a Tribal Government."); Montana Fish, Wildlife & Parks, *2007 Deer, Elk & Antelope Regulations* 19, *available at* http://fwp.mt.gov/content/getItem.aspx?id=26827 (last visited Aug. 10, 2007).

Mr. Roberts's family, who are not members of any federally recognized Indian tribe, owns, in fee, lands geographically contained within the exterior bounds of the Crow Reservation. E.R. at 18–19. But for the unconstitutional regulations promulgated by the State, Mr. Roberts would hunt big game on his family's lands. *Id.* However, since Mr. Roberts is not a member of any federally

recognized tribe, including the Crow Tribe, the State does not permit him to pursue otherwise lawful activity on his family's property. *Id.*; Mont. Code Ann. § 87-2-121 ("In recognition of the inalienable right of persons to acquire and possess property in all lawful ways contained in . . . the Montana constitution and of the heritage of individual citizens to harvest wild game animals contained in . . . the Montana constitution, a landowner and a landowner's guests and lessees may hunt on the landowner's private property so long as the hunting is conducted in the manner proved by law and is consistent with regulations."). This denial of Mr. Roberts' rights is based entirely on his racial status, that is, because he is not a tribal member. Indeed, if Mr. Roberts were a member of the Crow Tribe, he would be permitted to hunt upon his family's lands.

This appeal follows the District Court's granting of the State's Motion for Summary Judgment (as converted by the court from a Motion to Dismiss). E.R. at 52. On June 21, 2007, Mr. Roberts filed his Opening Brief ("App't Br."); on July 31, 2007, the State filed its Response Brief ("Resp. Br."); and, on July 31, 2007, the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation filed an *Amicus Curiae* Brief ("*Amicus* Br."). Mr. Roberts now files his Reply Brief to both the Response Brief of the State and to the brief of *Amicus*.

ARGUMENT

I. Any Plenary Authority Held by the United States over Indian Matters is Irrelevant to the Case at Bar.

The State goes through some pains to discuss the plenary authority held by the United States regarding its relationship with the Indian tribes. Resp. Br. at 6–8. This discussion, however, is totally irrelevant to the case at bar since the State enjoys no special relationship with the Indian tribes: States "do not enjoy th[e] same unique relationship with Indians [as enjoyed by Congress]." *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 500–501 (1979). Thus, this Court should disregard the State's irrelevant argument.

II. The State Cannot Escape That Roberts's Hunting Rights Are Being Denied Based Upon His Race; Thus, Strict Scrutiny Must Be Applied.

The State attempts to veil its unconstitutional treatment of Roberts's rights under the auspices of a purportedly lawful "political" classification. Resp. Br. at 8–10. This argument, however, must fail. The immutable fact is that the purported "political" classification has only one membership requirement: race.

Membership of the "political" entity, in this case the Crow Tribe of Indians, is limited to:

> (a) all persons who possess one-quarter (1/4) Crow Indian Blood or more; or
> (b) all those persons who are enrolled as Crow Indians on the date of passage of this [the Crow Tribal] Constitution; or

> (c) all descendants of such Crow Indians referred to above with the enrollment status and benefits of such descendants determined by the Crow Tribal Enrollment Ordinance.

Crow Tribal Const. art. III, *available at* http://www.ntrjc.org/ccfolder /crow_const.htm (last visited Aug. 10, 2007). Regardless of how the State attempts to reframe the issue, the fact that membership of the purported "political" classification is based solely upon race mandates that this Court apply strict scrutiny, not the rational basis standard of review. *See* App't Br. at 13–20.

III. The State's Argument that the Checkerboard of "Land Ownership Patterns" and the "Logistic Difficulties" of Regulating Hunters Requires That Roberts Be Treated Unequally Must Fail.

Here, as at the District Court below, the State proffers that the disparate treatment suffered by Roberts is somehow justified because of the checkerboard of "land ownership patterns neither discernable in the wild nor respected by migrating animals" would make law enforcement too burdensome to be effected. Resp. Br. at 20; *see also Amicus* Br. at 8–10 ("[I]f this Court were to accept Roberts's argument, then it will become too complex and dangerous to enforce hunting and fishing laws on the Flathead Reservation."). This argument must fail. Wildlife managers are faced with checkerboard patterns of ownership throughout the State of Montana, and indeed all western states. Throughout the United States, property is held by private, state, and federal entities without any demarcations on the ground indicating ownership. Some of these lands are open to hunting; many are

not. Despite this, the State is fully capable of enforcing its wildlife laws. It is apparently only when private lands are surrounded by an Indian Reservation that the State is no longer capable of performing its duties. In fact, if the Roberts's property were located off of, but adjacent to, the reservation, the State would be able to fulfill its public obligations and enforce its laws.

