IN WATER WHEEL, THE NINTH CIRCUIT CORRECTS A LIMITATION ON TRIBAL COURT JURISDICTION

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Abstract: On June 10, 2011, in Water Wheel Camp Recreational Area, Inc. v. LaRance, the U.S. Court of Appeals for the Ninth Circuit held that a tribal court had jurisdiction over a non-Indian corporation and its non-Indian president through the tribe’s inherent authority to exclude and manage its land. The Ninth Circuit limited the application of Montana v. United States, a case restricting tribal authority, to situations involving non-tribal land or to situations in which competing state interests are at play. In so doing, the court gave tribal courts the breadth of power Congress intended.

Introduction

The Colorado River Indian Tribe (CRIT) is a federally-recognized tribe with a reservation that was established by Congress in 1865.¹ CRIT’s judicial system is comprised of a tribal court and a tribal court of appeals.² Its tribal court system is established by tribal ordinance with jurisdiction over “any person who . . . uses or possesses any property within the Reservation for any civil cause of action arising from such . . . use or possession.”³ CRIT also enacted a Property Code, allowing a cause of action to evict any person who occupies the premises after reasonable demand to leave.⁴ Congress has granted Indian tribes the authority to establish such ordinances and judicial systems.⁵

Water Wheel Camp Recreational Area, Inc. (“Water Wheel”) is a non-Indian corporation that was leasing tribal land from CRIT.⁶

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¹ Brief for the United States as Amicus Curiae in Support of Tribal Defendants-Appellants at 1, Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802 (9th Cir. 2011) (Nos. 09-17349 & 09-17357).

² Id. at 8.


⁴ See id.

⁵ Id. at 2 (citing 25 U.S.C. § 3601(4)–(5) (2006)).

⁶ Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 804–05 (9th Cir. 2011).
Johnson was Water Wheel’s non-Indian president who was living on CRIT’s tribal land.\(^7\) A lease dispute arose between the parties, and eventually CRIT brought an action against Water Wheel and Johnson in the tribal court for eviction, unpaid rent, damages, and attorney’s fees.\(^8\) The tribal court ruled in favor of CRIT.\(^9\)

Water Wheel and Johnson filed a complaint in the United States District Court for the District of Arizona, arguing that the tribal court lacked subject matter jurisdiction over both parties, and that the court lacked personal jurisdiction over Johnson.\(^10\) The district court found that the tribal court had subject matter jurisdiction over Water Wheel based on an exception to \textit{Montana v. United States}, a Supreme Court decision limiting tribal jurisdiction.\(^11\) The district court found that tribal court did not, however, have any jurisdiction over Johnson.\(^12\) The United States Court of Appeals for the Ninth Circuit reversed in part, holding that the tribe had subject matter jurisdiction over both Water Wheel and Johnson.\(^13\)

The Ninth Circuit limited the application of \textit{Montana} to situations involving the exercise of tribal authority over nonmembers on non-tribal land unless there are competing state interests at play.\(^14\) Although the Ninth Circuit agreed with the district court that the \textit{Montana} exceptions might be satisfied in this case, the court determined that such an analysis was unnecessary because the district court had improperly applied a \textit{Montana} exception to activity on tribal land.\(^15\) In situations involving tribal land, when the actions of a non-Indian have interfered with the ability of the tribe to exclude and manage that land, the tribe’s status as a landowner is sufficient for a tribal court to have jurisdic-

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\(^7\) \textit{Id.} at 805.
\(^8\) \textit{Id.} at 805–06.
\(^9\) \textit{Id.} at 806.
\(^10\) \textit{Id.} at 805–07.
\(^12\) \textit{Water Wheel}, 642 F.3d at 807–08.
\(^13\) \textit{Id.} at 805, 820.
\(^14\) \textit{See id.} at 813–14.
\(^15\) \textit{Id.} at 814, 816; \textit{see Montana}, 450 U.S. at 564–66. The Ninth Circuit noted that “the [district] court failed to recognize that in applying \textit{Montana} unnecessarily, it improperly expanded limitations on tribal sovereignty that, with only one narrow exception, have been applied exclusively to non-Indian land.” \textit{Water Wheel}, 642 F.3d at 807 n.4.
tion. In so deciding, the Ninth Circuit gives tribal courts the breadth of power Congress intended.

