

FEBRUARY 2010



California
Bar
Examination

Performance Test B

INSTRUCTIONS AND FILE

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RETTICK v. FLOYD INDUSTRIES, LLC, et al.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
6. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
7. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Morris, Fenton & Suzuki, LLP
1660 Rhoades Boulevard
Green River, Columbia 99906

MEMORANDUM

To: Applicant
From: Bram Fenton
Date: February 25, 2010
Re: **Rettick v. Floyd Industries, LLC, et al.**

We represent Floyd Industries, LLC, a manufacturer and seller of firearms, and Sandra Floyd. Floyd Industries is a limited liability company formed under Columbia law and located here in Columbia. Sandra Floyd is its owner.

Floyd Industries and Sandra Floyd were sued in the Tribal Court of the Taraconic Tribe by Orrin Rettick, the Tribe's Chief of Police, for products liability after one of Floyd Industries' handguns misfired and injured him. Ms. Floyd authorized us to seek a permanent injunction in federal district court to prohibit Rettick from prosecuting his products liability action in the Taraconic Tribal Court. Although she happens to be a member of the White Eagle Tribe, she didn't want to litigate in the Taraconic Tribal Court. Rettick is a prominent and popular member of the Taraconic Tribe, whose claim, in her view, is bogus or at least highly inflated, based on the misfiring of one of five handguns sold to a police force numbering more than 50 officers.

Rettick has filed a motion in federal district court, with a supporting memorandum of points and authorities, asking the court to dismiss or stay our action for a permanent injunction. Please draft a memorandum of points and authorities in opposition to Rettick's motion, making sure to follow the firm's instructions. Present our best arguments, and rebut each of Rettick's arguments, including any of his unsupported legal or factual assertions.

Morris, Fenton & Suzuki, LLP
1660 Rhoades Boulevard
Green River, Columbia 99906

MEMORANDUM

To: Associates
From: Executive Committee
Date: March 1, 2007
Re: **Memoranda of Points and Authorities for Motions**

All memoranda of points and authorities in support of, or in opposition to, motions must include the following sections and conform to the following guidelines.

The *introduction* must state the nature of the motion to be supported or opposed, and must briefly summarize the argument to be presented.

The *factual background and procedural history* must (1) contain the facts supporting our client's position and take account of the facts supporting our opponent's position, dealing with all such facts persuasively, in our client's favor, and (2) concisely indicate the major procedural events.

The *argument* must analyze the applicable law and bring it to bear on the facts, urging that the law and facts support our client's position. It must respond to, or anticipate, the attacks that our opponent has made, or may reasonably be expected to make, against our client's position. It must display a subject heading summarizing each claim and the outcome that it requires, such as, "Because Smith's Statement Is Hearsay and Does Not Come Within Any Exception, It Is Inadmissible," and should *not* state a bare conclusion, such as, "Smith's Statement Is Inadmissible."

The *conclusion* must state, in simple fashion, that the court should grant our client's motion, or deny our opponent's motion, for the reasons set forth in the argument.

Each memorandum of points and authorities will have its cover, table of contents, and table of authorities prepared by clerical and non-attorney staff prior to filing.

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2 La Plante & La Plante, LLP
3 700 Williams Road
4 Green River, Columbia 99906
5 (555) 567-6700

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7 Attorneys for Plaintiff
8 Orrin Rettick

9 **IN THE TRIBAL COURT OF THE TARACONIC TRIBE**
10 **SILVER OAK RESERVATION, STATE OF COLUMBIA**

11
12 ORRIN RETTICK,)
13 Plaintiff,) **No. 13-368**
14 v.) **COMPLAINT FOR DAMAGES:**
15 FLOYD INDUSTRIES, LLC, and) **PRODUCTS LIABILITY**
16 SANDRA FLOYD,)
17 Defendants.)
18)

19 Orrin Rettick (“Rettick”) hereby complains in tort against Floyd Industries, LLC,
20 and Sandra Floyd, for products liability, alleging as follows:

21 1. Rettick is a member of the Taraconic Tribe, resident on the Silver Oak
22 Reservation in the State of Columbia. He holds the position of Chief of Police for the
23 Taraconic Tribe, overseeing the operations of a police force numbering more than 50
24 officers. In addition, he sits on the Tribal Council of the Taraconic Tribe as one of its
25 five members.

