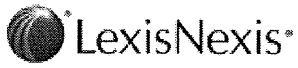

Cohen's Handbook of Federal Indian Law

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CHAPTER 6 TRIBAL/STATE RELATIONSHIP

1-6 Cohen's Handbook of Federal Indian Law § 6.02

§ 6.02 Tribal Governing Power

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[1] Tribal Authority Over Members

Strong federal judicial and legislative recognition of tribal governing authority has encouraged tribes to exercise their powers. Individual tribes have enacted regulations covering subject matter such as zoning, building codes, taxation, business licensing, conservation requirements, environmental controls, hunting and fishing, traffic rules, dog licensing, health requirements, sign laws, and most of the other police power regulations typically imposed by state and local governments. Virtually all challenges to tribal regulation have arisen in cases involving nonmembers of the tribe.

Tribal governing power is at its zenith with respect to authority over tribal members within Indian country.n116 The present right of tribes to govern their members and territories flows from a preexisting sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States. Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice. Neither the passage of time nor the apparent assimilation of Native peoples can be interpreted as a diminishment or an abandoning of a tribe's status as a self-governing entity. Once recognized as a political body by the United States, a tribe retains its sovereignty until Congress acts to divest that sovereignty.n117 The Supreme Court has observed that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."n118

In *United States v. Mazurie*,n119 the Supreme Court observed that tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory."n120 Even as it has limited tribal authority over nonmembers,n121 the Court has acknowledged that tribes' inherent sovereign authority includes the power to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance among members.n122 This authority over members extends to criminal as well as civil regulatory matters. Tribal jurisdiction over members is not limited to actions occurring within Indian country. In *John v. Baker*, the Alaska Supreme Court upheld a tribal court's authority to adjudicate a child custody dispute, arising outside of Indian country, between a member of an Alaska Native tribe and an Alaskan Native of another tribe who voluntarily submitted herself to the jurisdiction of the tribal court.n123 The court noted that "in determining whether tribes retain their sovereign powers, the Supreme Court looks to the character of the power that the tribe seeks to exercise, not merely the location of the events."n124 Other courts have recognized tribal power to regulate the exercise of off-reservation reserved treaty rights.n125

[2] Tribal Authority Over Nonmembers

[a] Generally

The Supreme Court has generally upheld tribal regulatory authority over non-Indians in Indian country. Indeed, the Court has never struck down a tribal tax or regulation of non-Indians engaged in a transaction or activity on Indian land.n126 In *Morris v. Hitchcock*,n127 the Court sustained a tribal tax on non-Indians' cattle-grazing activity on the

reservation. In *Washington v. Confederated Tribes of the Colville Indian Reservation*,n128 the Court stated that "[f]ederal courts ... have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity," and summarized the general rule as follows: "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."n129 In *Merrion v. Jicarilla Apache Tribe*,n130 the Court applied the rule to uphold a tribal oil and gas severance tax on a non-Indian company operating on the reservation. The Court stated that "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."n131 Furthermore, in *New Mexico v. Mescalero Apache Tribe*,n132 the Court applied these principles to uphold exclusive tribal licensing and regulation of non-Indian hunting and fishing on the reservation.

The involvement of a tribe or individual Indian as a landowner who can grant or deny entry is sufficient to sustain inherent tribal authority over the non-Indian transaction or activity.n133 The issue is not as easily resolved in the case of non-Indian owned land in Indian country. The principle that non-Indians in Indian country are subject to tribal law was stated in *Colville* in terms of transactions significantly involving a tribe or a tribal member.n134 Later, when cases arising on non-Indian owned reservation land reached the Supreme Court, a special rule was announced to cover these situations.

[b] On Non-Indian Land

A tribe's inherent sovereignty over its territory generally extends to the regulation of both members and nonmembers conducting activities on Indian land or affecting tribal interests. Nevertheless, a tribe's power to exercise its legislative and adjudicative power over nonmember conduct is more limited when it occurs on property owned by non-Indians within Indian country, unless the conduct threatens or affects Indian interests.

Thus, land ownership becomes relevant when the subject matter is nonmember conduct on non-Indian land in Indian country. The Supreme Court has asserted that treaty provisions securing tribal authority over reservation lands "must be read in light of the subsequent alienation of those lands."n135 Consequently, when non-Indians have a right to be in Indian country by virtue of land ownership, the usual presumption favoring tribal jurisdiction is reversed.

