# Statutory Divestiture of Tribal Sovereignty

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The Supreme Court's non-decision in *Dollar General v. Mississippi Band of Choctaw Indians*[1] is evidence not only of disagreement on tribal civil jurisdiction but perhaps also uncertainty in how to analyze divestiture of tribal sovereignty. Most scholars (including myself) have described the Court's behavior in tribal sovereign authority cases as one of judicial supremacy, in that the Court merely makes policy choices based on its own ideological views of tribal power.[2] That is a mistake. Persuaded by the federal government's argument in *Dollar General,* I now argue that the proper analysis rests with federal statutes. Indian law practitioners can and should reconsider the Court's prior decisions in this vein, as the best ones already do, and analyze tribal sovereign powers in the paradigm of statutory divestiture rather than judicial supremacy.

### The Law on Tribal Civil Jurisdiction Over Nonmembers on Tribal Lands

There is a lot of confusion about tribal jurisdiction over nonmembers, but a few areas are clear. It is well settled that Indian tribes may assert civil jurisdiction over nonmembers on tribal lands (lands owned or controlled by a tribe) where those nonmembers consent. Many nonmembers have entered into leases, vendor contracts, employment contracts, and any number of other arrangements where they have expressly consented to tribal jurisdiction by agreeing to comply with tribal laws.[3] Data on how many nonmembers have consented and what they have consented to is not readily available. Given that Indian tribes administer more than a billion dollars in federal contracts every year, extract billions of dollars in natural resources every year from their lands, and operate thousands of business enterprises, it should be apparent that many nonmembers are employed by and doing business with Indian tribes on tribal lands and under tribal laws and jurisdiction.

It is also fair to say that nonmember activities on tribal lands may be regulated and taxed by Indian tribes without their consent. The Supreme Court held in *Washington v. Colville Confederated Tribes*[4] and *Merrion v. Jicarilla Apache Tribe*[5] that Indian tribes retain the power to tax nonmember transactions on tribal lands.[6] In *New Mexico v. Mescalero Apache Tribe*, the Court held that tribes have authority to regulate nonmember hunting and fishing on tribal lands.[7] This kind of tribal jurisdiction is usually noncontroversial.

It is hotly contested whether nonmembers may be haled into tribal court as defendants to tort claims arising on tribal lands. What we do know is that nonmembers may bring a federal action to challenge tribal court jurisdiction but only after exhausting their tribal remedies.[8] Tribal exhaustion may be excused if the tribal court action is brought to harass defendants, brought in bad faith, is barred by an act of Congress, or is futile. We also know that the so-called *Montana* test, presumptively barring tribal jurisdiction over nonconsenting nonmembers, is the leading rule.[9]

To date, the Supreme Court in a limited universe of cases has not confirmed tribal court jurisdiction over nonconsenting nonmember defendants, except in dicta. In *Iowa Mutual Ins. Co. v. LaPlante*, the Court held that nonmembers must fully exhaust their tribal trial *and* appellate court remedies before challenging tribal court jurisdiction in federal court, stating: "Civil jurisdiction over [nonmember] activities *presumptively lies in the tribal courts* unless affirmatively limited by a specific treaty provision or federal statute."[10] In *Nevada v. Hicks*, the Supreme Court held that tribal courts have no jurisdiction over civil rights claims brought under 42 U.S.C. § 1983 against state officials.[11] The Court affirmed in dicta that, absent a federal statute divesting a tribe of jurisdiction, there was "little doubt" that a tribe could enforce its tort laws upon nonmembers on tribal lands.[12] But that Court also reserved for another day whether the presumption stated in *Iowa Mutual* was a meaningful precedent.[13]

The Ninth Circuit effectively follows the Supreme Court's statement that tribal jurisdiction over nonmembers on tribal lands is presumptive. In *Water Wheel Camp Recreational Area Inc. v. LaRance*, the court held that an Indian tribe may assert jurisdiction over nonmembers for trespass (and for breach of a lease) on tribal lands on the theory that "the tribe has regulatory jurisdiction through its inherent authority to exclude."[14] In short, the tribe as landowner and as sovereign has inherent authority to assert jurisdiction, absent controlling federal legislation to the contrary. The Ninth Circuit also held that *Montana* does not even apply on tribal lands, a holding consistent with the outcomes in cases like *Colville*, *Merrion*, and *Mescalero*, but potentially inconsistent with *Hicks*.

The Fifth Circuit has also approved tribal court jurisdiction over nonmember torts on tribal lands, but applies the more cautious rule, the *Montana* test. In *Dolgencorp Inc. v. Mississippi Band of Choctaw Indians*, the court held that the tribal court had jurisdiction over a tribal member's claim of sexual molestation by the defendant's employee.[15] Other circuits also apply the *Montana* test, and at least one circuit has held that a tribal court may exercise jurisdiction over nonmember torts committed on tribal lands.[16]

As a practical matter, even absent a Supreme Court ruling confirming tribal jurisdiction over nonmembers on tribal lands, Indian tribes routinely exercise authority over nonmembers. Most of that

authority is exercised by consent, but even in cases where nonmembers challenge tribal jurisdiction on tribal lands, tribal jurisdiction is usually confirmed. Nonmembers, after all, must exhaust tribal remedies before they can challenge tribal jurisdiction in federal court.

### The Law on Tribal Civil Jurisdiction Over Nonmembers on Nonmember Lands

The general rule announced by the Supreme Court is that Indian tribes do not retain civil jurisdiction over nonmembers on nonmember lands, with two (actually three) exceptions. The Supreme Court announced this test in *Montana v. United States*, where it held that the Crow Nation did not retain authority to impose hunting and fishing regulations on nonmember activities on state- or privately-owned lands.[17] The Court also held that the Crow Nation did not meet any of the possible exceptions to the general rule. The first exception, usually known as the consensual relations exception (or the *Montana 1* exception), provides, "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."[18] The second exception (or the *Montana 2* exception) provides, "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."[19] There is also a third exception—a tribe may regulate nonmembers in accordance with an "express congressional delegation."[20]

In the *Montana* case, nonmembers trying to fish on their own lands (or state lands) on the Crow Reservation did not consent under the first exception and did not implicate any of the critical factors in the second exception. And there was no express congressional delegation of authority to the tribe to regulate nonmember hunting and fishing. Importantly, the Court "readily agree[d]" that if the Crow Nation was seeking to prohibit or regulate nonmember hunting and fishing on tribal lands, the tribe possessed this authority.[21]

