

TRIBAL COURT JURISDICTION

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The materials addressed below are not intended to be all encompassing given the broad range of issues that may arise in Indian law, and in the practice of law before Tribal and federal courts. The term “Indian” law is not derogatory, and there is an entire body of federal and Tribal decisional law that has developed, and is generally described as “Indian” law. No offense should be taken, and none is intended.

1. Congress

There are many different policies that have developed over the past 200 plus years concerning Tribal courts, and jurisdiction over non-members. Many Treaties were made, and broken, but more recently rights and entitlements by Treaties with the United States are being enforced by the courts.

Congress has plenary, or absolute, power over the Indian Tribes. Indian Tribes are separate but dependent sovereign nations within the United States. The policies of Congress have changed over the years, from eradication, assimilation, and more recently self-government, and allowing Indian Tribes to make their own laws and be governed by them.

2. Indian Tribes

Each federally recognized Indian Tribe that has followed the Indian Reorganization Act has developed their own laws, including individual Tribal Law and Order Codes. Each Tribal Code is different, and many include provisions, e.g. Tribal law, including customs and usage, applies in the first instance, unless inconsistent with federal law, and generally, the Tribe may follow some state laws, but is not necessarily bound by state laws, rules of procedure, and rules of evidence. Many Tribal courts require admission to practice by taking and successfully passing a Tribal bar exam, as opposed to *pro hac vice* admission for a particular case.

Enrollment in a federally recognized Indian Tribe is determined by a quantum of Indian blood, or so much percentage of Indian blood, as recognized by the Tribe, is required to become eligible to become an enrolled member of the Tribe. The courts have generally characterized this as a “political” classification, but in reality, such may call into play issues of fairness, potential discrimination, due process, and equal protection concerns.

Since Indian Tribes pre-date the United States Constitution, and the forefathers of this country chose not to invite Indian Tribes to the Constitutional Convention, the Tribes and Tribal courts are generally not bound by the protections under the United States Constitution. The Tribes are, however, bound by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, which at least one Circuit Court has said is to be a “conduit to transmit federal constitutional protections to those individuals subject to tribal jurisdiction.” *Red Fox v. Red Fox*, 564 F.2d 361 (9th Cir. 1977).

An Indian Tribe may have its own Constitution, and in most instances, a Tribal Council. A legislature within a State may pass laws allowing for concurrent jurisdiction, usually in felony criminal matters, and in some instances, defined civil conduct which allows concurrent jurisdiction between a State court and a Tribal court. Pub. Law 280.

Generally, by United States Supreme Court decisions, no Tribal court has criminal jurisdiction over non-members of the Tribe. Recently, Congress has considered expanding criminal jurisdiction over instances involving domestic abuse and an enrolled member of the Tribe.

3. Civil Subject Matter Jurisdiction

It is well-established that “an Indian tribe generally retains sovereignty by way of self-government and control over other aspects of its internal affairs.” *Montana v. U.S.*, 450 U.S. 544, 564 (1981); *see also Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 425 (1989). However, the U.S. Supreme Court recognized the “general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (citing *Montana*, 450 U.S. at 565). The Court has recognized:

[t]he general principle that 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.”

Brendale, 492 U.S. at 426 (citing *Montana*, 450 U.S. at 564); *see also S. Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993).

The United States Supreme Court decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), significantly limited the authority of Tribal courts in tort actions against a non-member of the Tribe. Although *Strate* involved a motor vehicle accident within a U.S Highway right-of-way, the Court in *Strate* held:

[T]ribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question.

Strate, 520 U.S. at 442. The important distinction in *Strate* is that a Tribal court lacks subject matter jurisdiction to entertain and decide claims because:

Absent express authorization by federal statute or treaty, tribal jurisdiction over nonmembers' conduct exists only in limited circumstances.

Strate, 520 U.S. at 439. These limited circumstances are defined in the *Montana* case, and its progeny. In the event no federal statute or treaty creates Tribal court jurisdiction, e.g. where there is no federal statute or treaty that creates Tribal court jurisdiction in claims arising out of an off Reservation sale of a product designed and manufactured outside of the exterior boundaries of the forum Reservation, there is no Tribal court jurisdiction. A significant jurisdictional issue is whether the Tribe controls the land on which the dispute arose. *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999).

