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Tribal Jurisdiction over Nonmembers: A Legal Overview

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November 26, 2013

Congressional Research Service
7-5700
www.crs.gov
R43324

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

Indian tribes are quasi-sovereign entities that enjoy all the sovereign powers that are not divested by Congress or inconsistent with the tribes' dependence on the United States. As a general rule, this means that Indian tribes cannot exercise criminal or civil jurisdiction over nonmembers. There are two exceptions to this rule for criminal jurisdiction. First, tribes may exercise criminal jurisdiction over nonmember Indians. Second, tribes may try non-Indians who commit dating and domestic violence crimes against Indians within the tribes' jurisdictions provided the non-Indians have sufficient ties to the tribes. There are three exceptions to this rule for civil jurisdiction. First, tribes may exercise jurisdiction over nonmembers who enter consensual relationships with the tribe or its members. Second, tribes may exercise jurisdiction over nonmembers within a reservation when the nonmember's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. These first two exceptions, enunciated in the case of *Montana v. United States*, are based on the tribes' inherent sovereignty, and exercises of jurisdiction under them must relate to a tribe's right to self-government. Third, Indian tribes may exercise jurisdiction over nonmembers when Congress authorizes them to do so. Congress may delegate federal authority to the tribes, or re-vest the tribes with inherent sovereign authority that they had lost previously. Indian tribes may also exercise jurisdiction over nonmembers under their power to exclude persons from tribal property. However, it is not clear whether the power to exclude is independent of the *Montana* exceptions.

The question of a tribe's jurisdiction over nonmembers can be very complex. It is fair to say, however, that tribal jurisdiction over non-Indians is quite limited. Tribal jurisdiction over nonmember Indians is more extensive. Federal courts, however, consistently require nonmember defendants to challenge tribal court jurisdiction in tribal court before pursuing relief in federal court.

Contents

Contacts

Introduction

Originally, Indian tribes exercised sovereign authority over their territory and the all people within it, including non-Indians.[1] However, Indian tribes lost some of that authority by "ceding their lands to the United States and announcing their dependence on the Federal Government."[2] "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *inconsistent with their status*."[3] Express termination of a tribe's sovereign authority may be found in treaties and statutes. As to sovereign authority lost by virtue of the tribes' status, the Supreme Court has explained, "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe."[4] By virtue of their "dependent status," therefore, tribes have lost the sovereign authority to determine their relations with nonmembers.[5] Accordingly, in *Oliphant v. Suquamish*, the Supreme Court held that Indian tribes do not have inherent sovereign authority to try non-Indian criminal defendants,[6] and in *Montana v. United States,* the Supreme Court announced the general rule for civil jurisdiction that "the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe."[7]

Immediately after announcing this rule for civil jurisdiction in *Montana*, however, the Court identified two exceptions, known as the *Montana* exceptions:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[8]

In order to fit within one of these exceptions, nonmember conduct must somehow impinge on a tribe's inherent authority to govern itself and its members.[9]

The Supreme Court has identified the tribes' right as landowners to exclude nonmembers from tribal land as one of the bases for upholding tribal taxes against nonmembers' activities on tribal

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[1] *See* Duro v. Reina, 495 U.S. 676, 685 (1990) ("A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens. *Oliphant [v. Suquamish]* recognized that tribes can no longer be described as sovereigns in this sense.").

[2] Oliphant v. Suquamish, 435 U.S. 191, 208 (1978).

[3] *Id.* (emphasis in original; internal quotations omitted).

[4] United States v. Wheeler, 435 U.S. 313, 326 (1978).

[5] *Id.* This is not an absolute rule. This report discusses the limited exceptions to it at pages 4-10.

[6] 435 U.S. 191 (1978).

[7] 450 U.S. 544, 565 (1981). In *Montana*, the Court considered whether the Tribe had jurisdiction to enforce its hunting regulations against nonmembers hunting on non-Indian fee land located within the Tribe's reservation.

[8] *Id.* at 565-566.