I. THE MONTANA EXCEPTIONS, WATER WHEEL’S LEASE, AND THE ENSUING LAWSUITS

Montana v. United States “is the pathmarking case concerning tribal civil authority over nonmembers.” In Montana, the United States Supreme Court held that the Crow Indian Tribe could not regulate hunting and fishing by nonmembers of the tribe on land owned by nonmembers, despite the nonmembers’ land being within the reservation. The Court established a limitation on tribal civil authority over nonmembers, holding that tribal authority cannot be exercised “beyond what is necessary to protect tribal self-government or to control internal relations . . . .” The Court allowed two exceptions to this rule. Tribal authority may be exercised over nonmembers beyond what is necessary to protect self-government or to control internal relations (1) when a consensual relationship exists between nonmembers and the tribe or its members; or (2) when the conduct of a nonmember “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”

A. Water Wheel’s Lease

In 1975, CRIT and Water Wheel signed a business lease for twenty-six acres of tribe-owned land on CRIT’s reservation. On the land, Water Wheel operated a recreational resort with facilities including a marina, convenience store, bar, and trailer and camping spaces. Pursuant to the lease, Water Wheel paid CRIT a percentage of the gross re-

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16 See Water Wheel, 642 F.3d at 814, 816.
20 Id. at 564.
21 See id. at 565–66; Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 809 (9th Cir. 2011).
22 See Montana, 450 U.S. at 565–66; Water Wheel, 642 F.3d at 809.
23 Water Wheel, 642 F.3d at 805.
24 Id.
ceipts from the resort and rent of one hundred dollars per acre. After twenty-five years, the parties were to renegotiate the rent based on the property’s market value.

In 1981, Robert Johnson, a non-Indian, purchased half of Water Wheel’s stock. Four years later, he purchased the remaining stock, became the president of Water Wheel, and began living at the site. For over twenty-two years, Johnson lived at the site, controlling and operating the resort. When the parties attempted to renegotiate the lease in 2000, they failed to reach an agreement. The following year, Water Wheel stopped paying CRIT the percentage of gross business receipts. Water Wheel paid only nominal rent in 2003 and 2004, and beginning in 2005 Water Wheel stopped paying rent altogether. After the lease expired on July 6, 2007, Water Wheel and Johnson continued to operate the resort and refused to vacate the property while paying nothing to the tribe.

B. The Lawsuits

CRIT brought an action against Water Wheel and Johnson in tribal court for eviction, unpaid rent, and damages from the tribe’s loss of use of their property. Water Wheel and Johnson moved to dismiss, arguing that the tribal court lacked subject matter jurisdiction over both parties, and that the court lacked personal jurisdiction over Johnson in part because his relationship with CRIT was involuntary. The tribal court denied the motion to dismiss and ruled in favor of CRIT on all claims.

26 Id.
27 Water Wheel, 642 F.3d at 805.
28 Id.
29 Id.
30 Id.
31 Id.
32 Water Wheel, 642 F.3d at 805.
33 Id.
34 Id.
35 Id. at 805–07; Water Wheel, 2009 WL 3089216, at *4. In addition, Water Wheel and Johnson attempted to overcome the lease by arguing that the land did not belong to CRIT or that the lease was with the United States, and not CRIT. Water Wheel, 2009 WL 3089216, at *4. The district court decided that these arguments were “foreclosed by ‘[p]laintiffs’ repeated concession that this case [did] not challenge the Indian title or reservation status of the land,” and by the parties’ dealings with each other as landlord and tenant for over twenty years. Id. at *2, *4.
36 Water Wheel, 642 F.3d at 806.
The court held that Johnson and Water Wheel were “alter egos,” and the court pierced the corporate veil to hold Johnson personally and jointly liable for the damages resulting from the breach.\footnote{Id. (internal quotations omitted).} Johnson and Water Wheel appealed, and the tribal court of appeals affirmed.\footnote{Id.}

Water Wheel and Johnson then filed a complaint against the tribal court judge and the court’s clerk in the District Court for the District of Arizona, seeking declaratory and injunctive relief from the tribal court’s jurisdiction.\footnote{Id. at 807.} The district court held that the tribal court had subject matter jurisdiction over Water Wheel through Montana’s first exception—a consensual relationship between non-Indians and the tribe or its members—because the corporation had entered into a consensual relationship with the tribe.\footnote{Id.; see Montana, 450 U.S. at 565–66.} Nevertheless, the court held that the tribal court did not have jurisdiction over Johnson because he had not voluntarily consented to the tribal court’s jurisdiction.\footnote{Water Wheel, 2009 WL 3089216, at *8–10.}

