

# TRIBAL CIVIL, CRIMINAL, AND REGULATORY JURISDICTION OVER NONMEMBERS

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## I. Quick and Dirty History of Tribal Jurisdiction over Nonmembers (1778-1978)

### A. Treaty and Statutory Landscape

Jurisdiction over nonmembers in Indian country in the founding generation was a question of reservation and tribe specific negotiation. The federal statutory baseline rules on criminal jurisdiction in Indian country came in the first Indian affairs statutes passed by Congress, the Trade and Intercourse Acts. Treaties might or might not adjust that baseline on a tribe by tribe or reservation by reservation basis.

The Trade and Intercourse Acts set the baseline or default rules of Indian affairs for the first generation of federal law, and this baseline remains somewhat intact. The 1790 Trade and Intercourse Act provided that any “citizen or inhabitant” of the United States committed a crime in Indian country, that crime would be prosecuted as a violation of federal law.<sup>1</sup> The original act expired, and the statutes that followed retained this general rule.<sup>2</sup>

The first generation of Indian treaties often dealt specifically with jurisdiction over nonmembers. The first formal treaty between the United States and an Indian tribe is the Treaty with the Delawares in 1778.<sup>3</sup> There, the tribe and the United States agreed not to exercise criminal jurisdiction over each others’ citizens unless “a fair and impartial trial can be had by judges or juries of both parties. . . .”<sup>4</sup> Other early treaties, most notably the 1795 treaty that ended the Northwest War,<sup>5</sup> provided that American citizens who entered Indian country without consent “forfeit[ed] the protection of the United States, and the Indians may punish them him as

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<sup>1</sup> Act of July 22, 1790, 1 Stat. 137.

<sup>2</sup> Act of March 1, 1793, 1 Stat. 329, 329; Act of May 19, 1796, 1 Stat. 469, 470; Act of March 3, 1799, 1 Stat. 743, 744-45; Act of March 30, 1802, 2 Stat. 139, 141. See also Act of June 30, 1834, 4 Stat. 729, 733 (requiring the application of federal law).

<sup>3</sup> 7 Stat. 13 (1778).

<sup>4</sup> Id. at 14. See also Treaty with the Cherokee, 9 Stat. 871, 872 (1846).

<sup>5</sup> Treaty with the Wyandots et al., 7 Stat. 49, 52 (1795).

they please.”<sup>6</sup> Others required the tribe to turn over intruders to the United States,<sup>7</sup> or to petition the United States to remove them.<sup>8</sup> In one instance, the tribe asked the United States Congress to grant the tribe the power to prosecute nonmembers.<sup>9</sup>

Most early treaties denied tribal criminal jurisdiction over American citizens for regular criminal offenses. These treaties provided that American citizens who committed crimes against an Indian would be punished under the laws of the United States, or turned over to the United States for punishment.<sup>10</sup> The 1785 Cherokee treaty provided that the punishment of the American citizen must be “in the presence of some of the Cherokees. . . .”<sup>11</sup> Some treaties provided for the punishment by the United States of nonmember traders who violated their federal licenses,<sup>12</sup> for the introduction of liquor into Indian country in violation of federal law,<sup>13</sup> or to turn over nonmember fugitives.<sup>14</sup>

On occasion, treaties would deal with specific relationships between Indians and American citizens. The 1789 Treaty with the Wyandots dealt with the problem of horse stealing, providing that a federal civil magistrate would handle any horse theft claims brought by

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<sup>6</sup> Treaty with the Wyandots et al, 7 Stat. 16, 17 (1785). See also Treaty with the Cherokees, 7 Stat. 18, 19 (1785); Treaty with the Choctaws, 7 Stat. 21, 22 (1785); Treaty with the Chickasaws, 7 Stat. 24, 25 (1786); Treaty with the Creeks, 7 Stat. 35, 36 (1790); Treaty with the Cherokees, 7 Stat. 39, 40 (1791).

<sup>7</sup> Treaty with the Wyandots, 7 Stat. 28, 30 (1789).

<sup>8</sup> Treaty with the Sacs and Foxes, 7 Stat. 84, 86 (1804).

<sup>9</sup> Treaty with the Choctaws, 7 Stat. 333, 334 (1830).

<sup>10</sup> Treaty with the Cherokees, 7 Stat. 18, 19 (1785); Treaty with the Choctaws, 7 Stat. 21, 22 (1785); Treaty with the Chickasaws, 7 Stat. 24, 25 (1786); Treaty with the Shawnees, 7 Stat. 26, 26 (1786); Treaty with the Wyandots, 7 Stat. 28, 29 (1789); Treaty with the Six Nations, 7 Stat. 33, 34-35 (1789); Treaty with the Creeks, 7 Stat. 35, 37 (1790); Treaty with the Cherokees, 7 Stat. 39, 41 (1791); Treaty with the Sacs and Foxes, 7 Stat. 84, 85 (1804); Treaty with the Great and Little Osages, 7 Stat. 107, 109 (1808); Treaty with the Quapaws, 7 Stat. 176, 177 (1818); Treaty with the Kansas, 7 Stat. 244, 246 (1825); Treaty with the Poncar Tribe, 7 Stat. 247, 248 (1825); Treaty with the Teetons, Yanctons, and Yantones Bands of the Sioux, 7 Stat. 250, 251 (1825); Treaty with the Sioues and Ogallalas, 7 Stat. 252, 253 (1825); Treaty with the Cheyenne Tribe, 7 Stat. 255, 256 (1825); Treaty with the Hunkpapas Band of the Sioux, 7 Stat. 257, 258 (1825); Treaty with the Ricaras, 7 Stat. 259, 260 (1825); Treaty with the Minnetarees, 7 Stat. 261, 262 (1825); Treaty with the Mandan Tribe, 7 Stat. 264, 265 (1825); Treaty with the Crow Tribe, 7 Stat. 266, 267 (1825); Treaty with the Oto and Missouri Tribe, 7 Stat. 277, 278 (1825); Treaty with the Pawnee Tribe, 7 Stat. 279, 280 (1825); Treaty with the Maha Tribe, 7 Stat. 282, 283 (1825); Treaty with the Choctaws, 7 Stat. 333, 334 (1830); Treaty with the Comanches and Other Tribes, 9 Stat. 844, 845 (1846); Treaty with the Navajo Tribe of Indians, 9 Stat. 974, 975 (1849); Treaty with the Apaches, 10 Stat. 979, 979 (1852); Treaty with the Rogue River Indians, 10 Stat. 1018, 1019 (1853); Treaty with the Cow Creek Indians, 10 Stat. 1027, 1028 (1853); Treaty with the Yakamas, 12 Stat. 951, 954 (1855); Treaty with the Nez Percés, 12 Stat. 957, 960 (1855); Treaty with the Quinaielts, 12 Stat. 971, 973 (1855); Treaty with the Flatheads, 12 Stat. 975, 977 (1855); Treaty with the Blackfeet, 11 Stat. 657, 659 (1855); Treaty with the Pawnees, 11 Stat. 729, 731 (1857); Treaty with the Yancton Tribe of Sioux, 11 Stat. 743, 747 (1858); Treaty with the Mendawakanton Sioux, 12 Stat. 1031, 1034 (1858); Treaty with the Sisseton Sioux, 12 Stat. 1037, 1040 (1858); Treaty with the Tabeguache Indians, 13 Stat. 673, 674 (1863); Treaty with the Shoshonee-Goship Bands, 13 Stat. 681, 681 (1863); Treaty with the Snake Indians, 13 Stat. 683, 684 (1865).

<sup>11</sup> Treaty with the Cherokees, 7 Stat. 18, 19 (1785). See also Treaty with the Choctaws, 7 Stat. 21, 22 (1785); Treaty with the Chickasaws, 7 Stat. 24, 25 (1786).

<sup>12</sup> Treaty with the Comanches and Other Tribes, 9 Stat. 844, 844 (1846).

<sup>13</sup> Treaty with the Comanches and Other Tribes, 9 Stat. 844, 846 (1846); Treaty with the Shawnees, 10 Stat. 1053, 1058 (1854); Treaty with the Middle Oregonians, 14 Stat. 751, 752 (1865).

<sup>14</sup> Treaty with the Cherokee, 9 Stat. 871, 872 (1846).

