Note 1

part: (C) Any Tribal–State compact negotiated under subparagraph (A) **may** include provisions relating to—(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; (ii) the **allocation** of criminal and civil **jurisdiction** between the State and the Indian tribe necessary for the enforcement of such laws and regulations;. . . . (emphasis added). The Compact here does not include any such allocation of jurisdiction. Instead, the Compact provides only: ''This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction'' and that tort claims may be heard in a ''court of competent jurisdiction.'' The Tribe could have, but did not, include such jurisdictional allocation in this Compact. Neither the IGRA nor the Compact as approved enlarged the Tribe's jurisdiction. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

In *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001), the Supreme Court recognized the authority of state courts as courts of ''general jurisdiction'' and further acknowledged our system of ''dual sovereignty'' in which state courts have concurrent jurisdiction with federal courts, absent specific Congressional enactment to the contrary. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

Thus, a tribal court is not a court of general jurisdiction. Its jurisdiction could be asserted in matters involving non-Indians **only** when their activities on Indian lands are activities that may be regulated by the Tribe. (citing *Nevada v. Hicks*, 533 U.S. 343 (2001)) *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

The Oklahoma district court is a ''court of competent jurisdiction'' to hear Cossey's tort claim. The Tribe's sovereign interests are not implicated so as to require tribal court jurisdiction under the exceptions in *Montana*, *supra*. Cossey's right to seek redress in the Oklahoma district court is guaranteed by our Constitution. Moreover, the United States Supreme Court has upheld *Montana* and the cases following it, indicating the Court's continued recognition of the need to protect the sovereign interests of Indian tribes, while acknowledging the plenary powers of the states to adjudicate the rights of their citizens within their borders. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

ARTICLE I [NAME, ORGANIZATION AND JURISDICTION OF TRIBE]

Section

Section headings are editorially supplied.

§ 1. [Name and organization of tribe]

The name of this tribe of Muscogee (Creek) people shall be ''The Muscogee (Creek) Nation'', and is hereby organized under Section 3 of the Act of June 26, 1936 (48 Stat. 1967)[1].

[1] 25 U.S.C.A. § 503.

Library References

Indians ⇦214.
Westlaw Topic No. 209.
C.J.S. Indians § 59.

Notes of Decisions

1. Construction and application

The Court finds the original formula of one (1) representative per district plus one (1) repre-

sentative for each 1500 citizens must yield to the Constitutional Amendment that set the maximum number of seats at 26. *Harjo v. Muscogee (Creek) Nation Election Board*, SC 07–50 (Muscogee (Creek) 2007)

[T]he Court finds that the total enrollment of the Muscogee (Creek) Nation as of July 11th, 2007 is 63,156. This number is the number as supplied in the Citizenship Board's Memorandum to Principal Chief A.D. Ellis and presented to this Court as Plaintiff's Exhibit #1 minus the ''undefined.'' *Harjo v. Muscogee (Creek) Nation Election Board*, SC 07–50 (Muscogee (Creek) 2007)

The Court holds the following breakdown as supplied in the Plaintiff's Exhibit #2 for the 2007 election as the correct number of representatives per district: Creek 3, McIntosh 3, Muskogee 2, Ofuskee 3, Okmulgee 5, Tukvpvtce 2, Tulsa 7, Wagoner 1, Total 26. *Harjo v. Muscogee (Creek) Nation Election Board*, SC 07–50 (Muscogee (Creek) 2007)

The Muscogee (Creek) Nation Constitution is the Supreme Law of the Muscogee (Creek) Nation and allows for the reapportionment. *Harjo v. Muscogee (Creek) Nation Election Board*, SC 07–50 (Muscogee (Creek) 2007)

[T]he Muscogee (Creek) Nation's Constitution takes precedence over all laws and ordinances passed by the National Council. *Harjo v. Muscogee (Creek) Nation Election Board*, SC 07–50 (Muscogee (Creek) 2007)

[T]his Court reminds the parties that the Indian Civil Rights Act states that: **''no tribe in exercising its powers of self-government SHALL: deny to any persons within its jurisdiction the Equal Protection of the laws.''** (Emphasis added). This mandate in the Indian Civil Rights Act (''ICRA'') requires equal voting rights to all eligible tribal voters. The Equal Protection clause of the ICRA thus requires a ''one man one vote'' rule to be obeyed in this tribe's electoral process. (emphasis and bold in original) *Harjo v. Muscogee (Creek) Nation Election Board*, SC 07–50 (Muscogee (Creek) 2007)

Indian tribes were not made subject to the Bill of Rights. However, the laws of the Muscogee Nation are subject to the limitation imposed upon the tribal governments by the Indian Civil Rights Act of 1968, as amended, found at 25 U.S.C. 1301 et seq. This limits the powers of tribal governments by making certain provisions of the Bill of Rights applicable to tribal governments. *Ellis v. Muscogee (Creek) National Council*, SC 06–07 (Muscogee (Creek) 2007)

We have held that the Constitution of this Nation must be strictly construed and interpreted; and where the plain language is clear, we must not place a different meaning on the words. *Oliver v. Muscogee (Creek) National Council*, SC 06–04 (Muscogee (Creek) 2006)

The Constitution of the Muscogee (Creek) Nation ''must be strictly construed and interpreted and where the Constitution speaks in plain language with reference to a particular matter, the Court must not place a different meaning on the words.'' (Citing *Cox v. Kamp*, 4 Mvs. L. Rep. 75 (Muscogee (Creek) 1991)) *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

The Muscogee (Creek) Nation Constitution cannot be infringed upon or expounded on simply by words in a superfluous document disguised as an ''agreed order.'' *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

There are defined procedures in place to amend our Constitution if there are deemed to be inadequacies with the delineated responsibilities of the differing branches. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

The Muscogee (Creek) Nation Constitution is the epitome of what makes the Muscogee Nation great; a document that has withstood the test of time, trials and tribulations, forced assimilation, statehood and eventual rebirth. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

To allow an Agreed Journal Entry to supersede the Constitution's powers appears to this Court a very unwise leap to make. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

The roles of the different branches are clearly defined both in the Constitution of the Nation and in its laws, . . . , there are proper procedures in place to amend the Constitution of this Nation, and those procedures should not be assumed by a document proposing to be an Agreed Journal Entry in a lawsuit litigated between the Principal Chief and the National Council. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

There is simply no jurisdiction besides the Nation's that can adequately deal with drug traffic on tribal lands. The only mans in which the Nation may reduce the amount of drugs brought onto tribal lands by non-Indians is through the limited provisions of the Nation's civil code. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2*, SC 05–01 (Muscogee (Creek) 2005)

As a matter of tribal law, all conduct occurring on the Mackey site is subject to the laws of the Nation regardless of the status of the parties. The Mackey site is under the jurisdiction of the Nation because; (1) the land is located within the political and territorial boundaries of the Nation; and (32) the land is owned by the Nation. 27 Muscogee (Creek) Nation Code. Ann. § 1–102(A)(Territorial Jurisdiction). *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2*, SC 05–01 (Muscogee (Creek) 2005)

The Courts of this Nation exercise general civil jurisdiction over all civil actions arising under the Constitution, laws or treaties which arise within the Nation's Indian country, regardless of the Indian or non-Indian status of the parties. 27 Muscogee (Creek) Nation Code. Ann. § 1–102(B)(Civil Jurisdiction). *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

Personal jurisdiction exists over all persons, regardless of their status as Indian or non-Indian, in ''cases arising from any action or event'' occurring on the Nation's Indian Country and in other cases in which the defendant has established sufficient contacts. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

As a matter of Federal law, the Tenth Circuit United States Court of Appeals has already determined that this same tract of land and this exact gaming facility are subject to the civil authority of the Muscogee (Creek) Nation and not the state of Oklahoma. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

In that case [Indian Country, USA v. State of Oklahoma, 829 f.2d 967 (10th Cir. 1987)] the Tenth Circuit noted the Mackey Site is part of the original treaty land still held by the Creek Nation. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

. . . the Tenth Circuit classified the Mackey Site as ''the purest form of Indian Country,'' considering it equal to or great in magnitude, for purposes of tribal jurisdiction, than lands that are held by the federal government in trust for the various tribes. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

We hold that as a matter of tribal law and consistent with federal law, the Nation has exclusive regulatory jurisdiction over the land where Appellant's conduct occurred. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

Because the citation issued to Russell Miner was civil in nature, *Oliphant* does not apply. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

Non–Indians will be subject to tribal regulatory authority when they voluntarily choose to go onto tribal land and do business with the tribe. Non–Indians who chose to purchase products, engage in commercial activities, or pay for entertainment inside Indian country place themselves with the regulatory reach of the Nation. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

The Nation has exclusive jurisdiction to regulate the conduct of all persons on tribal land, particularly those that voluntarily come on to tribal land for the purpose of patronizing tribal businesses. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

The act of coming on to tribal property and entering the casino for commercial purposes constitutes a consensual relationship. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

The state also lacks jurisdiction [for] the criminal conduct inside the Nation's Indian Country. Because the Nation does not have a cross-deputization agreement with Tulsa County, Oklahoma, the Nation would have no means of addressing Appellant's conduct through the assistance of another jurisdiction. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

There is simply no jurisdiction besides the Nation's that can adequately deal with drug traffic on tribal lands. The only mans in which the Nation may reduce the amount of drugs brought onto tribal lands by non-Indians is through the limited provisions of the Nation's civil code. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

[T]he Nation possess authority to regulate public safety through civil laws that restrict the possession, use or distribution of illegal drugs. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

[T]he Nation's courts possess civil adjudicatory jurisdiction over forfeiture proceedings including the forfeiture of (1) controlled dangerous substances; (2) vehicles used to transport or conceal controlled dangerous substances; and (3) monies and currency found in close proximity of a forfeitable substance. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a*

2004 General Motors Hummer H2, SC 05–01 (Muscogee (Creek) 2005)

Under traditional Mvskoke law controversies were resolved by clan Vculvkvlke (elders). Their integrity was considered beyond reproach. They were obligated by the responsibilities of their position to decide cases fairly, and honestly, regardless of clan or family affiliation. *In Re: The Practice of Law Before the Courts of the Muscogee (Creek) Nation*, SC 04–02 (Muscogee (Creek) 2005)

Since this Nation's establishment of a constitutional form of government in 1867, Mvskoke law is ruled upon by appointed Judges, but the obligation under traditional Mvskoke law remain in effect. *In Re: The Practice of Law Before the Courts of the Muscogee (Creek) Nation*, SC 04–02 (Muscogee (Creek) 2005)

Although Federal Law may serve as an informative tool of guidance, procedural rules such as our final order rule are solely matters of tribal law. *Brown and Williamson Tobacco Corp. v. District Court*, 5 Okla. Trib. 447 (Muscogee (Creek) 1998).

Our use of any federal authorities considering this matter [writs] is limited to review of that of persuasive value. *Brown and Williamson Tobacco Corp. v. District Court*, 5 Okla. Trib. 447 (Muscogee (Creek) 1998).

Pursuant to NCA 89–21 § 103, the Court shall first apply tribal ordinances in any legal resolution. If there is no applicable tribal ordinance, then the court may process to apply federal law. If no tribal or federal laws are applicable, then the Court shall apply Oklahoma law. *Brown and Williamson Tobacco Corp. v. District Court*, 5 Okla. Trib. 447 (Muscogee (Creek) 1998).

The Court may at various times, adopt certain federal or state laws or legal concepts into Muscogee Nation case law. When this occurs, we must note that the Muscogee Nation Supreme Court is only using federal or state principles for the purposes of guidance and is merely incorporating those laws into our common law. *Brown and Williamson Tobacco Corp. v. District Court*, 5 Okla. Trib. 447 (Muscogee (Creek) 1998).

Adherence to National Council Ordinances and Muscogree (Creek) Nations Constitutional limits on this Courts power is required by our doctrine of separation of powers. *Brown and Williamson Tobacco Corp. v. District Court*, 5 Okla. Trib. 447 (Muscogee (Creek) 1998).

It is a fundamental tenet of our case law that each branch of government remains autonomous and that each respect the duties of the others. *Brown and Williamson Tobacco Corp. v. District Court*, 5 Okla. Trib. 447 (Muscogee (Creek) 1998).

The Supreme Court has a duty to inquire into its own jurisdiction. *Kelly v. Wilde*, 5 Okla. Trib. 209 (Muscogee (Creek) 1996).

Muscogee (Creek) Nation's National Council and not the Principal Chief has general appointment powers under the Constitution of the Muscogee (Creek) Nation. *Fife v. Health Systems*, 4 Okla. Trib. 319 (Muscogee (Creek) 1995).

All three branches of government of the Muscogee (Creek) Nation have right to employ legal counsel to assist in accomplishing their constitutional responsibilities. *Fife v. Health Systems*, 4 Okla. Trib. 319 (Muscogee (Creek) 1995).

Muscogee (Creek) Nation Constitution empowers the National Council to legislate on matters subject to constitutionally imposed limitations-''to promote the public health and safety, education and welfare that may contribute to the social, physical well-being and economic advancement of citizens of the Muscogee (Creek) Nation.'' *Fife v. Health Systems*, 4 Okla. Trib. 319 (Muscogee (Creek) 1995).

District Court of the Muscogee (Creek) Nation has jurisdiction to quiet title and ejectment claims of tribal members against non-members where the land in question lies within Muscogee (Creek) Indian Country. *Enlow v. Bevenue*, 4 Okla Trib. 175 (Muscogee (Creek) 1994).

Indian Tribes may exercise a broad range of civil jurisdiction over the activities of non-member Indians on Indian reservation and in which tribes have a significant interest. *Enlow v. Bevenue*, 4 Okla Trib. 175 (Muscogee (Creek) 1994).

When non-Indian conduct does not affect tribal interests, tribal jurisdiction lacks. *Enlow v. Bevenue*, 4 Okla Trib. 175 (Muscogee (Creek) 1994).

If one party in a lawsuit is tribal member, interest of tribe in regulating activities of tribal members and resolving disputes over Indian property are sufficient to confer jurisdiction to the court. *Enlow v. Bevenue*, 4 Okla Trib. 175 (Muscogee (Creek) 1994).

A Muscogee (Creek) Nation Chartered Community is not a federally recognized tribe. *Reynolds v. Skaggs*, 4 Okla. Trib. 116 (Muscogee (Creek) 1994).

Once case or controversy concerning meaning of a constitutional provision reaches tribal courts, such courts become the final arbiter as to constitutionality of governmental actions. *Courtwright v. July*, 3 Okla. Trib. 132 (Muscogee (Creek) 1993).

The Constitution of the Muscogee (Creek) Nation must be strictly construed and interpreted and where the Constitution speaks in plain language with reference to a particular matter, the Court must not place a different meaning on the words. *Cox v. Kamp*, 5 Okla. Trib. 530 (Muscogee (Creek) 1991).

The duty of the Court is not to merely give definition to words within the law, but is as a group, to determine the intent and scope behind the words. *Cox v. Kamp*, 5 Okla. Trib. 530 (Muscogee (Creek) 1991).

Court must look to what intent the founders of the Constitution of the Creek Nation had when using the language they used in drafting

the Constitution. *Cox v. Kamp,* 5 Okla. Trib. 530 (Muscogee (Creek) 1991).

The District Court of the Muscogee (Creek) Nation has exclusive original jurisdiction over all matters not otherwise limited by tribal ordinance. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

The District Court of the Muscogee (Creek) Nation has personal jurisdiction and subject matter jurisdiction over suits by the Nation against Tobacco companies with respect to their manufacture, marketing, and sale of tobacco products where some of such activities by defendant and/or their agents are alleged to have occurred within the Nation's Indian Country and/or where products have entered the stream of commerce within the Nation's territorial and political jurisdiction thus creating minimum contacts for jurisdictional purposes. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Indian Tribes have adjudicatory jurisdiction where party's actions have substantial effect on political integrity, economic security, or health and safety and welfare of the tribe. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Treaty of 1856 did not divest the Muscogee (Creek) Nation of otherwise extant adjudicatory jurisdiction over non-Indians and/or corporations. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Muscogee (Creek) Nation Constitution and statutes dictate manner in which question of law are to be addressed by the Court. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Article I § 2 states that political jurisdiction should be as it geographically appeared in 1900 which is based on those treaties entered into by the Muscogee (Creek) Nation and the United States of America. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Personal jurisdiction shall exist when person is served within jurisdictional territory or served anywhere in cases arising within territorial jurisdiction of the Muscogee (Creek) Nation. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc. (Cr.) D.Ct. 1998).

Muscogee (Creek) Nation does not exceed its powers as a matter of tribal law or under notions of federal due process if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the foreseeability and expectation that its product would be consumed by the Muscogee (Creek) Nation. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc. (Cr.) D.Ct. 1998).

Defendant's contacts are sufficient both under statutory mandates of the Muscogee (Creek) Nation's statutes and under well established minimum contacts jurisprudence developed in the federal system. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc. (Cr.) D.Ct. 1998).

Congress drafted Indian Country statute [18 U.S.C.S. § 1151 (1997)] as a criminal statute but the tribal and federal courts have applied the statutory definition to civil matters. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc. (Cr.) D.Ct. 1998).

Absent express Congressional enactment to the contrary, the jurisdiction power of the Muscogee (Creek) Nation remains unscathed. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Cannons of Treaty construction developed by the United States Supreme Court resolve ambiguities in favor of Indians and that language of an Indian Treaty is to be understood today as that same language was understood by tribal representatives when the treaty was negotiated. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Entire reading of Treaty of 1856 in light of historical realties clearly indicates that the United States Congress has abrogated the treaty and subsequently restored the governmental powers of the Muscogee (Creek) Nation which includes the power of the Court to assert jurisdiction. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

No indication in the 1867 Treaty that the men gave up any right to full adjudicatory authority. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

No provision nor implication in the 1867 Constitution of the Muscogee (Creek) Nation that prohibited jurisdiction over corporations doing business in the Muscogee (Creek) Nation. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Muscogee (Creek) Nation reorganized their tribal government under the Oklahoma Indian Welfare Act and adopted a new constitution which was approved by the United States Department of Interior and organizes tribal government into executive, legislative, and judicial branches with no divestiture of authority over non-Indians or corporations. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Due Process requires notice to be reasonably calculated to give parties notice of an action pending and giving those parties reasonable time to appear and object. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc. (Cr.) D.Ct. 1998).

