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Tribal Court Jurisdiction and the Exhausting Nature of Federal Court Interference

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[A]djudication of matters impairing reservation affairs by any nontribal court . . . infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.

–RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 28 cmt. a (AM. L. INST. 2022)

I. INTRODUCTION

It is a general principle of federal Indian law that matters of tribal law should properly be interpreted by tribal courts. However, when it comes to questions of tribal jurisdiction, as a matter of federal common law, the United States Supreme Court imagined the authority to review tribal court determinations of jurisdiction. With this authority, the United States Supreme Court simultaneously created the tribal exhaustion doctrine, which established that tribal courts should have the first opportunity to evaluate the factual and legal bases for a challenge to their own jurisdiction.

This Article examines an overview of tribal court jurisdictional cases alongside their correlating federal court decisions to analyze the efficacy of the tribal exhaustion doctrine. Part I of this Article provides a brief introduction. Part II provides an overview of background doctrines including tribal sovereignty, tribal self-government, and the tribal exhaustion doctrine. Part III of this Article examines the principles of jurisdiction. For a basis of comparison, this Article first sets out traditional tribal law principles of jurisdiction. As an example of intertribal common law, tribal customary law jurisdictional principles can provide an example of how Tribal Nations can define their own interpretations of law and jurisdiction. Second, the Article provides an overview of how federal courts have determined tribal jurisdiction. Using tribal law and federal decisional law, Part IV analyzes how the principles of traditional tribal law are being balanced with the principles of federal Indian law in tribal law jurisdictional cases considering the tribal exhaustion doctrine. Part V shows that, in some instances, federal court review directly influences tribal court analysis. Such influence infringes on tribal sovereignty and self-government. To avoid such infringement, tribal courts deserve the recognition of their sovereignty ahead of and apart from federal court review of tribal court jurisdiction. Tribal courts should be proactive. Tribal courts can define tribal jurisdiction from a tribal perspective in tribal court opinions. Tribal courts can ensure that their analysis is not being constrained by federal court determinations of tribal customary principles. Lastly, this final Part calls on Congress to exercise its power to strip the federal courts of federal common law jurisdiction over tribal court matters, and to fully embrace tribal court determinations of their

own tribal customary law jurisdictional principles, furthering tribal self-government and self-determination.

II. BACKGROUND DOCTRINES

This Part provides a background overview of federal Indian law doctrines, including tribal sovereignty, tribal self-government, and tribal exhaustion.

A. Tribal Sovereignty

Inherent tribal sovereignty marks our starting point, for it underlies the exercise of tribal jurisdiction. As Vine Deloria, Jr. explained, the notions and principles embedded in the concept of sovereignty are an ancient idea.[1] Tribes are sovereigns that pre-existed the establishment of the United States and the development of federal Indian law.[2] As a result,

> [p]erhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather "inherent powers of a limited sovereignty which has never been extinguished."[3]

As the Hon. William D. Johnson, Chief Judge of the Umatilla Tribal Court, explained, "[t]he flame of sovereignty continues to burn through oral traditions given to us throughout time. This is our true law—our language, tradition, and custom."[4]

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1. VINE DELORIA, JR., AM. INDIAN POL'Y CTR., TRIBAL SOVEREIGNTY AND AMERICAN INDIAN LEADERSHIP (2002).

2. Kekek Jason Stark et al., *Re-Indigenizing Yellowstone*, 22 WYO. L. REV. 397, 412 (2022) ("Indigenous nations exercised their sovereign powers prior to the arrival of Europeans in North America."); *see also* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973) ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."); Talton v. Mayes, 163 U.S. 376, 384 (1896) ("[A]s the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government."); United States v. Bryant, 579 U.S. 140, 149-50 (2016) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978))).

3. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a] (Nell Jessup Newton ed., 2019) [hereinafter COHEN'S HANDBOOK] (quoting United States v. Wheeler, 435 U.S. 313, 322-23 (1978)).

4. Gregory S. Arnold, *Hon. William D. Johnson Chief Judge, Umatilla Tribal Court Confederated Tribes of the Umatilla Indian Reservation, Pendleton, Oregon*, FED. LAW (April 2015).

An integral aspect of inherent tribal sovereignty is the authority to control conduct within the sovereign's territory.[5] As a result, Indian tribes generally retain the power to govern themselves and to control internal relations.[6] Therefore,

> [c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact."[7]

This understanding is reinforced by the reserved rights doctrine that establishes that treaties solidified Indian rights, including inherent rights of sovereignty, because "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[8]

B. Tribal Self-Government

In the furtherance and recognition of tribal sovereignty, the federal government has encouraged the policy of advancing and supporting tribal self-government.[9] The policy of promoting tribal self-government "reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' to the extent that sovereignty has not been withdrawn by federal statute or treaty."[10] The goal of promoting tribal self-government has been incorporated in countless federal statutes.[11] The culmination of these statutes embody our current time

5. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15, 19 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."); *see also* Montana v. United States, 450 U.S. 544, 565-66 (1981); Washington v. Confederated Tribes, 447 U.S. 134, 152-53 (1980); Fisher v. District Ct., 424 U.S. 382, 387-89 (1976).

6. *Wheeler*, 435 U.S. at 326.

7. *Iowa Mut. Ins. Co.*, 480 U.S. at 18, 20 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982)).

8. United States v. Winans, 198 U.S. 371, 381 (1905).

9. *Iowa Mut. Ins. Co.*, 480 U.S. at 14 ("We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government."); *see also* Three Affiliated Tribes v. Wold Engineering, P.C., 476 U.S. 877, 890 (1986); *Merrion*, 455 U.S. at 138 n.5; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44, 144 n.10 (1980); Williams v. Lee, 358 U.S. 217, 220-21 (1959).

10. *Iowa Mut. Ins. Co.*, 480 U.S. at 14 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).

11. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 (1983) ("[B]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes."); COHEN'S HANDBOOK, *supra* note 3, § 4.01[1][c] ("Since the 1960s Congress has demonstrated consistent and strong support for tribal sovereignty. Illustrative statutes from the 1960s and 1970s include the Indian Civil Rights Act of 1968, the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975, and the Indian Child Welfare Act. More recent examples of Congress's continuing commitment to strengthening and

period in what many refer to as the era of tribal self-determination.[12]

An integral aspect of furthering the policy of tribal self-determination is the recognition that tribes retain the sovereign power to determine their own forms of government.[13] Included in these forms of government is the necessity to build capacity and the infrastructure necessary to carry out tribal governmental functions.[14] One such governmental function is the establishment of tribal courts and the recognition that "tribal courts play a vital role in tribal self-government."[15] In the furtherance of this vital role is the "development of the entire tribal court system, including appellate courts."[16]

C. Tribal Exhaustion

It is a general principle of federal Indian law that matters of tribal law should be interpreted by tribal courts.[17] As the Sixth Circuit Court of

supporting tribal self-government include the Tribal Self-Governance Act, the Indian Law Enforcement Reform Act, the Tribal Law and Order Act, and the 2013 reauthorization of the Violence Against Women Act. In addition, congressional recognition of tribal authority is reflected in statutes requiring that various administrative acts of the President or the Department of the Interior be carried out only with the consent of the Indian tribe, its head of government, or its council.").

12. COHEN'S HANDBOOK, *supra* note 3, § 1.07 ("Self-determination operates on many fronts to promote the practical exercise of inherent sovereign powers possessed by Indian tribes.").

13. *Id.* § 4.01[2][a] ("A quintessential attribute of sovereignty is the power to constitute and regulate its form of government.").

14. *Id.* § 1.07 ("A major task of the self-governance era has been to create new structures for decision making and program administration at the tribal level. The concept and operation of a self-determination and self-government policy runs counter to many of the long-established bureaucratic ways of the Department of the Interior, the Bureau of Indian Affairs, and tribal governments as well. . . . The two major acts of self-governance policy declaration and implementation have been the Indian Self-Determination and Education Assistance Act of 1975, and the Tribal Self-Governance Act of 1994. The 1975 legislation was the result of tribal efforts to bring Indian participation to federal programs that previously had been run almost exclusively by the Bureau of Indian Affairs. This Act allowed tribes to contract to run health, education, economic development, and varied social programs themselves. The 1994 legislation was the culmination of the successful 1988 Tribal Self-Government Demonstration Project, which had provided selected Indian nations with block grants and far greater budgeting authority. In making self-governance compacts available to all tribes, the 1994 Act sets forth specific tribal eligibility criteria, under which the number of self-governance tribes has continued to grow. In many ways these acts have been a declaration of independence for tribal governments. They have provided a chance for tribal governments to govern.").

15. *Iowa Mut. Ins. Co.*, 480 U.S. at 14-15.

16. *Id.* at 16-17.

17. *Id.* at 19; Navajo Nation v. Intermountain Steel Bldgs., Inc., 42 F. Supp. 2d 1222, 1229-30 (D.N.M. 1999) ("It is difficult to conceive how tribal self-government and self-determination will be advanced by the exercise of federal court jurisdiction over a matter involving the Navajo Nation, a Navajo commercial entity, and a contract between these Navajo parties and a non-Indian defendant to construct a Navajo-owned building located on Navajo land within the boundary of the Navajo Nation. This is especially true because the parties disagree about the applicability of Navajo law and custom. . . . There is no reason to believe that the courts of the Navajo Nation would not be able to properly address the parties' dispute. To support tribal self-government, the Navajo tribal courts should be given the opportunity to do so. . . . Moreover, if the Navajo Tribal Court reached the merits of the action, a federal

Appeals articulated, quoting the United States Supreme Court in *Iowa Mutual Insurance Co. v. LaPlante*,[18] "Ordinarily, we defer to tribal court interpretations of tribal law 'because tribal courts are best qualified to interpret and apply tribal law.'"[19] As a result of this premise, the tribal exhaustion doctrine establishes that a tribal court should have the first opportunity to evaluate the factual and legal bases for a challenge to its own jurisdiction.[20] This exhaustion requirement includes any appellate review by a tribal court.[21] Some courts have even held that "[e]xhaustion of tribal remedies is 'mandatory.'"[22]

The tribal exhaustion doctrine was established in the case *National Farmers Union Insurance Companies v. Crow Tribe of Indians*.[23] The case originated from a tribal court action entitled *Sage v. Lodge Grass School District*.[24] In this matter, Leroy Sage, an enrolled member of the Crow Tribe and a fifth grader at Lodge Grass Elementary School, suffered injuries when he was struck by a motorcycle in the school parking lot while his class was returning from a school picnic.[25] The school was a

court would have the benefit of the Navajo Tribal Court's prior interpretation of Navajo law and customs that may apply to this case.").

18. 480 U.S. at 16-17 ("Although petitioner alleges that federal jurisdiction in this case is based on diversity of citizenship, rather than the existence of a federal question, the exhaustion rule announced in *National Farmers Union* applies here as well. Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.' In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law. As *National Farmers Union* indicates, proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors.' The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts." (quoting National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985)).

19. Kelsey v. Pope, 809 F. 3d 849, 864 (6th Cir. 2016) (quoting *Iowa Mut. Ins. Co.*, 480 U.S. at 16); *see also* United States v. Wheeler, 435 U.S. 313, 332 (1978) (recognizing that "tribal courts are important mechanisms for protecting significant tribal interests"); Water Wheel Camp Recreational Area, Inc. v. Larance, 642 F.3d 802, 808 (9th Cir. 2011); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990).

20. National Farmers Union Ins. Cos., 471 U.S. at 856-57.

21. *Iowa Mut. Ins. Co.*, 480 U.S. at 17; Elliot v. White Mountain Apache Tribal Court, 566 F.3d 842, 847 (9th Cir. 2009); Davis v. Mille Lacs Band of Chippewa Indians, 193 F.3d 990, 992 (8th Cir. 1999).

22. Marceau v. Blackfoot Hous. Auth., 540 F.3d 916, 920-21 (9th Cir. 2008) (quoting Burlington N. R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1245 (9th Cir. 1991)); Stock West Corp. v. Taylor, 964 F.2d 912, 919-20 (9th Cir. 1992); Wellman v. Chevron U.S.A., Inc., 815 F.2d 577 (9th Cir. 1987); Texaco, Inc. v. Zah, 5 F.3d 1374, 1378 (10th Cir. 1993).

23. National Farmers Union Ins. Cos., 471 U.S. at 856-57.

24. Sage v. Lodge Grass Sch. Dist., 10 Indian L. Rep. 6019 (1982).

25. *Id.* at 6019. ("The plaintiff was injured severely, and sustained damages consisting of a compound, commuted fracture of the right tibia and fibula together with facial abrasions; the leg was set with four AO screw; plaintiff is now in a cast for over five months, and has endured great pain and

Montana public school operated on fee-patent land owned by the Lodge Grass School District, and was located within the exterior boundaries of the Crow Indian Reservation.[26] The complaint filed against the school district alleged that the district's negligence was the proximate cause of the minor's injuries.[27] The court entered a default judgment in the matter.[28] Eight days later, the school district filed for a preliminary injunction and temporary restraining order in the United States District Court for the District of Montana.[29] The district court enjoined the enforcement of the default judgement, holding that the tribal court lacked jurisdiction "over the tort that was the basis of the default judgment."[30] In doing so, the district court determined that it had "acquir[ed] jurisdiction by way of federal common law."[31] The United States Court of Appeals for the Ninth Circuit reversed, concluding that the insurance company "may not assert its claim as one arising under common law."[32] The United States Supreme Court reversed the Ninth Circuit, imagining the authority to review tribal court determinations of jurisdiction.[33] In doing so, the

suffering, developed a phobia of cars and motorcycles, has experienced reoccurring nightmares, and can no longer participate in sports and other physical activities with his peers . . . .").

26. *Id.*

27. *Id.* ("The defendant school district, in violation of 10.53.503 (1) Administrative Rules of Montana, negligently constructed a fence at the perimeter of the School by placing the pedestrian entrance in such a position as to require students to cross a paved area that serves as a driveway, unloading area for buses, and parking lot when they attempted to enter the elementary school; Defendant School District in violation of 10.53.503 (1) and 16.10.1102 (d) Administrative Rules of Montana, negligently failed to provide safe and suitable sidewalks for students when they attempted to enter the elementary school.").

28. *Id.* at 6020.

29. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 560 F. Supp. 213, 214 (D. Mont. 1983).

30. *Id.* at 214-218.

31. *Id.* at 215.

32. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d. 1320, 1323-24 (9th Cir. 1984) ("In asking that we recognize a civil cause of action arising under federal common law, National is requesting that we supplement a remedy Congress intended to be exclusive [pursuant to the Indian Civil Rights Act], and that we do so without statutory authority. The judicial recognition of a cause of action arising under federal common law is an unusual course, to be approached cautiously. In view of Congress's manifest purpose to limit the intrusion of federal courts upon tribal adjudication, we decline to recognize a common law cause of action in addition to the limited remedies available under the ICRA. We conclude that National may not assert its claim as one arising under common law. National's complaint must be dismissed for failure to state a claim for federal relief. The district court was rightly concerned that there must be a 'proper forum wherein the extent of tribal court jurisdiction can be determined . . . .' However, the proper forum for this determination, at least in the first instance, is not a federal court but a tribal court." (citations omitted)).

33. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985) ("Our conclusions that § 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction, and that exhaustion is required before such a claim may be entertained by a federal court, require that we reverse the judgment of the Court of Appeals. Until the petitioners have exhausted the remedies available to them in the Tribal Court system, it would be premature for a federal court to consider any relief" (citations omitted)); *see infra* Part III.B for additional discussion on the federal common law cause of action.

United States Supreme Court simultaneously created the tribal exhaustion doctrine, which established that tribal courts should have the first opportunity to evaluate the factual and legal bases for a challenge to its own jurisdiction.[34]

Pursuant to *National Farmers Union*, tribal exhaustion is required to ensure certain tribal court interests are advanced, including: "(1) supporting tribal self-government and self-determination; (2) promoting the 'orderly administration of justice in the federal court by allowing a full record to be developed in the Tribal Court;' and, (3) providing other courts with the benefit of the tribal courts' expertise in their own jurisdiction."[35] In furtherance of the tribal exhaustion doctrine, a federal court will generally not review a case on its merits and will instead focus solely on the issue of tribal court jurisdiction and whether all tribal remedies have been exhausted.[36]

There are exceptions to the tribal exhaustion doctrine, as established by the United States Supreme Court.[37] These exceptions to the requirement for exhaustion of tribal court remedies are as follows:

> (1) [A]n assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by" *Montana*'s main rule.[38]

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34. *Id.* at 856-857 ("We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover, the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of 'procedural nightmare' that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." (citations omitted)); *see also* Sage v. Lodge Grass School District, 13 Indian L. Rep. 6035 (1986). On remand, the Crow Court of Appeals concluded "that the Crow Tribal Court has jurisdiction to adjudicate the controversy between a tribal member and a non-Indian school district." *Id.* at 6040. Applying the test established by the Supreme Court in *Montana* the Crow Court of Appeals determined that the School District entered consensual transactions with the Crow Tribe and that the actions complained of affect the health, welfare and economic interests of the Crow Tribe. *Id.* at 6038-39.

35. Hengle v. Asner, 433 F. Supp. 3d 825, 860 (E.D. Va. 2020) (citing *National Farmers Union Ins. Cos.*, 471 U.S. at 856-57).

36. Sibley v. Indian Health Servs., No. 95-35939, 1997 U.S. App. LEXIS 6709, *3 (9th Cir. Feb. 7, 1997).

37. *National Farmers Union Ins. Cos.*, 471 U.S. at 856 n.21.

38. Burlington N. R.R. v. Red Wolf, 196 F.3d 1059, 1065 (9th Cir. 1999) (citations omitted) (citing

In spite of these exceptions to the tribal exhaustion doctrine, the Restatement of the Law of American Indians clearly provides: "[A]djudication of matters impairing reservation affairs by any nontribal court . . . . infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law."[39] For courts to even question the basis of tribal law and its application is an extension of the assimilative policies[40] of the past and is an infringement on inherent tribal sovereignty and the right for tribes to be self-governing.[41]

III. TRIBAL JURISDICTION

In furtherance of tribal sovereignty, tribal self-government, and the tribal exhaustion doctrine, this Part examines the principles of jurisdiction. Very little has academic scholarship has been done considering how tribes define their own principles of jurisdiction. In response, for basis of comparison, this Article first sets out traditional tribal law principles of jurisdiction. As an example of intertribal common law, tribal customary law jurisdictional principles provide an example of how tribal nations can define their own interpretations of law as a basis for determining jurisdiction. This Part also provides an overview of how federal courts have determined tribal jurisdiction.

Montana v. United States, 450 U.S. 544, 576-77 (1981)); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18-19 (1987) ("Petitioner also contends that the policies underlying the grant of diversity jurisdiction—protection against local bias and incompetence—justify the exercise of federal jurisdiction in this case. We have rejected similar attacks on tribal court jurisdiction in the past. The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers Union*, and would be contrary to the congressional policy promoting the development of tribal courts. Moreover, the Indian Civil Rights Act, 25 U.S.C. § 1302, provides non-Indians with various protections against unfair treatment in the tribal courts." (citations omitted)).

39. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 28 cmt. a (AM. L. INST. 2022).

40. United States v. Clapox, 35 F. 575, 576-77 (1888). The Oregon district court acknowledged:

> These "courts of Indian offenses" are not the constitutional courts provided for in section 1, art. 3, Const., which congress only has the power to "ordain and establish," but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.

Id. at 577. The curriculum established by the U.S. included punishment for certain "'Indian offenses,' such as the 'sun,' the 'scalp,' and the 'war dance,' polygamy, 'the usual practices of . . . selling Indian women for the purpose of cohabitation." *Id.* at 576.

41. *National Farmers Union Ins. Cos.*, 471 U.S. at 856 n.21. See Part IV for additional discussion on how the principles of traditional tribal law are being balanced with the principles of federal Indian law in tribal law jurisdictional cases considering the tribal exhaustion doctrine.

A. Determining Tribal Jurisdiction Pursuant to Tribal Customary Law

The vital component embodying jurisdiction from a tribal customary law perspective is the rule of reciprocal relationships.[42] The crux of this rule is that tribal cultural values are reciprocally embedded within traditional tribal law and have the goal of achieving harmony.[43] As a result, pursuant to tribal customary law, relationship protocols based upon kinship obligations provide consent to regulate how individuals are supposed to conduct themselves in relationship with others, as well as how they are supposed to act according to the laws of the territory. This is because embedded in indigenous kinship systems are ways of relating—that is, how to act in relationship with one another. Also included in this principle is that the ways of relating are mirrored and extend to tribal traditional territories. For many tribes, these obligations are reserved in their treaties in the establishment of their reservations as permanent homelands.

1. Reciprocal Relations

Tribal kinship relationships embody the existence of responsibilities of conduct with respect to clan, family, and other extended relationships. As a result, tribal kinship systems coupled with kinship obligations establish a complex system of tribal organization.[44] It is through these kinship systems that indigenous communities learned how to live according to societal and kinship norms and achieve harmony within the tribal nation through indigenous traditional governance structure.[45] The principles of jurisdiction are rooted in this complex system of tribal organization.[46] Each person was responsible for contributing to the general welfare of the family, village, territory, and nation.[47]

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42. Mathew L.M. Fletcher, *Due Process and Equal Protection in Michigan Anishinaabe Courts*, MICH. STATE L. REV. (Jan. 22, 2023), https://www.michiganstatelawreview.org/vol-20222023/2023/1/22/due-process-and-equal-protection-in-michigan-anishinaabe-courts.

43. Kekek Jason Stark, *Anishinaabe Inaakonigewin: Principles for the Intergenerational Preservation of Mino-Bimaadiziwin*, 82 MONT. L. REV. 293 (2021).

44. ELLA DELORIA, SPEAKING OF INDIANS 24-38 (1998); HEIDI BOHAKER, DOODEM AND COUNCIL FIRE: ANISHINAABE GOVERNANCE THROUGH ALLIANCE 90 (2020) ("The doodem tradition shaped self-conception and political actions, law, and governance practices.").

45. DELORIA, *supra* note 44, at 17-26; Restoule v. Canada, 2018 ONSC 7701, Elder Kelly Tr., Vol. 21 at 2866-67, 2934 (Nov. 1, 2017).

46. RUTH LANDES, OJIBWA SOCIOLOGY 31-52 (AMS Press 1969); DELORIA, *supra* note 44, at 17-26.

47. BASIL JOHNSTON, OJIBWAY HERITAGE 61 (1990). The Anishinaabe *doodem* (clan) system uses various animals as symbols for the clans. *Id.* at 60. The animals' characteristics provide an identity and define roles and responsibilities for members of each *doodem* including the following functions of traditional Anishinaabe society: leadership, defense, hunting, learning, and medicine. *Id.*

In many tribal societies, tribal kinship systems include both lineal and lateral relatives.[48] There are many ways that an individual can become incorporated within the tribal kinship systems: by birth, long time residence, adoption, intermarriage, and assimilation.[49] As a result, tribal kinship systems encompass a vast expanse of people denoted as relatives while also providing social responsibilities and guidelines for all members of the familial unit and community to abide by.[50] In this way, community members are compelled to adhere to kinship and societal norms.[51] This is because the rules of tribal law systems are "embedded in a matrix of social relationships."[52] Therefore, social relationships define how a person is to act.[53]

The responsibility and obligation to act according to societal and kinship norms was summarized by Vine Deloria Jr. as follows:

> [T]here once was a small group in nature . . . and this group recognized the value of relatives. So they said, "We're going to have a society of responsibility. In order to belong to this tribe you have to do certain things. You have to treat your relatives a certain way, you have to treat society at large a certain way. You have to feed the poor, you have to take care of the orphans, [and] provide for the elders."[54]

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48. LANDES, *supra* note 46, at 31-52 (1969). For example, the brothers of a child's father are considered to be the child's fathers as well. *Id.* Likewise, a child's mother's sisters are also the child's mothers. *Id.* The cross siblings then become the child's aunts and uncles. *Id.* The father's brother's sons are the child's brothers, and the mother's sister's daughters are the child's sisters. *Id.* The kinship network also entails complex levels of cross and parallel cousins. *Id.*

49. Kimberly Tallbear, *DNA, Blood, and Racializing the Tribe*, 18 WICAZO SA REV. 81, 93 (2003); MATTHEW L.M FLETCHER, FEDERAL INDIAN LAW 366 (2016) ("The demand for reservation resources brought many American citizens to Indian country seeking access to reservation assets. Here, too, non-Indians had several options and strategies for accessing Indian markets, and usually accepted some form of tribal regulation in bargaining for access. For example, American citizens, sometimes armed with a federal trader license and sometime not, often used intermarriage to form the kinship ties necessary to access the fur trade. It was an old tactic, if not ritual going to the 16th and 17th centuries when the French began marrying Anishinaabe women.").

50. EDWARD BENTON-BENAI, THE MISHOMIS BOOK: THE VOICE OF THE OJIBWAY 74-78 (1988); LANDES, *supra* note 46, at 31-52; WILLIAM W. WARREN, HISTORY OF THE OJIBWAY PEOPLE 41-53 (1984); JOHNSTON, *supra* note 47, at 59-79; James Dumont, *Anishinaabe Izhichigewin*, *in* SACRED WATER: WATER FOR LIFE 13, 27-42 (1999); Heidi Bohaker, *Reading Anishinaabe Identities: Meaning and Metaphor in Nindoodem Pictographs*, 57 ETHNOHISTORY 11, 13 (2010); Heidi Bohaker, Nindoodemag*: The Significance of Algonquian Kinship Networks in the Eastern Great Lakes Region, 1600-1701*, 63 WM. & MARY Q. 23, 23-49 (2006).

51. LANDES, *supra* note 46, at 5.

52. MICHAEL L. BARKER, POLICING IN INDIAN COUNTRY 3 (1998).

53. CARRIE E GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 17 (Jerry Gardner & Heather Valdez eds., 2d ed. 2015) ("One reason that traditional laws were designed to protect the community is that the spiritual beliefs of many tribes instructed individuals about their duties and responsibilities to families, clans, and the tribe.").

54. DELORIA., *supra* note 1 ("You're born into this society and you're the beneficiary of the concerns of everybody who is older than you. As you age and go through that society you have different responsibilities.").

As described by Deloria, it is important for members of the community to understand the responsibilities and obligations of societal and kinship systems. Because tribal law systems concentrated on the expected behavior of the community based upon social, kinship, and clan obligations and responsibilities, "written legal codes were non-existent, but strong behavioral norms were enforced, and violators sanctioned."[55] An example of how tribal kinship relationships embody the existence of our responsibilities of conduct can be drawn from the case of *Means v. District Court of the Chinle Judicial District.*

a. Means v. District Court of the Chinle Judicial District, *2 Am. Tribal L. 439 (Navajo 1999)*

In *Means v. District Court of the Chinle Judicial District*, the Navajo Nation Supreme Court addressed the issue of personal jurisdiction over a non-member Indian.[56] In this case, the petitioner was charged with two battery offenses and a threatening behavior offense committed against kinship relatives.[57] The court determined that the Navajo Nation had jurisdiction over the petitioner by virtue of his "assuming tribal relations and establishing familial and community relationships under Navajo common law."[58] The court reasserted its prior holding that a person who assumes tribal relations is considered an Indian pursuant to the classification of *hadane* (and not pursuant to their status as a non-member Indian as evidenced in this case), and as a result is fully subject to Navajo law.[59] The court reasoned as follows:

> An individual who marries or has an intimate relationship with a Navajo is a *hadane* (in-law). The Navajo people have *adoone'e* or clans, and many of them are based upon the intermarriage or original Navajo clan members with people of other nations. The primary clan relation is traced through the mother, and some of the "foreign nation" clans include the "Flat Foot-Pima clan," the "Ute people clan," the "Zuni clan," the "Mexican clan," and the "Mescalero Apache clan" The list of clans is not exhaustive. A *hadane* or in-law assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is conducted within the Navajo Nation, there are reciprocal obligations to and from family and clan members under Navajo common law. Among those obligations is the duty

55. BARKER, *supra* note 52, at 3; GARROW & DEER, *supra* note 53, at 14 ("Many tribal laws did not focus on the bad behavior of a person, but rather on the positive, expected behavior of people.").