In *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), the Ninth Circuit Court of Appeals was compelled to follow *Strate* in addressing the limitations of Tribal court jurisdiction over non-members. As in *Strate*, *Wilson* involved a motor vehicle accident on non-tribal land. However, the limitations on Tribal court jurisdiction, and tort actions against non-members, should apply equally in other civil actions, whether product liability, or otherwise.

In *Wilson* the court rejected the contention that Tribal self-government and internal affairs are involved whenever a Tribal member is allegedly injured. The court in *Wilson* stated:

It is difficult to argue that these important interests will be diminished, much less jeopardized, if *Wilson* must present her individual tort claims in state or federal court, where she has plain, speedy, and adequate remedies.

Wilson, 127 F.3d at 815.

The established “right of reservation Indians to make their own laws and be ruled by them” recognized in *Williams v. Lee*, 358 U.S. 217, 220 (1959) are not implicated in a typical civil action. Under *Strate*:

Neither regulatory nor adjudicatory authority over the . . . accident at issue is needed to preserve “the right of reservation Indians to make their own laws and be ruled by them.”

Strate, 520 U.S. at 459 (citing *Williams*, 358 U.S. at 220).

The powers of self-government “involve only the relations among members of a tribe.” *Yellowstone Co. v. Pease*, 96 F.3d 1169, 1174 (9th Cir. 1996); *cert. denied*, *Pease v. Yellowstone Co.*, 520 U.S. 1209 (1997) (citing *Montana*, 450 U.S. at 563-564, citing *U.S. v. Wheeler*, 435 U.S. 313 (1978)). In *Pease*, the Ninth Circuit Court of Appeals recognized that under *Montana*, a Tribe’s sovereignty regarding external relations with non-members has been divested. *Pease*, 96 F.3d at 1173. In *Montana*, the Court determined that regulation of hunting and fishing by non-members on non-tribal land “bears no clear relationship to tribal self-government or internal relations” *Montana*, 450 U.S. at 564. Likewise, an action against a non-member bears no clear relationship to Tribal self-government or internal relations.

In the *Montana* analysis of Tribal sovereignty, the Court in *Pease*

addressed circumstances within the exercise of Tribal power necessary to protect self-government or to control internal relations. For example: the power to punish Tribal offenders; the power to determine enrollment qualifications for Tribal membership; the power to regulate domestic relations among members; and the power to prescribe rules of inheritance for members. *Pease*, 96 F.3d at 1174. Such powers of self-government involve only relations among members of the Tribe. A contract, and/or tort action by Tribal members against a non-member lacks any relationship to Tribal self-government or internal relations. Accordingly, the general rule under *Montana* controls.

In the examination of the *Montana* decision, the Court in *Strate* stated:

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.

Strate, 520 U.S. at 446. The exceptions “cannot be construed in a manner that would ‘swallow the rule,’ or ‘severely shrink’ it.” *Plains Commerce Bank*, 554 U.S. at 330 (citing *Strate*, 520 U.S. at 458).

For example, a Tribal court arguably lacks the power to adjudicate any contract, sale, transaction, or otherwise, entered into outside of the exterior boundaries of the Reservation. The allegations do not amount to a “consensual relationship” that is within the first exception for Tribal court jurisdiction over nonmembers. Further, the second exception to the *Montana* rule, with regard to the Tribe's political integrity, economic security, health or welfare likely does not apply. See e.g. *Strate*, 520 U.S. at 446; *Wilson*, 127 F.3d at 813; *Austin's*

Express, Inc. v. Arneson, 23 M.F.R. 135 (1998); *Burlington N. R.R. Co. v. Est. of Red Wolf*, 106 F.3d 868 (9th Cir. 1997).

