

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

JOHNNY L. GRAHAM

PLAINTIFF

v.

CIVIL ACTION NO. 4:08CV00026-TSL-CKA

**APPLIED GEO TECHNOLOGIES, INC.
D/B/A CHAHTA ENTERPRISE,
ALLEN HINES, TIM NELSON
MICHAEL MILLER AND SANDRA BOOKER
IN THEIR INDIVIDUAL AND OFFICIAL
CAPACITIES AS PRESIDENT, DIRECTOR OF
ADMINISTRATION, VICE PRESIDENT OF
OPERATIONS AND SENIOR QUALITY
MANAGER RESPECTIVELY, JOHN DOES
ENTITIES 1-10 AND JOHN DOES 1-10**

DEFENDANTS

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO
EXHAUST TRIBAL REMEDIES**

I. INTRODUCTION

Plaintiff Johnny Graham (“Plaintiff”), an African American, has sued Defendants under Title VII, 42 U.S.C. § 2000e, and under 42 U.S.C. § 1981, alleging that Defendants discriminated against him on the basis of his race in terminating his employment with AGT.¹ First Amended Compl. ¶ I.

¹ As noted in Defendants’ Motion to Dismiss, Defendants have other dispositive legal defenses to Plaintiff’s Title VII and § 1981 claims as neither statute applies to Indian tribes or their tribally-owned, tribally-chartered companies or officers or employees thereof sued for actions they are alleged to have taken within the course and scope of their employment. However, under the tribal exhaustion doctrine the proper forum for addressing those legal defenses in the first instance is the Choctaw Tribal Court. *See, McArthur v. San Juan County*, 309 F.3d 1216, 1227 (10th Cir. 2002) (reversing District Court’s dismissal of claims arising within Indian Reservation boundaries on jurisdictional (sovereign immunity) grounds because District Court should instead have first required exhaustion of tribal remedies *viz.* the sovereign immunity defense: “[*Nevada v. Hicks* thus stands for the proposition that *Montana* analysis should proceed before considering immunity defenses. In sum, we conclude that the district court should have performed a *Montana* analysis before reaching the sovereign immunity question.” (Insert added).

The Defendant Applied Geo Technologies (AGT) is a tribally-owned, tribally- chartered corporation established by the Tribal Council of the Mississippi Band of Choctaw Indians, a federally recognized Indian tribe. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *U.S. v. John*, 437 U.S. 634 (1978) ; *Bank One, N.A. v. Shumake*, 281 F.3d 507 (5th Cir. 2002). AGT was designated as a Mississippi Choctaw “tribal entity” in the Council ordinance issuing AGT’s Charter. It is not (as alleged by Plaintiff’s First Amended Compl. ¶ III, 2) a state-chartered corporation and does not operate “d/b/a Chahta Enterprise.” See, Mississippi Choctaw Tribal ordinances establishing AGT and issuing its Charter (and amendments thereto) appended as Exhibits 2, 3 and 4 to the Affidavit of Tim Nelson (Exhibit A to AGT’s Motion to Dismiss). Instead, AGT is a Mississippi Choctaw tribal entity, wholly-owned by the Mississippi Band of Choctaw Indians d/b/a Chahta Development Company. *Id.*

AGT’s headquarters (at which Plaintiff Graham was employed and where he was terminated) are located on Mississippi Choctaw Indian Reservation lands.² The Tim Nelson Affidavit shows that the decision to terminate Plaintiff occurred at the AGT Headquarters. Accordingly, Plaintiff’s cause of action as here pled arose on the Mississippi Choctaw Indian Reservation. *Id.* Nelson Affidavit, ¶¶ 3-9.

The remaining Defendants (First Amended Compl., ¶¶ III, 3-6) are non-Indian but are all officers or employees of AGT sued for decisions they are alleged to have made (for AGT) at

² The Tim Nelson Affidavit and Exhibit 1 thereto show that the AGT headquarters are located on Mississippi Choctaw Indian Reservation (trust) lands. All Choctaw trust lands also constitute “reservation” lands, both because the Supreme Court so held in *U.S. v. John*, 437 U.S. 634 (1978) (all lands taken into trust for Mississippi Choctaws constitute informal reservation lands), and because Congress subsequently confirmed the formal reservation status of all Mississippi Choctaw trust lands by statute at Public Law 106-228, 114 Stat. 228, Act of June 29, 2000, Section 1(a)(1) which provided that “All lands taken into trust by the United States for the benefit of the Mississippi Band of Choctaw Indians on or after December 13, 1944, shall be part of the Mississippi Choctaw Indian Reservation.”