56. Means v. District Ct., 2 Am. Tribal L. 439 (Navajo 1999).

57. *Id.* at 442.

58. *Id.* at 450. The Court also determined that the Navajo Nation had jurisdiction over the petitioner as a nonmember Indian pursuant to the 1868 Treaty. *Id.* at 449.

59. *Id.* (citing Navajo Nation v. Hunter, 7 Navajo Rep. 194, 197-198 (Navajo 1996)).

> to avoid threatening or assaulting a relative by marriage (or any other person).[60]

The core tenant of the principle embodying reciprocal relationships as utilized by the Navajo Nation Supreme Court is the reciprocity or mutuality of the principle. As the court implements the tenants of reciprocal relationships, it recognizes the tenants of indigenous existence through the principles of achieving harmony.

2. Traditional Territory

The principles that establish the responsibilities and obligations that tribal societies have to one another also extend to the traditional territories of the nation, as well as all of creation.[61] As Leroy Little Bear explains, "everything has spirit, then everything is capable of relating. In the Native view, all of creation is interrelated."[62] As a result, infringement on the principles of adherence to societal norms establishes a direct effect on the public health, safety, and welfare of the tribe. This adherence must be evaluated from a cultural perspective.[63] The cultural relevance of an individual's conduct has a direct effect on tribal self-governance as implemented through the tribe's understanding of relational governance.[64] Reciprocal relationships established the path to achieve harmony within the nation.[65] When tribal nations achieve harmony, and all individuals flourish pursuant to traditional tribal law, we see economic self-sufficiency. We see community members taking care of each other, ensuring all are healthy and provided for, and as a result, tribal nations thrive.[66] *Hoover v. Colville Confederated Tribes* is an illustrative example of how tribal territorial governance can be evaluated from a cultural perspective.

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60. *Id.* (citations omitted).

61. Fletcher, *supra* note 42 ("Both principles demand Anishinaabe people acknowledge their obligations to each other and the greater world, which includes all things and places, animate and inanimate.").

62. Leroy Little Bear, *Aboriginal Relationships to the Land and Resources*, *in* SACRED LANDS: ABORIGINAL WORLD VIEWS, CLAIMS, AND CONFLICTS 15, 18 (Jill Oakes et al. eds., 1998).

63. MATTHEW L.M. FLETCHER, THE THREE LIVES OF MAMENGWAA: TOWARD AN INDIGENOUS CANON OF CONSTRUCTION, https://ssrn.com/abstract=4380679.

64. Kekek Jason Stark, *Bezhigwan Ji-Izhi-Ganawaabandiyang: The Rights of Nature and its Jurisdictional Application for Anishinaabe Territories*, 83 MONT. L. REV. 79, 107 (2022).

65. Fletcher, *supra* note 42.

66. Stark, *supra* note 43.

a. Estate of Hoover v. Colville Confederated Tribes, *29 Indian L. Rep. 6035 (Confederated Tribes of the Colville Reservation App. Ct. 2002)*

In *Hoover v. Colville Confederated Tribes*, the Colville Confederated Tribes Court of Appeals addressed a matter involving the tribes' ability to regulate fee lands of a non-member within the exterior boundaries of the Colville Confederated Tribes Reservation.[67] The court determined that the tribes had jurisdiction to regulate the non-member's fee lands, because the non-member's conduct would affect the health and welfare of members of the tribes.[68] In doing so, the court addressed the spiritual and cultural health of the tribes in connection with its lands as follows:

> Plants and animals preserved through comprehensive management in the reserve are not only a source of food, but also play a vital and irreplaceable role in the cultural and religious life of Colville people. Annual medicine dances, root feasts, and ceremonies of the Longhouse religion all incorporate natural foods such as deer and elk meat and the roots and berries found in the Hellsgate Reserve. The ceremonies play an integral role in the current well[-]being and future survival of Colville people, both individually and as a tribal entity.[69]

In upholding the importance of the spiritual and cultural health of the tribes in connection with its lands, the court determined that "[t]he inability of the Tribes to apply comprehensive planning regulations to fee lands within the Reserve will substantially impair the Tribes' ability to preserve the general character, cultural and religious values, and natural resources associated with the Reserve."[70] The court acknowledged that "spirituality" and its connection to the earth is "vital to the spiritual health of the Tribes and its members."[71] In doing so, the court adopted a "totality of the circumstances" test, weighing all the factors and interests involved in balancing the purpose of the land in question with the intent of the proposed regulatory action.[72]

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67. Estate of Hoover v. Colville Confederated Tribes, 29 Indian L. Rep. 6035, 6035 (Confederated Tribes of the Colville Reservation App. Ct. 2002).

68. *Id.* at 6041.

69. *Id.* at 6039.

70. *Id.* at 6038.

71. *Id.* at 6039-40 ("It is well known in Indian Country that spirituality is a constant presence within Indian tribes. Meetings and gatherings all begin with prayers of gratitude to the Creator. The culture, the religion, the ceremonies—all contribute to the spiritual health of a tribe. To approve a planned development detrimental to any of these things is to diminish the spiritual health of the Tribes and its members. The spiritual health of the American Indian is bound with the earth. . . . It is the land and the animals which renew and sustain their vigor and spiritual health.").

72. *Id.* at 6040-41 ("Again, we are of the opinion we should look at the totality of circumstances. We see the circumstances as this—the Tribes have express delegated authority to regulate water quality within the Reservation. The Tribes have enacted a Comprehensive Land Use and Development Code that

3. Treaty

For many tribal nations, it is generally understood that these jurisdictional principles of reciprocal relationships and territorial governance were reserved through their treaties negotiated with the United States in the establishment of their reservations as permanent homelands.[73] Through the establishment of reservations, tribal nations ensured that they would always retain a permanent homeland that was set aside for their exclusive use and occupancy:[74] a use and occupancy retaining their existing reciprocal relationships, and thereby their understanding of jurisdiction. An example of how tribal jurisdictional principles were reserved pursuant to their treaties can be drawn from the cases of *Dale Nicholson Trust v. Chavez* and *EXC, Inc. v. Kayenta District Court.*

a. Dale Nicholson Trust v. Chavez, *5 Am. Tribal L. 365 (Navajo 2004)*

In *Dale Nicholson Trust v. Chavez*, the Navajo Nation Supreme Court addressed the issue of subject-matter jurisdiction over a dispute between officials of the New Mexico Taxation and Revenue Department and the Dale Nicholson Trust.[75] The trustee in this case was a non-member Indian, and the beneficiary of the trust was an enrolled member of the Navajo Nation.[76] The dispute involved a threat by the state of New Mexico to seize property and shut down businesses of the trust located within the exterior boundaries of the Navajo Nation in the satisfaction of tax bills.[77] The trust sought an injunction regarding the cession of property as well as the return of any property seized.[78] In laying out the test for

is neutral in its application to Indians and non-Indians. The Tribes have closed the Reserve to unrestricted development and actively work to enhance its wildlife. The Reserve has a 'vital and irreplaceable role in the cultural and religious life of Colville people.' The large game animals within the Reserve are an important food source for the Colville people. Finally, Congress has appropriated millions of dollars for purchase of fee lands within the Reserve in order to help maintain the area in a natural state.").

73. Arizona v. Navajo Nation, 143 S. Ct. 1804, 1824 (2023) ("The Treaty of 1868 promises the Navajo a 'permanent home.'"); Michael D. Sullivan Sr., *Geyaabi na bezhigo*? Linguistic Analysis of the Translations of the Treaty of 1854 at LaPointe at 3, Lac Courte Oreilles Band of Lake Superior Chippewa Indian v. Evers, 46 F.4th 552 (7th Cir. 2022) (No. 3:18-cv-00992-jdp) ("For the Anishinaabe, the focus consistently visible in the limited documentation we have of the treaty negotiations was their desire to remain in their homeland and maintain permanent relationship to resources from which they made their living . . . .").

74. Anton Treuer, Historical Background on the Treaty of 1854 at 48, Lac Courte Oreilles Band of Lake Superior Chippewa Indian v. Evers, 46 F.4th 552 (7th Cir. 2022) (No. 3:18-cv-00992-jdp).

75. Dale Nicholson Trust v. Chavez, 5 Am. Tribal L. 365 (Navajo 2004).

76. *Id.* at 368.

77. *Id.*

78. *Id.*

jurisdiction under Navajo law, the court considered the effects of the Treaty of 1868[79] on this issue.[80]

The Navajo Nation Supreme Court reasoned that the Treaty of 1868 "recognizes additional authority not defined as 'inherent' by recent United States Supreme Court opinions."[81] The court explained that "under the Treaty our courts have broad authority over non-Indians on land where the Navajo Nation has the absolute right to exclude them, which includes the power to condition their presence in conformity with our laws."[82] As a result, the court concluded that "state officials are clearly not employees of 'the government' authorized to enter the Navajo Nation exempt from the treaty"; therefore, "[o]ur courts then may regulate any state official activity on tribal lands."[83]

79. Treaty with the Navaho, 1868, Navajo-U.S., June 1, 1868, 15 Stat. 667.

80. *Dale Nicholson Trust*, 5 Am. Tribal L. at 370-71. In addition to analyzing the Treaty, the court reasoned that the determination of the "status of the land" is integral to the claim. *Id.* "If the case concerns tribal land, then the plaintiff needs only to allege specific facts showing that the cause of action arose on tribal land." *Id.* The court specified however, "if the cause of action arises on non-Indian owned fee land within the Navajo Nation the plaintiff has a higher burden," as the plaintiff must satisfy one of the Montana exceptions. *Id.* Under Montana, the court advised that specific facts must be alleged showing "(1) a consensual relationship with the Navajo Nation or its members that has a nexus to the dispute, or (2) that the conduct has a direct effect on the political integrity, economic security, or health or welfare of the Navajo Nation." *Id.* The court advised that "a statement that the dispute occurs within 'the Navajo Nation,' or in 'the territorial jurisdiction of the Navajo Nation' is no longer enough. The Plaintiff must affirmatively plead the status of the land." *Id.*

81. *Id.* at 373 ("Treaty of 1868 recognizes criminal authority over non-member Indians." (citing Means v. District Ct., 1 Am. Tribal L. 717 (1999))). In its analysis, the Court recognized that "state officials are a special category of non-Indians for jurisdictional purposes." *Id.* at 371-73 (citing Office of Navajo Lab. Rels. *ex rel.* Jones v. Central Consol., 4 Am. Tribal L. 599 (2002)). In spite of this recognition, the Court emphasized that "State officials are not, however, outside Navajo courts' subject matter jurisdiction merely because they are acting as agents of the state government." *Id.* The Court emphasized that with regard to the conduct of state officials pursuant to *Office of Navajo Labor Relations ex rel. Jones v. Central Consolidated*, "jurisdiction depends on fulfilling *Montana*," regardless of the status of the land. *Id.* The Court then went one step further beyond the inherent sovereignty analysis of *Hicks* and *Jones*, by considering the effects of the Treaty of 1868 on this issue. *Id.* The Court acknowledged that before its ruling in *Nevada v. Hicks*, the United States Supreme Court recognized that the treaty relationship provided additional authority regarding non-Indians separate from inherent sovereignty, "and did nothing to undermine that recognition in Hicks." *Id.* The Court then emphasized that after it has determined whether the state officials conduct fulfills *Montana* its analysis does not end, "as the Hicks rule only defines the Navajo Nation's 'inherent sovereignty.'" *Id.*

82. *Id.* at 373 (citing Arizona Pub. Serv. Co. v. Office of Navajo Lab. Rels., 17 Indian L. Rptr. 6105 (1990)).

83. *Id.* at 373-374 ("Therefore, in a situation where a plaintiff sues state officials, the general rules discussed above, apply in our courts. The plaintiff must allege that the cause of action arises on one of two categories of land: (1) tribal land, or (2) non-Indian owned fee land. If the activity is on the first category of land, no other showing is needed to establish jurisdiction. If on the second category, the plaintiff mut allege fulfillment of one of the two *Montana* exceptions, with as much information as the plaintiff has before discovery or an evidentiary hearing." (citations omitted)).

b. EXC, Inc. v. Kayenta District Court, *9 Am. Tribal L. 176 (Navajo 2010)*

In *EXC, Inc. v. Kayenta District Court*, the Navajo Nation Supreme Court addressed the issue of personal jurisdiction over a non-member corporation.[84] In this case, a tour bus provider and its driver, tour director, and tour organizer brought a petition seeking a writ of prohibition preventing the Kayenta District Court from exercising jurisdiction over negligence claims filed against them that arose from a motor vehicle accident occurring within the Navajo Nation on U.S. Highway 160, west of Kayenta Township in Arizona.[85] The petitioners were non-members of the Navajo Nation.[86] The accident resulted in two fatalities: a Navajo man and an unborn fetus.[87]

The Navajo Nation Supreme Court held that the district court possessed jurisdiction over the negligence claims pursuant to the following: Article II of the 1868 Treaty with the Navajo Nation, the reserved rights doctrine,[88] and the federal policy of furthering Indian self-determination.[89] The court reasoned that, "for the Navajo Nation,

84. EXC, Inc. v. Kayenta Dist. Ct., 9 Am. Tribal L. 176, 179 (Navajo 2010).

85. *Id.* at 178.

86. *Id.*

87. *Id.* at 188 ("The fatalities in this case were a Navajo father and fetus. We take judicial notice that the child, even the unborn child, occupies a space in Navajo culture that can best be described as holy or sacred, although neither of these words convey the child's status accurately. The child is *awéé t'áá'íídą́ą́'hinį́*, alive at conception, and develops perfectly in the care of the mother. The umbilical cord, *íiná bita' nanít'i'*, is the lifeline between the mother and unborn child. The mother, and now the surviving grandmother and aunts (RPIs) have the maternal role of *Iiná Yę́sdá hi*, which encompasses bearing, raising and teaching a child, as established by White Shell Woman in our journey narratives. It is in the interest of the Navajo Nation government that family members may bring action concerning their children in a Navajo Nation court that fully comprehends how such concerns should be treated on the basis of *k'é*." (citing *Riggs v. Estate of Tom Attakai*, 7 Am. Tribal L. 534, 536 (Navajo 2007))).

88. *Id.* at 179, 189-90 ("Our ancestors understood that the Navajo Treaty terms provided that we would be free to handle all reservation affairs not expressly excepted in the document, and handle them according to our own laws. It is universally understood in the Navajo world that the future of the Navajo Nation was secured for posterity by our valiant ancestors (*Nihizázíni'*). This sacrifice is poignantly stated in the phrase *Naayéé' yee ak'ehdeesdlį́įgo Hózhǫ́ǫ́jíí yee ak'idiyaa silį́į'* (by defending the Navajo Way of Life, our ancestors restored peace and harmony with the United States).").

89. *Id.* at 179-84. The court also established that in addition to the Treaty, the court had jurisdiction over this matter pursuant to the Navajo Nation Long-Arm statute. *Id.* The court held that the petitioners engaged in "commercial dealings" under the consent component of the tribal long-arm statute. In addressing the Health, Safety and Welfare component of the tribal long-arm statute the court concluded that "their conduct and the need to regulate that conduct have a direct impact on Navajo Nation interests." *Id.* at 181. The court explained that "due to their size, concerns with vehicle maintenance and driver fatigue, inattention, and speeding, and the narrowness, curves, and often rolling nature of Navajo Nation roads, tour buses are a potential public safety menace." *Id.* The court further determined that the petitioners had the requisite notice that their activities might lead to suits in connection with the negligence claims. *Id.* at 179-84. The court also held that the petitioners cannot evade jurisdiction by engaging in unlawful conduct and therefore impliedly consented to application of the tribal long-arm statute. *Id.* In doing so the court reasoned:

jurisdiction over reservation matters is well-settled both as an inherent right and as conferred under Article II of the Treaty of 1868 (Navajo Treaty)."[90] The court reiterated that, pursuant to tribal court precedent, "Article II of the Navajo Treaty specifically recognizes the Navajo Nation's authority to regulate all non-members, including non-Indians, other than certain federal employees on its lands."[91]

In analyzing its jurisdiction pursuant to Article II of the Treaty of 1868, the court acknowledged the "Indian canons of construction" as tribal

> Permit or none, Petitioners knew or should have known that their activities would subject them to Navajo Nation jurisdiction over their tour-related activities . . . .
>
> . . . .
>
> . . . We have found the requisite nexus between Petitioners and this forum. As a matter of public welfare and Navajo Nation governance, this Court cannot agree with Petitioner that the absence of a signed consent allows a tour business to evade Navajo Nation regulatory and adjudicatory authority.
>
> There is no doubt that Petitioners regularly took advantage of a Navajo Nation scenic site for business purposes while leaving it off the itinerary and failing to obtain necessary permits. This Court is unable to find any authorities that support Petitioners' theory that consent to jurisdiction can be withheld by a violation of a forum's laws. In this Court's view, Petitioners submitted to the personal jurisdiction of the Navajo Nation under the Long-Arm Statute through the provision of their tour services which further satisfies "implied consent" under the language of the Long-Arm Statute for due process reasons.

Id.

90. *Id.* at 179 ("The precedents of this Court have emphasized the Navajo Treaty as the primary source of the Nation's authority." (citing Dale Nicholson Trust v. Chavez, 5 Am. Tribal L. 365 (Navajo 2004))); *Id.* at 185-88. The court then proceeded to differentiate this case from the federal Indian law precedent established in *Strate v. A-1 Contractors*. *Id.* The court opined that "in its view," the United States Supreme Court in *Strate*, "distorts federal governmental policy and ignores the reality of Indian Nation regulatory and jurisprudential authority, particularly on the Navajo Nation." *Id.* at 186. The court clarified that "U.S. Highway 160 is *not* like the highway in *Strate* in several key ways, including our regulatory right. U.S. Highway 160 is within the exclusive regulatory control of the Navajo Nation and is within our territorial jurisdiction as defined by Navajo Nation and U.S. statutes." *Id.* at 185. The court concluded that "U.S. Highway 160 is part of the territory of the Navajo Nation for governance purposes over reservation matters . . . and *Montana-Strate* is inapplicable." *Id.* at 188. The court reasoned:

> The grant of a right-of-way on U.S. Highway 160 had no effect on Navajo Nation regulatory control . . . The right-of-way on U.S. Highway 160 was intended solely to benefit the Navajo Nation and further the purposes of the Navajo Treaty. This differs from *Strate*, where the highway was intended for general public access to a lake maintained by the Federal Corp. of Engineers. In addition, the *Strate* highway was short (6.59 miles) in length, while U.S. Highway 160, stretching from the eastern to western external boundaries of the Navajo Nation, is 197.5 miles long, connecting numerous Navajo communities, with rights-of-way granted to two states, neither of whom have any regulatory or adjudicatory authority over the highway without consent of the Navajo Nation. We find that under the proposition in *Strate*, U.S. Highway 160 is not "equivalent to non-Indian alienated land for non-member governance purposes."

Id. at 187.

91. *Id.* at 179 (citing Dale Nicholson Trust v. Chavez, 5 Am. Tribal L. 365 (Navajo 2004)) ("We have rightly expected the Navajo Treaty, like all treaties with the United States, to be treated as the 'supreme Law of the Land,' binding every state under Article VI of the U.S. Constitution. The Navajo Treaty has not been changed or rescinded and holds force today.").

law.[92] The court stated that, for the Navajo, "[o]ur ancestors understood that authority over all non-Indian criminal reservation matters that concern Navajos were reserved to the Navajo people."[93] In applying the canons, the court reasoned that "treaty terms are to be liberally interpreted to accomplish their protective purposes, with ambiguities to be resolved in favor of the Indians due to the disadvantaged position of tribes and their terms often explained inexactly or incorrectly to the Indian signatories."[94]

B. Determining Tribal Jurisdiction Pursuant to Federal Common Law

To understand determinations of tribal jurisdictional principles made pursuant to federal common law, the first inquiry is: from where does this authority stem? The quick answer is that federal court authority to review tribal court determinations of jurisdictional principles was imagined.[95] In essence, it is a matter of "pure federal common law."[96] According to Matthew L.M. Fletcher, "'[p]ure' federal common [law] exists when the Supreme Court identifies a right as a matter of federal common law and identifies a cause of action under federal common law."[97] In the context of federal court authority to review tribal court determinations of jurisdictional principles, the rule was established in *National Farmers Union*.[98] In this case, the United States Supreme Court determined, as

92. *Id.* (citing Dale Nicholson Trust v. Chavez, 5 Am. Tribal L. 365 (Navajo 2004)); Means v. District Ct., 2 Am. Tribal L. 439 (Navajo 1999). As a basic principle of federal Indian law, the canons establish that: (1) ambiguous expressions must be resolved in favor of the Indian parties concerned. Winters v. United States, 207 U.S. 564, 576-77 (1908); (2) Indian treaties must be interpreted as the Indian themselves would have understood them. United States v. Winans, 198 U.S. 371, 380-81 (1905) ("And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.' How the treaty in question was understood may be gathered from the circumstances."); and (3) Indian treaties must be liberally construed in favor of the Indians. Washington v. Washington State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979); Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1429 (W.D. Wis. 1987); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

93. *EXC, Inc.*, 9 Am. Tribal L. at 179.

94. *Id.* at 180. *See also* Jones v. Meehan, 175 U.S. 1, 10-12 (1899); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999).

95. Frank Pommersheim, *"Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123, 174 (2000) ("Without much concern for thus issue, federal courts have routinely, if not blithely, assumed jurisdiction to review tribal court jurisdiction without any constitutional or statutory mandate to do so.").

96. Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1716 (2008).

97. FLETCHER, *supra* note 49, at 381 (quoting Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1716-1721 (2008)).

98. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985).

summarized by Mathew L.M. Fletcher, that "whether tribal courts have jurisdiction over nonmember civil defendants in a given case is a question arising under federal law, and therefore Section 1331 of the Judicial code authorizes federal courts to give an answer."[99] In doing so, the Court established that the tribal court must recognize that:

> the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.[100]

The result was an implicit divesture approach to tribal sovereignty.[101] Here, the Court presumed that hundreds of years of the implementation of assimilative polices in the assertion of plenary power had diminished the inherent sovereignty of tribes.[102] As a result, rather than the individual contesting the tribe's sovereign authority having the burden to prove that the power of the tribe in question's authority was diminished, the burden was shifted to the tribe to prove that the power continued to exist as an element of its retained inherent tribal sovereignty or as an express delegation of federal authority.[103]

With the backdrop of imagined federal court authority to review tribal court determinations of jurisdictional principles in mind, we can now review the parameters of tribal jurisdiction pursuant to federal common law principles. It is a general rule of federal Indian law that tribes have the ability to exercise their own laws within their territorial boundaries.[104]

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99. FLETCHER, *supra* note 49, at 379 (citing *National Farmers Union Ins. Cos.*, 471 U.S. 857).

100. *National Farmers Union Ins. Cos.*, 471 U.S. at 855-56.

101. ROBERT A. WILLIAM, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 113 (2005) ("The lesson that should be learned from Rehnquist's opinion in Oliphant is how the Marshall model can indeed continue to function like a loaded weapon directly aimed at the destruction of Indian rights. Until the Marshall model's underlying metaprinciple of white racial superiority is repudiated by the Court, its racist precedents and language of Indian inferiority lie ready at hand for any justice who can plausibly claim an urgent need to declare the existence of an implicit divesture of Indian rights under the Supreme Court's Indian law.").

102. DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 173 (2001) ("The Supreme Court lacks constitutional authority to abrogate specific rights or to divest Indian tribes of their rights by implication; such power is constitutionally vested in, and on few occasions has been expressly wielded by, the U.S. Congress. From an indigenous perspective, corroborated by a plethora of federal policy, judicial opinions, and some historical practice, the Supreme Court's decision in *The Kansas Indians* (72 U.S. 737 [1866]) contains the most reasonable articulation of how Indian treaties/agreements may be changed. The Court held that Indian treaties and the rights affirmed or created by treaty provisions may be modified, amended, or terminated only through bilateral treaty stipulations, by purchase, or by voluntary abandonment by the tribal organization.").

103. *National Farmers Union Ins. Cos.*, 471 U.S. at 855-56.

104. Williams v. Lee, 358 U.S. 217, 220-22 (1959) ("[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."); *id.* at 223 ("[T]he exercise of state jurisdiction here would

This is usually confined to Indian Country.[105] However, federal courts have also recognized that tribes can extend their laws over their "members" in the area encompassing their traditional territories in certain instances, such as in the exercise of treaty-reserved rights, or in certain cases "involving the internal concerns of . . . members," including tribal membership, probate, child custody, and child support.[106] Tribes are typically foreclosed, pursuant to federal common law, from exercising tribal jurisdiction outside of Indian Country over "non-members."[107] As a result of treaty principles, however, some tribes can also advocate for the application of their laws to non-members within their treaty territories.[108] In the context of determining subject matter jurisdiction pursuant to federal common law over a matter covered by tribal law, a court must determine the following: (1) does the tribe have regulatory jurisdiction to impose the law, and (2) does the tribe have adjudicatory jurisdiction to enforce the law in tribal court?[109]

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undermine the authority of the tribal courts over Reservation affairs and hence would infringe the right of the Indians to govern themselves.").

105. 18 U.S.C. § 1151 (defining Indian country as "(a) all land within the limits of any Indian reservation . . . (b) all dependent Indian communities . . . and (c) all Indian allotments"). State courts may not entertain civil suits against reservation Indians for claims arising in Indian country. *Williams*, 358 U.S. at 223. Tribal jurisdiction is, of course, cabined by geography. The jurisdiction of tribal courts does not extend beyond tribal boundaries. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 658 n.12 (2001).

106. COHEN'S HANDBOOK, *supra* note 3, § 7.02; *see, e.g.*, United States v. Winans, 198 U.S. 371, 381-82 (1905); Settler v. Lameer, 507 F.2d 231, 237-38 (9th Cir. 1974); United States v. Washington, 384 F. Supp. 312, 339-42 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676, 686 (9th Cir. 1974); Washington v. Washington State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 684-85 (1979); United States v. Michigan, 471 F. Supp. 192, 273 (W.D. Mich. 1979); United States v. Felter, 546 F. Supp. 1002, 1022-23 (D. Utah 1982), *aff'd*, 752 F.2d 1505 (10th Cir. 1985); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1241 (W.D. Wis. 1987); United States v. Oregon, 787 F. Supp. 1557, 1566 (D. Or. 1992), *aff'd*, 29 F.3d 481 (1994); Baker v. John, 982 P.2d 738, 743 (Alaska 1999); Fisher v. District Ct., 424 U.S. 382, 389 (1976) (establishing exclusive tribal court jurisdiction in adoption proceeding involving tribal members).

107. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) (stating that absent express federal law to the contrary, Indians going beyond the reservation boundaries have generally been held subject to nondiscriminatory state law); COHEN'S HANDBOOK, *supra* note 3, § 7.02 (2019) (stating that tribal jurisdiction may extend to non-members outside of Indian Country who have consented to tribal jurisdiction).