For nearly two centuries now, we have recognized Indian tribes as ''distinct, independent political communities,'' *Worcester v. Georgia*, 6 Pet. 515 (1832), qualified to exercise many of the powers and prerogatives of self-government.(internal cite omitted) *Plains Commercial*

Bank v. Long Family Land & Cattle Co. et al., 128 S.Ct. 2709 (2008)

We have frequently noted, however, that the ''sovereignty that the Indian tribes retain is of a unique and limited character.'' (citing *United States v. Wheeler*, 435 U.S. 313 (1978)). *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

It[sovereignty] centers on the land held by the tribe and on tribal members within the reservation. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

They [tribes] may also exclude outsiders from entering tribal land. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

But tribes do not, as a general matter, possess authority over non-Indians who come within their borders: ''[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'' (citing *Montana v. United States*, 450 U.S. 544 (1981)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

As we explained in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), the tribes have, by virtue of their incorporation into the American republic, lost ''the right of governing . . . person[s] within their limits except themselves.'' (emphasis and internal quotation marks omitted). This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians—what we have called ''non-Indian fee land.'' (quoting *Strate v. A–1 Contractors*, 520 U.S. 438, 446 (1997)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

[w]hen the tribe or tribal members convey a parcel of fee land ''*to non-Indians*, [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands.'' (quoting *South Dakota v. Bourland*, 508 U.S. 679 (1993)) (emphasis in original) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

As a general rule, then, ''the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.'' (quoting *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

By their terms, the exceptions [announced in *Montana v. United States*, 450 U.S. 544 (1981)] concern regulation of ''the *activities* of nonmembers'' or ''the *conduct* of non-Indians on fee land.'' (emphasis in original) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

According to our precedents, ''a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.'' We reaffirm that principle today . . . (quoting *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)) (internal cites omitted) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

The status of the land is relevant ''insofar as it bears on the application of . . . *Montana*'s exceptions to [this] case.'' (quoting *Nevada v. Hicks*, 533 U.S. 353 (2001)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

The tribe's ''traditional and undisputed power to exclude persons'' from tribal land, for example, gives it the power to set conditions on entry to that land via licensing requirements and hunting regulations (quoting *Duro v. Reina*, 495 U.S. 676 (1990)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

The power to tax certain nonmember activity can also be justified as ''a necessary instrument of self-government and territorial management'' insofar as taxation ''enables a tribal government to raise revenues for its essential services,'' to pay its employees, to provide police protection, and in general to carry out the functions that keep peace and order (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)) (internal quotes omitted) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

By definition, fee land owned by nonmembers has already been removed from the tribe's immediate control. [quoting *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)] It has already been alienated from the tribal trust. The tribe cannot justify regulation of such land's sale by reference to its power to superintend tribal land, then, because non-Indian fee parcels have ceased to *be* tribal land. (emphasis in original) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

Any direct harm to its political integrity that the tribe sustains as a result of fee land sale is sustained at the point the land passes from Indian to non-Indian hands. It is at that point the tribe and its members lose the ability to use the land for their purposes. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

Once the land has been sold in fee simple to non-Indians and passed beyond the tribe's immediate control, the mere resale of that land works no additional intrusion on tribal relations or self-government. Resale, by itself, causes no additional damage. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

The *uses* to which the land is put may very well change from owner to owner, and those uses may well affect the tribe and its members. As our cases bear out, the 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.(internal cite omitted, emphasis in original). *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

[t]he key point is that any threat to the tribe's sovereign interests flows from changed uses or nonmember activities, rather than from the mere fact of resale. The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember *activity* on the land, within the limits set forth in our cases. The tribe has no independent interest in restraining alienation of the land itself, and thus, no authority to do so. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. Tribal sovereignty, it should be remembered, is ''a sovereignty outside the basic structure of the Constitution.'' (quoting *United States v. Lara*, 541 U.S. 193 (2004)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

The Bill of Rights does not apply to Indian tribes. (quoting *Talton v. Mayes*, 163 U.S. 376 (1896)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

[n]onmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

[w]e said it ''defies common sense to suppose'' that Congress meant to subject non-Indians to tribal jurisdiction simply by virtue of the nonmember's purchase of land in fee simple. If Congress did not anticipate tribal jurisdiction would run with the land, we see no reason why a nonmember would think so either. (internal cite omitted, quoting from *Montana v. United States*, 450 U.S. 544 (1981)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

The sovereign authority of Indian tribes is limited in ways state and federal authority is not. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

Montana [*Montana v. United States*, 450 U.S. 544 (1981)] provides that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian fee land. But conduct taking place on the land and the sale of the land are two very different things. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' ''conduct'' menaces the ''political integrity, the economic security, or the health or welfare of the tribe.'' The conduct must do more than injure the tribe, it must ''imperil the subsistence'' of the tribal community. (quoting *Montana v. United States*, 450 U.S. 544 (1981))(internal citation omitted) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

The sale of formerly Indian-owned fee land to a third party is quite possibly disappointing to the tribe, but cannot fairly be called ''catastrophic'' for tribal self-government. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

[t]he *Bracker* [*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)] interest-balancing test applies only where ''a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.'' It does not apply where, as here, a state tax is imposed on a non-Indian and arises as a result of a transaction that occurs off the reservation. (internal citation omitted) *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

We have further determined that, even when a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be pre-empted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

We have applied the balancing test articulated in *Bracker* [*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)] only where ''the legal incidence of the tax fell on a nontribal entity engaged in a transaction with tribes or tribal members on the reservation.'' (internal citation omitted)(quoting *Arizona Dept. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999)) *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

The *Bracker* interest-balancing test has never been applied where, as here, the State asserts its taxing authority over non-Indians off the

reservation. And although we have never addressed this precise issue, our Indian tax immunity cases counsel against such an application. [*White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980)] *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95 (2005)

Limiting the interest-balancing test exclusively to *on-reservation* transactions between a nontribal entity and a tribe or tribal member is consistent with our unique Indian tax immunity jurisprudence. We have explained that this jurisprudence relies ''heavily on the doctrine of tribal sovereignty . . . which historically gave state law 'no role to play' within a tribe's territorial boundaries.'' (emphasis in original, quoting *Oklahoma Tax Commission v. Sac and Fox Nation,* 508 U.S. 114 (1993)) *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95 (2005)

We have further explained that the doctrine of tribal sovereignty, which has a ''significant geographical component,'' requires us to ''revers[e]'' the ''general rule'' that ''exemptions from tax laws should . . . be clearly expressed.'' And we have determined that the geographical component of tribal sovereignty ''provide[s] a backdrop against which the applicable treaties and federal statutes must be read.'' (internal cites omitted, quoting from *Oklahoma Tax Commission v. Sac and Fox Nation,* 508 U.S. 114 (1993) and *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980)) *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95 (2005)

[W]e have concluded that ''[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.'' (quoting *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973)) *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95 (2005)

If a State may apply a nondiscriminatory tax to Indians who have gone beyond the boundaries of the reservation, then it follows that it may apply a nondiscriminatory tax where, as here, the tax is imposed on non-Indians as a result of an off-reservation transaction. *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95 (2005)

We must decide whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority. We conclude that Congress does possess this power. *U.S. v. Lara,* 541 U.S. 193 (2004)

We assume, . . . that Lara's double jeopardy claim turns on the answer to the ''dual sovereignty'' question. What is ''the source of [the] power to punish'' nonmember Indian offenders, ''inherent *tribal* sovereignty'' or delegated *federal* authority? [quoting *United States v. Wheeler,* 435 U. S. 313 (1978)]. We also believe that Congress intended the former answer. The statute [Act of Oct. 28, 1991, 105 Stat. 646] says that it ''recognize[s] and affirm[s]'' in each tribe the *''inherent'' tribal* power (not delegated federal power) to prosecute nonmember Indians for misdemeanors. (emphasis added in original, internal cites omitted) *U.S. v. Lara,* 541 U.S. 193 (2004)

Thus the statute [Act of Oct. 28, 1991, 105 Stat. 646] seeks to adjust the tribes' status. It relaxes the restrictions, recognized in *Duro,* [*Duro v. Reina,* 495 U.S. 676 (1990)], that the political branches had imposed on the tribes' exercise of inherent prosecutorial power. *U.S. v. Lara,* 541 U.S. 193 (2004)

[t]he [U.S.] Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ''plenary and exclusive.'' This Court has traditionally identified the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as sources of that power. *U.S. v. Lara,* 541 U.S. 193 (2004)

The ''central function of the Indian Commerce Clause,'' we have said, ''is to provide Congress with plenary power to legislate in the field of Indian affairs.'' (quoting *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163 (1989)) *U.S. v. Lara,* 541 U.S. 193 (2004)

We recognize that in 1871 Congress ended the practice of entering into treaties with the Indian tribes. 25 U.S.C. § 71. But the statute saved existing treaties from being ''invalidated or impaired,'' and this Court has explicitly stated that the statute ''in no way affected Congress' plenary powers to legislate on problems of Indians,'' (quoting *Antoine v. Washington,* 420 U.S. 194 (1975)) *U.S. v. Lara,* 541 U.S. 193 (2004)

Congress, with this Court's approval, has interpreted the Constitution's ''plenary'' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority. *U.S. v. Lara,* 541 U.S. 193 (2004)

[o]ur conclusion that Congress has the power to relax the restrictions imposed by the political branches on the tribes' inherent prosecutorial authority is consistent with our earlier cases. *U.S. v. Lara,* 541 U.S. 193 (2004)

[t]hese holdings [referring to *United States v. Wheeler,* 435 U.S. 313 (1978); *Oliphant v. Suquamish Tribe,* 435 U.S. 191 (1978); *Duro v. Reina,* 495 U.S. 676 (1990)] reflect the Court's view of the tribes' retained sovereign status *as of the time* the Court made them. They did not set forth constitutional limits that prohibit Congress from changing the relevant legal circumstances, *i.e.,* from taking actions that modify or adjust the tribes' status. *U.S. v. Lara,* 541 U.S. 193 (2004)

Oliphant and *Duro* [*Oliphant v. Suquamish Tribe,* 435 U.S. 191 (1978); *Duro v. Reina,* 495 U.S. 676 (1990)] make clear that the Constitution does not dictate the metes and bounds of tribal autonomy, nor do they suggest that the Court should second-guess the political branch-

es' own determinations. *U.S. v. Lara*, 541 U.S. 193 (2004)

Wheeler, Oliphant, and *Duro,* [*United States v. Wheeler,* 435 U.S. 313 (1978); *Oliphant v. Suquamish Tribe,* 435 U.S. 191 (1978); *Duro v. Reina,* 495 U.S. 676 (1990)] then, are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes. And that fact makes all the difference. *U.S. v. Lara*, 541 U.S. 193 (2004)

[t]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians. We hold that Congress exercised that authority in writing this statute [Act of Oct. 28, 1991, 105 Stat. 646]. *U.S. v. Lara*, 541 U.S. 193 (2004)

The Court has also said that ''statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.'' (quoting *Montana v. Blackfeet Tribe,* 471 U.S. 759 (1985)) *Chickasaw Nation v. United States,* 534 U.S. 84 (2001)

[t]he canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed. See *United States v. Wells Fargo Bank,* 485 U.S. 351 (1988) *Chickasaw Nation v. United States,* 534 U.S. 84 (2001)

Nor can one say that the pro-Indian canon is inevitably stronger–particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue. This Court's earlier cases are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength. (internal cite omitted) *Chickasaw Nation v. United States,* 534 U.S. 84 (2001)

Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States,* 450 U.S. 544 (1981) *Nevada v. Hicks*, 533 U.S. 353 (2001)

Where nonmembers are concerned, the ''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.'' (emphasis in original, quoting *Montana v. United States,* 450 U.S. 544 (1981)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is ''necessary to protect tribal self-government or to control internal relations.'' It may sometimes be a dispositive factor. *Nevada v. Hicks*, 533 U.S. 353 (2001)

[t]he absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* [*Montana v. United States,* 450 U.S. 544 (1981)] the extension of tribal civil authority over nonmembers on non-Indian land. *Nevada v. Hicks,* 533 U.S. 353 (2001)

[t]he existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers. *Nevada v. Hicks*, 533 U.S. 353 (2001)

[T]hat Indians have ''the right . . . to make their own laws and be ruled by them,'' (quoting *Montana v. United States,* 450 U.S. 544 (1981)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them. *Nevada v. Hicks*, 533 U.S. 353 (2001)

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 a reservation's border. 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.' '' (quoting both *Worcester v. Georgia*, 6 Pet. 515, 561 (1832), *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 141 (1980)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

Ordinarily, it is now clear, ''an Indian reservation is considered part of the territory of the State'' (quoting U.S. Dept. of Interior, Federal Indian Law 510, Note 1 (1958)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the principle that Indians have the right to make their own laws and be governed by them requires ''an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.'' (quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156 (1980)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest (quoting *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 141 (1980)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land. *Nevada v. Hicks*, 533 U.S. 353 (2001)

It is also well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed (as was the alleged poaching in this case) off the reservation. (quoting *Mescalero Apache Tribe v. Jones,*

411 U.S. 145 (1973)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

We conclude . . ., that tribal authority to regulate state officers in executing process related to the violation, off 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.'' *Nevada v. Hicks*, 533 U.S. 353 (2001)

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

The States' inherent jurisdiction on reservations can of course be stripped by Congress. *Nevada v. Hicks*, 533 U.S. 353 (2001)

Sections 1152 and 1153 of Title 18, which give United States and tribal criminal law generally exclusive application, apply only to crimes committed *in Indian Country;* Public Law 280, codified at 18 U.S.C. § 1162 which permits some state jurisdiction as an exception to this rule, is similarly limited. *Nevada v. Hicks*, 533 U.S. 353 (2001)

25 U.S.C. § 2804 which permits federal-state agreements enabling state law-enforcement agents to act on reservations, applies only to deputizing them for the enforcement of federal or tribal criminal law. Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation. *Nevada v. Hicks*, 533 U.S. 353 (2001)

25 U.S.C. § 2806 affirms that ''the provisions of this chapter alter neither . . . the law enforcement, investigative, or judicial authority of any . . . State, or political subdivision or agency thereof. . . .'' *Nevada v. Hicks*, 533 U.S. 353 (2001)

This historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts. *Nevada v. Hicks*, 533 U.S. 353 (2001)

Respondents' contention that tribal courts are courts of ''general jurisdiction'' is also quite wrong. A state court's jurisdiction is general, in that it ''lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe.'' (quoting from *Tafflin v. Levitt*, 493 U.S. 455 (1990)). Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction. (internal cites omitted) *Nevada v. Hicks*, 533 U.S. 353 (2001)

It is true that some statutes proclaim tribal-court jurisdiction over certain questions of federal law.(quoting 25 U.S.C. § 1911 (Indian Child Welfare Act of 1978); 12 U.S.C. § 1715 (foreclosures brought by the Secretary of Housing and Urban Development against reservation homeowners)). But no provision in federal law provides for tribal-court jurisdiction over § 1983 [42 U.S.C. § 1983] actions. *Nevada v. Hicks*, 533 U.S. 353 (2001)

[t]he simpler way to avoid the removal problem is to conclude (as other indications suggest anyway) that tribal courts cannot entertain § 1983 suits. *Nevada v. Hicks*, 533 U.S. 353 (2001)

State officials operating on a reservation to investigate off-reservation violations of state law are properly held accountable for tortious conduct and civil rights violations in either state or federal court, but not in tribal court. *Nevada v. Hicks*, 533 U.S. 353 (2001)

Tribal jurisdiction is limited: For powers not expressly conferred them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty. *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

An Indian tribe's sovereign power to tax–whatever its derivation–reaches no further than tribal land. *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

. . . we think the generalized availability of tribal services patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land. The consensual relationship must stem from ''commercial dealing, contracts, leases, or other arrangements,'' *Montana* [450 U.S. 544 (1981)], and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection. *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

Congress has authorized the Commissioner of Indian Affairs ''to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.'' [25 U.S.C. § 261] *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

Irrespective of the percentage of non-Indian fee land within a reservation, *Montana*'s [450 U.S. 544 (1981)], second exception grants Indian tribes nothing ''beyond what is necessary to protect tribal self-government or to control internal relations.'' (quoting from *Strate v. A–1 Contractors*, 530 US 438 (1997)) *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

Indian tribes are ''unique aggregations possessing attributes of sovereignty over both their members and their territory,'' but their dependent status generally precludes extension of tribal civil authority beyond these limits. (quoting *United States v. Mazurie,* 419 U.S. 544

(1975)) *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

The Navajo Nation's imposition of a tax upon nonmembers on non-Indian fee land within the reservation is, therefore, presumptively invalid. Because respondents have failed to establish that the hotel occupancy tax is commensurately related to any consensual relationship with petitioner or is necessary to vindicate the Navajo Nation's political integrity, the presumption ripens into a holding. *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

The Court explained, ''the inherent sovereign powers of an Indian tribe''—those powers a tribe enjoys apart from express provision by treaty or statute—''do not extend to the activities of nonmembers of the tribe.'' (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non Indians on their reservations, even on non Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non Indians on fee 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. (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Montana thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare .. (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

National Farmers and *Iowa Mutual*, [*National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987)] we conclude, are not at odds with, and do not displace, *Montana*. Both decisions describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction; neither establishes tribal court adjudicatory authority, even over the lawsuits involved in those cases. *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Respect for tribal self government made it appropriate ''to give the tribal court a full opportunity to determine its own jurisdiction.'' (quoting *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

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.... ''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.'' (quoting *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

[t]hat state courts may not exercise jurisdiction over disputes arising out of on reservation conduct—even over matters involving non Indians—if doing so would ''infring[e] on the right of reservation Indians to make their own laws and be ruled by them.'' (quoting *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382 (1976)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Recognizing that our precedent has been variously interpreted, we reiterate that *National Farmers* and *Iowa Mutual* [*National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987)] enunciate only an exhaustion requirement, a ''prudential rule,'', based on comity. These decisions do not expand or stand apart from *Montana*'s instruction on ''the inherent sovereign powers of an Indian tribe.'' [*Montana v. United States*, 450 U.S. 544 (1981)] (internal citations omitted) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of ''inherent sovereignty.'' Regarding activity on non Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise ''forms of civil jurisdiction over non Indians.'' As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal court jurisdiction, we adhere to that understanding. (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana, [Montana v. United States*, 450 U.S. 544 (1981)] the civil authority of Indian tribes and their courts with respect to non Indian fee lands generally ''do[es] not extend to the activities of nonmembers of the tribe.'' *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

A grant over land belonging to a tribe requires ''consent of the proper tribal officials,'' § 324, and the payment of just compensation, § 325. [25 U.S.C. §§ 323–328] *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Read in isolation, the *Montana* [*Montana v. United States*, 450 U.S. 544 (1981)] rule's second exception can be misperceived. Key to its

proper application, however, is the Court's preface: ''Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self government or to control internal relations.'' (quoting *Montana) Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

The federal government has had a ''longstanding policy of encouraging tribal self government.'' *Iowa Mutual Insurance Company v. LaPlante*, 107 S. Ct. 971, 480. U.S. 9, 94 L.Ed.2d 10 (1987).

