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TRIBAL JURISDICTION IN CIVIL MATTERS: THE HIGH COURT MAKES FURTHER INROADS ON THE CONCEPT OF "INHERENT SOVEREIGNTY"

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Introduction

Indian tribes have sought to rekindle their economies by instituting Indian gaming on their reservations. Here in South Dakota and elsewhere, tribes have negotiated gaming compacts with states. The whole purpose behind this move is to bring economic revitalization to reservations. As is true with many state-sponsored lotteries and games of chance, the revenues generated from gaming on the reservation are intended to support the schools, programs and services operated on the reservation. The social consequences of wide-spread gaming are yet to be realized.

Gaming is just one visible sign of economic prosperity on the reservation. Indian tribes have also developed oil and gas ventures, mining ventures, ranching and farming operations, arts and cultural trades, recreational pursuits, including fishing and hunting, snow skiing operations, and other forms of tourism. Indian tribes in many cases have paramount rights to the use and enjoyment of water. There exists unlimited potential for unleashing the economic engines of change on reservations.

One of the key attributes of Indian self-determination and tribal self-government is a legal system to resolve disputes involving Indians and non-Indians that occur on the reservation. These disputes may involve hunting and fishing rights of non-Indians on property located within the boundaries of the reservation, water rights and other environmental concerns, general run-of-the-mill tort claims arising on the reservation, breach of contract, products liability, and other business and commercial torts arising on the reservation, etc. Although the United States Supreme Court, early on, gave an expansive definition to the term "inherent tribal sovereignty," the Court, over the last two decades, has made ever-increasing inroads on this concept.

Tribal Court Jurisdiction

Beginning in 1981, the Court turned the concept of tribal sovereignty on its head. In *Montana v. United States*, 450 U.S. 544 (1981), the Court held that the Crow Tribe in Montana did not retain inherent regulatory powers to limit or forbid hunting and fishing by non-Indians (and nonmembers of the Tribe) on land within the Tribe's reservation owned in fee simple by non-Indians. The Court acknowledged, however, that the Crow Tribe retained the power to limit or forbid hunting and fishing by nonmembers on land owned by or held in trust for the Tribe. *Montana* announced a general rule that, *in the absence of a specific delegation of tribal authority by treaty or statute*, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions:

[First] 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. [Second] 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.

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Montana, 450 U.S. at 565-66 (citations and footnote omitted).

What is striking and harsh about this general rule announced in *Montana* is that it flies directly in the face of the basic concept of aboriginal title, as expressed in Supreme Court cases dating back over 165 years ago.

In 1831, Chief Justice John Marshall described Indian tribes as "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). He referred to the tribes as subordinate and dependent nations, possessed of all powers and limited only to the extent that they have been *expressly* required to surrender their powers by the superior sovereign, the United States. Justice Marshall summarized by stating that the Indian tribe's "relation to the United States resembles that of a ward to his guardian." *Id.*

Clearly, the right of tribal self-government is not lost merely by submitting to the protection of the United States. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice John Marshall concluded that the guardian-ward relationship did not abolish preexisting tribal powers or make the tribes dependent upon federal law for their powers of self-government. Marshall traced the history of federal-tribal relations. Applying principles of international law, he began by recognizing that Indian tribes were initially treated as sovereigns by the European nations. *Id.* at 542-43. Later, tribes consented to enter into alliances or treaties with those nations. When the United States succeeded to the European claims, it followed a similar policy of entering into alliances through a series of treaties which itself evidenced an acknowledgment of the tribes' sovereign status. *Id.* at 555. Justice Marshall said that the United States had assumed the role of "protector" of the Indian tribes, acknowledging and guaranteeing their security as distinct political communities in exchange for their friendliness to the United States. *Id.* at 557.

The Court held that this protectorate relationship did not destroy tribal sovereignty:

[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence--its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.

Id. at 560-61.

The late Felix Cohen, a noted authority on Indian law, outlined the basic developments of tribal sovereignty:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all of the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e. its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

F. Cohen, *Handbook of Federal Indian Law*, pp. 241-42 (1982 ed.).

More recently, and prior to *Montana*, the Court held: "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). One of the most basic principles of Indian law, supported by a long legion of Supreme Court decisions up until *Montana*, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather are "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. at 313, 322-23. This principle is the overriding determinant of the scope of tribal

United States v. Wheeler, 435 U.S. at 313, 322-23. This principle is the overriding determinant of the scope of tribal authority.

Traditionally, the subject matter jurisdiction of tribal courts has been limited only by the U.S. Constitution, treaties, and federal statutes. Such jurisdiction extends to matters arising on the reservation which involve significant tribal interests. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). However, in a recent decision, the Supreme Court held that tribal courts lack subject matter jurisdiction over tort claims against nonmembers of the tribe, which occur on the Indian reservation. *See Strate v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404, 137 L. Ed.2d 661 (1997). The Court, in a unanimous opinion authored by Justice Ginsburg, held that when an accident occurred on a portion of public highway maintained by the state under a federally-granted right-of-way over Indian reservation land, tribal courts could not exercise civil jurisdiction against an allegedly negligent driver and driver's employer, neither of whom was a member of the tribe--absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question. *Id.*, 117 S. Ct. at 1407-08. The Court placed great emphasis on *Montana* for the "general" proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 1409, quoting *Montana*, 450 U.S. at 565. This again represents an abrupt departure from the traditional framework of inherent tribal sovereignty.