In the decade or more after *Montana*, the Supreme Court addressed several jurisdictional disputes arising on *tribal* lands (cases such as *Colville*, *Merrion*, and *Mescalero*, discussed above) without much reference to *Montana*'s general rule or its exceptions. In 1997, in *Strate v. A-1 Contractors*, the Court labeled *Montana* as the "pathmarking" precedent in jurisdictional disputes arising on nonmember lands.[22] There, the Court held that the tribal court at what is now known as the Mandan Hidatsa Arikara Nation (then the Three Affiliated Tribes) could not have asserted jurisdiction over a tort claim involving two nonmembers where the alleged accident occurred on a highway maintained and patrolled by the state. The Court held that the highway was not tribal land and, therefore, applied the *Montana* test. Because the tribal nation was a "stranger[] to the accident," the Court concluded that there could have been no consensual relationship between the tribe and the parties.[23] And because the tort claim itself did not implicate the capacity of the tribe to "preserve 'the right of reservation Indians to make their own laws and be ruled by them,'" the plaintiff could not meet the second exception, either.[24]

In several cases arising on nonmember lands both before and after *Strate*, the Court narrowly construed the *Montana* exceptions and repeatedly refused to confirm tribal civil jurisdiction over nonmembers. In *South Dakota v. Bourland*,[25] the Court held that the Cheyenne River Sioux Tribe could not regulate nonmember hunting on nonmember lands taken by the federal government for a dam project. In *Atkinson Trading Co. Inc. v. Shirley*,[26] the Court held that the Navajo Nation had no authority to impose taxes on a nonmember trading post on nonmember lands within the vast Navajo reservation. In *Plains Commerce Bank v. Long Family Land & Cattle Co.*,[27] the Court held that the Cheyenne River Sioux Tribal Court could not assert jurisdiction over a nonmember bank that a tribal jury found had discriminated against a tribal member-owned ranching company, again on nonmember-owned lands.

There are few lower court decisions confirming tribal jurisdiction over tortious nonmember activity on nonmember lands, though many nonmembers have expressly consented to tribal jurisdiction in an agreement of some sort. The most critical cases involve tribal regulation of nonmember point source water polluters under the Clean Water Act.[28] In *State of Montana v. EPA*, the court concurred with EPA's determination that "activities of the nonmembers posed such serious and substantial threats to tribal health and welfare that tribal regulation was essential."[29] As these cases show, nonconsenting nonmembers are likely to avoid tribal jurisdiction unless their activities "imperil" the tribe's ability to self-govern.[30] In *Plains Commerce Bank*, the Court reasoned that the sale of nonmember-owned lands to another nonmember "cannot fairly be called 'catastrophic' for tribal self-government."[31] In the morbid world of the *Montana* test, potential environmental devastation may justify tribal authority but mere death and dismemberment of tribal members does not.[32]

### The Narrative of 'Implicit Divestiture' and Judicial Supremacy

The Supreme Court initially, and commentators ever since, have referred to the limitations on tribal civil jurisdiction over nonmembers as a product of "implicit divestiture."[33] The Court's decision in *Oliphant v. Suquamish Indian Tribe*[34] is seen as the starting point of an era of what some have called "judicial supremacy" in Indian affairs.[35]

In *Oliphant*, the Supreme Court held that Indian tribes do not possess the authority to prosecute non-Indians (later, all nonmembers).[36] Prior to *Oliphant*, the courts had analyzed divestiture of tribal authority under a rubric that presumed the retention of tribal power absent a controlling Act of Congress, a reserved rights doctrine first suggested by Felix S. Cohen in the original *Handbook of Federal Indian Law* in 1940.[37] But in *Oliphant*, the Court seemed to reverse that analysis where the exercise of power by Indian tribes was "inconsistent with their status."[38] The Court could not find a federal statute or a prior judicial precedent to serve as controlling authority and chose to parse through centuries of federal pronouncements to announce the existence of "the commonly shared presumption of Congress, the executive branch, and lower federal courts that tribal courts do not have the power to try non-Indians."[39] The Court seemingly tried to marry the Cohen formulation of tribal powers with its own analysis by adding, "'Indian law' draws principally upon the treaties drawn and executed by the executive branch and legislation passed by Congress. These instruments … beyond their actual text form the backdrop for the intricate web of judicially made Indian law."[40]

It was language referring to vague notions such as "inconsistent with their status," "commonly shared presumption[s]," and "judicially made Indian law" that must have led many commentators to conclude the Supreme Court was arrogating to itself the power to decide the scope of tribal powers. The scholarly criticism of *Oliphant* is voluminous and well deserved.[41] It didn't help that there seemed to

be little or no guidance from Congress to contain judicial discretion.

In the civil jurisdiction context, the Court's reliance on federal historical sources helped tribal interests block an *Oliphant*-style bright line rule that would have eliminated all tribal authority over nonmembers. In *National Farmers Union*, the Court expressly rejected an invitation to bar tribes from exercising any form of jurisdiction over nonmembers, reasoning that no federal statute "grant[s] the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation."[42]

Importantly, in *National Farmers Union*, the Court reoriented its understanding of *Oliphant* by pointing out that the 1790 Trade and Intercourse Act was the federal statute upon which that holding rested: "Congress' decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian country supported the holding in *Oliphant*."[43] In short, the act can be readily interpreted to mean that Congress federalized Indian country crime by non-Indians, thereby divesting tribes of that power. That is exactly how the Supreme Court in *National Farmers Union* viewed *Oliphant*. This statement more accurately reflects how practitioners and judges should analyze the state of the law of tribal jurisdiction.

### Statutory Explanations for Tribal Divesture Cases

Every major case involving the divestiture of tribal civil jurisdiction over nonmembers can be traced to a federal statute. Absent such a federal statute, tribal power over nonmembers should be retained under the reserved rights doctrine articulated by Cohen in 1940.

The simplest case is *El Paso Natural Gas Co. v. Neztsosie*.[44] There, the Supreme Court rejected tribal court jurisdiction over certain uranium-mining-based tort claims. The Price-Anderson Act expressly routed all such claims to federal courts, effectively pre-empting tribal court jurisdiction.[45] This is express statutory divestiture.