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 effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana v. United States*, 101 S.Ct. 1245, 450 U.S. 544, 67 L.Ed.2d 493 (1981).

[W]e reject the arguments that (a) tribal statutory authority merely allowing for notation of a lien, (b) the title form itself or (c) a general right to go to tribal court would substitute for tribal law concerning perfection. *Malloy v. Wilserv Credit Union*, 516 F.3d 1180 (10th Cir. 2008)

As for the argument of amici, we do not require that Nation certificate-of-title law be the exclusive source of establishing perfection and priority. *Malloy v. Wilserv Credit Union*, 516 F.3d 1180 (10th Cir. 2008)

''Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1).'' *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1302–03 (10th Cir. 2001) (citation omitted). *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

''Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.'' [quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

The Court held specifically that Title I of the ICRA–the same statute upon which the Miner parties base some of their claims for relief–did not abrogate tribal sovereign immunity, and therefore suits against a tribe under the ICRA are barred. [quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S.751, 754 (1998), the Supreme Court affirmed that, ''[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.'' While noting that ''[t]here are reasons to doubt the wisdom of perpetuating the doctrine,'' it nonetheless rejected the defendant's invitation to narrow the scope of tribal sovereign immunity. The Court recognized that it had ''taken the lead in drawing the bounds of tribal immunity,'' but it deferred to Congress to limit or abrogate the doctrine through legislation, as it has done with respect to limited classes of suits.(internal quotes omitted) *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

This court has applied the Supreme Court's straightforward test to uphold Indian tribes' immunity from suit. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

We disagree that federal-question jurisdiction negates an Indian tribe's immunity from suit. Indeed, nothing in § 1331 unequivocally abrogates tribal sovereign immunity. In the context of the United States' sovereign immunity, we have held that ''[w]hile 28 U.S.C. § 1331 grants the court jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States, it does not independently waive the Government's sovereign immunity; § 1331 will only confer subject matter jurisdiction where some other statute provides such a waiver.'' [quoting from *High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006)], *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Tribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States. [quoting *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319–20 (10th Cir. 1982)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Therefore, in an action against an Indian tribe, we conclude that § 1331 will only confer subject matter jurisdiction where another statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its immunity. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

We noted that Indian tribes' ''limited sovereign immunity from suit is well-established'' and that the tribe in that case ''ha[d] not chosen to waive that immunity.'' We then proceeded to consider whether the tribe's sovereign immunity extended to the tribal-officer defendants, holding: When the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked. If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit. Any other rule would mean that a claim of sovereign immunity would protect a sover-

eign in the exercise of power it does not possess. [internal cites omitted by author. Quoting from *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

We also concluded that, in the suit against the tribal officers, the extent of the tribe's sovereignty to enact the challenged ordinances raised a federal issue sufficient for federal-question jurisdiction in the district court. [quoting from *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Like this case, *Tenneco* involved two different aspects of an Indian tribe's ''sovereignty'': its immunity from suit and the extent of its power to enact and enforce laws affecting non-Indians. But it does not stand for the proposition, as the Miner parties suggest, that an Indian tribe cannot invoke its sovereign immunity from suit in an action that challenges the limits of the tribe's authority over non-Indians. On the contrary, we held in *Tenneco* that the tribe was immune from suit. [quoting from *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

We distinguished *Santa Clara Pueblo*, [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)] noting that the Supreme Court in that case emphasized the availability of the tribal courts and the intra-tribal nature of the issues, whereas in *Dry Creek [Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980)] the plaintiffs were non-Indians who had been denied any remedy in a tribal forum. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

This court later expressly limited the holding in *Dry Creek [*non-Indian denied any remedy in a tribal court forum, *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980)] to apply only where the tribal remedy is ''shown to be nonexistent by an actual attempt'' and not merely by an allegation that resort to a tribal remedy would be futile.[quoting *White v. Pueblo of San Juan*, 728 F.2d 1307 (10th Cir. 1984)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

The *Dry Creek* rule has ''minimal precedential value''; in fact, this court has never held it to be applicable other than in the *Dry Creek* [*Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980)] decision itself. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

The Miner parties clearly fail to come within the narrow *Dry Creek [Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980)] exception to tribal sovereign immunity. Considering whether they could have brought this action in the Tribal Court rather than the district court, they hypothesize that the Nation would have claimed immunity from suit in that forum as well. But they must show an actual attempt; their assumption of futility of the tribal-court remedy is not enough. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Moreover, ''[a] tribal court's dismissal of a suit as barred by sovereign immunity is simply not the same thing as having no tribal forum to hear the dispute.'' [quoting *Walton v. Tesuque Pueblo*, 443 F.3d 1274 (10th Cir.) reversing district court's denial of motion to dismiss where tribal defendants did not waive immunity and no statute authorized the suit, (internal cites omitted)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

We conclude that, in the absence of congressional abrogation of tribal sovereign immunity from suit in this action, or an express waiver of its sovereign immunity by the Nation, the district court erred in failing to grant the Nation's motion to dismiss. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

We review a question of tribal sovereign immunity de novo. *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

Indian tribes possess the same immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo*, [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)]. As with other forms of sovereign immunity, tribal immunity ''is subject to the superior and plenary control of Congress.'' Accordingly, absent explicit waiver of immunity or express authorization by Congress, federal courts do not have jurisdiction to entertain suits against an Indian tribe. (internal cites omitted). *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

In *Santa Clara Pueblo*, [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)] the Supreme Court held that the ICRA [Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303] does not authorize the maintenance of suits against a tribe nor does it constitute a waiver of sovereignty. Further, the ICRA does not create a private cause of action against a tribal official. The only exception is that federal courts do have jurisdiction under the ICRA over habeas proceedings. (internal cites omitted) *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

Dry Creek [Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980)] has come to stand for the proposition that federal courts have jurisdiction to hear a suit against an Indian tribe under 25 U.S.C. § 1302, notwithstanding *Santa Clara Pueblo*, [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)]when three circumstances are present: (1) the dispute involves a non-Indian; (2) the dispute does not

involve internal tribal affairs; and (3) there is no tribal forum to hear the dispute. Our jurisprudence in this field is circumspect, and we have emphasized the need to construe the *Dry Creek* exception narrowly in order to prevent a conflict with *Santa Clara*.(internal cites omitted) *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

[f]ederal courts do have jurisdiction under the ICRA [Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303] to entertain habeas proceedings. Specifically, 25 U.S.C. § 1303 makes available to any person ''[t]he privilege of the writ of habeas corpus . . ., in a court of the United States, to test the legality of his detention by order of an Indian tribe.'' *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

Restricted Indian land is ''land or any interest therein, the title to which is held by an individual Indian, subject to Federal restrictions against alienation or encumbrance.'' 25 C.F.R. § 152.1(c). Such land is generally entitled to advantageous tax treatment. [quoting *Oklahoma Turnpike Authority v. Bruner*, 259 F.3d 1236 (10th Cir.2001) (''Income derived by individual Indians from restricted allotted land, held in trust by the United States, is subject to numerous exemptions from taxation based on statute or treaty.'')] *Estate of Bruner v. Bruner*, 338 F.3d 1172 (10th Cir. 2003)

Consent for fundamental political decisions may be obtained from the ultimate source of legislative authority, the people themselves. *Harjo v. Kleppe*, 420 F.Supp. 1110 (1976).

This Court acknowledged Oklahoma did not take steps to assume jurisdiction under the previous PL–280 in *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*. We held that ''[b]ecause Oklahoma did not take the appropriate steps to take jurisdiction under PL–280, the proper inquiry to be made in this case must focus upon the congressional policy of fostering tribal autonomy in the light of pertinent U.S. Supreme Court jurisprudence.'' *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

The IGRA provides at § 2710(d)(3)(C) a list of provisions which any negotiated tribal-state compact ''may'' include. ''May'' is ordinarily construed as permissive, while ''shall'' is ordinarily construed as mandatory. See *Osprey L.L.C. v. Kelly–Moore Paint Co., Inc.*, 1999 OK 50, 984 P.2d 194; *Shea v. Shea*, 1975 OK 90, 537 P.2d 417. Section 2710(d)(3)(C) provides in part: (C) Any Tribal–State compact negotiated under subparagraph (A) **may** include provisions relating to—(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; (ii) the **allocation** of criminal and civil **jurisdiction** between the State and the Indian tribe necessary for the enforcement of such laws and regulations;. . . . (emphasis added). The Compact here does not include any such allocation of jurisdiction. Instead, the Compact provides only: ''This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction'' and that tort claims may be heard in a ''court of competent jurisdiction.'' The Tribe could have, but did not, include such jurisdictional allocation in this Compact. Neither the IGRA nor the Compact as approved enlarged the Tribe's jurisdiction. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

A ''court of competent jurisdiction'' is one having jurisdiction of a person and the subject matter and the power and authority of law at the time to render the particular judgment. (string cites omitted) *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

The Compact is derived from the Oklahoma Statutes. It incorporates Oklahoma's Governmental Tort Claims Act (GTCA) into its provisions. The district courts of Oklahoma thus have subject matter jurisdiction of any claim arising under the GTCA, including one which originates under the Compact. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

In *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001), the Supreme Court recognized the authority of state courts as courts of ''general jurisdiction'' and further acknowledged our system of ''dual sovereignty'' in which state courts have concurrent jurisdiction with federal courts, absent specific Congressional enactment to the contrary. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

Thus, a tribal court is not a court of general jurisdiction. Its jurisdiction could be asserted in matters involving non-Indians **only** when their activities on Indian lands are activities that may be regulated by the Tribe. (citing *Nevada v. Hicks*, 533 U.S. 343 (2001)) *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

The Oklahoma district court is a ''court of competent jurisdiction'' to hear Cossey's tort claim. The Tribe's sovereign interests are not implicated so as to require tribal court jurisdiction under the exceptions in *Montana*, ***supra*. Cossey's right to seek redress in the Oklahoma district court is guaranteed by our Constitution. Moreover, the United States Supreme Court has upheld *Montana*** and the cases following it, indicating the Court's continued recognition of the need to protect the sovereign interests of Indian tribes, while acknowledging the plenary powers of the states to adjudicate the rights of their citizens within their borders. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

Tribal criminal jurisdiction may extend to both member and non-member Indians. 25 U.S.C. § 1301(2); *United States v. Lara*, 541 U.S. 193 (2004). It does not extend to non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). That said, tribal officers do have the authority to investigate violations of law on tribal land, and detain persons, including non-Indians, suspected of violating the law. *Duro v. Reina*, 495 U.S. 676 (1990) (internal cites omit-

ted) *United States v. Green*, 140 Fed.Appx. 798, (10th Cir. 2005)

[t]ribal authorities may investigate unauthorized possession of firearms on gaming premises which is proscribed by tribal law. *See* Muscogee (Creek) Nation Code Ann., tit. 21., § 5–116(C). *United States v. Green*, 140 Fed. Appx. 798 (10th Cir. 2005)

2. Separation of powers

This Court has jurisdiction to hear the above styled case in accordance with the Muscogee (Creek) Nation Constitution. This dispute involves the citizens of the Nation and elections as held in accordance with the Muscogee (Creek) Constitution. *Harjo v. Muscogee (Creek) Nation Election Board*, SC 07–50 (Muscogee (Creek) 2007)

The Court decided it had judicial power to render its decision in that case, not based on a specific grant of power, but on the implied powers derived from examination of the United States Constitution. See *Marbury v. Madison*, 1 Cranch, 137. The Court then decided, while not following United States law, the United State Supreme Court's decision was persuasive inasmuch as it was the opinion of the court that the Muscogee Nation Constitution was modeled after the U.S. Constitution as to the separation of powers doctrine. *Ellis v. Muscogee (Creek) National Council, ''Ellis II'',* SC 06–07 (Muscogee (Creek) 2007)

We think that the highest court of a sovereign government, when created by the Constitution of that government which recognizes the principle of separation of powers, is entitled to be free to function as the framers of that Constitution intended, and it should guard its prerogatives jealously to preserve its powers as an independent co-equal branch of government. *Ellis v. Muscogee (Creek) National Council, ''Ellis II'',* SC 06–07 (Muscogee (Creek) 2007)

Any demand for jury trial in the Supreme Court that is not based on a right found in the Indian Civil Rights Act, and if granted, would interfere with the inherent powers bestowed upon the Supreme Court by our Constitution. *Ellis v. Muscogee (Creek) National Council, ''Ellis II'',* SC 06–07 (Muscogee (Creek) 2007)

It is also important for the parties to be reminded of *Harjo v. Kleppe*. Harjo states that the Principal Chief is not the sole embodiment of the Muscogee (Creek) Nation. These same principles apply to the National Council. The National Council is not the sale embodiment of the Muscogee (Creek) Nation either. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II'',* SC 06–07 (Muscogee (Creek) 2007)

[T]he Principal Chief shall have oversight of the National Council's Budget and cannot continually veto the Council's Budget. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II'',* SC 06–07 (Muscogee (Creek) 2007)

It is also important to understand that the National Council cannot continue to circumvent the budget process by passing National Council Resolutions that appropriate Muscogee (Creek) Treasury monies that have no check or balance upon them. National Council Resolutions are for the internal business of the National Council, not supplements to the budget that leave the Principal Chief out of the oversight of appropriations being spent. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II'',* SC 06–07 (Muscogee (Creek) 2007)

Though the National Council has authority to approve or disapprove the Budget submitted by the Principal Chief, the National Council does not have line-item veto power over the Budget. The National Council cannot pick and choose areas of the Budget that it specifically does not like or does not want to fund. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II'',* SC 06–07 (Muscogee (Creek) 2007)

The National Council's role in approving the Budget and subsequently appropriating operating funds to the Nation is one of a coordinated effort acting as an equivalent branch of government with the Principal Chief. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II'',* SC 06–07 (Muscogee (Creek) 2007)

When a governmental entity is responsible for initiating, editing, processing, changing and reviewing a process assigned to it under the Constitution, it is the Court's opinion this entity is the ultimate authority for the process. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II'',* SC 06–07 (Muscogee (Creek) 2007)

It is our opinion that the Executive Branch of the Nation is the ultimate responsible authority for the Budget. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II'',* SC 06–07 (Muscogee (Creek) 2007)

The National Council cannot manipulate funds by passing National Council Resolutions that the Chief does not see nor have the opportunity to veto. Again, in doing so, these National Council Resolutions affect the Treasury of the Muscogee (Creek) Nation and there must be a check on this seemingly unbridled power of the National Council. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II'',* SC 06–07 (Muscogee (Creek) 2007)

It seems abundantly clear to this Court that meetings between the Principal Chief and the National Council must continue until the two branches have worked out a mutually agreed upon Budget for the Nation for the year. This Court will not tolerate the negotiations being stone-walled by one branch of government for months at a time, as that branch would be affecting the functions and responsibilities of the other branch. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II'',* SC 06–07 (Muscogee (Creek) 2007)

Any attempt of the National Council to raise or lower any particular employee or tribal officer's compensation, or to cause the dismissal of a person by withholding funding for that person's position through the Budget approval pro-

cess is a clear interference in the execution of the laws of the Nation which the National Council itself has passed. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

The Judicial Branch of the Muscogee (Creek) Nation, like the Executive Branch and the National Council, is a Constitutional body and a co-equal branch to the Legislative and Executive branches of this Nation. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

The type of infringement repeatedly exhibited by the National Council simply cannot continue. It is manipulative, disruptive, and in contradiction to the established law of the Muscogee (Creek) Nation. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

[W]e have not and will not be intimidated by either branch of government; this Court serves the Constitution and the Muscogee people. The Supreme Court is a constitutional body with the responsibility to interpret and uphold the laws. Attempts to control the Supreme Court, under the guise of legislation, will not be tolerated. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

This Court has addressed the issue of legal funds before. As stated *supra*, all three branches have the right to legal counsel. All three Branches of government deserve to have equal funding for legal representation. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

This Court has held that a fundamental tenet of our case law is that each branch of government remains autonomous and that each respects the duties of the others. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

There must be a careful balance of power whereupon each branch has special limitations that are constitutionally placed upon them. (emphasis in original) *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

Traditionally, in our Creek society, a tribal officer has an important role to fill in our Nation's Government and should be given authority to carry out his or her role without interference. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

The concept in our society is that all the roles within our society are important, and to be honored. Kinship and clan responsibilities are the bedrock of our society, in earlier times as warrior and peace keeping communities, and continuing today. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

For our tribal society to function properly, we must honor and respect the respective roles of others. Our Constitution is based on our societal values, as a people, and that interconnectedness lays out the separate powers and duties of the various branches of government. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

This Court has held in previous cases that each branch of this government has a right to hire legal representation. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

Unlike other societies. there is nowhere in Creek society that one group or individual has control of all of the affairs of tribal communities. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

The separations of authority and the requirement for respect of such separation is an ingrained part of our culture and society. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

Today, we still have three co-equal branches of government that we have continued to reiterate in our opinions are co-equal, each sharing powers and each having inherent powers, but with no one branch being more powerful than the other. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

[O]ur decision in this Opinion is made based on our constitutional prescription and an eye toward our need for separate spheres of authority, and the obligation to our People for a government that will respect these individual spheres of authority. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

It is therefore imperative that the National Council understand that the constitutional requirement is that the Principal Chief prepares the Budget and the Council approves or disapproves the Budget without line-item veto or line-item amendment power. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

The Budget is a joint decision and not one where the Council can make changes and then force those changes upon the Chief by using the veto override. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

Disrespect for the head of a branch of government in performing its constitutionally mandated duties is an insult to the Muscogee (Creek) Nation people. Each branch is to serve the people and not attempt to become more powerful than another branch. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

[N]o individual within those branches should believe themselves above the law. Our law is a

law of the people, for the people, and by the people. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

The citizens of this Nation need to be aware that those individuals elected to serve on the National Council and represent the people of the Muscogee (Creek) Nation disrespected this Court and the authority of this Court and disrespected the Principal Chief. *Ellis v. Muscogee (Creek) Nation National Council, ''Ellis II''*, SC 06–07 (Muscogee (Creek) 2007)