Indians.<sup>15</sup> The 1808 Treaty with the Osages provided that American citizens who were unlicensed hunters be turned over to the United States for punishment.<sup>16</sup> The 1835 Treaty with the Comanche provided a process by which crimes by members of another tribe could be prosecuted.<sup>17</sup>

On rare occasions, a treaty might deal with civil claims. The 1816 Treaty with the Chickasaws granted regulatory jurisdiction over disputes with nonmember traders to the federal Indian agent.<sup>18</sup> The 1820 Treaty with the Choctaws provided funds to allow the tribe to organize a Light-Horse brigade, “so that good order may be maintained, and that all men, both white and red, may be compelled to pay their just debts. . . .”<sup>19</sup> The 1866 Treaty with the Choctaw and Chickasaw Nations acknowledged the power of the tribe to license nonmember commercial actors.<sup>20</sup>

In some instances, treaties provided for American citizens to become citizens of certain tribes, or to benefit from treaty rights.<sup>21</sup> The 1866 Treaty with the Choctaw and Chickasaw Nations provided that those nonmembers who became members under tribal law could be subject to criminal prosecution by the tribe.<sup>22</sup>

Later treaties became very specific, although the language used in the treaties was not always helpful. In the 1855 Treaty with the Choctaw and Chickasaw Nations, the language guaranteed the tribes’ “unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits.”<sup>23</sup> The same treaty required each tribe to extradite criminals to the other.<sup>24</sup> The 1866 Treaty with the Choctaw and Chickasaw Nations provided that the tribes could create a council with the power to “legislate . . . the administration of justice between members of the several tribes . . . and persons other than Indians and members of said tribes or nations . . . .”<sup>25</sup> The 1866 Treaty with the Cherokee Nation created a court of general jurisdiction over “inhabitants.”<sup>26</sup>

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<sup>15</sup> Treaty with the Wyandots, 7 Stat. 28, 29-30 (1789). See also Treaty with the Six Nations, 7 Stat. 33, 34-35 (1789); Treaty with the Comanches and Other Tribes, 9 Stat. 844, 845 (1846).

<sup>16</sup> Treaty with the Great and Little Osages, 7 Stat. 107, 110 (1808).

<sup>17</sup> 7 Stat. 474, 475 (1835). See also Treaty with the Kioway, Ka-ta-ka, and Ta-wa-ka-ro Nations of Indians, 7 Stat. 533, 534 (1837).

<sup>18</sup> 7 Stat. 150, 151 (1816).

<sup>19</sup> 7 Stat. 210, 213 (1820).

<sup>20</sup> 14 Stat. 769, 779 (1866). See also Treaty with the Delaware Indians, 14 Stat. 793, 796 (1866); Treaty with the Cherokee Indians, 14 Stat. 799, 801 (1866).

<sup>21</sup> Treaty with the Chickasaw, 7 Stat. 450, 452-53 (1834); Treaty with the Choctaw and Chickasaw Nations, 14 Stat. 769, 777 (1866).

<sup>22</sup> 14 Stat. 769, 779 (1866).

<sup>23</sup> 11 Stat. 611, 613 (1855). See also Treaty with the Creek and Seminole Nations, 11 Stat. 699, 703 (1856).

<sup>24</sup> Treaty with the Choctaw and Chickasaw Nations, 11 Stat. 611, 613 (1855). See also Treaty with the Creek and Seminole Nations, 11 Stat. 699, 703 (1856).

<sup>25</sup> 14 Stat. 769, 772 (1866). See also Treaty with the Creek Nation, 14 Stat. 785, 789 (1866); Treaty with the Cherokee Nation, 14 Stat. 799, 802 (1866).

<sup>26</sup> 14 Stat. 799, 800-01 & 803 (1866).

Treaties from 1867 and 1868 included the famed “bad men clauses” that detailed criminal jurisdiction authority on several reservations. The clauses typically required the tribe to turn over “bad men among the whites” to the United States for punishment.<sup>27</sup>

## **B. The Reality on the Ground**

The pre-contact American Indian commercial markets and trading fairs were extraordinary concerns covering the whole of what is now American territory. These networks and markets continued for centuries after the arrival of European outsiders from overseas.<sup>28</sup> Lakes and rivers were the commercial superhighways of North American Indian markets, allowing Indian people to transport goods over a thousand miles if necessary.<sup>29</sup> Regularly held Indian trading fairs were enormous, and may have included thousands of Indian peoples representing dozens of Indian nations.<sup>30</sup> For example, in 1805, Lewis and Clark were amazed to find enormous trading fairs drawing Indians from dozens of tribes.<sup>31</sup> Nonmembers, even enemies, would be adopted into the tribal community to allow for more effective and inclusive trading.<sup>32</sup> A limited form of tribal citizenship, then, could be a formal prerequisite to Indian trade, a kind of permission to access the Indian market. The French and Spanish, then the Dutch and the British, and finally the Americans, bargained to access the Indian commercial market. Tribal commercial practices adapted to meet the new trading partners’ particular notions of property rights and trade.<sup>33</sup>

Tribal permission to access Indian trade was required, and it could mean that Indian traders required tribal citizenship or familial ties with the tribe to acquire or earn that permission. Kinship ties created between Indian traders and tribal members bound together the groups both politically and socially. Indian traders married into the tribe, worked for the tribe as interpreters, and otherwise took on the rights and responsibilities that tribal rules and norms required of

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<sup>27</sup> Treaty with the Kiowas and Comanches, 15 Stat. 581, 581 (1867); Treaty with the Cheyenne [and Arapaho] Indians, 15 Stat. 593, 593 (1867); Treaty with the Ute Indians, 15 Stat. 619, 620 (1868); Treaty with the Sioux Indians, 15 Stat. 635, 635 (1868); Treaty with the Crow Indians, 15 Stat. 649, 649 (1868); Treaty with the [Northern] Cheyenne [and Northern Arapaho] Indians, 15 Stat. 655, 655 (1868); Treaty with the Navajo Indians, 15 Stat. 667, 667 (1868); Treaty with the Shoshonees and Bannacks, 15 Stat. 673, 673 (1868).

<sup>28</sup> Robert J. Miller, Reservation “Capitalism”: Economic Development in Indian Country 21-22 (2012).

<sup>29</sup> Id. at 22; Helen Hornbeck Tanner, *Atlas of Great Lakes Indian History* 6 (1987) (“A complete geographic description of the Great Lakes Region . . . draws attention first to the Straits of Mackinac connecting Lake Huron and Lake Michigan, and to the St. Marys River flowing from Lake Superior to Lake Huron. This vital crossroads was the center of a trade and communications network permeating the Great Lakes Region and by extensions reaching the Great Plains of the Canadian and American West, Hudson Bay, the Atlantic Ocean and the Gulf of Mexico.”).

<sup>30</sup> Miller, *supra* note 28, at 22.

<sup>31</sup> Id. at 22-23.

<sup>32</sup> Id. at 23.

<sup>33</sup> Id. at 23. See also Susan Sleeper-Smith, *Cultures of Exchange in an Atlantic World*, in *Rethinking the Fur Trade: Cultures of Exchange in an Atlantic World*, at xxxvii-xlvi (Susan Sleeper-Smith, ed., 2009) (describing the tribal transformation into “Indians as Consumers”).

relatives.<sup>34</sup> The “real source of power” in the trading relationship during this time was not the federal government, but Indian politics that defined the boundaries of the trading spaces.<sup>35</sup>

Intermarriage as a form of entry into Indian trade markets was very strong in the western Great Lakes well into the American era. American citizens, sometimes armed with a federal Indian trader license and sometimes not, often used intermarriage to form the kinship ties necessary to access the fur trade. It was an old tactic, if not ritual, going back to the 16th and 17th centuries when the French began marrying Anishinaabe women.<sup>36</sup>

Anishinaabe trade prior to the 20th century was a highly propertied affair. Families and clans formed complex property rights structures to control fishing, farming, ricing, hunting, trapping, sugaring, and other productive activities.<sup>37</sup> Distribution of Anishinaabe-produced goods were also subject to complex property systems. As the French before them, less so the British, Americans married into Anishinaabe families. They typically served as middle-men between Indian producers and non-Indian purchasers of Great Lakes trade goods. They lived in large houses on Mackinac Island and often prospered.<sup>38</sup> But they also acquired obligations to the Anishinaabe families and clans into which they married.<sup>39</sup>

As a general matter, non-Indians not part of the Anishinaabe production and distribution could be nothing more than mere passive participants in trade. The western Great Lakes were not merely empty places where non-Indians could walk in and set up camp. Trade secrets such as locations of good fishing and trapping, or wintertime lodges, or good routes to reach what is now called the St. Lawrence Seaway, would not be merely given away to the first white men who walked into the area. Many early French traders realized that access to trade secrets was closely guarded by familial and clan relationships. If non-Indians were to access and exploit Anishinaabe

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<sup>34</sup> Michael Witgen, *An Infinity of Nations: How the Native New World Shaped Early North America* 33 (2012).

<sup>35</sup> *Id.* at 138.

<sup>36</sup> Susan Sleeper-Smith, *Indian Women and French Men: Rethinking Cultural Encounter in the Western Great Lakes* 16-19 (2001).

<sup>37</sup> Frank G. Speck, *The Family Hunting Band as the Basis of Algonkian Social Organization*, 17 *Am. Anthropologist* 289 (1915). See also Dean R. Snow, *Wabanaki “Family Hunting Territories,”* 70 *Am. Anthropologist (New Series)* 1143 (1968).

<sup>38</sup> E.g., Elizabeth A. Scott, *A Feminist Approach to Historical Archaeology: Eighteenth-Century Fur Trade Society at Michilimackinac*, 25:4 *Gender in Historical Archeology* 42 (1991); John E. McDowell, *Therese Schindler of Mackinac: Upward Mobility in the Great Lakes Fur Trade*, 61:2 *Wis. Mag. of Hist.* 125 (Winter 1977-1978).