26 2. Floyd Industries is not a member of the Taraconic Tribe, but is a limited
27 liability company, formed under the law of the State of Columbia, and with its principal
28 place of business in this state, engaged in the manufacture and sale of firearms. On
29 information and belief, the owner of Floyd Industries is Sandra Floyd, who, on
30 information and belief, is a member of the White Eagle Tribe.

1 3. In 2008, on land owned by the Taraconic Tribe within the Silver Oak
2 Reservation, Rettick, as Chief of Police for the Taraconic Tribe, and Floyd Industries,
3 through Sandra Floyd, entered into a contract under which Floyd Industries agreed to
4 sell and Rettick agreed to buy five (5) nine-millimeter (9 mm.) semi-automatic handguns
5 styled the "Model 9." Immediately thereafter, Floyd Industries, through Sandra Floyd,
6 delivered the handguns that were the subject of the contract to Rettick on land owned
7 by the Taraconic Tribe within the Silver Oak Reservation.

8 4. On or about May 1, 2009, on land owned by the Taraconic Tribe within the
9 Silver Oak Reservation, Rettick was seriously injured in the course of performing his
10 duties as Chief of Police for the Taraconic Tribe when a Model 9 he attempted to fire
11 exploded in his hand.

12 5. Floyd Industries and Sandra Floyd knew that the Model 9 would be bought
13 and used without inspection for defects.

14 6. When it left the control of Floyd Industries and Sandra Floyd, the Model 9 was
15 defective in design and/or manufacture.

16 7. At the time of Rettick's serious injury, Rettick was using the Model 9 in the
17 manner intended by Floyd Industries and Sandra Floyd.

18 8. Rettick's serious injury was proximately caused by Floyd Industries and
19 Sandra Floyd's defective design and/or manufacture of the Model 9.

20 9. Rettick's serious injury caused him loss in the amount of five million dollars
21 (\$5,000,000).

22 Wherefore, Rettick prays for judgment for costs of suit; for such relief as is fair,
23 just, and equitable; and specifically for damages in the amount of five million dollars
24 (\$5,000,000).

25 Date: December 28, 2009

La Plante & La Plante, LLP

26 by: Megan La Plante

27 Megan La Plante

28 Attorneys for Plaintiff Orrin Rettick

29

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7 Attorneys for Plaintiffs
8 Floyd Industries, LLC, and Sandra Floyd

9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE WESTERN DISTRICT OF THE STATE OF COLUMBIA**
12

13 FLOYD INDUSTRIES, LLC, and)
14 SANDRA FLOYD,)
15 Plaintiffs,) **No. Civ. 203-489 KMB**
16 v.) **COMPLAINT FOR**
17 ORRIN RETTICK,) **PERMANENT INJUNCTION**
18 Defendant.)
19)

20
21 With the allegations that follow, Floyd Industries, LLC, and Sandra Floyd bring
22 this action to permanently enjoin Orrin Rettick (“Rettick”) from prosecuting a tort action
23 for products liability that he brought against Floyd Industries and Sandra Floyd in the
24 Tribal Court of the Taraconic Tribe, Silver Oak Reservation, State of Columbia, styled
25 *Orrin Rettick v. Floyd Industries, LLC, and Sandra Floyd*, No. 13-368 (hereafter “the
26 Tribal Court Products Liability Action”):

27 1. This Court has subject matter jurisdiction over this action for permanent
28 injunction under 28 U.S.C. § 1331, inasmuch as it arises under the law of the United
29 States bearing on the sovereignty of the Taraconic Tribe.

30 2. Venue in this District is proper under 28 U.S.C. § 1391(b) because Rettick
31 resides herein.

1 3. Floyd Industries is a manufacturer and seller of firearms, formed as a limited
2 liability company under the law of the State of Columbia and maintaining its principal
3 place of business in this state, and is not a member of the Taraconic Tribe.

4 4. Sandra Floyd is the owner of Floyd Industries and a resident of the State of
5 Columbia, and is not a member of the Taraconic Tribe.