Most tribal civil jurisdiction cases involving nonmember land can be explained by federal statutes that alienate tribal lands to nonmembers. This could be construed as implicit statutory divestiture. In *Montana*, the divestiture of tribal regulatory jurisdiction over the nonmember landowners can be traced to the allotment statutes that divested the Crow Nation of those lands. The Ninth Circuit stated exactly that: "It defies reason to suppose that Congress intended that nonmembers who reside on fee patent lands could hunt and fish thereon only by consent of the tribe."[46] The Supreme Court adopted this reasoning, holding that federal and tribal power over nonmembers could only exist on tribal lands: "If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians."[47] The Court adopted the same reasoning in *Plains Commerce Bank*[48] and *Bourland*.[49] In short, the Court has repeatedly held that the federal allotment statutes alienating lands to nonmembers were inconsistent with continued tribal jurisdiction over those lands. Read in this light, these are not cases of implicit divestiture or judicial supremacy—they are cases of statutory divestiture.

Similarly, in *Strate*, the Supreme Court focused on the federal statute that authorized the United States and the tribe to grant a right-of-way to the state.[50] The specific grant reserved to the tribe's members the right to construct crossings over the easement, but "the Three Affiliated Tribes expressly reserved no right to exercise dominion or control over the right-of-way."[51] Again, this is no mere implicit divestiture, it is statutory divestiture.

In *Atkinson Trading*, the Court noted that the land upon which the nonmember trading post had been acquired as an original fee patent from the federal government.[52] Later, Congress expanded the Navajo Reservation to include the trading post, but did not authorize the tribe to assert jurisdiction over the nonmember land within its expanded jurisdiction. The Court seemed to focus on the fact that this land had never been in tribal hands after the federal government's alienation of the land to nonmembers. Here, although the Court doesn't mention the specific statute, the relevant law is likely a homestead act of some sort (or perhaps an Indian trader law) that governed the alienation of federal lands to American citizens.

Similar to *El Paso*, *Hicks* involved a § 1983 claim, a federal civil rights statute that effectively foreclosed tribal court jurisdiction over the state officials who were the defendants.[53] The statute was enacted as part of the Civil Rights Act of 1871 and was designed to provide a remedy for persons harmed by state officials' refusal to stop Ku Klux Klan abuses. Section 1983 is a limited abrogation of state sovereign immunity, and likely Congress did not anticipate state officials would be sued in tribal courts. The *Hicks* Court also noted that § 1983 suits are intended to be removable to federal court, which isn't available to tribal court defendants.[54] *Hicks* is an easy case in that tribal jurisdiction over state officers simply could not coexist with a limited federal abrogation of state sovereign immunity.

In two cases, the Court confirmed tribal jurisdiction to tax nonmembers even with the presence of a federal statute that could have been construed to divest tribes of that power. In *Merrion*, the Court held that the tribal power to tax was an inherent power.[55] The Court also held that a tribe could place conditions on nonmembers' entrance to tribal lands arising from the power of exclusion.[56] The Court added that the secretary of the interior had approved the tribal ordinance that imposed the tax.[57] The approval requirement came from the tribal constitution, which itself was a product of § 16 of the Indian Reorganization Act.

That approval begged the question answered by the Court in *Kerr-McGee*, whether secretarial approval was required to tax nonmembers. There, the Navajo Nation had no tribal constitution and did not seek secretarial approval of its taxation of nonmembers. The Court confirmed that the tribal power to tax nonmembers on tribal lands was inherent, and that the Indian Reorganization Act did not require secretarial approval.[58]

In sum, federal statutes, and not judicial common-lawmaking, are at the core of the reasoning in these decisions. A federal statute may still effect the implicit divestiture of tribal authority where the tribe's authority should not or cannot operate in the same space as the federal statute, as in *Hicks*. But the Supreme Court is not merely making federal common law from scratch in these cases, nor should it be encouraged to do so in the future.

### *Dollar General* and Statutory Divestiture

The Supreme Court's affirmation of tribal jurisdiction over a nonmember by an equally divided vote, meaning the Court generated no opinions, might seem like the wrong place to begin reconsidering tribal civil jurisdiction. Though the parties focused their written arguments on the *Montana* rubric, at oral argument the (rather heated) discussion often focused on the federal statutory framework.[59]

The story of *Dollar General* is troubling. Dollar General leased trust land from the Mississippi Choctaw tribe. In the lease documents, the company agreed to resolve disputes arising from the lease

in tribal court. The company also agreed to comply with all tribal laws. As a side agreement later, the store manager agreed to host tribal member children through a tribal work-study arrangement, to be paid by the tribe. A store employee, Dale Townsend, allegedly molested a tribal member employee, a teenager. The matter was referred to state and federal prosecutors, but they declined to prosecute. The child's family then sued both the store and the employee in Mississippi Choctaw tribal court, seeking more than $1 million in damages, including punitive damages.

The tribal court denied Dollar General's motion to dismiss, and the tribal appellate court affirmed upon interlocutory appeal. Though the case never went to trial, the appellate court's decision apparently satisfied the nonmembers' obligation to exhaust remedies. The federal courts held that the work-study arrangement authorized tribal court jurisdiction, but that the lease arrangement did not. The lease arrangement holding is highly contestable, and the tribal interests disputed that holding before the Court.

Dollar General argued in its petition for certiorari that tribal courts are unfair to nonmembers and asked the Court to bar tribal jurisdiction over nonmembers completely, absent congressional authorization.[60] In its merits brief, Dollar General shifted its strategy away from criticizing tribal courts. This is smart, because the Mississippi Choctaw tribal court is a renowned judiciary and to claim that this particular court is incompetent or unfair is disingenuous at best. Moreover, Dollar General knew that the chances of prevailing under the Montana consensual relations test was poor given the company's express consent to at least some form of tribal jurisdiction. The tribe's brief focused heavily on that consent, and the tribe's counsel even read from the lease agreement during oral argument. Still, that Dollar General asked the court to focus on constitutional issues helped to frame the argument in terms of statutory divestiture.