108. Littell v. Nakai, 344 F.2d 486, 490 (9th Cir. 1965) ("The Navajo Tribe as such need not have a proprietary or other legally recognized interest in the particular litigation or its outcome in order for the controversy to be one concerning internal affairs. To so conclude mistakes the nature of the Tribe's interests and ignores the holding in *Williams v. Lee*. In that case a non-Indian licensed to trade on the Navajo Reservation sued a tribal member to recover for goods sold—strictly a 'private' mercantile transaction between individuals. Yet the Supreme Court concluded that the matter was one involving the Tribe's internal affairs. No doubt the Tribe in *Williams*, as in the case before us, was neither an indispensable, a necessary, or even a proper party to the action, but that was not the test. Rather, the test was a broader one hinging on whether the matter was one demanding the exercise of the Tribe's responsibility for self-government. Here, we believe that requisite is met. Indeed, the very heart of the dispute appears to center on Nakai's authority as Chairman."); *see also* Stark, *supra* note 64, at 107.

109. FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 931 (9th Cir. 2019); Knighton v. Cedarville Rancheria of N. Paiute Indians, 922 F.3d 892, 899 (9th Cir. 2019); Water Wheel Camp

1. Regulatory Jurisdiction

Historically, the United States Supreme Court has established as a general rule that tribes retain the right of self-governance over their traditional territory as an integral aspect of tribal sovereignty.[110] This principle was upheld in 1959, when the United States Supreme Court in *Williams v. Lee*[111] determined:

> there can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the reservation and the transaction with the Indian took place there.[112]

A tribe's ability to impose tribal law pursuant to its regulatory jurisdiction over non-members is derived from "two distinct frameworks."[113] The first is the *Merrion* Rule, which encompasses the presumption in favor of tribal jurisdiction and "generally applies to non-member conduct on *tribal land*."[114] The second is the *Montana* Rule, which encompasses the presumption against tribal jurisdiction unless one of the exceptions applies, and "generally appl[ies] to nonmember conduct on non-tribal land."[115]

Recreational Area, Inc. v. Larance, 642 F.3d 802, 808-09 (9th Cir. 2011) ("To exercise its inherent civil authority over a defendant, a tribal court must have subject matter jurisdiction—consisting of regulatory and adjudicative jurisdiction . . . ."); *see also* AT&T Corp. v. Coeur d'Alene Tribe, 295 F.3d 899, 903-04 (9th Cir. 2002) ("[A] federal court may not readjudicate questions—whether of federal, state or tribal law—already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason.").

110. Worchester v. Georgia, 31 U.S. 515, 557 (1832) (Tribes are "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States").

111. 358 U.S. 217 (1959).

112. *Id.* at 223; *id.* at 220 ("[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

113. *FMC Corp.*, 942 F.3d at 931; *see also* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."); Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe, 609 F.3d 927, 934-935 (8th Cir. 2010) (briefly discussing the historical scope of tribal sovereignty).

114. *FMC Corp.*, 942 F.3d at 931 (emphasis in original); *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (holding that the tribe's inherent sovereignty reached the activities of non-members conducted on Indian owned land pursuant to leases with the tribe); *Water Wheel Camp Recreational Area, Inc.*, 642 F.3d at 810-13 (rejecting the application of the *Montana* test in favor of following the *Merrion* rule, as the tribal appellate court had done, confirming the tribe's jurisdiction over the non-members); *Knighton*, 922 F.3d at 895 ("[A] tribe's regulatory power over nonmembers on tribal land does not solely derive for an Indian tribe's exclusionary power, but also derives separately from its inherent sovereign power to protect self-government and to control internal relations.").

115. *FMC Corp.*, 942 F.3d at 931; *see also* Montana v. United States, 450 U.S. 544, 565-66 (1981) ("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."); Bugenig v. Hoopa Valley Tribe, 266

a. Montana Rule

In 1981, the United States Supreme Court decided *Montana v. United States*[116] and for the first time "applied an implicit divesture approach" to tribal civil jurisdiction.[117] In this case, the Crow Tribe sought to enforce a tribal regulation prohibiting hunting and fishing by non-members within the exterior boundaries of the Crow Indian Reservation.[118] In doing so, the United States, in its own right as well as pursuant to its treaty trust obligations, sought quiet title to the bed and banks of the Big Horn River.[119] The Court determined that the "exercise of tribal power beyond what is necessary to protect self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[120] As a result, the Court established as a general rule that on non-tribal fee land, the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" except in three circumstances referred to as the *Montana* exceptions.[121]

Under the first *Montana* exception, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[122] The regulation of this sort of conduct arises directly out of this consensual relationship, establishing a nexus, and thereby establishing the tribes' ability to regulate.[123]

Under the second *Montana* exception, "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee

F.3d 1201, 1209-10 (9th Cir. 2001) (discussing the same).

116. 450 U.S. 544 (1981).

117. COHEN'S HANDBOOK, *supra* note 3, § 4.02(3)(c)(1); *see also FMC Corp.*, 942 F.3d at 925 (quoting Judge Gabourie discussing the effects of the *Montana* decision: "[it] has been just murderous to Indian tribes").

118. *Montana*, 450 U.S. at 547.

119. *Id.* ("Relying on its purported ownership of the bed of the Big Horn River, on the treaties which created its reservation and on its inherent power as a sovereign, the Crow Tribe of Montana claims the authority to prohibit all hunting and fishing by nonmembers of the Tribe on non-Indian property within reservation boundaries.").

120. *Id.* at 564.

121. *Id.* at 564-66.

122. *Id.* at 565-66.

123. Knighton v. Cedarville Rancheria of N. Paiute Indians, 922 F.3d 892, 904 (9th Cir. 2019) ("*Montana*'s consensual relationship exception requires that 'the regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.'" (quoting Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001))); *see also* FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 935, 940 (9th Cir. 2019) ("The nexus question is part of the jurisdictional question. Once jurisdiction is established, lack of nexus is not a ground for denying comity under *Marchington*." (citing Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997))).

lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[124] Tribal regulatory jurisdiction under this exception "may exist concurrently with federal regulatory jurisdiction."[125] The Court in *Plains Commerce Bank v. Long Family Land and Cattle Co.*[126] explained that an action "must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community."[127] In establishing this exception, a tribe "may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same."[128] As expressed by the United States Court of Appeals for the Ninth Circuit, "[t]hreats to tribal natural resources, including those that affect tribal cultural and religious interests, constitute threats to tribal self-governance, health and welfare."[129]

Under the final exception, a tribe may exercise jurisdiction over non-members when Congress authorizes them to do so.[130] There are a number of federal statutes and treaties in which Congress has expressly authorized tribal authority to regulate specific aspects of tribal territories, as well as individuals conducting prohibited activities within these territories.[131] Essentially, these exceptions, as a matter of federal common law, require that the application of a tribe's laws to non-members are "a necessary

124. *Montana*, 450 U.S. at 565-66.

125. *FMC Corp.*, 942 F.3d at 935 ("[T]here is 'no suggestion' in the *Montana* case law 'that inherent [tribal] authority exists only when no other government can act.'" (citation omitted)).

126. 554 U.S. 316 (2008).

127. *Id.* at 341 (quoting Montana v. United States, 450 U.S. at 566).

128. *Id.* at 336.

129. *FMC Corp.*, 942 F.3d at 935 (citing *Plains Commerce Bank*, 554 U.S. at 333); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 441 (1989); Montana v. U.S. EPA, 137 F.3d 1135, 1139, 1141 (9th Cir. 1998).

130. *Montana*, 450 U.S. at 564 ("But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."); Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201, 1210-11 (9th Cir. 2001) ("There is ample support for the general proposition that Congress *can* delegate jurisdiction to an Indian tribe. The Supreme Court has stated, repeatedly, that Congress can delegate authority to an Indian tribe to regulate the conduct of non-Indians on non-Indian land that is within a reservation . . . . Although there are limits on the authority of Congress to delegate its legislative power, '[t]hose limitations are . . . less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a separate people possessing the power of regulating their internal and social relations.'" (partially quoting United States v. Mazurie, 419 U.S. 544, 556-57 (1975) (emphasis added))).

131. *FMC Corp.*, 942 F.3d at 932 ("[A] Tribe may regulate the conduct of nonmembers on non-Indian fee land when that regulation is expressly authorized by federal statute or treaty."); *see also* Strate v. A-1 Contractors, 520 U.S. 438, 445-46 (1997); Montana v. U.S. EPA, 137 F.3d at 1140.

instrument of self-government and territorial management."[132]

b. Merrion Rule

In 1982, the United States Supreme Court decided *Merrion v. Jicarilla Apache Tribe*,[133] in which the Jicarilla Apache Tribe implemented an oil and gas severance tax on non-members who produced oil and gas on the reservation pursuant to leases granted by the Secretary of the Interior.[134] In addressing the tribe's authority to implement the severance tax, the Court reasoned that "the power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."[135] As a result, the Court determined that the power to exercise tribal civil authority over non-member conduct on tribal land within the tribe's reservation stemmed from the tribe's power to exclude non-Indians from the reservation as well as its inherent power of self-government.[136]

In addressing the tribe's power to exclude, the Court noted that "a hallmark of Indian sovereignty is the power to exclude non-Indian from Indian lands, and that this power provides a basis for tribal authority."[137] In explaining the origins of this power, the Court acknowledged that the power to exclude includes a territorial component.[138] This is because the authority embedded in the power to exclude arises when the "non-member enters tribal lands or conducts business with the tribe."[139] The Court explained as follows:

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132. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137, 141 (1982). The power to exercise tribal civil authority over nonmembers "does not simply derive from the Tribe's power to exclude such persons but is an inherent power necessary to tribal self-government and territorial management." *Id.* at 141.

133. 455 U.S. 130 (1982).

134. *Id.* at 133.

135. *Id.* at 137.

136. *Id.* at 159 ("In *Worcester* v. *Georgia*, Chief Justice Marshall observed that Indian tribes had 'always been considered as distinct, independent political communities, retaining their original natural rights.' Although the tribes are subject to the authority of the Federal Government, the 'weaker power does not surrender its independence -- its right to self-government, by associating with a stronger, and taking its protection.' Adhering to this understanding, we conclude that the Tribe did not surrender its authority to tax the mining activities of petitioners, whether this authority is deemed to arise from the Tribe's inherent power of self-government or from its inherent power to exclude nonmembers. Therefore, the Tribe may enforce its severance tax unless and until Congress divests this power, an action that Congress has not taken to date." (citations omitted))).

137. *Id.* at 141.

138. *Id.* at 142.

139. *Id.* ("This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.").

> Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation. When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to tax or to place other conditions on the non-Indian's conduct or continued presence on the reservation. A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power. The fact that the tribe chooses not to exercise its power to tax when it initially grants a non-Indian entry onto the reservation does not permanently divest the tribe of its authority to impose such a tax.[140]

Lastly, the Court emphasized that the tribe's authority did not "derive[] solely from the power to exclude," but rather also derived from the tribe's inherent power of self-government.[141]

In explaining the origins of the tribe's inherent power of self-government, the Court recognized that "Indian Tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest."[142] As a result, the Court explained that

> [t]he power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's 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.[143]

c. Blurring the Line between Montana and Merrion

Generally, pursuant to the federal principles of tribal jurisdiction over non-members, land status is the ultimate factor necessary for determining

140. *Id.* at 144-45.

141. *Id.* at 137, 142 ("However, we do not believe that this territorial component to Indian taxing power, which is discussed in these early cases, means that the tribal authority to tax derives solely from the tribe's power to exclude nonmembers from tribal lands.").

142. *Id.* at 139 (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152-53 (1980)).

143. *Id.* at 137, 141 ("Limiting the tribes' authority to tax in this manner contradicts the conception that Indian tribes are domestic, dependent nations, as well as the common understanding that the sovereign taxing power is a tool for raising revenue necessary to cover the costs of government.").

which jurisdictional rule applies. For example, under the *Merrion* Rule, it is likely that a tribe will be able to exercise its laws within its respective reservation over non-members on tribal land.[144] However, the United States Supreme Court in *Nevada v. Hicks*[145] blurred this line by attempting to shift the ultimate factor from land status to membership status, articulating that, in *Montana*, the Court found that "the ownership status of land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or control internal relations.'"[146] In *Plains Commerce Bank*, the Court continued along this same line of reasoning, explaining that the *Montana* Rule exceptions "restrict[ ] tribal authority over nonmember activities taking place on the reservation, and [the case against jurisdiction] is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians . . . ."[147] Ultimately, the decision as to the appropriate rule to apply pursuant to the federal principles of tribal jurisdiction is left up to the tribal court to navigate, and whether the tribe can assert jurisdiction under the blurred line separating *Merrion* and *Montana*.[148] All the while, the federal courts have been waiting to review the determination.

2. Adjudicatory Jurisdiction

In *Strate v. A-1 Contractors*,[149] the United States Supreme Court

144. *Id*.

145. 533 U.S. 353 (2001).

146. *Id.* at 359-60; *see also* Water Wheel Camp Recreation Area, Inc. v. LaRance, 642 F.3d 802, 814-18 (9th Cir. 2011) (a "tribe's status as landowner is enough to support regulatory jurisdiction . . . [except] when the specific concerns at issue [in *Hicks*] exist . . . . Doing otherwise would impermissibly broaden *Montana*'s scope beyond what any precedent requires and restrain tribal sovereign authority despite Congress's clearly stated federal interest in promoting tribal self-government.").

147. 554 U.S. 317, 328 (2008).

148. *Merrion*, 455 U.S. at 145-48. The Court discussed the blurring of this line as a denigration of tribal sovereignty as follows:

> Most important, petitioners and the dissent confuse the Tribe's role as commercial partner with its role as sovereign. This confusion relegates the powers of sovereignty to the bargaining process undertaken in each of the sovereign's commercial agreements.
>
> Confusing these two results denigrates Indian sovereignty.
>
> . . . .
>
> . . . Requiring the consent of the entrant deposits in the hands of the excludable non-Indian the source of the tribe's power, when the power instead derives from sovereignty itself.
>
> . . . .
>
> . . . To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head, and we do not adopt this analysis.

Id. at 145-48.

149. 520 U.S. 438 (1997).

explained that a tribe's adjudicatory jurisdiction over non-members may not exceed its regulatory jurisdiction.[150] In interpreting the existence of a tribe's adjudicatory jurisdiction, the Court has held that, "where tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'"[151] Therefore, the existence of tribal regulatory jurisdiction, inherent tribal sovereignty, and the federal trust responsibility combine to establish that a tribe possesses adjudicatory jurisdiction.[152] As the United States Court of Appeals for the Ninth Circuit has stated, "[a]ny other conclusion would impermissibly interfere with the tribe's inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress's interest in promoting tribal self-government."[153]

IV. BALANCING TRADITIONAL TRIBAL LAW WITH FEDERAL INDIAN LAW

As Professor Frank Pommersheim reminds us, the decisions of tribal courts "need to contain both compelling legal analysis and cultural referents to demonstrate that the decisions comport with both applicable law and cultural standards."[154] As tribes revitalize their traditional laws, they must balance these laws with the principles of federal Indian law in a manner that is tribal in character.[155] Tribes must ensure that the development of their law is derived from tribal traditions, culture, and

150. *Id.* at 453.

151. *Id.*; Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."); *Water Wheel Camp Recreational Area, Inc.*, 642 F.3d at 814; Knighton v. Cedarville Rancheria of N. Paiute Indians, 922 F.3d 892, 906 (9th Cir. 2019).

152. FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 941 (9th Cir. 2019); *Knighton*, 922 F.3d at 906-07; *Water Wheel Camp Recreational Area, Inc.*, 642 F.3d at 814-16; *see also* FLETCHER, *supra* note 49, 376-77 ("Although the Supreme Court has held that the contours and extent of tribal adjudicatory and regulatory jurisdiction are equal, as a practical matter they are not. Thousands upon thousands of nonmembers consent to tribal jurisdiction as a matter of course; and perhaps hundreds of thousands, of nonmembers work for Indian tribes, live in tribal housing, receive direct tribal government services such as job training and health care, and engage in direct contractual relationships with Indian tribes. The only cases federal courts now review are the outlier cases, where nonmembers engage in almost herculean efforts to avoid noncontroversial assertions of tribal jurisdiction.").

153. *FMC Corp.*, 942 F.3d at 941-42 (quoting *Water Wheel*, 642 F.3d at 816).

154. Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot for the Field*, 21 VT. L. REV. 7, 8-16 (1996).

155. Arnold, *supra* note 4 ("Future cases with similar issues are likely to be decided the same way--that is, with an open mind to the laws of other sovereigns and with the oral customs, traditions, and historical practices of the tribe as central, controlling consideration.").

ceremonies.[156] Tribes are sovereigns that pre-existed the establishment of the United States and the development of federal Indian law.[157] As a result, it is their traditional law principles that make tribes unique, separate sovereigns.[158]

As courts continue to balance traditional tribal law with federal Indian law, they must determine when tribal jurisdictional principles are satisfied. Generally, there are two theories of tribal jurisdiction pursuant to federal common law, "territory-based authority and consent-based authority."[159] However, these federal common law principles "are not binding on the tribal court in fashioning its tribal law doctrines."[160] When the tribal court engages in this analysis, the tribal court should properly apply what Mathew L.M. Fletcher calls the "Indigenous Canon of Construction of tribal laws."[161] This canon establishes that "tribal laws should be interpreted by tribal judiciaries in light of tribal philosophies rather than those of the colonizer."[162] This tribal court analysis of determining tribal jurisdictional principles should include a determination of whether the principles of reciprocal relations and relational accountability are present.[163] In this regard, the tribal court should determine how a jurisdictional determination reflects tribal systems of relating.[164] It is also up to the tribal court to determine whether the laws of the territory were violated, whether tribal self-governance was infringed upon, whether the health, safety, and welfare of the community were threatened, or whether a treaty is implicated.[165] When a federal court analyzes tribal jurisdictional principles, it should ensure that tribal

156. Symposium, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 245 & n.59 (1994) [hereinafter *Tribal Courts*] ("'Tradition,' 'custom,' and 'usage' are not synonymous, though they are often used interchangeably. 'It is possible for a tradition not to be a custom or usage, and many customs and usages are not traditional. Some traditions may be a custom.' Custom is more than opinion; it is a common belief which results in practice or regularity of conduct." (quoting James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265, 275 (1984))).

157. Stark et al., *supra* note 2, at 412 ("Indigenous nations exercised their sovereign powers prior to the arrival of Europeans in North America.").

158. *Tribal Courts*, *supra* note 156, at 245 ("The tribal courts creatively use indigenous customs and usages that survived the five-hundred-year encounter and struggle with Euro-American cultures. Despite the repeated efforts to destroy the cultural foundation of American Indian tribes, important customary principles persisted. Custom and usage identify different parts of the cultural system. Custom is the belief component. Usage identifies the conduct or behavior in conformance to specific customary beliefs.").

159. Mathew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L. J. 779, 779 (2014).

160. Thompson v. Cheyenne River Sioux Tribal Bd. of Police Comm'r, 23 Indian L. Rep. 6045, 6048 (Cheyenne River Sioux Tribal App. Ct. 1996).

161. FLETCHER, *supra* note 63, at 60.

162. *Id.*

163. *See generally supra* Part III.A.1.

164. *See generally supra* Part III.A.1

165. *See generally supra* Parts III.A.2 & III.A.3.

remedies are properly exhausted, and that proper deference is given to the tribal court's determination of tribal jurisdictional principles pursuant to tribal philosophy.[166]

With this perspective in mind, using traditional tribal law and federal decisional law, this Part analyzes how the principles of tribal customary law are balanced with the principles of federal Indian law in tribal law jurisdictional cases that consider the tribal exhaustion doctrine. By reviewing tribal jurisdictional cases pursuant to the tribal exhaustion doctrine, this Part details the manner in which tribal courts are determining their own jurisdiction and sovereign authority while also evidencing the amount of deference and acknowledgement federal courts grant tribal court determinations. This Part shows that federal courts rarely acknowledge or benefit from tribal court jurisdictional analysis. This is significant, because when federal courts refuse to acknowledge and adhere to jurisdictional principles of traditional tribal law, the result is often a diminishment of tribal authority pursuant to federal common law principles.[167] As Nell Jessup Newton explained, "[a] tribal court victory could result in a loss for tribal court jurisdiction in general . . . . Native Americans have little reason to be confident that the federal courts, especially the Supreme Court, will respect their differences."[168] Lastly, this Part establishes that the federal courts do not allow matters to be fully exhausted in tribal courts before hearing a matter, and that a full record of the matter is not developed in the tribal court.

A. Chilkat Indian Village v. Johnson, *20 Indian L. Rep. 6127 (Chilkat Indian Village Tribal Ct. 1993)*

In *Chilkat Indian Village, IRA v. Johnson*,[169] the Chilkat Indian Village Tribal Court addressed a claim for "the conversion of tribal trust property and violation of a tribal ordinance which prohibits the removal of such property from the village without notification of and approval by the Chilkat Village Council."[170] In this case, the removed tribal trust property consisted of clan crest objects, including a Whale House rain screen and four house corner posts.[171] The court determined that the tribe had

166. *See generally supra* Parts II & III.A.

167. *In re* Estate of Komaquaptewa, 4 Am. Tribal L. 432, 442 (Hopi App. Ct. 2002) ("Hopi tribal and village customs and traditions would not receive the same consideration in a non-tribal forum and the results could be devastating to Hopi parties, the Tribe, and the Villages.").

168. Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1051 (1995).

169. 20 Indian L. Rep. 6127 (Chilkat Indian Village Tribal Ct. 1993).

170. *Id.* at 6127.

171. *Chilkat Indian Village, IRA*, 20 Indian L. Rep. at 6134. It was explained by an expert witness that the clan crest objects, "which include the artifacts here at issue, have gone through a ceremonial

jurisdiction and possessed the authority to regulate the non-Indian defendant's conduct as well as his corporation.[172] In addressing the merits of this case, the court established that "[t]he law applicable in this tribal court action is tribal law, which is comprised of both written and unwritten, custom law of the village."[173] Evidence was presented that, according to tribal law, "no individual could sell the artifacts, and that the artifacts represent the history of the Ganexteidi Clan."[174]

In addressing the first prong of *Montana*, the court determined that "[t]here is no dispute that defendant Michael Johnson (and his corporation) entered into contractual relations with the Tlingit defendants regarding the removal and sale of the Whale House artifacts."[175] As a result, the court concluded that "[t]hese facts meet the first basis of the *Montana* Court set forth above. This court holds that the Tribe has the authority to regulate these consensual relations, and that it had jurisdiction in this respect over non-Indian defendants Michael Johnson and his corporation."[176]

In addressing the second prong of *Montana*, the court held that "the Tribe retains the inherent power to exercise authority over the conduct of Michael Johnson, who conspired with the Tlingit defendants to remove the artifacts from the village in violation of the 1976 ordinance."[177] The court determined:

> The trial evidence convincingly demonstrated the continuing importance of the [Whale House] artifacts to the tribe. As such, this court concludes that the removal of the artifacts from Klukwan had a direct effect on and posed a distinct threat to the political integrity, health, and welfare of the Tribe. This court heard extensive, credible testimony about the significance of the artifacts of the Ganexteidi Clan as well as the entire tribe. All members of the village continue to rely on the artifacts for essential

process, such as a potlatch in which the objects are dedicated. The spirits of ancestors are honored, and those spirits are warmed and like to be around clan crests such as the Whale House artifacts, according to Tlingit belief." *Id.*

172. *Id.* at 6138-40.

173. *Id.* at 6129; *see also id.* at 6140 ("The defendant's argument that Tlingit culture is essentially dead was unsupported by the trial evidence. While the culture has been under assault from non-Indian outsiders and institutions, the lengthy testimony of many credible witnesses at trial confirmed the vitality of Tlingit culture at Klukwan, and the continuing, important role of traditional law.").

174. *Id.* at 6134 ("[T]he Whale House artifacts are crest objects which are owned by the Ganexteidi Clan on the whole. They were commissioned in the traditional way and brought out in potlatch, in which members of the opposite side (Eagles) played a central role. Under Tlingit law, such objects cannot be sold, unless for some reason (such as restitution for a crime) the entire clan decides to do so. The participants in a clan decision such as this would include all adult males, and high-ranking women. The witness testified that the traditional penalty for an individual selling artifacts in violation of tribal law was death.").

175. *Id.* at 6139.

176. *Id.*

177. *Id.*

> ceremonial purposes. The artifacts embody the clan's history. Just as earlier attempts to remove the artifacts caused injury to the tribe through friction and clashes among tribal houses and clans, *a fortiori* the 1984 removal in violation of the tribe's 1976 Ordinance had a direct effect on the health and welfare of the tribe.[178]

The court concluded that, to restore harmony to the community, "as a matter of tribal law the artifacts must be returned to Klukwan. Placing them in the Whale House will return the parties to the status that existed before the illegal 1984 removal."[179]

Prior to this action being heard in the Chilkat Indian Village Tribal Court, the village filed an action in the United States District Court for the District of Alaska.[180] In this action, the village sought the return of the clan crest objects, alleging violations of tribal law and federal law.[181] The district court dismissed the case and the village appealed.[182] On appeal, the United States Court of Appeals for the Ninth Circuit determined that the "claims for enforcement of the ordinance against the non-Indian defendants do[ ] arise under federal law . . . ."[183] The Ninth Circuit reasoned that, "[i]n seeking to apply its ordinance to Michael Johnson and his corporation, [ ] the Village is not *prima facie* engaged in regulating its internal affairs. Instead, it is pressing 'the outer boundaries of an Indian tribe's power over non-Indians[,]' which 'federal law defines.'"[184] This reasoning directly conflicts with the tribal court's subsequent determination that the village was not only regulating conduct associated with consensual relations, but also conduct pertaining to the spiritual health and welfare of the Tribe, which was precisely within its sovereign authority and inherent power of self-government.[185] By reasoning that the application of tribal law to non-members arises as a federal claim as determined by "federal common law," the Ninth Circuit confined the extent to which the tribal court could determine the application of its own

178. *Id.*

179. *Id.* at 6141.

180. Chilkat Indian Village, IRA v. Johnson, 643 F. Supp. 535 (D. Alaska 1986).

181. *Id.* at 536-37.

182. Chilkat Indian Village, IRA v. Johnson, 870 F.2d 1469 (9th Cir. 1989).

183. *Id.* at 1473 ("The Chilkat Tribe possesses paramount sovereign rights over the Whale House artifacts. Relying on the authority given to it by its federally-approved constitution and its reserved powers, the Chilkat Tribe has regulated the use and disposition of all tribal artifacts found within its borders.").

184. *Id.* at 1474 (9th Cir. 1989) (citing National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 851 (1986)).