The Principal Chief, as head of the Executive Branch, is given the duty and power to make judicial appointments to the Supreme Court. However, the Principal Chiefs power to make such appointments to the Court is not absolute; it is subject to the majority approval of the National Council. *Oliver v. Muscogee (Creek) National Council*, SC 06–04 (Muscogee (Creek) 2006)

The ''checks'' of this system refers to the abilities, rights, and responsibilities of each branch of government to monitor the activities of the other two branches. ''Balances'' refers to the ability of each branch of government in the Creek Nation to use its authority to limit the powers of the other two branches, whether in general scope or in a particular case, so that one branch does not attain power greater than that of either of the other two branches. *Oliver v. Muscogee (Creek) National Council*, SC 06–04 (Muscogee (Creek) 2006)

As officers of this Nation, all three branches are equally obligated to uphold the Muscogee (Creek) Nation Constitution. Each share a co-equal status and no one branch stands above another. *Oliver v. Muscogee (Creek) National Council*, SC 06–04 (Muscogee (Creek) 2006)

In cases of original jurisdiction such as the instant case, the duty of this Court is to interpret the laws and determine what statutes are constitutional or unconstitutional-it is not the National Council's duty to make such determinations. *Oliver v. Muscogee (Creek) National Council*, SC 06–04 (Muscogee (Creek) 2006)

[I]f one branch of our government abandons the co-equal model of government (as embodied in the Constitution of this Nation) it no doubt will lead to a weakened government and a true crisis for citizens of this Nation. *Oliver v. Muscogee (Creek) National Council*, SC 06–04 (Muscogee (Creek) 2006)

Each of this Nation's three branches of government holds great power, but each must also act with a great sense of responsibility and recognition of its rightful authority and its concomitant limitations. *Oliver v. Muscogee (Creek) National Council*, SC 06–04 (Muscogee (Creek) 2006)

In a previous case, this Nation's District Court aptly stated, ''Th[e District] Court should be ever hesitant to interfere in the operations of the Executive and Legislative branches.'' *Burden v. Cox*, 1 Mvs. L. Rep. 135 (1988). This Court agrees. *Oliver v. Muscogee (Creek) National Council*, SC 06–04 (Muscogee (Creek) 2006)

The very essence of separation of powers is an easy enough concept to grasp: government can best be sustained by dividing the various powers and functions of government among separate and relatively independent governmental entities; no single branch of government is able to exercise complete authority and each is dependent on the other. This autonomy prevents powers from being concentrated in one branch of government, yet, the independence of each helps keep the others from exceeding their powers. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

The Muscogee (Creek) Nation has a long history of practicing separation of powers as is apparent in the teachings of some of the earliest declarations of this Court (going on to quote *Muscogee Nation v. Tiger*, 7 Mvs. L. Rep. 8, Volume 10, Page 65, Original Handwritten Volume (October 16, 1885)). *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

Though the term ''separation of powers'' is not specifically delineated in the Muscogee (Creek) Constitution, this Court stated in *Beaver v. National Council*, 4 Mvs. L. Rep. 28 (Muscogee (Creek) 1986), ''the Constitution of the Muscogee (Creek) Nation is patterned after the United States Constitution with respect to separation of powers.'' We further expounded on this notion in *Cox v. Kamp*, 4 Mvs. L. Rep. 75 (Muscogee (Creek) 1991) saying that ''each branch of government has special limitations placed on it'' and ''there must be a balance of powers.'' Finally, we also articulated that ''the Muscogee (Creek) Nation Constitution intended to incorporate into it the basic parts of the separation of powers between the three branches of government.'' *Id. Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

Often as members of a tribal governing body we must put aside personal agendas, prejudices and biases to work together for the best interest of the Nation. (emphasis in original). *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

Under the doctrine of separation of powers, the executive branch is the branch of government charged with implementing, and/or executing the law and running the day-to-day affairs of the government. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

Also, under the doctrine of separation of powers, the legislative branch is charged with legislating; making laws by which the citizenry abide and the Nation runs. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

The Office of the Principal Chief is vested with executive powers and the National Council

is vested with legislative powers. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

The legislative branch does not have the authority to mandate any member of the executive branch to take or refrain from taking any action without due process of law. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

Likewise, the executive branch does not have the authority to mandate that the legislative branch regulate in areas that are left squarely to that branch in the Constitution. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

. . . is an Agreed Journal Entry sufficient enough a document to ''specify the roles'' of two of our three branches of government? As to the latter, this Court thinks not and believes the proposed Agreed Journal Entry sets a dangerous precedent for all future relations between the separate but equal branches of the Muscogee (Creek) Nation. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

The Muscogee (Creek) Nation Constitution cannot be infringed upon or expounded on simply by words in a superfluous document disguised as an ''agreed order.'' *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

The roles of the different branches are clearly defined both in the Constitution of the Nation and in its laws, . . ., there are proper procedures in place to amend the Constitution of this Nation, and those procedures should not be assumed by a document proposing to be an Agreed Journal Entry in a lawsuit litigated between the Principal Chief and the National Council. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

. . . the Court is also mindful of as our role as arbitrator of disputes and there are times that additional clarification to the Constitution meaning is needed. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

Under the Doctrine of Separation of Powers, the Executive Branch as set out in the Muscogee (Creek) Nation Constitution Article V, and further as organized in the laws in Title 16 Muscogee (Creek) Nation Code,-''Executive Branch'' shall remain in full force and effect unless duly changed by proper procedures to secure a Constitutional Amendment or by Tribal Resolution. . . . as the head of the Executive Branch, the Principal Chief continues to have the authority to deal with all Executive Branch employment decisions, except over independent agencies as will be discussed *infra*; including but not limited to all appointments as set out in the Constitution of this Nation and any laws that the National Council shall enact. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

It is also the function of the Executive Branch to continue to deal with its internal employment decisions, excluding those employment decisions over independent agencies (gaming, e.g.). *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

Each branch of the Muscogee (Creek) Nation has the rights and powers consistent with the Constitution and this Court's prior rulings to contract *on behalf of its own branch* for the proper running of day-to-day activities that help the government run efficiently. (emphasis in original) *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

It is therefore the responsibility of *each* of the three branches to dutifully fulfill their obligations to the Nation when negotiating and contracting with outside entities on their own behalf. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

It is, therefore, imperative that no member of the Executive Branch nor any member of the National Council nor any member of the Judicial Branch use his or her position to influence any Commissioner or independent board officer to gain any advantage for themselves or on behalf of another. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

The National Council under the Separation of Powers doctrine as discussed *supra* does not have the power to ''mandate'' the Principal Chief to act or not act in a certain way in his official capacity as the Chief Executive Officer of this Nation. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

A simple reading of the language of the Constitution indicates that the framers of the Muscogee (Creek) Nation Constitution envisioned a government where the legislature legislated: in other words, made laws for the Office of the Principal Chief to execute. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

Nowhere in the Creek Nation's Constitution does the language state or even imply that the National Council can mandate the Principal Chief to act or refrain from acting in his official capacity. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

All branches must coexist equally to continue to strengthen and build the Muscogee (Creek) Nation. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

The state also lacks jurisdiction [for] the criminal conduct inside the Nation's Indian Country. Because the Nation does not have a cross-deputization agreement with Tulsa County,

Oklahoma, the Nation would have no means of addressing Appellant's conduct through the assistance of another jurisdiction. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

Under traditional Mvskoke law controversies were resolved by clan Vculvkvlke (elders). Their integrity was considered beyond reproach. They were obligated by the responsibilities of their position to decide cases fairly, and honestly, regardless of clan or family affiliation. *In Re: The Practice of Law Before the Courts of the Muscogee (Creek) Nation,* SC 04–02 (Muscogee (Creek) 2005)

Adherence to National Council Ordinances and Muscogree (Creek) Nations Constitutional limits on this Courts power is required by our doctrine of separation of powers. *Brown and Williamson Tobacco Corp. v. District Court*, 5 Okla. Trib. 447 (Muscogee (Creek) 1998).

Assuming jurisdiction over an appeal that we have no legislative or constitutional authority to hear would amount to judicial usurpation of power. *Brown and Williamson Tobacco Corp. v. District Court*, 5 Okla. Trib. 447 (Muscogee (Creek) 1998).

It is a fundamental tenet of our case law that each branch of government remains autonomous and that each respect the duties of the others. *Brown and Williamson Tobacco Corp. v. District Court*, 5 Okla. Trib. 447 (Muscogee (Creek) 1998).

The Court cannot supersede the powers granted to us with respect to our appellate authority. *Brown and Williamson Tobacco Corp. v. District Court*, 5 Okla. Trib. 447 (Muscogee (Creek) 1998)

Muscogee (Creek) Nation's National Council and not the Principal Chief has general appointment powers under the Constitution of the Muscogee (Creek) Nation. *Fife v. Health Systems*, 4 Okla. Trib. 319 (Muscogee (Creek) 1995).

All three branches of government of the Muscogee (Creek) Nation have right to employ legal counsel to assist in accomplishing their constitutional responsibilities. *Fife v. Health Systems*, 4 Okla. Trib. 319 (Muscogee (Creek) 1995).

Muscogee (Creek) Nation Constitution empowers the National Council to legislate on matters subject to constitutionally imposed limitations-''to promote the public health and safety, education and welfare that may contribute to the social, physical well-being and economic advancement of citizens of the Muscogee (Creek) Nation.'' *Fife v. Health Systems*, 4 Okla. Trib. 319 (Muscogee (Creek) 1995).

National Council is authorized by Article IV § 7 to legislate on 10 categories of matters including the power to exercise any power not specifically set forth in this Article which may at some future date be exercised by the Muscogee (Creek) Nation. The Constitution contains no analogous grant of power to the Executive Branch. *Fife v. Health Systems Board*, 4 Okla. Trib. 261 (Muscogee (Creek) 1995).

Muscogee (Creek) Nation NCA 88–15, which requires that cabinet appointments of Principal Chief be confirmed by National Council, is constitutional. *Cox v. Kamp*, 2 Okla. Trib. 303 (Muscogee (Creek) 1991).

Muscogee (Creek) Nation Supreme Court may take judicial notice of fact that persons have not been confirmed in their appointments to cabinet positions in Nation's executive branch, may declare such positions vacant, and may issue permanent injunctions regarding former occupants of such positions and their current status. *Cox v. Kamp*, 2 Okla. Trib. 303 (Muscogee (Creek) 1991).

Muscogee (Creek) Nation Supreme Court has power to direct Nation's Principal Chief to show cause as to why he is not in contempt, where Nation's executive branch or Principal Chief continues employment of individuals in violation of an earlier Order from that Court. *Cox v. Kamp*, 2 Okla. Trib. 303 (Muscogee (Creek) 1991).

The Muscogee (Creek) Nation Constitution intended to incorporate into it the basic parts of the separation of powers between the three branches of government. *Cox v. Kamp*, 5 Okla. Trib. 530 (Muscogee (Creek) 1991).

Each branch of the government has special limitations placed on it. *Cox v. Kamp*, 5 Okla. Trib. 530 (Muscogee (Creek) 1991).

There must be a balance of powers. The founders of the Muscogee (Creek) Constitution gave unbridled authority to the executive branch. *Cox v. Kamp*, 5 Okla. Trib. 530 (Muscogee (Creek) 1991).

The National Council always has the authorization to amend legislation subject only to one Principal Chief veto or constitutional validity as determined by the judicial branch. *Cox v. Kamp*, 5 Okla. Trib. 530 (Muscogee (Creek) 1991).

Supreme Court of the Muscogee (Creek) Nation may direct tribal Chief and other tribal officers to conform their conduct to validly enacted tribal laws. *National Council v. Cox*, 5 Okla. Trib. 513 (Muscogee (Creek) 1990).

Where emergency exists due to expiration of all terms on appointed tribal board, and where no one has been nominated and/or confirmed to fill the vacancies the tribal Supreme Court may designate persons to sit on such board pending nomination and/or confirmation of their successors. *In re Hospital and Clinics Board*, 2 Okla. Trib. 155 (Muscogee (Creek) 1991).

Tribal Supreme Court has power, when enforcing sanctions pursuant to finding of contempt, to order financial institutions holding tribal funds to a tribal official in contempt. *In re Financial Services*, 2 Okla. Trib. 142 (Muscogee (Creek) 1990).

When judicial office is create by legislature under due constitutional authority, legislative

body may fix term of office or alter it at legislature's pleasure. Extension of judicial terms under such circumstances does not violate appointment power of Muscogee (Creek) Nation's Principal Chief. *In re District Judge*, 2 Okla. Trib. 100 (Muscogee (Creek) 1990).

Each of the three branches of Muscogee (Creek) Nation's government are separate, distinct legal entities. *Preferred Mgmt. Corp. v. National Council*, 2 Okla. Trib. 37 (Muscogee (Creek) 1990).

Muscogee (Creek) Const. Art. V, section 3 calls for involvement of legislative branch in the expenditure of funds belonging to the Tribe. *Preferred Mgmt. Corp. v. National Council*, 2 Okla. Trib. 37 (Muscogee (Creek) 1990).

Muscogee (Creek) Nation Ordinance NCA 87–37, which authorizes Principal Chief to enter into contracts and leaves the details of such contracts to his discretion, is constitutional. *Preferred Mgmt. Corp. v. National Council*, 2 Okla. Trib. 37 (Muscogee (Creek) 1990).

Muscogee (Creek) National Council may retain legal counsel on its behalf to assist in its responsibilities under tribal Constitution, without approval of tribal executive branch, within confines of funds appropriated to legislative branch of government. *Bryant v. Childers*, 1 Okla. Trib. 316 (Muscogee (Creek) 1989).

Principal Chief of Muscogee (Creek) Nation may retain legal counsel on behalf of executive branch of government to assist in its responsibilities under tribal Constitution, without approval of tribal legislative branch, within confines of funds appropriated to executive branch of government. *Bryant v. Childers*, 1 Okla. Trib. 316 (Muscogee (Creek) 1989).

Judicial branch of Muscogee (Creek) Nation may retain legal counsel to assist in its responsibilities under the tribal Constitution, without approval of other branches, within confines of funds appropriated to judicial branch of government. *Bryant v. Childers*, 1 Okla. Trib. 316 (Muscogee (Creek) 1989)

Muscogee (Creek) Nation's Hospital and Clinics Board is not purely executive in nature. *Cox v. Moore*, 1 Okla. Trib. 263 (Muscogee (Creek) 1989)

Principal Chief of Muscogee (Creek) Nation lacks the power to remove members of tribal Hospital and Clinics Board without cause and due process as set out in ordinance establishing the Board. *Cox v. Moore*, 1 Okla. Trib. 263 (Muscogee (Creek) 1989).

Constitution of Muscogee (Creek) Nation establishes the judicial branch as necessary and separate branch of tribal government, and instills in that branch judicial authority and power of the Muscogee (Creek) Nation. *In re Supreme Court*, 1 Okla. Trib. 89 (Muscogee (Creek) 1986).

Power and authority of Muscogee (Creek) Nation's Supreme Court may not be decreased by, nor may Court be diminished by, any other branch of Muscogee (Creek) Nation's government. *In re Supreme Court*, 1 Okla. Trib. 89 (Muscogee (Creek) 1986).

Constitution of Muscogee (Creek) Nation is patterned after United States Constitution with respect to separation of powers; decisions of United States courts with respect to that doctrine are therefore applicable with equal force to government of Muscogee (Creek) Nation. *Beaver v. National Council*, 1 Okla. Trib. 57 (Muscogee (Creek) 1986).

Sections 818 and 819 of NCA 81–82 (Muscogee (Creek) Nation) unlawfully vest judicial power in the National Council, the legislative branch of the Muscogee (Creek) Nation. *Beaver v. National Council*, 1 Okla. Trib. 57 (Muscogee (Creek) 1986).

The Supreme Court is a necessary and separate branch of the Muscogee (Creek) Nation instilled with the Judicial Authority and power of the Muscogee (Creek) Nation. *Done in Conference, October 31, 1986* (Muscogee (Creek) Nation (1986))

The continued operation of the Court is of extreme importance and necessary for the preservation of the rights of all of the citizens of the tribal government of the Muscogee (Creek) Nation. *Done in Conference, October 31, 1986* (Muscogee (Creek) Nation (1986))

The power and authority of this Court will not be decreased nor will this Court be diminished by any other branch of the tribal government by its failure to perform its duties and obligations under the constitution of the Muscogee (Creek) Nation and this Court finds that the Justices of this Court should retain their position and continue to perform the duties of Justice of this Supreme Court until their successors shall be duly qualified. *Done in Conference, October 31, 1986* (Muscogee (Creek) Nation (1986))

It is THEREFORE ORDERED, ADJUDGED AND DECREED that each Justice of the Supreme Court of the Muscogee (Creek) Nation shall and do retain their position and authority and shall continue to serve as Justice until their successor is duly qualified. *Done in Conference, October 31, 1986* (Muscogee (Creek) Nation (1986))

It is not the business of the Tribal Courts to interfere with the affairs of any Creek communities that is why by-laws and constitutions were passed and ratified. *Johnson v. Holdenville Indian Community*, 5 Okla. Trib. 543 (Musc. (Cr.) D.Ct. 1991).

District Court of the Muscogee (Creek) Nation has power to enjoin application of amendments to Holdenville (Creek) Indian Community's Constitution and by-laws until receipt of documentation that amendments were properly adopted. *Johnson v. Holdenville Indian Community*, 5 Okla. Trib. 543 (Musc. (Cr.) D.Ct. 1991).

District Court of Muscogee (Creek) Nation may impose fines on officials of Nation's executive branch for failure to comply with writ of mandamus directing them to comply with valid

and constitutional tribal ordinance. *Frye v. Cox*, 2 Okla. Trib. 179 (Musc. (Cr.) D.Ct. 1991).

Muscogee (Creek) Nation Ordinance 89–07, which directs Nation's executive branch to publish to National Council and tribal citizens financial information concerning salaries and other compensation paid to employees of the Nation, is constitutional. *Frye v. Cox*, 2 Okla. Trib. 115 (Muscogee (Cr.) D.Ct. 1990).

District Court of Muscogee (Creek) Nation has power to issue writ of mandamus to Nation's Principal Chief directing him to comply with constitutional tribal ordinance. *Frye v. Cox*, 2 Okla. Trib. 115 (Musc. (Cr.) D.Ct. 1990).