[9] Nevada v. Hicks, 533 U.S., 353, 361 (2001) ("Tribal assertion of regulatory authority over non-members must be connected to that right of the Indians to make their own laws and be governed by them.").

land.[10] It is unclear, however whether the power to exclude is independent of the *Montana* exceptions.[11]

Tribes may also exercise jurisdiction over nonmembers when Congress authorizes them to do so. Congress has provided for tribal authority over nonmembers related to the sale of alcohol on reservations, enforcement of tribal hunting and fishing ordinances on reservations, and enforcement of certain environmental statutes.

Although tribal jurisdiction over nonmembers is fairly limited, if a nonmember defendant in tribal court believes the court lacks jurisdiction, he or she must first challenge the jurisdiction in tribal court.[12] Only after exhausting the tribal court remedies may the nonmember get relief in federal court.

Criminal Jurisdiction

In most cases, tribal criminal jurisdiction over non-Indian offenders is clear—as a general rule, Indian tribes do not have it. However, there is an exception for tribes to exercise criminal jurisdiction over non-Indians who commit dating and domestic violence against Indians within a tribe's jurisdiction, provided the non-Indian has sufficient ties to the tribe and the tribe provides certain rights.

Tribal criminal jurisdiction over nonmember Indians is more difficult to discern. Such jurisdiction depends on whether the nonmember Indian is recognized as an Indian by the federal government or the tribal community. This determination turns on factors such as enrollment in a tribe; the degree to which the nonmember Indian has received federal services and benefits for Indians; benefited from tribal rights or services; and participated in tribal ceremonies and social life.

Over Non-Indians

In *Oliphant v. Suquamish Indian Tribe*, the Court held that tribes lack inherent sovereign authority over non-Indian offenders.[13] The Court first analyzed the history of criminal jurisdiction over non-Indians within Indian country through treaty provisions, executive branch activities and opinions, and lower court opinions, and concluded that historically the legislative and executive branches and lower courts presumed that Indian tribes did not have authority over non-Indians who committed offenses within Indian country.[14] Although the Court wrote that this history was not "conclusive," it determined that it "carries considerable weight."[15] Accordingly, the Court read the Suquamish Tribe's (Tribe's) treaty with the United States in light of the historical presumption against tribal jurisdiction over non-Indian offenders.[16] The Court acknowledged that

[10] Merrion v. Jicarrilla Apache Tribe, 455 U.S. 130 (1982).

[11] Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

[12] Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987); National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

[13] 435 U.S. 191 (1978).

[14] *Id.* at 196-206.

[15] *Id.* at 206.

[16] *Id.* at 207.

on its own, the treaty probably would not divest the Tribe of criminal jurisdiction over non-Indian offenders if it otherwise retained that authority.[17] However, the Court determined that Tribe did not retain the authority to try non-Indian offenders.

The Court cited two reasons to support its determination that Indian tribes did not possess the inherent authority to try non-Indian offenders. First, the Court wrote, "Indian tribes are prohibited from exercising those powers of autonomous states that are expressly terminated by Congress *and* those powers *inconsistent with their status*."[18] The Court identified some of the restrictions imposed on the tribes' sovereignty by virtue of their incorporation into the United States as loss of "the tribes' power to transfer lands [and] exercise external political sovereignty."[19] In addition, quoting Justice Johnson's opinion from the first Indian case to reach the Supreme Court, the Court wrote, "'[T]he restrictions upon the soil in the Indians, amount … to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves*.'"[20] Noting that protection of its territory within its boundaries is "central" to the sovereign interests of the United States, the Court wrote that "the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."[21] The power to try and punish individuals "is an important manifestation of the power to restrict personal liberty."[22] The Court concluded, "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[23]

The second reason the Court gave for determining that Indian tribes did not retain inherent authority to try non-Indian offenders was related to the Court's precedent. In *Ex Parte Crow Dog*,[24] the Supreme Court held that federal courts lacked jurisdiction to try an Indian who had committed an offense against another Indian on reservation land. In that case, the Court looked to the "nature and circumstances of the case" and concluded that the United States was seeking to extend

> law, by argument and inference only, … over aliens and strangers; over the members of a community separated by race [and] tradition, … from the authority and power which seeks to impose upon them the restraints of an external and unknown code …; which judges them by a standard made by others and not for them…. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, by … a different race, according to the law of a social state of which they have an imperfect conception….[25]

The Court wrote that the same considerations applied to subjecting non-Indian offenders to the laws of Indian tribes and contradicted the notion that, although the tribes are "fully subordinated

[17] *Id.*

[18] *Id.* at 208 (internal quotation marks and citation omitted; emphasis in original).