Congress has never enacted general legislation to supply a federal or state forum for civil disputes between Indians and non-Indians that arise on the reservation. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978), the Court declared: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." Two other decisions, *National Farmers Union*, 471 U.S. 845 (1985) and *Iowa Mutual*, 480 U.S. 9 (1987), provide ample authority for subject matter jurisdiction in the tribal court in cases involving torts committed within the exterior boundaries of an Indian reservation--whether involving Indians and/or non-Indians, or tribal members and/or non-members. Both cases reaffirm the vital role tribal courts play in tribal self-government; a role that has consistently been encouraged and protected by the federal courts, in particular the U.S. Supreme Court.

In *National Farmers Union*, a member of the Crow Tribe of Indians filed suit against a school district in the Crow Tribal Court for personal injuries received in a motor vehicle accident occurring within the boundaries of the Crow Indian Reservation. The Court held that the answer to the question whether a tribal court may exercise civil subject-matter jurisdiction over non-Indians in a case arising on the reservation is not automatically foreclosed, as an extension of *Oliphant* would require. Rather, the existence and extent of tribal court jurisdiction will require:

A careful examination of tribal sovereignty, the extent to which the 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.

471 U.S. at 855-56. The Court held that this examination should be conducted in the first instance by the tribal court itself. Therefore, the Court required that the litigants exhaust their tribal court remedies before a federal court may entertain a claim that the tribal court has exceeded the lawful limits of its jurisdiction in any particular case.

Iowa Mutual involved an accident in which a member of the Blackfeet Indian Tribe was injured while driving a cattle truck within the boundaries of the reservation. The driver and his wife, also a tribal member, brought suit in the Blackfeet Tribal Court, naming among others the Montana corporation that employed the driver and the individual owners of the ranch situated on reservation land owned by Blackfeet Indians residing on the reservation. The tribal court ruled it had jurisdiction over the case. *Iowa Mutual*, 480 U.S. at 11-12. A separate action was then filed in federal court in Montana, invoking federal jurisdiction based on the parties' diverse citizenship. The district court dismissed the action for lack of subject matter jurisdiction, and the court of appeals affirmed. *Id.* at 13-14. The Supreme Court then reversed, holding that the district court could properly exercise subject matter jurisdiction; however, the district court on remand was directed to determine whether "the federal action should be stayed pending further Tribal Court proceedings or dismissed." *Id.* at 20, n. 14.

In *Iowa Mutual*, the Court elaborated on the breadth of tribal court jurisdiction in civil matters, over non-Indians:

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States*, 450 U.S. 544, 565-566, 101 S. Ct. 1245, 67 L. Ed.2d 493 (1981); *Washington v. Confederated Tribes of Coville Indian Reservation*, 447 U.S. 134, 152-153, 100 S. Ct. 2069, 65 L. Ed.2d 10 (1980); *Fisher v. District Court*, 424 U.S. [382,] 387-389. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. . . . In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion.

Iowa Mutual, 480 U.S. at 18.

The civil code of most tribes provides that the tribal courts may exercise subject matter jurisdiction to the fullest extent possible. For example, Article I of the Constitution of the Oglala Sioux Tribe in South Dakota provides:

The jurisdiction of the Oglala Sioux Tribe of Indians shall extend to the territory within the original confines of the Pine Ridge Indian Reservation boundaries . . .

Likewise, Section 20 of the Oglala Sioux Tribal Code (1992), as amended, provides:

The Oglala Sioux Tribal Court shall have jurisdiction of all suits wherein the defendant is a member of the Oglala Sioux Tribe and of all other suits between members and non-members who consent to the jurisdiction of the tribe.

Section 20(a), entitled "Implied Consent," provides:

Any person who is not a member of the Oglala Sioux Tribe shall be deemed as having consented to the jurisdiction of the Oglala Sioux Tribe by doing personally, through an employee, through an agent or through a subsidiary, any of the following acts within the exterior boundaries of the Pine Ridge Indian Reservation . . . :

1. The transaction of any business.
2. The commission or omission of any act which results in a tort action.

In addition, Section 1.3 of the Oglala Sioux Tribal Code provides the following definition of "territorial jurisdiction":

The Pine Ridge Reservation shall be taken to include all of territory within the original Reservation boundaries, including fee patent lands, roads, waters, bridges, and lands use[d] for agency purposes.

The Supreme Court has repeatedly confirmed the federal government's long-standing policy of supporting and encouraging the development of tribal courts and tribal self-determination.