Executive branch of Muscogee (Creek) Nation government has no discretion to refuse to pay funds duly appropriated and budgeted by tribe's legislative branch. In this respect, duties of tribal Director of Treasury and Comptroller of Treasury are ministerial only. *Childers v. Bryant*, 1 Okla. Trib. 311 (Musc. (Cr.) D.Ct. 1989).

Tribal court may issue mandamus to tribal Director of Treasury and Comptroller of Treasury to issue payment of moneys owed to counsel validly retained by tribal legislative branch. *Childers v. Bryant*, 1 Okla. Trib. 311 (Musc. (Cr.) D.Ct. 1989).

Judicial interpretation of Constitution and Ordinances of Muscogee (Creek) Nation is vested only in judicial branch of Nation. *O.C.M.A. v. National Council*, 1 Okla. Trib. 293 (Musc. (Cr.) D.Ct. 1989).

Jurisdiction of courts of Muscogee (Creek) Nation is not to be defeated by actions of tribal officers at their pleasure. *National Council v. Preferred Mgmt. Corp.*, 1 Okla. Trib. 278 (Musc. (Cr.) D.Ct. 1989).

Grants of power to all branches of government of Muscogee (Creek) Nation must be strictly construed against the power. *Burden v. Cox*, 1 Okla. Trib. 247 (Musc. (Cr.) D.Ct. 1988).

Article VI, section 6, clause (a) of Muscogee (Creek) Nation's Constitution requires that two-thirds of full membership (not members present and voting) vote to override veto by Nation's Principal Chief before veto override is successful. *Burden v. Cox*, 1 Okla. Trib. 247 (Musc. (Cr.) D.Ct. 1988).

As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

The burden rests on the tribe to establish one of the exceptions to *Montana*'s [*Montana v. United States*, 450 U.S. 544 (1981)] general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

The logic of *Montana* [*Montana v. United States*, 450 U.S. 544 (1981)] is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) 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. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

[n]onmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

We have further determined that, even when a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be pre-empted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

[W]e have concluded that ''[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.'' (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)) *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

We must decide whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority. We conclude that Congress does possess this power. *U.S. v. Lara*, 541 U.S. 193 (2004)

Thus the statute [Act of Oct. 28, 1991, 105 Stat. 646] seeks to adjust the tribes' status. It relaxes the restrictions, recognized in *Duro*, [*Duro v. Reina*, 495 U.S. 676 (1990)], that the political branches had imposed on the tribes' exercise of inherent prosecutorial power. *U.S. v. Lara*, 541 U.S. 193 (2004)

[t]he [U.S.] Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ''plenary and exclusive.'' This Court has traditionally identified the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as sources of that power. *U.S. v. Lara*, 541 U.S. 193 (2004)

The ''central function of the Indian Commerce Clause,'' we have said, ''is to provide Congress with plenary power to legislate in the field of Indian affairs.'' (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989)) *U.S. v. Lara*, 541 U.S. 193 (2004)

Congress, with this Court's approval, has interpreted the Constitution's ''plenary'' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority. *U.S. v. Lara*, 541 U.S. 193 (2004)

[o]ur conclusion that Congress has the power to relax the restrictions imposed by the political branches on the tribes' inherent prosecutorial authority is consistent with our earlier cases. *U.S. v. Lara*, 541 U.S. 193 (2004)

[t]hese holdings [referring to *United States v. Wheeler,* 435 U.S. 313 (1978); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *Duro v. Reina,* 495 U.S. 676 (1990)] reflect the Court's view of the tribes' retained sovereign status *as of the time* the Court made them. They did not set forth constitutional limits that prohibit Congress from changing the relevant legal circumstances, *i.e.,* from taking actions that modify or adjust the tribes' status. *U.S. v. Lara*, 541 U.S. 193 (2004)

Oliphant and *Duro* [*Oliphant v. Suquamish Tribe,* 435 U.S. 191 (1978); *Duro v. Reina,* 495 U.S. 676 (1990)] make clear that the Constitution does not dictate the metes and bounds of tribal autonomy, nor do they suggest that the Court should second-guess the political branches' own determinations. *U.S. v. Lara*, 541 U.S. 193 (2004)

[t]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians. We hold that Congress exercised that authority in writing this statute [Act of Oct. 28, 1991, 105 Stat. 646]. *U.S. v. Lara,* 541 U.S. 193 (2004)

[T]hat Indians have ''the right . . . to make their own laws and be ruled by them,'' (quoting *Montana v. United States,* 450 U.S. 544 (1981)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

This historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts. *Nevada v. Hicks*, 533 U.S. 353 (2001)

It is true that some statutes proclaim tribal-court jurisdiction over certain questions of federal law. (quoting 25 U.S.C. § 1911 (Indian Child Welfare Act of 1978); 12 U.S.C. § 1715 (foreclosures brought by the Secretary of Housing and Urban Development against reservation homeowners)). But no provision in federal law provides for tribal-court jurisdiction over § 1983 [42 U.S.C. § 1983] actions. *Nevada v. Hicks*, 533 U.S. 353 (2001)

Congress has authorized the Commissioner of Indian Affairs ''to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.'' [25 U.S.C. § 261] *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

Montana thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare . . (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana,[Montana v. United States*, 450 U.S. 544 (1981)] the civil authority of Indian tribes and their courts with respect to non Indian fee lands generally ''do[es] not extend to the activities of nonmembers of the tribe.'' *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

We conclude that, in the absence of congressional abrogation of tribal sovereign immunity from suit in this action, or an express waiver of its sovereign immunity by the Nation, the district court erred in failing to grant the Nation's motion to dismiss. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Like this case, *Tenneco* involved two different aspects of an Indian tribe's ''sovereignty'': its immunity from suit and the extent of its power to enact and enforce laws affecting non-Indians. But it does not stand for the proposition, as the Miner parties suggest, that an Indian tribe cannot invoke its sovereign immunity from suit in an action that challenges the limits of the tribe's authority over non-Indians. On the contrary, we held in *Tenneco* that the tribe was immune from suit. [quoting from *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma,* 725 F.2d 572 (10th Cir. 1984)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Therefore, in an action against an Indian tribe, we conclude that § 1331 will only confer subject matter jurisdiction where another statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its immunity. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

We noted that Indian tribes' ''limited sovereign immunity from suit is well-established'' and that the tribe in that case ''ha[d] not chosen to waive that immunity.'' We then proceeded to consider whether the tribe's sovereign immunity extended to the tribal-officer defendants, holding: When the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked. If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable

to suit. Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess. [internal cites omitted by author. Quoting from *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Tribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States. [quoting *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319–20 (10th Cir. 1982)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

''Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1).'' *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1302–03 (10th Cir. 2001) (citation omitted). *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

''Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.'' [quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

The Court held specifically that Title I of the ICRA–the same statute upon which the Miner parties base some of their claims for relief–did not abrogate tribal sovereign immunity, and therefore suits against a tribe under the ICRA are barred. [quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998), the Supreme Court affirmed that, ''[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.'' While noting that ''[t]here are reasons to doubt the wisdom of perpetuating the doctrine,'' it nonetheless rejected the defendant's invitation to narrow the scope of tribal sovereign immunity. The Court recognized that it had ''taken the lead in drawing the bounds of tribal immunity,'' but it deferred to Congress to limit or abrogate the doctrine through legislation, as it has done with respect to limited classes of suits. (internal quotes omitted) *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

This court has applied the Supreme Court's straightforward test to uphold Indian tribes' immunity from suit. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Dry Creek [Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980)] has come to stand for the proposition that federal courts have jurisdiction to hear a suit against an Indian tribe under 25 U.S.C. § 1302, notwithstanding *Santa Clara Pueblo*, [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)]when three circumstances are present: (1) the dispute involves a non-Indian; (2) the dispute does not involve internal tribal affairs; and (3) there is no tribal forum to hear the dispute. Our jurisprudence in this field is circumspect, and we have emphasized the need to construe the *Dry Creek* exception narrowly in order to prevent a conflict with *Santa Clara*.(internal cites omitted) *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

[f]ederal courts do have jurisdiction under the ICRA [Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303] to entertain habeas proceedings. Specifically, 25 U.S.C. § 1303 makes available to any person ''[t]he privilege of the writ of habeas corpus . . ., in a court of the United States, to test the legality of his detention by order of an Indian tribe.'' *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

Indian tribes possess the same immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo*, [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)]. As with other forms of sovereign immunity, tribal immunity ''is subject to the superior and plenary control of Congress.'' Accordingly, absent explicit waiver of immunity or express authorization by Congress, federal courts do not have jurisdiction to entertain suits against an Indian tribe. (internal cites omitted). *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

This Court acknowledged Oklahoma did not take steps to assume jurisdiction under the previous PL–280 in *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*. We held that ''[b]ecause Oklahoma did not take the appropriate steps to take jurisdiction under PL–280, the proper inquiry to be made in this case must focus upon the congressional policy of fostering tribal autonomy in the light of pertinent U.S. Supreme Court jurisprudence.'' *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

The IGRA provides at § 2710(d)(3)(C) a list of provisions which any negotiated tribal-state compact ''may'' include. ''May'' is ordinarily construed as permissive, while ''shall'' is ordinarily construed as mandatory. See *Osprey L.L.C. v. Kelly–Moore Paint Co., Inc.*, 1999 OK 50, 984 P.2d 194; *Shea v. Shea*, 1975 OK 90, 537 P.2d 417. Section 2710(d)(3)(C) provides in part: (C) Any Tribal–State compact negotiated under subparagraph (A) **may** include provisions relating to—(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; (ii) the **allocation** of criminal and civil **jurisdiction** between the State and the Indian tribe necessary for the enforcement of such laws and regulations;. . . . (emphasis added). The Compact here does not include any

such allocation of jurisdiction. Instead, the Compact provides only: ''This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction'' and that tort claims may be heard in a ''court of competent jurisdiction.'' The Tribe could have, but did not, include such jurisdictional allocation in this Compact. Neither the IGRA nor the Compact as approved enlarged the Tribe's jurisdiction. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

A ''court of competent jurisdiction'' is one having jurisdiction of a person and the subject matter and the power and authority of law at the time to render the particular judgment. (string cites omitted) *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

The Compact is derived from the Oklahoma Statutes. It incorporates Oklahoma's Governmental Tort Claims Act (GTCA) into its provisions. The district courts of Oklahoma thus have subject matter jurisdiction of any claim arising under the GTCA, including one which originates under the Compact. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

In *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001), the Supreme Court recognized the authority of state courts as courts of ''general jurisdiction'' and further acknowledged our system of ''dual sovereignty'' in which state courts have concurrent jurisdiction with federal courts, absent specific Congressional enactment to the contrary. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

Thus, a tribal court is not a court of general jurisdiction. Its jurisdiction could be asserted in matters involving non-Indians **only** when their activities on Indian lands are activities that may be regulated by the Tribe. (citing *Nevada v. Hicks*, 533 U.S. 343 (2001)) *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

The Oklahoma district court is a ''court of competent jurisdiction'' to hear Cossey's tort claim. The Tribe's sovereign interests are not implicated so as to require tribal court jurisdiction under the exceptions in *Montana*, ***supra*. Cossey's right to seek redress in the Oklahoma district court is guaranteed by our Constitution. Moreover, the United States Supreme Court has upheld *Montana*** and the cases following it, indicating the Court's continued recognition of the need to protect the sovereign interests of Indian tribes, while acknowledging the plenary powers of the states to adjudicate the rights of their citizens within their borders. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

[t]ribal authorities may investigate unauthorized possession of firearms on gaming premises which is proscribed by tribal law. *See* Muscogee (Creek) Nation Code Ann., tit. 21., § 5–116(C). *United States v. Green*, 140 Fed. Appx. 798 (10th Cir. 2005)

3. Sovereign immunity

The recent decision by this Court in *Glass v. Muscogee (Creek) Nation Tulsa Casino, et al.* decided in April 2006 (affirming dismissal because no waiver from sovereign immunity was obtained by Plaintiff) is controlling as to the GOAB [Gaming Operations Authority Board]. *Molle and Chalakee v. The Gaming Operations Authority Board, et al.*, SC 06–05 (Muscogee (Creek) 2008)

The Court further holds that the receipt of a waiver from sovereign immunity must be obtained from the National Council as a condition precedent to filing suit against the GOAB [Gaming Operations Authority Board]. *Molle and Chalakee v. The Gaming Operations Authority Board, et al.*, SC 06–05 (Muscogee (Creek) 2008)

The District Court properly applied this Court's decision in *Glass,*[*Glass v. Muscogee (Creek) Nation Tulsa Casino, et al.*, SC 05–04*(* 2006)] and therefore, the dismissal of Respondent/Defendant GOAB as being protected from civil suit by sovereign immunity was also proper. *Molle and Chalakee v. The Gaming Operations Authority Board, et al.*, SC 06–05 (Muscogee (Creek) 2008)

The doctrine of sovereign immunity, a condition precedent to filing suit against the GOAB, is often accompanied by the doctrine of qualified immunity for government employees acting within the scope of their employment. Qualified immunity is not, however, absolute. *Molle and Chalakee v. The Gaming Operations Authority Board, et al.*, SC 06–05 (Muscogee (Creek) 2008)

The qualified immunity test requires a two-part analysis: ''(1) Was the law governing the official's conduct clearly established? (2) Under the law, could a reasonable officer have believed the conduct was lawful?'' [citing *Act-Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993); *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988), cert. denied, 490 U.S. 1075 (1989).] This Court is persuaded by and hereby adopts the forgoing reasoning regarding the application of the doctrine of qualified immunity. *Molle and Chalakee v. The Gaming Operations Authority Board, et al.*, SC 06–05 (Muscogee (Creek) 2008)

On remand, the District Court should apply the two-part test discussed above [(1) Was the law governing the official's conduct clearly established? (2) Under the law, could a reasonable officer have believed the conduct was lawful?] to determine whether the named individual defendants may be immune from suite under the doctrine of qualified immunity. *Molle and Chalakee v. The Gaming Operations Authority Board, et al.*, SC 06–05 (Muscogee (Creek) 2008)

As stated in the Court's *Glass* decision, MCNCA 21 § 4–103(c)(1)(h) is ''valid, clear and directly on point.'' *Glass v. Muscogee (Creek) Nation Tulsa Casino, et al.*SC 05–04,*(* 2006)

The simple fact is that the statute does not preclude an individual from ever being able to file suit, it merely requires the government or governmental agency grant a waiver of sovereign immunity first. *Molle and Chalakee v. The*

Gaming Operations Authority Board, et al., SC 06–05 (Muscogee (Creek) 2008)

We have frequently noted, however, that the ''sovereignty that the Indian tribes retain is of a unique and limited character.'' (citing *United States v. Wheeler*, 435 U.S. 313 (1978)). *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

It[sovereignty] centers on the land held by the tribe and on tribal members within the reservation. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

They [tribes] may also exclude outsiders from entering tribal land. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

But tribes do not, as a general matter, possess authority over non-Indians who come within their borders: ''[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'' *(*citing *Montana v. United States*, 450 U.S. 544 (1981)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

As we explained in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), the tribes have, by virtue of their incorporation into the American republic, lost ''the right of governing . . . person[s] within their limits except themselves.'' (emphasis and internal quotation marks omitted). This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians—what we have called ''non-Indian fee land.'' (quoting *Strate v. A–1 Contractors*, 520 U.S. 438, 446 (1997)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

We have recognized two exceptions to this principle, circumstances in which tribes may exercise ''civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.'' 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 exercise ''civil authority over the conduct of non-Indians on fee lands within the 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.'' (quoting *Montana v. United States*, 450 U.S. 544 (1981)) (internal cites omitted) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

We have upheld as within the tribe's sovereign authority the imposition of a severance tax on natural resources removed by nonmembers from tribal land. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). We have approved tribal taxes imposed on leasehold interests held in tribal lands, as well as sales taxes imposed on nonmember businesses within the reservation. *Kerr-McGee Corp*. v. *Navajo Tribe*, 471 U.S. 195 (1985). We have similarly approved licensing requirements for hunting and fishing on tribal land. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983)(internal cites omitted) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

[t]he key point is that any threat to the tribe's sovereign interests flows from changed uses or nonmember activities, rather than from the mere fact of resale. The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember *activity* on the land, within the limits set forth in our cases. The tribe has no independent interest in restraining alienation of the land itself, and thus, no authority to do so. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. Tribal sovereignty, it should be remembered, is ''a sovereignty outside the basic structure of the Constitution.'' (quoting *United States v. Lara*, 541 U.S. 193 (2004)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

The Bill of Rights does not apply to Indian tribes. (quoting *Talton v. Mayes*, 163 U.S. 376 (1896)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

[n]onmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

[w]e said it ''defies common sense to suppose'' that Congress meant to subject non-Indi-

ans to tribal jurisdiction simply by virtue of the nonmember's purchase of land in fee simple. If Congress did not anticipate tribal jurisdiction would run with the land, we see no reason why a nonmember would think so either. (internal cite omitted, quoting from *Montana v. United States*, 450 U.S. 544 (1981)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

The sovereign authority of Indian tribes is limited in ways state and federal authority is not. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

Limiting the interest-balancing test exclusively to *on-reservation* transactions between a nontribal entity and a tribe or tribal member is consistent with our unique Indian tax immunity jurisprudence. We have explained that this jurisprudence relies ''heavily on the doctrine of tribal sovereignty . . . which historically gave state law 'no role to play' within a tribe's territorial boundaries.'' (emphasis in original, quoting *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993)) *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

We have further explained that the doctrine of tribal sovereignty, which has a ''significant geographical component,'' requires us to ''revers[e]'' the ''general rule'' that ''exemptions from tax laws should . . . be clearly expressed.'' And we have determined that the geographical component of tribal sovereignty ''provide[s] a backdrop against which the applicable treaties and federal statutes must be read.'' (internal cites omitted, quoting from *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)) *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

[W]e have concluded that ''[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.'' (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)) *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

We must decide whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority. We conclude that Congress does possess this power. *U.S. v. Lara*, 541 U.S. 193 (2004)

We assume, . . . that Lara's double jeopardy claim turns on the answer to the ''dual sovereignty'' question. What is ''the source of [the] power to punish'' nonmember Indian offenders, ''inherent *tribal* sovereignty'' or delegated *federal* authority? [quoting *United States v. Wheeler*, 435 U. S. 313 (1978)]. We also believe that Congress intended the former answer. The statute [Act of Oct. 28, 1991, 105 Stat. 646] says that it ''recognize[s] and affirm[s]'' in each tribe the *''inherent'' tribal* power (not delegated federal power) to prosecute nonmember Indians for misdemeanors. (emphasis added in original, internal cites omitted) *U.S. v. Lara*, 541 U.S. 193 (2004)

