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*Indian Tribal Civil Jurisdiction's Reach Over Non-Indians:
Plains Commerce Bank v. Long Family Land and Cattle Co.*

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Abstract. The Supreme Court addressed the reach of tribal civil jurisdiction over nonmembers in *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.* (491 F.3d 878 (8th Cir. 2007), cert. granted, 128 S. Ct. 829 (2008)), a case that presents the question of whether Indian tribal courts have jurisdiction over a nonmember involved in a civil tort claim arising out of a consensual business relationship with a tribal member. In this case, tribal members had alleged that an off-reservation bank had discriminated against them by refusing to sell back land that the tribal members had previously owned and sold to the bank pursuant to a mortgage agreement. In tribal court, the tribal members brought an array of tribal common law claims, and won most of them, including the discrimination claim. The Supreme Court, however, reversed, holding that tribes cannot regulate or adjudicate claims relating to the sale of non-Indian fee lands.

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Indian Tribal Civil Jurisdiction's Reach Over Non-Indians: *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*

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Summary

Many Indian tribes have tribal court systems where tribal laws and regulations may be enforced against tribal members. However, absent express congressional authorization, a tribal court may subject nonmembers to its civil jurisdiction for claims arising from non-Indian fee lands located within Indian reservations only if: (1) the nonmember has entered into a consensual commercial relationship with the tribe or a tribal member, or (2) the conduct of the nonmember has some direct effect on the political integrity, economic security, or the health or welfare of the tribe. The Supreme Court addressed the reach of tribal civil jurisdiction over nonmembers in *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.* (491 F.3d 878 (8th Cir. 2007), *cert. granted*, 128 S. Ct. 829 (2008)), a case that presents the question of whether Indian tribal courts have jurisdiction over a nonmember involved in a civil tort claim arising out of a consensual business relationship with a tribal member. In this case, tribal members had alleged that an off-reservation bank had discriminated against them by refusing to sell back land that the tribal members had previously owned and sold to the bank pursuant to a mortgage agreement. In tribal court, the tribal members brought an array of tribal common law claims, and won most of them, including the discrimination claim. The Supreme Court, however, reversed, holding that tribes cannot regulate or adjudicate claims relating to the sale of non-Indian fee lands.

Background. Indian tribes, prior to the signing of the U.S. Constitution, were sovereign entities.¹ To this day, tribes largely retain their inherent sovereignty over their internal affairs.² However, tribal sovereignty has been viewed by the federal courts as

¹ Felix S. Cohen. Handbook of Federal Indian Law 205 (Nell Jessup Newton ed. 2005) [hereinafter "Cohen"]. See also *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (characterizing Indian tribes as "distinct, independent political communities").

² See *United States v. Wheeler*, 435 U.S. 313 (1978).

limited, in view of the tribes' status as domestic dependent nations,³ and is subject to the near plenary power of Congress.⁴

One aspect of inherent tribal sovereignty that remains largely intact is the power to regulate the internal affairs of the tribe that occur within the boundaries of the reservation and, in some limited situations, matters that directly affect tribal members outside of the reservation.⁵ A tribe's civil jurisdiction over its members is a product of this inherent sovereignty. However, even though the federal government does not delegate jurisdiction to tribes through statutes or treaties, federal judicial decisions do impose some restrictions on the scope of tribal jurisdiction. In addition, because inherent tribal sovereignty is defined by federal decisional law and is not rooted in the Constitution, Congress can also choose to expand or contract tribal jurisdiction through legislation.⁶

In the absence of federal legislation, federal court decisions define the parameters of tribal jurisdiction. The basic framework for tribal civil jurisdiction was established in *Montana v. United States*, which held that Indian tribes could not regulate the activities of nonmembers who are on non-Indian fee lands⁷ located within Indian reservations.⁸ *Montana's* original holding only addressed a tribe's civil regulatory authority over nonmembers, but has since been interpreted to limit a tribe's civil adjudicatory authority as well.⁹ However, the Court in *Montana* also carved two exceptions to this restriction: tribes may assert civil jurisdiction over nonmembers on non-Indian fee lands when (1) the nonmember has entered into a consensual relationship with the tribe or its members or (2) the nonmember's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.¹⁰