"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." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987), citing *Montana*, 450 U.S. at 565-66, *Washington v. Confederated Tribes*, 447 U.S. 134, 152-53 (1980) (tribes may tax transactions occurring on tribal trust lands); *Fisher v. District Court*, 424 U.S. 382, 387-89 (1976); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (holding tribe may impose taxes on business operated by non-Indians on basis of tribe's inherent sovereign authority to control economic activity within its jurisdiction); *Williams v. Lee*, 358 U.S. 217, 223 (state court did not have jurisdiction over civil suit by non-Indian against Indian where cause of action arose on reservation). "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." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 149 n.14.

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The Supreme Court has also stated that inherent tribal sovereignty:

Exists only at the sufferance of Congress and is subject to complete defeasance. *But until Congress acts, the tribes retain their existing sovereign powers.* In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication of a *necessary* result of their dependent status.

Wheeler, 435 U.S. at 323 (emphasis added). The Supreme Court has found implicit divestiture of inherent sovereignty necessary only:

Where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the Tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts (for criminal activity) which do not accord the full protection of the Bill of Rights.

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 153-54 (1980).

It can be said that tribal courts, unlike federal courts, are courts of general jurisdiction when it comes to civil, as opposed to criminal, matters. In other words, tribal courts have been given broad authority and power to adjudicate civil disputes among both Indians and non-Indians. The Supreme Court has declared this to be part and parcel of the inherent sovereign powers retained by Indian tribes. The Court has reinforced, time and again, the central concept that tribal courts play an important role in the self-determination and sovereign status of Indian tribes.

Tribal courts, like state and federal courts, enforce the government's civil jurisdiction. Holding non-Indian persons and entities accountable for their conduct is a very important and significant role and function played by the tribal court. To deny tribal courts of jurisdiction over tort claims arising within the boundaries of a reservation would be to deprive the tribe of its sovereign status and inherent powers and authority to adjudicate and determine civil disputes among Indians and non-Indians.

Whether a tribe has exceeded its lawful jurisdiction over a civil matter is a "federal question" that federal courts are authorized to decide. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). However, *National Farmers Union* also held that non-Indians who challenge the tribe's jurisdiction must first raise the issue in the tribal court proceeding and exhaust tribal appellate procedures before raising the issue in a federal court. Federal courts have the final word regarding the scope of a tribe's jurisdiction, but the federal court should not address this question until after the tribal courts have done so. "Congress is committed to a policy of supporting tribal self-government and self-determination," the Supreme Court has declared and imposing an exhaustion requirement is consistent with this federal policy. *Id.*, 471 U.S. at 856.

When a federal court reviews a tribal court's decision regarding the scope of its jurisdiction, all findings of fact made by the tribal court must be accepted as conclusive by the federal court. A party cannot re-litigate factual issues in federal court that it lost in the tribal court. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

The parties presumably would have the same rights, remedies, and procedural protections available to them that would otherwise be accorded to the parties if this case were pending in state or federal court. For example, Section 20.27 of the Oglala Sioux Tribal Code specifically incorporates applicable federal law and furthermore empowers this Court to exercise its discretion and be "guided" by state law where appropriate.

The parties presumably would have the same defenses and procedural protections available in any other civil action tried in state or federal court.

Conclusion

The tribes' inherent sovereign powers over non-Indians in civil matters have been substantially eroded over the last two decades. In *Montana* and most recently in *Strate*, the Supreme Court has made an about-face on the theoretical underpinnings of tribal sovereignty. The Court has abandoned the most basic principle of tribal sovereignty, that being that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather are "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. at 313, 322-23.

Indian tribes, like the several states, have an important and legitimate interest in protecting the health and safety of its members and residents. In addition, tribes, as do the states, have an important and legitimate interest in affording those who have been killed or injured in accidents occurring on the reservation--whether at the hands of Indians or non-Indians, or members or non-members--with a judicial remedy. As the Court once declared: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

Tribal court jurisdiction is an important aspect of tribal sovereignty, and refusing to recognize its existence may have demonstrably serious, adverse effects on the political integrity of Indian tribes and their people.

Endnotes

1. The United States Constitution declares:

Congress shall have power . . . [to] regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

U.S. Const. art. I, 8, cl. 3. Thus, Congress is recognized as having "plenary" or absolute authority over Indian tribes. *Winston v. Amos*, 255 U.S. 372 (1886).

2. Tribal court jurisdiction over criminal matters is treated differently. In 1978, the Supreme Court held that an Indian tribe cannot exercise criminal jurisdiction over a non-Indian unless Congress has expressly given the tribe that power. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). It is presumed that tribes have no criminal jurisdiction over non-Indians. Regarding civil jurisdiction, however, the presumption is just the opposite. As the Supreme Court stated in 1980, Indian tribes may exercise "a broad range of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980). Most recently, the Supreme Court declared: "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).
- 3.

The tribal exhaustion principle is based on considerations of comity and the long-standing policy of promoting tribal self-government and self-determination. *National Farmers*, 471 U.S. at 856. "[T]he 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.'" *Iowa Mutual*, 480 U.S. at 16, quoting *National Farmers*, 471 U.S. at 857.