Thus the statute [Act of Oct. 28, 1991, 105 Stat. 646] seeks to adjust the tribes' status. It relaxes the restrictions, recognized in *Duro*, [*Duro v. Reina*, 495 U.S. 676 (1990)], that the political branches had imposed on the tribes' exercise of inherent prosecutorial power. *U.S. v. Lara*, 541 U.S. 193 (2004)

Congress has also granted tribes greater autonomy in their inherent law enforcement authority (in respect to tribal members) by increasing the maximum criminal penalties tribal courts may impose. § 4217, 100 Stat. 3207–146, codified at 25 U.S.C. § 1302(7) (raising the maximum from ''a term of six months and a fine of $500'' to ''a term of one year and a fine of $5,000''). *U.S. v. Lara*, 541 U.S. 193 (2004)

[o]ur conclusion that Congress has the power to relax the restrictions imposed by the political branches on the tribes' inherent prosecutorial authority is consistent with our earlier cases. *U.S. v. Lara*, 541 U.S. 193 (2004)

[t]hese holdings [referring to *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *Duro v. Reina*, 495 U.S. 676 (1990)] reflect the Court's view of the tribes' retained sovereign status *as of the time* the Court made them. They did not set forth constitutional limits that prohibit Congress from changing the relevant legal circumstances, *i.e.*, from taking actions that modify or adjust the tribes' status. *U.S. v. Lara*, 541 U.S. 193 (2004)

Oliphant and *Duro* [*Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *Duro v. Reina*, 495 U.S. 676 (1990)] make clear that the Constitution does not dictate the metes and bounds of tribal autonomy, nor do they suggest that the Court should second-guess the political branches' own determinations. *U.S. v. Lara*, 541 U.S. 193 (2004)

Wheeler, *Oliphant*, and *Duro*, [*United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *Duro v. Reina*, 495 U.S. 676 (1990)] then, are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes. And that fact makes all the difference. *U.S. v. Lara*, 541 U.S. 193 (2004)

[t]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians. We hold that Congress exercised that authority in writing this statute [Act of Oct. 28, 1991, 105 Stat. 646]. *U.S. v. Lara*, 541 U.S. 193 (2004)

Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States*, 450 U.S. 544 (1981) *Nevada v. Hicks*, 533 U.S. 353 (2001)

Where nonmembers are concerned, the ''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.'' (emphasis in original, quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is ''necessary to protect tribal self-government or to control internal relations.'' It may sometimes be a dispositive factor. *Nevada v. Hicks*, 533 U.S. 353 (2001)

[t]he absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* [*Montana v. United States*, 450 U.S. 544 (1981)] the extension of tribal civil authority over nonmembers on non-Indian land. *Nevada v. Hicks*, 533 U.S. 353 (2001)

[T]hat Indians have ''the right ... to make their own laws and be ruled by them,'' (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them. *Nevada v. Hicks*, 533 U.S. 353 (2001)

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 a reservation's border. 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.'' (quoting both *Worcester v. Georgia*, 6 Pet. 515, 561 (1832), *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the principle that Indians have the right to make their own laws and be governed by them requires ''an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.''(quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156 (1980)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

We conclude ..., that tribal authority to regulate state officers in executing process related to the violation, off 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.'' *Nevada v. Hicks*, 533 U.S. 353 (2001)

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

The States' inherent jurisdiction on reservations can of course be stripped by Congress. *Nevada v. Hicks*, 533 U.S. 353 (2001)

Respondents' contention that tribal courts are courts of ''general jurisdiction'' is also quite wrong. A state court's jurisdiction is general, in that it ''lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe.'' [quoting from *Tafflin v. Levitt*, 493 U.S. 455 (1990)] Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.(internal cites omitted) *Nevada v. Hicks*, 533 U.S. 353 (2001)

It is true that some statutes proclaim tribal-court jurisdiction over certain questions of federal law.(quoting 25 U.S.C. § 1911 (Indian Child Welfare Act of 1978); 12 U.S.C. § 1715 (foreclosures brought by the Secretary of Housing and Urban Development against reservation homeowners)). But no provision in federal law provides for tribal-court jurisdiction over § 1983 [42 U.S.C. § 1983] actions. *Nevada v. Hicks*, 533 U.S. 353 (2001)

[t]he canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed. See *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988) *Chickasaw Nation v. United States*, 534 U.S. 84 (2001)

Tribal jurisdiction is limited: For powers not expressly conferred them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty. *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

An Indian tribe's sovereign power to tax–whatever its derivation–reaches no further than tribal land. *Atkinson Trading Company v. Shirley, Jr. et al..*, 532 U.S. 645 (2001)

Irrespective of the percentage of non-Indian fee land within a reservation, *Montana*'s [450 U.S. 544 (1981)], second exception grants Indian tribes nothing ''beyond what is necessary to protect tribal self-government or to control internal relations.'' (quoting from *Strate v. A–1*

Contractors, 530 US 438 (1997)) *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

Indian tribes are ''unique aggregations possessing attributes of sovereignty over both their members and their territory,'' but their dependent status generally precludes extension of tribal civil authority beyond these limits. (quoting *United States v. Mazurie,* 419 U.S. 544 (1975)) *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

the Court explained, ''the inherent sovereign powers of an Indian tribe''—those powers a tribe enjoys apart from express provision by treaty or statute—''do not extend to the activities of nonmembers of the tribe.'' (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non Indians on their reservations, even on non Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non Indians on fee 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. (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Montana thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare . . (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

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. . . . ''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.'' (quoting *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

[t]hat state courts may not exercise jurisdiction over disputes arising out of on reservation conduct—even over matters involving non Indians—if doing so would ''infring[e] on the right of reservation Indians to make their own laws and be ruled by them.'' (quoting *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382 (1976)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Recognizing that our precedent has been variously interpreted, we reiterate that *National Farmers* and *Iowa Mutual* [*National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9 (1987)] enunciate only an exhaustion requirement, a ''prudential rule,'', based on comity. These decisions do not expand or stand apart from *Montana*'s instruction on ''the inherent sovereign powers of an Indian tribe.'' [*Montana v. United States*, 450 U.S. 544 (1981)] (internal citations omitted) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of ''inherent sovereignty.'' Regarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise ''forms of civil jurisdiction over non Indians.'' As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal court jurisdiction, we adhere to that understanding. (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*,*[Montana v. United States*, 450 U.S. 544 (1981)] the civil authority of Indian tribes and their courts with respect to non Indian fee lands generally ''do[es] not extend to the activities of nonmembers of the tribe.'' *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Read in isolation, the *Montana* [*Montana v. United States*, 450 U.S. 544 (1981)] rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: ''Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self government or to control internal relations.'' (quoting *Montana) Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

We conclude that, in the absence of congressional abrogation of tribal sovereign immunity from suit in this action, or an express waiver of its sovereign immunity by the Nation, the district court erred in failing to grant the Nation's motion to dismiss. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation,* 505 F.3d 1007 (10th Cir. 2007)

Like this case, *Tenneco* involved two different aspects of an Indian tribe's ''sovereignty'': its immunity from suit and the extent of its power to enact and enforce laws affecting non-Indians. But it does not stand for the proposition, as the

Miner parties suggest, that an Indian tribe cannot invoke its sovereign immunity from suit in an action that challenges the limits of the tribe's authority over non-Indians. On the contrary, we held in *Tenneco* that the tribe was immune from suit. [quoting from *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Therefore, in an action against an Indian tribe, we conclude that § 1331 will only confer subject matter jurisdiction where another statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its immunity. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

We noted that Indian tribes' ''limited sovereign immunity from suit is well-established'' and that the tribe in that case ''ha[d] not chosen to waive that immunity.'' We then proceeded to consider whether the tribe's sovereign immunity extended to the tribal-officer defendants, holding: When the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked. If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit. Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess. [internal cites omitted by author. Quoting from *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Tribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States. [quoting *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319–20 (10th Cir. 1982)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

''Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1).'' *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1302–03 (10th Cir. 2001) (citation omitted). *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

''Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.'' [quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

The Court held specifically that Title I of the ICRA–the same statute upon which the Miner parties base some of their claims for relief–did not abrogate tribal sovereign immunity, and therefore suits against a tribe under the ICRA are barred. [quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S.751, 754 (1998), the Supreme Court affirmed that, ''[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.'' While noting that ''[t]here are reasons to doubt the wisdom of perpetuating the doctrine,'' it nonetheless rejected the defendant's invitation to narrow the scope of tribal sovereign immunity. The Court recognized that it had ''taken the lead in drawing the bounds of tribal immunity,'' but it deferred to Congress to limit or abrogate the doctrine through legislation, as it has done with respect to limited classes of suits.(internal quotes omitted) *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

This court has applied the Supreme Court's straightforward test to uphold Indian tribes' immunity from suit. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Dry Creek [Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980)] has come to stand for the proposition that federal courts have jurisdiction to hear a suit against an Indian tribe under 25 U.S.C. § 1302, notwithstanding *Santa Clara Pueblo*, [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)]when three circumstances are present: (1) the dispute involves a non-Indian; (2) the dispute does not involve internal tribal affairs; and (3) there is no tribal forum to hear the dispute. Our jurisprudence in this field is circumspect, and we have emphasized the need to construe the *Dry Creek* exception narrowly in order to prevent a conflict with *Santa Clara*.(internal cites omitted) *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

[f]ederal courts do have jurisdiction under the ICRA [Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303] to entertain habeas proceedings. Specifically, 25 U.S.C. § 1303 makes available to any person ''[t]he privilege of the writ of habeas corpus . . ., in a court of the United States, to test the legality of his detention by order of an Indian tribe.'' *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

Indian tribes possess the same immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo*, [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)]. As with other forms of sovereign immunity, tribal immunity ''is subject to the superior and plenary control of Congress.'' Accordingly, absent explicit waiver of immunity or express authorization by Congress, federal courts do not have jurisdiction to entertain suits against an Indian tribe. (internal cites

omitted). *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

This Court acknowledged Oklahoma did not take steps to assume jurisdiction under the previous PL–280 in *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*. We held that ''[b]ecause Oklahoma did not take the appropriate steps to take jurisdiction under PL–280, the proper inquiry to be made in this case must focus upon the congressional policy of fostering tribal autonomy in the light of pertinent U.S. Supreme Court jurisprudence.'' *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

The IGRA provides at § 2710(d)(3)(C) a list of provisions which any negotiated tribal-state compact ''may'' include. ''May'' is ordinarily construed as permissive, while ''shall'' is ordinarily construed as mandatory. See *Osprey L.L.C. v. Kelly–Moore Paint Co., Inc.*, 1999 OK 50, 984 P.2d 194; *Shea v. Shea*, 1975 OK 90, 537 P.2d 417. Section 2710(d)(3)(C) provides in part: (C) Any Tribal–State compact negotiated under subparagraph (A) **may** include provisions relating to—(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; (ii) the **allocation** of criminal and civil **jurisdiction** between the State and the Indian tribe necessary for the enforcement of such laws and regulations;.... (emphasis added). The Compact here does not include any such allocation of jurisdiction. Instead, the Compact provides only: ''This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction'' and that tort claims may be heard in a ''court of competent jurisdiction.'' The Tribe could have, but did not, include such jurisdictional allocation in this Compact. Neither the IGRA nor the Compact as approved enlarged the Tribe's jurisdiction. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

A ''Court of competent jurisdiction'' is one having jurisdiction of a person and the subject matter and the power and authority of law at the time to render the particular judgment. (string cites omitted) *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

The Compact is derived from the Oklahoma Statutes. It incorporates Oklahoma's Governmental Tort Claims Act (GTCA) into its provisions. The district courts of Oklahoma thus have subject matter jurisdiction of any claim arising under the GTCA, including one which originates under the Compact. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

In *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001), the Supreme Court recognized the authority of state courts as courts of ''general jurisdiction'' and further acknowledged our system of ''dual sovereignty'' in which state courts have concurrent jurisdiction with federal courts, absent specific Congressional enactment to the contrary. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

Thus, a tribal court is not a court of general jurisdiction. Its jurisdiction could be asserted in matters involving non-Indians **only** when their activities on Indian lands are activities that may be regulated by the Tribe. (citing *Nevada v. Hicks*, 533 U.S. 343 (2001)) *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

The Oklahoma district court is a ''court of competent jurisdiction'' to hear Cossey's tort claim. The Tribe's sovereign interests are not implicated so as to require tribal court jurisdiction under the exceptions in *Montana*, *supra*. Cossey's right to seek redress in the Oklahoma district court is guaranteed by our Constitution. Moreover, the United States Supreme Court has upheld *Montana* and the cases following it, indicating the Court's continued recognition of the need to protect the sovereign interests of Indian tribes, while acknowledging the plenary powers of the states to adjudicate the rights of their citizens within their borders. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

Tribal criminal jurisdiction may extend to both member and non-member Indians. 25 U.S.C. § 1301(2); *United States v. Lara*, 541 U.S. 193 (2004). It does not extend to non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). That said, tribal officers do have the authority to investigate violations of law on tribal land, and detain persons, including non-Indians, suspected of violating the law. *Duro v. Reina*, 495 U.S. 676 (1990) (internal cites omitted) *United States v. Green*, 140 Fed.Appx. 798 (10th Cir. 2005)

[t]ribal authorities may investigate unauthorized possession of firearms on gaming premises which is proscribed by tribal law. *See* Muscogee (Creek) Nation Code Ann., tit. 21., § 5–116(C). *United States v. Green*, 140 Fed. Appx. 798 (10th Cir. 2005)

Tribal criminal jurisdiction may extend to both member and non-member Indians. 25 U.S.C. § 1301(2); *United States v. Lara*, 541 U.S. 193 (2004). It does not extend to non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). That said, tribal officers do have the authority to investigate violations of law on tribal land, and detain persons, including non-Indians, suspected of violating the law. *Duro v. Reina*, 495 U.S. 676 (1990) (internal cites omitted) *United States v. Green*, 140 Fed.Appx. 798 (10th Cir. 2005)

§ 2. [Political jurisdiction]

The political jurisdiction of The Muscogee (Creek) Nation shall be as it geographically appeared in 1900 which is based upon those Treaties entered

into by The Muscogee (Creek) Nation and the United States of America; and such jurisdiction shall include, however not limited to, properties held in trust by the United States of America and to such other properties as held by The Muscogee (Creek) Nation, such property, real and personal to be TAX–EXEMPT, from Federal and State taxation, when not inconsistent with Federal law.

Cross References

Districts, see Const. Art. VI, § 1.
Funds for out-of-boundaries citizens, see Title 35, § 5–101 et seq.

United States Code Annotated

Indian country defined, see 18 U.S.C.A. § 1151.

Notes of Decisions

1. Construction and application

The Muscogee (Creek) Nation Constitution is the Supreme Law of the Muscogee (Creek) Nation and allows for the reapportionment. *Harjo v. Muscogee (Creek) Nation Election Board*, SC 07–50 (Muscogee (Creek) 2007)

[T]he Muscogee (Creek) Nation's Constitution takes precedence over all laws and ordinances passed by the National Council. *Harjo v. Muscogee (Creek) Nation Election Board*, SC 07–50 (Muscogee (Creek) 2007)

[T]his Court reminds the parties that the Indian Civil Rights Act states that: **''no tribe in exercising its powers of self-government SHALL: deny to any persons within its jurisdiction the Equal Protection of the laws.''** (Emphasis added). This mandate in the Indian Civil Rights Act (''ICRA'') requires equal voting rights to all eligible tribal voters. The Equal Protection clause of the ICRA thus requires a ''one man one vote'' rule to be obeyed in this tribe's electoral process. (emphasis and bold in original) *Harjo v. Muscogee (Creek) Nation Election Board*, SC 07–50 (Muscogee (Creek) 2007)

Indian tribes were not made subject to the Bill of Rights. However, the laws of the Muscogee Nation are subject to the limitation imposed upon the tribal governments by the Indian Civil Rights Act of 1968, as amended, found at 25 U.S.C. 1301 et seq. This limits the powers of tribal governments by making certain provisions of the Bill of Rights applicable to tribal governments. *Ellis v. Muscogee (Creek) National Council*, SC 06–07 (Muscogee (Creek) 2007)

We have held that the Constitution of this Nation must be strictly construed and interpreted; and where the plain language is clear, we must not place a different meaning on the words. *Oliver v. Muscogee (Creek) National Council*, SC 06–04 (Muscogee (Creek) 2006)

The Constitution of the Muscogee (Creek) Nation ''must be strictly construed and interpreted and where the Constitution speaks in plain language with reference to a particular matter, the Court must not place a different meaning on the words.'' (Citing *Cox v. Kamp*, 4 Mvs. L. Rep. 75 (Muscogee (Creek) 1991)) *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

The Muscogee (Creek) Nation Constitution cannot be infringed upon or expounded on simply by words in a superfluous document disguised as an ''agreed order.'' *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

There are defined procedures in place to amend our Constitution if there are deemed to be inadequacies with the delineated responsibilities of the differing branches. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

The Muscogee (Creek) Nation Constitution is the epitome of what makes the Muscogee Nation great; a document that has withstood the test of time, trials and tribulations, forced assimilation, statehood and eventual rebirth. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

To allow an Agreed Journal Entry to supersede the Constitution's powers appears to this Court a very unwise leap to make. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

The roles of the different branches are clearly defined both in the Constitution of the Nation and in its laws, . . . , there are proper procedures in place to amend the Constitution of this Nation, and those procedures should not be assumed by a document proposing to be an Agreed Journal Entry in a lawsuit litigated between the Principal Chief and the National Council. *Ellis v. Muscogee (Creek) Nation National Council*, SC 05–03/05 (Muscogee (Creek) 2006)

There is simply no jurisdiction besides the Nation's that can adequately deal with drug traffic on tribal lands. The only mans in which

the Nation may reduce the amount of drugs brought onto tribal lands by non-Indians is through the limited provisions of the Nation's civil code. *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three and 14/100; Methamphetamine; and a 2004 General Motors Hummer H2,* SC 05–01 (Muscogee (Creek) 2005)

Since this Nation's establishment of a constitutional form of government in 1867, Mvskoke law is ruled upon by appointed Judges, but the obligation under traditional Mvskoke law remain in effect. *In Re: The Practice of Law Before the Courts of the Muscogee (Creek) Nation,* SC 04–02 (Muscogee (Creek) 2005)

The District Court of the Muscogee (Creek) Nation has exclusive original jurisdiction over all matters not otherwise limited by tribal ordinance. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

The District Court of the Muscogee (Creek) Nation has personal jurisdiction and subject matter jurisdiction over suits by the Nation against Tobacco companies with respect to their manufacture, marketing, and sale of tobacco products where some of such activities by defendant and/or their agents are alleged to have occurred within the Nation's Indian Country and/or where products have entered the stream of commerce within the Nation's territorial and political jurisdiction thus creating minimum contacts for jurisdictional purposes. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Indian Tribes have adjudicatory jurisdiction where party's actions have substantial effect on political integrity, economic security, or health and safety and welfare of the tribe. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Treaty of 1856 did not divest the Muscogee (Creek) Nation of otherwise extant adjudicatory jurisdiction over non-Indians and/or corporations. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Muscogee (Creek) Nation Constitution and statutes dictate manner in which questions of law are to be addressed by the Court. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Article I § 2 states that political jurisdiction should be as it geographically appeared in 1900 which is based on those treaties entered into by the Muscogee (Creek) Nation and the United States of America. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Personal jurisdiction shall exist when person is served within jurisdictional territory or served anywhere in cases arising within territorial jurisdiction of the Muscogee (Creek) Nation. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc. (Cr.) D.Ct. 1998).