Any attempt to determine a valid exercise of tribal civil jurisdiction begins with an analysis under *Montana*,¹¹ although various factors affect the precise scope of the exceptions. For example, a mere showing of a consensual relationship between a nonmember and either the tribe or a tribal member is not sufficient to support tribal civil

³ See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁴ For an analysis of retained tribal sovereignty, see *Duro v. Reina*, 495 U.S. 676 (1990); *Montana v. United States*, 450 U.S. 544 (1981).

⁵ Cohen, *supra* 212-219.

⁶ *Id.* See also *United States v. Lara*, 541 U.S. 193 (2004); 25 U.S.C. §1301(2) (conferring on tribal courts criminal jurisdiction over Indians who are not members of the tribe).

⁷ "Non-Indian fee land" refers to land that was once previously held by the federal government in trust for the benefit of an Indian tribe, but is now owned by an individual in fee simple. The federal government in 1908 had allotted several million acres of tribal trust land to individual tribal members in fee simple parcels, freeing those lands from the trust's alienability restrictions.

⁸ 450 U.S. 544 (1981).

⁹ *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal court jurisdiction, we adhere to that understanding.").

¹⁰ *Montana*, 450 U.S. at 565-66.

¹¹ See L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty At The Millennium*, 96 Colum. L. Rev. 809, 872 (1996).

jurisdiction.¹² The tribal exercise of authority must “take the form of taxation, licensing, or ‘other means’ of regulating the activities of the nonmember” and “must have some nexus to the consensual relationship.”¹³ In order for there to be a possibility of tribal civil jurisdiction, the lawsuit must arise from the consensual relationship itself.¹⁴

Although the reach of tribal court jurisdiction does not necessarily turn on the ownership status of the land upon which the dispute occurred, in most circumstances, nonmember ownership of the land is presumptively conclusive of the absence of tribal civil jurisdiction.¹⁵

Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.

Facts Of The Case. The Long Company was an Indian-owned farming and ranching business incorporated under the laws of South Dakota and located within the Cheyenne River Sioux Indian Reservation. The Company had mortgaged its land to Plains Commerce Bank, a South Dakota corporation located outside of the reservation. The Company and the Bank later entered into a loan agreement, which provided that the Company would deed the mortgaged land to the Bank while the Bank would cancel the Company’s prior debt and issue additional loans for use in the Company’s ranching operations. The Company was then given a two-year lease on the property with an option to purchase. The loan agreement was negotiated within the tribe’s offices under the supervision of tribal and Bureau of Indian Affairs (BIA) officers, but signed in the bank’s offices off-reservation.

According to the Long family, who owned the Company, Plains Commerce Bank had initially offered more favorable purchase terms during the negotiations of the lease agreement, but later withdrew the offer, citing “possible jurisdictional problems” posed by the Long Company’s status as an “Indian owned entity on the reservation.” Furthermore, the Longs claimed that the bank never provided the promised operating loans and, as a result, the Long Company could not support its ranching operation through the winter of 1996-97. Because of the loss of hundreds of livestock during that winter, the Longs lacked sufficient funds to exercise their option to repurchase the land. When the Longs did not vacate the property, Plains Commerce Bank initiated state eviction proceedings and asked the Cheyenne River Sioux Tribal Court to serve the Longs a notice

¹² *Strate*, 520 U.S. at 457 (determining that even though the nonmember was engaged in subcontract work with the tribe and was, thus, in a consensual relationship with the tribe, the tribal member suing the nonmember was not a party to the subcontract, and, thus, the lawsuit did not qualify for the consensual relationship exception to the general prohibition of tribal civil jurisdiction over nonmembers).