185. *Id.* at 1475-76 ("In the overwhelming majority of instances, a tribe's enforcement of its ordinances against its own members will raise no federal question at all. Such cases primarily raise issues of tribal law, and they are the staple of the tribal courts. Nothing on the face of the village's complaint tells us that this case is any different. We conclude therefore, that the Village's claim for enforcement of its ordinance against its own members does not arise under federal law . . . ." (citations omitted)).

law.[186] Although the village was successful in this instance, this reasoning diminishes the authority of tribal courts and directly conflicts with the principles established in the exhaustion doctrine,[187] and is perpetuated in other jurisdictional cases such as *Kodiak Oil & Gas, Inc.*[188]

B. Fredericks. v. Continental Western Insurance Co., *20 Indian L. Rep. 6009 (N. Plains Intertribal App. Ct. 1993)*

In *Fredericks, et. al. v. Continental Western Insurance Co., et. al.*, the Northern Plains Intertribal Court of Appeals addressed the issue of subject matter and personal jurisdiction involving non-Indians.[189] The case involved an automobile accident on a state highway running through the Fort Berthold Indian Reservation.[190] The accident occurred when a gravel truck, operated by Lyle Stockert, collided with a Honda Civic, operated by Gisela Fredericks.[191] The gravel truck was owned by A-1 Contractors, was insured by Continental Western Insurance Company, and was hauling gravel under a subcontract with a tribal corporation.[192] Mrs. Fredricks was a forty-year resident of the reservation, was married to a tribal member, had five tribal member children, and owned real and personal property within the reservation.[193] In determining jurisdiction, the Intertribal Court of Appeals determined that, although Mrs. Fredricks was a non-member, "she [was] a member of the Fort Berthold community and a resident for many years."[194] The court explained that, "[l]ike any sovereign, [the] Three Affiliated Tribes has an interest in providing a forum for peacefully resolving disputes that arise within their geographic jurisdiction and [in] protecting the rights of those who are injured within such jurisdiction."[195]

In concluding that the tribal court had jurisdiction, the court applied a

186. *Id.* at 1475 ("In our view, the Village's claim of sovereign power to enact a valid ordinance, applicable to non-Indians regulating tribal artifacts on its fee lands is equally based on a disputed federal claim. The extent of the 'reserved' power alleged by the Village is determined by federal common law, and the extend of the Village's power under the IRA depends upon the construction of that federal statute." (citations omitted)).

187. *See supra* Part II.C.

188. *See* XTO Energy Inc. v. Burr, No. 4:14-cv-00085-DLH-CSM (Sup. Ct. of the Mandan, Hidatsa & Arikara Nation Dec. 4, 2017); Kodiak Oil & Gas Inc. v. Burr, 932 F.3d 1125 (8th Cir. 2019).

189. Fredericks v. Continental W, Ins. Co., 20 Indian L. Rep. 6009 (N. Plains Intertribal App. Ct. 1993).

190. *Id.* at 6009.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 6010.

195. *Id.*

two-prong test.[196] The court explained that the first prong requires an "inquiry . . . [of] whether a tribal court is authorized by the governing authority to take jurisdiction."[197] In addressing the first prong, the court utilized various provisions of the Tribal Code and determined that "[i]t is clear that the tribal council gave [the] tribal court broad authority to hear civil disputes and did not limit the court to particular types of actions or persons."[198] The court continued, "[t]here is no limitation in the code excluding non-Indians from seeking relief in a tort action against another non-Indian."[199] The court then articulated that the second prong requires an "inquiry [of] whether a tribal court is limited in taking jurisdiction by either treaty provision or federal law."[200] In addressing the second prong, the court determined it was unable to find a "treaty restriction or federal statute prohibiting the tribal court from taking jurisdiction over this case."[201] Finding no limit on the tribal court's authority, the court explained that it "is subject to the limitation of minimum contacts in taking jurisdiction."[202] The court determined that minimum contacts were satisfied since the accident occurred within the exterior boundaries of the reservation.[203]

When reviewing this case, the United States District Court for the District of North Dakota agreed with the tribal court and found that the tribal court possessed jurisdiction.[204]A split panel of the United States Court of Appeals for the Eighth Circuit upheld tribal jurisdiction.[205] On rehearing en banc, however, the Eighth Circuit denied tribal jurisdiction, reasoning that "this case has nothing to do with the Indian tribe's ability to govern its own affairs under tribal laws and customs. It deals only with the conduct of non-Indians and the tribe's asserted ability to exercise plenary judicial authority over a decidedly non-tribal matter."[206] In reaching this decision, the court held that neither prong of the *Montana*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* ("In this case the tribal governing body has extended the civil justice system to all are on the Fort Berthold Reservation so that they have the right to seek redress in a court of law when they are not satisfied by offers of settlement or when a party denies liability.").

200. *Id.*

201. *Id.* ("The tribal court may be limited by the Indian Civil Rights Act 25 U.S.C. § 1302, on how it may proceed but it does not create a prohibition on the tribal court in taking jurisdiction; nor has the State of North Dakota taken jurisdiction of this case through Public Law 280; 25 U.S.C. § 1321.").

202. *Id.* at 6011.

203. *Id.* ("Minimum contacts is not a concern since the automobile accident took place within the boundaries of the reservation.").

204. A-1 Contractors v. Strate, No. A1-92-24, 1992 WL 696330, at *5 (D.N.D. 1992).

205. A-1 Contractors v. Strate, No. 92-3359, 1994 WL 666051 at *5 (8th Cir. 1994).

206. A-1 Contractors v. Strate, 76 F.3d 930, 940 (8th Cir. 1996).

test was satisfied.[207]

On appeal, the United States Supreme Court upheld the Eighth Circuit's decision denying tribal jurisdiction.[208] When addressing the merits, the Court first determined whether *Montana* was limited by the subsequent rulings in *National Farmers* and *Iowa Mutual*.[209] The Court concluded that "*National Farmers* and *Iowa Mutual* enunciate only an exhaustion requirement, a 'prudential rule,' based on comity."[210] The Court continued, "[t]hese decisions do not expand or stand apart from *Montana's* instruction on the 'inherent sovereign powers of an Indian tribe.'"[211]

The Court then addressed whether the *Merrion* line of cases controlled, rather than that of *Montana*, due to the fact that the land underlying the road where the accident occurred was tribal trust land.[212] In responding to this issue, the Court reasoned that the issuance of the right-of-way for the creation of the highway alienated the land, and as a result, the underlying land should be treated the same as non-tribal land, and *Montana* applied.[213] In addressing whether the *Montana* exceptions were met, the Court explained, "[n]either regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the rights of reservation Indians to make their own laws and be ruled by them.'"[214] The Court concluded, "the *Montana* rule, therefore, and not its exceptions, applies to this case."[215]

C. Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Co., *No. 97-010, 1998 Mont. Crow Tribe LEXIS 3 (Crow App. Ct. Jan. 27, 1998)*

In *Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Co.*, the Crow Court of Appeals addressed whether the tribal court had jurisdiction over a personal injury action stemming from an accident that occurred on a railroad right-of-way where a train operated by Burlington

207. *Id.* at 941 ("Simply stated, this case is not about a consensual relationship with a tribe or the tribe's ability to govern itself; it is all about the tribe's claimed power to govern non-Indians and nonmembers of the tribe just because they enter the tribe's territory.").

208. Strate v. A-1 Contractors, 520 U.S. 438, 460 (1997).

209. *Id.* at 448-52.

210. *Id.* at 453 (citations omitted).

211. *Id.* (citations omitted).

212. *Id.* at 454.

213. *Id.* at 456.

214. *Id.* at 459 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

215. *Id.*

Northern Railroad Company ("BNRC") struck an automobile, killing two tribal members.[216]

BNRC motioned the court to stay the proceedings pending a decision in federal court regarding "jurisdictional questions raised by *Strate v. A-1 Contractors*."[217] BNRC argued that, pursuant to footnote 14 in *Strate*, it was "not required to exhaust Tribal judicial remedies otherwise required by *National Farmers*."[218] BNRC argued that the stay would "serve the interests of judicial economy and conserve the parties' resources."[219] The plaintiffs opposed, arguing that the federal court matter must be stayed pending the decision of the tribal court.[220] The court, in denying the motion, determined that exhaustion was required and that the "court's jurisdiction is not controlled by *Strate's* footnote 14," as argued by BNRC.[221]

The court reasoned that, pursuant to *Strate*, the determination of jurisdiction was subject to the following questions: "(1) whether the accident occurred on alienated, non-Indian land; (2) if so, whether either of the *Montana* exceptions applies; and (3) if neither *Montana* exception applies, whether any federal grant provides for Tribal governance of nonmembers' conduct on such land."[222] In addressing the first question, the court determined:

> the federal courts have held in the past that such railroad grants, including the one at issue here, do not divest the tribe of all its interest in the right-

216. Estates of Red Wolf & Bull Tail v. Burlington N. R.R. Co., No. 97-010, 1998 Mont. Crow Tribe LEXIS 3, at *3 (Crow App. Ct. Jan. 27, 1998); *see also* Estates of Red Wolf & Bull Tail v. Burlington N. R.R. Co., No. 94-31, 1996 Mont. Crow Tribe LEXIS 1, at *6 (Crow App. Ct. Jan. 19, 1996) (dismissing Ronnie Little Nest's motion to intervene as untimely); Estates of Red Wolf & Bull Tail v. Burlington N. R.R. Co., 1996 Mont. Crow Tribe LEXIS 2, at *3 (Crow App. Ct. Jan. 29, 1996) (dismissing a motion for emergency stay of the proceedings pending appeal of the tribal court's pre-trial rulings); Estates of Red Wolf & Bull Tail v. Burlington N. R.R. Co., No. 94-31, 1996 Mont. Crow Tribe LEXIS 3, at *20-22 (Crow App. Ct. Feb. 21, 1996) (declining to review the tribal court order dated February 9, 1996, or to consider the Railroad's application for stay and waiver of the Bond until after the tribal court had the opportunity to enter final orders concerning the specific security required as a condition of a stay of judgment); Estates of Red Wolf & Bull Tail v. Burlington N. R.R. Co., No. 94-31, 1996 Mont. Crow Tribe LEXIS 4, at *1-2, 4-5 (Crow App. Ct. Apr. 24, 1996). The Crow Court of Appeals considered the BNRC motion for Judgement Notwithstanding the Verdict, and then BNRC subsequently filed an appeal. *Id.* at *1. The tribal court held that it lacked jurisdiction to rule on the motion for judgment notwithstanding the verdict once the appeal was filed. *Id.* at *2. The Crow Court of Appeals reversed and remanded the matter to the tribal court for determination of the motion for judgement notwithstanding the verdict. *Id.* at *5.

217. Estates of Red Wolf & Bull Tail v. Burlington N. R.R. Co., No. 97-010, 1998 Mont. Crow Tribe LEXIS 3, at *1 (Crow App. Ct. Jan 27, 1998) (citing Strate v. A-1 Contractors, 520 U.S. 438 (1997)).

218. *Id.* at *1-2 (citing National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985)).

219. *Id.*

220. *Id.* at *2.

221. *Id.* at *4.

222. *Id.* at *3.

> of-way. Thus, based on our preliminary review, it would appear that the right-of-way at issue in this case is not obviously equivalent to alienated, non-Indian land that would be covered by *Montana's* main rule pursuant to footnote 14 of *Strate*.[223]

As a result, the court held that, since the status of the land was determined to be tribal land, it was not required to determine whether either of the *Montana* exceptions apply.[224] The court explained that "prosecuting this case to conclusion should not pose a hardship" on the parties.[225] The court emphasized that "the interests of sound judicial administration would be better served in this case if this court proceeded to render a full decision on subject matter jurisdiction and (if jurisdiction is held to exist) the merits of the appeal."[226] The court concluded that the case "falls within the 'otherwise applicable exhaustion requirement' of *National Farmers Union*, which requires the federal courts, as a matter of comity, to stay their hands pending disposition of this appeal."[227]

In *Burlington Northern R. Co. v. Red Wolf*, the United States District Court for the District of Montana granted the preliminary injunction regarding the execution or enforcement of the $250 million tribal court judgment and stayed any further proceedings pending exhaustion of tribal remedies in tribal court.[228] On appeal, the United States Court of Appeals for the Ninth Circuit emphasized that, "as with any other exercise of federal jurisdiction, injunctive relief requires exhaustion of tribal court remedies unless there is an applicable exception to the exhaustion rule."[229] The Ninth Circuit noted that the BNRC did not argue that an exhaustion rule exception applied in the case.[230] The Ninth Circuit determined that the district court "lacks discretion to exercise jurisdiction until tribal remedies have been exhausted or an exception to the

223. *Id.* at *4-5 (citations omitted).

224. *Id.* at *5-7. The court also differentiated the case from *Dust v. Austin Express*, Civ. No. 96-436 (Crow Trial Ct. 1997) which was a jurisdictional case involving an accident on a state highway right-of-way. *Id.* at *7. In *Dust*, the court granted a stay pursuant to *Strate* and *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). *Id*.

225. *Id.* at *8.

226. *Id.*

227. *Id.*

228. Burlington N. R.R. Co. v. Red Wolf, 106 F.3d 868 (9th Cir. 1997).

229. *Id.* at 870 ("National Farmers recognized certain exceptions to the exhaustion requirement: 'We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.'" (citations omitted) (quoting National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 (1985)).

230. *Id.*

exhaustion requirement makes exhaustion unnecessary."[231] The United States Supreme Court subsequently vacated the judgment and remanded the case to the Ninth Circuit "for further consideration in light of *Strate*."[232]

On remand, the Ninth Circuit sent the case back to the district court for reconsideration under *Strate*.[233] The district court held "that exhaustion of tribal remedies was not required under *Strate*."[234] The district court then granted BNRC's motion for summary judgment, "holding that exhaustion was unnecessary and permanently enjoining any further proceedings in tribal court."[235] On appeal, the Ninth Circuit held that the railroad right-of-way was deemed alienated, non-Indian land and that

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231. *Id.* at 871. The dissent by Judge Kleinfeld focused upon the perpetuation of fear tactics involving due process rather than whether the tribal court properly determined its jurisdiction in this case. *Id.* at 872. The dissent emphasized that

> If Burlington Northern posts the $250 million, it subjects the money to the decisions of a tribunal not bound by the Constitution. If it does not, it risks having its tracks across the reservation torn up and sold for scrap to satisfy the judgment.
>
> . . . .
>
> . . . tearing up Burlington Northern's tracks through the reservation would interfere with interstate commerce outside the reservation. . . . The railroad runs 20 to 25 trains per day across the Crow reservation, 16 of which are coal trains bound for utilities in Minnesota and Wisconsin.

Id. at 872-74 (Kleinfeld, J., dissenting). Ironically the dissent's fear-based argument was misplaced, as a few years earlier the Crow tribe attempted to regulate railroads crossing the reservation citing the importance of the railroad to Crow economic development. Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239 (9th Cir. 1991). A large portion of the coal that is shipped across the reservation is Crow coal that extracted from the reservation and the ceded strip. *See* Crow Tribe of Indians v. United States, 657 F. Supp. 573 (D. Mont. 1985) (discussing the importance of coal to the tribal economy).

232. Burlington N. R.R. Co. v. Estate of Red Wolf, 522 U.S. 801 (1997); *see also* Estates of Red Wolf & Bull Tail v. Burlington N. R.R. Co., No. 97-010, 1998 Mont. Crow Tribe LEXIS 4, at **1, *5-6 (Crow App. Ct. Apr. 22, 1998). The tribal court considered the pending

> [m]otion to Allow Supplementation of the Record filed February 3, 1998 pursuant to the court's Final Scheduling Order of January 26, 1998. The Plaintiffs-appellees subsequently filed a Request for the Court to take Judicial Notice on February 10, 1998. The evidence tendered by plaintiffs-appellees [was] intended to go to the issue of subject matter jurisdiction in light of the Supreme Court's decision in *Strate v. A-1 Contractors*.

Id. at *1. Citing *National Farmers*, the court emphasized that "the existence and extent of Tribal Court jurisdiction in a case such as this requires a 'careful examination of tribal sovereignty,' including 'a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.'" *Id.* at *5. The court explained that "in order to allow this court to fully consider *Strate* while avoiding additional delay that could have resulted from yet another remand, this court in its Revised Order Governing Conduct of Appeal entered June 17, 1997, provided the parties the opportunity to supplement the record with 'such public records as they believe are relevant to the jurisdictional inquiry, including but not limited to treaties, statutes, Tribal ordinances and right-of-way documents.'" *Id.* at *5-6.

233. *Burlington N. R.R. Co.*, 196 F.3d at 1062.

234. *Id.*

235. *Id.*

neither exception to *Montana* applied.[236] The Ninth Circuit explained that "in examining a tribal court's jurisdictional reach, *Strate* adopted the analysis established in *Montana*."[237] The Ninth Circuit referenced *Montana*'s general rule that "absent the contrary intervention of treaty or federal law, a tribe has no civil authority over non-tribal members for activities on reservation land alienated to non-Indians." The Ninth Circuit then determined that the threshold question was whether the land may be deemed alienated to non-Indians.[238]

The proper question was not whether the land was alienable. Rather, the question should have been as the tribal court determined it to be: what are the effects of the alienation in lieu of the applicable Railroad Act and the treaties and agreements with the Crow Nation?[239] The Ninth Circuit stated that "a right-of-way granted to a railroad by Congress over reservation land is 'equivalent for non-member governance purposes, to alienated, non-Indian land.'"[240] However, the Ninth Circuit failed to provide historical analysis for this statement outside of a general reference to the Railroad Agreement.[241] For Congress to divest a tribe of its sovereignty, it must say so.[242] Congress did not clearly diminish tribal

236. *Id.* at 1066 ("Because tribal courts plainly do not have jurisdiction over this controversy pursuant to *Montana* and *Strate*, the railroad was not required to exhaust its tribal remedies before proceeding in federal court.").

237. *Id.* at 1062 (citing Montana v. United States, 450 U.S. at 563-65 (1981)).

238. *Id.* at 1062-63 ("In *Strate*, the Supreme Court held that a highway right-of-way acquired by a State over land within the boundaries of an Indian reservation was 'equivalent, for nonmember governance purposes, to alienated, non-Indian land.'" (quoting Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997)).); *id.* at 1062 ("In *Wilson*, we held that *Strate* precluded tribal civil adjudicatory jurisdiction over a suit brought by a tribal member against a non-member arising out of an accident on the highway." (citing Wilson v. Marchington, 127 F.3d 805, 815 (9th Cir. 1997))).

239. Crow Tribe of Indians v. United States, 151 F.2d 281, 286 (Ct. Cl. 1960) ("It is true that the language of the Treaty is not the technical language of recognition of title. Nevertheless, we think that the participation of the United States in a treaty wherein the various Indian tribes describe and recognize each others' territories is, under the circumstances surrounding this treaty, and in light of one of the overriding purposes to be served by the treaty, i.e., securing free passage for emigrants across the Indians' lands by making particular tribes responsible for the maintenance of order in their particular areas, a recognition by the United States of the Indians' title to the areas for which they are to be held responsible, and which are described as "their respective territories." (citing Treaty of Fort Laramie, 11 Stat. 749 (Sept. 17, 1851)).

240. Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1063 (9th Cir. 1999).

241. *Id.* ("In this case, the congressional right-of-way grant to the Railroad's predecessor in interest was absolute, encompassing a grant 'for the construction, operation and maintenance of its railroad, telegraph, and telephone line through the lands set apart for the use of the Crow Indians.'" (citing Pub. L. No. 50-134, § 1, 25 Stat. 660 (1889))).

242. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) ("The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted, and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold

sovereignty pursuant to the treaties with the Crow Nation or the Railroad Agreement.[243] Here, the Ninth Circuit flipped the presumption in its application of the general rule of *Montana*, stating, "[t]ribal jurisdiction over nonmembers on land subject to *Montana's* main rule requires express congressional authorization."[244] This statement depicts the error of this presumption.[245] Pursuant to the reserved rights doctrine, the tribe reserved all of its inherent sovereignty unless the tribe expressly diminished it in a treaty or agreement.[246] The Ninth Circuit referenced language in the Railroad Agreement that specified that "operation of such railroad shall be conducted with due regard for the rights of the Indians."[247] Rather than interpret this provision pursuant to the reserved rights doctrine as a retention of tribal authority, the Ninth Circuit explained that it was not an express congressional authorization of tribal jurisdiction.[248] Furthermore, railroad agreements have been held to be the equivalent of treaties.[249] As a result, the Ninth Circuit should have

otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.").

243. Treaty of Fort Laramie with Sioux, Etc., Crow-U.S., Sept. 17, 1851, 11 Stat. 749; Treaty with the Crows, Crow-U.S., May 7, 1868, 15 Stat. 649; Act of Feb. 12, 1889, ch. 134, 25 Stat. 660.

244. Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1064 (9th Cir. 1999); *id.* at 1062 (by declaring as to nonmembers, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *Strate* altered the lens through which we view the boundaries of a tribal court's civil adjudication." (citing Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997))).

245. Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201, 1210-11 (9th Cir. 2001) ("There is ample support for the general proposition the Congress *can* delegate jurisdiction to an Indian tribe. The Supreme Court has stated, repeatedly, that Congress can delegate authority to an Indian tribe to regulate the conduct of non-Indians on non-Indian land that is within a reservation. . . . Although there are limits on the authority of Congress to delegate its legislative power, '[t]hose limitations are . . . less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a separate people possessing the power of regulating their internal and social relations.'" (partially quoting United States v. Mazurie, 419 U.S. 544, 556-57 (1975))).

246. Stark et al., *supra* note 2, at 412 ("Treaties solidified aboriginal rights because these instruments did not grant rights *to* Indigenous nations, but instead granted rights to the United States *from* Indigenous nations. In other words, Indigenous nations reserved those rights for themselves that were not granted in the treaty." (citing United States v. Winans, 198 U.S. 371, 381 (1905))).

247. Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1064 (9th Cir. 1999) (citing Pub. L. No. 50-134, § 3, 25 Stat. 660 (1889)).

248. *Id.*

249. VINE DELORIA JR. & RAYMOND DEMALLIE, 1 DOCUMENTS OF AMERICAN INDIAN DIPLOMACY TREATIES, AGREEMENTS AND CONVENTIONS 1775-1979 233 (1999) ("Even after the 1871 prohibition of treaties, government officials still believed they were making treaties when commissions were sent to negotiate with tribes . . . ."); *id.* at 249 ("By the fall of 1873 the government seemed to have settled on the term 'agreement,' even though in congressional debates through the 1890s, in instructions to federal negotiators in the field, and in federal courts, both the process of negotiation and the documents were called treaties."); *id* at 515 ("All indications are that as railroads expanded and Congress authorized more rights-of-way. . . . [t]o make transactions seem legal they devised legal documents that sometimes took the form of a treaty and sometimes that of a memorandum. Both railroad representatives and the chiefs of the Indian nation signed these documents, which were then forwarded to Washington for

analyzed the Railroad Agreement pursuant to the canons of treaty construction and acquired evidence as to how the Tribe understood the agreement.[250] The Ninth Circuit should have also examined the parameters of the agreement under the "backdrop" of tribal sovereignty, rather than under the backdrop of divesture.[251]

The Ninth Circuit then proceeded to analyze the *Montana* exceptions and how they apply to this case.[252] In applying the first *Montana* exception, the Ninth Circuit stated, "[a] right-of-way created by congressional grant is a transfer of a property interest that does not create a continuing consensual relationship between a tribe and the grantee."[253] Again, the application of this general rule without examining the specific historical facts is flawed. The Ninth Circuit acknowledged that Congress required tribal consent as a condition for granting the right-of-way but disregarded the meaning of this consent.[254] Congress required consent because the Railroad agreement carried the same status as a treaty, and the court should have properly analyzed the agreement pursuant to the rules governing treaty interpretation when interpreting whether a

Congressional approval. Very quickly it became a practice to pass a federal statute that granted a right-of-way contingent on the railroad's obtaining permission of the Indian nation.").

250. As a basic principle of federal Indian law, the canons establish that: (1) ambiguous expressions must be resolved in favor of the Indian parties concerned. Winters v. United States, 207 U.S. 564, 576-77 (1908); (2) Indian treaties must be interpreted as the Indian themselves would have understood them. United States v. Winans, 198 U.S. at 380-81; (3) Indian treaties must be liberally construed in favor of the Indians. Washington v. Washington State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979); Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970); Lac Courte Oreilles Band of Lake Superior Chippewa v. Wisconsin, 653 F. Supp. 1420, 1429 (W.D. Wis. 1987); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); and (4) tribal sovereignty and property rights are preserved unless Congress clearly and unambiguously provides otherwise. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020).

251. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) ("[T]raditional notions of Indian self-government are so deeply engrained on our jurisprudence that they have provided an important 'backdrop' against which vague or ambiguous federal enactments must always be measured." (citations omitted) (quoting McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 172 (1973))); Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123-24 (1993) ("Our decision in *McClanahan* relied heavily on the doctrine of tribal sovereignty. We found a 'deep rooted' policy in our Nation's history of 'leaving Indians free from state jurisdiction and control.' . . . The Indian sovereignty doctrine, which historically gave state law 'no role to play' within a tribe's territorial boundaries, did not provide 'a definitive resolution of the issues,' but it did 'provide a backdrop against which the applicable treaties and federal statutes must be read.'" (citations omitted)); Washington v. EPA, 752 F.2d 1465, 1470 (9th Cir. 1985) ("Respect for the long tradition of tribal sovereignty and self-government also underlies the rule that state jurisdiction over Indians in Indian country will not be easily implied. Vague or ambiguous federal statutes must be measured against the 'backdrop' of tribal sovereignty, especially when the statute affects an area in which the tribes historically have exercised their sovereign authority or contemporary federal policy encourages tribal self-government." (citations omitted)).

252. Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1064 (9th Cir. 1999).

253. *Id.*

254. *Id.* at 1063 (9th Cir. 1999) ("It is true, Congress allowed the President, in his discretion, to require tribal consent as a condition for granting the right-of-way." (citing Pub. L. No. 50-134, §3, 25 Stat. 660 (1889)).

consensual relationship was established.[255] Furthermore, rather than interpret the agreement as a "transfer of property interest," the Ninth Circuit should have determined whether the treaties or the agreement established a "consensual relationship" as the exception clearly dictates.[256]

In analyzing the second exception of *Montana*, the Ninth Circuit emphasized that "a nonmember's impact must be 'demonstrably serious.'"[257] In doing so, the Ninth Circuit rejected the argument that "deaths of tribal members cause damage to the community by depriving the Tribe of potential councilmembers, teachers and babysitters."[258] In utilizing *Wilson*, the court of appeals reiterated that, "if the possibility of injuring multiple tribal members does not satisfy the second *Montana* exception under *Strate*, then perforce, a plaintiff's status as a tribal member alone cannot."[259] Here, the Ninth Circuit misinterpreted the argument. The analysis should have reflected safety. Specifically, did BNRC have the requisite safety protocols in place, and if these protocols were violated, could a tribal member bring suit, or could a tribe regulate the activity to ensure its safety? This analysis is pertinent in light of the alleged history of the many "bodies scattered along the railway," referencing that "there have, in fact, been many Crows killed by the BN and this is no secret."[260]

In summary, the Ninth Circuit determined that "*Montana*'s main rule, rather than its exceptions, applies to this case."[261] The court of appeals recognized "that when Congress provides for the conveyance of certain property rights from tribes to nonmember parties, it acts within its unique

255. DELORIA & DEMALLIE, *supra* note 249, at 249 ("By the fall of 1873 the government seemed to have settled on the term 'agreement,' even though in congressional debates through the 1890s, in instructions to federal negotiators in the field, and in federal courts, both the process of negotiation and the documents were called treaties."); Winters v. United States, 207 U.S. 564, 576-77 (1908) ("[A]mbiguities occurring will be resolved from the standpoint of the Indians."); United States v. Winans, 198 U.S. 371, 380-81 (1905) ("[We] will construe a treaty with the Indians as . . . [they] understood it."); Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970) ("[T]his Court has often held that treaties with the Indians must be interpreted as they would have understood them."); McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) (stating that tribal sovereignty and property rights are preserved unless Congress clearly and unambiguously provides otherwise). Treaties solidified Indian rights because "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *Winans*, 198 U.S. at 381.

256. Montana v. United States, 450 U.S. 544, 565-66 (1981). Under the first *Montana* exception, "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.*

257. *Burlington N. R.R. Co.*, 196 F.3d at 1065 (quoting Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 431 (1989)).

258. *Id.*

259. *Id.* (quoting Wilson v. Marchington, 127 F.3d 805, 815 (9th Cir. 1997)).

