



CIVIL AND REGULATORY JURISDICTION: RESERVATION STATUS

BY

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[I]n matters involving jurisdiction on Indian reservations, we often are unable to know what the law is until the United States Supreme Court tells us what it is. – Chief Justice Vande Walle, North Dakota Supreme Court¹

I. Overview

There are three potential sovereigns that may be able to assert jurisdiction in matters arising within Indian country: tribal government, state government, or the federal government. Which sovereign is legally capable of asserting jurisdiction turns on two questions: (1) the political identity of the parties involved; and (2) the location of the action giving rise to the matter.

A. Political Identity

In matters related to Indian country, the determination of which court has jurisdiction turns in part on the political identity of the parties involved. There are three possible political identities: (1) member Indian, (2) non-member Indian, and (3) non-Indian.

B. Location – What is Indian Country?

Indian country is more than reservation land. Indian country is defined at 18 U.S.C. § 1151. See also United States v. Sandoval. Although this is part of the criminal section of the Code, the Supreme Court has applied the definition in the civil context. 18 U.S.C. § 1151 provides that Indian country includes: (1) all land within a reservation, notwithstanding issuance of a patent and including rights of way; (2) dependent Indian communities; and (3) all allotments.

¹ *Winer v. Penny Enters., Inc.*, 674 N.W.2d 9, 18 (N.D. 2004) (Vande Walle, C.J., concurring specially).

In addition to 18 U.S.C. § 1151, the U.S. Supreme Court announced a test to help determine whether an area of land is Indian country. Under this test, the Court will ask whether the area has been validly set apart for the use of the Indians as such under the superintendence of the Government.

- **Oklahoma Tax Comm'n v. Sac and Fox Nation (1993) – Reservations**

Oklahoma sought to impose income tax on employees of the Tribe. Tribal land had been reduced to 800 acres. The Oklahoma Tax Commission sought to place a motor vehicle tax on tribal members who lived and garaged their cars in the territory, but not necessarily on the 800 acres. Both the federal district and circuit courts found in favor of the Tribe. The Supreme Court held that Oklahoma cannot impose income taxes or motor vehicle taxes on the Tribe without explicit congressional permission to do so.

The Commission argued that the reservation had been diminished and there was no longer a formal reservation. However, the Court explained that it is not necessary to have a formal reservation for there to be Indian country. Congress defined Indian country broadly. Unless there is explicit congressional authorization, the presumption is against the ability of the state to regulate.

- TAKE AWAYS

- Indian country is broader than reservation lines.
- There is a presumption against state regulation in Indian country unless specifically authorized by Congress.

- **Alaska v. Native Village of Venetie Tribal Government (1998) – Dependent Indian Communities**

A reservation was created by the Secretary of the Interior in 1943. Congress enacted the Alaska Natives Claims Settlement Act (ANCSA) in 1971. ANCSA extinguished all aboriginal title, reconveyed 44 million acres to the Native people, and also distributed \$942 million to the Natives. The Act also created over 200 village corporations and 12 regional corporations. All assets were transferred to the corporations. The Native corporation land that remained undeveloped and unleased to third parties was immune from state taxation for 20 years (extended indefinitely by 1991 Amendments). The purpose of the Act was to end federal supervision over Indian affairs and to settle all land claims. ANCSA abolished aboriginal claims to Alaskan lands.

Under the Act, fee title was conveyed from the U.S. to Native corporations, who in turn transferred title to the Native Village of Venetie tribal government. The Native Village sought to tax private contractors building a public school in the area, and the state sued.

The Court evaluated whether the land owned in fee by the Village of Venetie was Indian country. The Court found that the land was not Indian country. ANCSA specifically revoked reservation and allotment land in Alaska. The

Court therefore focused on whether the land in question was part of a dependent Indian community. In deciding whether this was a dependent Indian community, the Court looked to whether the land was set aside by the federal government for the use of Indians and whether the land was under federal superintendence. The Court found that after ANCSA the lands are no longer set aside for Indian usage under the superintendence of the federal government.

- TAKE AWAYS
 - Except for one reservation in Alaska, there is no Indian country in Alaska.
 - The U.S. Supreme Court established a test that can be used to determine whether land is part of a dependent Indian community. Generally, this test evaluates whether the land in question is set aside for Indian usage under federal superintendence.