Both parties appealed, and the Ninth Circuit reversed the district court’s decision as to Johnson and, on different reasoning, affirmed as to Water Wheel.\footnote{See Water Wheel, 642 F.3d at 808, 816, 820.} The Ninth Circuit found that the tribe had regulatory and adjudicative jurisdiction over Water Wheel, but not based on Montana.\footnote{Id. at 814, 816.} Instead, because there were no competing state interests at play, the court concluded that CRIT’s right to exercise jurisdiction flowed from the tribe’s inherent authority to exclude and manage its own land.\footnote{Id.}

The Ninth Circuit added that even if Montana applied, the tribe would still have jurisdiction over both Water Wheel and Johnson because both of the Montana exceptions would be satisfied.\footnote{Id. at 818–17.} The Ninth Circuit expressly refuted the district court’s finding that Johnson had not consented to a relationship with the tribe.\footnote{Id. at 818.} The tribe had jurisdiction over Johnson because he should have anticipated tribal jurisdiction based on his business dealings with CRIT which took place on the tribe’s land.\footnote{See Water Wheel, 642 F.3d at 818. Johnson was also not protected by the fiduciary shield rule because it was an established fact that Johnson was Water Wheel’s “alter ego,” and therefore Johnson’s actions on behalf of Water Wheel were also on behalf of himself.}
Johnson based on traditional personal jurisdiction principles because he was both physically present on the tribal land and had sufficient minimum contacts with the land. Therefore, even though the tribal court had jurisdiction over Johnson based on its inherent authority, it would have also had jurisdiction based on traditional principles of personal jurisdiction and either Montana exception.

II. THE COURTS’ CONFLICTING BASES FOR ESTABLISHING TRIBAL JURISDICTION

The key difference between the district court’s and the Ninth Circuit’s bases for jurisdiction was the applicability of Montana v. United States. The district court determined that the tribal court had jurisdiction based on the first Montana exception because there was a consensual relationship between Water Wheel and CRIT. The court found that the lease between Water Wheel and CRIT was a classic example of a consensual relationship under Montana because commercial dealings, contracts, leases, or other arrangements are acceptable bases for the exception. As the lawsuit resulted from Water Wheel’s lease, the relationship met the Supreme Court’s requirement that the regulation imposed by the tribe have a nexus to the consensual relationship. According to the district court, the tribe’s status as the landowner did not obviate the need to apply Montana. It determined that a tribe’s jurisdiction over nonmembers must be exercised within the Montana framework, implying that the tribe’s inherent power to exclude does not independently provide a basis for jurisdiction.

In contrast, the Ninth Circuit held that the tribal court had jurisdiction irrespective of Montana because there were no competing state

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Id. at 818–19 (citing Katzir’s Floor & Home Design, Inc. v. M-MLS.com, 394 F.3d 1143, 1149 (9th Cir. 2004); Davis v. Metro Prods., Inc., 885 F.2d 515, 520 (9th Cir. 1989)).

48 Id. at 819–20 (citing Burnham v. Superior Court, 495 U.S. 604, 610 (1990); Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).


50 See Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 814, 816 (9th Cir. 2011); Water Wheel Camp Recreational Area, Inc. v. LaRance, No. CV-08-0474-PHX-DGC, 2009 WL 3089216, at *5 (D. Ariz. Sept. 23, 2009), aff’d in part, vacated in part, rev’d in part, 642 F.3d 802 (9th Cir. 2011).


52 Water Wheel, 2009 WL 3089216, at *3.

53 Id. at *3; see Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001) (describing the nexus requirement for Montana’s consensual relationship exception).

54 Water Wheel, 2009 WL 3089216, at *4 n.5.

55 See id. at *10–12.
interests at play, the activity being regulated took place on CRIT’s land, and the activity interfered directly with CRIT’s inherent power to exclude and manage its lands. According to the Ninth Circuit, the tribe had jurisdiction based on “the long-standing rule that Indian tribes possess inherent sovereign powers, including the authority to exclude . . . unless Congress clearly and unambiguously says otherwise.” The tribe’s power to exclude nonmembers from its land necessarily includes the incidental power to regulate because the tribe should be able to set conditions on nonmembers’ entry. The court determined that Montana did not affect this finding.