260. Burlington N. R.R. Co. v. Red Wolf, 106 F.3d 868, 872 (9th Cir. 1997).

261. *Burlington N. R.R. Co.*, 196 F.3d at 1065.

authority to defeat tribal jurisdiction to the extent its purposes require."[262] This statement was applied as a general rule rather than to analyze the purpose of the Railroad Agreement and to determine what authorities the tribe reserved in the Agreement.[263] Here, the Ninth Circuit perpetuated the desire to divest tribal sovereign authority, utilizing the concept of "landowner" in connection with interpreting the tribal adjudicative right. In *EXC, Inc. v. Kayenta District Court*, the Amicus Mountain States Legal Foundation perpetuated this same rationale, stating "that the Navajo Nation is merely a landowner who may make conditions for conduct on tribal land but has 'insufficient retained sovereignty' to enforce those conditions against non-members."[264] Amicus argued that "'the power of the Navajo Nation' to regulate, if it exists, . . . does not extend to the adjudication of [those] violations."[265] The Navajo Nation Supreme Court responded:

> The use of the term "landowner" by some federal courts in regard to tribal governments denies the true extent of our governmental role over reservation affairs. It further encourages the dangerous logic put forward by Amicus in this case that ignores history, reality, and express federal Indian policy that has been in effect since 1975 with the enactment of the Indian Self-Determination Act.
>
> . . . .
>
> The concept of land ownership from which the term "landowner" is being applied to Indian Nations was wholly foreign to the Navajo People.[266]

As a result, the Ninth Circuit concluded that the tribal exhaustion doctrine was not required in this case.[267] The Ninth Circuit summarized the four exceptions to the requirement for exhaustion of tribal court remedies as follows:

> (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith;[268] (2) the action is patently violative of express

262. *Id.*

263. Estates of Red Wolf & Bull Tail v. Burlington N. R.R. Co., No. 97-010, 1998 Mont. Crow Tribe LEXIS 3, at *4 (Crow App. Ct. Jan. 27, 1998) (determining that "the federal courts have held in the past that such railroad grants, including the one at issue here, do not divest the tribe of all its interest in the right-of-way. Thus, based on our preliminary review, it would appear that the right-of-way at issue in this case is not obviously equivalent to alienated, non-Indian land that would be covered by *Montana's* main rule pursuant to footnote 14 of *Strate*"); *see also* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Evers, 46 F.4th 552 (7th Cir. 2022) (declining to apply the general rule of diminished sovereign authority over allotted lands, because in this instance the creation of the reservations for the Lake Superior Chippewa Bands pursuant to the Treaty of 1854 was for the purpose of establishing a permanent homeland, and this purpose was not defeasible through the issuance of treaty allotments).

264. EXC, Inc. v. Kayenta Dist. Ct., 9 Am. Tribal L. 176, 189 (Navajo 2010).

265. *Id*.

266. *Id.*

267. *Burlington N. R.R. Co.*, 196 F.3d at 106.

268. *Id.* (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15, 19 n.12 (1987)).

> jurisdictional prohibitions;[269] (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction;[270] or (4) it is plain that no federal grant provides for tribal governance of nonmembers conduct on land covered by *Montana*'s main rule.[271]

The utilization of these exceptions to the general rule requiring exhaustion defeats the purpose of the exhaustion rule: that is, the purpose of supporting tribal self-government and self-determination, allowing a full record to be developed in the tribal court, and providing other courts with the benefit of the tribal courts' expertise in their own jurisdictions.[272] In this case, the tribal court was never provided the opportunity to apply how the *Montana* exceptions may be interpreted according to Crow Tribal law.[273] At a minimum, the Ninth Circuit should have at least remanded the case to the tribal court with the opportunity to fully develop the record and provide the federal court with the benefit of Crow tribal court expertise in determining its own jurisdiction.[274] In this instance, the exceptions swallow the rule.

D. In re Atkinson Trading Co., Inc., *1 Am. Tribal L. 451 (Navajo 1997)*

In *In the Matter of Atkinson Trading Company, Inc.*, the Navajo Nation Supreme Court addressed the issue of the application of a tribal hotel occupancy tax on non-Indian guests situated on non-Indian fee land located within the Navajo Nation.[275] The hotel originally brought a declaratory judgment in federal court, seeking relief from the application of the tribal hotel occupancy tax.[276] The United States District Court for the District of New Mexico held that "exhaustion and dismissal are

269. *Id.* (citing *Iowa Mut. Ins. Co.*, 480 U.S. at 19 n.12).

270. *Id.* (citing *Iowa Mut. Ins. Co.*, 480 U.S. at 19 n.12).

271. *Id.* (citing Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997)).

272. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).

273. Estates of Red Wolf & Bull Tail v. Burlington N. R.R. Co., No. 97-010, 1998 Mont. Crow Tribe LEXIS 3, at *8 (Crow App. Ct. Jan. 27, 1998) (holding that since the status of the land was determined to be tribal land, that it was not required to determine whether either of the *Montana* exceptions apply); *id.* at *4-5 (differentiating the case from Dust v. Austin Express, No. 96-436 (Crow Trial Ct. 1997) which was a jurisdictional case involving an accident on a state highway right-of-way). In *Dust*, the court granted a stay pursuant to *Strate* and *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). *Id.* at *6-7.

274. The court initially established three questions for determining jurisdiction in this case. This case should have been returned to the tribal court to establish at a minimum its determination of the second and third questions. These questions were as follows: "(2) if it was determined that the accident occurred on alienated, non-Indian land, "whether either Montana exception applies; and (3) if neither Montana exception applies, whether any federal grant provides for tribal governance of nonmembers' conduct on such land." *Id.* at *3.

275. *In re* Atkinson Trading Co., Inc., 1 Am. Tribal L. 451 (Navajo 1997).

276. Atkinson Trading Co. v. Navajo Nation, 866 F. Supp. 506 (D.N.M. 1994).

proper."[277] In making this determination, the district court determined that "[a]ll three factors articulated in *National Farmers* would be served by requiring exhaustion."[278]

The Navajo Nation Supreme Court subsequently determined that Atkinson was subject to the provisions of the Navajo Nation Hotel Occupancy Tax because the rental rooms at its facility were located on non-Indian fee land within the exterior boundaries of the Navajo Nation.[279] In doing so, the Navajo Nation Supreme Court acknowledged that the Navajo Nation had jurisdiction in this matter under various tribal law principles. First, the court held that the Navajo Nation's responsibilities and mutual obligations existed pursuant to the principle of reciprocal relations.[280] The court emphasized that the trading post "caters to the tourist trade" and was served by Navajo members in the form of employees and as suppliers of goods, as well as benefitted from the Nation's protection in the form of many governmental services.[281] As

277. *Id.* at 511.

278. *Id.* at 511-12 (listing the three factors as the following: "(1) *Support of Tribal Self-Determination*[:] At issue in this case is the power of the Navajo Nation to tax. Nothing could go more to the heart of tribal self-determination and self-government than the ability of the tribe to tax and raise revenue. . . . Tribal self-determination and self-government would be furthered by requiring that a challenge to this power be made via tribal administrative and judicial processes. Inherent in the sovereign power to tax should be the power of the taxing sovereign, at least in the first instance, to hear a challenge to a taxing statute and to determine the statute's application; (2) *Serving the Orderly Administration of Justice*[:] The 'orderly administration of justice' will be served by requiring plaintiff first to seek tribal administrative and judicial remedies in regard to the Hotel Occupancy Tax. . . . (3) *Obtaining the Benefit of Tribal Expertise*[:] The Navajo Nation Council enacted the challenged ordinance. The Navajo tribal courts would be in the best position, at least in the first instance, to evaluate tribal law in light of existing federal law. The Navajo Nation has developed a sophisticated judicial system with highly competent jurists. There is every reason to expect that the Navajo Nation will grant plaintiff a fair, unbiased consideration of its arguments about why the Hotel Occupancy Tax should not be imposed on plaintiff's operations").

279. *In re Atkinson Trading Co., Inc.*, 1 Am. Tribal L. at 463 (Navajo 1997) ("The Navajo Nation Hotel Occupancy Tax generally applies to the class of hotel-keepers within the Navajo Nation. There is no justifiable reason to exclude Atkinson's facility from the tax. It would not be fair to other places of lodgings to exclude Atkinson while it accepts all the benefits of Navajo Nation governmental services without paying its fair share of the cost. We conclude that the incidence of the Navajo Nation Hotel Occupancy Tax is primarily upon tourists within Navajo Indian Country; there is no explicit federal prohibition against taxing Atkinson's non-Indian guests; and the Navajo Nation has the power and authority to require Atkinson to collect and remit the tax. We affirm the decision of the Navajo Tax Commission.").

280. *Id.* at 462 ("The Navajo Nation has responsibilities to everyone that is present within its jurisdiction.").

281. *Id.* at 453-54 ("The facility caters to the tourist trade, with a hotel, restaurant, cafeteria, gallery, curio shop, retail store and recreational vehicle park. It is near the east entrance to the Grand Canyon. The guests who stay at the hotel and use the facilities are primarily non-Navajo tourists. . . . The Commission found that guests are served by Navajo employees of the facility, who are 75 to 80% of Atkinson's work force. Guests get goods brought by suppliers who enter and travel across the Navajo Nation to reach Atkinson's facility. That includes Navajo arts and crafts which Atkinson buys from off-reservation sources. . . . The Navajo Nation Police, the primary law enforcement agency in the Cameron area, and the Navajo Nation Fire Department, protect the tourists and Atkinson's facility. Both respond to emergency

a result, the court emphasized that, pursuant to federal law principles, the existence of business activities within the exterior boundaries of the reservation established a consensual relationship as a form of reciprocal relations.[282]

Secondly, the Navajo Nation Supreme Court acknowledged that the Navajo Nation had jurisdiction in this matter because the conduct was within its territorial boundaries.[283] In doing so, the court acknowledged that the land encompassing the Cameron Trading Post is located within the exterior boundaries of the Navajo Nation and is completely surrounded by Navajo Nation trust lands.[284] The court emphasized that

calls, including 911 calls, from tourists and local residents. The police routinely patrol and perform security checks in the area, including Atkinson's facility, which benefit tourist safety and security. The police respond to accidents involving non-Indian tourists and call Navajo Nation emergency medical services for them when needed. The Navajo Nation Division of Health protects the health of guests by inspecting food preparation conditions, not only in the Cameron area, but throughout the Navajo Nation. The Navajo Nation Tourism Department serves guests by telling them of the attractions of the Navajo Nation and provides facilities, and that function also serves Atkinson. As a general matter, the Navajo Nation government funds many kinds of activities which benefit Atkinson and its guests, including economic development ventures, human resource programs, natural resource development (including parks and scenic sites), public safety, health services, social services, education, and legislative and judicial services. In sum, Atkinson and Cameron, as an (Indian) trading 'company' or 'post,' operate in a Navajo environment and use Navajo trappings to lure tourists. Those tourists and the facility benefit from a wide range of Navajo Nation governmental services.").

282. *Id.* at 461 ("Atkinson has availed itself of the substantial privilege of carrying on business within Navajo Nation jurisdiction. Atkinson's facility is located and operates within Navajo Nation jurisdiction or Navajo Indian Country. These facts are bolstered by the federal court's ruling that Atkinson is subject to federal laws regulating trade with Indians on Indian lands, because it operates on the Navajo Nation as an Indian trader. Atkinson uses a Navajo Indian environment, including culture, Navajo employees, crafts, and other Navajo Indian trappings, to lure tourists to its facility for business purposes. While on Atkinson's property, the tourists are served by Navajo employees, who make up a majority of Atkinson's work force, to provide a distinctly Navajo flavor. Suppliers enter and drive across the Navajo Nation to bring Atkinson and its guests goods, because Atkinson has accepted the privilege of doing business on the Navajo Nation. . . . Here, Atkinson has purchased arts and crafts from Navajo tribal members and sales have been made to tribal members. Furthermore, Atkinson has even suggested that it might be subject to Navajo Nation labor laws because it employs a large number of Navajo tribal members. Atkinson and its guests receive and benefit from many modern Navajo Nation governmental services, or from the advantages of a civilized society that are assured by the Navajo Nation government. The Navajo Nation police respond to calls from Atkinson's guests and the Cameron Trading Post and perform routine security checks on Atkinson's facility. The Navajo Nation Fire Department responds to alarms and calls from Atkinson's guests and the Cameron Trading Post. The Navajo Nation Emergency Medical Services provides medical services to Atkinson's guests when needed. The Navajo Nation government provides other services to Atkinson and its guests including health protection through the Navajo Nation Division of Health, tourism services through the Navajo Nation Tourism Department, and as a general matter economic ventures, human resource programs, natural resource development, public safety, health services, social services, education, and legislative and judicial services. Accordingly, we hold that the facts of this case qualify it under *Montana's* consensual relationships exception. 'Under these circumstances, there is nothing exceptional in requiring [Atkinson and its guests] to contribute through taxes to the general cost of [Navajo Nation] government.'" (citations omitted)).

283. *Id.* at 456 ("The Navajo Nation enjoys governmental authority over its territory, as does any sovereign.").

284. *Id.* at 453 ("Atkinson, a New Mexico Corporation with a principal place of business at Gallup, New Mexico, operates a facility known as the Cameron Trading Post at Cameron, Navajo Nation

Congress, through enactment of the 1934 Boundary Act, expressly delegated civil authority over the area encompassing the Cameron Trading Post to the Navajo Nation when Congress "brought the Cameron area back into the territorial jurisdiction of the Navajo Nation, and included the subject fee land within the exterior boundaries of the Navajo Nation."[285] As a result, the court rejected Atkinson's argument that the allotment policies diluted tribal authority in the area, because Congress expressly restored any diminishment in tribal authority caused by the allotment and assimilative polices.[286] Third, the Navajo Nation Supreme Court acknowledged that the Navajo Nation had jurisdiction in this matter because the Navajo Nation's inherent sovereign authority to exercise jurisdiction was reserved pursuant to the Treaty of 1868.[287]

Following the Navajo Nation Supreme Court's affirmation of the tax issuance, Atkinson again filed an action in the United States District Court for the District of New Mexico, seeking a declaratory judgement that the tribe had no jurisdiction to impose the tax.[288] The district court entered summary judgement in favor of the Navajo Tax Commission members.[289] In doing so, the district court applied the *Mustang* standard of review, which requires deference to tribal courts' factual determinations.[290] The district court applied this deference by applying the tribal court's factual determinations to the tests established in both *Montana* and *Merrion*.[291] The court determined: "The *Merrion* provision-of-services or benefits-of-a-civilized-society factors, thus, are relevant to the *Montana* test because they are indicators that the necessary consensual relationship is present to allow the tribe to impose a tax upon the fee-land activity."[292] The court

(Arizona), within the exterior boundaries of the Navajo Nation. The facility is located on non-Indian fee land and completely surrounded by Navajo Nation trust lands.").

285. *Id.* at 455 (citing the Act of June 14, 1934, 73 Pub. L. No. 352, ch. 521, 48 Stat. 960, (1934)).

286. *Id.* at 455 (quoting the Act of June 14, 1934, 73 Pub. L. No. 352, ch. 521, 48 Stat. 960, (1934)) ("In 1934, Congress, anticipating that the IRA would restore land to existing Indian reservations and correct the abuses of the General Allotment Act, passed the 1934 Boundary Act '[t]o define the exterior boundaries of the Navajo Indian Reservation in Arizona. . . .'").

287. *Id.* at 462 ("The 1868 Navajo Treaty, in Article II, reserves authority to the Navajo Nation to admit non-Navajos or not and the United States specifically agreed that no person (with certain exceptions) 'shall ever be permitted to pass over, settle upon, or reside in' the reservation. If we were to accept Atkinson's argument that the Navajo Nation lacks power over it and its guests, that would compromise the 'pass over' authority reserved in the Treaty.").

288. Atkinson Trading Co., Inc. v. Gorman, No. 97-1261, 1998 WL 36030442 (D.N.M. Aug. 21, 1998).

289. *Id.* at *1.

290. *Id.* ("As Plaintiff acknowledges, the Tenth Circuit has recently decided that in cases such as this, concerning a tribal-court decision asserting jurisdiction over non-members, the proper standard of review is for this Court to review the tribal court's findings of fact for clear error, while applying a *de novo* review to the tribal court's conclusions of law." (citing Mustang Prod. Co. v. Harrison, 94 F.3d. 1382, 1384 (10th Cir. 1996))).

291. *Id.* at *5.

292. *Id.*

then reasoned that "[t]he real question with respect to tribal-taxation cases and the consensual-relationships test is whether the nonmembers' consensual activity within Indian Country is significant enough to allow the tribe to tax that activity."[293] The district court concluded that "the Tribe provides Plaintiff's overnight guests with the 'benefits of civilized society' while the guests are present, and the presence of the guests creates a greater need, both actual and potential, for tribal services."[294]

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed.[295] Atkinson complained that the district court's holding "was too deferential to decisions of tribal courts and argue[d] that *Mustang* is no longer good law in light of the Supreme Court's decision in *Strate v. A-1 Contractors*."[296] The Tenth Circuit rejected this argument, stating that "*Strate* . . . reiterated the holding of *National Farmers Union* and specifically upheld its reasoning."[297] As a result, the Tenth Circuit concluded that "*Mustang* is still good law and the district court in this case did not err in applying the *Mustang* standard to the decisions of the Navajo Supreme Court and Navajo Tax Commission."[298] The court also stated that "[t]his standard 'indicate[d] that federal courts have no obligation to follow [the tribal courts'] expertise, but need only be guided by it."[299] The Tenth Circuit concluded that, "as applied to Appellant's guests, the Navajo Hotel Occupancy Tax falls under the consensual relationship exception of the *Montana* rule."[300]

The United States Supreme Court reversed, holding that the Navajo Nation lacked the authority to impose the Navajo Hotel Occupancy Tax on non-member guests of the hotel because neither *Montana* exception was satisfied.[301] The Court began its analysis with the statement that "[t]ribal jurisdiction is limited."[302] The Court then reiterated its conclusion from *Montana* that "the inherent sovereignty of Indian tribes was limited to 'their members and their territory': 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes.'"[303] Here, the Court emphasized the language of dependency as an

293. *Id.*

294. *Id.* at *6.

295. Atkinson Trading Co., Inc. v. Shirley, 210 F.3d 1247 (10th Cir. 2000).

296. *Id.* at 1250 ("Appellant asserts that *Strate* overruled the reasoning of *National Farmers Union* [, and, by implication, the reasoning of *Mustang* and *FMC*." (citations omitted)).

297. *Id.*

298. *Id.* at 1252 (quoting FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990)).

299. *Id.* at 1251-52.

300. *Id.* at 1264.

301. Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 649 (2001).

302. *Id.* at 649.

303. *Id.* at 650-51.

extension of assimilative policies and plenary power rather than addressing the merits of the case from the perspective of furthering inherent tribal sovereignty and tribal self-determination.[304] The question that the Court should have asked is: what does dependency mean from a tribal law perspective? The answer is that the language of dependency entails the notion of fulfilling tribal trust obligations as evident in the establishment of reciprocal relationships.[305]

The Court reasoned that the rule from *Merrion* emphasizing "the advantages of a civilized society" only extends to "transactions occurring on *trust lands* and significantly involving a tribe or its members."[306] This reasoning directly contradicts the Navajo Nation Supreme Court's decision, which focused on the conduct being regulated (here, commercial dealings), rather than the type of land upon which the conduct occurred.[307] This is especially true because the Treaty of 1868 reserved the Tribe's jurisdictional authority within the exterior boundaries of the Navajo Indian Reservation.[308] In determining the consensual relationships prong on the *Montana* test, the Court stated that "a nonmember's actual or potential receipt of tribal police, fire and medical services does not create the requisite connection."[309] The Court also determined that Atkinson's status as an "Indian trader" was insufficient for the establishment of a consensual relationship. Here, the Court reasoned that there was an insufficient nexus between the tax imposed and the Indian trader status.[310]

In determining the direct effects prong of the *Montana* test, the Court stated: "[W]e fail to see how petitioner's operation of a hotel on non-Indian fee land 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'"[311] The Court reasoned that, "[w]hatever effect petitioner's operation of its trading post might have upon surrounding Navajo land, it does not endanger the Navajo Nation's political integrity."[312] Had the United States Supreme Court properly adhered to the reasoning underlying the

304. *See generally supra* Part II.A & Part II.B.

305. *See generally supra* Part III.A.1.

306. *Atkinson Trading Co., Inc.*, 532 U.S. at 653.

307. *In re* Atkinson Trading Co., Inc., 1 Am. Tribal L. 451, 453, 456 (Navajo 1997) ("The Navajo Nation enjoys governmental authority over its territory, as does any sovereign.").

308. *See supra* note 287.

309. *Atkinson Trading Co., Inc*., 532 U.S. at 655.

310. *Id.* at 656-57 ("The hotel occupancy tax at issue here is grounded in petitioner's relationship with its nonmember hotel guests, who can reach the Cameron Trading Post on United States Highway 89 and Arizona Highway 64, non-Indian public rights-of-way. Petitioner cannot be said to have consented to such a tax by virtue of its status as an 'Indian trader.'").

311. *Id.* at 657.

312. *Id.* at 659.

establishment of the exhaustion rule, the Court could have gained insight from the decision of the Navajo Nation Supreme Court as to what the tribe considered an endangerment of the Navajo Nation's political integrity as applied to its territory, as well as the effects of the Treaty of 1868's reservation of the Tribe's jurisdictional authority within the exterior boundaries of the Navajo Indian Reservation.[313]

E. Hicks v. Harold, *21 Indian L. Rep. 6076 (W. Nev. Intertribal App. Ct. 1994)*

In *Hicks v. Harold, et. Al.*, the Western Nevada Intertribal Court of Appeals addressed an appeal of an order quashing service of process on state defendants pertaining to a tribal member's civil rights and tort action stemming from the seizure of big horn sheep trophy heads from a tribal allotment located within the exterior boundaries of the reservation.[314] In addressing the merits, the court determined that, pursuant to the tribe's Law & Order Code, the tribal court was authorized to take jurisdiction over all civil matters "arising or existing" within the tribe's traditional territory.[315] In addition, the court also determined that, pursuant to the tribe's Law & Order Code, "the act of entry upon the territory within the jurisdiction of the Fallon Tribal Court shall conclusively be deemed consent to the jurisdiction of the Fallon Tribal Court with respect to any civil action arising out of such entry."[316] The court emphasized that the "State defendants repeatedly and voluntarily[] availed themselves of the jurisdiction of the Fallon Paiute-Shoshone Tribal Court" when they requested permission of the tribal court to conduct the search of the Hicks residence, which was located on tribal lands.[317]

Two weeks after the Western Nevada Intertribal Court of Appeals upheld tribal jurisdiction, the state of Nevada and its officials filed suit in the United States District Court for the District of Nevada, seeking a declaratory judgment that the tribal court lacked jurisdiction.[318] The district court entered summary judgement in favor of the tribal member and the tribal court.[319] The state and its officials appealed, and the United

313. *See supra* note 282.

314. Hicks v. Harold, 21 Indian L. Rep. 6076 (W. Nev. Intertribal App. Ct. 1994).

315. *Id.* at 6077.

316. *Id.*

317. *Id.* ("That in 1990 and 1991, state defendants repeatedly and voluntarily availed themselves of the jurisdiction of the Fallon Paiute-Shoshone Tribal Court, after obtaining legal counsel from the Churchill County District Attorney, to seek permission to conduct a search of Hicks' allotted Indian lands and his residence on the Fallon Indian Reservation for evidence of the killing of the California subspecies of bighorn sheep, a gross misdemeanor under Nevada law.").

318. Nevada v. Hicks, 944 F. Supp. 1455 (D. Nev. 1996).

319. *Id.* at 1458.

States Court of Appeals for the Ninth Circuit held that the tribal court had jurisdiction over the tribal members' claims, and that the state officials had failed to exhaust their tribal remedies in tribal court.[320] In so holding, the Ninth Circuit determined that the *Merrion* line of cases were applicable to this matter because "the incidents underlying the instant case occurred on Indian-owned land, Indian-controlled land, over which the Tribe retained its rights to exclude non-members."[321]

The Ninth Circuit reasoned that, unlike in *Strate*, in which the grant of an easement was akin to alienation of tribal land, in this case, the tribe did not grant the state of Nevada any broad authority by approving the search warrant.[322] The court explained: "The land on which Hick's residence stood was neither open to the public, nor controlled or maintained by any entity other than the Tribe. When the tribal court agreed to grant the state warden's request for a warrant, it was exercising its 'gatekeeping right.'"[323] As a result, the court concluded that "[t]his case then, involves no 'significant alienation of tribal sovereignty and control' over law enforcement or Indian-owned land within the reservation." [324]

The United States Supreme Court reversed, holding that "[b]ecause the Fallon Paiute–Shoshone Tribes lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duties."[325] The Court also concluded that "since the lack of authority is clear, there is no need to exhaust the jurisdictional dispute in tribal court."[326] In addressing the merits of the case, the Court proceeded to blur the lines between the *Merrion* and *Montana* Rules, which establish that land status is the ultimate factor necessary for determining which jurisdictional rule to apply.[327] The Court articulated that, in *Montana*, the Court found that "[t]he ownership status of land . . . is only one factor to consider in determining whether

320. *Id.* at 1027.

321. *Id.*

322. *Id.* at 1026-28 ("Our analogizing to *Strate* was explicit: 'Like the tribes in *Strate*, which consented to and received payment for a highway easement, the Nez Perce Tribe ceded its "gatekeeping right," by consenting to and receiving the benefits of state law enforcement protection.'" (citing County of Lewis v. Allen, 163 F.3d 509, 514 (9th Cir. 1998))).

323. *Id.* at 1028 ("The tribal court was free to exclude state officials engaged in law enforcement activities on the reservation. The tribal court was the sole authority to which the state warden could apply—and to which in fact had to apply—for permission to execute a search warrant on the reservation. Further underscoring the exclusivity of tribal jurisdiction is the fact that the state warden was accompanied by a tribal officer upon the execution of each warrant.").

324. *Id.*

325. Nevada v. Hicks, 533 U.S. 353, 374 (2001).

326. *Id.*

327. *See supra* Part III.B.1.c.

regulation of the activities of nonmembers is 'necessary to protect tribal self-government or control internal relations.'"[328]

In furthering the doctrine of implicit divesture, the Court explained: "Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at the reservation's border."[329] As a result, the Court concluded "that tribal authority to regulate state officers in executing process related to the violation, off the reservation, of state laws is not essential to tribal self-government or internal relations—to 'the right to make laws and be ruled by them.'"[330] The Court continued: "The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government."[331] In making this determination, the Court perpetuates the implicit divesture doctrine.[332] In this regard, the Court explained that Congress has the power to strip the state of its inherent jurisdiction on reservation and references various statutes that fail to expressly limit state authority.[333] However, this analysis is flawed, as the Court fails to cite any statute expressly divesting the tribe of its inherent sovereign authority.[334] Lastly, the Court likewise dismissed the requirement for tribal exhaustion, stating that "adherence to the tribal exhaustion requirement in such cases [involving state officials' causes of action

328. *Hicks*, 533 U.S. at 360.

329. *Id.* at 361 ("Though tribes are often referred to as 'sovereign' entities, it was 'long ago' that 'the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries.").

330. *Id.* at 364.

331. *Id.*

332. *See* United States v. Wheeler, 435 U.S. 313, 326 (1978) In the development of the implicit divesture doctrine, the Court has determined that tribes have "implicitly lost," or have been divested of certain aspects of their inherent sovereignty by "virtue of their dependent status." *Id.* The Court explained,

> the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. They cannot enter into direct commercial or governmental relations with foreign nations. And, as we have recently held, they cannot try nonmembers in tribal courts.