AGT's headquarters on the Mississippi Choctaw Indian Reservation in the course and scope of their employment with AGT. *Id.*

II. THIS COURT IS REQUIRED TO DISMISS OR STAY PLAINTIFF'S SUIT DUE TO PLAINTIFF'S FAILURE TO EXHAUST TRIBAL REMEDIES

National Farmers Union v. Crow Tribe of Indians, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987) hold that where a party seeks to secure a federal court ruling on a civil cause of action arising on an Indian reservation in which one of the parties to the dispute is a tribal entity of that reservation, the party seeking such federal adjudication must first exhaust his tribal remedies as to such claims, except in the event of certain exceptions not here relevant.³ *Id.*

This doctrine applies as to any civil action involving any dispute arising on Indian Reservation lands to which a tribe, tribal member or tribal entity of that reservation is a party, where there is at least a colorable claim to tribal jurisdiction over the underlying dispute. *Bank One, N.A. v. Lewis*, 144 F.Supp. 2d 640 (S.D. Miss. 2001) (exhaustion of tribal remedies required on non-Indian creditor's effort to compel arbitration on claims of fraud filed in Choctaw Court in connection with installment sales contracts executed on Choctaw Indian Reservation), *aff'd sub nom Bank One, N.A. v. Shumake*, 281 F.3d 507 (5th Cir. 2002), *r'hrq and r'hrq en banc den'd*, 34 Fed. Appx. 965 (5th Cir. 2002), *cert. den'd.*, 537 U.S. 818 (2002); *accord, Martha Williams-Willis v. Carmel Financial Corporation*, 139 F.Supp.2d 773 (S.D. Miss. 2001); *TTEA Corp. v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999) (exhaustion of tribal remedies

³ *National Farmers Union* at 856. n.21 ("We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' *cf. Juidice v. Vail*, 430 US 327, 338, 51 L Ed 2d 376, 98 S Ct 1211 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."); *El Paso Natural Gas Company v. Neztosie*, 526 U.S. 473 (1999) (exhaustion of tribal remedies not required where the Congress has clearly expressed an intent that a particular federal claim be heard only in a federal forum). None of those exceptions apply here.

required on tribe's claim that contract with non-Indian was void under 25 U.S.C. § 81); *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 31 (1st Cir. 2000) ("The tribal exhaustion doctrine holds that when a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims.").

A.

This duty to exhaust tribal remedies applies to claims filed against tribally-chartered, tribally-owned corporations or other tribal entities to the same extent as suits to which Indian tribes or their members are parties. *Sharber v. Spirit Mt. Gaming, Inc.*, No. 00-1376-AS (D.Ore. 2001) (non-Indian former employee's wrongful termination suit against tribally chartered corporation wholly-owned by Indian tribe dismissed for failure to exhaust tribal remedies), *aff'd*, *Sharber v. Spirit Mt. Gaming, Inc.*, 343 F.3d 974 (9th Cir. 2003); *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221 (9th Cir. 1989) (non-Indian plaintiff's suit against tribally-chartered, tribally-owned business corporations ("tribal entities") dismissed for failure to exhaust tribal remedies); *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc.*, 491 F.3d 878 (8th Cir. 2007) (recognizing that duty to exhaust tribal remedies applied and had been satisfied in civil suit involving dispute between non-Indian party and tribal member-owned state chartered corporation), *U.S. cert. granted*, No. 07-411 (2008); *Marceau v. Blackfeet Housing Authority*, 519 F.3d 838 (9th Cir. 2008) (civil action involving tribal housing authority (tribally-chartered corporation) established by Blackfeet Tribe was subject to doctrine requiring exhaustion of tribal remedies, but housing authority forfeited right to insist on exhaustion of tribal remedies by not raising that argument until Authority petitioned

for rehearing in federal appellate court); *Marceau v. Blackfeet Housing Authority*, 455 F.3d 974, 978-983 (9th Cir. 2006) (Blackfeet Housing Authority was originally established as a tribally-chartered corporation as required by HUD regulations, 24 C.F.R. Part 805.109(c) (1979)); *Ninigret, Development Corp., supra* (dismissing suit against tribally established housing authority for failure to exhaust tribal remedies); *Brown v. Washoe Housing Authority*, 835 F.2d 1327 (10th Cir. 1988) (vacating and remanding to federal district court for failure to exhaust tribal remedies with instructions to determine whether suit against tribal housing authority should be stayed or dismissed until tribal remedies have been exhausted). *See, Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157, n.13 (1973) (holding that form of corporate entity through which Indian tribe chooses to do business does not alter application of special Indian law rules and immunities otherwise applicable to the tribe: “In any event, the question of [state] tax immunity cannot be made to turn on the particular form in which the tribe chooses to conduct business.”) (insert added).