- **Diminishment v. Disestablishment.** Indian country may be diminished, but, if it is disestablished, it is no longer Indian country. As a result, courts will often evaluate to determine whether tribes have been diminished or disestablished. In Solem v. Bartlett, 465 U.S. 463 (1984), the Court considered whether a crime that was committed on a portion of the Tribe's land that had been opened for allotment occurred in Indian country. The Court indicated that in determining whether there was diminishment or disestablishment the necessary factors to consider were: (1) whether there is language of cessation; (2) whether the legislative history suggests there was agreement about cessation; and (3) what occurred after the land was opened. In Solem, the Court found no conclusive evidence that the land had been disestablished.
 - Two recent U.S. Supreme Court cases are examining questions of reservation diminishment or disestablishment:
 - **Nebraska v. Parker**, 136 S. Ct. 1072 (2016): The Omaha Tribe amended its Beverage Control Ordinance and sought to apply it against retailers in the village of Pender, which the Tribe alleged was located within its reservation. The plaintiffs, the owners of clubs and venues that sold alcoholic beverages in Pender, Nebraska, joined by the state of Nebraska, sued for injunctive relief and argued that they are not located on federally-recognized Indian reservation land and therefore were not under the jurisdiction of the Omaha Tribe. Both the federal district court and the U.S. Court of Appeals for the Eighth Circuit found against the plaintiffs, concluding that the reservation had not been diminished. The U.S. Supreme Court affirmed the lower court.

Relevant to resolution of this case were actions related to the Tribe's reservation in the nineteenth century. In 1854 and 1865,

the Tribe and federal government entered into treaties that resulted in land from the Tribe's reservation being ceded to the federal government. In 1872 and 1882, land was also taken from the reservation, but in a different way. In both 1872 and 1882, Congress passed acts allowing for the Tribe's reservation land to be surveyed, appraised, and tracts of land sold. The proceeds of these sales were to be put in a fund for the Tribe's benefit. Neither of the acts specified that these sales diminished the reservation. Under the 1882 Act, W.E. Peebles purchased a tract of land and established the village of Pender. As mentioned above, in 2006, the Tribe amended its Beverage Control Ordinance, and applied it to alcohol retailers in the village of Pender.

The issue in this case is whether the passage of the 1882 Act diminished the original boundaries of the Omaha Indian Reservation. The Court unanimously found that it did not. Justice Thomas wrote the opinion. In reaching this conclusion, the Court explained that only the clear intent of Congress can determine when tribal land is diminished. Because the 1882 Act only allowed for the Tribe to sell plots of tribal lands to non-tribal members and there was no clear indication that Congress intended to diminish the reservation, the Omaha Tribe's boundaries had not been diminished. Further, the Court did look at the surrounding circumstances and historical evidence, but there was not enough evidence to overcome this presumption against diminishment. Similarly, the Court can look to subsequent demographic history and treatment of the land by government officials, but such considerations have never been the sole basis for a conclusion that land had been diminished. While there was evidence of limited tribal presence in the area and government officials not treating the land as reservation land, the Court concluded that this was not enough information to overcome the presumption. The Court explained that, because the issues were not raised on appeal, it declined to address whether equitable considerations such as laches and acquiescence may curtail the Tribe's ability to apply its Ordinance against the plaintiffs.

- **Murphy v. Royal**, 875 F.3d 896 (10th Cir. 2017)²: An Oklahoma prisoner was convicted of first degree murder and sentenced to death. Following his conviction, he filed a writ of habeas corpus arguing that, because the murder occurred within the Muscogee (Creek) Reservation, the state court did not have jurisdiction in the matter. The relevant question of Indian law before the Tenth Circuit was whether

² Note that this is actually the opinion denying rehearing en banc. However, in the opinion denying en banc rehearing, the court attached a revised version of the panel decision, which is why the en banc decision is cited here.

the Muscogee (Creek) Reservation had been diminished or disestablished. The court held that the reservation had not been disestablished, and, as a result, the federal government and not the state had jurisdiction over the crime.

Mr. Murphy is a citizen of the Muscogee (Creek) Nation. He was charged with murdering another man. After his conviction in state court, Mr. Murphy raised the question of the status of the land where the murder was allegedly committed. If the land in question was Indian country, then the state would not have jurisdiction over the crime, as the Major Crimes Act would apply giving the federal government jurisdiction. The court therefore focused on whether the land in question was Indian country, or, in the alternative, if the Muscogee (Creek) Nation's reservation had been disestablished and therefore the land in question was no longer Indian country.