<sup>39</sup> Cf. Michael A. McDonnell, *Maintaining a Balance of Power: Michilimackinac, the Anishinaabe Odawas, and the Anglo-Indian War of 1763*, 13:1 *Early American Studies: An Interdisciplinary Journal* 38, 49 (2015) (“French officials constantly complained that métis traders confounded efforts to impose imperial policies at places like Michilimackinac—because they acted too much in the interests of their Indian kin. Historians have tended to view men such as Langlade as go-betweens, or mediators, and as métis, but his Indian kin were just as likely to see him as Anishinaabe. As one French official complained as early as 1709, the children born of mixed marriages ‘try to create as many difficulties as possible for the French.’”) (citation omitted).

production and distribution markets, then they would have to form familial and clan relationships. Many did.<sup>40</sup>

Intermarriage was only one way that the Great Lakes Anishinaabeg governed their hunting and trading territories – Indian people expected compensation for trespass and property damages. In one notable instance, missionaries in what is now the Upper Peninsula of Michigan invited there by fur traders in the 19th century faced demands that they enter into agreements to compensate local Indians for expanding the facilities at the trading posts or face attacks on their own property in retaliation.<sup>41</sup> Natives in Waukesha, Wisconsin demanded damages after white settlers allowed their cattle to roam free and destroy Indian corn crops; the “Indians being legally in possession of the land” required and received retribution in the form of a large ox in one instance.<sup>42</sup>

After the removal of the Five Civilized Tribes to Oklahoma, the tribes established strict permitting requirements governing noncitizens who wished to reside upon, work within, and lease Indian lands, or marry into Indian families. In Oklahoma Indian country, American citizens wishing to access the Indian markets had to acquire a federal Indian trader permit and a tribal permit, and often married into the tribe and acquired tribal citizenship.<sup>43</sup> In many instances, it appears, white men married Indian women merely to acquire property.<sup>44</sup>

In the mid-19th century, several Indian nations in and around Indian Territory, what is now the State of Oklahoma, enacted legislation purporting to govern non-Indian activity.<sup>45</sup> These Indian nations regulated entrance, residence, contracting, and employment by non-Indians with the tribes. In 1880 and 1890, Interior Department reports on Indian affairs acknowledged these types of permitting statutes.<sup>46</sup> A 1912 report to Congress on the Five Civilized Tribes noted that

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<sup>40</sup> E.g., Michael A. McDonnell, *Maintaining a Balance of Power: Michilimackinac, the Anishinaabe Odawas, and the Anglo-Indian War of 1763*, 13:1 *Early American Studies: An Interdisciplinary Journal* 38, 49 (2015) (“A Nassauekue-ton Odawa (nation de la Fourche) woman named Domitilde, for example, married one in 1712, and, after his death, she married Augustin Langlade in the 1720s. Their son, Charles Langlade, became one of the most influential and well-known figures from Michilimackinac.”). The Michigan Supreme Court case of *Stockton v. Williams*, 1 Doug. 546 (Mich. 1845), a case of alleged identity theft, with one Anishinaabe woman, Mokitchenouqua (aka Nancy Smith), the child of John Smith, an Indian trader, alleging that another Anishinaabe woman, Mokitchenouqua (aka Elizabeth Lyons), the child of yet another Indian trader, Archibald Lyons, stole her lands.

<sup>41</sup> Cary Miller, *Ogimaag: Anishinaabeg Leadership, 1760-1845*, at 101 (2011).

<sup>42</sup> Alexander F. Pratt, *Reminiscences of Wisconsin*, No. 3 *Sketch of Waukesha*, in *Wisconsin Historical Collections* vol. I, 1855, at 135 (Lyman Copeland Draper, ed.) (republished by the State Historical Society of Wisconsin in 1903).

<sup>43</sup> E.g., Oliver Knight, *An Oklahoma Indian Trader As a Frontiersman of Commerce*, 23:2 *J. Southern Hist.* 203 (1957) (detailing the life of James J. McAlester, an American citizen who traded inside of Choctaw Indian country under a federal license and a tribal permit, and acquired tribal citizenship by marrying a Choctaw woman).

<sup>44</sup> Francis E. Leupp, *The Indian and His Problem* 345-46 (1918).

<sup>45</sup> In at least one instance, the Choctaw Nation, the tribe’s removal treaty expressly provided that noncitizens must procure a written permit from the tribe or the federal government. *Treaty of Dancing Rabbit Creek* (Treaty with the Choctaw), art. X, 7 Stat. 333, Sept. 27, 1830.

<sup>46</sup> *Annual Report of the Commissioner of the Office of Indian Affairs to the Secretary of Interior* 91 (1890); *Annual Report of the Commissioner of the Office of Indian Affairs to the Secretary of Interior* 95 (1880).

the tribes had long been issuing employment permits to noncitizens.<sup>47</sup> The same report noted that tribal courts adjudicated the rights of noncitizens employed in accordance with a permit.<sup>48</sup>

The United States Attorney General also addressed the legal consequences of tribal permit systems, acknowledging tribal authority to govern nonmembers. In an 1855 opinion, Attorney General Caleb Cushing reviewed the permitting and intermarriage systems established by the Choctaw Nation. In 1846, the Supreme Court had decided *United States v. Rogers*,<sup>49</sup> which had held that a white man who had acquired tribal citizenship was not released from federal criminal jurisdiction. But Cushing would hold that non-Indians who acquired tribal citizenship remained subject to tribal civil authority.

In the opinion, the Attorney General was called to answer the question of whether the Choctaw tribal court (which then had jurisdiction over Chickasaw tribal members) could have civil jurisdiction over a white man who had acquired tribal citizenship through the permit system. The Attorney General answered in the affirmative. The opinion's syllabus concludes:

[I]n matters of civil jurisdiction, arising within the nation, its courts have jurisdiction over a white man who has voluntarily made himself a Chickasaw by intermarriage and exercise of all the rights of a Chickasaw, and where the question concerns property the proceeds of a head-right granted to him as a Chickasaw.<sup>50</sup>

The syllabus suggests that tribal jurisdiction over white men is dependent on the white man's adoption by marriage into the Chickasaw Nation, and property acquired by white men through a treaty provision.

The white man in question, Thomas F. Cheadle, married a Chickasaw woman before the federal government removed the majority of the Chickasaw and Choctaw people from the southeast United States to what is now Oklahoma.<sup>51</sup> He acquired property—a Chickasaw headright—in an 1834 treaty, drew a treaty annuity as a Chickasaw tribal member, and enjoyed Chickasaw political rights.<sup>52</sup> Cheadle and his wife eventually sold property he acquired by virtue of the treaty terms, and their children claimed the proceeds.<sup>53</sup>

The Choctaw Nation argued that the dispute should be resolved in tribal court, and the United States Indian Agent opposed that position, arguing that he should have exclusive authority to resolve the dispute.<sup>54</sup> The Attorney General rejected that view out of hand, labeling

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<sup>47</sup> Five Civilized Tribes in Oklahoma, S. Doc. 1139, 62nd Cong., 3rd Sess., at 110 (1912).

<sup>48</sup> *Id.* at 121.

<sup>49</sup> 45 U.S. 567 (1846).

<sup>50</sup> 7 Op. Att'y Gen. 174, 174-75 (1855).

<sup>51</sup> *Id.* at 175.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 176.

<sup>54</sup> *Id.*

the position “suicidal.”<sup>55</sup> That left the tribal court as the proper forum. The critical portion of the opinion of the Attorney General was that no federal or state court would have jurisdiction over this uniquely internal question:

But there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this, a question of property strictly internal to the Choctaw nation; nor is there any written law which confers jurisdiction of such a case on any court of the United States. The Agent admits that if the courts of the Choctaws have not jurisdiction, the case must depend for its decision on the executive authorities of the United States.<sup>56</sup>

Immediately after, the Attorney General’s views had support in a smattering of lower court cases addressing similar issues.<sup>57</sup>

In 1968, Congress enacted the Indian Civil Rights Act (ICRA).<sup>58</sup> Congress intended ICRA to affect tribal criminal processes more than civil processes, and even provided for a federal habeas right to challenge tribal convictions.<sup>59</sup> However, ICRA made no distinction between criminal and civil tribal court actions, and also made no distinction between cases solely involving tribal members and those involving nonmembers.<sup>60</sup> In Congress’s most important modern venture into tribal law Congress expressed no opinion on the question of tribal civil jurisdiction over nonmembers.

Until the 1960s, tribal assertions of power were unusual because in the 19th century, Congress and the Department of Interior presided over the break-up of many Indian reservations through the allotment processes put into place by Indian treaties<sup>61</sup> and the General Allotment Act.<sup>62</sup> Allotment divided up the larger, communally owned reservations to individually owned parcels and opened up “surplus” reservation lands to public sale.<sup>63</sup> The resulting pattern of land ownership generated a complicated “checkerboard” pattern of federal, state, and tribal

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<sup>55</sup> Id. at 179.

<sup>56</sup> Id. at 179.

<sup>57</sup> *Tuten’s Lessee v. Byrd and Welcker*, 31 Tenn. 108, 108 (1851); *United States v. Ragsdale*, 27 F. Case. 684, 686 (No. 16,113) (Circuit Court, D. Ark. 1847). Cushing’s opinion has been revived in recent decades by the Supreme Court. *Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985).

<sup>58</sup> 25 U.S.C. § 1301 et seq.