B.

The other Defendants, though they are non-Indian, are all officers or employees of AGT sued for decisions they are alleged to have made (for AGT) at AGT’s headquarters on the Mississippi Choctaw Indian Reservation in the course and scope of their employment with AGT. As such, the claims against them are also subject to the duty to exhaust tribal remedies. *Stock West Corporation v. Michael Taylor*, 964 F.2d 912 (9th Cir. 1992) (*en banc*) (non-Indian plaintiff’s claim against non-Indian tribal attorney arising from legal representation of tribally chartered business corporations as in-house legal counsel to tribe and its corporations sued for legal opinions given on-reservation and resultant on-reservation dispute involving validity of plaintiff’s contract with those tribal entities, was subject to dismissal for failure to exhaust tribal

remedies because tribal attorney's conduct was undertaken on the reservation on behalf of those tribal entities); *Toledo v. U.S.A., et al.*, Civ. No. 05-802 JC/DJS, U.S. District Court for the District of New Mexico (Order of September 18, 2006) (unpublished copy appended as Exhibit 2 to AGT's Motion to Dismiss) (dismissing plaintiff's tort claims against law firm for failure to exhaust tribal remedies based on conduct of firm's attorneys occurring both on and off-reservation as counsel to Indian tribe in connection with the claims sued upon where underlying cause of action occurred on Jemez Pueblo Reservation lands).

C.

The duty to exhaust tribal remedies does not apply where the Congress has made clear its intent to have the claims involved resolved in a federal forum. *El Paso Natural Gas Company vs. Neztosie*, 526 U.S. 473, 485, n.7, 487 (1999) (the fact that federal law issues are involved does not ordinarily excuse tribal exhaustion, but such exhaustion is not required for claim covered by Price Anderson Act, 42 U.S.C. 2210; since such claims present the rare circumstance in which a federal statute expresses a clear Congressional preference for a federal forum); *Armstrong v. Mille Lacs County Sheriffs Dept.*, 112 F.Supp.2d 840, 844 (D.Minn. 2000) (citing *Neztosie*, and observing that "where Congress has entrusted a particular cause of action to be exclusive jurisdiction of the Federal Courts, then the Court need not defer to a Tribal Court, in that instance, to determine its jurisdiction to resolve the merits of the claim"); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (since RCRA created special federal rights and exclusively federal causes of action which could only be heard in federal court, exhaustion of tribal remedies is not required for RCRA claims); *Chickaway v. Bank One Dayton, N.A.*, 261 B.R. 646 (S.D. Miss. 2001) (claims which are core proceedings in bankruptcy can only

be heard in federal bankruptcy court, hence exhaustion of tribal remedies is not required as to such claims).

However, the mere fact that a claim arises under or invokes federal law is not sufficient to invoke that exception. *El Paso Natural Gas Company vs. Neztosie*, 526 U.S. 473, 485, n.7, 487 (1999) (“Under normal circumstances tribal courts, like state courts, can and do decide questions of federal law and there is no reason to think that questions of federal preemption are any different. . . The situation here [involving tort claims covered by the Price Anderson Act] is the rare one in which statutory provisions for conversions of state claims to federal ones and removal to federal courts express congressional preference for a federal forum.” (Insert added)); *Bank One, N.A. v. Lewis supra* (non-Indian plaintiff was required to exhaust tribal remedies on claims seeking to compel arbitration under Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*), *aff’d sub. nom, Bank One, N.A. v. Shumake, supra*; *TTEA Corp. v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999) (since tribal court had colorable jurisdiction to adjudicate cause of action arising under federal statute, 25 U.S.C. § 81, exhaustion of tribal remedies was required); *Martha Williams-Willis v. Carmel Financial Corp., supra* (exhaustion of tribal remedies required on federal claims brought under Truth-In-Lending Act, 15 U.S.C. §§ 1601 *et seq.*); *Buchanan v. Sakaogon Chippewa Tribe*, 40 F.Supp.2d 1043 (E.D. Wis. 1999) (exhaustion of tribal remedies required on federal RICO claims brought under 18 U.S.C. §§ 1961 *et seq.*); *Hartman v. Kickapoo Tribe Gaming Comm’n.*, 176 F.Supp.2d 1168 (D. Kan. 2001) (exhaustion of tribal remedies required on claims brought under Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*); *Sharber v. Spirit Mt. Gaming, Inc., supra* (exhaustion of tribal remedies required on claims brought under Family Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*).