Id. (citations omitted). In establishing this doctrine, the Court artificially makes a distinction regarding a tribe's right to self-government. *Id.* The Court expounded that the internal right of self-government continues to exist, however the external right has been divested, or lost. *Id.*

333. *Hicks*, 533 U.S. at 365-66 ("The States' inherent jurisdiction on reservations can of course be stripped by Congress. But with regard to the jurisdiction at issue here that has not occurred." (citations omitted)).

334. *Id.*

relating to the performance of official duties] 'would serve no purpose other than delay,' and is therefore unnecessary."[335]

F. Bugenig v. Hoopa Valley Tribe, *5 NICS App. 37 (Hoopa Valley Tribal App. Ct. 1998)*

In *Bugenig v. Hoopa Valley Tribe*, the Hoopa Valley Tribal Court of Appeals addressed a matter involving the tribe's ability to regulate fee lands of a non-member within the exterior boundaries of the Hoopa Valley Indian Reservation.[336] The court held that the tribe retained regulatory authority over all land located within the boundaries of the Hoopa Valley Indian Reservation.[337] As a result, the tribe retained the ability to prohibit logging within a one-half mile buffer zone adjoining the Hoopa Valley Tribe's sacred White Deerskin Dance Ground.[338] The court asserted:

> The White Deerskin Dance is a world renewal dance. And the intent of the dance . . . is to put everything back in balance that's gotten out of balance from dance to dance. And that's the main emphasis of the dance, it is not only for the good of the Hoopa Tribe, but for all people.[339]

The court continued by explaining its connection with its traditional territories:

> Beyond the coastal mountains of northwestern California, the Trinity River runs through a rich valley which has always been the center of the Hupa [Hoopa] world, the place where the trails return. There, the legends say, the people came into being, and there they have always lived. From this central valley, Hupa [Hoopa] land spread out in every direction . . . . Within this land were fields of grass; groves of pine, madrona, and oak; streams, which supported many fish, birds, and animals; and mountain forests of pine, yew, fir, and oak filled with wildlife. The Hupa [Hoopa] used all of these resources, but they made their homes and villages beside the Trinity River, in the valley from which they took their name.
>
> At the very heart of that valley was *Takimildin*. This village known as the "Place of the Acorn Feast" was the site of three Hupa ceremonies; the place from which the tribe's main spiritual leader was chosen, and the spiritual center for the people of the valley. For longer than any man could remember, the sacred house had stood there. For thousands of years, spiritual leaders and members of the tribe had come here to pray and

335. *Id.* at 369.
336. Bugenig v. Hoopa Valley Tribe, 5 NICS App. 37 (Hoopa Valley Tribal App. Ct. 1998).
337. *Id.* at 49.
338. *Id.* at 44, 49.
339. *Id.* at 38.

> meditate, and dancers had met outside the big house on the night before the most sacred White Deerskin Dance to practice.[340]

In concluding that the Tribe retained regulatory authority over all land located within the boundaries of the reservation, the Hoopa Valley Tribal Court of Appeals utilized several historical factors that can be applied similarly to similar situated tribal jurisdictional questions.

The first factor was the establishment of the reservation. The Hoopa Valley Indian Reservation was established by executive order on August 21, 1865.[341] The exterior boundaries were approved and declared by the president on June 23, 1876.[342] The reservation boundaries were later extended by executive order in 1891.[343] The reservation was later portioned "and returned to its original size pursuant to the Hoopa-Yurok Settlement Act of 1988."[344]

The second historical factor utilized in the court's analysis was the establishment and approval of the tribe's existing governing documents. The Hoopa Valley Tribe is organized pursuant to the Indian Reorganization Act of 1934 under a "constitution and amendments approved by the Secretary of the Interior on November 20, 1933, September 4, 1952, August 9, 1963, and August 18, 1972."[345] The constitution was subsequently "ratified and confirmed" as a part of the Hoopa-Yurok Settlement Act.[346]

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340. *Id.* at 39.

341. *Id.* at 41 ("On August 21, 1865, Austin Wiley, Superintendent of Indian Affairs for the State of California, acting under authority of the United States of America, issued an Executive Order stating, in part: 'I do hereby proclaim and make known to all concerned that I have this day located an Indian reservation to be known and called by the name and title of the Hoopa Valley Reservation, Cal., to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President of the United States. Settlers in Hoopa Valley are hereby notified not to make any further improvements upon their places, as they will be appraised and purchased as soon as the Interior Department may direct.'").

342. *Id.* ("On June 23, 1876, President Ulysses S. Grant issued an Executive Order describing the reservation's boundaries encompassing a portion of lands adjoining the Trinity River the perimeter of which was 'declared to be the exterior boundaries of the Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,573.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes. . . .'").

343. *Id.*

344. *Id.* ("The reservation was . . . later partitioned and returned to its original size by the Hoopa-Yurok Settlement Act of 1988. That law states in part: 'Effective with the partition of the joint reservation as provided in subsection (a) of this section, the area of land known as the "square" (defined as the Hoopa Valley Reservation established under Section 2 of the Act of April 8, 1864, the Executive Order of June 23, 1876, and the Executive Order of February 17, 1912) shall thereafter be recognized and established as the Hoopa Valley Reservation. The unallotted trust land and assets of the Hoopa Valley Reservation shall thereafter be held in trust by the United States for the benefit of the Hoopa Valley Tribe.'" (citations omitted)).

345. *Id.* at 42.

346. *Id.* at 41-42 (The Hoopa-Yurok Settlement Act of 1988 states: "The existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.").

The third factor utilized in the court's analysis was the powers expressed in the tribe's constitution.[347] Pursuant to Article II of the tribe's constitution, the tribe declared that it possessed jurisdiction within the exterior boundaries of the reservation.[348] Pursuant to Article IX, the Tribe declared the ability "to provide assessments or license fees upon non-members"[349] and "to safeguard and promote the peace, safety, morals, and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use or disposition of property . . . affecting non-members."[350]

The fourth factor utilized in the court's analysis was the effects of allotment on the reservation. As the court explained, "[t]he property involved in this dispute is located on the Hoopa Valley Indian Reservation in an area referred to as Bald Hill and was originally allotted to members of the Hoopa Tribe under the General Allotment Act."[351]

The fifth factor utilized in the court's analysis was the scope of the regulatory action.[352] In this instance, the dispute involved the Tribe's harvest management plan.[353] The plan established that one of its goals was to "protect cultural and religious resources."[354] The prohibition on logging within a one-half mile buffer zone adjoining the Hoopa Valley Tribe's sacred White Deerskin Dance Ground was established pursuant to this stated goal.[355]

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347. *Id.* at 42.

348. *Id.* ("Article II of the Constitution and Bylaws of the Hoopa Valley Tribe states: 'The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Indian Reservation boundaries as established by Executive Order of June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians.'").

349. *Id.* ("Article IX Powers and Duties of Tribal Council includes in Section 1 (f): '(1) To provide assessments or license fees upon non-members doing business or obtaining special privileges within the reservation, subject to the approval of the Commissioner of Indian Affairs or his authorized representative. (2) To promulgate and enforce assessments or license fees upon members exercising special privileges or profiting from the general resources of the reservation.'").

350. *Id.* ("Article IX, Section 1 (l) authorizes the governing Tribal Council: 'To safeguard and promote the peace, safety, morals, and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use or disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative.'").

351. *Id.* at 42-43 ("One twenty-acre portion held in trust for Mae Wallace Baker was subsequently converted to fee simple patent in 1947. Another parcel, held in trust for Robert Pratt, was sold out of trust status in 1958 to Don H. Gould. Both parcels later became the property of a California Limited Partnership called the Gould Family Partnership. The present-day Hoopa Valley Indian Reservation, referred to as 'the Hoopa Square,' has less than one percent of its approximately ninety thousand acres held in fee simple status by non-Indians.").

352. *Id.* at 43-45.

353. *Id.* at 43.

354. *Id.*

355. *Id.* at 43-44 ("[T]he Hoopa Valley Tribe prepared an archaeological evaluation of the proposed timber harvest area and enlisted the participation of the Bureau of Indian Affairs in initiating a consultation with the State of California under Section 106 of the National Historic Preservation Act. The

The court then proceeded to analyze these five factors pursuant to *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*.[356] The court explained:

> Our attention is drawn to the footnote accompanying the case law cited by the Supreme Court in support of the second *Montana* exception, wherein the Court stated: "As a corollary, this Court has held that Indian tribes retain rights to river waters necessary to make their reservation livable." Given that logic, it would seem to follow that a timber harvest regulation, neutrally applied, the purpose and effect of which is to preserve the sanctity of the Hoopa Tribe's most sacred spiritual location for the present and future use of tribal members would be a right retained by the Hupa people to ensure that their reservation remained livable. Or as Justice White would have it, the Hoopa Valley Tribe has neither relinquished nor abrogated, in the fact of Appellant Bugenig's effort to "bring a pig into the parlor" to the White Deerskin Dance Ground, its inherent sovereign authority "to ensure that this area maintains its unadulterated character."[357]

Based upon the cultural and spiritual significance of the area, the court held as follows:

> The *Brendale* standard as applied to the second *Montana* exception supports the right of the Hoopa Valley Tribe to implement neutrally applied regulations to reasonably restrict encroachment upon "that sacred place 'among the oak tops' on Bald Hill, where, the legends say, the immortal watch the people of the valley dance with the precious white deerskins and the sacred obsidian blades."[358]

In summary, the Hoopa Valley Tribal Court of Appeals concluded that all the above-described documents and actions point toward a congressional intent that the Hoopa Valley Tribe retain its inherent sovereignty to regulate logging in the area in question.

Following the decision of the Hoopa Valley Tribal Court of Appeals, Bugenig brought an action in the United States District Court for the

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BIA letter stated in part: 'The results of [the] studies documented the presence of two archaeological/cultural sites in the APE that are evaluated as potentially eligible for inclusion on the National Register of Historic Places. The site of the White Deerskin Dance Grounds and trail is considered very significant to the tribe.'").

356. 492 U.S. 408, 441 (1989); *Bugenig*, 5 NICS App. at 48 ("By conducting logging activities not in compliance with tribal law, the defendant acted in contravention of tribal law, threatening and physically disturbing the integrity and sacred status of the White Deerskin Dance area and Trail . . . the activity threatened the health and welfare of the tribe and the Hoopa Valley People's customs and traditions . . . . The Hoopa Valley Tribe has the power and authority to define areas of sacred significance and through establishment of the buffer no-cut zone in the Bald Hill area, has exercised that power." (quoting United States v. Montana 450 U.S. 544, 566 (1981))).

357. *Bugenig*, 5 NICS App. at 48-49 (citations omitted) (quoting Arizona v. California, 373 U.S. 546, 599 (1963)); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 441 (1989).

358. *Id.* at 49.

Northern District of California against the tribe and tribal council, seeking declaratory and injunctive relief from application of the tribal ordinance regulating logging on her nonmember fee land. The district court dismissed the action.[359] On appeal, the United States Court of Appeals for the Ninth Circuit reversed and remanded the action.[360] On rehearing en banc, the Ninth Circuit upheld tribal jurisdiction, reasoning that Congress's action of establishing the reservation and subsequently ratifying the Hoopa Valley Tribe's Constitution in the Hoopa-Yurok Settlement Act effectively constitutes "*an express delegation of authority to the Tribe*[*s*]" to regulate non-Indians within the Hoopa Valley Indian Reservation.[361] The United States Supreme Court denied the petition for writ of certiorari.[362]

G. Smith v. Salish Kootenai College, *4 Am. Tribal L. 90 (Confederated Salish & Kootenai Tribes App. Ct. 2003)*

In *Smith v. Salish Kootenai College*, the Court of Appeals of the Confederated Salish and Kootenai Tribes addressed the issue of jurisdiction pertaining to a negligence claim.[363] Specifically, the court addressed "whether a tribal college committed a tort or torts in the course of its instructional program."[364] The court determined that tribal law authorizes the court to exercise jurisdiction over the case.[365] In analyzing the matter pursuant to federal common law, the court began by highlighting the importance of educating tribal members as a component of tribal self-government.[366] The court then proceeded to find, for purposes of determining jurisdiction, that the Salish Kootenai College

359. Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201, 1204 (9th Cir. 2001).

360. Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210, 1223 (9th Cir. 2000).

361. *Bugenig*, 266 F.3d at 1216.

362. Bugenig v. Hoopa Valley Tribe, 535 U.S. 927 (2002).

363. Smith v. Salish Kootenai Coll., 4 Am. Tribal L. 90 (Confederated Salish & Kootenai Tribes App. Ct. 2003).

364. *Id.* at 93-94 ("This is not a case that is 'distinctly non-tribal in nature.' Nor is it a 'run-of-the-mill [highway] accident.' Rather, this is a case that arose in a distinctly tribal context, i.e., that of tribally-established college created to provide advancement for tribal members through education. The case involves three students in the college, two of whom were tribal members. The third, Appellant Smith, a member of the Umatilla Tribe, testified that he enrolled in the Tribal college, 'To better my life' and the life of 'my family.' Assertions and allegations as to causation extend far beyond an accident on a state highway to earlier events at the college pertaining to supervision of the students and control and maintenance of the vehicle." (citations omitted)).

365. *Id.* at 93.

366. *Id.* at 94-95 ("The greater the Indian and tribal interests involved in a case the lore likely exercise of judicial authority will be found to be necessary to self-government. Here, the Tribes have significant interests in the education of tribal members as well as in regulation of the manner in which their education is delivered.").

("SKC") is a tribal entity, and that the "case arose in a distinctly tribal context," further justifying tribal jurisdiction.[367]

In analyzing jurisdiction under *Montana*, the court emphasized that "the parties have not identified any controlling treaty provision or federal statute that would confer civil jurisdiction over nonmembers such as Smith. The question, then, is whether the Tribal Court has jurisdiction under the Tribes' inherent authority."[368] In addressing the first prong of *Montana*, the court determined that Smith possessed a "consensual relationship" with the tribes.[369] The court emphasized that "Smith chose to enroll in the college for the purposes of being educated . . . . Thus, he voluntarily engaged in a consensual relationship with SKC, a tribal entity within the exterior boundaries of the Flathead Reservation."[370] The court also determined that Smith's complaint against SKC was "a direct outcome of the relationship of student-college that he chose to establish," and thereby a "direct nexus" existed.[371] In addressing the second prong of *Montana*, the court explained that the establishment of the SKC as an education endeavor was "essential to tribal self-government and internal relations thus impacting 'the political integrity' of the Tribes within the meaning of *Montana*."[372] The court emphasized that "[i]t is difficult to argue that an educated citizenry is not essential to self-government, whether of a tribe or of another government."[373] As a result, the court concluded that the second prong of *Montana* was also satisfied.[374] In doing so, the court distinguished this case from *Strate*, determining that the integral factor was not the status of the land where the incident occurred, but rather the conduct in question.[375] The court highlighted that the requisite conduct was the duty "to provide a safe and reasonable educational environment."[376]

Although Smith was the party that initiated the claim in tribal court, following an unfavorable verdict, he proceeded to file an injunction in federal court claiming that the tribal court lacked subject matter jurisdiction.[377] The United States District Court for the District of

367. *Id.* at 93-94.

368. *Id.* at 96.

369. *Id.* at 97.

370. *Id.*

371. *Id.*

372. *Id.* ("In establishing SKC the Tribes were both implementing and sustaining their self-governing powers. As outlined above, the more significant a particular interest is to a tribe the more likely regulation of that interest will be essential to tribal self-government.").

373. *Id.* at 98.

374. *Id.*

375. *Id.* at 97-98.

376. *Id.* at 98.

377. Smith v. Salish Kootenai Coll., No. 9:02-CV-00055, 2003 WL 24831272, at *1 (D. Mont.

Montana determined that the tribal court had jurisdiction and denied the injunction.[378] On appeal, the United States Court of Appeals for the Ninth Circuit reversed on the grounds that the tribal court lacked jurisdiction.[379] The Ninth Circuit subsequently vacated the opinion and granted en banc review.[380]

In reviewing the matter en banc, the Ninth Circuit first addressed whether SKC was a tribal entity and therefore should be treated as a member for purposes of the jurisdictional analysis.[381] The Ninth Circuit, agreeing with the determinations of the Court of Appeals of the Confederated Salish and Kootenai Tribes and the district court, concluded that "SKC is a tribal entity and, for purposes of civil tribal court jurisdiction, may be treated as though it were a tribal 'member.'"[382] The Ninth Circuit then proceeded to address whether the claim bore a relationship to tribal lands.[383] The Ninth Circuit recognized that "*Montana* applies to both Indian and non-Indian land" and, therefore, "the ownership status of the land . . . is only one factor to consider."[384] In this matter, the Ninth Circuit recognized that "Smith's claim . . . implicated SKC's actions on the college campus, not on the highway."[385] The Ninth Circuit distinguished *Strate*, emphasizing that, "[u]nlike the accident in *Strate*, where the plaintiff alleged that the defendant's negligence on public roads caused her injuries, Smith alleged negligence occurring on the reservation, on lands and in the shop controlled by a tribal entity, SKC."[386] Smith also claimed that SKC "destroyed notes from the post-accident investigation."[387] The Ninth Circuit reasoned that, "[w]hether or not the notes were in fact lost or destroyed on tribal lands, SKC had control over the notes. For our purposes, Smith's claim arose out of activities conducted or controlled by a tribal entity on tribal lands."[388]

March 7, 2003).

378. *Id.* at *5.

379. Smith v. Salish Kootenai Coll., 378 F.3d 1048 (9th Cir. 2004).

380. Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1130 (9th Cir. 2006).

381. *Id.* at 1133-35.

382. *Id.* at 1135 ("[T]he Tribal Court of Appeals concluded that 'SKC is a tribal entity closely associated with and controlled by the Tribes. For purposes of determining jurisdiction, it must be treated as a tribal entity.' Similarly, the district court found that 'SKC is a tribal entity or an arm of the tribe for purposes of federal Indian law regarding tribal court jurisdiction.' We do not disagree with these assessments.").

383. *Id,*

384. *Id.* (citing Nevada v. Hicks, 533 U.S. 353, 360 (2001).) ("Our inquiry is not limited to deciding precisely when and where the claim arose . . . . Rather, our inquiry is whether the cause of action brought by these parties bears some direct connection to tribal lands.").

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

In reviewing the claims pursuant to *Montana*, the Ninth Circuit emphasized the importance of Smith choosing the tribal court as a forum.[389] The court reasoned that, "even though his claims did not arise from contracts or leases with the tribes, Smith could and did consent to the civil jurisdiction of the tribes' courts."[390] The Ninth Circuit determined that this case fell within the rule established by *William v. Lee*.[391] The court reasoned that:

> Smith comes to this proceeding as the plaintiff, in full control of the forum in which he prosecutes his claims against SKC. Although he did not have a prior contractual relationship with a tribal member, he brought suit against SKC, a tribal entity, for its alleged tortious acts committed on tribal lands. We do not think that civil tribal jurisdiction can turn on finely-wrought distinctions between contract and tort.[392]

The Ninth Circuit concluded that, "[a]s in *Williams*, we think it was 'immaterial that [Smith] is not [a member]' once he chose to bring his action in tribal court."[393] As a result, the Ninth Circuit concluded that "a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a 'consensual relationship' with the tribe within the meaning of *Montana*."[394]

Although the Ninth Circuit properly determined that the tribes possessed jurisdiction in this case, in doing so, the court perpetuated the application of the *Montana* test to all matters involving non-members. This further blurs the line between the application of *Merrion* versus the application of *Montana*.[395] Because the court determined that the matter involved tribal lands, the court could have easily applied the presumption of tribal jurisdiction established in *Merrion*. By relying upon the *Montana* test, however, the court confined itself, and potential future matters, to fit within one of the *Montana* exceptions, even if the conduct occurs on tribal land. The positive takeaways from this opinion include the court's recognition that the parties' conduct involved in the case matters, which

389. *Id.* at 1136.

390. *Id.*

391. *Id.* at 1136-37 ("[T]he Court found that it was 'immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.'" (quoting Williams v. Lee, 358 U.S. 217, 222-23 (1959))).

392. *Id.* ("Smith is within the *Williams* rule.").

393. *Id.* (quoting Williams, 358 U.S. at 223).

394. *Id.* at 1140-41 ("If Smith has confidence in the tribal courts, we see no reason to forbid him from seeking compensation through the Tribes' judicial system. Had the jury awarded compensation to Smith, we have little doubt that we would not have entertained a claim by SKC that the tribal courts lacked jurisdiction to enter judgement against it and in favor of a tribal nonmember. Having made that choice, Smith cannot be heard to complain that judgement was not in his favor.").

395. *See supra* Part III.B.1.c.

is the precise criticism many scholars have articulated regarding the court's analysis in cases such as *Plains Commerce Bank*.[396] The court also extended the parameters of consensual relations beyond the strict reading of the language of commercial dealings, contracts, leases, and other arrangements as expressed in *Montana*. This is a positive takeaway, as practitioners more commonly utilize traditional tribal law concepts of consensual relations that may exist beyond the narrow confines of language established in *Montana*.[397]

H. The Bank of Hoven, Now Known as Plains Commerce Bank v. Long Family Land and Cattle Co., *32 Indian L. Rep. 6001 (Cheyenne River Sioux Tribal App. Ct. 2004)*

In *Bank of Hoven (Plains Commerce Bank) v. Long Family Land and Cattle Co., Inc.*, the Cheyenne River Sioux Tribal Court of Appeals addressed a discrimination claim against an off-reservation bank.[398] In determining jurisdiction, the court noted that the basis of the discrimination claim is grounded in tribal law.[399] The court explained as follows:

> [T]here is a basis for a discrimination claim that arises directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom. Such a potential claim arises from the existence of Lakota customs and norms such as the "traditional Lakota sense of justice, fair play and decency to others,"[400] and "the Lakota custom of fairness and respect for individual dignity. . . ."[401] Therefore a tribally based cause of action grounded in an assertion of discrimination may proceed as a "tort" claim as defined in the Cheyenne River Sioux Tribal Code, as derived from Tribal tradition and custom . . . .[402]

In analyzing jurisdiction, the tribal court of appeals concluded that the

396. *See supra* Part IV.A; Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316 (2008).

397. *See supra* Part III.A.

398. Plains Com. Bank v. Long Fam. Land & Cattle Co., Inc., 32 Indian L. Rep. 6001 (Cheyenne River Sioux Tribal App. Ct. 2004).

399. *Id.* at 6002 n.3 ("Discrimination is prohibited under tribal customary law in much the same way that other injurious or tortious conduct is prohibited under the common law. . . . Under tribal law, the courts 'have jurisdiction over claims and disputes arising on the reservation[,]' including claims arising out of 'tortious conduct.'" (citations omitted)).

400. *Id.* at 6003 (quoting Miner v. Banley, No. 94-003 A, at 6 (Cheyenne River Sioux Tribal App. Ct. Feb. 3, 1995)).

401. *Id.* (("[T]he Lakota custom of fairness and respect for individual dignity that should infuse all tribal actions by providing those harmed by tribal government officials with a vehicle for seeking to remedy such wrongs." (quoting Thompson v. Cheyenne River Sioux Tribal Bd. of Police Comm'rs, 23 Indian L. Rep. 6045, 6048 (Cheyenne River Sioux Tribal App. Ct. 1996))).

402. *Id.*

facts of this case satisfied both prongs of *Montana*.[403] The court noted that the case involved a consensual agreement pursuant to a signed contract between a tribal member and a non-Indian bank.[404] The contract dealt with fee land owned wholly within the exterior boundaries of the reservation. Though tribal member parties had previously owned the land, it now belonged to the bank due to the events of this suit.[405] The court further noted that the contract dealt with business activities on the reservation in the form of loans for the members' ranching activities, which included numerous meetings that occurred on the reservation involving the bank, tribal member parties, the tribe, and the Bureau of Indian Affairs.[406] The court, analyzing the second prong of *Montana*, noted that the case directly involved the "economic security" of the tribe, and observed that both the Cheyenne River Sioux Tribe and the Bureau of Indian Affairs were directly involved and consulted on the business activities (ranching operations) that occurred on the reservation.[407]

In reviewing this case, the United States District Court for the District of South Dakota found that tribal jurisdiction was properly exercised because the bank had entered a consensual relationship with tribal members.[408] The United States Court of Appeals for the Eighth Circuit affirmed the district court's holding that the discrimination claim "arose directly from [the tribal members'] preexisting commercial relationship with the bank."[409] The Eighth Circuit reasoned that, when the bank chose to provide a loan to tribal members, the bank consented to substantive regulation by the tribe.[410] The United States Supreme Court reversed, holding that the tribal court did not have jurisdiction to adjudicate the discrimination claim.[411] The Court focused on the discrimination claim's effect on the sale of the land as a "restraint on alienation" rather than as a regulation of non-member conduct.[412] In reviewing the tribal court's application of traditional notions of law embodying "justice, fair play, and decency," the Court diminished the claim as being "novel."[413] Had the Court properly utilized the tribal court's expertise in defining its own jurisdiction and its own application of tribal law, it would have been

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. Plains Com. Bank v. Long Fam. Land & Cattle Co., 440 F. Supp. 2d 1070, 1080-81 (D.S.D. 2006).

409. Plains Com. Bank v. Long Fam. Land & Cattle Co., 491 F.3d 878, 887 (8th Cir. 2007).

410. *Id.*

411. Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316 (2008).

412. *Id.* at 331.

413. *Id.* at 338.

evident that the tribe was properly regulating the non-member conduct pursuant to tribal law principles.[414]

I. John Doe, Jr. v. Dollar General Corp.; Dolgencorp, Inc., *No. CV-02-05 (Miss. Band of Choctaw Indians Sup. Ct. Feb. 11, 2008)*

In *John Doe, Jr. v. Dollar General Corp.; Dolgencorp, Inc.*, the Supreme Court of the Mississippi Band of Choctaw Indians addressed a tort claim involving the sexual molestation of a tribal member child brought against a non-member individual and corporation that occurred on tribal trust lands leased to the corporation.[415] At the tribal court level, the defendants filed a motion to dismiss the matter for lack of subject matter jurisdiction.[416] The tribal court denied the motion in an oral opinion and the defendants filed an interlocutory appeal.[417] The Mississippi Band of Choctaw Tribal Code requires the element of "obvious error" to accept a matter on interlocutory appeal.[418] Although the court acknowledged that the "predicate of 'obvious error' committed by the tribal court is not satisfied in the instant case," the court accepted the matter for "reasons of judicial economy and in order to avoid further delay and potential (potential procedural) unfairness to the parties."[419]

In examining subject matter jurisdiction under federal Indian law, the court utilized the *Montana* analysis, explaining that "[s]ubsequent cases expanded the territorial reach of *Montana*, which culminated in *Hick*'s requirement that [a] *Montana* analysis was always required, regardless of where the non-Indian activity took place."[420] The court criticized the expanded territorial reach of *Montana*, stating: "Needless to say, this developing jurisprudence has neither constitutional nor statutory roots, but rather is the product of generally (unarticulated) judicial common law decision-making."[421] The court acknowledged,

414. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-857 (1985).

415. John Doe, Jr. v. Dollar General Corp., No. CV-02-05, (Miss. Band of Choctaw Indians Sup. Ct. Feb. 11, 2008).

416. *Id.* at 3.

417. *Id.*

418. *Id.* ("Mississippi Band of Choctaw Tribal Code at § 7-1-10(d)(1), which provides that an interlocutory appeal 'shall be granted only if the lower court has committed an obvious error which would render further lower court proceeding useless or substantially limit the freedom of a party to act and substantial question of law is presented which would determine the outcome of the appeal.'").