As a starting point, the court explained that the Major Crimes Act, 18 U.S.C. §1153, applies to major crimes, including murder, committed within Indian country. The Major Crimes Act makes jurisdiction over such crimes concurrent between the federal government and tribe. Jurisdiction does not depend on whether the victim is an Indian. Further, "all lands within the boundaries of a reservation have Indian country status" for purposes of the Major Crimes Act. *Murphy*, 875 F.3d at 917. Accordingly, if the murder occurred within the boundaries of the Muscogee (Creek) Reservation, then the federal government, and not the state, would have jurisdiction under the Major Crimes Act.

The court next focused on determining whether or not the land where the murder occurred was within the Muscogee (Creek) Reservation. Only Congress can diminish or disestablish an Indian reservation, so, in determining the status of the land, the court focused on the actions and intent of Congress. Courts cannot lightly infer disestablishment or diminishment, and, as a result, the presumption is against diminishment or disestablishment. The court looked for clear and plain intent that Congress wanted to diminish or disestablish the Reservation. The court applied the factors from the U.S. Supreme Court's decision in *Solem v. Bartlett*, 465 U.S. 463 (1984), to determine whether diminishment or disestablishment had occurred. Under *Solem*, courts examine the relevant statutory text to see if diminishment or disestablishment occurred. Explicit reference to cessation will indicate that Congress intended to diminish or disestablish the reservation. The second factor requires courts to consider events surrounding passage of the relevant congressional act. And, to a lesser extent, the third factor instructs courts to consider relevant subsequent historical treatment, such as how Congress treated

the land in question and demographics of the area. *Murphy*, 875 F.3d at 920-21. Finally, courts must resolve any ambiguities in the favor of tribes. *Id.* at 921.

The court then went on to apply the three *Solem* factors to the present case. The court explained that, as to the first factor, there are no “magic” words of cessation. The court provided extensive detail related to the history of the Muscogee (Creek) Nation. As to the first factor, the court concluded that “[t]he most important evidence – the statutory text – fails to reveal disestablishment at step one. Instead, the relevant statutes contain language affirmatively recognizing the Creek Nation’s borders.” *Id.* at 937. In terms of the second and third factors, the court concludes that the evidence is “mixed” and does not clearly support or negate disestablishment or diminishment. Accordingly, since ambiguities are to be resolved in favor of tribes, the court concludes that there is no evidence to support a finding of diminishment or disestablishment. *Id.* at 954-66. The court ultimately holds that the evidence does not support a finding that the reservation was diminished or disestablished, and, as a result, the state did not have jurisdiction over the alleged crimes committed by Mr. Murphy.

The U.S. Supreme Court granted the writ of certiorari on May 21, 2018, and oral argument was held on November 27, 2018. The Court requested supplemental briefing on two questions: (1) Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area’s reservation status. (2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U. S. C. §1151(a). At the time of writing the U.S. Supreme Court has not issued its opinion.

II. Civil Jurisdiction

a. Civil Jurisdiction in Indian Country Generally

Although civil jurisdiction in Indian country is a complicated area of federal Indian law with many exceptions, a few guidelines provide a starting point for understanding civil jurisdiction in Indian country. Generally, tribal courts have exclusive jurisdiction³ where: 1) the matter occurs in Indian country and involves both Indian plaintiffs and Indian defendants; or 2) the matter occurs in Indian country, and the defendant is a member of the tribe. Tribal courts may have concurrent jurisdiction with state courts where: 1) the matter occurs outside of Indian country and involves both Indian plaintiffs

³ This assumes the incidents at issue do not implicate state interests outside of Indian country. In *Nevada v. Hicks*, 533 U.S. 353, 362 (2001), the Supreme Court indicated that a state may have jurisdiction over incidents occurring within Indian country if the incidents implicate state interests beyond Indian country.