As referenced above, this Court (and the Fifth Circuit) have previously ruled that since neither the FAA nor any other federal law requires adjudication of arbitration claims in a federal forum, non-Indian parties asserting arbitration claims in response to their joinder in tribal court suits by tribal members, were required to exhaust their remedies as to such claims in the Choctaw Courts. *Bank One, N.A. v. Lewis, Supra, aff'd sub nom Bank One, N.A. v. Shumake, supra.* (question whether Choctaw party and non-Indian party had entered into a binding arbitration clause enforceable under the FAA regarding an on-Reservation transaction had to be resolved in the Choctaw Tribal Court rather than the U.S. District Court under the Tribal Exhaustion Doctrine, notwithstanding presence of diversity jurisdiction and strong federal policy favoring arbitration; federal law and policy reflected in FAA does not override the federal policy of deference to tribal courts per the Tribal Exhaustion Doctrine since federal law does not require adjudication of arbitration claims in federal forum); *accord, Martha Williams-Willis v. Carmel Financial Corporation, supra.*

Likewise, federal law does not require that adjudication of claims pled under Title VII (42 U.S.C. § 2000e), or under 42 U.S.C. § 1981, be resolved only in a federal forum. *Yellow Freight System v. Donnelly*, 494 U.S. 820 (1990) (state courts have concurrent jurisdiction to adjudicate Title VII claims); *Partain v. Sta-Ham Health Agency*, 904 So.2d 1112 (Miss. App. 2004) (adjudicating Title VII claims in state court); *Luvane v. Waldrup*, 905 So.2d 697 (Miss. App. 2004) (adjudicating Title VII and 42 U.S.C. § 1981 civil rights claim in state court). Thus, the mere fact that Plaintiff's claim arises under federal law provides no basis for implying an exception to Plaintiff's duty to exhaust tribal remedies.

Moreover, the rule of decision in the Choctaw Courts as to causes of action arising under federal law is the same as the federal rule of decision. This is made clear in § 1-1-4 (Law Applicable in Civil Actions), Choctaw Tribal Code:⁴

In all civil actions the Choctaw Court shall apply applicable laws of the United States and authorized regulations of the Secretary of the Interior, and ordinances, customs, and usages of the Tribe. Where doubt arises as to the customs and usages of the Tribe, the court may request the advice of persons generally recognized in the community as being familiar with such customs and usages. Any matter not covered by applicable federal law and regulations or by ordinances, customs, and usages of the Tribe, shall be decided by the court according to the laws of the State of Mississippi. (Emphasis added).

Finally, in the only case defendants have been able to locate involving claims pled against an Indian tribe (the Santa Clara Pueblo) and its tribal officials arising under 42 U.S.C. § 1981 which was not summarily dismissed (*see, fn. 1 supra*), the U.S. District Court of New Mexico twice required that the non-Indian plaintiffs exhaust their remedies on their § 1981 claims in the Santa Clara Tribal Court. *Burrell v. Armijo*, No. CIV 98-0438 JC/WWD, U.S. District Court, District of NM (Memorandum Opinion and Order (Dkt. 37 and 38) entered September 2, 1998 dismissing non-Indian plaintiff's complaint for failure to exhaust tribal remedies on claims against tribe and tribal officials brought *inter alia* under 42 U.S.C. § 1981); *Burrell v. Armijo*, No. CIV 02-542 WJ/DJS, U.S. District Court, District of NM (Memorandum Opinion and Order entered November 22, 2002 (Dkt. 22) dismissing non-Indian plaintiff's complaint for failure to exhaust tribal remedies on claims against tribe and tribal officials brought *inter alia* under 42 U.S.C. § 1981). (Copies of unpublished opinions appended as Exhibits 3 and 4 to AGT's Motion to Dismiss). *See, Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th

⁴ The entire Choctaw Tribal Code is available at <http://www.Choctaw.org>. This Court may (and is hereby requested to) take judicial notice of this tribal code provision, and of the Revised Constitution and Bylaws of the Mississippi Band of Choctaw Indians (under "History" on the same website). *See, U.S. v. City of Miami, Florida*, 664 F.2d 435 (5th Cir. 1981) and n's. 16 and 21 (taking judicial notice of city ordinance which had "never been introduced as evidence but had been referenced in appellate briefs"), and authorities there cited.