419. *Id.* at 3-4.

420. *Id.* at 6 ("The *Hicks* case morphed *Montana's* primary concern with *place* into a primary concern with (non-Indian) *persons*, where place was still relevant, but not determinative or dispositive." (quoting Nevada v. Hicks, 533 U.S. 353 (2001))).

421. *Id.*

> This common law approach appears to be guided not by the normal (federal) understanding that the primary role of common law decision-making is to fill gaps in the relevant substantive law, but rather to vindicate a conscious judicial policy to significantly insulate non-Indians from civil accountability in Tribal courts.[422]

The court proceeded to differentiate the instance case from the referenced "conscious judicial policy" underlying both *Montana* and *Hicks*.[423] Here, the court acknowledged that Dollar General had a signed lease with a tribal entity and consciously entered the reservation for commercial activities.[424] As a result, the "notions of surprise and lack of foreseeability" were absent.[425]

In addressing the first prong of the *Montana* analysis, the court determined that the commercial lease constituted a consensual relationship.[426] The court reasoned that there was "a considerable nexus between the alleged tort and the commercial lease."[427] The court also explained that there was a foreseeable connection with tribal court jurisdiction when Dollar General entered into an (unwritten) consensual agreement with the tribe for the placement of a tribal minor for job training purposes.[428] The court determined that this rationale was supported by the fact that Dollar General operated its business activity on the reservation under a license issued by the tribe in accordance with tribal law.[429]

In addressing the second prong of the *Montana* analysis, the court determined that the same rationale that applied to the first prong equally applied in analyzing the second prong.[430] The court emphasized as follows:

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422. *Id.*

423. *Id.* at 7 ("In *Montana*, this was couched in language describing the fact that non-Indian settlers on the Crow Reservation would never have envisioned being subject to tribal regulatory authority on fee land. Likewise in *Hicks*, there was apparent concern to protect (non-Indian) state employees, who were legitimately carrying out state functions (i.e. executing a joint state-tribal search warrant) on the Reservation from accountability in tribal courts." (citations omitted)).

424. *Id.*

425. *Id.* ("The notion of surprise or lack of foreseeability so central to the Court's thinking in *Montana* and *Hicks* is simply not present in the instant case.").

426. *Id.* at 8 ("The alleged tort in this case took place on the leased premises that are subject of the consensual agreement and the individual tortfeasor was an employee, indeed the manager of the leased premises.").

427. *Id.* at 8 ("The victim of the alleged tort was not a customer or private employee hired directly by dollar general, but a tribal minor placed at the store by the tribe to receive job training. This fact tightens the nexus further.").

428. *Id.*

429. *Id.* at 9 ("It strains credulity to somehow assert the licensee is not accountable within the legal structure of the sovereign, who granted the license in the first instance, for an alleged wrong that took place at the very premise where the licensed commercial activities took place.").

430. *Id.*

> If the Tribe cannot protect the "health or welfare" of its members by ensuring the availability of a Tribal forum for disputes when it places a Tribal minor with a non-Indian commercial venture, who is on the Reservation solely as a result of a commercial lease with a Tribal entity, then this exception is meaningless. It becomes no more than a bankrupt formalism.[431]

The court concluded that the tribal court possessed subject matter jurisdiction under both *Montana* prongs as well as pursuant to tribal law precedent.[432]

In reviewing this case, the United States District Court for the Southern District of Mississippi found that the tribal court may properly exercise jurisdiction over tribal member tort claims.[433] The district court determined that "Dolgen enjoyed a commercial benefit from its agreement to allow [John Doe's] placement in its store," thereby satisfying the first prong of the *Montana* exception.[434] The district court further determined that the tortious conduct "[arose] directly from this consensual relationship so that the requirement of a sufficient nexus between the consensual relationship and exertion of tribal authority is satisfied."[435]

The United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling, holding that "Dolgencorp's consensual relationship with Doe gives rise to tribal court jurisdiction."[436] In doing so, the Fifth Circuit did not get into the merits of the second prong of the *Montana* exceptions.[437] The Fifth Circuit rejected the argument advanced in *Boxx*

431. *Id.* at 9-10 ("This Court believes . . . that the Supreme Court in *Montana* meant this prong of its proviso to have potential consequences in the real world. The Court considers that facts in this case to constitute such a real world situation.").

432. *Id.* at 10-11 ("The result in *Parke-Davis* requires an affirmation of Tribal court jurisdiction in the case at bar. As noted in *Parke-Davis*: 'Parke-Davis, it seems, would like to secure the benefits of doing business on the Reservation without any attendant responsibility. Such an asymmetrical approach by a party would clearly be impermissible in any state or federal situation and it should be no less so in a tribal situation. Respect and parity cannot be one-sided *for* the State and federal sovereigns but *against* the Tribal sovereign.'" (quoting Williams v. Parke-Davis, No. CV-1142-01, at 8 (Miss. Band of Choctaw Indians Sup. Ct. 2004))).

433. Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 846 F. Supp. 2d 646 (S.D. Miss. 2011).

434. Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, No. 4:08CV22TSL-JCS, 2008 WL 5381906, at *5 (S.D. Miss. 2008) (determining "[i]f John Doe performed services for Dolgen that had value to Dolgen such that Dolgen enjoyed a commercial benefit from its agreement, to allow his placement in the store, then it would be reasonable to conclude that there existed the kind of consensual relationship required by *Montana's* first exception").

435. *Dolgencorp, Inc.*, 846 F. Supp. 2d at 650.

436. Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 168 (5th Cir. 2014).

437. *Id.* at 172 n.2 ("The Court further held that '[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.' Because the tribal defendants do not argue that this second exception is applicable here, we do not consider it further." (quoting Montana v. United States, 450 U.S. 544, 566 (1981))).

v. Long Warrior that the consensual relationship must be of a commercial nature.[438] The Fifth Circuit also agreed that the tortious conduct "has an obvious nexus to Dolgencorp's participation in the YOP" ("Youth Opportunity Program").[439] The Fifth Circuit emphasized that the nexus requirement "centers on the nexus between the alleged misconduct and the consensual action of Dolgencorp in participating in the YOP."[440] The Fifth Circuit also rebutted the dissenting opinion's suggestion that the lack of foreseeability of the application of tribal law to tortious activity rendered the nexus insufficient.[441] In this rebuttal, however, the Fifth Circuit never mentioned the existence of the tribal court ruling on this question, even though the tribal court came to the same conclusion.[442] The Fifth Circuit further determined that *Plains Commerce* does not require a specific narrow showing that a business enterprise must threaten the internal relations of the tribe or threaten tribal self-rule in order to be subject to tribal regulatory authority, and that such a showing could be

438. *Id.* at 173. The Fifth Circuit recognized that *Boxx* was disapproved in *Smith v. Salish Kootenai College. Id.* Regardless, the court of appeals reasoned that such a requirement would have been satisfied in this case. *Id.* The court determined "Although Doe worked for only a brief time at the Dollar General store and was not paid, he was essentially an unpaid intern, performing limited work in exchange for job training and experience. This is unquestionably 'of a commercial nature.'" *Id.*

439. *Id.* at 173-74 ("In essence, a tribe that has agreed to place a minor tribe member as an unpaid intern in a business locate don tribal land on a reservation is attempting to regulate the safety of the child's workplace. Simply put, the tribe is protecting its own children on its own land. It is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business. The Fact that the regulation takes the form of a tort duty that may be vindicated by individual tribe members in tribal court makes no difference.").

440. *Id.* at 174.

441. *Id.* at 174 n.4 ("The dissenting opinion suggests that the nexus is insufficient here because 'Dolgencorp could not have anticipated that its consensual relationship with Doe would subject it to any and all tort claims actionable under tribal law.' We are not concerned here with 'any and all tort claims actionable under tribal law.' Doe has brought two specific claims, both of which are based on the alleged sexual molestation of a child by a store manager. We suspect that Dolgencorp could have easily anticipated that such a thing would be actionable under Choctaw law. Accordingly, under the facts of this case, we need not reach the hypothetical factual scenarios posited by the dissenting opinion. Furthermore, we do not agree that tribal law and tribal court are entirely unfamiliar to Dolgencorp. For example, in its commercial lease agreement, Dolgencorp agrees to 'comply with all codes and requirements of all tribal and federal laws and regulations' pertaining to the leased premises. The agreement also provides that it 'shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the state of Mississippi' and that it 'is subject to the Choctaw Tribal Tort Claims Act.' Finally, the agreement provides that '[e]xclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians.' Although we do not consider whether the lease agreement in itself would have a sufficient nexus to support tribal court jurisdiction over Doe's tort claims, we highlight this agreement to show that a business operating on Indian land in a reservation is unlikely to be surprised by the possibility of being subjected to tribal law in tribal court.").

442. John Doe, Jr. v. Dollar Gen. Corp., No. CV-02-05, at 7 (Miss. Band of Choctaw Indians Sup. Ct. Feb. 11, 2008) ("The notion of surprise or lack of foreseeability so central to the Court's thinking in *Montana* and *Hicks* is simply not present in the instant case.").

general in nature.[443] Lastly, the Fifth Circuit concluded that "the availability of punitive damages has no effect on the tribal court's jurisdiction."[444] The United States Supreme Court affirmed the existence of tribal court jurisdiction in a 4-4 tie.[445]

J. Colorado River Indian Tribes v. Water Wheel Camp Recreational Area, Inc., *No. 08-0003 (Colorado River Indian Tribes App. Ct. Mar. 17, 2009)*

In *Colorado River Indian Tribes v. Water Wheel Camp Recreational Area, Inc.*, the Court of Appeals of the Colorado River Indian Tribes addressed an eviction proceeding seeking to regain possession of land occupied by Robert Johnson and the Water Wheel Camp Recreational Area, Inc., pursuant to an expired lease.[446] As part of the eviction action, the tribe sought "rents, damages, attorney's fees claimed due under the lease and for the defendant's continued possession after termination of the lease and for interference with the Tribe's business opportunities for the lands."[447] Ruling in favor of the tribe, the tribal court determined that the lease had expired, and that Robert Johnson and Water Wheel Camp Recreational Area, Inc. "had no continuing right, title, or interest thereafter in the disputed property."[448] The tribal court granted the tribe's petition for eviction and awarded damages for unpaid rent, lost profits, and attorney's fees.[449]

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443. Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 175 (5th Cir. 2014) ("We do not interpret *Plains Commerce* to require an additional showing that one specific relationship, in itself, 'intrude[s] on the internal relations of the tribe or threaten[s] self-rule.' It is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact. On the other hand, at a higher level of generality, the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government. Nothing in *Plains Commerce* requires a focus on the highly specific rather than the general." (citing Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 334-35 (2008))).

444. *Id.* at 177 (rejecting the argument that Indian tribes lack jurisdiction to impose civil punitive damages on a nonmember because an award of punitive damages may implicate due process protections). The court stated, "If the federal government could never 'waive a citizen's constitutional right' by subjecting him to the jurisdiction of a court lacking full constitutional protections, a non-Indian could *never* be subjected to tribal court jurisdiction. Yet the Supreme Court has acknowledged that by entering certain consensual relationships with Indian tribes, a nonmember may implicitly consent to jurisdiction in a tribal court that operates differently from federal and state courts." *Id.*

445. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 579 U.S. 545 (2016).

446. Colorado River Indian Tribes v. Water Wheel Camp Recreational Area, Inc., No. 08-0003 (Colo. River Indian Tribes App. Ct. Mar. 17, 2009).

447. *Id.* at 1-2.

448. *Id.* at 2.

449. *Id.* at 1-2 ("The Court therefore granted the Tribe's petition for eviction, awarded damages for unpaid rent due under the lease prior to its expiration in the amount of $1,486,146.42 plus interest at ten percent (10%) per annum, awarded damages for continued illegal possession of the lands after expiration of the lease based on the interference with the Tribe's prospective economic advantages in the amount of

On appeal, the defendants advanced six arguments for reversal; however, the Court of Appeals of the Colorado River Indian Tribes only considered three of these arguments, with the primary claim addressing whether the tribal court possessed jurisdiction.[450] In addressing the jurisdictional claim, the court determined that subject matter jurisdiction clearly fell within the Tribal Law and Order Code, as the leased property was within the Colorado River Indian Reservation and the Tribe owned the property.[451] The court stated that, as a matter of tribal law, the Colorado River Indian Tribes had chosen to incorporate federal law determinations into their own definition of the scope of jurisdiction of their tribal courts.[452] In upholding tribal jurisdiction pursuant to federal law determinations, the court determined that the conduct occurred on Indian lands within the reservation that both *Merrion*[453] and *Kerr-McGee*[454] control, and thereby the presumption of tribal jurisdiction.[455] The court reasoned that, pursuant to these cases, "this case fully satisfies the consensual relationship prong of the *Montana* test."[456] The court further determined that "Section 34 of the Lease Addendum" itself established the requisite consent pursuant to *Montana*.[457] The court concluded that, "[u]nquestionably, by agreeing to section 34 of the Lease the Defendants/Appellants agreed that they were subject to the laws of the Tribe and, and therefore to tribal authority and jurisdiction. Thus Defendants/Appellants expressly agreed to abide by and be subject to tribal jurisdiction when they signed the lease."[458]

$33,459.58 per month from July 7, 2007, the date of the expiration of the lease, measured by the Tribe's lost profits, and, under the lease terms, awarded the Tribe a total of $281,382.00 in attorneys fees and $2,110.72 in costs.").

450. *Id.* at 10-11 ("While having asserted six grounds for appeal in their third petition for appeal, in Appellants' opening brief the Defendant/Appellants only advanced three claims of those claims, i.e. the claimed lack of jurisdiction of the Tribal Court, the claim of newly discovered material evidence related to that jurisdictional issue, and the assertion that the Tribal Court erred in its finding piercing the corporate veil and holding Defendant/Appellant Robert Johnson jointly and severally liable for all damages against Water Wheel.").

451. *Id.* at 14.

452. *Id.* at 23.

453. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

454. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985).

455. *Wheel Camp Recreational Area, Inc*., No. 08-0003 at 27 ("Thus, both *Merrion* and *Kerr-McGhee* clearly hold that Indian tribes have inherent sovereignty over non-member activities occurring pursuant to lease on tribally-owned lands.").

456. *Id.*

457. *Id.* at 30-33 ("[S]ection 34 of the Lease Addendum, which provides . . . 'Lessee . . . agree[s] to abide by all laws, regulations, and ordinances of the Colorado River Tribes now in force and effect, *or that may be hereafter in force or effect* provided, that no future laws, regulations or ordinances shall have the effect of this lease *unless consented to in writing by the lease*.'").

458. *Id.* at 35.

The court also determined that this case met the "economic security prong" of the *Montana* test.[459] In doing so, the appellate court reasoned that, "[f]or the Tribe, as for most Indian tribes, its land constitutes its single most valuable economic asset."[460] The court continued: "If the Tribe has no power to monitor whether a lease like Water Wheel actually pays its rent under such leases and to enforce such rents against the lessee through its tribal laws, it frequently will have no effective way to assure that it is paid the substantial tribal rents that it is due."[461] The court reasoned that, because "substantial tribal revenues are involved," this "cash flow constitutes an essential portion of the Tribe's 'economic security.'"[462] As a result, the court concluded that "[n]othing could imperil the economic security of an Indian tribe than losing control over both its lands and the rental income derived therefrom."[463]

While the case was pending before the tribal court, Robert Johnson and the Water Wheel Camp Recreational Area, Inc. filed for declaratory and injunctive relief in the Unites States District Court for the District of Arizona.[464] The district court held that a consensual relationship existed pursuant to the lease, and as result, the tribal court had subject matter jurisdiction under the first prong of *Montana*.[465] The district court, however, rejected the claim that independent of *Montana*, the Tribe possessed jurisdiction pursuant to its inherent power to exclude.[466]

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the district court.[467] In the opening of its opinion, the Ninth Circuit acknowledged that the "tribal court's determination of its own jurisdiction is entitled to 'some deference.'"[468] The Ninth Circuit concluded based upon the principles established in *Merrion* that "the tribe [possessed] regulatory jurisdiction through its inherent authority to exclude, independent from the power recognized in *Montana v. United States*."[469] After determining that tribal regulatory jurisdiction existed, the

459. *Id.* at 27.

460. *Id.*

461. *Id.* at 27-28.

462. *Id.* at 28.

463. *Id.*

464. Water Wheel Camp Recreational Area, Inc., v. LaRance, 2009 WL 3089216, No. CV-08-0474-PHX-DGC (D. Ariz. Sept. 23, 2009).

465. *Id.* at *10.

466. *Id.* at *12.

467. Water Wheel Camp Recreational Area, Inc., v. LaRance, 642 F.3d 802 (9th Cir. 2011).

468. *Id.* at 808 (quoting FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990)).

469. *Id.* at 805, 812 & n.7 ("We must therefore conclude that the CRIT's right to exclude non-Indians from tribal land includes the power to regulate them. . . . Further bolstering our conclusion that the tribe has regulatory jurisdiction is the fact that this is an action to evict non-Indians who have violated their conditions on entry and trespassed on tribal land, directly implicating the tribe's sovereign interest in managing its own lands.").

Ninth Circuit proceeded to address whether tribal adjudicative jurisdiction also existed.[470] The Ninth Circuit reasoned that "the important sovereign interests at stake, the existence of regulatory jurisdiction, and long standing Indian law principles recognizing tribal sovereignty all support finding adjudicative jurisdiction here."[471] The Ninth Circuit emphasized that *Montana* does not apply to this case.[472] It acknowledged, however, that even if the test applied, both prongs would be satisfied.[473] The Ninth Circuit concluded that "[t]o exercise civil authority over a defendant, a tribal court must have both personal jurisdiction and subject matter jurisdiction."[474] The Ninth Circuit held that "Johnson lived on tribal land, which on its own serves as a basis for personal jurisdiction."[475] The Ninth Circuit continued: "Johnson clearly had sufficient minimum contacts with [the Colorado River Indian Tribes referred to as] CRIT and its tribal land to satisfy considerations of fairness and justice."[476]

It is evident that in this case, the Ninth Circuit gained insight from the tribal court's determination of its own jurisdiction. In its opinion, the Ninth Circuit not only referenced the holdings of the Court of Appeals of the Colorado River Indian Tribes, but also referenced the court's reasoning in its summary of the case.[477] Although the Ninth Circuit did not specifically cite to the tribal court of appeals in its determination of the merits, the Tribal Court of Appeal's reasoning was peppered throughout the opinion and mirrored the reasoning of the Ninth Circuit. Although this is a step in the right direction of providing deference to tribal court determinations, the Ninth Circuit could have specifically referenced the tribal court's determinations and actually provided deference in its opinion.

470. *Id.* at 814-16.

471. *Id.* at 816.

472. *Id.*

473. *Id.* at 817 ("The Tribe clearly had authority to regulate the corporation's activities under Montana's first exception and—considering that the business also involved the use of tribal land and that the business venture itself constituted a significant economic interest for the tribe—under the second exception as well.").

474. *Id.* at 819.

475. *Id.*

476. *Id.* at 820 (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

477. *Id.* at 806.

K. FMC Corp. v. Shoshone-Bannock Tribes, *No. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal App. Ct. June 26, 2012);* FMC Corp. v. Shoshone-Bannock Tribes, *No. C-06-0069, C-07-0017, C-07-0035 (Shoshone-Bannock Tribal App. Ct. Apr. 15, 2014)*

In *FMC Corp. v. Shoshone-Bannock Tribes Land Use Department and Fort Hall Business Council*, the Shoshone-Bannock Tribal Court of Appeals addressed the exercise of tribal jurisdiction for purposes of planning, zoning, and hazardous waste management regulation over on-reservation fee land owned by FMC, a non-member corporation.[478] The tribal court of appeals upheld the tribal court's determination that the Tribes had jurisdiction over FMC under the first prong of *Montana*.[479] In doing so, the tribal court of appeals determined that "this case contains sufficient evidence to support a finding of jurisdiction based upon consensual commercial dealings between FMC and the Tribes."[480] As evidence of the establishment of a consensual commercial relationship, the court utilized FMC's contractual agreement, the letter consenting to tribal jurisdiction, and the consent decree entered in the United States District Court for the District of Idaho.[481] The Court of Appeals also determined that the tribal court erred in not allowing the tribes to present evidence that tribal jurisdiction over FMC's waste storage activities was met pursuant to the second prong of *Montana*.[482] The Court of Appeals concluded that the tribes should be granted an evidentiary trial to present evidence on the second prong of *Montana.*[483]

The trial was held before the Shoshone-Bannock Tribal Court of Appeals from April 1, 2014, to April 15, 2014, during which evidence was presented.[484] In setting forth the legal standard under the second prong of *Montana*, the tribal court of appeals explained that "[u]nder *Montana* tribes can take action to, for instance, mitigate on-reservation threats to the natural resources which their members rely upon."[485] The court continued, explaining that "[t]ribal jurisdiction under the second *Montana* exception may also exist concurrently with federal regulatory

478. FMC Corp. v. Shoshone-Bannock Tribes Land Use Dep't, Nos. C-06-0069, C-07-0017, and C-07-0035 (Shoshone-Bannock Tribal App. Ct. June 26, 2012).

479. *Id.*

480. *Id.* at 14.

481. *Id.* at 14-15.

482. *Id.* at 15-16.

483. *Id.* at 62.

484. Shoshone-Bannock Tribes Land Use Dep't v. FMC Corp., Nos. C-06-0069, C-07-0017, C-07-0035, at 4 (Shoshone-Bannock Tribal App. Ct. Apr. 15, 2014).

485. *Id.* at 5 (citing Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210, 1222 (9th Cir. 2000)).

jurisdiction over a non-Indian's activities."[486] Lastly, the court emphasized that "there is 'no suggestion' in the *Montana* case law that 'inherent [tribal] authority exists only when no other government can act.'"[487]

Utilizing this legal standard, the court held that, based on the evidence presented at the trial, the second prong of *Montana* had been met.[488] The court concluded that "[t]he factual evidence establishes that the contamination on FMC's fee land poses a threat to the Tribe and tribal members."[489] The court further emphasized that "a tribe can exercise jurisdiction before a catastrophe occurs in order to avert a threat to its members."[490] The court reasoned that the "use of the distinctive 'or' between the words 'threatens' and 'has some direct effect' indicates there are two scenarios that can satisfy the second exception [of *Montana*]: 1) the threat of harm; or 2) actual harm."[491] The court also relied upon *Brendale* in making its determination, stating:

> *Brendale* has significance to this case, as the Shoshone-Bannock Tribes are seeking to enforce a land use policy ordinance permit requirement for the storage of toxic and deadly waste that generates the emission of deadly gases and contaminates ground water, both to protect the quality of their land and natural resources, and to protect their members' ability to take part in important cultural ceremonies that cannot be performed because of contamination in the Portneuf River. In sum, a catastrophe does not have to happen for the Tribes to assert jurisdiction in this case.[492]

The court established that interference with the customs and traditions of tribal members was "more than a mere possibility," as evidence was presented that the "activity of FMC has in fact interfered with the customs and traditions of the Shoshone[-]Bannock Tribal Members."[493] As a result, the court concluded "[t]hat interference has a direct effect on the Tribe's political integrity, economic security, or their health or welfare."[494]

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486. *Id.* (citing South Dakota v. Bourland, 508 U.S. 679, 695, 697-698 (1993)).

487. *Id.* (quoting Montana v. EPA, 137 F.3d 1135, 1141 (9th Cir. 1998)).

488. *Id.* at 4.

489. *Id.* at 11.

490. *Id.*

491. *Id.* ("The logic of Montana is that certain activities on non-Indian fee land . . . or certain uses . . . may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated." (citing Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 334-35 (2008))).

492. *Id.* at 12-13 ("In *Brendale*, the Court also recognized the tribe's interest in a part their reservation that 'remain[ed] an undeveloped refuge of *cultural and religious significance*, a place where tribal members may camp, hunt, fish, and gather roots and berries in the *tradition of their culture*.'" (quoting Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 441 (1989))).

493. *Id.* at 14.

494. *Id.* ("The impact on the Tribes in this case far outweighs the speculative chances of future

Following the decision of the Shoshone-Bannock Tribal Court of Appeals, FMC filed suit in the United States District Court for the District of Idaho, challenging tribal jurisdiction and requesting that the district court deny enforcement of the tribal court judgement.[495] The district court held that the tribes had regulatory and adjudicatory jurisdiction under both *Montana* exceptions.[496] On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision concluding that the tribes had regulatory and adjudicatory jurisdiction under both *Montana* exceptions.[497]

In addressing the first prong of *Montana*, the Ninth Circuit determined that "FMC entered a consensual relationship with the Tribes, both expressly and through its actions, when it negotiated and entered into a permit agreement with the Tribes."[498] The court explained that this relationship had a nexus to the conduct being regulated because the "conduct that the Tribes seek to regulate through the permit fees at issue—the storage of hazardous waste on the Reservation—arises directly out of this consensual relationship."[499] The court also emphasized that "FMC should have reasonably anticipated that its interactions might 'trigger' tribal regulatory authority."[500]

The Ninth Circuit based its conclusions regarding the second prong of *Montana* on the Shoshone-Bannock Tribal Court of Appeals' factual findings.[501] In doing so, the Ninth Circuit concluded that "FMC's storage of millions of tons of hazardous waste on the Reservation 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare' of the Tribes to the extent that it 'imperil[s] the subsistence or welfare' of the Tribes."[502]

The Ninth Circuit acknowledged that, if the court determined that the Tribe had jurisdiction, then the court "must enforce the tribal judgement without reconsidering issues decided by the tribal court."[503] However, the Ninth Circuit also explained that in certain circumstances the court could

interference brought out and approvingly recognized by the Supreme Court in *Brendale*. Indeed, if a catastrophic impact were required, *Brendale* shows that interfering with sacred tribal customs and traditions has such an impact.").

495. FMC Corp. v. Shoshone-Bannock Tribes, No. 4:14-CV-489-BLW, 2017 WL 4322393, at *4 (D. Idaho Sept. 28, 2017).

496. *Id.* at *13.

497. FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 931 (9th Cir. 2019).

498. *Id.* at 933.

499. *Id.*

500. *Id.*

501. *Id.* at 935.

502. *Id.* (quoting Montana v. United States, 450 U.S. 544, 566 (1981)).

503. *Id.* at 930.

decide against upholding a tribal court judgement.[504] These reasons were explained as follows:

> First, we will not recognize and enforce a judgement if the tribal court did not have both personal and subject matter jurisdiction. Second, we will not enforce a judgement if the tribal court denied due process to the losing party. Further, "[u]nder limited circumstances . . . . [we] may refuse to recognize or enforce a tribal judgement on equitable grounds as an exercise of discretion."[505]

As detailed previously in this Article, federal court authority to determine tribal jurisdiction is imagined as a matter of federal common law.[506] However, this federal court authority only extends to determinations of tribal jurisdiction.[507] Federal courts do not possess the authority to set aside or impede tribal court judgments based upon determinations of due process.[508] Likewise, federal courts do not possess the authority to set aside or impede tribal court judgements as a matter of discretion.[509] The federal court refusing to enforce a judgment is different than setting a judgment aside or impeding the implementation of a tribal court judgment.[510] The perpetuation of this narrative clearly infringes upon tribal self-government and the development of tribal court systems, as it perpetuates the de-legitimization of tribal courts.[511] We can see the effects of this de-legitimization narrative in *National Farmers Union*, when the Court questioned the tribe's ability to confiscate computer terminals, other computer equipment, and a truck in fulfillment of the

504. *Id.*

505. *Id.* (quoting AT&T Corp. v. Coeur d'Alene Tribe, 295 F.3d 899, 903 (9th Cir. 2002)).