6 5. Rettick is a member of the Taraconic Tribe, and resides within this District on
7 the Silver Oak Reservation in the State of Columbia.

8 6. Rettick brought the Tribal Court Products Liability Action against Floyd
9 Industries in the Tribal Court of the Taraconic Tribe, alleging, among other things, that:
10 (a) Rettick held the position as Chief of Police for the Taraconic Tribe and sat on the
11 Tribal Council of the Taraconic Tribe as one of its five members; (b) on information and
12 belief, the owner of Floyd Industries is Sandra Floyd; (c) on information and belief,
13 Sandra Floyd is a member of the White Eagle Tribe; (d) Rettick and Floyd Industries
14 entered into a contract, on land owned by the Taraconic Tribe within the Silver Oak
15 Reservation, pursuant to which Rettick bought and Floyd Industries sold certain
16 handguns; and (e) Rettick suffered serious injury, on land owned by the Taraconic Tribe
17 within the Silver Oak Reservation, as a result of a defect in one such handgun.

18 7. Because Floyd Industries and Sandra Floyd are not members of the
19 Taraconic Tribe, the Tribal Court of the Taraconic Tribe lacks jurisdiction over the Tribal
20 Court Products Liability Action.

21 8. Because the Tribal Court of the Taraconic Tribe clearly lacks jurisdiction over
22 the Tribal Court Products Liability Action, Floyd Industries and Sandra Floyd have not
23 presented the question of jurisdiction to the Tribal Court for its consideration.

24 Wherefore, Floyd Industries and Sandra Floyd request this Court, in the exercise
25 of its equitable powers, to:

26 a. Permanently enjoin Rettick from prosecuting the Tribal Court Products
27 Liability Action; and

1 b. Award Floyd Industries the costs of bringing this action for permanent
2 injunction, as well as other and additional relief as this Court may determine to be just and
3 proper.

4
5 Date: January 26, 2010

Morris, Fenton & Suzuki, LLP

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7 by: *Bram Fenton*

8 Bram Fenton

9 Attorneys for Plaintiffs

10 Floyd Industries, LLC, and Sandra Floyd
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10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE WESTERN DISTRICT OF THE STATE OF COLUMBIA**
12
13

14 FLOYD INDUSTRIES, LLC, and)
15 SANDRA FLOYD,) **No. Civ. 203-489 KMB**
16 Plaintiffs,) **MOTION OF DEFENDANT**
17 v.) **ORRIN RETTICK TO DISMISS**
18 ORRIN RETTICK,) **OR, IN THE ALTERNATIVE,**
19 Defendant.) **FOR A STAY**
20)
21

22 Orrin Rettick moves this Court to enter an order against Floyd Industries, LLC,
23 and Sandra Floyd, as follows:

24 1. To dismiss Floyd Industries and Sandra Floyd's action for permanent
25 injunction because their complaint fails to state a claim upon which relief can be
26 granted; or, in the alternative,

27 2. To stay Floyd Industries and Sandra Floyd's action for permanent injunction
28 because they have failed to exhaust their remedies in the Tribal Court of the Taraconic
29 Tribe, Silver Oak Reservation, State of Columbia.

1 This motion is supported by the pleadings on file and by a memorandum of
2 points and authorities submitted herewith.

3
4 Date: February 16, 2010

Respectfully submitted,
La Plante & La Plante, LLP

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7 by: *Megan La Plante*

8 Megan La Plante
9 Attorneys for Defendant Orrin Rettick

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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE WESTERN DISTRICT OF THE STATE OF COLUMBIA**
11

12
13 FLOYD INDUSTRIES, LLC, and)
14 SANDRA FLOYD,) **No. Civ. 203-489 KMB**
15 Plaintiffs,) **MEMORANDUM OF POINTS AND**
16 v.) **AUTHORITIES IN SUPPORT OF**
17 ORRIN RETTICK,) **MOTION OF DEFENDANT ORRIN**
18 Defendant.) **RETTICK TO DISMISS OR, IN THE**
19) **ALTERNATIVE, FOR A STAY**
20

21 **I. Introduction**

22 In this action, Floyd Industries, LLC, a manufacturer and seller of firearms, and
23 Sandra Floyd, its owner, are seeking to prevent Orrin Rettick (“Rettick”), the Chief of
24 Police for the Taraconic Tribe and one of the five members of the Tribal Council of the
25 Taraconic Tribe, from obtaining relief in the Tribal Court for the serious injury they have
26 caused him. Floyd Industries and Sandra Floyd’s claim is that, notwithstanding the
27 tribe’s inherent sovereignty, the tribal court lacks jurisdiction.