The United States framed part of its argument in terms of statutory divestiture. That brief concludes with engaging in the federal statutory framework.[61] Instead of locating a federal statute that would be inconsistent with tribal court jurisdiction over nonmember torts, the United States found several statutes that implicitly confirmed tribal authority.

First, the Indian Civil Rights Act (ICRA) applies to "any person" within tribal jurisdiction, including nonmembers.[62] The statute also helps answer the recurring question of how American constitutional rights norms apply to tribal actors where the Constitution is inapplicable to Indian tribes.[63]

Second, Congress repeatedly has stated its support for tribal court jurisdiction:

> Congress [declared] that "Congress and the federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands." 25 U.S.C. § 3651(6) (enacted in 2000); *see* 25 U.S.C. § 3601(6) (similar finding enacted in 1993). Along with the recognition that "tribal justice systems are an essential part of tribal governments," 25 U.S.C. §§ 3601(5), 3651(5), that understanding has formed the backdrop for Congress's multiple efforts to strengthen tribal courts rather than simply shunt their cases into other forums.[64]

The federal government, which looked for federal statutes that could be interpreted as divesting tribes of jurisdiction, found only support. Congress has not recently stripped tribes of jurisdiction but has instead acknowledged or vested tribes with additional authority in the so-called "Duro Fix,"[65] reaffirming tribal criminal jurisdiction over nonmember Indians, and the Violence Against Women Reauthorization Act of 2013,[66] extending criminal jurisdiction over non-Indian domestic violence perpetrators to qualifying tribes.

Dollar General, and the justices in apparent support of its position, argued that Article III of the Constitution, which provides for any case filed in the state or federal courts to potentially (hypothetically) be reviewed by the Supreme Court as a statutory divesture of tribal jurisdiction. They argued that tribal court decisions cannot be reviewed by, or removed to, Article III courts, absent congressional authorization. According to Dollar General (and perhaps up to four justices), ICRA is insufficient to protect nonmembers from potential unfairness in relation to juries, punitive damages, and other due process questions. *National Farmers Union*, which interpreted 28 U.S.C. § 1331 to allow Article III courts to hear nonmember challenges to tribal court jurisdiction, should take some of the wind out of the sails of that argument. Moreover, the freedom to contract allows American citizens to contract away their right to sue in federal or state courts, which suggests that nonmembers like Dollar General can do the same. Still, the 4-4 tie suggests that some justices are persuaded by these constitutional arguments.

These efforts to tie the Constitution to tribal jurisdiction, if they are to have any import, may require the Supreme Court to reconsider its prior holdings that tribal governments are not constrained by the Constitution. Such a holding may require a fundamental rethinking of Indian law. After all, as Justice Antonin Scalia once wrote, "It would be absurd to suggest that the tribes surrendered [authority] in a convention to which they were not even parties."[67] If Dollar General's consent to tribal jurisdiction in the form of participating in the tribe's work-study program is barred by the Constitution, then perhaps all nonmember consent is barred as well. There's no sense in that, unless the paternalistic program of the Supreme Court is to legally and economically segregate Indian tribes and tribal members away from their business partners and employees.

### Tribal Exclusion Power and *Montana*

Underlying presumptive tribal authority over nonmember activity on tribal lands is tribal property ownership and the tribal power of exclusion from their lands. Tribal civil jurisdiction over nonmembers on tribal lands has a robust territorial sovereignty component. As the United States argued in *Dollar General*, tribal inherent authority to regulate nonmember conduct may derive from land ownership and might not be subject to the *Montana* analysis at all.[68]

The United States argued that the Supreme Court's decisions in this area have a strong territorial component.[69] For example, in *Merrion v. Jicarilla Apache Tribe*[70] the Court held that tribal inherent power alone authorized the tribe to tax nonmember activities on tribal lands. More recently, the government argued, the Court in *Plains Commerce Bank* had reaffirmed the notion that inherent tribal sovereignty alone authorized tribal jurisdiction over nonmembers on nonmember lands.[71] The government concluded that "in addition to 'interests in protecting internal relations and self-government,' tribes retain 'inherent sovereign authority to set conditions on entry' and otherwise 'superintend tribal land'—the same powers that supported the tax in *Merrion* irrespective of consent."[72]

This is the view of the Ninth Circuit,[73] though other circuits more conservatively apply *Montana* on tribal lands as well.[74] However, because the Supreme Court directly applied the *Montana* test in *Hicks*,[75] it would take a Supreme Court decision to settle this question once and for all.

Whether or not *Montana* applies on tribal lands, tribal land-ownership should be dispositive in almost all cases, excepting suits against officials and governments protected by sovereign immunity, as in *Hicks*. More and more each year, *Hicks* appears to be the true outlier case.

### Skewing Tribal Jurisdiction Doctrine Through the Certiorari Process

Nonmembers routinely consent to tribal jurisdiction. The state of Michigan has even consented to tribal court jurisdiction to resolve disputes under a tax agreement with Michigan tribes.[76] But the certiorari process virtually guarantees that the cases the Supreme Court is likely to hear are outlier matters, where well-funded nonmembers have an incentive to fight until the end. This small universe of cases has the potential to skew the Court's doctrine on tribal jurisdiction.

It is well known that the Supreme Court's docket is completely discretionary, at least since 1988.[77] Most of the Court's docket comes from lower court splits in authority, most especially circuit splits. Indian law is different, it seems, in that there are far fewer circuit splits. In *none* of the dozen or so cases involving tribal civil jurisdiction over nonmembers was there a split in authority, largely because these cases are so heavily bound in the unique facts of each case.[78] The Court has already stated the applicable law, one could argue, in *Montana*, and all the cases that have followed are mere fact-bound disputes over the application of settled law. And yet the Court continues to grant cert.