[19] *Id.* at 209.

[20] *Id.* quoting Fletcher v. Peck, 6 Cranch. 87, 147 (1810) (alterations and emphasis in original).

[21] *Id.* at 210.

[22] *Id.*

[23] *Id.*

[24] 109 U.S. 556 (1883).

[25] *Oliphant*, 435 U.S. at 210-211, quoting Ex Parte Crow Dog, 109 U.S. at 572 (alterations in original).

to the sovereignty of the United States, [they] retain the power to try non-Indians according to their own customs and procedures."[26]

Although the Court recognized that some Indian judicial systems had become "increasingly sophisticated" and in many respects resemble state court systems; that the Indian Civil Rights Act had extended certain basic procedural rights to anyone tried in tribal court so that many of the dangers for non-Indians that existed a few decades ago have disappeared; and that there is a prevalence of non-Indian crime on Indian reservations, the Court wrote that those factors should be addressed to Congress for it to "weigh in deciding whether Indian tribes should finally be authorized to try non-Indians."[27]

Congress authorized tribes to try non-Indians who commit dating and domestic violence in the Violence Against Women Act Reauthorization[28] (VAWA Reauthorization). In short, the VAWA Reauthorization re-vests Indian tribes with the inherent authority to prosecute non-Indians who commit dating and domestic violence crimes against Indians within the tribes' jurisdictions provided the non-Indians have certain enumerated ties to the tribes and the tribes provide protections for the rights of the domestic abuse criminal defendants.[29]

Over Nonmember Indians

In *Duro v. Reina*, the Supreme Court applied *Oliphant* to hold that a tribe does not possess authority to exercise criminal jurisdiction over Indian offenders who are not members of the tribe.[30] In response, Congress amended the Indian Civil Rights Act so that the terms "powers of self-government" include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians,"[31] and "Indian" "means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies."[32] Thus Congress re-vested the tribes with the inherent authority to try nonmember Indians.[33]

The authority to try nonmember Indians, however, does not extend to all persons who are racially Indians. "The term 'Indian' is not statutorily defined, but courts have judicially explicated its meaning. The generally accepted test for Indian status considers '(1) the degree of Indian blood; and (2) tribal or government recognition as an Indian.'"[34] For the first requirement, there is no set

[26] *Oliphant*, 435 U.S. at 211.

[27] *Id.* at 212.

[28] P.L. 113-4 (2013).

[29] For an analysis of the legal issues raised by the VAWA Reauthorization, see CRS Report R42488, *Tribal Criminal Jurisdiction over Non-Indians in S. 47 and H.R. 11, the Violence Against Women Reauthorization Act of 2013*, by Jane M. Smith and Richard M. Thompson II.

[30] 495 U.S. 676.

[31] 25 U.S.C. §1301(2).

[32] 25 U.S.C. §1301(3).

[33] United States v. Lara, 541 U.S. 193 (2004). In *Lara*, the Court held that Congress had authority to "relax" restrictions imposed on the tribes' inherent authority.

[34] United States v. Maggi, 598 F.3d 1073, 1078 (9th Cir. 2010), quoting United States v. Bruce, 394 F.3d 1215 (9th Cir. 2005) (internal quotation marks and citations omitted).

degree of Indian blood that is required.[35] However, the Indian blood must trace back to a federally recognized tribe.[36] The second requirement "requires membership or affiliation with a federally recognized tribe."[37] "When analyzing this prong, courts have considered, in declining order of importance, evidence of the following: (1) tribal enrollment; (2) government recognition formally and informally through receipt of assistance reserved only to Indians; (3) enjoyment of the benefits of tribal affiliation; and (4) social recognition through residence on a reservation and participation in Indian social life."[38] Therefore, a person with Indian blood who is not a member of the tribe may be subject to prosecution by the tribe if he or she is enrolled in another Indian tribe; received federal benefits or services for Indians; partook of any of the privileges of tribal affiliation, such as participating in tribal hunting or fishing rights or being arrested by tribal police and tried in tribal courts; resided on the Indian reservation; or participated in tribal ceremonies and social events.[39] It appears that courts look to the cumulative effect of these considerations, with no single factor being determinative.

