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Off the Beaten Path? The Ninth Circuit's Approach to Tribal Courts' Civil Jurisdiction over Nonmember Defendants

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OFF THE BEATEN PATH? THE NINTH CIRCUIT'S APPROACH TO TRIBAL COURTS' CIVIL JURISDICTION OVER NONMEMBER DEFENDANTS

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I. Introduction

Justice Ginsburg described *Montana v. United States*[1] as "the pathmarking case concerning tribal civil authority over nonmembers."[2] But the path that federal and tribal courts have been directed to walk since that pivotal 1981 decision has proven to be more treacherous than expected. Recently, the U.S. Court of Appeals for the Ninth Circuit reached the issue of whether *Montana*'s analytical framework (as the test from that case is commonly called) should be applied to determine a tribal court's civil jurisdiction over a nonmember defendant when the claim arises on tribal land. The Court held that *Montana* should not apply to such a claim and that the tribal court had jurisdiction based on the tribe's power to exclude nonmembers from tribal land.[3] By that time, the U.S. Courts of Appeal for the Eighth and Tenth Circuits had reached the opposite conclusion. These courts held that Supreme Court precedents limit tribal civil jurisdiction over nonmembers to the situations in which at least one of the two "*Montana* exceptions" is satisfied.[4]

These opposing conclusions reflect a split at the circuit level over how to interpret Supreme Court precedents, especially *Montana*, dealing with tribal civil jurisdiction. The jurisdiction of tribal courts is a basic issue of great practical importance; like the judgments or orders of any court, tribal courts' actions can be binding on parties and enforceable in other courts only if the tribal court has jurisdiction over the parties. When a tribal court issues an injunction or renders a judgment against a nonmember party, the tribal court's finding of jurisdiction can be challenged in a U.S. district court. The federal court system is then faced with the task of deciding

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1. 450 U.S. 544 (1981).

2. Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997).

3. Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 810-11 (9th Cir. 2011).

4. *See, e.g.*, Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1150-51, 1153 (10th Cir. 2011).

whether the tribal court has jurisdiction. In short, it is faced with deciding how to apply *Montana*.

This Comment argues that the Ninth Circuit's approach to the application of *Montana* most accurately reflects the U.S. Supreme Court's past decisions. The Ninth Circuit's approach preserves the distinction between non-Indian fee land and tribal land (referred to as "the location factor" in this Comment) for purposes of determining whether civil jurisdiction exists. While the Supreme Court's decision in *Nevada v. Hicks*[5] downplays the distinction between tribal land and non-Indian fee land by incorporating it as a sub-factor considered under the *Montana* exceptions, this Comment argues that the *Hicks* approach is an aberration in the *Montana* line of cases. As the *Water Wheel* court explains, however, *Hicks* can be interpreted as consistent with past Supreme Court decisions.

Part II provides an overview of the relevant U.S. Supreme Court precedents; the case law of the Eighth, Ninth, and Tenth Circuits dealing with the issue; and policy concerns. Next, Part III suggests adoption of the Ninth Circuit's approach to the application of *Montana*. Part IV offers a critique of this thesis. Finally, Part V restates this Comment's conclusions. This Comment does not describe the development and current state of tribal criminal jurisdiction over nonmember defendants, nor does it describe the broader shifts in the Supreme Court's approach to tribal sovereignty.[6] Rather, this Comment offers an up-to-date analysis of a basic practical concern and a persistently controversial aspect of tribal sovereignty.

II. Background

A. Overview of Supreme Court Precedents

Because this Comment explores the recent attempts to apply and interpret *Montana v. United States*, this part takes the case as its starting point, after providing some background, and reviews subsequent relevant Supreme Court decisions. As the U.S. Court of Appeals for the Ninth Circuit has repeatedly observed, "questions of jurisdiction over Indians and Indian country remain a complex patchwork of federal, state, and tribal law, which is better explained by history than by logic."[7] Similarly, Douglas B.

5. 533 U.S. 343 (2001).

6. For an account that relates civil and criminal aspects of tribal jurisdiction (although now somewhat dated), see Thomas P. Schlosser, *Tribal Civil Jurisdiction over Nonmembers*, 37 TULSA L. REV. 573 (2001).

7. Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1130 (9th Cir. 2006) (internal quotation marks omitted).