28 Because, as will appear, Floyd Industries and Sandra Floyd’s claim is meritless,
29 Rettick now moves this Court to dismiss Floyd Industries and Sandra Floyd’s action
30 because their complaint fails to state a claim upon which relief can be granted, or, in the
31 alternative, to stay their action because they have failed to exhaust their remedies.

1 **A. This Court Should Dismiss Floyd Industries’ Action for Failure to State a Claim**
2 **Because the Tribal Court Unquestionably Has Jurisdiction.**

3 Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss an action
4 for “failure [by the plaintiff] to state a claim upon which relief can be granted.”

5 The Taraconic Tribe possesses “inherent power as a sovereign.” *Montana v.*
6 *United States* (U.S. Sup. Ct., 1981). As a consequence, it enjoys “inherent adjudicatory
7 authority.” *Nevada v. Hicks* (U.S. Sup. Ct., 2001). Its authority is broadest where the
8 claim in question arises on tribal land and involves members of the tribe. *Cf. Nevada v.*
9 *Hicks, supra* (implying that authority is limited as to nontribal members).

10 In their complaint in this Court, Floyd Industries and Sandra Floyd have admitted:
11 (1) Floyd Industries’ owner, Sandra Floyd, is a member of a tribe; (2) Rettick is a
12 member of a tribe; and (3) Rettick’s claim arose on tribal land.

13 In light of Floyd Industries’ and Sandra Floyd’s admissions, the Tribal Court of
14 the Taraconic Tribe unquestionably has jurisdiction over Rettick’s claim against them.
15 In all of its particulars, Rettick’s claim arose on tribal land—specifically, land owned by
16 the Taraconic Tribe within the Silver Oak Reservation—and involves members of a
17 tribe—specifically, Rettick and Sandra Floyd, in entering into the contract for the
18 purchase of the Model 9, in receiving delivery of the Model 9, and causing and suffering
19 serious injury through the Model 9.

20 Floyd Industries and Sandra Floyd may be expected to invoke the so-called rule
21 of *Montana v. United States* in an attempt to argue against the Tribal Court’s
22 jurisdiction, but any such attempt is doomed to failure.

23 Given a reasonable reading, the *Montana* “rule” is that tribal courts lack
24 jurisdiction over claims arising on nontribal land and involving non-tribe members.
25 Certainly, the Supreme Court has never held—contrary to what Floyd Industries and
26 Sandra Floyd may be expected to argue—that a tribal court lacks jurisdiction *whenever*
27 a claim is asserted against a nonmember, whether the claim arose on tribal or nontribal
28 land. *See Smith v. Salish College* (U.S. 15th Cir. Ct. App., 2004).

29 As such, the *Montana* “rule” is inapplicable to the claim here, which arose on
30 tribal land and involves members of a tribe.

1 But even if the *Montana* “rule” were applicable, the result would be no different.
2 By its own terms, the *Montana* “rule” contains two exceptions, one for claims based on
3 “consensual relationships,” the other for claims based on conduct that “threatens” a
4 tribe’s “political integrity, . . . economic security, or . . . health or welfare.” *Montana v.*
5 *United States, supra*. Each exception is satisfied here. As Floyd Industries and Sandra
6 Floyd have admitted, Rettick’s claim is based *both* on a contract under which “Rettick
7 bought and Floyd Industries sold certain handguns” *and also* on conduct that resulted in
8 “serious injury” to Rettick as “Chief of Police for the Taraconic Tribe.” Complaint ¶ 6.
9 By coming to the Silver Oak Reservation and by staying to enjoy its protection, Floyd
10 Industries and Sandra Floyd have subjected themselves to the jurisdiction of the
11 Taraconic Tribe.