In *Montana v. United States*,n136 the Supreme Court held that the Crow Tribe did not have jurisdiction to regulate hunting and fishing by non-Indians on non-Indian owned fee land within the reservation under the circumstances of that case. The opinion acknowledges that the tribe could "prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe."n137 In addition, the Court recognized that, "[t]o 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."n138 But those inherent powers do not extend to all the activities of nonmembers of a tribe. Thus, the Court held that the circumstances in *Montana* did not justify the tribe's prohibition of fishing and hunting by nonmembers because there was no threat to a substantial tribal interest.n139 Not only did the non-Indians own their land in fee, but they were fishing and hunting on a river at the edge of the reservation, the bed of which, the Court held, was owned by the state.n140 They also had no contractual or commercial relationship with the tribe or its members.n141 Moreover, the tribe had not alleged that non-Indian hunting and fishing impaired its treaty rights or tribal members' subsistence, and there was no evidence "that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation."n142 The Court announced a test to be applied in such cases:

> 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 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.n143

In a 1989 case testing tribal regulation of land use on the Yakima Reservation, the Supreme Court reached no consensus on how to apply *Montana*. In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,n144 the Court held that the Yakima Nation could apply its land-use laws to nonmember-owned lands on one part of the reservation,

but not to those lands on another part. The Court's next significant application of the *Montana* test occurred in *Strate v. A-1 Contractors*.n145 In *Strate*, a non-Indian reservation resident brought suit in tribal court for personal injuries she sustained when a truck driven by a non-Indian driver collided with her car. The defendant challenged the court's jurisdiction. The Supreme Court found that the *Montana* criteria for establishing sufficient involvement of a tribe or its members to justify extension of tribal authority over nonmembers on non-Indian land had not been met.n146 First, the consensual relationship of the defendant to the tribe was too attenuated.n147 Although the defendant was present on the reservation to perform work pursuant to his employer's contract with the tribe, that contract was not necessary for the defendant to enter the reservation since he was on a state highway, for which the state had received an unrestricted right-of-way. In this respect, the right-of-way was tantamount to the fee title held by the non-Indians in *Montana*.n148 Presumably, the Court would have held otherwise if the tribe had retained the right to condition or limit entry, or if the right of the non-Indian defendant to enter the reservation could be revoked.

Applying the part of the test recognizing tribal jurisdiction when the tribe's political, economic, or health or welfare interests are affected, the Court held that, while careless drivers "surely jeopardize the safety of tribal members," to treat this as threatening the health or welfare of the tribe within the rule in *Montana* would "severely shrink" the rule.n149 One interpretation of the Court's holding is that no Indian or tribal interests in health or safety were actually, as opposed to theoretically, threatened by the accident in this case because both the actor and the injured parties were non-Indians.n150

The Court also applied *Montana* in *Atkinson Trading Co. v. Shirley*,n151 dealing with the authority of the Navajo Nation to levy a nondiscriminatory tax on overnight guests of a hotel located on non-Indian fee land within the boundaries of the Navajo Reservation. The Court held that the tribal tax was invalid as applied to nonmembers of the tribe.n152 The Court distinguished *Merrion v. Jicarilla Apache Tribe*, a case that validated a tribe's inherent sovereign power to tax non-Indians' economic activity within reservation boundaries as "a necessary instrument of self-government and territorial management."n153 Although language in *Merrion* "suggest[ed] a broader scope for tribal taxing authority," the Court noted that *Merrion* involved activity on tribal trust lands, not fee lands.n154 Like the Court's other tribal jurisdiction cases applying the *Montana* test, *Atkinson* has created further uncertainty about how that test should be applied in any particular factual setting.n155

It is not clear how the Supreme Court will apply *Montana* in future cases. In *Nevada v. Hicks*,n156 the Court invoked a modified version of the *Montana* test to deny tribal court jurisdiction over a tribal member's civil claims against state officials for conduct occurring on the tribal member's own land within reservation boundaries.n157 Although the *Hicks* Court opined that the *Montana* test applies to assertions of tribal power over nonmembers regardless of the ownership status of the land on which nonmember conduct occurs, the Court also expressly limited its holding to "the question of tribal-court jurisdiction over state officers enforcing state law."n158 Moreover, lower courts adhering to the Supreme Court's jurisdictional analysis in *Strate v. A-1 Contractors*,n159 have continued recognizing land status as a crucial threshold inquiry for ascertaining *Montana*'s applicability.n160

FOOTNOTES:

(n1)Footnote 116. *See* Ch. 4, § 4.01.

(n2)Footnote 117. *See* Ch. 3, § 3.02[5].*See, e.g., United States v. Long, 324 F.3d 475, 479-480 (7th Cir. 2003)* ; *Harjo v. Kleppe, 420 F. Supp. 1110 (D.D.C. 1976) aff'd sub nom. Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978)* .

(n3)Footnote 118. *United States v. Wheeler, 435 U.S. 313, 323 (1978)* ; *see also 55 Interior Dec. 14 (1934)* ; Felix S. Cohen, *Indian Rights and the Federal Courts, 24 Minn. L. Rev. 145, 183 (1940). See* Ch. 4, § 4.02.

(n4)Footnote 119. *United States v. Mazurie, 419 U.S. 544 (1975)* .

(n5)Footnote 120. *United States v. Mazurie, 419 U.S. 544, 557 (1975)* .

(n6)Footnote 121. *See* Ch. 4, § 4.02[3].

(n7)Footnote 122. *See* Ch. 4, § 4.01[2].

(n8)Footnote 123. *John v. Baker, 982 P.2d 738 (Alaska 1999)* .

(n9)Footnote 124. *John v. Baker, 982 P.2d 738, 752 (Alaska 1999)* . These tribal powers include the jurisdiction to determine ownership of tribal property. *See Chilkat Indian Village v. Johnson, 870 F.2d 1469 (9th Cir. 1989)* .