¹³ *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) (holding that a tribal hotel-occupancy tax was invalid when imposed on a nonmember owned hotel located on non-Indian fee land because the tax was not authorized by Congress by either treaty or statute, and it had not been established that the tax was related to a consensual relationship between the tribe and the nonmember-owned hotel or that the tax would affect the political integrity of the tribe).

¹⁴ *Id.* (“A nonmember’s consensual relationship in one area thus does not trigger tribal civil authority in another...”).

¹⁵ *Nevada v. Hicks (Hicks)*, 533 U.S. 353, 359-360 (2001).

to quit. Plains Commerce Bank also divided the land into separate parcels and sold these parcels to several nonmembers.

Procedural Background. The Longs filed a complaint in tribal court alleging an array of claims, including a discrimination claim. Plains Commerce Bank answered that the tribal court lacked jurisdiction and stated a counterclaim. The tribal court found that it had jurisdiction, denied the Bank's motion for summary judgment on its counterclaim, and then proceeded to judgment. At the conclusion of the tribal court trial, the jury was instructed on four of the Longs' claims: breach of contract, bad faith, discrimination, and improper use of self-help. A unanimous jury found for the Longs on all counts except the self-help claim, and returned a general verdict in their favor for \$750,000 in damages plus interest. A later supplemental judgment further awarded the Longs an option to purchase land they still occupied, which would have nullified the Bank's previous sale of land to nonmembers.

The Bank appealed the judgment to the tribal court of appeals, arguing that tribal courts did not have jurisdiction to adjudicate violations of federal discrimination laws. The tribal appellate court held that the discrimination claim filed by the Longs arose not from federal law, but from tribal common law. Furthermore, the tribal appellate court held that the tribal court could exercise jurisdiction over the discrimination claim because the Bank had a consensual relationship with a tribal member that implicated the tribe's economic security.

Plains Commerce Bank then filed an action in federal district court seeking a declaration that the tribal judgment was not entitled to recognition because the tribal court lacked jurisdiction over the Longs' discrimination claim.¹⁶ The district court found that the tribal court did have jurisdiction over Plains Commerce Bank based on its consensual relationship with the Longs and their company, the clear nexus between the discrimination claim and the consensual relationship, and because tort claims, in general, fall under the rubric of the "consensual relationship" exception.

Eighth Circuit. The Bank then appealed the district court judgment to the U.S. Court of Appeals for the Eighth Circuit. The Eighth Circuit focused on whether there was a sufficient consensual relationship between Plains Commerce Bank and the Long Company, and then whether the suit arose from that consensual relationship.¹⁷ The Eighth Circuit concluded that the commercial dealings between Plains Commerce Bank and the Long Company constituted a consensual relationship and that the tribe's common law discrimination cause of action was a valid means of regulating commercial dealings.¹⁸ Therefore, the court concluded that the tribe had inherent authority to regulate a nonmember's conduct arising out of a consensual relationship through the adjudication of a tortious discrimination claim.

¹⁶ Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., 440 F. Supp. 2d 1070 (D.S.D. 2006).

¹⁷ Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., 491 F.3d 878 (8th Cir. 2007).

¹⁸ *Id.* at 887.

U.S. Supreme Court. Plains Commerce Bank petitioned the U.S. Supreme Court for a writ of *certiorari* to review the Eighth Circuit decision.¹⁹ The Supreme Court granted the petition on January 4, 2008.²⁰ On June 25, 2008, the Supreme Court reversed the decision of the Eighth Circuit.²¹ The Court began by citing the proposition that tribal sovereignty lies upon tribal trust land and on tribal members within the reservation. But, the Court noted, tribes generally do not have such authority over non-Indians who come within the tribal borders. “This general rule thus restricts tribal authority over non-member activities taking place on the reservation, and is particularly strong when the nonmember’s activity occurs on land owned in fee simple by non-Indians.”²² This is true even if the land was at one time tribal; once converted into fee simple, the tribe loses plenary authority over it. Therefore, the tribe loses the authority not only to enjoin the land’s sale, but also the authority to regulate the use of fee land by way of tribal ordinance or actions in the tribal courts. The only two exceptions to this rule are the ones outlined in *Montana*.²³ The Court concluded, however, that the *Montana* exceptions apply only to the tribal authority to regulate activities conducted on non-Indian fee lands, and that *Montana* categorically does not permit tribes to regulate the sale of non-Indian fee lands.