Cir. 2006) (reversing district court's dismissal of claims against tribal officials based on sovereign immunity defense and remanding for further proceedings on §§ 1981 and 1985 claims against those officials as to which claims the court stated: "Lastly, we express no opinion as to the merits of the Burrells' § 1981 claims against the individual tribal officials.").

D.

Nevada v. Hicks, 533 U.S. 353 (2001) is not to the contrary. While *Hicks* did rule that tribal courts could not adjudicate claims sounding in tort or arising under 42 U.S.C. § 1983 against state officers in cases filed by tribal members against those officers based on their on-reservation conduct carried out while on duty, the Court was careful to disclaim any holding on any broader issue respecting the scope of tribal court jurisdiction over non-Indian defendants in general; *Hicks*, *supra* at 358, fn.2 and 373; and, nothing in *Hicks* otherwise undermined the existence of tribal court jurisdiction to adjudicate civil claims filed by non-members against tribal defendants under *Williams v. Lee*, 358 U.S. 217 (1959) (state courts may not adjudicate civil claims filed by non-Indians against Indians on causes of action arising on defendants' Indian reservation; proper forums for resolving such disputes are the tribal courts of those reservations); *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 104 S.Ct. 2267 (1984) (clarifying that *Williams v. Lee* rule also applies to suits against Indian tribes as defendants).

III. THE TRIBAL EXHAUSTION DOCTRINE APPLIES EVEN WHERE NO TRIBAL COURT PROCEEDINGS HAVE BEEN INITIATED

A federal court plaintiff's duty to exhaust tribal remedies applies even when no tribal court proceedings have yet been initiated. *Sharber v. Spirit Mt. Gaming, Inc.*, 343 F.3d 974 (9th Cir. 2003); *Burlington N. R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1245-1247 (9th Cir. 1991); *Brown v. Washoe Hous. Auth.*, 835 F.2d 1327 (10th Cir. 1988); *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 673-674 (8th Cir. 1986); *Smith v. Moffett*, 947 F.2d 442,

445 (10th Cir. 1991); *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 31 (1st Cir. 2000); *but see, Garcia v. Akwesabne Housing Authority*, 268 F.3d 76 (2nd Cir. 2001) (exhaustion not required where it was unclear whether tribal court was functioning).

Indeed, the whole federal policy of requiring exhaustion of tribal remedies would be rendered meaningless if that policy could be evaded by simply winning a race to the federal courthouse. This is especially true where, as here, the party seeking to evade tribal jurisdiction is a non-Indian Plaintiff seeking judicial relief against a tribal entity for a cause of action arising on the reservation, as to which it has long been settled that tribal courts are the appropriate forums for resolving such disputes. *Williams v. Lee*, 358 U.S. 217 (1959).

IV. ALL PREREQUISITES TO APPLICATION OF THE TRIBAL EXHAUSTION DOCTRINE HAVE BEEN SATISFIED

A.

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) and *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001), the Court reiterated that under *National Farmers Union* and *Iowa Mutual* exhaustion of tribal remedies is required where there exists at least a colorable claim that the federal requirements for exercise of tribal jurisdiction over a non-Indian party are met. Where as here, the plaintiff is non-Indian seeking relief against a tribal entity and its officers or employees for a cause of action arising on the reservation, it remains clear under *Williams v. Lee*, *supra*, that the tribal courts of that reservation are the proper forum to resolve that dispute.

Initially, in *Williams v. Lee*, 358 U.S. 217 (1959) the Court barred the exercise of state court jurisdiction over causes of action arising on Indian reservations in which non-Indians sought to sue Indians for such causes of action, ruling that tribal courts were the proper forum for hearing those cases. In this regard, the Court stated at pp. 220, 223:

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the rights of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there. . . .The cases in this court have consistently guarded the authority of Indian governments over their reservations. (Citations omitted).

Likewise, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-72 (1978), the Court ruled *inter alia* that the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.*, (“ICRA”) did not create any private right of action for ICRA violations in the federal courts, other than habeas relief. The Court also emphasized that “Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”