Civil Jurisdiction

The general rule that tribes lack civil jurisdiction over nonmembers is deceptively simple. Tribal civil jurisdiction over nonmembers is complicated for several reasons.

First, the two *Montana* exceptions to the general rule for consensual relationships and threats to the tribe do not provide bright line rules. Courts must decide cases involving tribal civil jurisdiction over nonmembers based on the unique facts of each case.

Second, there are two types of civil jurisdiction: legislative[40] and adjudicatory.[41] The Court has held that tribal adjudicatory jurisdiction is no broader than tribal legislative jurisdiction.[42] It has not determined whether tribal adjudicatory jurisdiction is as broad as tribal legislative jurisdiction. To answer the question whether a tribal court may adjudicate a case involving nonmember conduct, therefore, the Court inquires whether the tribe would be able to regulate that conduct.[43] Again, there are no bright line rules.

Third, the court has refused to draw a bright line based on the ownership of the land on which the nonmember conduct takes place. In *Nevada v. Hicks*, the Court held that the *Montana* rule applied to Indian and non-Indian land.[44] The status of the land is one factor—perhaps in some cases even

[35] *Maggi*, 598 F.3d at 1080.

[36] *Id.*

[37] *Id.* at 1081 (internal quotation marks and citations omitted; alteration omitted).

[38] *Id.*, quoting *Bruce*, 394 F.3d at 1224 (internal quotation marks and citations omitted).

[39] See *Bruce*, 394 F.3d at 1226 and *Maggi*, 598 F.3d at 1082-1083.

[40] Legislative jurisdiction is the authority to regulate.

[41] Adjudicatory jurisdiction is the authority to hear and decide cases.

[42] Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997).

[43] *See* Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008), and *Hicks*, 533 U.S. 353 (2001).

[44] *Hicks*, 533 U.S. at 360.

a determinative factor—to consider in determining whether a tribe has jurisdiction over non-Indian conduct.[45]

Finally, it is unclear whether tribes generally have civil jurisdiction over Indians who are not members of the tribe. Although Congress re-vested tribes with jurisdiction to try nonmember Indians for criminal conduct, it did not take any action regarding civil jurisdiction over nonmember Indians. The leading commentator on Indian law, however, believes that because *Oliphant*'s analysis focused on the understanding of Congress and the executive branch, in addition to that of the courts, Congress's decision to re-vest tribes with criminal jurisdiction over nonmember Indians alters the Court's analysis of Congress's understanding of tribal jurisdiction over nonmember Indians such that the Court might find that tribes have civil jurisdiction over nonmember Indians even though Congress has not provided for it.[46]

The *Montana* Exceptions

Most of the litigation concerning the *Montana* exceptions has concerned the exception for nonmembers who enter consensual relationships with tribes or tribal members. The Supreme Court has significantly limited the exception for threats to the tribe.

Consensual Relationships

Tribes may exercise jurisdiction over non-Indians when the non-Indians enter consensual relationships, such as "commercial dealing[s], contracts, leases, or other arrangements," with the tribe or tribal members.[47] The Court has interpreted this exception narrowly. Federal courts have rarely found tribal jurisdiction based on a nonmember's consensual relationship. In *First Specialty Insurance v. Confederated Tribes of the Grand Ronde Community of Oregon*, the district court upheld the tribal court's jurisdiction over a claim based on a contract between the Tribes and the insured nonmember investment company.[48] In this case, the Tribes' causes of action were based directly on a formal agreement between the Tribes and the nonmember. The Supreme Court has stated, however, that the consensual relationship need not be formal.[49]

The Consensual Relationship Must Be Related to the Non-Indian Conduct at Issue

In *Atkinson Trading Co. v. Shirley*, in considering a tribal tax, the Court wrote, "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself."[50] "A non-member's consensual relationship in one area thus does not trigger tribal civil authority in another—it is not in for a penny, in for a

[45] *Id.*

[46] Cohen's Handbook of Federal Indian Law (2005) (Cohen) §4.03[3] at 248.