In reciting the history of tribal civil jurisdiction, the Court noted that tribal civil jurisdiction was recognized in circumstances that involved taxation, licensing for hunting and fishing, and the sale of merchandise by a non-Indian to an Indian on the reservation.²⁴ The Court emphasized that the only time it had previously recognized tribal authority to regulate nonmember activity on non-Indian fee land was when it permitted restraints on land use imposed by tribal zoning regulations. Even then, the Court noted, the regulation was permitted only because of the fee land was isolated in “the heart of a closed portion of the reservation.”²⁵ Noting this history, the Court concluded that because tribes held limited sovereign interests, the *Montana* exceptions were meant only to permit tribal oversight of nonmember conduct that would threaten or intrude on the tribe’s internal affairs or self-rule.²⁶ The Court found that this proposition precludes the tribe from regulating the sale of non-Indian fee lands because the effect land ownership has on a tribe’s internal affairs and self-rule ends when the land passes from tribal ownership to fee simple status. Although nonmember conduct on the land may injure the tribe’s internal affairs and self-rule, this injury may only be remedied by regulating the nonmember conduct, and not by enjoining the sale of such lands to other nonmembers.²⁷

In applying this reasoning to the Longs’ discrimination suit, the Court characterized the suit as a means for the tribe to regulate a “non-Indian’s sale of non-Indian fee land.”

¹⁹ 128 S. Ct. 829 (2008).

²⁰ *Id.*

²¹ Plains Commerce Bank v. Long Family Land & Cattle Co., slip op., 554 U.S. ___ (2008).

²² *Id.* at 9.

²³ *Id.* at 8-10.

²⁴ *Id.* at 14.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 15-17.

Because the discrimination suit would have nullified such a sale, which *Montana* prohibits a tribe from doing, the Court reversed the Eighth Circuit decision.²⁸

Concluding Observations. The *Plains Commerce Bank* case has clarified one crucial point: tribal governments may not regulate the sale of non-Indian fee lands located within the reservation. This appears to be a per se rule because the Supreme Court in its analysis concluded that such sales categorically do not implicate the legitimate tribal interests that *Montana* exceptions are meant to protect. On the other hand, the Supreme Court has left open the possibility that the conduct of nonmembers on non-Indian fee lands can still be regulated. A remaining issue is the precise scope of tribal authority over nonmembers. The Court may have to address in the future whether tribal jurisdiction over nonmember conduct is restricted to taxation or licensing, or if a tribe's civil jurisdiction can also encompass more extensive oversight via common law adjudications.

Another issue this case has helped to clarify is the effect that the ownership status of land has upon tribal jurisdiction. Traditionally, it had been understood that ownership status of the land carried great weight.²⁹ More recently, however, there had been signs that the Supreme Court was placing less emphasis on land status in determining whether there was civil jurisdiction.³⁰ This case, on the other hand, has reaffirmed the important role ownership status plays in determining the breadth and reach of tribal authority. Although the Court appeared to leave open the possibility for tribes to regulate nonmember conduct on non-Indian fee lands within their reservations, it would seem the activities that a tribe can regulate are limited to those that have an unusually extraordinary impact on tribal self-rule.

²⁸ *Id.* at 24.

²⁹ *See Montana*, 450 U.S. at 565-566.

³⁰ *See Hicks*, 533 U.S. at 359-360; *Atkinson Trading Co.*, 532 U.S. at 660 (J. Souter, concurring).