L. Endreson has written that the decisions handed down since *Montana* each "arose on specific facts that both framed the issue and were determinative of its outcome."[8] The following account will therefore be mainly historical, seeking to relate the relevant factual details of the major U.S. Supreme Court decisions in more or less chronological order and then repeating a similar overview of decisions by the Eighth, Ninth, and Tenth Circuits. Not only are the principles and holdings from these cases relevant, but also their factual contexts, so the necessity of a detailed inventory bears repeating.

As will be shown, though the Court has attempted to limit sweeping language about the inherent sovereignty of tribes in the past three decades, it has never rejected two key concepts: (1) tribal power to exclude nonmembers as a basis for civil jurisdiction, and (2) the distinction between Indian and non-Indian lands for purposes of determining whether tribal civil jurisdiction is proper. *Hicks* challenged the latter concept;[9] conflicting interpretations of the *Hicks* decision consequently lie at the heart of the split discussed in this Comment.

Some context for the decision in *Montana* is necessary. Tribal jurisdiction over members of the tribe, whether criminal or regulatory, was well established by the time *Montana* was decided.[10] Tribal jurisdiction over nonmembers, however, was still being defined. The Court established that tribes retain "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[11] Today, however, the rule is harder to define. In holding that tribes lack criminal jurisdiction to prosecute nonmembers,[12] the Court's important *Oliphant v. Suquamish Indian Tribe* decision set the stage for new limitations on tribal sovereignty.[13] Importantly, however, the Court declined

8. Douglas B. L. Endreson, *Reconciling the Sovereignty of Indian Tribes in Civil Matters with the* Montana *Line of Cases*, 55 VILL. L. REV. 863, 874 (2010).

9. 533 U.S. at 359-60.

10. Neil G. Westesen, *From* Montana *to* Plains Commerce Bank *and Beyond: The Supreme Court's View of Tribal Jurisdiction over Non-Members*, *in* 2 NATURAL RESOURCES DEVELOPMENT ON INDIAN LANDS 9-1, 9-10 & 9-11 (Rocky Mountain Min. L. Found., 2011).

11. United States v. Wheeler, 435 U.S. 313, 323 (1978), *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. §§ 1301-03, *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

12. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978), *superceded by statute*, 25 U.S.C. §§ 1301-03, *as recognized in Lara*, 541 U.S. 193.

13. Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 397 (2008) (asserting that the *Oliphant* decision represents the beginning of a modern attack on tribal sovereignty).

to extend the *Oliphant* rule to tribal civil jurisdiction over nonmembers, leaving the issue open for development on a case-by-case basis.[14]

The extent of tribal courts' jurisdiction has been explained in relation to both tribal regulatory power and the location of where the claim arose. The Court has held that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[15] The location factor (whether the claim arose on reservation land held by an Indian versus land held in fee by a non-Indian) has also historically been accorded great weight in the Court's analysis of tribal civil jurisdiction over nonmembers. Tribal courts have exclusive jurisdiction (absent an act of Congress) over cases in which a nonmember sues an Indian over a transaction taking place on reservation land.[16]

The seminal decision in *Montana* provides the framework for considering whether a tribal court has jurisdiction over nonmembers and remains the most important case dealing with this issue. As a result, *Montana* must be the starting point for any discussion of the narrower issue of tribal civil jurisdiction over nonmember defendants.[17] The case arose from the Crow Tribe's attempt "to prohibit all hunting and fishing by nonmembers" within its reservation.[18] In its decision, the Court addressed two issues: (1) "whether the United States conveyed beneficial ownership of the riverbed [of the Big Horn River] to the Crow Tribe,"[19] and (2) "the question of the power of the [Crow] Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe."[20]

With regard to the first issue, as the Court summarized, the Crow Tribe "[sought] to establish a substantial part of their claim of power to control hunting and fishing on the reservation by asking [the Court] to recognize their title to the bed of the Big Horn River."[21] The Court flatly rejected this claim, holding that in this case, the language of the treaties relied on by the tribe could not rebut the "strong presumption against conveyance" of title to the Big Horn River.[22] As to the second issue, the Court's analysis addressed

14. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855 (1985).
15. Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997).
16. Williams v. Lee, 358 U.S. 217, 222-23 (1959).
17. *See Strate*, 520 U.S. at 445.
18. Montana v. United States, 450 U.S. 544, 547 (1981).
19. *Id.* at 550-51.
20. *Id.* at 557.
21. *Id.* at 550.
22. *Id.* at 552-54.

two possible sources of tribal authority to regulate non-Indian (and therefore nonmember) fishing and hunting: the previously mentioned treaties and the inherent sovereignty of the Crow Tribe.[23] It proceeded to systematically reject each potential source of authority in turn in parts III.A and .B of the opinion.