12 In sum, because Floyd Industries and Sandra Floyd have effectively conceded
13 the jurisdiction of the Tribal Court of the Taraconic Tribe, they have necessarily failed to
14 state a claim upon which relief can be granted.

15 **B. At The Very Least, This Court Should Stay Floyd Industries’ Action**
16 **Because It Failed to Exhaust Its Remedies in the Tribal Court.**

17 Because the Taraconic Tribe possesses “inherent power as a sovereign,”
18 *Montana v. United States, supra*, Floyd Industries and Sandra Floyd must present their
19 claim denying the jurisdiction of the Tribal Court of the Taraconic Tribe to the Tribal
20 Court itself in the first instance. *See National Farmers Union Ins. Cos. v. Crow Tribe*
21 (U.S. Supreme Ct., 1985); *cf. Nevada v. Hicks, supra*.

22 Not only have Floyd Industries and Sandra failed to exhaust their remedies in the
23 Tribal Court, by their own admission, they have admittedly not even invoked those
24 remedies. Complaint ¶ 8.

25 It follows that, at the very least, Floyd Industries’ and Sandra Floyd’s action must
26 be stayed. *See National Farmers Union Ins. Cos. v. Crow Tribe, supra; cf. Nevada v.*
27 *Hicks, supra*.

28 **IV. Conclusion**

29 For the reasons stated, in light of the undoubted jurisdiction of the Tribal Court of
30 the Taraconic Tribe, this Court should grant Rettick’s motion and accordingly dismiss
31 Floyd Industries’ and Sandra Floyd’s action because their complaint fails to state a

1 claim upon which relief can be granted, or, in the alternative, should stay their action
2 because they have failed to exhaust their remedies in the Tribal Court.

3

4 Date: February 15, 2010

Respectfully submitted,
La Plante & La Plante, LLP

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by: Megan La Plante

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Megan La Plante

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Attorneys for Defendant Orrin Rettick

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FEBRUARY 2010



*California
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RETTICK v. FLOYD INDUSTRIES, LLC, et al.

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Montana v. United States

United States Supreme Court (1981)

By a tribal regulation, the Crow Tribe of Montana (“Tribe”) sought to prohibit hunting and fishing within its reservation by anyone who is not a member of the Tribe. Relying on its inherent power as a sovereign, the Tribe claimed authority to prohibit hunting and fishing by nonmembers of the Tribe even on land within the reservation owned by nonmembers. The State of Montana, however, continued to assert its authority to regulate hunting and fishing by nonmembers within the reservation.

To resolve the conflict between the Tribe and the State of Montana, the United States, proceeding as fiduciary for the Tribe, filed the present action, seeking a declaratory judgment establishing that the Tribe has sole authority to regulate hunting and fishing within the reservation. The District Court denied relief. The Court of Appeals reversed. We granted certiorari and now reverse.

Although the Tribe may prohibit or regulate hunting or fishing by nonmembers on land belonging to the Tribe or its members, it has no power to regulate fishing and hunting by nonmembers of the Tribe on land within the reservation owned by nonmembers.

The Tribe’s “inherent sovereignty” does not support its regulation of nonmember hunting and fishing on nonmember land within the reservation. Through their original incorporation into the United States, the tribes have lost many of the attributes of sovereignty, particularly as to the relations between a tribe and nonmembers. 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.

As a general proposition, the inherent sovereign powers of a tribe do not extend to the activities of nonmembers. To be sure, tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over nonmembers on their reservations, even

on nonmember land. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members. A tribe may also retain inherent power to exercise civil authority over the conduct of nonmembers on nonmember land within its reservation when that conduct threatens the political integrity, the economic security, or the health or welfare of the tribe.

No such circumstances, however, are involved in this case. Nonmember hunters and fishermen on nonmember land do not enter into any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction. And nothing in this case suggests that such nonmember hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation.

Reversed and remanded.

National Farmers Union Ins. Cos. v. Crow Tribe

United States Supreme Court (1985)

Leroy Sage (“Sage”), a Crow Tribe minor, was struck by a motorcycle in the Lodge Grass Elementary School parking lot. The school is located on land owned by the State of Montana within the boundaries of the Crow Reservation. Through his guardian, Sage initiated a lawsuit in the Crow Tribal Court against the School District, a political subdivision of the State, alleging damages of \$150,000.