and Indian defendants; 2) the matter occurs outside of Indian country and involves an Indian defendant; 3) the matter occurs in Indian country, and the plaintiff is Indian but the defendant is not; 4) the matter occurs on non-Indian fee land within Indian country, and the plaintiff is Indian, but the defendant is not; or 5) the matter occurs in Indian country, and both the plaintiff and defendant are non-Indians. State courts have exclusive jurisdiction where: 1) the matter occurs outside of Indian country, and the defendant is a non-Indian; or 2) the matter occurs either outside of Indian country or on Indian country fee lands, and both the plaintiff and defendant are non-Indians.⁴ Furthermore, federal courts may have civil jurisdiction over matters occurring in Indian country when either federal statutes or federal common law provide a basis for the cause of action.

b. Tribal Court Civil Jurisdiction

As mentioned above, the civil jurisdiction of tribal courts turns on the status of the plaintiff and defendant, as well as the location of the incident.⁵ One of the first U.S. Supreme Court cases to address the question of tribal civil jurisdiction was Williams v. Lee, 358 U.S. 217 (1959). In Williams, a unanimous Court held that state courts have no jurisdiction over transactions arising on the Navajo reservation and involving an Indian defendant. Because of the status of the defendant and the location of the transaction, the Court reasoned that state court jurisdiction in the matter “would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.” Id. at 223. The Court applied similar reasoning in Fisher v. District Court, 424 U.S. 382 (1976), where it determined that tribal courts have exclusive jurisdiction over matters involving Indian plaintiffs and Indian defendants when the matter occurs in Indian Country. The Fisher Court explained that tribal court subject matter jurisdiction over tribal members is a matter of tribal law, and, therefore, there is no federal limitation on tribal court jurisdiction over tribal members. See id. at 389. Following Williams and Fisher, tribal courts have civil jurisdiction over Indian defendants involved in incidents occurring within Indian country. Yet, if the actions of the Indians in Indian country implicate a state interest, the state may have the authority to assert jurisdiction over matters occurring within Indian country. See Nevada v. Hicks, 533 U.S. 353, 362 (2001) (holding that Nevada had the ability to execute a search warrant for evidence in an off-reservation crime in an Indian’s home located on an Indian reservation).

Tribal jurisdiction, however, is not as clear when the defendant is a non-Indian. This is because “when nonmembers have a right to be in Indian Country by virtue of land ownership, the usual presumption favoring tribal jurisdiction is reversed.” Felix Cohen, Handbook of Federal Indian Law, 600-601 (LexisNexis Matthew Bender 2005).

⁴ See William C. Canby, Jr., American Indian Law in a Nutshell 225 (4th ed. 2004). Canby’s American Indian Law in a Nutshell is an excellent source on federal Indian law for an attorney who is new to the field, because it provides an adequate introduction to federal Indian law in an easy-to-use format.

⁵ This discussion of tribal court jurisdiction focuses on tribal court subject matter jurisdiction. Just as state and federal courts must have personal and subject matter jurisdiction to assert authority over a matter, so too must tribal courts have personal and subject matter to assert jurisdiction over a matter. In the case of federal Indian law, it is likely that if a tribal court has subject matter jurisdiction, it will also likely have personal jurisdiction.

Accordingly, tribal courts typically do not have civil jurisdiction over non-Indian defendants, even for matters occurring in Indian country. The Supreme Court, however, in Montana v. United States, 450 U.S. 544 (1981), articulated two exceptions to this general prohibition of tribal court jurisdiction over non-Indians.⁶

To be sure, 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.

Id. at 565-566 (citations omitted). The Court's decision in Montana is commonly referred to as the Montana exception. It allows tribal courts to assert civil jurisdiction over non-Indians when the non-Indians either enter into a consensual relationship with the plaintiff, allowing for tribal court jurisdiction, or when the non-Indians' activities threaten the health, welfare, economic security or political integrity of the tribe. In reality, the second Montana exception allowing tribal courts to assert jurisdiction in instances where non-Indian conduct threatens the tribe's health, welfare, economic security or political integrity has rarely been applied by courts. As a result, tribal courts will have difficulty asserting jurisdiction over non-Indian defendants acting on non-Indian-owned land unless the non-Indian has entered into some consensual relationship with the plaintiff granting the tribe civil jurisdiction. Congress, however, has the authority to grant tribal courts jurisdiction over non-Indians. See City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 558 (8th Cir. 1993) (finding that Congress delegated tribes the authority to regulate liquor traffic of non-Indians within Indian Country).