[47] 450 U.S. at 565.

[48] 2007 U.S. Dist. LEXIS 82591 (D.Ore. November 2, 2007).

[49] *Plains Commerce Bank*, 554 U.S. at 337 (nonmember's consent may be demonstrated "either expressly or by his actions.").

[50] 532 U.S. 645, 656 (2001).

pound."[51] Similarly, a court's adjudicative jurisdiction must have some nexus to the consensual relationship.

In *Strate v. A-1 Contractors*,[52] the defendant in tribal court had a contract with the Three Affiliated Tribes of the Ft. Berthold Indian Reservation to perform landscaping. The contractor found itself a defendant in tribal court in conjunction with a traffic accident that occurred on a state highway within the reservation. The Court held that the tribal court did not have jurisdiction over a claim arising out of the accident. Thus, it is not enough that the nonmember have a consensual relationship with a tribe or a tribal member. The conduct over which the tribe is exercising jurisdiction must be related to that consensual relationship. As the Court put it, even though the contractor had a consensual relationship with the Tribes, they "were strangers to the accident."[53]

The Consensual Relationship Must Be Private

Not every consensual relationship with tribal members or a tribe is subject to tribal jurisdiction, even if it has a nexus to the nonmember conduct at issue. In *Hicks*, the Court wrote that the relationship must be private.[54] In this case, a tribal member who resided on tribal land sued state game wardens in tribal court for damages to property caused by the wardens violating the terms of their search warrant. The wardens had a consensual relationship with the tribe in that they executed the warrant through the tribal court. However, the Court found that the relationship did not fit within the first *Montana* exception and denied that the tribal court had jurisdiction.

In *MacArthur v. San Juan County*, the U.S. Court of Appeals for the Tenth Circuit extended the *Hicks* requirement to apply to state agencies generally.[55] In *MacArthur*, tribal members sued a county, a county agency, and various agency employees in tribal court for allegedly wrongful conduct in connection with the tribal members' employment by the agency, which was located on non-Indian land within the reservation. The court drew a distinction between "private individuals or entities who voluntarily submit themselves to tribal jurisdiction and 'States or state officers acting in their governmental capacity,'"[56] and held "in the absence of congressional delegation, the tribes may not regulate a State qua State on non-Indian land (even within the exterior boundaries of the reservation) based on a consensual relationship between members of the tribe and the State."[57] The court specifically reserved for another case whether a tribe may exercise jurisdiction over a state that has entered a consensual relationship with a tribe or its members in a non-governmental or proprietary capacity.

[51] *Id.* (internal quotations omitted).

[52] 520 U.S. 438 (1997).

[53] *Id.* at 457.

[54] 533 U.S. at 359 n. 3.

[55] 497 F.3d 1057 (9th Cir. 2007).

[56] *Id.* at 1073.

[57] *Id.* at 1073-1074. *See also* Red Mesa Unified School Dist. v. Yellowhair, 2010 U.S. Dist. LEXIS 104276 (D. Ariz. September 28, 2010) (holding that employment contract between tribal members and school district operating a public school on tribal land was not a private consensual relationship within the *Montana* exception).

The Consensual Relationship May Consist of Invoking Tribal Court Jurisdiction

A nonmember party who brings suit against a tribal member or the tribe in tribal court has entered into a consensual relationship with the tribe for the purposes of adjudicating claims in which the nonmember is a plaintiff or a defendant in a subsequent related action.

In *Smith v. Salish Kootenai College*, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) upheld the tribal court's jurisdiction to adjudicate a nonmember's claim against a tribal college.[58] Smith, the nonmember, was driving a tribal college truck with two tribal members in it when the truck overturned, killing one member and seriously injuring Smith and the other tribal member. The estate of the member who died filed suit against Smith and the tribal college in tribal court. The tribal college filed a cross-claim against Smith. The injured tribal member then filed suit in tribal court against Smith and the tribal college. Smith filed a cross-claim against the tribal college. All the claims except Smith's claim against the tribal college settled. Rather than filing his claim against the tribal college in state court, Smith went to trial in tribal court and lost. He then asserted that the tribal court lacked jurisdiction over his claim. The Ninth Circuit held that even though Smith was originally a defendant, by filing a cross-claim against the tribal college he "knowingly enter[ed] tribal court for the purposes of filing suit against the tribal college [and], by the act of filing his claims, entered into a 'consensual relationship' with the tribe within the meaning of *Montana*."[59]