| Case | Petitioner | Tribal Action | Land Ownership | Governing Law | Prevailing Party |
|---|---|---|---|---|---|
| *Washington v. Colville Confederated Tribes,* 447 U.S. 134 (1980) | Nonmember | Tax | Tribal | Inherent Tribal Sovereignty | Tribal Interest |
| *Montana v. United States,* 450 U.S. 544 (1981) | Nonmember | Hunting and Fishing Licensure | Nonmember | *Montana* | Nonmember |
| *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 139 (1982) | Nonmember | Tax | Tribal | Inherent Tribal Sovereignty | Tribal Interest |
| *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983) | Nonmember | Hunting and Fishing Licensure | Tribal | Inherent Tribal Sovereignty | Tribal Interest |
| *Kerr-McGee v. Navajo Tribe,* 471 U.S. 195 (1985) | Nonmember | Tax | Tribal | Inherent Tribal Sovereignty | Tribal Interest |
| *National Farmers Union v. Crow Tribe,* 471 U.S. 845 (1985) | Nonmember | Tort Claim | Tribal | Inherent Tribal Sovereignty | [Remand—Order Nonmember to Exhaust Tribal Remedies] |
| *Iowa Mutual v. LaPlante,* 480 U.S. 9 (1987) | Nonmember | Tort Claim | Tribal | Inherent Tribal Sovereignty | [Remand–Order Nonmember to Exhaust Tribal Remedies] |
| *Brendale v. Yakima Confederated Tribes,* 492 U.S. 408 (1989) | Nonmember | Zoning | Mixed Tribal and Nonmember | Mixed *Montana* and Inherent Tribal Sovereignty | Mixed Tribal Interest and Nonmember—no majority opinion |
| *South Dakota v. Bourland,* 508 U.S. 679 (1993) | Nonmember | Hunting and Fishing Licensure | Nonmember | *Montana* | Nonmember |
| *Strate v. A-1 Contractors,* 520 U.S. 438 (1997) | Tribal Interest | Tort Claim | Nonmember | *Montana* | Nonmember |
| *El Paso Natural Gas v. Neztsosie,* 526 U.S. 473 (1999) | Nonmember | Tort Claim | Tribal | Federal Statute | Nonmember |
| *Atkinson Trading v. Shirley,* 532 U.S. 645 (2001) | Nonmember | Tax | Nonmember | *Montana* | Nonmember |
| *Nevada v. Hicks,* 533 U.S. 353 (2001) | Nonmember | § 1983 Claim | Tribal | Mixed *Montana* and Federal Statute | Nonmember |
| *Plains Commerce Bank v. Long Family,* 554 U.S. 316 (2008) | Nonmember | Tort Claim | Nonmember | *Montana* | Nonmember |
| *Dollar General v. Mississippi Choctaw,* 136 S.Ct. 2159 (2016) | Nonmember | Tort Claim | Tribal | N/A | Tribal Interest—no majority opinion |
| | 14 Nonmember Petitions granted, 1 Tribal Interest Petition granted | 6 Tort Claims, 4 Tax, 3 Hunting and Fishing Licensure, 1 § 1983 Claim, 1 Zoning | 9 Tribal Lands, 5 Nonmember, 1 Mixed | 6½ Inherent Tribal Sovereignty, 6 *Montana*, 1½ Federal Statute | 7½ Nonmember, 5½ Tribal Interest, 2 Remands |

Tribal advocates who observe outcomes in the Supreme Court's certiorari process may believe the Supreme Court is looking for vehicles to embarrass tribal interests and their federal trustee.[79] The Court often requests a brief from the United States on whether to hear an Indian law petition, and then routinely rejects the recommendation by the government to deny cert.[80] Since the ascension of Chief Justice William Rehnquist, the Court has granted a tribal cert petition standing alone exactly twice.[81] Of the 15 tribal jurisdiction cases going back to *Colville* in 1980, 14 of the cases arose out of petitions filed by nonmembers. In the world of the Supreme Court, where the Constitution treats Indian tribes like outsiders, tribal interests are foreign.

The chart on page 43 shows first, that the Supreme Court almost exclusively grants cert in cases where tribal interests have prevailed below, and second, that tribal interests tend to prevail in cases arising on lands owned or controlled by Indian tribes.

Matters where a nonmember prevails in the lower courts, or where they have consented to tribal jurisdiction (thereby eliminating a case or controversy), will almost never be heard at the Supreme Court. Because the only cases the Court sees involve contested nonmember consent issues, which are rare, outlier cases, that universe of cases has the potential to skew, or even eradicate, critical tribal jurisdiction issues.

Consider the case of a nonmember company that once leased trust land from an Indian tribe but, once that lease expired, refused to leave and became a holdover tenant. If the Supreme Court had held in *Dollar General* that tribal courts are forbidden to exercise jurisdiction over nonconsenting nonmembers, even a holdover tenant, then tribes would be forced to seek relief from a foreign sovereign to eject bad actors. In other words, tribes would be forced to sue nonmembers in state courts where jurisdiction over Indian lands is often barred or to petition the federal government to evict the nonmember. This would be an absurd result. Yet these are the facts of *Water Wheel* and another case currently pending before the Ninth Circuit, *French v. Starr*.[82] These are easy cases made unusually complex because the Court develops tribal jurisdiction rules from hard cases.

## Future Tribal Jurisdiction Questions

The argument in the *Dollar General* matter may be a preview to future cases involving congressional affirmation of tribal inherent authority to exercise jurisdiction over nonmembers, and also congressional delegation of federal power to tribes. Topics at oral argument and in the pleadings included the following:

### Supervisory Power of Article III Courts/Removal to Federal Court

Some justices expressed concern that a tribal court judgment against a tribal member could not be reviewed on the merits, even in theory, by the Supreme Court. The same justices also seemed concerned that nonmembers would not be able to invoke the right to remove their cases to federal court. These concerns seemed premised on a possible holding that Dollar General had not expressly consented to tribal court jurisdiction, and so express consent might seem to be the correct solution. Moreover, it is not clear how a mere tort claim could arise under federal law, justifying removal.

### Tribal Juries

Chief Justice John Roberts in particular expressed worry about tribal juries. Justice Sandra Day O'Connor had expressed a similar concern in the *Strate* matter when she asked at oral argument, "Well, how about if it goes to trial in the tribal court and the tribe chooses to use as the jury all the friends and relatives of the victim, and they say, yeah, she's really been injured, and we're going to give a heck of a verdict here … ?" The answer, of course, is that tribal law would prohibit that kind of extreme due process violation. Perhaps more salient to federal judges, the due process clause of ICRA[83] would also prohibit that kind of conduct. The Court in *United States v. Bryant*[84] was satisfied that ICRA adequately protected criminal defendants' rights in another context. In the worst case scenario, tribal judgments founded on violations of due process would not be enforceable in federal or state courts.[85] Some justices expressed skepticism that nonmember due process rights would be adequately protected even with these statutes in play.