Although the Ninth Circuit and the district court disagreed about the basis of the tribal court’s jurisdiction, both courts supported their approaches with precedent. The Ninth Circuit cited a number of Supreme Court cases supporting its finding of tribal court jurisdiction without applying Montana. In Merrion v. Jicarilla Apache Tribe and New Mexico v. Mescalero Apache Tribe, the Supreme Court addressed whether tribes have inherent authority irrespective of Montana. In Merrion, the Court recognized a tribe’s inherent authority to exclude nonmembers from tribal land without discussing Montana. There, the Supreme Court upheld a tribal tax as a condition of entry for non-Indians conducting business on tribal land. In Mescalero Apache Tribe, the Court remanded a case for reconsideration in light of Montana regarding hunting and fishing regulation rights on tribe-owned land. On re-
mand, the Ninth Circuit adhered to its earlier determination, and the Supreme Court later affirmed, that *Montana* did not affect the question at issue because “*Montana* concerned lands located within the reservation but not owned by the [t]ribe or its members.”66

The Supreme Court has almost exclusively applied *Montana* to situations involving non-Indian land or its equivalent, such as land within the reservation owned in fee simple by non-Indians.67 For example, in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, the Court applied *Montana* to preclude a tribe from regulating the sale of non-Indian land, even though the land was within the tribe’s reservation.68 In *Strate v. A-I Contractors*, the Court applied *Montana* to preclude tribal jurisdiction over a civil action involving a car accident on a public highway, even though the highway passed over the tribe’s reservation.69 The Court in *Strate* specified that *Montana* applied to situations “on non-Indian land,” and expressly stated that its decision did not address instances “when an accident occurs on a tribal road within a reservation.”70 The Court reiterated this distinction in *Atkinson Trading Co. v. Shirley*, describing the *Montana* exceptions as “two possible bases for tribal jurisdiction over non-Indian fee land.”71

Despite the Supreme Court’s trend of applying *Montana* only to situations on non-Indian land, the district court relied on a Supreme Court decision that does not follow the trend—*Nevada v. Hicks*.72 In *Hicks*, the Court applied *Montana* to a situation involving Indian-owned land.73 There, the Court precluded tribal jurisdiction over state officials who entered tribal land to execute a search warrant against a tribe member.74 The tribe member was suspected of violating state law off the reservation, and the Court determined that “[t]he State’s interest in execution of process [was] considerable . . . .”75 Furthermore, “tribal authority to regulate state officers in executing process related to the

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66 See id. at 330–31.
67 *Water Wheel*, 642 F.3d at 809.
68 554 U.S. 316, 330, 332 (2008). In *Bourland*, the Court explained that a tribe that conveyed land to non-Indians “lost the right of absolute use and occupation . . . [and that] the [t]ribe no longer had the incidental power to regulate the use of the lands . . . .” 508 U.S. at 688.
70 See id. at 442, 446 (emphasis added).
72 See *Nevada v. Hicks*, 533 U.S. 353, 360 (2001); *Water Wheel*, 642 F.3d at 809–10; *Water Wheel*, 2009 WL 3089216, at *4 n.5.
73 533 U.S. at 358, 370.
74 Id. at 355, 364, 366.
75 Id. at 355, 364.
violation, off reservation, of state laws [was] not essential to tribal self-government . . . .”\textsuperscript{76} In other words, the state had a competing interest, so the tribe’s power of exclusion was not enough to assert regulatory jurisdiction.\textsuperscript{77} Jurisdiction could only be established through one of the \textit{Montana} exceptions, and neither exception was met.\textsuperscript{78} According to \textit{Hicks, Montana} “clearly impl[ies] that the general rule of \textit{Montana} applies to both Indian and non-Indian land,” and ownership of the land is only one factor to be considered.\textsuperscript{79}

In addition to \textit{Hicks}, the district court relied on the Ninth Circuit’s decision \textit{Hardin v. White Mountain Apache Tribe} to support its application of \textit{Montana} to Indian-owned land.\textsuperscript{80} In \textit{Hardin}, the Ninth Circuit allowed a tribal court to permanently exclude from the reservation a nonmember who was living on tribal land.\textsuperscript{81} Although the court did not explicitly apply the \textit{Montana} exceptions, the court referenced the consensual relationship exception in finding that the nonmember’s lease with the Tribe conferred jurisdiction on the tribal court.\textsuperscript{82} Therefore, both the Ninth Circuit and the district court agreed that the tribal court had some jurisdiction over Water Wheel, but they disagreed about the basis for that jurisdiction and the extent of its reach.\textsuperscript{83}

\textbf{III. The Ninth Circuit’s Approach Aligns with Federal Policy and Supreme Court Precedent}

The distinction between the courts’ holdings is significant because finding jurisdiction over nonmembers on tribal land only by applying \textit{Montana} improperly limits the reach of tribal jurisdiction and ignores tribes’ inherent authority.\textsuperscript{84} The Commerce Clause allows Congress to regulate commerce with Indian Tribes, a power the Supreme Court describes as “plenary and exclusive,” and federal policies of deference
to tribal courts promoting tribal self-government are well established. For example, the Indian Tribal Justice Act, which facilitates federal assistance to tribal court systems, demonstrates Congress’s intent to support and encourage the growth of tribal self-government. In its findings, Congress emphasized that “Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems . . .”