In *Ford Motor Credit Co. v. Poitra*,[60] the court extended the holding in *Salish Kootenai College* to uphold tribal court jurisdiction over a member's claim against a nonmember because the nonmember, in a related but separate claim, had invoked the tribal court's jurisdiction as a plaintiff. Ford Credit, as plaintiff, obtained a default judgment in tribal court against the tribal member for failing to make payments on a vehicle that Ford Credit financed. Three years later, in a separate lawsuit, the tribal member sued Ford Credit in tribal court seeking damages as a result of Ford Credit's failure to execute the default judgment. Ford Credit lost in tribal court and sought an injunction against enforcement of the tribal court judgment in federal district court, claiming that the tribal court lacked jurisdiction over it. The district court, citing *Salish Kootenai College*, upheld the tribal court's jurisdiction. Quoting the tribal court of appeals, the court wrote, "A non-Indian cannot utilize a tribal forum to gain relief against a tribal member and then attempt to avoid that jurisdiction when it acts negligently in that same action resulting in potential harm to the tribal member."[61]

Threat to the Tribe's Integrity

The second *Montana* exception provides that tribes may exercise jurisdiction over nonmembers when the nonmember's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[62] Subsequent cases have limited this exception significantly.

[58] 434 F.3d 1127 (9th Cir. 2006).

[59] 434 F.3d at 1140.

[60] 2011 U.S. Dist. LEXIS 20835 (D.N.D. March 2, 2011).

[61] *Id.* at 4.

[62] *Montana*, 450 U.S. at 565.

In *Atkinson Trading Co. v. Shirley*, the Court struck down a tribal tax on guests of a nonmember's hotel located on non-Indian fee land within the reservation.[63] The Navajo Nation (Nation) argued that the trading post of which the hotel was a part had "direct effects" on its welfare: the Nation provided services to the trading post; the owner of the trading post was an "Indian trader"; the trading post employed almost 100 tribal members; the trading post derived business from the tourists visiting the reservation; and the trading post was surrounded entirely by tribal land. The Court rejected the Nation's argument.

> The [second] exception is only triggered by *non-member conduct* that threatens the Indian tribe, it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government. Thus, unless the drain of the non-member's conduct upon tribal services and resources is so severe that it actually "imperils" the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.[64]

In *Plains Commerce Bank v. Long Family Land and Cattle Co.*, the Court reiterated the limited nature of this exception: "[t]he conduct must do more than injure the tribe, it must imperil the subsistence of the tribal community. One commentator has noted that 'the elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.'"[65]

There is one recent court of appeals case that upheld a tribal court's jurisdiction over a nonmember based on this second exception. In *Attorney's Process and Investigation Services v. Sac & Fox Tribe of the Mississippi in Iowa*, the U.S. Court of Appeals for the Eighth Circuit upheld the tribal court's jurisdiction over trespass and trade secrets claims against a nonmember for taking over the Tribe's facilities and seizing tribal financial documents.[66] In this case, there had been an ongoing tribal leadership dispute: the elected leaders refused to honor the recall petitions submitted by tribal members, and the opposition leaders took control of the Tribe's government building and casino. The opposition leaders held an election in which a majority voted against the elected leaders. The elected leaders hired the nonmember to remove the opposition from the Tribe's facilities. The nonmember raided the facilities with 30 agents armed with batons. At least one agent had a firearm. Later, the Tribe sued the nonmember in tribal court. After the tribal court found for the tribe, the nonmember challenged the tribal court's jurisdiction in federal court. The court of appeals upheld the tribal court's jurisdiction, finding that the nonmember's raid "threatened the tribal community and its institutions" as well as the "political integrity and economic security of the Tribe."[67]

> The dawn attack was directed at the Tribe's community center—the seat of tribal government—and the casino, which the tribal appellate court characterized as "the Tribe's economic engine." As it appears from the allegations, the raid sought to return the [elected leaders] to power despite the majority's rejection of the leadership in the May election. This was a direct attack on the heart of tribal sovereignty, the right of Indians to protect tribal self-government.[68]

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[63] 532 U.S. 645 (2001).