Absent express authorization by federal statute or treaty, and absent the applicability of either exception under *Montana*, a Tribal court lacks jurisdiction to entertain and decide an action against a non-member.

a. Do the recognized exceptions to the general rule under *Montana* apply?

The relevant Tribal court jurisdictional inquiry under the *Montana* decision must also address the two exceptions to the general rule, which are as follows:

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.” *Montana*, 450 U.S. at 565. Second, “[a] tribe may also . . . 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.” *Id.*, at 566.

Brendale, 492 U.S. at 428; *Plains Commerce Bank*, 544 U.S. at 330.

i. Is there a “consensual relationship” entered into on the Reservation?

In addressing the “consensual relationship” exception to the general rule under *Montana* as applied to the facts of the given case, it is important to determine whether any commercial dealings occurred within the exterior boundaries of the Reservation. See e.g. *Plains Commerce Bank*, 544 U.S. at 316 (consensual relationship exception to *Montana* general rule did not apply to sale of bank and claim of discrimination in lending practices); *Nevada v. Hicks*, 533 U.S. 353 (2001) (tribal court lacked jurisdiction to adjudicate tort and 42 U.S.C. § 1983 claims related to an off-reservation crime); *Atkinson Trading Co. v.*

Shirley, 532 U.S. 645 (tribe lacked authority to impose tax on non-member guests of hotel); *Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087 (8th Cir. 1998) (off-Reservation brewery manufacture, sale and distribution of malt liquor bearing name of Indian spiritual/political leader did not occur on Reservation land and, therefore, tribal court lacked jurisdiction). Further, a presence on the Reservation, in and of itself, may not be sufficient to establish Tribal court jurisdiction. See e.g. *Town Pump, Inc. v. LaPlante*, 394 Fed. Appx. 425, 2010 WL 3469578 (D. Mont. Sept. 30, 2010), affirming the Montana Federal District Court decision that neither exception to the *Montana* general rule applied. Tribal law and Order Code provisions may take a contrary position, e.g. contract to be performed, or sale on the Reservation, or doing business on the Reservation.

ii. Does the second exception to the general rule in *Montana* apply?

The second exception to the general rule in *Montana* may apply where there is a direct effect on the political integrity, economic security, or health and welfare of the Tribe as a whole. *Pease*, 96 F.3d at 1176-1177 (citing *Bourland*, 39 F.3d at 870, *aff'd* in 508 U.S. 679, see *Montana*, 450 U.S. at 566). The focus is on the interests of the Tribe as a whole, rather than the interests of individual members of the Tribe. In most cases, the alleged defective product, and other claims, do not affect the interests of the Tribe as a whole. An isolated alleged act of negligence was not found to threaten Tribal interests in *Azure v. U.S.*, 10 M.F.R. 343 (D. Mont 1991); *New Hampshire Ins. Co. v. U.S.*, 19 M.F.R. 25 (D. Mont. 1995); and *Wilson*, 127 F.3d 805. In *Wilson*, the Ninth Circuit Court of Appeals was compelled to follow *Strate* in addressing the limitations of Tribal

court jurisdiction over a non-member, and the Court indicated that individual tort claims may be raised in state or federal court, which present plain, speedy, and adequate remedies in tort actions against non-members. *Wilson*, 127 F.3d at 815.

4. Personal Jurisdiction

In addition to issues regarding whether or not a Tribal court lacks subject matter jurisdiction, personal jurisdiction issues may arise as well. The initial inquiry is whether the non-member has purposefully availed itself of any benefits and protections of Tribal laws and/or whether the non-member has consented to Tribal court jurisdiction. See e.g. *Town Pump, Inc. v. LaPlante*, 394 Fed. Appx. at 427; *Hanson v. Denckla*, 357 U.S. 235 (1958); and, *J. McIntyre Machinery Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011). Many Tribal Law and Order Codes contain provisions that assert personal jurisdiction over a non-member who may be found within the exterior boundaries of the Reservation, or where a contract is entered into, or is to be performed, on the Reservation. The Tribal Law and Order Code, however, cannot be inconsistent with the federal decisional law concerning limitations on personal jurisdiction.