<sup>59</sup> 25 U.S.C. § 1303.

<sup>60</sup> E.g., 25 U.S.C. § 1302(a)(8) (“No Indian tribe in exercising powers of self-government shall ... deny to *any person within its jurisdiction* the equal protection of its laws or deprive any person of liberty or property without due process of law....”) (emphasis added).

<sup>61</sup> Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* 241-42 (1994) (summarizing the allotment provisions contained in the Manypenny treaties negotiated and ratified in the 1850s. E.g., *Treaty of Detroit*, 11 Stat. 621 (1855); Matthew L.M. Fletcher, *The Eagle Returns: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians* x, 62-69 (2012) (describing the implementation and effects of treaty allotment in certain Michigan Indian communities under the 1855 Treaty of Detroit).

<sup>62</sup> See generally D.S. Otis, *The Dawes Act and the Allotment of Indian Lands* (Francis Paul Prucha ed. 1973); Judith V. Royster, *The Legacy of Allotment*, 27 *Ariz. St. L. J.* 1 (1995).

<sup>63</sup> Id. at 10-15.



jurisdiction that plagues much of Indian country even today.<sup>64</sup> These land sales also introduced many nonmembers into the area formerly and formally understood to be Indian country.<sup>65</sup> Meanwhile, the federal government's late 19th century bureaucracy began to intrude on the daily operations of many, if not most, Indian tribes;<sup>66</sup> so much so that even by the 1950s, federal bureaucrats purported to control even the bedtimes of some reservation Indians.<sup>67</sup>

In this demographic and political dynamic, it is no wonder the tribal governance structures collapsed. While some tribal communities maintained a working justice system and civil governance structure, such as the Cherokee Nation of Oklahoma<sup>68</sup> and perhaps the Navajo Nation,<sup>69</sup> tribal governance in most of Indian country was an informal and inefficient affair for many decades.<sup>70</sup> As former director of the Office American Studies for the Smithsonian Institute Wilcomb Washburn wrote, "Indian groups in 1934 were mere shadows of their former selves."<sup>71</sup> In areas of Indian country where non-Indians owned most of the land and constituted a significant portion of the population, tribal governance as we see it now likely was latent.

Additionally, many Indian tribes are relative newcomers to governance. The federal government has recognized the sovereignty of many hundreds of Indian tribes since 1934 when Congress passed the Indian Reorganization Act.<sup>72</sup> There are now 567 federally recognized Indian tribes.<sup>73</sup> In 1934, there were between 200 and 300 recognized tribes, and Congress legislatively terminated (but later restored) many of those tribes starting in the 1950s.<sup>74</sup> The vast majority of Indian tribes recognized since 1934 have a small, heavily checkerboarded land base, small populations, are surrounded by non-Indian land, and outnumbered (sometimes overwhelmingly) by their non-Indian neighbors.<sup>75</sup> Many numbers of tribes, as a result of all of this convulsive

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<sup>64</sup> *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962); *Hydro Resources, Inc. v. EPA*, 608 F.3d 1131, 1137 (10th Cir. 2010) (en banc).

<sup>65</sup> E.g., *Hagen v. Utah*, 510 U.S. 399, 420-21 (1994) ("Of the original 2 million acres reserved for Indian occupation, approximately 400,000 were opened for non-Indian settlement in 1905. Almost all of the non-Indians live on the opened lands. The current population of the area is approximately 85 percent non-Indian.").

<sup>66</sup> C. Blue Clark, *How Bad It Really Was Before World War II: Sovereignty*, 23 *Okla. City U. L. Rev.* 175 (1998); Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 *Conn. L. Rev.* 1251, 1256-58 (1994) ("era of pupilage").

<sup>67</sup> Felix S. Cohen, *The Erosion of Indian Rights 1950-1953: A Case Study in Bureaucracy*, 62 *Yale L.J.* 348, 360 (1953) (quoting Hearings before Senate Appropriations Committee on Interior Department Appropriations for 1953, 82d Cong., 2d Sess. 840 (1952)).

<sup>68</sup> Rennard Strickland, *Fire and Spirits: Cherokee Law from Clan to Court* (1975).

<sup>69</sup> Mary Shepardson, *Navajo Ways in Government: A Study in Political Process* (1963).

<sup>70</sup> Vine Deloria, Jr., *The Indian Reorganization Act: Congresses and Bills ix* (2002) (labeling 1890-1930 as the "time of the traditional governments.").

<sup>71</sup> Wilcomb E. Washburn, *A Fifty-Year Perspective on the Indian Reorganization Act*, 86 *Am. Anthropologist* 279, 279 (1984).

<sup>72</sup> Act of June 18, 1934, 48 Stat. 984, codified as amended at 25 U.S.C. § 5101 et seq.

<sup>73</sup> Bureau of Indian Affairs, *Indian Entities Recognized and Eligible To Receive Services From the Bureau of Indian Affairs*, 82 Fed. Reg. 4915 (Jan. 17, 2017).

<sup>74</sup> Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 *Am. Indian L. Rev.* 139 (1977).

<sup>75</sup> For example, the Department of Interior recognized three lower peninsula Michigan tribes – the Grand Traverse Band of Ottawa and Chippewa Indians, the Huron Nottawseppi Band of Potawatomi Indians, and the Match-E-Be-

history, had limited resources and little political and legal infrastructure to exercise their police powers at the inception of their federal recognition.

In the 1950s through the 1970s, though, established reservation communities began to reassert their police power throughout Indian country, inspired by the threat of Public Law 280,<sup>76</sup> the recognition of inherent tribal court jurisdiction by the Supreme Court,<sup>77</sup> and the dictates of the Indian Civil Rights Act.<sup>78</sup> The impetus for this increased tribal governance activity, ironically, was a federal statute purporting to undermine tribal governance, Public Law 280. That law extended state civil and criminal jurisdiction into Indian country in five (later six) states,<sup>79</sup> and allowed other states to enact legislation to assert jurisdiction into Indian country voluntarily.<sup>80</sup> The Navajo Nation, for example, feared that the Arizona legislature would exact legislation to assert jurisdiction within the reservation, and so the Nation established its own court system to deter the state legislature's proposed action.<sup>81</sup> Second, in *Williams v. Lee*,<sup>82</sup> the Supreme Court held that the Navajo Nation's judicial system had exclusive authority to adjudicate civil claims arising on the reservation against tribal members.<sup>83</sup> Congress's enactment of the so-called Indian Bill of Rights in 1968,<sup>84</sup> along with the Supreme Court's holding in 1978 that federal rights created in the Indian Bill of Rights may only be asserted in tribal forums,<sup>85</sup> compelled many tribes to develop their own justice systems.<sup>86</sup> The federal government's dramatic shift toward supporting tribal self-determination in the 1970s helped as well.<sup>87</sup> Now there are over 300 tribal courts, and many more in development.

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Nash-She-Wish Band of Pottawatomi Indians – since 1980. Congress recognized three others – the Little Traverse Bay Bands of Odawa Indians, the Little River Band of Ottawa Indians, and the Pokagon Band of Potawatomi Indians. All six tribes suffered from “administrative termination” – a uniquely devastating breach of the federal-tribal trust relationship. Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. Rev. 487, 502-15 (2006). By the time Congress and Executive branch restored their tribal status, each of the six tribes were virtually landless and penniless.

<sup>76</sup> Public Law 83-280, codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360. See generally Duane Champagne & Carole Goldberg, *Captured Justice: Native Nations and Public Law 280* (2012).

<sup>77</sup> *Williams v. Lee*, 358 U.S. 217 (1959). See generally Dewi Ione Ball, *Williams v. Lee (1959) – 50 Years Later: A Re-assessment of One of the Most Important cases in the Modern-era of Federal Indian Law*, 2010 Mich. St. L. Rev. 391; Bethany Berger, *Williams v. Lee and the Debate over Indian Equality*, 109 Mich. L. Rev. 1463 (2011).

<sup>78</sup> 25 U.S.C. §§ 1301-1303. See generally *The Indian Civil Rights Act at Forty* (Kristen A. Carpenter, Matthew L.M. Fletcher, and Angela R. Riley eds. 2012).

<sup>79</sup> See 18 U.S.C. § 1162 (criminal) and 28 U.S.C. § 1360 (civil).

<sup>80</sup> Congress amended Public Law 280 in 1968 to require tribal consent to assertions of state authority. See Public Law 90-283, Title IV, §§ 401-402, codified at 25 U.S.C. § 1321 (criminal) and 25 U.S.C. 1322 (civil).

<sup>81</sup> Raymond D. Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* 25-29 (2009).

<sup>82</sup> 358 U.S. 217 (1959).

<sup>83</sup> See *id.* at 221-22.

<sup>84</sup> 25 U.S.C. §§ 1301-1303.

<sup>85</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-70 (1978).

<sup>86</sup> See generally Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Colo. L. Rev. 59 (2013).

<sup>87</sup> See generally Philip S. Deloria, *The Era of Indian Self-Determination: An Overview*, in *Indian Self-Rule* 191 (Kenneth R. Philp, ed. 1986).