[64] 532 U.S. at 657 n. 12 (emphasis in original).

[65] 554 U.S. at 341, quoting Cohen §4.02[3][c], at 232 n. 220.

[66] 609 F.3d 927 (8th Cir. 2010).

[67] *Id.* at 939.

[68] *Id.* (internal quotations omitted).

The court reinforced its conclusion that the tribal court had jurisdiction over the Tribe's claims against the nonmember with the fact that the raid occurred on tribal land: as the landowner, the Tribe had the power to exclude the nonmember altogether. That power includes the authority to regulate conduct on the tribal land.[69]

Based on the language from *Atkinson* and *Plains Commerce Bank*, the second *Montana* exception appears to be very limited and will be applied only in cases in which the tribe's survival is threatened by nonmember conduct.

The Power to Exclude

In *Merrion v. Jicarilla Apache Tribe*, decided one year after *Montana*, the Supreme Court upheld the Tribe's authority to impose a severance tax on a nonmember company extracting oil and gas from tribal property, in addition to the negotiated royalty payments under the lease.[70] The Court found the jurisdiction to tax nonmembers on tribally owned land derived from the Tribe's power, as a landowner, to exclude nonmembers and its "general authority, as sovereign, to control economic activity within its jurisdiction and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction."[71]

It is not clear, however, if the power to exclude is independent of the *Montana* exceptions. Although the Court has written that "[r]egulatory authority goes hand in hand with the power to exclude,"[72] it has also written that "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers."[73] If the power to exclude were independent of the *Montana* exceptions, it seems that the existence of tribal ownership alone would suffice to support regulatory jurisdiction.

Moreover, language in the *Atkinson* opinion, decided in 2001, raises further questions about whether the power to exclude is independent of the *Montana* exceptions. Rejecting the Tribe's argument that *Merrion*'s recognition of inherent authority to tax supported an occupancy tax on guests staying at a nonmember hotel on non-Indian land, the Court wrote,

> *Merrion* [] was careful to note that an Indian tribe's inherent power to tax only extended to "transactions occurring on *trust lands* and significantly involving a tribe or its members." There are undoubtedly parts of the *Merrion* opinion that suggest a broader scope for tribal taxing authority than the quoted language above. But *Merrion* involved a tax that only applied to activity occurring on the reservation, and its holding is therefore easily reconcilable with the *Montana-Strate* line of authority, which we deem to be controlling. An Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land.[74]

[69] *Id.* at 940.

[70] 455 U.S. 130 (1982).

[71] *Id.* at 137.

[72] South Dakota v. Bourland, 508 U.S. 679, 691 n. 11 (1993).

[73] *Hicks*, 533 U.S. at 360.

[74] 532 U.S. at 653 (emphasis in original; internal citations and parenthetical omitted).

Thus, because the Court wrote that the *Montana-Strate* line of precedent controlled, it is not clear whether the power to exclude provides authority over nonmembers on tribal land independent of the *Montana* exceptions. Despite this uncertainty, in *Water Wheel Camp Recreational Area, Inc. v. LaRance*,[75] the U.S. Court of Appeals for the Ninth Circuit found that the tribal court had jurisdiction over a non-Indian who had leased land from the Colorado River Indian Tribes but stayed after the lease had expired based on the Tribes' power to exclude, independent of the Tribes' inherent authority under the *Montana* exceptions.