The Supreme Court has acknowledged Congress’s interest in promoting tribal self-government and a federal policy of deference to tribal courts. In *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, the Court established the exhaustion doctrine, requiring that parties exhaust tribal court remedies before a federal court may entertain a civil action. In *Santa Clara Pueblo v. Martinez*, the Court further noted that “a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.” In *Iowa Mutual Insurance Co. v. LaPlante*, the Court emphasized that “[t]ribal courts play a vital role in tribal self-government,” and that “the Federal Government has consistently encouraged their development.”

Notwithstanding the precedent cited by the district court, both the Supreme Court and the Ninth Circuit have demonstrated that *Montana* should not be applied to situations on tribe-owned land where there are no competing state interests at play. Although the district court relied on *Nevada v. Hicks*, the *Hicks* Court limited its holding to “the question of tribal-court jurisdiction over state officers enforcing state

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90 436 U.S. 49, 60 (1978).
91 See 480 U.S. at 14–15.
92 See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330–31 (1983); Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842, 850 (9th Cir. 2009).
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law.” Both prior to and in the Water Wheel Camp Recreational Area, Inc. v. LaRance decision, the Ninth Circuit established that Hicks has limited applicability and should not be extended to conduct of non-Indians on tribal land unless there exists a competing state interest, such as the regulating of state officers related to off-reservation violations in Hicks.

The effect of the Ninth Circuit’s decision is already evident. In a recent decision by the District Court for the District of Arizona, a non-Indian plaintiff brought an action against members of a tribal council regarding a revenue-sharing project with an Indian-owned corporation that was located on tribal land. The plaintiff argued that the tribal court did not have jurisdiction since neither Montana exception applied. The district court dismissed the plaintiff’s lawsuit because the situation involved tribal land and there were no competing state interests at play, making it likely that the tribal court had jurisdiction. Had the court accepted the plaintiff’s argument and based jurisdiction on Montana instead of the tribe’s inherent authority to exclude nonmembers, the tribal court may have been unable to adjudicate this dispute involving and occurring on its land. Water Wheel protects against such scenarios and thereby advances Congress’s intent to support and encourage tribal self-government.

93 Nevada v. Hicks, 533 U.S. 353, 358 n.2 (2001); see Water Wheel Camp Recreational Area, Inc. v. LaRance, No. CV-08-0474-PHX-DGC, 2009 WL 3089216, at *4 n.5 (D. Ariz. Sept. 23, 2009), aff’d in part, vacated in part, rev’d in part, 642 F.3d 802 (9th Cir. 2011).

94 Water Wheel, 642 F.3d at 813; see Hicks, 533 U.S. at 355, 364; Elliott, 566 F.3d at 850 (“We reject Plaintiff’s argument that the Court’s holding in Hicks forecloses tribal court jurisdiction [over non-Indians on tribal land].”); McDonald v. Means, 309 F.3d 530, 540 n.9 (9th Cir. 2002) (“Even if [Hicks] could be interpreted as suggesting that the [Montana] rule is more generally applicable . . . [Hicks] makes no claim that it modifies or overrules [Montana].”).


96 Id. at *1, *3–4.

97 Id. at *2.

98 Id. at *3–4.

99 See id. at *2–4.

Conclusion

The Ninth Circuit corrected the district court’s limitation on tribal jurisdiction by reversing its erroneous application of *Montana v. United States*. The Ninth Circuit’s holding still allows a federal court to preclude tribal court jurisdiction over a non-Indian when the activity occurs on non-tribal land or a competing state interest exists. In *Water Wheel Camp Recreational Area, Inc. v. LaRance*, the Ninth Circuit emphasized that the tribal court had jurisdiction because the land belonged to the tribe and there were no competing state interests at play. The court’s conclusion that a *Montana* analysis is unnecessary when determining jurisdiction over activities on Indian land properly aligns with both Supreme Court precedent and important federal policy. As the Ninth Circuit stated, deciding otherwise “would impermissibly interfere with the tribe’s inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress’s interest in promoting tribal self-government.”101

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101 Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 816 (9th Cir. 2011).