## II. Modern Tribal Criminal Jurisdiction over Nonmembers

Tribal criminal jurisdiction over nonmembers is very limited. The Supreme Court held in 1978 that Indian tribes do not possess criminal jurisdiction over non-Indians absent authorization from Congress.<sup>88</sup> In 1990, the Court extended that rule to a category of persons known as nonmember Indians.<sup>89</sup>

Twice Congress has authorized Indian tribes to assert criminal jurisdiction beyond the Supreme Court's rulings. The first instance, known colloquially as the "Duro fix," reauthorized Indian tribes to assert criminal jurisdiction over all "Indians."<sup>90</sup> That term is legally equivalent to the same term used in federal criminal prosecutions under the Major Crimes Act.<sup>91</sup> As such, Indians includes more than just tribal members. More recently, Congress authorized Indian tribes to prosecute non-Indians for dating and domestic violence.<sup>92</sup>

For prosecutions of "Indians," the Indian Civil Rights Act provides the federal minimum baselines for criminal procedure rights owed by prosecuting tribes to criminal defendants.<sup>93</sup> The "Indian Bill of Rights," initially enacted in 1968, requires tribes to guarantee to all persons certain rights roughly equivalent to the federal Bill of Rights: freedom of speech, freedom of religion, search and seizure, takings, due process, equal protection, and so on. Criminal defendants have a right to a jury, but there is no guarantee of the right to paid counsel for indigent defendants. There is a one year limit to jail time a tribe can impose. Persons detained by a tribe have a federal habeas right.<sup>94</sup>

In the Tribal Law and Order Act of 2010, Congress authorized Indian tribes to sentence convicted criminals to up to three years in jail (nine years total for consecutive sentences), so long as those tribes guarantee the right to paid counsel for indigenous defendants, law trained judges, prison space, and other requirements.<sup>95</sup> Again, "Indians" – which includes nonmember Indians – may be prosecuted under these enhanced sentencing provisions.

In the Violence against Women Reauthorization Act of 2013, Congress authorized tribes beginning in 2016 to prosecute non-Indians for dating and domestic violence, so long as at least one defendant or victim is an Indian and if the defendant has ties to the tribe.<sup>96</sup> Congress required

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<sup>88</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>89</sup> *Duro v. Reina*, 495 U.S. 676 (1990).

<sup>90</sup> 25 U.S.C. § 1301(4). See also *United States v. Lara*, 541 U.S. 193 (2004) (affirming constitutionality of Duro fix).

<sup>91</sup> 18 U.S.C. § 1153.

<sup>92</sup> 25 U.S.C. § 1304.

<sup>93</sup> 25 U.S.C. § 1302(a).

<sup>94</sup> 25 U.S.C. § 1303.

<sup>95</sup> 25 U.S.C. §§ 1302(b)-(d).

<sup>96</sup> 25 U.S.C. § 1304(b)(4)(A).

tribes to guarantee the constitutional rights provided for in the enhanced sentencing statute, as well as the right to a jury trial of the defendant's peers.<sup>97</sup>

In short, non-Indians have far better procedural protections than Indians in tribal courts.

### III. Modern Tribal Civil Jurisdiction over Nonmembers

The sheer number of nonmembers that have already consented expressly or impliedly to tribal jurisdiction is also unprecedented in American Indian history. It is now routine for nonmembers to pay tribal taxes,<sup>98</sup> be haled into tribal court in civil cases,<sup>99</sup> to sue in tribal court,<sup>100</sup> and even serve on tribal court juries.<sup>101</sup> Tribal governance over Indian lands has expanded dramatically as the federal government supports and encourages tribal self-determination, replacing the whispers of federal and state government authority over Indian lands.

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<sup>97</sup> 25 U.S.C. § 1304(d).

<sup>98</sup> Cf. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 139-41 (1982); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

<sup>99</sup> See, e.g., *One Thousand Four Hundred Sixty Three Dollars v. Muscogee (Creek) Nation*, 9 Okla. Trib. 83 (Muscogee (Creek) 2005) (holding tribal court was the correct forum for civil forfeiture proceedings involving non-Indians' illegal drug use and distribution in casino parking lot); *Wolf Point Org. v. Investment Centers of America, Inc.*, 3 Am. Tribal Law 290 (Fort Peck Ct. App. 2001) (holding tribal court was the correct forum for a dispute involving a non-Indian investment company operating on the reservation).

<sup>100</sup> Due to their perceived deep pockets, tribes with casinos often attract slip-and-fall cases to their tribal courts. See, e.g., *Lefevre v. Mashantucket Pequot Tribe*, 1 Mash. Rep. 1, 23 Ind. L. Rep. 6018 (Mashantucket Pequot Tribal Ct. 1992) (deciding a slip and fall case at the Tribe's bingo hall as the first case heard by the Tribal Court). Non-Indians sue in tribal courts for numerous other reasons, as well. See *Neptune Leasing, Inc. v. Mountain States Petroleum Corp.*, 11 Am. Tribal Law 162 (Navajo 2013) (breach of payment plan); *Marathon Oil Co. v. Johnston*, \_\_ Am. Tribal Law \_\_, 2006 WL 6926419 (Shoshone & Arapaho App. Ct. 2006) (finding tribal court was the correct forum to resolve dispute between non-Indian employee and non-Indian employer stationed on tribal lands); *Mustang Fuel Corp. v. Cheyenne-Arapaho Tax Com'n*, 4 Okla. Trib. 11 (Cheyenne-Arapaho 1994) (entertaining suit by non-Indian fuel corporation regarding Tribe's ability to tax entities on allotted lands).

<sup>101</sup> Fulfilling the requirement that juries expanding tribal criminal jurisdiction under the Violence Against Women Reauthorization Act of 2013 must represent a "fair cross section of the community," tribal courts have altered their tribal codes to include non-Indians within jury pools. § 204(d)(3)(A). See Fort Peck Tribes Comprehensive Code of Justice, tit. 6, ch. 5 § 507(b)(1), (c)-(d) (requiring the juror list for special domestic violence criminal jurisdiction include 50 tribal members and 50 non-tribal members, randomly summoning 21 individuals and choosing six); Sisseton-Wahpeton Oyate Codes of Law ch. 23, § 23-10-03, -04, -05 (compiling a potential juror list that includes tribal members, residents of the reservation, full time employees of the tribe, and individuals leasing tribal lands); Pascua Yaqui Tribal Code, 3 PYTC 2-1-160 (pulling potential jurors from tribal members, individuals living in tribal housing, and anyone working for the tribe); Tulalip Tribal Codes, ch. 2.05, § 110 (creating a potential juror list from tribal members and employees of the tribe's casino and Quil Ceda Village, then referencing census data to ensure it reflects a fair cross-section); Confederated Tribes of the Umatilla Indian Reservation, Criminal Code and Procedures, ch. 3, § 3.19 (using county voter registration lists to find and summon potential jurors from any resident of the Umatilla Indian Reservation, regardless of tribal membership).

There has been a similar dramatic shift in Indian country land ownership patterns, originating from the allotment era of federal Indian affairs.<sup>102</sup> Although many tribes were affected by allotment practices decades earlier,<sup>103</sup> allotment policies occurred in full force from 1887 to 1934.<sup>104</sup> During this period, the United States opened up dozens of communally owned Indian reservations to non-Indian ownership.<sup>105</sup> Indian country on those reservations is now heavily checkerboarded, with Indian nations, tribal members, nonmembers, and non-tribal governments owning and controlling large swaths of former Indian reservation lands.<sup>106</sup> Somewhat similarly, landless tribes have benefitted from the Interior Secretary's acquisition of land in trust for Indian nations and individual Indians,<sup>107</sup> but almost by definition those trust lands created more checkerboarding, as the trust lands are islands of tribal and federal jurisdiction surrounded by state and local jurisdiction.

For purposes of this section of the paper, we will use the term "Indian lands" to mean lands that remain in reservation or trust status, and other lands over which Indian nations retain the power to exclude.

## **A. Indian Lands**

There is a lot of confusion about tribal jurisdiction over nonmembers, but a few areas are clear. It is well settled that Indian tribes may assert civil jurisdiction over nonmembers on tribal lands (lands owned or controlled by a tribe) where those nonmembers consent. Many nonmembers have entered into leases, vendor contracts, employment contracts, and any number of other arrangements where they have expressly consented to tribal jurisdiction by agreeing to comply with tribal laws.<sup>108</sup> Data on how many nonmembers have consented and what they have

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<sup>102</sup> The changes in land ownership because of allotment were contemplated by the Supreme Court as early as 1896. *Draper v. United States*, 164 U.S. 240, 246 (1896). See generally Kristin T. Ruppel, *Unearthing Indian Land: Living with the Legacies of Allotment* (2008); Judith V. Royster, *The Legacy of Allotment*, 27 *Az. St. L.J.* 1 (1995).

<sup>103</sup> Earlier approaches to allotment occurred through piecemeal treaties and special acts, but encompassed a broad number of parcels. In the one year prior to the beginning of the formal allotment era, 7,673 separate allotments were made. Dep't of Interior, *Report of the Commissioner of Indian Affairs* 411 (1886). The year before, 1885, at minimum 6,537 allotments were made. Dep't of Interior, *Report of the Commissioner of Indian Affairs* 355 (1885).