Statutory Exceptions

In addition to exercising authority over nonmembers pursuant to their inherent sovereign authority, Indian tribes may exercise jurisdiction over nonmembers within reservations when Congress authorizes them to do so.[76] Congress may relax restrictions on tribes' inherent sovereign authority, as it did with tribal criminal jurisdiction over nonmember Indians and non-Indian dating and domestic violence defendants, or delegate federal authority to tribes. Congress may delegate federal authority to tribes through laws authorizing federal enforcement of tribal legal standards or laws authorizing tribal enforcement of federal statutes.[77]

There are two "prominent" examples of Congress providing for federal enforcement of tribal standards.[78] First, Section 1161 provides that the federal criminal statutes prohibiting the introduction of alcohol in Indian country "shall not apply ... to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the [governing] tribe."[79] In *United States v . Mazurie*, the Supreme Court upheld Section 1161 as a delegation to Indian tribes of Congress's authority to regulate the sale of alcohol by non-Indians within Indian reservations.[80] In *City of Timber Lake v. Cheyenne River Sioux Tribe*, the Eighth Circuit upheld the authority of the Tribe to require nonmembers to obtain tribal liquor and business licenses and to enforce those requirements in tribal court.[81] Second, Section 1165 establishes criminal penalties for anyone who, "without lawful authority or permission, willfully and knowingly goes upon" individual Indian or tribal trust land or any lands reserved for Indian use "for the purpose of hunting, trapping, or fishing thereon."[82] Section 1165, therefore, imposes federal criminal penalties for knowing violations of tribal hunting and fishing licensing requirements.

The Clean Air Act provides an example of Congress delegating federal authority to tribes to regulate nonmember conduct on non-Indian fee land by enforcing their own standards. Under Section 7601(d)(1)(A), Indian tribes may petition the Environmental Protection Agency (EPA) for authority to regulate reservation air quality in accordance with minimum federal standards.[83] If

[75] 642 F.3d 802 (9th Cir. 2011).

[76] *Atkinson*, 532 U.S. at 649-650.

[77] Cohen §4.03[1] at 238.

[78] *Id.* at 238-239.

[79] 18 U.S.C. §1161.

[80] 419 U.S. 544 (1975).

[81] 10 F.3d 554 (8th Cir. 1993) *cert. denied*, 512 U.S. 1236 (1994).

[82] 18 U.S.C. §1165.

[83] 42 U.S.C. §7601(d)(1)(A); discussed in Cohen, §4.03[1] at 239-240. The Clean Water Act provides a similar process (continued...)

EPA grants a petition, the tribe establishes standards, issues permits, and enforces the standards for all land, including non-Indian fee land, within the reservation.

Nonmembers Must First Challenge Tribal Court Jurisdiction in Tribal Court

Although tribal civil jurisdiction over nonmembers is quite limited, a nonmember defendant in tribal court who believes the court lacks jurisdiction must first challenge the tribal court's jurisdiction in tribal court.[84] Federal courts will dismiss an action challenging the jurisdiction of a tribal court if the tribal court defendant has not challenged tribal court jurisdiction through the tribal court appellate process subject to four exceptions:

> (1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay."[85]

Once a defendant has appealed his or her challenge of tribal court jurisdiction to the highest tribal court, he or she may then challenge the tribal court's jurisdiction in federal court.

Conclusion

As a general rule, Indian tribes lack criminal and civil jurisdiction over nonmembers. However, there are exceptions. First, Congress re-vested Indian tribes with inherent authority to exercise criminal jurisdiction over nonmember Indians, as well as non-Indians who commit dating and domestic violence against Indians within the tribes' jurisdictions, provided the non-Indian has certain enumerated ties to the tribes. Second, under the first *Montana* exception, tribes may exercise civil jurisdiction over nonmembers when the nonmembers have entered private consensual relationships with the tribe or its members, provided the conduct at issue relates to the consensual relationship. Third, under the second *Montana* exception, Indian tribes may exercise civil jurisdiction over nonmembers when the nonmembers' conduct threatens the integrity of the tribe. Fourth, tribes may exercise jurisdiction over nonmembers when Congress authorizes them to do so. Although the Supreme Court has recognized the tribal right to exclude nonmembers from tribal land as a basis for regulatory authority, it is not clear whether the right to exclude is independent of the *Montana* exceptions. While the Supreme Court has drawn tribal jurisdiction over nonmembers narrowly, it has also held that defendants in tribal court who challenge the tribal court's jurisdiction must exhaust their tribal court remedies before seeking relief in federal court.

(...continued)

for tribes to assume authority to enforce their own clean water standards.

[84] Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987) (federal question jurisdiction); National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (diversity jurisdiction).

[85] Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842, 847 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009), quoting *Hicks*, 533 U.S. at 369.

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