Defendant's act of entry into Muscogee (Creek) Nation by placing their products into the stream of commerce within the political and territorial jurisdiction of the Muscogee (Creek) Nation and thus consented to civil jurisdiction of the Muscogee (Creek) Nation. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc. (Cr.) D.Ct. 1998).

Absent express Congressional enactment to the contrary, the jurisdiction power of the Muscogee (Creek) Nation remains unscathed. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Canons of Treaty construction developed by the United States Supreme Court resolve ambiguities in favor of Indians and that language of an Indian Treaty is to be understood today as that same language was understood by tribal representatives when the treaty was negotiated. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Entire reading of Treaty of 1856 in light of historical realties clearly indicates that the United States Congress has abrogated the treaty and subsequently restored the governmental powers of the Muscogee (Creek) Nation which includes the power of the Court to assert jurisdiction. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

No indication in the 1867 Treaty that the men gave up any right to full adjudicatory authority. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

No provision nor implication in the 1867 Constitution of the Muscogee (Creek) Nation that prohibited jurisdiction over corporations doing business in the Muscogee (Creek) Nation. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

Muscogee (Creek) Nation reorganized their tribal government under the Oklahoma Indian Welfare Act and adopted a new constitution which was approved by the United States Department of Interior and organizes tribal government into executive, legislative, and judicial branches with no divestiture of authority over non-Indians or corporations. *Muscogee (Creek) Nation v. American Tobacco Co.,* 5 Okla. Trib. 401 (Musc.(Cr.) D.Ct. 1998).

We begin by noting that whether a tribal court has adjudicative authority over nonmembers is a federal question. If the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void. (internal cites to *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845 (1985) omitted) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

For nearly two centuries now, we have recognized Indian tribes as ''distinct, independent political communities,'' *Worcester v. Georgia*, 6

Pet. 515 (1832), qualified to exercise many of the powers and prerogatives of self-government.(internal cite omitted) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

We have frequently noted, however, that the ''sovereignty that the Indian tribes retain is of a unique and limited character.'' (citing *United States v. Wheeler*, 435 U.S. 313 (1978)). *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

It[sovereignty] centers on the land held by the tribe and on tribal members within the reservation. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

They [tribes] may also exclude outsiders from entering tribal land. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

But tribes do not, as a general matter, possess authority over non-Indians who come within their borders: ''[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'' *(*citing *Montana v. United States*, 450 U.S. 544 (1981)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

As we explained in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), the tribes have, by virtue of their incorporation into the American republic, lost ''the right of governing . . . person[s] within their limits except themselves.'' (emphasis and internal quotation marks omitted). This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians—what we have called ''non-Indian fee land.'' (quoting *Strate v. A–1 Contractors*, 520 U.S. 438, 446 (1997)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

[w]hen the tribe or tribal members convey a parcel of fee land ''*to non-Indians*, [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands.'' (quoting *South Dakota v. Bourland*, 508 U.S. 679 (1993)) (emphasis in original) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

As a general rule, then, ''the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.'' (quoting *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

We have recognized two exceptions to this principle, circumstances in which tribes may exercise ''civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.'' 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 exercise ''civil authority over the conduct of non-Indians on fee lands within the 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.'' (quoting *Montana v. United States*, 450 U.S. 544 (1981)) (internal cites omitted) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

By their terms, the exceptions [announced in *Montana v. United States*, 450 U.S. 544 (1981)] concern regulation of ''the *activities* of nonmembers'' or ''the *conduct* of non-Indians on fee land.'' (emphasis in original) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

Given *Montana*'s ''general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid,'' [quoting *Montana v. United States*, 450 U.S. 544 (1981) and *Atkinson Trading Co. v. Shirley*, 532 U. S. 645 (2001)] *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

The burden rests on the tribe to establish one of the exceptions to *Montana*'s [*Montana v. United States*, 450 U.S. 544 (1981)] general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

According to our precedents, ''a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.'' We reaffirm that principle today . . . (quoting *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)) (internal cites omitted) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

The status of the land is relevant ''insofar as it bears on the application of . . . *Montana*'s exceptions to [this] case.'' (quoting *Nevada v. Hicks*, 533 U.S. 353 (2001)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

Montana [*Montana v. United States*, 450 U.S. 544 (1981)] does not permit Indian tribes to regulate the sale of non-Indian fee land. *Montana* and its progeny permit tribal regulation of

nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. *Montana* expressly limits its first exception to the ''activities of nonmembers,'' allowing these to be regulated to the extent necessary ''to protect tribal self-government [and] to control internal relations.'' *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

We have upheld as within the tribe's sovereign authority the imposition of a severance tax on natural resources removed by nonmembers from tribal land. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). We have approved tribal taxes imposed on leasehold interests held in tribal lands, as well as sales taxes imposed on nonmember businesses within the reservation. *Kerr-McGee Corp*. v. *Navajo Tribe*, 471 U.S. 195 (1985). We have similarly approved licensing requirements for hunting and fishing on tribal land. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983)(internal cites omitted) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

The logic of *Montana* [*Montana v. United States*, 450 U.S. 544 (1981)] is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) 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. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

The tribe's ''traditional and undisputed power to exclude persons'' from tribal land, for example, gives it the power to set conditions on entry to that land via licensing requirements and hunting regulations (quoting *Duro v. Reina*, 495 U.S. 676 (1990)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

The power to tax certain nonmember activity can also be justified as ''a necessary instrument of self-government and territorial management'' insofar as taxation ''enables a tribal government to raise revenues for its essential services,'' to pay its employees, to provide police protection, and in general to carry out the functions that keep peace and order (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)) (internal quotes omitted) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

By definition, fee land owned by nonmembers has already been removed from the tribe's immediate control. [quoting *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)] It has already been alienated from the tribal trust. The tribe cannot justify regulation of such land's sale by reference to its power to superintend tribal land, then, because non-Indian fee parcels have ceased to *be* tribal land. (emphasis in original) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

Any direct harm to its political integrity that the tribe sustains as a result of fee land sale is sustained at the point the land passes from Indian to non-Indian hands. It is at that point the tribe and its members lose the ability to use the land for their purposes. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

Once the land has been sold in fee simple to non-Indians and passed beyond the tribe's immediate control, the mere resale of that land works no additional intrusion on tribal relations or self-government. Resale, by itself, causes no additional damage. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

The *uses* to which the land is put may very well change from owner to owner, and those uses may well affect the tribe and its members. As our cases bear out, the 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.(internal cite omitted, emphasis in original). *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

[t]he key point is that any threat to the tribe's sovereign interests flows from changed uses or nonmember activities, rather than from the mere fact of resale. The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember *activity* on the land, within the limits set forth in our cases. The tribe has no independent interest in restraining alienation of the land itself, and thus, no authority to do so. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. Tribal sovereignty, it should be remembered, is ''a sovereignty outside the basic structure of the Constitution.'' (quoting *United States v. Lara*, 541 U.S. 193 (2004)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

The Bill of Rights does not apply to Indian tribes. (quoting *Talton v. Mayes*, 163 U.S. 376 (1896)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.,* 128 S.Ct. 2709 (2008)

Indian courts ''differ from traditional American courts in a number of significant respects.'' (quoting *Nevada v. Hicks*, 533 U.S. 353 (2001)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

[n]onmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

[w]e said it ''defies common sense to suppose'' that Congress meant to subject non-Indians to tribal jurisdiction simply by virtue of the nonmember's purchase of land in fee simple. If Congress did not anticipate tribal jurisdiction would run with the land, we see no reason why a nonmember would think so either. (internal cite omitted, quoting from *Montana v. United States*, 450 U.S. 544 (1981)) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

The sovereign authority of Indian tribes is limited in ways state and federal authority is not. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

Montana [*Montana v. United States*, 450 U.S. 544 (1981)] provides that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian fee land. But conduct taking place on the land and the sale of the land are two very different things. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' ''conduct'' menaces the ''political integrity, the economic security, or the health or welfare of the tribe.'' The conduct must do more than injure the tribe, it must ''imperil the subsistence'' of the tribal community. (quoting *Montana v. United States*, 450 U.S. 544 (1981))(internal citation omitted) *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

The sale of formerly Indian-owned fee land to a third party is quite possibly disappointing to the tribe, but cannot fairly be called ''catastrophic'' for tribal self-government. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

Seeking the Tribal Court's aid in serving process on tribal members for a pending state-court action does not, we think, constitute consent to future litigation in the Tribal Court. *Plains Commercial Bank v. Long Family Land & Cattle Co. et al.*, 128 S.Ct. 2709 (2008)

[t]he *Bracker* [*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)] interest-balancing test applies only where ''a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.'' It does not apply where, as here, a state tax is imposed on a non-Indian and arises as a result of a transaction that occurs off the reservation. (internal citation omitted) *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

[u]nder our Indian tax immunity cases, the ''who'' and the ''where'' of the challenged tax have significant consequences. We have determined that ''[t]he initial and frequently dispositive question in Indian tax cases . . . is *who* bears the legal incidence of [the] tax,'' and that the States are categorically barred from placing the legal incidence of an excise tax *''on a tribe or on tribal members* for sales made *inside Indian country''* without congressional authorization (emphasis in original)(quoting *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995)) *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

We have further determined that, even when a State imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be pre-empted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

We have applied the balancing test articulated in *Bracker* [*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)] only where ''the legal incidence of the tax fell on a nontribal entity engaged in a transaction with tribes or tribal members on the reservation.'' (internal citation omitted)(quoting *Arizona Dept. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999)) *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

The *Bracker* interest-balancing test has never been applied where, as here, the State asserts its taxing authority over non-Indians off the reservation. And although we have never addressed this precise issue, our Indian tax immunity cases counsel against such an application. [*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)] *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

Limiting the interest-balancing test exclusively to *on-reservation* transactions between a nontribal entity and a tribe or tribal member is consistent with our unique Indian tax immunity jurisprudence. We have explained that this jurisprudence relies ''heavily on the doctrine of tribal sovereignty . . . which historically gave state law 'no role to play' within a tribe's territorial boundaries.'' (emphasis in original, quoting *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993)) *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005)

We have further explained that the doctrine of tribal sovereignty, which has a ''significant geo-

graphical component,'' requires us to ''revers[e]'' the ''general rule'' that ''exemptions from tax laws should . . . be clearly expressed.'' And we have determined that the geographical component of tribal sovereignty ''provide[s] a backdrop against which the applicable treaties and federal statutes must be read.'' (internal cites omitted, quoting from *Oklahoma Tax Commission v. Sac and Fox Nation,* 508 U.S. 114 (1993) and *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980)) *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95 (2005)

[W]e have concluded that ''[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.'' (quoting *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973)) *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95 (2005)

If a State may apply a nondiscriminatory tax to Indians who have gone beyond the boundaries of the reservation, then it follows that it may apply a nondiscriminatory tax where, as here, the tax is imposed on non-Indians as a result of an off-reservation transaction. *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95 (2005)

We must decide whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority. We conclude that Congress does possess this power. *U.S. v. Lara,* 541 U.S. 193 (2004)

[i]n *Duro v. Reina,* [*Duro v. Reina,* 495 U.S. 676 (1990)], this Court had held that a tribe no longer possessed *inherent or sovereign authority* to prosecute a ''nonmember Indian.'' But it pointed out that, soon after this Court decided *Duro,* Congress enacted new legislation specifically authorizing a tribe to prosecute Indian members of a different tribe. [Act of Oct. 28, 1991, 105 Stat. 646]. That new statute, in permitting a tribe to bring certain tribal prosecutions against nonmember Indians, does not purport to delegate the Federal Government's own *federal* power. Rather, it enlarges the *tribes'* own ''powers of self-government'' to include ''the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all* Indians,'' including nonmembers. 25 U.S.C. § 1301(2) (emphasis added in original). *U.S. v. Lara,* 541 U.S. 193 (2004)

We assume, . . . that Lara's double jeopardy claim turns on the answer to the ''dual sovereignty'' question. What is ''the source of [the] power to punish'' nonmember Indian offenders, ''inherent *tribal* sovereignty'' or delegated *federal* authority? [quoting *United States v. Wheeler,* 435 U. S. 313 (1978)]. We also believe that Congress intended the former answer. The statute [Act of Oct. 28, 1991, 105 Stat. 646] says that it ''recognize[s] and affirm[s]'' in each tribe the *''inherent'' tribal* power (not delegated federal power) to prosecute nonmember Indians for misdemeanors. (emphasis added in original, internal cites omitted) *U.S. v. Lara,* 541 U.S. 193 (2004)

Thus the statute [Act of Oct. 28, 1991, 105 Stat. 646] seeks to adjust the tribes' status. It relaxes the restrictions, recognized in *Duro,* [*Duro v. Reina,* 495 U.S. 676 (1990)], that the political branches had imposed on the tribes' exercise of inherent prosecutorial power. *U.S. v. Lara,* 541 U.S. 193 (2004)

[t]he [U.S.] Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ''plenary and exclusive.'' This Court has traditionally identified the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as sources of that power. *U.S. v. Lara,* 541 U.S. 193 (2004)

The ''central function of the Indian Commerce Clause,'' we have said, ''is to provide Congress with plenary power to legislate in the field of Indian affairs.'' (quoting *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163 (1989)) *U.S. v. Lara,* 541 U.S. 193 (2004)

We recognize that in 1871 Congress ended the practice of entering into treaties with the Indian tribes. 25 U.S.C. § 71. But the statute saved existing treaties from being ''invalidated or impaired,'' and this Court has explicitly stated that the statute ''in no way affected Congress' plenary powers to legislate on problems of Indians,''(quoting *Antoine v. Washington,* 420 U.S. 194 (1975)) *U.S. v. Lara,* 541 U.S. 193 (2004)

Congress, with this Court's approval, has interpreted the Constitution's ''plenary'' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority. *U.S. v. Lara,* 541 U.S. 193 (2004)

Congress has also granted tribes greater autonomy in their inherent law enforcement authority (in respect to tribal members) by increasing the maximum criminal penalties tribal courts may impose. § 4217, 100 Stat. 3207–146, codified at 25 U.S.C. § 1302(7) (raising the maximum from ''a term of six months and a fine of $500'' to ''a term of one year and a fine of $5,000''). *U.S. v. Lara,* 541 U.S. 193 (2004)

[o]ur conclusion that Congress has the power to relax the restrictions imposed by the political branches on the tribes' inherent prosecutorial authority is consistent with our earlier cases. *U.S. v. Lara,* 541 U.S. 193 (2004)

[t]hese holdings [referring to *United States v. Wheeler,* 435 U.S. 313 (1978); *Oliphant v. Suquamish Tribe,* 435 U.S. 191 (1978); *Duro v. Reina,* 495 U.S. 676 (1990)] reflect the Court's view of the tribes' retained sovereign status *as of the time* the Court made them. They did not set forth constitutional limits that prohibit Congress from changing the relevant legal circumstances, *i.e.,* from taking actions that modify or

adjust the tribes' status. *U.S. v. Lara*, 541 U.S. 193 (2004)

Oliphant and *Duro* [*Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *Duro v. Reina*, 495 U.S. 676 (1990)] make clear that the Constitution does not dictate the metes and bounds of tribal autonomy, nor do they suggest that the Court should second-guess the political branches' own determinations. *U.S. v. Lara*, 541 U.S. 193 (2004)

Wheeler, *Oliphant*, and *Duro*, [*United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *Duro v. Reina*, 495 U.S. 676 (1990)] then, are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes. And that fact makes all the difference. *U.S. v. Lara*, 541 U.S. 193 (2004)

[t]he Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians. We hold that Congress exercised that authority in writing this statute [Act of Oct. 28, 1991, 105 Stat. 646]. *U.S. v. Lara*, 541 U.S. 193 (2004)

The Court has often said that ''every clause and word of a statute'' should, ''if possible,'' be given ''effect.'' (quoting *United States v. Menasche*, 348 U.S. 528 (1955)) *Chickasaw Nation v. United States*, 534 U.S. 84 (2001)

The Court has also said that ''statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.'' (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985)) *Chickasaw Nation v. United States*, 534 U.S. 84 (2001)

[t]he canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed. See *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988) *Chickasaw Nation v. United States*, 534 U.S. 84 (2001)

Nor can one say that the pro-Indian canon is inevitably stronger–particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue. This Court's earlier cases are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength. (internal cite omitted) *Chickasaw Nation v. United States*, 534 U.S. 84 (2001)

Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States*, 450 U.S. 544 (1981) *Nevada v. Hicks*, 533 U.S. 353 (2001)

Where nonmembers are concerned, the ''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.'' (emphasis in original, quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is ''necessary to protect tribal self-government or to control internal relations.'' It may sometimes be a dispositive factor. *Nevada v. Hicks*, 533 U.S. 353 (2001)

[t]he absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* [*Montana v. United States*, 450 U.S. 544 (1981)] the extension of tribal civil authority over nonmembers on non-Indian land. *Nevada v. Hicks*, 533 U.S. 353 (2001)

[t]he existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers. *Nevada v. Hicks*, 533 U.S. 353 (2001)

[T]hat Indians have ''the right . . . to make their own laws and be ruled by them,'' (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them. *Nevada v. Hicks*, 533 U.S. 353 (2001)

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 a reservation's border. 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.'' (quoting both *Worcester v. Georgia*, 6 Pet. 515, 561 (1832), *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