<sup>104</sup> These dates are bounded by the 1887 passage of the Dawes Act, also known as the General Allotment Act, Pub. L. No. 49-119, 24 Stat. 387, and the passage of the Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984, in 1934. Centered is the Burke Act of 1906, which allowed the Secretary to take allotments out of trust status prior to the required 25 years prescribed by the Dawes Act, opening the land up to unscrupulous non-Indian land collectors. Pub. L. No. 5-149, 34 Stat. 182.

<sup>105</sup> The Dawes Act included a provision allowing surplus land, land existing after all tribal members had received allotments, to be sold to non-Indians. Dawes Act, § 5, 24 Stat. 389-90.

<sup>106</sup> Cohen's *Handbook of Federal Indian Law* § 1.04 (2012 ed.).

<sup>107</sup> 25 U.S.C. §§ 2201 et. seq; 25 C.F.R. Part 151 (2011).

<sup>108</sup> E.g., *Fine Consulting, Inc. v. Rivera*, 915 F. Supp. 2d 1212, 1217 (D.N.M. 2013) (employment agreement); *Fox Drywall & Plastering, Inc. v. Sioux Falls Const. Co.*, 2012 WL 1457183 (D.S.D., April 26, 2012) (construction contract); *Joseph K. Lumsden Bahweting Public School Academy v. Sault Ste. Marie Tribe of Chippewa Indians*, 2004 WL 2387619 (Mich. Ct. App., Oct. 26, 2004) (lease). Cf. *Smith v. Salish Kootenai College*, 434 F.3d 1127,

consented to is not readily available. Given that Indian tribes administer more than a billion dollars in federal contracts every year, extract billions of natural resources every year from their lands, and operate thousands of business enterprises, it should be apparent that many nonmembers are employed by and doing business with Indian tribes on tribal lands, and under tribal laws and jurisdiction.

It is also fair to say that nonmember activities on tribal lands may be regulated and taxed by Indian tribes without their consent. The Supreme Court held in *Washington v. Colville Confederated Tribes* (cigarettes)<sup>109</sup> and *Merrion v. Jicarilla Apache Tribe* (severance tax)<sup>110</sup> that Indian tribes retain the power to tax nonmember transactions on tribal lands.<sup>111</sup> In *New Mexico v. Mescalero Apache Tribe*, the Court held that tribes have authority to regulate nonmember hunting and fishing on tribal lands.<sup>112</sup> This kind of tribal jurisdiction is usually noncontroversial.

Lacking criminal jurisdiction over non-Indians, many Indian tribes have resorted to imposing civil fines for offenses, typically for traffic offenders and offenses at tribal casino and resort properties, but also for poaching and dumping violations.

It is hotly contested whether nonmembers may be haled into tribal court as defendants to tort claims arising on tribal lands. What we do know is that nonmembers may bring a federal action to challenge tribal court jurisdiction but only after exhausting their tribal remedies.<sup>113</sup> Tribal exhaustion may be excused if the tribal court action is brought to harass defendants, brought in bad faith, is barred by an act of Congress, or is futile. We also know that the so-called Montana test, presumptively barring tribal jurisdiction over nonconsenting nonmembers, is the leading rule.<sup>114</sup>

To date, the Supreme Court in a limited universe of cases has not confirmed tribal court jurisdiction over nonconsenting nonmember defendants, except in dicta. In *Iowa Mutual Ins. Co. v. LaPlante*, a case in which the Court held that nonmembers must fully exhaust their tribal trial and appellate court remedies before challenging tribal court jurisdiction in federal court, the Court stated, “Civil jurisdiction over [nonmember] activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute . . . .”<sup>115</sup> In *Nevada v. Hicks*,<sup>116</sup> the Supreme Court held that tribal courts have no jurisdiction over civil rights claims brought under 42 U.S.C. § 1983 against state officials. The Court affirmed in dicta that, absent a federal statute divesting a tribe of jurisdiction, there was “little doubt” that a tribe

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1134-35 (9th Cir. 2006) (en banc) (nonmember consents when invoking tribal court jurisdiction); *Ford Motor Credit Co. v. Poitra*, 776 F. Supp. 2d 954, 959 (D.N.D. 2011) (same).

<sup>109</sup> 447 U.S. 134 (1980).

<sup>110</sup> 450 U.S. 130, 139 (1982).

<sup>111</sup> See also *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) (inherent power to tax).

<sup>112</sup> 462 U.S. 324, 334-36 (1983).

<sup>113</sup> *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985).

<sup>114</sup> *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

<sup>115</sup> 480 U.S. 9, 18 (1987).

<sup>116</sup> 533 U.S. 353 (2001).

could enforce its tort laws upon nonmembers on tribal lands.<sup>117</sup> But that Court also reserved for another day whether the presumption stated in *Iowa Mutual* was a meaningful precedent.<sup>118</sup>

The Ninth Circuit effectively follows the Supreme Court's statement that tribal jurisdiction over nonmembers on tribal lands is presumptive. In *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 805 (9th Cir. 2011) (per curiam), the court held that an Indian tribe may assert jurisdiction over nonmembers for trespass (and for breach of a lease) on tribal lands on the theory that "the tribe has regulatory jurisdiction through its inherent authority to exclude . . . ." In short, the tribe as landowner and as sovereign has inherent authority to assert jurisdiction, absent controlling federal legislation to the contrary. The Ninth Circuit also held that Montana does not even apply on tribal lands, a holding consisting with the outcomes in cases like *Colville*, *Merrion*, and *Mescalero*, but potentially inconsistent with *Hicks*.

The Fifth Circuit has also approved tribal court jurisdiction over nonmember torts on tribal lands, but applies the more cautious rule, the Montana test. In *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*,<sup>119</sup> the court held that the tribal court had jurisdiction over a tribal member's claim of sexual molestation by the defendant's employee. Other circuits also apply the Montana test, and at least one circuit has held that a tribal court may exercise jurisdiction over nonmember torts committed on tribal lands.<sup>120</sup>

As a practical matter, even absent a Supreme Court ruling confirming tribal jurisdiction over nonmembers on tribal lands, Indian tribes routinely exercise authority over nonmembers. Most of that authority is exercised by consent, but even in cases where nonmembers challenge tribal jurisdiction on tribal lands, tribal jurisdiction is usually confirmed. Nonmembers, after all, must exhaust tribal remedies before they can challenge tribal jurisdiction in federal court.

## **B. Non-Indian Lands**

The general rule announced by the Supreme Court is that Indian tribes do not retain civil jurisdiction over nonmembers on nonmember lands, with two (actually three) exceptions. The Supreme Court announced this test in *Montana v. United States*,<sup>121</sup> where it held that the Crow Nation did not retain authority to impose hunting and fishing regulations on nonmember activities on state or privately-owned lands. The Court also held the Crow Nation did not meet any of the possible exceptions to the general rule. The first exception, usually known as the

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<sup>117</sup> *Id.* at 368 (citing *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 482 n.4 (1999)).

<sup>118</sup> *Hicks*, 533 U.S. at 358 n.2.

<sup>119</sup> 746 F.3d 167, 168 (5th Cir. 2014), *aff'd* by an equally divided court, *Dollar General v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (2016).

<sup>120</sup> E.g., *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 939-41 (8th Cir. 2010) (trespass), *cert. denied*, 562 U.S. 1179 (2011). *Contra MacArthur v. San Juan County*, 497 F.3d 1057, 1069-1070 (10th Cir. 2007) (employment discrimination), *cert. denied*, 552 U.S. 1181 (2008).

<sup>121</sup> 450 U.S. 544, 565 (1981).

consensual relations exception (or the *Montana* 1 exception), provides, “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 dealing, contracts, leases, or other arrangements.”<sup>122</sup> The second exception (or the *Montana* 2 exception) provides, “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 or welfare of the tribe.”<sup>123</sup> There is also a third exception – a tribe may regulate nonmembers in accordance with an “express Congressional delegation.”<sup>124</sup>

In the *Montana* case, nonmembers trying to fish on their own lands (or state lands) on the Crow Reservation did not consent under the first exception and did not implicate any of the critical factors in the second exception. And there was no express Congressional delegation of authority to the tribe to regulate nonmember hunting and fishing. Importantly, the Court “readily agree[d]” that if the Crow Nation was seeking to prohibit or regulate nonmember hunting and fishing on tribal lands, the tribe possessed this authority.<sup>125</sup>

In the decade or more after *Montana*, the Supreme Court addressed several jurisdictional disputes arising on *tribal* lands (cases such as *Colville*, *Merrion*, and *Mescalero*, discussed above) without much reference to *Montana*’s general rule or its exceptions. In 1997, the Court labeled *Montana* as the “pathmarking” precedent in jurisdictional disputes arising on nonmember lands.<sup>126</sup> There, the Court held that the tribal court at what is now known as the Mandan Hidatsa Arikara Nation (then the Three Affiliated Tribes) could not have asserted jurisdiction over a tort claim involving two nonmembers where the alleged accident occurred on a highway maintained and patrolled by the state. The Court held that the highway was not tribal land, and therefore applied the *Montana* test. Because the tribal nation was a “stranger[] to the accident,” the Court concluded that there could have been no consensual relationship between the tribe and the parties.<sup>127</sup> And because the tort claim itself did not implicate the capacity of the tribe to “preserve ‘the right of reservation Indians to make their own laws and be ruled by them,’” the plaintiff could not meet the second exception, either.<sup>128</sup>

In several cases arising on nonmember lands both before and after *Strate*, the Court narrowly construed the *Montana* exceptions and repeatedly refused to confirm tribal civil jurisdiction over nonmembers. In *South Dakota v. Bourland*,<sup>129</sup> the Court held the Cheyenne River Sioux Tribe could not regulate nonmember hunting on nonmember lands taken by the

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<sup>122</sup> Id. at 565.