### Tribal Law

The Court has effectively held in cases like *Plains Commerce Bank* that Indian tribes cannot apply customary or traditional law to nonconsenting nonmembers. In that case, the only cause of action (out of several) challenged by the nonmember bank was founded on "Lakota tradition as embedded in Cheyenne River Sioux tradition and custom."[86] Justice David Souter's concurrence in *Hicks* developed the foundation for the concern, arguing that it would be unfair to apply "unfamiliar" tribal law to nonmembers. However, it is now clear that tribal courts do not apply "unfamiliar" tribal customary or traditional law to nonmembers.[87] Justice Souter joined the dissent in *Plains Commerce*, so he may have been satisfied. Other justices seemed to have retained their skepticism. Again, tribal law and ICRA would likely bar this result, and tribal judgments would not be enforceable.

### Tribal Judges/Judicial Independence

Possibly the oldest (and hoariest) worry about tribal justice is judicial independence. For some, the dominant perception about tribal judges is that they are mere extensions of the tribal political branches. Indian tribes have worked hard to establish statutory separation of powers. Even better, tribes have moved a long way toward professionalizing their judiciaries, which is the strongest protection of judicial independence.[88] Once again, tribal law and ICRA will likely prevent extreme results, and tribal judgments procured by conflicted or biased courts would not be enforceable.

### Punitive Damages

Dollar General made much of the claim for punitive damages made by the plaintiffs, and some justices echoed this concern. The Roberts Court intervened into the field of punitive damages in federal and state courts, applying a substantive due process analysis to restrict punitive damages awards.[89] Since the Dollar General claim has not yet gone before a trial court on the merits, we know nothing about the merits. But if there are concerns with punitive damages, one would think that tribal law and ICRA would offer adequate protections. And, again, extreme tribal judgments would be unenforceable.

Still, punitive damages share elements of the punitive character of criminal law. And since tribal governments have no power to prosecute non-Indians (outside of the domestic violence jurisdiction in 25 U.S.C. § 1304), this is an area that is likely to arouse even more skepticism from the Court.

### Congressional Power to Recognize Tribal Inherent Authority or Delegate Federal Power to Tribes

In the years to come, it is likely that the Supreme Court will be asked to review a tribal court conviction of a non-Indian under the domestic violence jurisdictional provisions of the Violence Against Women Act.[90] It is also possible, if unlikely, that Congress may enact a statute expressly recognizing broader tribal civil jurisdiction over nonmembers. In such circumstances, the Court will most certainly review federal legislative jurisdiction to enact Indian affairs statutes. All of the concerns expressed above may be in play, as well as the sources of congressional power.[91] This is no place to parse through that discussion, but when it happens before the Court, it could have almost existential significance for Indian tribes.

### Federal Statutes of General Applicability

Another controversial area in federal Indian law affected by tribal inherent authority involves federal statutes of general application—in other words, federal statutes that are silent as to their applicability to Indian tribes. The lower courts usually follow a common-law test announced by the Ninth Circuit in addressing these questions, usually referred to as the *Coeur d'Alene* test, after *Donovan v. Coeur d'Alene Tribal Farm*.[92] Scholars have criticized that test,[93] and one federal judge agrees, arguing that the judge-made test rests on a house of cards.[94]

If analyzed under the rubric of statutory divestiture, the courts should look to whether the federal law and the tribal law can coexist. In the case of an environmental statute, it seems at least plausible that federal and tribal regimes could be inconsistent, leading to problems in managing an ecosystem that does not respect government boundaries. In the case of a labor and employment statute, however, there is no interconnected national or regional regime at stake, suggesting that inconsistent tribal and federal laws can coexist. The Tenth Circuit has adopted this analysis.[95]

## Conclusion

As Indian tribes continue to develop their capacities to govern, there will be more and more opportunities for the federal judiciary to review tribal jurisdiction over nonmembers. Nonmembers are already employed by Indian tribes in large numbers, do business with Indian tribes on tribal lands, and otherwise consent to tribal law. Many other nonmembers enter tribal lands for short periods of time. They could be casino and resort invitees, or they could be people engaged in illegal dumping or traffic violators. How the federal judiciary decides to address tribal jurisdiction over this second category of cases will have critical impacts on Indian country governance. ⊙

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## Endnotes

[1]*Dollar Gen. v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (2016). All briefs, lower court materials, and other materials is this matter are available online at the Turtle Talk blog. *See* Matthew L.M. Fletcher, *Dollar Gen. v. Mississippi Band of Choctaw Indians Background Materials*, Turtle Talk (July 1, 2015), *available at* http://turtletalk.wordpress.com/2015/07/01/dollar-general-v-mississippi-band-of-choctaw-indians-background-materials (last visited Jan. 8, 2017).

[2]*E.g.,* N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 Am. Indian L. Rev. 353 (1994); John P. Lavelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen's Handbook Cutting-Room Floor*, 38 Conn. L. Rev. 731 (2005); Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 Tulsa L.J. 267 (2000).

[3]*E.g., Fine Consulting Inc. v. Rivera*, 915 F. Supp. 2d 1212, 1217 (D.N.M. 2013) (employment agreement); *Fox Drywall & Plastering Inc. v. Sioux Falls Const. Co.,* 2012 WL 1457183 (D.S.D., Apr. 26, 2012) (construction contract); *Joseph K. Lumsden Bahweting Public School Academy v. Sault Ste. Marie Tribe of Chippewa Indians*, 2004 WL 2387619 (Mich. Ct. App., Oct. 26, 2004) (lease). *Cf. Smith v. Salish Kootenai College*, 434 F.3d 1127, 1134-35 (9th Cir. 2006) (en banc) (nonmember consents when invoking tribal court jurisdiction); *Ford Motor Credit Co. v. Poitra*, 776 F. Supp. 2d 954, 959 (D.N.D. 2011) (same).

[4]*Washington v. Colville Confederated Tribes,* 447 U.S. 134 (1980) (cigarettes).

[5]*Merrion v. Jicarilla Apache Tribe,* 450 U.S. 130, 139 (1982) (severance tax).

[6]*See also Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) (inherent power to tax).

[7]*New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334-36 (1983).

[8]*National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985).