Under *Williams v. Lee* (and under *Montana*) where a cause of action arises on-reservation and involves a non-member plaintiff suing a tribal defendant, the propriety of tribal court jurisdiction to adjudicate such claim under federal law is well-settled. Those kind of claims do not require analysis of the more rigorous sort required under *Montana* when the tribal court plaintiff is Indian and the tribal court defendant is non-Indian as in *Bank One, supra. Montana v. United States*, 450 U.S. 544, 565-566 (1981) (listing *Williams v. Lee* as example of case where tribal jurisdiction was clearly appropriate under consensual relations exception to Main Rule); *see, Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) (construing *Montana*’s reference to *Williams v. Lee* as “declaring tribal jurisdiction exclusive over a lawsuit arising out of an on-reservation sales transaction between non-member plaintiff and member defendants”); *Nevada v. Hicks*, 533 U.S. 353, 357, n.2 (2001), where the court noted that the typical case in which the court has addressed and upheld the exercise of tribal court jurisdiction are to be which “have

involved claims brought against tribal defendants. *See, e.g., Williams v. Lee . . .*,” but also noting that:

In *Strate v. A-I Contractors*, 520 U.S. 438, 453, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), however, we assumed that “where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts,” without distinguishing between nonmember plaintiffs and nonmember defendants. *See also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987). Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.

Even if *arguendo* one of the *Montana* rules (normally invoked only as to suits filed in tribal courts by a tribal plaintiff against a non-Indian defendant arising on non-Indian fee lands within reservation boundaries) were otherwise applicable to claims arising on reservation (trust) lands, it is clear under *Montana v. United States*, *supra*, and its progeny, that tribal courts have jurisdiction to adjudicate civil actions brought against tribes or tribal members or tribal entities by non-member plaintiffs under the first exception to Montana’s Main Rule where the dispute arises from “consensual relations with the Tribe or its members through commercial dealings, contracts, leases or other arrangements.” *Montana v. U.S. supra*, at 565-566; *Atkinson Trading Co., Inc. v. Shirley, supra*, 651-653 (to satisfy the first exception to Montana’s Main Rule “[t]he consensual relationship must stem from ‘commercial dealing, contracts, leases or other arrangements’”). Exercising such jurisdiction is a vital aspect of tribal sovereignty. *Iowa Mutual, supra*, at 14-15; *Williams v. Lee*, 358 U.S. 217, 220, 223 (1959).⁵

⁵ *Atkinson Trading Company, Inc. v. Shirley*, 650-651 also reaffirmed that a tribe does not have to satisfy the requirements of *Montana’s* Main Rule and its first exception to exercise jurisdiction over a non-Indian party where the cause of action arose on tribally owned reservation (trust) lands rather than on non-Indian owned fee lands within a reservation boundary. Since AGT’s employment relationship with AGT clearly satisfies *Montana’s* “consensual relationship” standard, the court need not explore whether the Tribe’s civil jurisdiction would independently pass muster under *Montana’s* Secondary Rule solely on the grounds that this dispute arose from AGT’s alleged misconduct respecting the termination of that employment relationship on tribally owned reservation (trust) land, or whether *Nevada v. Hicks*, 533 U.S.

B.

United States v. Montana, *supra*, building on *Williams v. Lee*, *supra*, originally enunciated a Main rule with two exceptions, and a Secondary rule, all addressing the circumstances when the exercise of tribal civil jurisdiction over the activities of non-Indians occurring within Indian reservations was proper. Under *Montana's* Main rule, tribal civil jurisdiction over non-Indians for non-Indian conduct *on non-Indian fee land* could only be sustained when one of the two exceptions to that Main rule were established. *Id.* at 565-566. The first was the “consensual relationship” exception (“a tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements.”). *Id.* at 565. The second was the “health and welfare” exception. (“A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”). *Id.* at 566.

Montana's Secondary rule presumed the authority of tribes to regulate the behavior of non-Indians on tribal trust/reservation lands which remained in tribal/federal title. *Id.* at 557 (“The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the tribe, . . . and with this holding we can readily agree.”).

Subsequently, in *Iowa Mutual Insurance Company*, *supra* the Court reiterated that:

353 (2001) in any way altered those rules. *See, El Paso Natural Gas Company vs. Neztosie*, 526 U.S. 473, 482, n.4 (1999) (tribe would not have to satisfy *Montana's* Main rule in order to warrant exercise of civil jurisdiction over non-Indian party in tort claims arising on non-alienated tribal reservation lands; but, tribal exhaustion was not required in *Neztosie* since the kind of tort sued upon fell under the Price Anderson Act; and, the Congress had expressed an unmistakable preference that such claims be heard in a federal forum.) *Id.* at 487.

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. *See, Montana v. United States*, 450 U.S. 544, 565-566 . . . Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by specific treaty provision or federal statute. “Because the tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government the proper inference from silence . . . is that the sovereign power . . . remains intact.” (Emphasis added) (citations omitted).