506. *See generally supra* Part III.B.

507. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985) (Establishes federal court authority to review tribal court determinations of jurisdictional principles).

508. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) (Establishes due process review in federal court of a tribal court action is unavailable because Indian Civil Rights Act precludes private enforcement).

509. *Id.* at 59-60 ("[W]e must bear in mind that providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that 'subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves,' may 'undermine the authority of the tribal court . . . and hence . . . infringe on the right of the Indians to govern themselves.' *A fortiori*, resolution in a foreign forum of intratribal disputes of a more 'public' character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority. Although Congress clearly has power to authorize civil actions against tribal officers and has done so with respect to habeas corpus relief in § 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." (citations omitted)).

510. FMC Corp., 942 F.3d at 931 ("We further hold that there was no due process violation. Finally, we hold that the final judgement of the Shoshone-Bannock Tribal Court of Appeals is entitled to recognition and enforcement under principles of comity under both Montana exceptions.").

511. Pommersheim, s*upra* note 154, at 8-16.

tribal court judgement;[512] in *FMC Corp.*, when the corporation attempted to discredit the tribal judges;[513] in *Dollar General*, when the court questioned the tribal court's legitimacy;[514] in *Hicks*, when the Court likewise questioned the tribal court's legitimacy;[515] and in *Red Wolf*,

512. *National Farmers Union Ins. Cos.*, 471 U.S. at 849 n.4 ("After the District Court's injunction was vacated, tribal officials issued a writ of execution on August 1, 1984, and seized computer terminals, other computer equipment, and a truck from the School District. A sale of the property was scheduled for August 22, 1984. On that date, the School District appeared in the Tribal Court, attempting to enjoin the sale and to set aside the default judgment. The Tribal Court stated that it could not address the default-judgment issue 'without a full hearing, research, and briefs by counsel,' that it would consider a proper motion to set aside the default judgment; and that the sale should be postponed. Petitioners also proceeded before the Court of Appeals, which denied an emergency motion to recall the mandate on August 20, 1984. The next day Justice Rehnquist granted the petitioners' application for a temporary stay. On September 10, 1984, he continued the stay pending disposition of the petitioners' petition for certiorari. On September 19, the Tribal Court entered an order postponing a ruling on the motion to set aside the default judgment until after final review by this Court. Subsequently, the Court of Appeals stayed all proceedings in the District Court. On April 24, 1985, Justice Rehnquist denied an application to 'dissolve' the Court of Appeals' stay." (citations omitted)).

513. *FMC Corp.*, 942 F.3d at 924-925 ("While the case was pending before the Tribal Court of Appeals, Judges Gabourie and Pearson spoke at a conference entitled 'Tribal Courts: Jurisdiction and Best Practices' convened by the University of Idaho College of Law on March 23, 2012. In the audience were law students, tribal court practitioners, other lawyers, and members of the public. The conference was videotaped. FMC's counsel attended the judges' presentation. Judge Gabourie described the manner in which tribal appellate court decisions come before federal courts, and he noted that very few federal court judges have experience with tribes. He stated that 'every court has—should be impartial' and 'a good opinion comes [from] both sides, both parties. Because both parties rely on a good opinion, strong opinion.' He stated that a tribal appellate court decision should discuss the tribe's tradition and culture so that judges in the federal system have some context when they read the decision. He stated that an appellate judge has a responsibility to remand the case for testimony from expert witnesses if there is a weakness in the record. He discussed limitations on tribes' sovereign powers under current law, and how, in light of Supreme Court decisions like *Montana*, 'which has just been murderous to Indian tribes,' it is important for tribes to support good appellate courts that can issue strong opinions in the event issues are heard in a federal court. He discussed *Nevada v. Hicks*, and *Strate v. A-1 Contractors*, noting that the tribal appellate court decisions had not been good, and that, as a result, the U.S. Supreme Court did not have vital information about the tribes' cultures and traditions." (citations omitted)).

514. Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 181 (5th Cir. 2014) ("The elements of Doe's claims under Indian tribal law are unknown to Dolgencorp and may very well be undiscoverable by it. Choctaw law expressly incorporates, as superior to Mississippi state law, the 'customs . . . and usages of the tribes.' . . . Although the claims that Doe wishes to press against Dolgencorp have familiar state-law analogues, the majority's aggressive holding extends to the entire body of tribal tort law—including any novel claims recognized by the Choctaws but not by Mississippi." (citations omitted)).

515. Nevada v. Hicks, 533 U.S. 353, 383-385 (2001) ("The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals,' which differ from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal courts, 'the guarantees are not identical,' and there is a 'definite trend by tribal courts' toward the view that they 'ha[ve] leeway in interpreting' the ICRA's due process and equal protection clauses and 'need not follow the U.S. Supreme Court precedents "jot-for-jot,"' In any event, a presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant,* namely, an overriding concern that citizens who are not tribal members be 'protected

when the court questioned the tribal judge's ability to instruct the jury in the Crow language.[516]

L. Big Man v. Big Horn Electric Cooperative, Inc., *No. 12-118 (Apsaalooke App. Ct. Apr. 15, 2017)*

In *Big Man v. Big Horn County Electric Cooperative, Inc.*, the Apsaalooke Appeals Court for the Apsaalooke (Crow) Indian Reservation addressed whether a rural non-profit electric cooperative (called

. . . from unwarranted intrusions on their personal liberty.' Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts 'mirror American courts' and 'are guided by written codes, rules, procedures, and guidelines,' tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.' The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' which would be unusually difficult for an outsider to sort out." (citations omitted)).

516. Burlington N. R.R. Co. v. Red Wolf, 106 F.3d 868, 872 (9th Cir. 1997) ("The trial appears to have been in the 'wave the bloody shirt' genre. Before voir dire, a judge of the Crow appellate court addressed the entire venire in the Crow language (Burlington Northern had not been given notice that the jurors would be so addressed in the Crow language), reminding them of 'bodies scattered along the railway' in the past, and reminding them of their 'genealogy':

> Now Crows, you in this room all of you. This matter you know well; you are not young. This matter we respect. There is prayer involved in this matter. Our way of life, our good way of life. A train runs through the middle of our land. Crows, you know, I don't have to tell you. Bodies, in the past, bodies are scattered along the railway. Now, this is the day. You use your better judgment. I am not telling you what to do. I am not telling you who to follow. I am not telling you who to believe. Use your better judgment. God gave you a mind. God gave you a heart. This day, even this day use it. How am able to help. You should consider if you are a Crow. I don't have to tell you, you must use your mind. Look for a good solution. If this proceeding is successful, you will not be blamed. You are right, you are correct, you are proper. In the past this bench we were ridiculed. The people who presided are called upon. The people who presided are ridiculed, mocked. That's the way you Crows are. Within our reservation there is not many. You Crows established it. Other tribes are under the government, CFR. We are lucky. We have our own court. Consider that, you men and women. If you are kind, if you love, we are interrelated. Use your better judgment. Consider your people. Consider these people, consider those people. Use your better judgment. I want the creator to guide you. We are not kidding. Remember, young men and women. You are selected today because you are honest, because of your genealogy.

The reference to 'genealogy' was not a mere metaphor. All but one of the seven empaneled jurors were related to the decedents. Acknowledging the 'bodies scattered along the railway' theme, the decedents' heirs stated in their opposition to judgment n.o.v. in tribal court that 'what the trial was about' was that 'there have, in fact, been many Crows killed by the BN and this is no secret.' There may be a tribal court jurisdiction issue, regarding this tort case over a non-tribal member defendant operating on an easement to which tribal land is subject. If Burlington Northern posts the $250 million, it subjects the money to the decisions of a tribunal not bound by the Constitution. If it does not, it risks having its tracks across the reservation torn up and sold for scrap to satisfy the judgment."); *Id.*at 873-74 ("[T]earing up Burlington Northern's tracks through the reservation would interfere with interstate commerce outside the reservation. . . . The railroad runs 20 to 25 trains per day across the Crow reservation, 16 of which are coal trains bound for utilities in Minnesota and Wisconsin.").

"BHCEC") incorporated under the laws of the state of Montana was subject to the regulatory authority of the Crow Tribe for disconnected electrical service.[517] The Crow trial court held that the tribe did not have jurisdiction and dismissed the case.[518] On appeal, the Apsaalooke Appeals Court reversed, holding that the Crow Tribe's jurisdiction extends to all lands within the exterior boundaries of the Crow Indian Reservation.[519] In this instance, the court determined that, pursuant to tribal law, "the Crow Tribal Court has personal jurisdiction over Big Man who is a Crow tribal member who lived in Crow Agency, Montana . . . . By the same statute, the Crow Tribal Court has personal jurisdiction over BHCEC since BHCEC, a cooperative, transacted business within the exterior boundaries of the Crow Indian Reservation."[520] The court continued its assertion that pursuant to tribal law, "[s]ince the cause of action arose within the exterior boundaries of the Crow Indian Reservation, the Crow tribal court has subject matter jurisdiction over this matter."[521]

Addressing the *Montana* rule, the court acknowledged that "[t]his Court, due to three (3) decades of political activism by the United States Supreme Court and federal courts regarding the umbrella of tribal court jurisdiction, recognizes there is now the necessity that a jurisdictional analysis is conducted when tribal courts assert jurisdiction over non-Indians."[522] In conducting its analysis pursuant to federal common law, the court disagreed with the trial court's reading of *Plains Commerce Bank* and *Hicks*.[523] The court also determined that the trial court erred "when it did not inquire into BHCEC's land status within the Crow Reservation."[524]

In addressing the first prong of the *Montana* rule, the court ruled that a consensual relationship had been created by the parties when they entered

517. Big Man v. Big Horn Cnty. Electric Coop., Inc., No. 12-118 (Apsaalooke App. Ct. Apr. 15, 2017).

518. *Id.* at 20 ("The Crow trial court did not acknowledge the Crow Law and Order Code (CLOC) in its order. It simply used federal law and other case law for its conclusions of law. This Court however, chooses to apply Crow fundamental law, first, before moving on to an analysis of tribal court jurisdiction as decided by the United States Supreme Court and federal courts.").

519. *Id.* at 22-24 ("Article II of the Constitution [Crow Constitution and Bylaws, 2001] declares that 'The jurisdiction of the Crow Tribal General Council shall extend to all lands within the exterior boundaries of the Crow Indian Reservation including those lands within the original boundaries of the Crow Indian Reservation as determined by federal statutes and case law and to such other lands as may hereafter be acquired by or for the Crow Tribe of Indians.'").

520. *Id.* at 24.

521. *Id.*

522. *Id.*

523. *Id.* at 25 ("We hold that the Crow trial court's reliance on *Plains Commerce* and *Hicks* is misplaced because the United States Supreme Court has never overruled its decision in *Montana*.").

524. *Id.* at 27 ("The Crow trial court erred when it applied *Montana's* general rule to none-existent [sic] facts since it did not have a finding of fact of BHCEC's land status.").

into a signed cooperative agreement.[525] The court reasoned that "[t]he *first Montana* exception allows the Crow Tribal Court jurisdiction over BHCEC because BHCEC entered into consensual relationships, through a commercial contract, with the Crow Tribe (when it entered into some type of contract to establish electricity on the reservation) and its members (Big Man) through a cooperative agreement."[526]

In addressing the second prong of the *Montana* rule, the court again distinguished the facts in *Plains Commerce Bank*, since in this case "the involuntary shut-off of electricity in the middle of January in Montana imperils the health and welfare of the Crow Tribe's responsibility in protecting its members."[527] The court agreed with Big Man, saying "that when BHCEC disconnected his electrical service in the 'middle of winter' this was conduct 'which threatens to freeze people out of their homes for months on end.'"[528] As a result, the court determined that the second prong of *Montana* had been satisfied.[529]

The court then proceeded to examine jurisdiction based upon the "power to exclude" under *Merrion*.[530] In doing so, the court emphasized that,

> [o]f particular importance to this Court is the language from *Merrion* which stated that, "[i]f the power to exclude implies the power to regulate those who enter tribal lands, the jurisdiction that results is a consequence of the deliberate actions of those who would enter tribal lands to engage in commerce with Indians."[531]

As a result, the court concluded that "BHCEC is subject to Crow tribal regulation, such as Title 20, because it entered the Crow Reservation to engage the Crow Tribe in commerce (in setting up an electrical company to serve residents of the Crow Reservation)."[532] The court explained that the trial court had "overlooked the Crow Tribe's sovereignty in its order."[533] This is significant, as both "Big Man and BHCEC agreed that the 'power to exclude is the power to regulate,'" and that "this Court places great respect on the sovereign status of the Crow Tribe's Treaty rights, Constitution, tribal customs and traditions, and the Crow Law and Order Code. Crow Tribal Sovereignty serves as the basis for its power to

525. *Id.* at 28-29 ("A consensual relationship is a pivotal element of the first Montana exception as are commercial dealings and contracts.").

526. *Id.* at 29.

527. *Id.* at 31.

528. *Id.*

529. *Id.* ("The Crow trial court erred when it concluded that the second Montana exception is inapplicable because no catastrophic consequences existed.").

530. *Id.* at 31-35.

531. *Id.* at 32 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141-45 (1982)).

532. *Id.*

533. *Id.*

regulate and exclude."[534]

The BHCEC proceeded to file an action in the United States District Court for the District of Montana, seeking declaratory and injunctive relief.[535] The district court, pursuant to an order issued by a magistrate judge, established that the "Court has no discretion but to entertain Big Horn's complaint challenging tribal jurisdiction."[536] In doing so, the district court emphasized that, before a non-Indian challenges tribal jurisdiction in federal court, they "must first exhaust tribal court remedies."[537] The district court acknowledged that the case was remanded to the Crow trial court, however, the court determined BHCEC "satisfied its exhaustion requirement because the tribal appellate court took the opportunity to rule on the jurisdictional question and expressly held the tribal court had jurisdiction."[538] Had the district court fully engaged with the decision of the Apsaalooke Appeals Court, it would have understood that that the court determined on numerous occasions that the trial court needed to fully develop the facts in order to make a full determination of tribal jurisdiction.[539] This would have allowed for a full development of the record, and for the federal court to benefit from tribal expertise when determining its jurisdiction based upon the complete record.

The district court entered a subsequent order adopting in full the previous findings and recommendations of the magistrate judge.[540] In addressing whether the Tribe retained the right to exclude, the district court emphasized that "[d]etermining the status of the land at issue is key; if the land has not been alienated (that is, if a tribe has retained the right to exclude), then the tribe retains 'considerable control' over non-member conduct on tribal lands."[541] The district court proceeded to reject BHCEC's argument that, although the Big Man residence was on land held in trust, and therefore the tribe presumptively retained the power to exclude, the court should treat the land as alienated land due to the existence of the easement pursuant to *Strate* and *Red Wolf*.[542] The district court responded:

To hold that the presence of electrical service easements defeats tribal

534. *Id.* at 33.

535. Big Horn Cnty. Elec. Coop., Inc. v. Big Man, No. CV 17-65-BLG-SPW, 2018 WL 4603276 (D. Mont. Sept. 25, 2018).

536. *Id.* at *3.

537. *Id.* at *1.

538. *Id.* at *2.

539. *Big Horn Cnty. Elec. Coop., Inc.*, No. AP-2013-001 at 27 ("The Crow trial court erred when it applied *Montana's* general rule to non-existent facts since it did not have a finding of fact of BHCEC's land status.").

540. Big Horn Cnty Elec. Coop., Inc. v. Big Man, 526 F. Supp. 3d 756 (D. Mont. 2021).

541. *Id.* at 761 (Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997)).

542. *Id.* at 762.

> jurisdiction would render the entire Reservation (at least the portions with power) outside of tribal control—a result clearly in conflict with the purpose of the doctrine that express Congressional intent is required to divest a tribe of jurisdiction over tribal lands.[543]

Having concluded that the tribe retained the right to exclude, the district court determined that "even if the land were alienated from Tribal Control . . . the Tribe still possesses jurisdiction to regulate and adjudicate the dispute under both *Montana* exceptions."[544] In addressing the first prong of *Montana*, the district court accepted the rationale that "BHCEC and the Tribe had a consensual relationship because BHCEC entered contracts with tribal members (specifically Big Man) and that a nexus exists between that relationship and the regulation sought to be enforced."[545] The district court explained that:

> Title 20 [of the Crow Law and Order Code] prevents termination of electrical service during winter months without approval of the tribal health board. BHCEC has chosen to avail itself of the Tribe's customer base and in doing so created a consensual relationship. The Tribe then conditioned one aspect of that service with Title 20. This is exactly the nexus required by the first exception.[546]

In addressing the second prong of *Montana*, the district court accepted the rationale that the "termination of electrical service during the winter months has a direct effect on the health and welfare of the Tribe and therefore satisfies the second *Montana* exception."[547] The district court explained that the

> conduct at issue here imperils tribal health and welfare on a much greater scale than generalized safety concerns on roadways or railroads as in *Strate* and *Red Wolf*. Winter in Montana can be bitterly cold and electric service provides the necessary power to keep the heat on. Termination of that service clearly imperils the health and welfare of any tribal member who obtains service from BHCEC—a class of approximately 1,700 members—and therefore the Tribe itself. The second *Montana* exception applies.[548]

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543. *Id.* (citing McGirt v. Oklahoma, 140 S. Ct. 2452, 2462-63 (2020)).

544. *Id.* at 763.

545. *Id.*

546. *Id.* ("Here the issue directly arises from the association between a tribe and a non-member: the relationship arises from BHCEC's decision to provide electrical service to tribal members on the reservation and the Tribe is seeking to regulate the manner in which BHCEC provides (and stops providing) electrical service. This is not the scenario warned of in *Atkinson Trading Co. v. Shirley* (holding that a tribe could not impose a hotel occupancy tax on a non-member because the connection between the tribe and hotelier stemmed from business dealings separate from hotel use), where the Supreme Court declared that non-members are not 'in for a penny, in for a pound' and cautioned that a consensual relationship in one area does not trigger civil tribal authority in another area." (citations omitted)).

547. *Id.* at 764.

548. *Id.*

On appeal, the Unites States Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment based on the first prong of *Montana*, and as result determined that it did not need to reach a decision regarding the other grounds for jurisdiction.[549] The Ninth Circuit, relying on its decision in *Adams*, explained that "the BHCEC's 'voluntary provision of electrical services' on the Tribe's reservation and its contacts with tribal members to provide electrical services created a consensual relationship, within the meaning of *Montana*."[550] The Ninth Circuit concluded that "the regulation has a nexus to the activity that is the subject of the consensual relationship between BHCEC and the Tribe . . . . The unlawful termination of Big Man's electricity services is directly related to the consensual relationship."[551]

V. CONCLUSION

This Article has shown that, in some instances, federal court review has a direct influence on tribal court analysis, and that this influence is an infringement on tribal self-government and self-determination. In response, tribal courts should be sovereign. If federal courts properly adhered to the reasoning underlying the establishment of the tribal exhaustion doctrine, these courts could gain valuable insight from tribal court decisions.[552] As evidenced in this Article, when the tribal exhaustion doctrine is properly followed, federal courts do in fact gain insight from the tribal court's determination of its own jurisdiction.[553] To further this principle, courts should engage with and cite to the tribal court's determinations and reasoning relating to the establishment of jurisdiction. As this Article shows, this is currently rarely done. Furthermore, the utilization of the exceptions to the general rule requiring exhaustion defeats the purpose of the exhaustion rule.[554] Currently, the exceptions swallow the rule.

549. Big Horn Cnty. Elec. Coop., Inc. v. Big Man, No. 21-35223, 2022 WL 738623, at *1 (9th Cir. Mar. 11, 2022) ("We conclude that the first *Montana* exception is sufficient to sustain tribal jurisdiction over the dispute.").

550. *Id.* at *1 ("In Adams, we did not limit the tribal court's jurisdiction to suits on contract, but merely reaffirmed that the regulation/suit must arise out of the *activity* that is the subject of the contracts/consensual relationship—the provision of electrical services." (quoting Big Horn Cnty. Elec. Coop., Inc. v. Adams. 219 F.3d 944, 951 (9th Cir. 2000))).

551. *Id.*

552. *See In re* Atkinson Trading Co., Inc., 1 Am. Tribal L. 451, 461 (Navajo 1997).

553. *See Water Wheel Camp Recreational Area, Inc*., 642 F.3d at 806; *FMC Corp.*, 942 F.3d at 924-25.

554. The purpose of the tribal exhaustion rule is supporting tribal self-government and self-determination, allowing a full record to be developed in the tribal court, and for providing other courts with the benefit of the tribal courts' expertise in their own jurisdiction. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).

Additionally, tribal courts should not wait for federal courts to implement respect for tribal court jurisdiction. Rather, tribal courts should be proactive. Tribal courts can define tribal jurisdiction from a tribal perspective in tribal court opinions. In making assessments of tribal jurisdiction, a tribal court can engage in cultural and historical analysis in support of its determination. In doing so, tribal courts can utilize the canons of treaty construction and evaluate evidence as to how the tribe understood the applicable statutes, treaties, and agreements, as well as its own customary law principles of jurisdiction. This is significant, because when federal courts refuse to acknowledge and adhere to jurisdictional principles of traditional tribal law, the result is often a diminishment of tribal authority pursuant to federal common law principles.[555] Furthermore, pursuant to the reserved rights doctrine, a tribe reserves all of its inherent sovereignty unless the tribe expressly diminished it in a treaty or agreement.[556] Rather than interpret the presumption that tribal jurisdiction is divested, federal courts should presume that tribal authority is retained pursuant to the reserved rights doctrine unless Congress clearly states otherwise. In response, tribal courts will be unrestrained and free to examine the parameters of jurisdiction under the "backdrop" of tribal sovereignty, rather than under the "backdrop" of divesture.[557]

Tribal courts can also ensure that they are not constrained by federal court determinations of tribal customary principles. A positive takeaway from this Article is the court's recognition that the parties' conduct in cases matters.[558] As a reflection of this principle, tribal courts may build

555. *In re* Estate of Komaquaptewa, 4 Am. Tribal L. 432 (Hopi App. Ct. 2002); *id.* at 443 ("Hopi tribal and village customs and traditions would not receive the same consideration in a non-tribal forum and the results could be devastating to Hopi parties, the Tribe and the Villages.").

556. Stark et al., *supra* note 2, at 412 ("Treaties solidified aboriginal rights because these instruments did not grant rights *to* Indigenous nations, but instead granted rights to the United States *from* Indigenous nations. In other words, Indigenous nations reserved those rights for themselves that were not granted in the treaty." (citing United States v. Winans, 198 U.S. 371, 381 (1905))).

557. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) ("[T]raditional notions of Indian self-government are so deeply engrained on our jurisprudence that they have provided an important 'backdrop,' against which vague or ambiguous federal enactments must always be measured." (quoting McClanahan v. State Tax Comm'n, 411 U.S. 164, 172 (1973))); Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123-24 (1993) ("Our decision in *McClanahan* relied heavily on the doctrine of tribal sovereignty. We found a 'deeply rooted' policy in our Nation's history of 'leaving Indians free from state jurisdiction and control.' . . . The Indian sovereignty doctrine, which historically gave state law no role to play' within a tribe's territorial boundaries, did not provide 'a definitive resolution of the issues,' but it did 'provid[e] a backdrop against which the applicable treaties and federal statutes must be read.'" (citations omitted)); Washington v. EPA, 752 F.2d 1465, 1470 (9th Cir. 1985); ("Respect for the long tradition of tribal sovereignty and self-government also underlies the rule that state jurisdiction over Indians in Indian country will not be easily implied. Vague or ambiguous federal statutes must be measured against the 'backdrop' of tribal sovereignty, especially when the statute affects an area in which the tribes historically have exercised their sovereign authority or contemporary federal policy encourages tribal self-government." (citations omitted)).

558. Smith v. Salish Kootenai Coll., 434 F.3d 1127 (9th Cir. 2006).

upon this determination and utilize their expertise when defining their own jurisdiction and applying tribal law. This would allow tribes to properly regulate non-member conduct pursuant to tribal law principles. Another positive takeaway from this Article is that practitioners may utilize traditional tribal law concepts of consensual relations that exist beyond the narrow confines of a strict reading of the language of commercial dealings, contracts, leases, or other arrangements as established in *Montana*.[559] Tribes also may determine how an assessment of jurisdiction threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. For example, pursuant to tribal customary principles, it is proper for a tribal court to determine whether a non-member's conduct is "demonstrably serious."[560] Furthermore, the non-member's conduct can be general in nature.[561] As a result, the tribal court, rather than a federal court, is in the best position to determine whether, for example, "deaths to tribal members cause damage to the community by depriving the Tribe of potential councilmembers, teachers and babysitters."[562] This is because the tribal court is in the best position to render a decision that comports with the tribal customary law principles of harmony and balance.

Federal courts also need to be properly reminded that federal court authority to review tribal court determinations currently only extends to decisions of tribal jurisdiction,[563] and that "courts must enforce the tribal judgement without reconsidering issues decided by the tribal court."[564] Federal courts do not possess the authority to set aside or impede tribal court judgments based upon determinations of due process[565] or as a matter of discretion.[566] As evidenced in this Article, the effects of this de-legitimization narrative are evident.

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559. *Id.*

560. *See* Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1065 (9th Cir. 1999) (quoting Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 431 (1989)).

561. *See* Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 175 (5th Cir. 2014) ("We do not interpret *Plains Commerce* to require an additional showing that one specific relationship, in itself, 'intrude[s] on the internal relations of the tribe or threaten[s] self-rule.' It is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact. On the other hand, at a higher level of generality, the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government. Nothing in *Plains Commerce* requires a focus on the highly specific rather than the general." (citing Plains Com. Bank v. Long Fam. Land & Cattle Co, Inc., 554 U.S. 316, 334-35 (2008))).

562. *See Burlington N. R.R. Co.*, 196 F.3d at 1065.

563. *See supra* note 507.

564. FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 930 (9th Cir. 2019).

565. *See supra* note 508.

566. *Id.* at 59-60 ("[W]e must bear in mind that providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself." (citations omitted)).

In furtherance of sovereignty and proactivity, tribes may also define their jurisdiction from a tribal perspective in tribal codes and ordinances, as well as in their hierarchy of laws based upon tribal customary law principles. Tribes may proactively write their agreements establishing consensual relationships based upon tribal customary law principles, thereby establishing consent for tribal jurisdiction. Tribes also may proactively write their laws establishing the direct effects of a tribal action on tribal self-government, tribal economic security, and the health, safety, and welfare of the tribe. Additionally, tribes may enter into cooperative agreements with counties, states, and the federal government that recognize tribal jurisdiction and enter into co-management agreements recognizing tribal authority and tribal territorial sovereignty. Furthermore, tribes may enter Land Back agreements and create statutes recognizing tribal territorial jurisdictional authority and enter additional TAS applications recognizing tribal jurisdiction and authority. Lastly, Congress should exercise its power to strip federal courts of federal common law jurisdiction over tribal court matters, and instead fully embrace tribal court determinations of their own tribal customary law jurisdictional principles, thus furthering tribal self-government and self-determination.[567]

567. Patchak v. Zinke 583 U.S. 244, 252-53 (2018) (Congress also has the power to strip the federal courts of jurisdiction); Colorado River Indian Tribes v. Water Wheel Camp Recreational Area, Inc., Colorado Indian Tribes, No. 08-0003, at 23 (Colorado River Indian Tribes App. Ct. Mar. 17, 2009) ("The majority of the Supreme Court expressly held that the judge-made jurisdictional limitations on tribal court were not constitutionally mandated and therefore could be altered by Congress." (citing United States v. Lara, 541 U.S. 193 (2004))).