MUSCOGEE (CREEK) NATION CODE ANNOTATED

CONSTITUTION OF THE MUSCOGEE (CREEK) NATION

[ANNOTATED]

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UNDER THE GUIDANCE OF THE ALMIGHTY GOD, OUR CREATOR, WE THE PEOPLE OF THE MUSCOGEE (CREEK) NATION, TO PROMOTE UNITY, TO ESTABLISH JUSTICE, AND SECURE TO OURSELVES AND OUR CHILDREN THE BLESSINGS OF FREEDOM, TO PRESERVE OUR BASIC RIGHTS AND HERITAGE, TO STRENGTHEN AND PRESERVE SELF AND LOCAL GOVERNMENT, IN CONTINUED RELATIONS WITH THE UNITED STATES OF AMERICA, DO ORDAIN AND ESTABLISH THIS CONSTITUTION FOR THE MUSCOGEE (CREEK) NATION.

Notes of Decisions

Authority 1

1. Authority

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)

[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

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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)

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)

[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)

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)

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)

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)

[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.*

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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)

[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 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]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)

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

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federal court, but not in tribal court. *Nevada v. Hicks*, 533 U.S. 353 (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)

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)

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)

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 reserva-

tion, *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)

''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)

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)

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)

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 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)

The Court has no doubt that the political resourcefulness and resiliency exhibited for so long by the Creek Nation will finally enable the tribe to remove the uncertainty that has for so long dominated its political life and recapture the cherished self-determination that is its legal and moral right. The United States has given its word; the promise must be kept. *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

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

1. [Name and organization of tribe].
2. [Political jurisdiction].
3. [Official seal].

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

Construction and application 1
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1. Construction and application

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