It was against this backdrop that later rulings construed *Montana*’s Main rule and its exceptions as applying only when the cause of action arose on non-Indian fee land within reservation boundaries and did not apply—but instead the Secondary rule invoking the presumption of tribal jurisdiction applied—where the cause of action arose on tribal trust or reservation lands. *Brendale v. Confederated Yakima Nation*, 492 U.S. 408 (1989) (distinguishing between tribal regulatory authority over non-Indians on fee lands within reservation *versus* on reservation lands); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (ruling that tribe could not exercise civil authority over non-Indians on fee lands owned by the U.S. Corps of Engineers acquired for a dam within reservation boundaries); *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 446-447, n.6 (1997) (“*Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation subject to two exceptions. . . .”); *El Paso Natural Gas Company vs. Neztosie*, 526 U.S. 473, 482, n.4 (1999) (“. . . *Strate* dealt with claims against nonmembers arising on state highways. . . . By contrast, the events in question here occurred on tribal land.”); and in *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 651-654 (2001) (holding tribe had no jurisdiction to tax hotel operations on non-Indian fee land within reservation where neither *Montana* exception was met in contrast to tax upheld in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) where the activities taxed occurred on reservation lands); *Allstate Indemnity Company v. Stump*, 191 F.3d 1071 (9th Cir. 1999) (“Generally

speaking, the *Montana* rule governs only disputes arising on non-Indian fee land, not disputes on tribal lands; otherwise, the *Strate* court's analysis of why a state highway on tribal land was equivalent to non-tribal land would have been unnecessary;" held: Allstate Insurance must exhaust its remedies in tribal court because there was a colorable basis for the assertion of tribal jurisdiction even though the Court questioned whether the tribal court lawsuit actually arose from the underlying contractual relationship.).

Subsequently, the U.S. Supreme Court in *Nevada v. Hicks*, 533 U.S. 353 (2001) held that Indian tribal courts cannot adjudicate 42 U.S.C. § 1983 claims or tort claims filed against state officers for conduct occurring during the performance of their official duties on Indian reservations. *Id.* at 369. *Hicks* left open the question whether state officers could be subject to private tort claims in tribal courts based on conduct occurring on-reservation in their private capacities: "We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis." *Id.* at 373. Moreover, the Court made clear (*Id.* at 358, fn.2) that its holding in *Hicks* was "limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general." Hence, *Hicks* contains no holding changing the Court's prior interpretation of *Montana* or the ruling in *Williams v. Lee*, *supra*.

Six members of the Court in *Hicks* did express *in dicta* the view that *Montana's* Main rule and the requirement to satisfy one of the exceptions thereto should be extended to apply even on reservation lands in suits filed against non-Indians rather than being restricted to cases

arising on non-Indian fee lands within the reservation.⁶ *Id.* at 354, 359-360. However, as made clear by fn.2, at 358, this *dicta* was not a ruling or holding of the Court.

This is the view of the Ninth Circuit as originally expressed in *Ford Motor Credit Co. v. Todecheene*, 394 F.3d 1170 (9th Cir. 2005), before that opinion was withdrawn to require exhaustion of tribal remedies, 488 F.3d 1215 (9th Cir. 2007). In its 2005 opinion, the Ninth Circuit had this to say about *Hicks*:

Six justices in *Nevada v. Hicks* endorsed the premise first articulated by Justice Souter in *Atkinson* that the general Montana rule applies equally to conduct by nonmembers on tribal land and on non-Indian land within a reservation. *Id.* at 381 (Souter, J., concurring, joined by Kennedy, J., and Thomas, J.) . . . Justice Scalia’s majority opinion is somewhat equivocal on the point, stating in footnote two that it is leaving the question open, but later seemingly applying the general Montana rule, despite the fact that the search occurred on Indian land. Justice Ginsburg published a separate concurrence in order to note that the Court had not created any general rule concerning nonmember defendants in tribal courts. *Id.* at 386 (Ginsburg, J., concurring) (“The Court’s decision explicitly ‘leaves open the question of tribal-court jurisdiction over nonmember defendants in general.’” (quoting *id.* at 358 n.2)).

C.