⁶ Notably, Montana only addressed the authority of a tribe to regulate non-Indian-owned land within the borders of the tribe's reservation, and does not address the question of a tribe's authority over non-Indians acting on tribal trust land or tribally-owned land within the reservation. However, some may argue that the question of a tribe's authority of non-Indians acting on tribal trust land within the reservation was addressed by the Court in Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S.Ct. 2709 (2008). In Plains Commerce Bank, the Court considered an appeal from a tribal court decision awarding damages based on a discrimination complaint. The Indian plaintiffs alleged that the non-Indian owned Bank had discriminated against them by selling the land in question to non-Indians on terms more favorable than those offered to the Indian plaintiffs. The land in question was fee land within the reservation. In reaching its decision to overturn the tribal court's decision, the Court indicated that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 2718-2719. Notably, the Court went on to explain that this rule was "particularly strong" when applied to non-Indian owned land within the reservation but implied that the rule applied perhaps more weakly to situations involving nonmember activities on Indian owned or trust land.

Tribal court jurisdiction is not limited to matters that occur solely within Indian country. Tribal courts may have subject-matter jurisdiction over off-reservation treaty rights. See U.S. v. Sohappy, 770 F.2d 816, 819 (9th Cir. 1985) (finding that the tribe had concurrent jurisdiction with the federal government over fish caught outside of the reservation). Additionally, tribal courts may assert jurisdiction over matters occurring outside of Indian country if the matter involves internal concerns of the tribe. See John v. Baker, 982 P.2d 738, 756 (Alaska 1999) (“And tribal courts may also have jurisdiction to ‘resolve civil disputes involving nonmembers, including non-Indians’ when the civil actions involve essential self-governance matters such as membership or other areas where ‘the exercise of tribal authority is vital to the maintenance of tribal integrity and self-governance.’”) (citations omitted).

Despite circumstances that allow for tribal court jurisdiction, it is difficult for tribal courts to assert jurisdiction over non-Indian defendants. Circumstances under which tribes may assert jurisdiction outside of Indian country are further limited by the Supreme Court’s determination that a defendant’s identity is central to the determination of civil jurisdiction. See Nevada v. Hicks, 533 U.S. 353, 357-360 (2001). Furthermore, after litigating the jurisdictional issue in tribal court, litigants may challenge tribal court jurisdiction in federal court. See Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 856-857 (1985); but compare Nevada v. Hicks, 533 U.S. at 369 (finding that a state is not required to exhaust tribal remedies if exhaustion would only delay the proceeding because the tribal court clearly lacks jurisdiction).

c. Exhaustion of Tribal Remedies

Generally, a federal court will not take action in a matter arising in Indian country until a party shows that tribal remedies have been exhausted. The Supreme Court has indicated that federal courts should not address the question of whether tribal courts have jurisdiction until the appropriate tribal court has had the opportunity to address the question first. National Farmers Union Insurance Comp. v. Crow Tribe, 471 U.S. 845 (1985). “The current rule appears to be that federal courts must generally refuse to hear cases arising within Indian country until the tribal courts have had a chance to determine whether they have jurisdiction over the case.” Felix Cohen, *Handbook of Federal Indian Law*, 632 (LexisNexis Matthew Bender 2005). There are, however, exceptions to the exhaustion requirement. The U.S. Supreme Court declared that “where an assertion of tribal jurisdiction ‘is motivated by a desire to harass or is conducted in bad faith’ ... or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court’s jurisdiction.” National Farmers Union Insurance Comp. v. Crow Tribe, 471 U.S. 845, 856 n.21 (1985). Additionally, a tribe may opt to enter into a contract with a choice-of-forum clause, and, under such circumstances, the choice-of-forum clause may be directly enforced without first requiring exhaustion of tribal remedies. Finally, federal courts must generally defer to tribal court findings of facts, unless the tribal court findings of fact are clearly erroneous. Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1384 (10th Cir. 1996); Duncan Energy Co. v. Three Affiliated Tribes of the Ft. Berthold

Reservation, 27 F.3d 1294, 1300 (8th Cir. 1994); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990).

Additional Sources:

- Cohen's Handbook of Federal Indian Law (LexisNexis Matthew Bender 2012).
- William C. Canby, Jr., American Indian Law in a Nutshell (5th ed. 2009).