Ordinarily, it is now clear, ''an Indian reservation is considered part of the territory of the State'' (quoting U.S. Dept. of Interior, Federal Indian Law 510, Note 1 (1958)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the principle that Indians have the right to make their own laws and be governed by them requires ''an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.''(quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156 (1980)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in en-

couraging tribal self-government is at its strongest (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land. *Nevada v. Hicks*, 533 U.S. 353 (2001)

It is also well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed (as was the alleged poaching in this case) off the reservation. (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)) *Nevada v. Hicks*, 533 U.S. 353 (2001)

We conclude . . ., that tribal authority to regulate state officers in executing process related to the violation, off 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.'' *Nevada v. Hicks*, 533 U.S. 353 (2001)

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

The States' inherent jurisdiction on reservations can of course be stripped by Congress. *Nevada v. Hicks*, 533 U.S. 353 (2001)

Sections 1152 and 1153 of Title 18, which give United States and tribal criminal law generally exclusive application, apply only to crimes committed *in Indian Country;* Public Law 280, codified at 18 U.S.C. § 1162 which permits some state jurisdiction as an exception to this rule, is similarly limited. *Nevada v. Hicks*, 533 U.S. 353 (2001)

25 U.S.C. § 2804 which permits federal-state agreements enabling state law-enforcement agents to act on reservations, applies only to deputizing them for the enforcement of federal or tribal criminal law. Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation. *Nevada v. Hicks*, 533 U.S. 353 (2001)

25 U.S.C. § 2806 affirms that ''the provisions of this chapter alter neither . . . the law enforcement, investigative, or judicial authority of any . . . State, or political subdivision or agency thereof. . . .'' *Nevada v. Hicks*, 533 U.S. 353 (2001)

This historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts. *Nevada v. Hicks*, 533 U.S. 353 (2001)

Respondents' contention that tribal courts are courts of ''general jurisdiction'' is also quite wrong. A state court's jurisdiction is general, in that it ''lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe.'' [quoting from *Tafflin v. Levitt,* 493 U.S. 455 (1990)] Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.(internal cites omitted) *Nevada v. Hicks*, 533 U.S. 353 (2001)

It is true that some statutes proclaim tribal-court jurisdiction over certain questions of federal law.(quoting 25 U.S.C. § 1911 (Indian Child Welfare Act of 1978); 12 U.S.C. § 1715 (foreclosures brought by the Secretary of Housing and Urban Development against reservation homeowners)). But no provision in federal law provides for tribal-court jurisdiction over § 1983 [42 U.S.C. § 1983] actions. *Nevada v. Hicks*, 533 U.S. 353 (2001)

Were § 1983[42 U.S.C. § 1983] claims cognizable in tribal court, defendants would inexplicably lack the right available to state-court § 1983 defendants to seek a federal forum. *Nevada v. Hicks*, 533 U.S. 353 (2001)

[t]he simpler way to avoid the removal problem is to conclude (as other indications suggest anyway) that tribal courts cannot entertain § 1983 suits. *Nevada v. Hicks*, 533 U.S. 353 (2001)

Since it is clear, as we have discussed, that tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties, adherence to the tribal exhaustion requirement in such cases ''would serve no purpose other than delay,'' and is therefore unnecessary. *Nevada v. Hicks*, 533 U.S. 353 (2001)

State officials operating on a reservation to investigate off-reservation violations of state law are properly held accountable for tortious conduct and civil rights violations in either state or federal court, but not in tribal court. *Nevada v. Hicks*, 533 U.S. 353 (2001)

Tribal jurisdiction is limited: For powers not expressly conferred them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty. *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

An Indian tribe's sovereign power to tax–whatever its derivation–reaches no further than tribal land. *Atkinson Trading Company v. Shirley, Jr. et al..*, 532 U.S. 645 (2001)

. . . we think the generalized availability of tribal services patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land. The consensual relationship must stem from ''commercial dealing, contracts, leases, or other arrangements,'' *Montana* [450 U.S. 544 (1981)], and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite

connection. *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

Congress has authorized the Commissioner of Indian Affairs ''to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.'' [25 U.S.C. § 261] *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

Irrespective of the percentage of non-Indian fee land within a reservation, *Montana*'s [450 U.S. 544 (1981)], second exception grants Indian tribes nothing ''beyond what is necessary to protect tribal self-government or to control internal relations.'' (quoting from *Strate v. A–1 Contractors*, 530 US 438 (1997)) *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

Indian tribes are ''unique aggregations possessing attributes of sovereignty over both their members and their territory,'' but their dependent status generally precludes extension of tribal civil authority beyond these limits. (quoting *United States v. Mazurie,* 419 U.S. 544 (1975)) *Atkinson Trading Company v. Shirley, Jr. et al.*, 532 U.S. 645 (2001)

the Court explained, ''the inherent sovereign powers of an Indian tribe''—those powers a tribe enjoys apart from express provision by treaty or statute—''do not extend to the activities of nonmembers of the tribe.'' (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non Indians on their reservations, even on non Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non Indians on fee 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. (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Montana thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare .. (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

National Farmers and *Iowa Mutual*, [*National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9 (1987)] we conclude, are not at odds with, and do not displace, *Montana.* Both decisions describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction; neither establishes tribal court adjudicatory authority, even over the lawsuits involved in those cases. *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

[W]e do not extract from *National Farmers* anything more than a prudential exhaustion rule, in deference to the capacity of tribal courts ''to explain to the parties the precise basis for accepting [or rejecting] jurisdiction.'' (quoting *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845 (1985)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Respect for tribal self government made it appropriate ''to give the tribal court a full opportunity to determine its own jurisdiction.'' (quoting *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9 (1987)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

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.... ''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.'' (quoting *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9 (1987)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

[t]hat state courts may not exercise jurisdiction over disputes arising out of on reservation conduct—even over matters involving non Indians—if doing so would ''infring[e] on the right of reservation Indians to make their own laws and be ruled by them.'' (quoting *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382 (1976)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Recognizing that our precedent has been variously interpreted, we reiterate that *National Farmers* and *Iowa Mutual* [*National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9 (1987)] enunciate only an exhaustion requirement, a ''prudential rule,'', based on comity. These decisions do not expand or stand apart from *Montana*'s instruction on ''the inherent sovereign powers of an Indian tribe.'' [*Montana v. United States*, 450 U.S. 544 (1981)] (internal citations omitted) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of ''inherent sovereignty.'' Regarding activity on non Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise ''forms of civil jurisdiction over

non Indians.'' As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal court jurisdiction, we adhere to that understanding. (quoting *Montana v. United States*, 450 U.S. 544 (1981)) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana,[Montana v. United States*, 450 U.S. 544 (1981)] the civil authority of Indian tribes and their courts with respect to non Indian fee lands generally ''do[es] not extend to the activities of nonmembers of the tribe.'' *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

A grant over land belonging to a tribe requires ''consent of the proper tribal officials,'' § 324, and the payment of just compensation, § 325. [25 U.S.C. §§ 323–328] *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

So long as the stretch [of road] is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude. *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

[t]hose who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s [*Montana v. United States*, 450 U.S. 544 (1981)] second exception requires no more, the exception would severely shrink the rule. *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

Read in isolation, the *Montana* [*Montana v. United States*, 450 U.S. 544 (1981)] rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: ''Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self government or to control internal relations.'' (quoting Montana) *Strate v. A–1 Contractors*, 520 U.S. 438 (1997)

[W]e reject the arguments that (a) tribal statutory authority merely allowing for notation of a lien, (b) the title form itself or (c) a general right to go to tribal court would substitute for tribal law concerning perfection. *Malloy v. Wilserv Credit Union*, 516 F.3d 1180 (10th Cir. 2008)

''Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1).'' *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1302–03 (10th Cir. 2001) (citation omitted). *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

''Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.'' [quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

The Court held specifically that Title I of the ICRA–the same statute upon which the Miner parties base some of their claims for relief–did not abrogate tribal sovereign immunity, and therefore suits against a tribe under the ICRA are barred. [quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S.751, 754 (1998), the Supreme Court affirmed that, ''[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.'' While noting that ''[t]here are reasons to doubt the wisdom of perpetuating the doctrine,'' it nonetheless rejected the defendant's invitation to narrow the scope of tribal sovereign immunity. The Court recognized that it had ''taken the lead in drawing the bounds of tribal immunity,'' but it deferred to Congress to limit or abrogate the doctrine through legislation, as it has done with respect to limited classes of suits.(internal quotes omitted) *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

This court has applied the Supreme Court's straightforward test to uphold Indian tribes' immunity from suit. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

We disagree that federal-question jurisdiction negates an Indian tribe's immunity from suit. Indeed, nothing in § 1331 unequivocally abrogates tribal sovereign immunity. In the context of the United States' sovereign immunity, we have held that ''[w]hile 28 U.S.C. § 1331 grants the court jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States, it does not independently waive the Government's sovereign immunity; § 1331 will only confer subject matter jurisdiction where some other statute provides such a waiver.'' [quoting from *High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006)](quotation omitted), *cert. denied*, 127 S.Ct. 2134 (2007)(citations omitted in original). *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Tribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States. [quoting *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319–20 (10th Cir. 1982)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Therefore, in an action against an Indian tribe, we conclude that § 1331 will only confer subject matter jurisdiction where another statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its im-

munity. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

We noted that Indian tribes' ''limited sovereign immunity from suit is well-established'' and that the tribe in that case ''ha[d] not chosen to waive that immunity.'' We then proceeded to consider whether the tribe's sovereign immunity extended to the tribal-officer defendants, holding: When the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked. If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit. Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess. [internal cites omitted by author. Quoting from *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

We also concluded that, in the suit against the tribal officers, the extent of the tribe's sovereignty to enact the challenged ordinances raised a federal issue sufficient for federal-question jurisdiction in the district court. [quoting from *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Like this case, *Tenneco* involved two different aspects of an Indian tribe's ''sovereignty'': its immunity from suit and the extent of its power to enact and enforce laws affecting non-Indians. But it does not stand for the proposition, as the Miner parties suggest, that an Indian tribe cannot invoke its sovereign immunity from suit in an action that challenges the limits of the tribe's authority over non-Indians. On the contrary, we held in *Tenneco* that the tribe was immune from suit. [quoting from *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

We distinguished *Santa Clara Pueblo*, [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)] noting that the Supreme Court in that case emphasized the availability of the tribal courts and the intra-tribal nature of the issues, whereas in *Dry Creek [Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980)] the plaintiffs were non-Indians who had been denied any remedy in a tribal forum. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

This court later expressly limited the holding in *Dry Creek* [non-Indian denied any remedy in a tribal court forum, *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980)] to apply only where the tribal remedy is ''shown to be nonexistent by an actual attempt'' and not merely by an allegation that resort to a tribal remedy would be futile. [quoting *White v. Pueblo of San Juan*, 728 F.2d 1307 (10th Cir. 1984)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

The *Dry Creek* rule has ''minimal precedential value''; in fact, this court has never held it to be applicable other than in the *Dry Creek* [*Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980)] decision itself. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

The Miner parties clearly fail to come within the narrow *Dry Creek [Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980)] exception to tribal sovereign immunity. Considering whether they could have brought this action in the Tribal Court rather than the district court, they hypothesize that the Nation would have claimed immunity from suit in that forum as well. But they must show an actual attempt; their assumption of futility of the tribal-court remedy is not enough. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Moreover, ''[a] tribal court's dismissal of a suit as barred by sovereign immunity is simply not the same thing as having no tribal forum to hear the dispute.''[quoting *Walton v. Tesuque Pueblo*, 443 F.3d 1274 (10th Cir.) (reversing district court's denial of motion to dismiss where tribal defendants did not waive immunity and no statute authorized the suit), (internal cites omitted)] *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

We conclude that, in the absence of congressional abrogation of tribal sovereign immunity from suit in this action, or an express waiver of its sovereign immunity by the Nation, the district court erred in failing to grant the Nation's motion to dismiss. *Miner Electric and Russell Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007)

Indian tribes possess the same immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo*, [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)]. As with other forms of sovereign immunity, tribal immunity ''is subject to the superior and plenary control of Congress.'' Accordingly, absent explicit waiver of immunity or express authorization by Congress, federal courts do not have jurisdiction to entertain suits against an Indian tribe. (internal cites omitted). *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

In *Santa Clara Pueblo*, [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)] the Supreme Court held that the ICRA [Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303] does not authorize the maintenance of suits against a tribe nor

does it constitute a waiver of sovereignty. Further, the ICRA does not create a private cause of action against a tribal official. The only exception is that federal courts do have jurisdiction under the ICRA over habeas proceedings. (internal cites omitted) *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

Dry Creek [Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980)] has come to stand for the proposition that federal courts have jurisdiction to hear a suit against an Indian tribe under 25 U.S.C. § 1302, notwithstanding *Santa Clara Pueblo*, [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)]when three circumstances are present: (1) the dispute involves a non-Indian; (2) the dispute does not involve internal tribal affairs; and (3) there is no tribal forum to hear the dispute. Our jurisprudence in this field is circumspect, and we have emphasized the need to construe the *Dry Creek* exception narrowly in order to prevent a conflict with *Santa Clara*.(internal cites omitted) *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

[f]ederal courts do have jurisdiction under the ICRA [Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303] to entertain habeas proceedings. Specifically, 25 U.S.C. § 1303 makes available to any person ''[t]he privilege of the writ of habeas corpus . . ., in a court of the United States, to test the legality of his detention by order of an Indian tribe.'' *Walton v. Pueblo et al.*, 443 F.3d 1274 (10th Cir. 2006)

Restricted Indian land is ''land or any interest therein, the title to which is held by an individual Indian, subject to Federal restrictions against alienation or encumbrance.'' 25 C.F.R. § 152.1(c). Such land is generally entitled to advantageous tax treatment. [quoting *Oklahoma Turnpike Authority v. Bruner*, 259 F.3d 1236 (10th Cir.2001) (''Income derived by individual Indians from restricted allotted land, held in trust by the United States, is subject to numerous exemptions from taxation based on statute or treaty.'')] *Estate of Bruner v. Bruner*, 338 F.3d 1172 (10th Cir. 2003)

This Court acknowledged Oklahoma did not take steps to assume jurisdiction under the previous PL–280 in *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*. We held that ''[b]ecause Oklahoma did not take the appropriate steps to take jurisdiction under PL–280, the proper inquiry to be made in this case must focus upon the congressional policy of fostering tribal autonomy in the light of pertinent U.S. Supreme Court jurisprudence.'' *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

The IGRA provides at § 2710(d)(3)(C) a list of provisions which any negotiated tribal-state compact ''may'' include. ''May'' is ordinarily construed as permissive, while ''shall'' is ordinarily construed as mandatory. See *Osprey L.L.C. v. Kelly–Moore Paint Co., Inc.*, 1999 OK 50, 984 P.2d 194; *Shea v. Shea*, 1975 OK 90, 537 P.2d 417. Section 2710(d)(3)(C) provides in part: (C) Any Tribal–State compact negotiated under subparagraph (A) **may** include provisions relating to—(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; (ii) the **allocation** of criminal and civil **jurisdiction** between the State and the Indian tribe necessary for the enforcement of such laws and regulations;. . . . (emphasis added). The Compact here does not include any such allocation of jurisdiction. Instead, the Compact provides only: ''This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction'' and that tort claims may be heard in a ''court of competent jurisdiction.'' The Tribe could have, but did not, include such jurisdictional allocation in this Compact. Neither the IGRA nor the Compact as approved enlarged the Tribe's jurisdiction. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

A ''court of competent jurisdiction'' is one having jurisdiction of a person and the subject matter and the power and authority of law at the time to render the particular judgment. (string cites omitted) *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

The Compact is derived from the Oklahoma Statutes. It incorporates Oklahoma's Governmental Tort Claims Act (GTCA) into its provisions. The district courts of Oklahoma thus have subject matter jurisdiction of any claim arising under the GTCA, including one which originates under the Compact. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

In *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001), the Supreme Court recognized the authority of state courts as courts of ''general jurisdiction'' and further acknowledged our system of ''dual sovereignty'' in which state courts have concurrent jurisdiction with federal courts, absent specific Congressional enactment to the contrary. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

Thus, a tribal court is not a court of general jurisdiction. Its jurisdiction could be asserted in matters involving non-Indians **only** when their activities on Indian lands are activities that may be regulated by the Tribe. (citing *Nevada v. Hicks*, 533 U.S. 343 (2001)) *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

The Oklahoma district court is a ''court of competent jurisdiction'' to hear Cossey's tort claim. The Tribe's sovereign interests are not implicated so as to require tribal court jurisdiction under the exceptions in *Montana*, *supra*. Cossey's right to seek redress in the Oklahoma district court is guaranteed by our Constitution. Moreover, the United States Supreme Court has upheld *Montana* and the cases following it, indicating the Court's continued recognition of the need to protect the sovereign interests of Indian tribes, while acknowledging the plenary powers

of the states to adjudicate the rights of their citizens within their borders. *Cossey v. Cherokee Nation*, 212 P.3d 447 (Okla. 2009)

Tribal criminal jurisdiction may extend to both member and non-member Indians. 25 U.S.C. § 1301(2); *United States v. Lara*, 541 U.S. 193 (2004). It does not extend to non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). That said, tribal officers do have the authority to investigate violations of law on tribal land, and detain persons, including non-Indians, suspected of violating the law. *Duro v. Reina*, 495 U.S. 676 (1990) (internal cites omitted) *United States v. Green*, 140 Fed.Appx. 798 (10th Cir. 2005)

[t]ribal authorities may investigate unauthorized possession of firearms on gaming premises which is proscribed by tribal law. *See* Muscogee (Creek) Nation Code Ann., tit. 21., § 5–116(C). *United States v. Green*, 140 Fed. Appx. 798 (10th Cir. 2005)

An officer may seize evidence of a crime if it is in plain view, its incriminating character is immediately apparent, and the officer has a lawful right of access to the item. *Horton v. California*, 496 U.S. 128 (1990) *United States v. Green*, 140 Fed.Appx. 798 (10th Cir. 2005)

§ 3. [Official seal]

The official seal of The Muscogee (Creek) Nation shall be the Seal as is illustrated:

Cross References

Great seal and official flag, see Title 37, § 1–101 et seq.
Ordinances, orders, resolutions or other acts to be stamped with seal, see Const. Art. VI, § 6.
Unauthorized use of the Great Seal of the Muscogee (Creek) Nation, see Title 14, § 2–504.