[9]*Montana v. United States*, 450 U.S. 544, 565-66 (1981).

[10]*Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987) (emphasis added).

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

[12]*Id.* at 368 (citing *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 482 n.4 (1999)).

[13]*Hicks*, 533 U.S. at 358 n.2.

[14]*Water Wheel Camp Recreational Area Inc. v. LaRance,* 642 F.3d 802, 805 (9th Cir. 2011) (per curiam).

[15]*Dolgencorp Inc. v. Mississippi Band of Choctaw Indians,* 746 F.3d 167, 168 (5th Cir. 2014), *aff'd* by an equally divided court, *Dollar Gen. v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (2016).

[16]*E.g., Attorney's Process & Investigation Servs. Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 939-41 (8th Cir. 2010) (trespass), *cert. denied*, 562 U.S. 1179 (2011). *Contra MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1069-70 (10th Cir. 2007) (employment discrimination), *cert. denied*, 552 U.S. 1181 (2008).

[17]*Montana*, 450 U.S. at 565.

[18]*Id.*

[19]*Id.* at 566.

[20]*Id*. at 564.

[21]*Id*. at 558.

[22]*Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

[23]*Id.* at 457.

[24]*Id.* at 459 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).
[25]*South Dakota v. Bourland*, 508 U.S. 679 (1993).
[26]*Atkinson Trading Co. Inc. v. Shirley*, 532 U.S. 645 (2001).
[27]*Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008).
[28]*City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (Pueblo of Isleta); *State of Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1997) (Confederated Salish and Kootenai Tribes), *cert. denied*, 525 U.S. 921 (1998).
[29]*State of Montana*, 137 F.3d at 1141.
[30]*Plains Commerce Bank*, 554 U.S. at 341.
[31]*Id.* (quoting Felix S. Cohen, Handbook of Federal Indian Law § 4.02[3][c], at 232, n. 220 (2005 ed.)).
[32]*E.g., Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) (two tribal members killed at railroad crossing); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (tribal member injured in car wreck by nonmember), *cert. denied*, 523 U.S. 1074 (1998).
[33]*United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("In sum, 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*.") (emphasis added).
[34]*Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978).
[35]*E.g.,* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev. 431 (2005).
[36]*Oliphant*, 435 U.S. at 212. *See also Duro v. Reina*, 495 U.S. 676 (1990) (nonmember Indians).
[37]The Supreme Court expressly adopted the Cohen formulation in *Wheeler*, 435 U.S. 313, 323 ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. *But until Congress acts, the tribes retain their existing sovereign powers*. In sum, 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.") (emphasis added).
[38]*Oliphant*, 435 U.S. at 208.
[39]*Id*. at 206.
[40]*Id*.
[41]*E.g.*, Robert A. Williams Jr., Like a Loaded Weapon: The Rehnquist Court, Indian Rights, & the Legal History of Racism in America, ch. 7 (2005); Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty?: The Story of* Oliphant v. Suquamish Indian Tribe, *in* Indian Law Stories 261 (Carole Goldberg et al. eds. 2011).
[42]*National Farmers Union,* 471 U.S. at 854.
[43]*Id*.
[44]*El Paso Natural Gas Co. v. Neztsosie,* 526 U.S. 473 (1999).
[45]Price-Anderson Act, 42 U.S.C. § 2210(n)(2).
[46]*United States v. State of Montana*, 604 F.2d 1162, 1168 (9th Cir. 1979).
[47]*Montana*, 450 U.S. at 559.
[48]*Plains Commerce Bank*, 554 U.S. at 328 ("Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.") (collecting cases referencing allotment acts).
[49]*Bourland*, 508 U.S. 679, 689 (noting that when nonmembers acquire lands from the tribe or tribal members through allotment, the tribe "loses any former right of absolute and exclusive use and occupation of the conveyed lands."). *See also Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989) (defining "open" and "closed" reservation in accordance with post-allotment settlement patterns)
[50]25 U.S.C. §§ 323-328.
[51]*Strate*, 520 U.S. at 455.
[52]*Atkinson Trading*, 532 U.S. at 647-48.
[53]Price-Anderson Act, 42 U.S.C. § 1983.
[54]*Hicks*, 533 U.S. at 368-69.
[55]*Merrion,* 455 U.S. at 138.
[56]*Id*. at 144-45.
[57]*Id*. at 155-56.
[58]*Kerr-McGee,* 471 U.S. at 198-99.
[59]Matthew L.M. Fletcher, *Contract and (Tribal) Jurisdiction*, 126 Yale L.J.F. 1 (Apr. 11, 2016), *available at* www.yalelawjournal.org/forum/contract-and-tribal-jurisdiction.
[60]Petition for Writ of Certiorari 17-23, *Dollar Gen. v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (2016) (No. 13-1496).
[61]Brief for the United States as Amicus Curiae Supporting Respondents, at 28-33, *Dollar Gen. v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159 (2016) (No. 13-1496).
[62]25 U.S.C. § 1302(a).
[63]*Talton v. Mayes*, 163 U.S. 376 (1896).
[64]Brief for the United States, *supra* note 61, at 59-60 (footnotes omitted).
[65]25 U.S.C. § 1301(2).
[66]25 U.S.C. § 1304.
[67]*Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991).
[68]Brief for the United States, *supra* note 61, at 15-16.
[69]*Id*. at 15-18.
[70]*Merrion v. Jicarilla Apache Tribe,* 430 U.S. 155, 147 (1982).
[71]Brief for the United States, *supra* note 61, at 18.
[72]*Id.* (quoting *Plains Commerce* and *Merrion*).
[73]*Water Wheel Camp Recreational Area v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011).
[74]*Attorney's Process & Investigation Servs. Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010), *cert. denied*, 562 U.S. 1179 (2011); *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1069-1070 (10th Cir. 2007), *cert. denied*, 552 U.S. 1181 (2008).
[75]*Hicks*, 533 U.S. at 358
[76]Matthew L.M. Fletcher, *(Re)Solving the Tribal No-Forum Conundrum:* Michigan v. Bay Mills Indian Community, 123 Y.L.J. Online 311, 316 (2013), *available at* www.yalelawjournal.org/pdf/1215_s4ndkbwh.pdf.
[77]*See generally* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643 (2000).
[78]The only potential circuit split now—and it's a superficial one—is between the Ninth Circuit and the Fifth and Tenth Circuits over the application of *Montana* on tribal lands.
[79]*See generally* Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 Ariz. L. Rev. 933 (2009).
[80]Matthew L.M. Fletcher, *The Tenth Justice Lost in Indian Country*, 58 Fed. Law., March/April 2011, at 36.
[81]*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), and *Strate*, 520 U.S. at 438.
[82]The district court decision there is reported at 2015 WL 12592104 (D. Ariz., Feb. 12, 2015). For briefs, *see* Matthew L.M. Fletcher, *Ninth Circuit Materials in* French v. Starr, Turtle Talk (Sept. 28,