Likewise, the State's argument that it would "face the very real logistic difficulties of attempting to regulate hunting differently for tribal members and non-members" must fail. Resp. Br. at 20; *see also Amicus* Br. at 8–10. On a routine basis, the State's wildlife officials do just this. *See, e.g.*, *United States v. Strong*, 79 F.3d 925, 927 (9th Cir. 1995) (Montana wildlife officer cited defendant for unlawful hunting on federal lands); *Weitz v. Montana Dep't of Natural Res. & Conservation*, 943 P.2d 990, 991–992 (Mont. 1997) (same on state lands); *Montana v. Jack*, 529 P.2d 726, 728 (Mont. 1975) (same on federal lands); *see also* Mont. Code Ann. § 82-2-109 (requiring a license to hunt "*in this state*" and requiring that the license be produced for inspection upon request by a wildlife officer); *id.* § 87-1-502 (authorizing wildlife officers to enforce the laws and regulations of the state). State wildlife officials routinely patrol hunting parties to ensure that properly licensed individuals are hunting in areas to which they are authorized. *Id.* In fact, the State issues hunting licenses that are valid for specific geographical areas only. *See, e.g.*, Montana Fish, Wildlife & Parks, *2007 Deer,*

Elk & Antelope Regulations, *supra*, at 12, 22–23, 27–80 (identifying deer and elk hunting districts requiring area-specific hunting permits). Thus, the State already performs the very function that apparently it would be unable to perform on private lands within the geographic bounds of an Indian Reservation. Accordingly, this "logistic" bar argument is untenable and must be rejected.

IV. The Tribes Have No Authority to Regulate Roberts's Hunting Activities on His Non-Tribal, Fee Lands.

Amicus Curiae, the Confederated Salish and Kootenai Tribes, assert that the State's hunting regulations are lawful because they are rationally related to promoting tribal self-government, fulfilling the Federal trust obligation, and maintaining national honor and credibility. *Amicus* Br. at 11–13. These arguments are without merit; in fact, the Supreme Court rejected many of these arguments in *Montana v. United States*, 450 U.S. 544 (1981). Thus, *Amicus*'s proffered reasons cannot serve as any "rational" basis for the challenged regulation.

In *Montana v. United States*, the Supreme Court held that the tribes had no power to regulate non-Indian hunting and fishing on fee lands geographically located within an Indian Reservation. *Id.* at 560. Moreover, the Court held "regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations." *Id.* at 564.

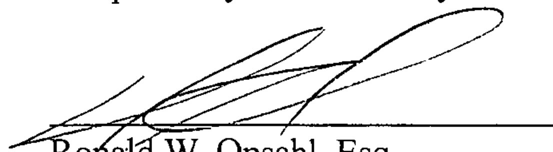
As noted above and in Mr. Roberts's Opening Brief, the State does not enjoy any special relationship with the tribes, thus the State has no trust obligation to fulfill or any interest in maintaining the national honor and credibility of the tribes. Accordingly, these proffered reasons for the inherently unequal treatment suffered by Mr. Roberts may not serve as a "rational" basis for the challenged regulations. Accordingly, these arguments must be rejected by this Court.

CONCLUSION

For the foregoing reasons, and those contained within Plaintiff-Appellant's Opening Brief, Mr. Roberts was entitled to summary judgment and the District Court erred in granting summary judgment for Montana. Accordingly, Mr. Roberts respectfully requests this Court reverse the District Court's opinion.

DATED this 14th day of August 2007.

Respectfully Submitted By:



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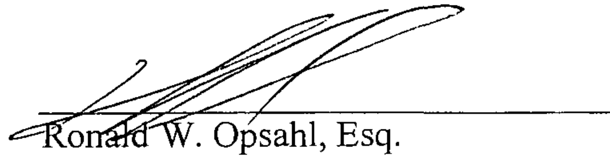
CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Reply Brief is proportionately spaced, has a typeface of 14 points or more, and contains 1,533 words.

Dated this 14th day of August 2007.



Ronald W. Opsahl, Esq.

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d)(2), I hereby certify that on the 14th day of August 2007 I dispatched by Overnight Federal Express in accordance with Fed. R. App. P. 25(a)(2)(B) the original and fifteen (15) copies of the foregoing APPELLANT'S REPLY BRIEF, addressed as follows:

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I also hereby certify that on the 14th day of August 2007, I served Counsel of Record for Defendants-Appellees and *Amicus Curiae* two (2) copies each of the foregoing APPELLANT'S REPLY BRIEF by United States mail, first-class, postage prepaid, and properly addressed to:

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