Thereafter, the School District and its insurer, National Farmers Union Insurance Companies, petitioners herein, commenced this litigation in the District Court for the District of Montana seeking an injunction. That court was persuaded that the Crow Tribal Court had no jurisdiction over a civil action against a nonmember and entered an injunction against further proceedings in the Tribal Court under 28 U.S.C. § 1331, which grants district courts jurisdiction over actions “arising under” federal law. The Court of Appeals reversed, holding that the District Court had no jurisdiction to enter such an injunction.

We granted certiorari to consider whether the District Court properly entertained petitioners’ request for an injunction under § 1331.

We agree with the District Court that § 1331 encompasses the federal question whether the Tribal Court exceeded the lawful limits of its jurisdiction. Since petitioners contend that federal law has divested the Tribe of its power to compel a nonmember property owner to submit to the civil jurisdiction of the Tribal Court, it is federal law on which petitioners rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action “arising under” federal law within the meaning of § 1331.

Although the District Court was right in its understanding of the scope of its jurisdiction under § 1331, it was wrong to exercise that jurisdiction when it did. As a matter of

comity, exhaustion of Tribal Court remedies is required before petitioners' claim may be entertained by the District Court. The existence and extent of the Tribal Court's jurisdiction should be determined in the first instance by the Tribal Court. It follows that the federal action should be stayed pending the development of the Tribal Court proceedings.

Reversed and remanded.

Nevada v. Hicks

United States Supreme Court (2001)

This case presents the question whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.

Hicks is a member of the Fallon Paiute-Shoshone Tribes of western Nevada and lives on the Tribes' reservation.

After game wardens of the State of Nevada executed state court and tribal court search warrants to search Hicks's home for evidence of an off-reservation crime, he filed suit in the Tribal Court against the game wardens, in their individual capacities, and the State of Nevada, alleging trespass and abuse of process. The Tribal Court held that it had jurisdiction over the claims, and the Tribal Appeals Court affirmed.

Nevada and the game wardens then sought, in Federal District Court, a declaratory judgment that the Tribal Court lacked jurisdiction over the claims. The District Court granted Hicks summary judgment on that issue and held that the game wardens would have to exhaust their qualified immunity claims in the Tribal Court.

The Ninth Circuit affirmed. It concluded that the fact that Hicks's home is on tribe-owned reservation land was sufficient to support tribal jurisdiction over civil claims against nonmembers arising from their activities on that land.

Having granted certiorari, we conclude that the Ninth Circuit erred.

First, the Tribal Court did not have jurisdiction to adjudicate the game wardens' alleged tortious conduct in executing a search warrant for an off-reservation crime. As to nonmembers, a tribal court's inherent adjudicatory authority is at most as broad as the tribe's regulatory authority. The rule of *Montana v. United States* (U.S. Supreme Ct.,

1981)—that, where nonmembers are concerned, “the exercise of tribal power” is limited to “what is necessary to protect tribal self-government or to control internal relations”—applies both to the land belonging to the tribe or its members and also to land that belongs to nonmembers. The land’s ownership status is only one factor to be considered in determining whether the protection of tribal self-government or the control of internal relations calls for the exercise of tribal power. While tribal ownership of land may sometimes be dispositive, it is not alone enough to support regulatory jurisdiction over nonmembers. The ultimate question always remains, in *Montana’s* words, whether “the exercise of tribal power” is “necessary to protect tribal self-government or to control internal relations.” The answer here is plain: Tribal authority to regulate state officers in executing process related to the off-reservation violation of state laws is not essential to tribal self-government or internal relations. The State’s interest in executing process is considerable, and it no more impairs the Tribes’ self-government than federal enforcement of federal law impairs state government. We hasten to add that our holding is limited to the question of tribal court jurisdiction over state officers enforcing state law. We leave open the question of tribal court jurisdiction over nonmember defendants in general.