2015), *available at* http://turtletalk.wordpress.com/2015/09/28/ninth-circuit-materials-in-french-v-starr (last visited Jan. 8, 2017).
[83]25 U.S.C. § 1302(a)(8).
[84]*States v. Bryant*, 136 S.Ct. 1954, 1966 (2016).
[85]*See generally* Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 Ariz. St. L.J. 779 (2014).
[86]*Plains Commerce Bank*, 554 U.S. at 338.
[87]Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 Houston L. Rev. 701 (2006).
[88]Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Colo. L. Rev. 59 (2013).
[89]*Phillip Morris USA v. Williams*, 549 U.S. 346 (2007).
[90]25 U.S.C. § 1304.
[91]The leading article on the federal power over Indian affairs probably is Gregory Ablavky, *Beyond the Indian Commerce Clause*, 124 Yale. L.J. 1012 (2015).
[92]*Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985).
[93]*E.g.,* Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 Mich. St. L. Rev. 435; Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. Rev. 691 (2004); Kaighn Smith Jr., *Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations within the Reservations*, 2008 Mich. St. L. Rev. 505.
[94]*NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 557-58 (6th Cir. 2015) (McKeague, C.J., dissenting), *cert. denied*, 136 S.Ct. 2508 (2016).
[95]*NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002).

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**Hunter Profile** *continued from page 19*

## Endnotes

[1]*See e.g.* Melissa Leal & Robert Angelo Horse, *Through His Eyes: Life in the South Dakota State Penitentiary*, 40 Am. Indian Cult. & Res. J. 93, 93-100 (2016) (asserting that 27 percent of inmates in Sioux Falls State Penitentiary are "Native American").
[2]A *guardian ad litem* is defined by *Black's Law Dictionary* (10th ed. 2014) as: "a guardian, usu. a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party."
[3]Constitution of the Ho-Chunk Nation art. VII, § 11, *available at* http://www.ho-chunknation.com/government/the-constitution-of-the-ho-chunk-nation.aspx.
[4]Mary Jo B. Hunter, *Tribal Court Opinions: Justice and Legitimacy,* 8 Kan. J.L. & Pub. Pol'y 142, 143 (1999).
[5]Justin B. Richland & Sarah Deer, Introduction to Tribal Legal Studies 43 (4th ed. 2016) (explaining the difference between the American legal system and tribal judiciaries).
[6]*See id.* at 2.
[7]*See id.* at 84.
[8]Treaty of land cessions, concluded at Prairie du Chien, Territory of Michigan, 7 Stat. 323 (1830); Treaty of cessions, concluded at Fort Armstrong, Rock Island, Illinois, 7 Stat. 370 (1833); Treaty of cessions, concluded in the City of Washington, 7 Stat. 544 (1838); Treaty of cessions, and intended acquisition of lands west of the Mississippi River for a new homeland, concluded in the City of Washington, 9 Stat. 878 (1847); Treaty of land cessions, and provisions for establishment of a homeland in the Territory of Minnesota, concluded in the City of Washington, 10 Stat. 1172 (1855); Treaty of relinquishment of western portion of Blue Earth reserve, and land assignments, concluded in the City of Washington, 12 Stat. 1101 (1861); Treaty of land cessions in the Territory of Dakota, with additional land grant in the Territory of Nebraska, concluded in the City of Washington, 14 Stat., 671 (1866).
[9]Tom Jones, Michael Schmudlach, Matthew Daniel Mason, Amy Lonetree & George A. Greendeer, People of the Big Voice: Photographs of Ho-Chunk Families by Charles Van Shaick, 1879-1942 vii-viii (2011).
[10]*See id.*
[11]Lance M. Foster, The Indians of Iowa 85-86 (2014). The two separate nations use different terminology as explained by Foster:

> Winnebago was the name given to this tribe by Algonquian-speaking tribes, neighbors of the Winnebago, who lived near Green Bay, Wisconsin. Winnebago, from *winnepeko,* means something like "Stinking Water," referring to the fishy-smelling shores of Green Bay on Lake Michigan. The "Winnebago" actually call themselves the Hochunkara, which mean[s] something like "People of the Great Language" or "People of the Big Voice," "big" meaning originating in the earliest times.… Today, some branches of the Hochunkara have decided to reject the foreign term "Winnebago" in favor of variations from their own language, Ho-Chunk. In Wisconsin, they are known as the Ho-Chunk; in Nebraska, they are the Winnebago.

[12]Richland & Deer, *supra* note 5, at 2.
[13]*See e.g.,* Christine Zuni, *Strengthening What Remains,* 7 Kan. J.L. & Pub. Pol'y 18 (1997). Zuni explains the relationship between the federal government and tribal self-governance as follows: A central proposition in federal Indian law governing tribal nations, and hence tribal judicial systems, is that Indian nations retain vestiges of their original sovereignty and therefore have residual authority to govern their own affairs. Their sovereign qualities were initially recognized by the federal government when it negotiated treaties with Indian nations as it did with other foreign nations. Thus, the power to establish and maintain tribal judicial systems is an inherent, retained power that was never surrendered.
[14]*See supra* note 3.
[15]*See Ho-Chunk Nation Legislature v. Chloris A. Lowe Jr. & Jo Deen B. Lowe,* CV 95-28 (HCN Tr. Ct., Jan. 30, 1997) at 7 (discussing how federal law is merely persuasive authority and not binding authority on cases in tribal courts unless a federal statute specifically mentions Indians).
[16]Ho-Chunk Nation Criminal Code, 9 HCC §§ 900-961 (May 5, 2015), *available at* http://www.ho-chunknation.com/government/judiciary/index-of-laws.aspx.