<sup>123</sup> Id. at 566.

<sup>124</sup> Id. at 564.

<sup>125</sup> Id. at 558.

<sup>126</sup> *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

<sup>127</sup> Id. at 457.

<sup>128</sup> Id. at 459 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

<sup>129</sup> 508 U.S. 679 (1993).



federal government for a dam project. In *Atkinson Trading Co., Inc. v. Shirley*,<sup>130</sup> the Court held that the Navajo Nation had no authority to impose taxes on a nonmember trading post on nonmember lands within the vast Navajo reservation. In *Plains Commerce Bank v. Long Family Land and Cattle Co.*,<sup>131</sup> the Court held that the Cheyenne River Sioux Tribal Court could not assert jurisdiction over a nonmember bank that a tribal jury found had discriminated against a tribal member-owned ranching company, again on nonmember-owned lands.

There are few lower court decisions confirming tribal jurisdiction over tortious nonmember activity on nonmember lands, though many nonmembers have expressly consented to tribal jurisdiction in an agreement of some sort. The most critical cases involve tribal regulation of nonmember point source water polluters under the Clean Water Act.<sup>132</sup> In *State of Montana v. EPA*, the court concurred with EPA's determination that "activities of the nonmembers posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential."<sup>133</sup> As these cases show, nonconsenting nonmembers are likely to avoid tribal jurisdiction unless their activities "imperil" the tribe's ability to self-govern.<sup>134</sup> In *Plains Commerce Bank*, the Court reasoned that the sale of nonmember owned lands to another nonmember "cannot fairly be called 'catastrophic' for tribal self-government."<sup>135</sup> In the morbid world of the *Montana* test, potential environmental devastation may justify tribal authority but mere death and dismemberment of tribal members does not.<sup>136</sup>

#### IV. What to Watch for in Future Cases

The argument in the Dollar General matter may be a preview to future cases involving Congressional affirmation of tribal inherent authority to exercise jurisdiction over nonmembers, and also Congressional delegation of federal power to tribes. Topics at oral argument and in the pleadings included the following:

##### *Supervisory Power of Article III Courts/Removal to Federal Court*

Some Justices expressed concern that a tribal court judgment against a tribal member could not be reviewed on the merits, even in theory, by the United States Supreme Court. The same Justices also seemed concerned that nonmembers would not be able to invoke the right to

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<sup>130</sup> 532 U.S. 645 (2001).

<sup>131</sup> 554 U.S. 316 (2008).

<sup>132</sup> *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), cert. denied, 522 U.S. 965 (1997) (*Pueblo of Isleta*); *State of Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1997) (*Confederated Salish and Kootenai Tribes*), cert. denied, 525 U.S. 921 (1998).

<sup>133</sup> 137 F.3d at 1141.

<sup>134</sup> 554 U.S. at 341.

<sup>135</sup> *Id.* (quoting Cohen's Handbook of Federal Indian Law § 4.02[3][c], at 232, n. 220 (2005 ed.)).

<sup>136</sup> E.g., *Burlington Northern Railroad Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) (two tribal members killed at railroad crossing); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (tribal member injured in car wreck by nonmember), cert. denied, 523 U.S. 1074 (1998).

remove their cases to federal court. These concerns seemed premised on a possible holding that Dollar General had not expressly consented to tribal court jurisdiction, and so express consent might seem to be the correct solution. Moreover, it is not clear how a mere tort claim could arise under federal law, justifying removal.

### *Tribal Juries*

Chief Justice Roberts in particular expressed worry about tribal juries. Justice O'Connor had expressed a similar concern in the *Strate* matter when she asked at oral argument, "Well, how about if it goes to trial in the tribal court and the tribe chooses to use as the jury all the friends and relatives of the victim, and they say, yeah, she's really been injured, and we're going to give a heck of a verdict here . . . ?" The answer, of course, is that tribal law would prohibit that kind of extreme due process violation. Perhaps more salient to federal judges, the due process clause of the Indian Civil Rights Act, 25 U.S.C. § 1302(a)(8), would also prohibit that kind of conduct. The Court in *United States v. Bryant*, 136 S. Ct. 1954, 1966 (2016), was satisfied that ICRA adequately protected criminal defendants' rights in another context. In the worst case scenario, tribal judgments founded on violations of due process would not be enforceable in federal or state courts.<sup>137</sup> Some Justices expressed skepticism that nonmember due process rights would be adequately protected even with these statutes in play.

### *Tribal Law*

The Court has effectively held in cases like *Plains Commerce Bank* that Indian tribes cannot apply customary or traditional law to nonconsenting nonmembers. In that case, the only cause of action (out of several) challenged by the nonmember bank was founded on "Lakota tradition as embedded in Cheyenne River Sioux tradition and custom . . . ."<sup>138</sup> Justice Souter's concurrence in *Nevada v. Hicks* developed the foundation for the concern, arguing that it would be unfair to apply "unfamiliar" tribal law to nonmembers. However, it is now clear that tribal courts do not apply "unfamiliar" tribal customary or traditional law to nonmembers.<sup>139</sup> Justice Souter joined the dissent in *Plains Commerce*, and so he may have been satisfied. Other Justices seemed to have retained their skepticism. Again, tribal law and ICRA would likely bar this result, and tribal judgments would not be enforceable.

### *Tribal Judges/Judicial Independence*

Possibly the oldest (and hoariest) worry about tribal justice is judicial independence. For some, the dominant perception about tribal judges is that they are mere extensions of the tribal political branches. Indian tribes have worked hard to establish statutory separation of powers.

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<sup>137</sup> See generally Matthew L.M. Fletcher, A Unifying Theory of Tribal Civil Jurisdiction, 46 Ariz. St. L.J. 779 (2014).

<sup>138</sup> 554 U.S. 316, 338 (2008).

<sup>139</sup> Matthew L.M. Fletcher, Toward a Theory of Intertribal and Intratribal Common Law, 43 Houston L. Rev. 701 (2006).

Even better, tribes have moved a long way toward professionalizing their judiciaries, which is the strongest protection of judicial independence.<sup>140</sup> Once again, tribal law and ICRA will likely prevent extreme results, and tribal judgments procured by conflicted or biased courts would not be enforceable.

### *Punitive Damages*

Dollar General made much of the claim for punitive damages made by the plaintiffs, and some Justices echoed this concern. The Roberts Court intervened into the field of punitive damages in federal and state courts, applying a substantive due process analysis to restrict punitive damages awards.<sup>141</sup> Since the Dollar General claim had not yet gone before a trial court on the merits, we know nothing about the merits. But if there are concerns with punitive damages, one would think that tribal law and ICRA would offer adequate protections. And, again, extreme tribal judgments would be unenforceable.

Still, punitive damages share elements of the punitive character of criminal law. And since tribal governments have no power to prosecute non-Indians (outside of the domestic violence jurisdiction in 25 U.S.C. § 1304), this is an area that is likely to arouse even more skepticism from the Court.

### *Congressional Power to Recognize Tribal Inherent Authority or Delegate Federal Power to Tribes*

In the years to come, it is likely that the Supreme Court will be asked to review a tribal court conviction of a non-Indian under the domestic violence jurisdictional provisions of the Violence Against Women Act, 25 U.S.C. § 1304. It is also possible, if unlikely, that Congress may enact a statute expressly recognizing broader tribal civil jurisdiction over nonmembers. In such circumstances, the Court will most certainly review federal legislative jurisdiction to enact Indian affairs statutes. All of the concerns expressed above may be in play, as well as the sources of Congressional power.<sup>142</sup> This is no place to parse through that discussion, but when it happens before the Court, it could have almost existential significance for Indian tribes.

### *Federal Statutes of General Applicability*

Another controversial area in federal Indian law affected by tribal inherent authority involves federal statutes of general application – in other words, federal statutes that are silent as to their applicability to Indian tribes. The lower courts usually follow a common law test announced by the Ninth Circuit in addressing these questions, usually referred to as the *Coeur*

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<sup>140</sup> Matthew L.M. Fletcher, Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited, 84 U. Colo. L. Rev. 59 (2013).

<sup>141</sup> Phillip Morris USA v. Williams, 549 U.S. 346 (2007).

<sup>142</sup> The leading article on the federal power over Indian affairs probably is Gregory Ablavky, Beyond the Indian Commerce Clause, 124 Yale L.J. 1012 (2015).