Second, the game wardens were not required to exhaust their qualified immunity claims in the Tribal Court before bringing them in the Federal District Court. Because under the facts presented the Tribal Court’s lack of jurisdiction is clear, adherence to the tribal exhaustion requirement of *National Farmers Ins. Union Cos. v. Crow Tribe* (U.S. Supreme Ct., 1985) would serve no purpose other than delay and is therefore unnecessary.

Reversed and remanded.

Smith v. Salish College

United States Court of Appeals for the Fifteenth Circuit (2004)

This case arises from a one-vehicle rollover. James Smith was a student at Salish College ("the college"), a community college operated by the Salish Tribe of the Flathead Reservation ("the tribe") as a tribal entity, and was not a member of the tribe. One day, he was driving a college dump truck, as part of a college vocational course, on United States Highway 93, a public road on nontribal land, as it ran through the Flathead Reservation. At the unfortunate time, for reasons still unclear, Smith caused the dump truck to veer sharply left. With great presence of mind and agility of body, Smith leapt from the truck unharmed. The truck was not as lucky, ending up a total loss after rolling over several times.

The college brought an action against Smith in tribal court, claiming that he negligently drove the dump truck.

In advance of trial in tribal court, Smith moved for dismissal of the college's action against him on the ground that the tribal court lacked jurisdiction.

At the same time, Smith filed suit in the United States District Court for the District of Franklin, seeking an injunction against the college's prosecution of its claim against him in the tribal court on the same lack of jurisdiction ground.

The tribal court subsequently denied Smith's motion to dismiss, concluding it had jurisdiction.

The federal district court proceeded to dismiss Smith's suit, arriving at the same conclusion.

Smith appealed from the federal district court's dismissal. We reverse.

Any time a tribal court wishes to exercise jurisdiction over a nonmember of the tribe, the framework in *Montana v. United States* (U.S. Supreme Ct., 1981) must be satisfied. See *Nevada v. Hicks* (U.S. Supreme Ct., 2001). A tribal court's adjudicative authority is, at most, only as broad as the tribe's regulatory authority. *Hicks*. Thus, while *Montana* dealt with a tribe's regulatory authority, it applies equally to a tribe's adjudicative authority.

Thus, *Montana* sets the framework: The general rule is that tribal courts lack jurisdiction over claims against nonmembers. There is an exception for claims against nonmembers who enter into consensual relationships with the tribe or its members. There is another exception for claims against nonmembers based on conduct that threatens the tribe's political integrity, economic security, health, or welfare. Albeit rebuttable by proof of one of these two exceptions, the presumption is that a tribal court does *not* have jurisdiction.

In *Hicks*, the Supreme Court's reasoning implies that *Montana*'s general rule that tribal courts lack jurisdiction over claims against nonmembers applies *whenever* a claim is asserted against a nonmember, whether the claim arose on tribal or nontribal land. To be sure, the *Hicks* Court limited its "*holding*" to the "question of tribal court jurisdiction over state officers enforcing state law." But the fact that the *Hicks* Court chose not to hold that the *Montana*'s general rule applies *whenever* a claim is asserted against a nonmember does not mean that we are powerless to do so. We are confident when the Supreme Court revisits the question, it will give the same answer as we do here.

With that said, *Montana*'s first exception is inapplicable here. To be sure, Smith may be deemed to have entered into a consensual relationship with the tribe by enrolling in the college, a tribal entity. But the focus of the inquiry is not so much whether Smith had entered into a consensual relationship with the tribe, but whether the claim against him—negligently driving a dump truck—is contractual in nature. It is not. Instead, it sounds in tort, specifically the tort of negligence.

Montana's second exception is also inapplicable. We do not disagree that the tribe's health and welfare requires maintaining public safety. But the conduct that the college alleges against Smith in its claim—negligently driving a dump truck—seems hardly capable of threatening public safety other than minimally. Were it otherwise, any tort claim against a nonmember would come within a tribal court's jurisdiction, and the exception would swallow the rule. Nor do we disagree that the tribe's political integrity is a matter of highest moment to the tribe. But to require the college to sue Smith, if at all, outside of tribal court would not erode the tribe's political integrity. The college's claim against Smith presents a simple tort issue and nothing more.

Reversed.