(n10)Footnote 125. *See Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974)* ; *United States v. Sohappy, 770 F.2d 816, 819 (9th Cir. 1985)* ; *see also* Ch. 18, § 18.04[3][a].

(n11)Footnote 126. *But, cf. Nevada v. Hicks, 533 U.S. 353 (2001)* (asserting that the tribe lacked adjudicative jurisdiction over state officials engaged in searching a tribal member's on-reservation property for evidence of an alleged off-reservation violation of state criminal law. *See* Ch. 7, § 7.01. The extent to which *Hicks* will have any further impact on existing doctrine sustaining tribal authority over nonmember conduct on tribal and trust lands is not clear. *See* Ch. 4, § 4.02[3][c][ii].

(n12)Footnote 127. *Morris v. Hitchcock, 194 U.S. 384 (1904)* ; *see* § 8.04[1].

(n13)Footnote 128. *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980)* .

(n14)Footnote 129. *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-153 (1980)* ; *Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956)* .

(n15)Footnote 130. *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)* .

(n16)Footnote 131. *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982)* .

(n17)Footnote 132. *New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)* .

(n18)Footnote 133. *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-148 (1982)* .

(n19)Footnote 134. *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980)* .

(n20)Footnote 135. *Montana v. United States, 450 U.S. 544, 561 (1981)* (discussing non-Indian fee lands alienated from tribal ownership as result of allotment legislation). The Court has treated as the equivalent of alienated, non-Indian fee land a highway right-of-way that was unconditionally granted to a state. *See Strate v. A-1 Contractors, 520 U.S. 438 (1997)* .

(n21)Footnote 136. *Montana v. United States, 450 U.S. 544 (1981)* . *See* Ch. 4, § 4.02[3].

(n22)Footnote 137. *Montana v. United States, 450 U.S. 544, 557 (1981)* .

(n23)Footnote 138. *Montana v. United States, 450 U.S. 544, 565 (1981)* .

(n24)Footnote 139. *Montana v. United States, 450 U.S. 544, 566-567 (1981)* .

(n25)Footnote 140. *Montana v. United States, 450 U.S. 544, 556-557 (1981)* .

(n26)Footnote 141. *Montana v. United States, 450 U.S. 544, 566 (1981)* .

(n27)Footnote 142. *Montana v. United States, 450 U.S. 544, 566 (1981)* .

(n28)Footnote 143. *Montana v. United States, 450 U.S. 544, 565-566 (1981)* .

(n29)Footnote 144. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989)* . *See* Ch. 4, § 4.02[3].

(n30)Footnote 145. *Strate v. A-1 Contractors, 520 U.S. 438 (1997)* . *See* Ch. 4, § 4.02[3].

(n31)Footnote 146. *Strate v. A-1 Contractors, 520 U.S. 438, 456-459 (1997)* .

(n32)Footnote 147. *Strate v. A-1 Contractors, 520 U.S. 438, 456-457 (1997)* .

(n33)Footnote 148. *See Strate v. A-1 Contractors, 520 U.S. 438, 454-456 (1997)* .

(n34)Footnote 149. *Strate v. A-1 Contractors, 520 U.S. 438, 457-458 (1997)* .

(n35)Footnote 150. *See Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997)* .

(n36)Footnote 151. *Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001)* . *See* Ch. 4, § 4.02[3], Ch. 8, § 8.04[2][b].

(n37)Footnote 152. *Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001)* .

(n38)Footnote 153. *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982)* .

(n39)Footnote 154. *Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 (2001)* .

(n40)Footnote 155. *See, e.g.*, Judith V. Royster, Oliphant *and Its Discontents: An Essay Introducing the Case for Reargument before the American Indian Nations Supreme Court*, 13 Kan. J.L. & Pub. Policy 59, 63-66 (2003); Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, a Theory that Has No Place in the Realm of Environmental Law, 7 Great Plains Nat. Res. J. 90, 97-106 (2002)* . *See also* Ch. 4, § 4.02[3].

(n41)Footnote 156. *Nevada v. Hicks, 533 U.S. 353 (2001)* .

(n42)Footnote 157. *See* Ch. 4, § 4.02[3][c][ii].

(n43)Footnote 158. *Nevada v. Hicks, 533 U.S. 353, 358 n.2 (2001)* .

(n44)Footnote 159. *Strate v. A-1 Contractors, 520 U.S. 438, 456-457 (1997)* .

(n45)Footnote 160. *See, e.g.*, *McDonald v. Means, 309 F.3d 530, 538 (9th Cir. 2002)* ; *Burlington Northern R.R. v. Red Wolf, 196 F.3d 1059, 1065 (9th Cir. 1999)* . *But see Smith v. Salish Kootenai College, 378 F.3d 1048, 1052 (9th Cir. 2004)* (opining that "*Montana* analysis applies whenever a party to a claim is a non-member"). *Nevada v. Hicks, 533 U.S. 353, 386 (2001)* (Ginsburg, J., concurring) (the question of *Montana*'s applicability to non-Indian conduct on tribal land remains open).