The first exception to *Montana*’s Main Rule (if that rule is applicable at all) is clearly satisfied here by the very employment relationship between Graham and AGT which underlies

⁶ However, even after *Hicks* the fact that the claims here at issue are alleged to have occurred on Choctaw Reservation lands (rather than on non-Indian fee lands) still makes a difference even under Plaintiffs’ post-*Hicks* interpretation; and, that difference lowers the bar on what circumstances are required to satisfy the *Montana* exceptions and the “nexus” assessment to sustain tribal jurisdictions for claims arising on reservation lands rather than on non-Indian fee lands. *Cf. Nevada v. Hicks, supra* at 359-360, and 382, n.4 (Souter, J. concurring) (“Thus, it is not that land status is irrelevant to a proper *Montana* calculus, only that it is not determinative in the first instance. Land status, for instance, might well have an impact under one (or perhaps both) of the *Montana* exceptions.”); *Bank One, N.A. v. Shumake, supra* at 312 and notes 12 and 13 (distinguishing between Choctaw reservation lands and non-Indian fee lands under *Montana* test), *r’hrq and r’hrq en banc den’d*, 34 Fed. Appx. 965 (5th Cir. 2002) (declining to overturn panel’s ruling despite argument that *Hicks* changed the *Montana* rules even where private tort claims arising from on-reservation consensual relationships are involved), *cert. den’d.*, 537 U.S. 818 (2002).

his claims. *Montana v. U.S. supra* at 565; *Strate v. A-1 Contractors, supra* at 445-447; *Atkinson Trading Co. v. Shirley, supra* at 655-666. It is well-settled that any kind of on-reservation employment relationship involving a tribal party (as employer or employee) and a non-Indian party (as employee or employer) constitutes a consensual relationship validating the exercise of tribal court jurisdiction under *Montana's* consensual relationship exception as to all claims against the employer arising from that relationship. *Shannon v. Houlton Band of Maliseet Indians*, 54 F.Supp.2d 35 (D.Me. 1999) (non-Indian former employee's suit against tribe claiming race discrimination motivated her employment termination was dismissed for failure to exhaust tribal remedies since tribe had colorable jurisdiction over dispute); *Fillion v. Houlton Band of Maliseet Indians*, 54 F.Supp.2d 50 (D.Me. 1999) (non-Indian former employee's claims alleging wrongful termination and seeking relief under Title VII, etc. dismissed *inter alia* for failure to exhaust tribal remedies); *accord, Sharber v. Spirit Mt. Gaming, Inc., supra*, (non-Indian employee's wrongful termination suit against tribally-chartered corporation wholly-owned by Indian tribe dismissed for failure to exhaust tribal remedies); *State of Montana v. Bremner*, 971 F.Supp. 436 (D.Mont. 1997) (Non-Indian contractor's (Blattner & Sons') voluntary employment of tribal member plaintiff for on-reservation work was consensual relationship which validated exercise of tribal court civil jurisdiction under *Montana* over tribal members tort claims against contractor for on the job injury), *rev'd on other grds.*, 152 F.3d 929 (9th Cir. 1998) (District Court reversed based on Appellant Blattner's showing in his briefs on appeal that plaintiff Brenner was actually employed by a different contractor –not by Blattner); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990) (FMC's leases with the Tribes or their members for raw materials and FMC's employment of tribal members in its on-reservation businesses were consensual relations sustaining tribal regulation of FMC's

employment activities under *Montana*); *MacArthur v. San Juan County*, 497 F.3d 1057, 1071 (10th Cir. 2007):

There is no doubt that an employment relationship between two parties is contractual in nature. . . . In fact, the common law tort cause of action for interference with contractual relations encompasses interference with employment, even where the employment is at will. . . . Consequentially, Montana's consensual relationship exception applies to a nonmember who enters into an employment relationship with a member of the tribe. (Citations omitted).

Alternatively, since Graham's employment relationship with AGT and his claims of unlawful discrimination all involve facts and circumstances which he alleges occurred at his office (and Defendant's headquarters) on the Choctaw Indian Reservation, the Secondary Rule of *Montana* is invoked and is satisfied, even without proof of "consensual relations" between the AGT and Graham of the type evidenced by their employment relationship. *See*, n.4, *supra*.

CONCLUSION

No matter how this Court interprets *Hicks*, the rule of *Williams v. Lee* that tribal courts may lawfully exercise jurisdiction to adjudicate claims filed by non-Indians against tribal defendants arising on the tribal defendants' Indian reservation (trust) lands remains unchanged.

Since nothing in *Montana* and its progeny, including *Hicks*, has in any way altered that rule, there clearly exists more than a colorable claim of tribal court jurisdiction over the claims here at issue. Thus, under *National Farmers Union* and *Iowa Mutual*, Plaintiff is required to pursue his claims in the Choctaw Tribal Courts; and, this Court is required to dismiss or stay Plaintiff's Complaint to require him to exhaust his remedies in the Choctaw Courts, before seeking any relief here via any effort to avoid the Choctaw Court's jurisdiction.

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2008, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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