*d'Alene* test, after *Donovan v. Coeur d'Alene Tribal Farm*.<sup>143</sup> Scholars have criticized that test,<sup>144</sup> and one federal judge agrees, arguing that the judge made test rests on a house of cards.<sup>145</sup>

If analyzed under the rubric of statutory divestiture, the courts should look to whether the federal law and the tribal law can coexist. In the case of an environmental statute, it seems at least plausible that federal and tribal regimes could be inconsistent, leading to problems in managing an ecosystem that does not respect government boundaries. In the case of a labor and employment statute, however, there is no interconnected national or regional regime at stake, suggesting that inconsistent tribal and federal laws can coexist. The Tenth Circuit has adopted this analysis.<sup>146</sup>

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<sup>143</sup> 751 F.2d 1113 (9th Cir. 1985).

<sup>144</sup> E.g., Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 Mich. St. L. Rev. 435; Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. Rev. 691 (2004); Kaighn Smith, Jr., *Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations within the Reservations*, 2008 Mich. St. L. Rev. 505.

<sup>145</sup> *NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537, 557-58 (6th Cir. 2015) (McKeague, C.J., dissenting), cert. denied, 136 S.Ct. 2508 (2016).

<sup>146</sup> *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002).

## **Appendix of Federal Appellate Cases Involving Tribal Civil Jurisdiction over Nonmembers**

### **I. Jurisdiction**

#### **Cases finding tribal jurisdiction over nonmembers on Indian lands**

Kerr-McGee v. Navajo Tribe, 471 U.S. 195 (1985) (tax)

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (hunting and fishing regulations)

Merrion v. Jicarilla Apache Tribe, 455 U.S. 139 (1982) (tax)

Washington v. Colville Confederated Tribes, 447 U.S. 134 (1980) (tax)

Soaring Eagle Casino and Resort v. NLRB, 791 F.3d 648 (6th Cir. 2015) (labor relations ordinance, dicta)

Dolgenercorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014), aff'd by equally divided court, 136 S.Ct. 2159 (2016) (tort claim against store leasing trust lands)

Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802 (9th Cir. 2011) (holding Montana does not apply on Indian lands)

Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa, 609 F.3d 927 (8th Cir. 2010) (trespass claim against contractor)

Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir. 2006) (en banc) (tort claim against nonmember Indian)

Burlington Northern Santa Fe R. Co. v. Assiniboine and Sioux Tribes of Fort Peck Reservation, 323 F.3d 767 (9th Cir. 2003) (tribal tax on railroad, but only allowing tribe time to make argument on impact of railroad on tribe)

McDonald v. Means, 309 F.3d 530 (9th Cir. 2002) (tort claim on BIA reservation road)

State of Montana v. Bremner, 152 F.3d 929, 1998 WL 385442 (9th Cir. 1998) (contract claim against state)

Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985) (civil exclusion)

Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983) (tribal regulations governing self-help repossession)

Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen, 665 F.2d 951 (9th Cir. 1982) (land use regulations on tribally owned lake)

#### **Cases finding tribal jurisdiction over nonmembers on non-Indian lands**

Brendale v. Yakima Confederated Tribes, 492 U.S. 408 (1989) (land use regulations on “closed” area of reservation)

Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001) (en banc) (land use regulation authorized pursuant to Congressional ratification of tribal governing documents)

Arizona Public Service Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000) (environmental regulation authorized by Clear Air Act)

City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996), cert. denied, 522 U.S. 965 (1997) (water quality regulations authorized by Clear Water Act);

State of Montana v. EPA, 137 F.3d 1135 (9th Cir. 1997), cert. denied, 525 U.S. 921 (1998) (water quality regulations authorized by Clear Water Act)

Pittsburg & Midway Coal Min. Co. v. Watchman, 52 F.3d 1531 (9th Cir. 1995) (tax on mining company, remanded for further factual determinations)

City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993) (tribal liquor tax authorized by federal law)

FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990) (TERO)

Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982) (tribal health regulations on grocery store)

Knight v. Shoshone and Arapahoe Indian Tribes of Wind River Reservation, 670 F.2d 900 (10th Cir. 1982) (zoning)

### **Cases not finding tribal jurisdiction over nonmembers on Indian lands**

Nevada v. Hicks, 533 U.S. 353 (2001) (Section 1983 claim against state officers)

El Paso Natural Gas v. Neztosie, 526 U.S. 473 (1999) (tort claim preempted by federal law)

Dolgenercorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014) (tort claim against store manager on trust lands)

Attorney’s Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa, 609 F.3d 927 (8th Cir. 2010) (conversion claim against contractor)

County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998) (law enforcement cooperative agreement precluded tribal court jurisdiction over tort claims against state officers)

Yellowstone County v. Pease, 96 F.3d 1169 (9th Cir. 1996) (no tribal court jurisdiction to decide whether county could tax Indian lands held in fee)

Arizona Public Service Co. v. Aspaas, 77 F.3d 1128 (9th Cir. 1995) (tribe waived authority to regulate nonmembers)

**Cases not finding tribal jurisdiction over nonmembers on non-Indian lands**

Plains Commerce Bank v. Long Family, 554 U.S. 316 (2008) (contract and tort claims)

Atkinson Trading v. Shirley, 532 U.S. 645 (2001) (tax)

South Dakota v. Bourland, 508 U.S. 679 (1993) (hunting and fishing regulations)

Brendale v. Yakima Confederated Tribes, 492 U.S. 408 (1989) (land use regulations on “open” area of reservation)

Montana v. United States, 450 U.S. 544 (1981) (hunting and fishing regulations)

EXC Inc. v. Jensen, 558 Fed.Appx. 720 (9th Cir. 2014) (tort claim arising on state highway)

Jackson v. Payday Financial, LLC, 764 F.3d 765 (7th Cir. 2014) (off-reservation payday lending forum selection clause)

Evans v. Shoshone-Bannock Land Use Policy Commission, 736 F.3d 1298 (9th Cir. 2013) (land use regulation imposed on nonmember on fee simple lands)

Town Pump, Inc. v. LaPlante, 394 Fed. Appx. 425 (9th Cir. 2010) (tribal regulation of nonmember gas station)

Nord v. Kelly, 520 F.3d 848 (8th Cir. 2008) (tort claim)

Boxx v. Long Warrior, 265 F.3d 771 (9th Cir. 2001) (tort claim)

Burlington Northern R. Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999) (tort claim against railroad)

State of Mont. Dept. of Transp. v. King, 191 F.3d 1108 (9th Cir. 1999) (TERO jurisdiction on state highway)

Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997) (tort claim on state highway)

**Cases not finding tribal jurisdiction over nonmembers where land ownership unknown or mixed**

Belcourt Public School District v. Davis, 786 F.3d 653 (8th Cir. 2015) (employment claims against public school district)

Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B., 786 F.3d 662 (8th Cir. 2015) (same)

Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140 (10th Cir. 2011) (off-reservation based attorney conduct before tribal court)

MacArthur v. San Juan County, 497 F.3d 1057 (10th Cir. 2007) (employee claims of state special service district)

Big Horn County Elec. Co-op., Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000) (tax on railroad)

Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998) (tort claims against off-reservation malt liquor seller)

State of Montana v. Gilham, 133 F.3d 1133 (9th Cir. 1998) (state immune from tort claim)

Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994) (tort claim)

## **II. Exhaustion**

### **Cases requiring exhaustion**

Iowa Mutual v. LaPlante, 480 U.S. 9 (1987)

National Farmers Union v. Crow Tribe, 471 U.S. 845 (1985)

Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation, 862 F.3d 1236 (10th Cir. 2017) (trespass claim against state police officers)

Window Rock Unified School District v. Reeves, 861 F.3d 894 (9th Cir. 2017) (tribal labor commission jurisdiction over public school employment)

Thlopthlocco Tribal Town v. Stidham, 762 F.3d 1226 (10th Cir. 2014)

DISH Network Service L.L.C. v. Laducer, 725 F.3d 877 (8th Cir. 2013) (abuse of process claim against off-reservation provider by customer on Indian lands)

Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc., 715 F.3d 1196 (9th Cir. 2013) (rejection of bad faith exception claim)

Rincon Mushroom Corp. v. Mazzetti, 490 Fed. Appx. 11 (9th Cir. 2012) (tribal regulation of business on Indian lands)

Lanphere v. Wright, 387 Fed. Appx. 766 (9th Cir. 2010) (challenge to tribal tax collection)

Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842 (9th Cir. 2009) (tort claim against nonmember who burned timber on Indian lands)

Ford Motor Co. v. Todecheene, 488 F.3d 1215 (9th Cir. 2007) (products liability claim brought by tribal police officer)



Allstate Indem. Co. v. Stump, 191 F.3d 1071 (9th Cir. 1999) (bad faith insurance claim)

Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997) (tort claim against uranium company; likely no longer good law because of *Neztsosie*)

Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994) (tax)

Texaco, Inc. v. Zah, 5 F.3d 1374 (10th Cir. 1993) (tax)

A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986) (contract claim)

### **Cases not requiring exhaustion**

Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation, 862 F.3d 1236 (10th Cir. 2017) (false imprisonment, false arrest, assault and battery, wrongful death, spoliation of evidence, and conspiracy claims against state police officers)

Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians, 807 F.3d 183 (7th Cir. 2015) (forum selection clause)

Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc., 569 F.3d 932 (9th Cir. 2009) (off-reservation defendant doing business on Indian lands)

BNSF Ry. Co. v. Ray, 297 Fed. Appx. 675 (9th Cir. 2008) (tort claim against railroad company)