Part III.A explained that the alienation of reservation lands must influence the Court's interpretation of the treaty.[24] While the treaty establishing the Crow reservation may have established the tribe's authority to regulate hunting and fishing on lands used exclusively by the tribe, such authority had been compromised by the subsequent "allotment and alienation of tribal lands . . . ."[25] The Court also rejected the argument that the treaties had been "augmented" by 18 U.S.C. § 1165.[26] In sum, because non-Indians could no longer be excluded from the land in question, tribal authority to regulate activities on those lands had dissipated. In addition to reaching this conclusion, the court also held that the tribe has jurisdiction to regulate nonmember conduct on tribal land--land that is still owned by the tribe or held in trust for the tribe by the United States.[27]

Proceeding to Part III.B, the Court stated that as a general rule, tribes do not have jurisdiction over nonmembers. Relying on *United States v. Wheeler*, the Court explained that,

> in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.[28]

The Court then identified two exceptions (now usually called the *Montana* exceptions) to "these general principles," which will support tribal civil jurisdiction over nonmembers "even on non-Indian fee lands."[29] The first

23. *Id.* at 557.
24. *Id.* at 561.
25. *Id.* at 558-59.
26. *Id.* at 561-62.
27. *Id.* at 557 (holding that "the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe.").
28. *Id.* at 564 (citations omitted).
29. *Id.* at 565-66.

exception applies when a nonmember consents to tribal regulation: "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."[30] The second exception applies when nonmember "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[31] "[T]he bar is set exceedingly high" for the latter exception.[32] Indeed, neither exception was held to apply to the situation in *Montana*, and the Court consequently struck down the Crow Tribe's attempted prohibition of nonmember hunting and fishing on non-Indian fee land.[33]

Almost immediately after the decision in *Montana*, the Court delivered another important decision in *Merrion v. Jicarilla Apache Tribe*.[34] The Jicarilla Apache Tribe had enacted a tax that "applie[d] to any oil and natural gas severed, saved and removed from Tribal lands."[35] Upholding the tribe's authority to enact the tax, the Court confirmed that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands, and that this power provides a basis for tribal authority to tax," although the power to exclude nonmembers does not form the only basis of that authority.[36] The Court reasoned that the authority to tax also derives "from its power to govern and to raise revenues to pay for the costs of government."[37] There was, therefore, a range of sources from which a tribe could derive the requisite authority to impose a tax on nonmembers.

Nonetheless, the *Merrion* Court held that the power to exclude non-Indians from the reservation would have been sufficient by itself to support the tax.[38] Unlike in *Montana*, where the power to exclude was only mentioned briefly, the *Merrion* Court explained this aspect of tribal power in some detail.[39] "Nonmembers who lawfully enter tribal lands remain

30. *Id.* at 565.

31. *Id.* at 566.

32. Westesen, *supra* note 10, at 9-23. *But see* Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa, 609 F.3d 927, 940 (8th Cir. 2010) (holding that the second *Montana* exception was satisfied where a nonmember security agency forcibly intervened in a dispute over tribal government); *see also infra* Part II.C.

33. *Montana*, 450 U.S. at 566-67.

34. 455 U.S. 130 (1982).

35. *Id.* at 135-36 (citations omitted) (internal quotation marks omitted).

36. *Id.* at 141.

37. *Id.* at 144.

38. *See id.* at 149.

39. *See id.* at 144-45.

subject to the tribe's power to exclude them."[40] In other words, even if a nonmember is initially allowed entry or access without any restrictions, the tribe retains its authority to impose new conditions after the fact. Furthermore, "Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose."[41] Under *Merrion*, it would seem that consent is *not* required when the claim pertains to activity *on tribal land*.[42]

Subsequent cases also supported tribal civil jurisdiction over nonmember defendants when the claim arose on tribal land. For instance, in *National Farmers Union Insurance Companies v. Crow Tribe of Indians*,[43] the Court decided whether a nonmember defendant being sued over a claim arising on non-Indian owned reservation land was required to exhaust its tribal court remedies before seeking an injunction against the tribal court in federal court. The Court did not directly decide whether jurisdiction was proper but, perhaps even more importantly, declined to extend *Oliphant*'s prohibition on tribal court jurisdiction over nonmember criminal defendants to the context of tribal civil jurisdiction.[44] As the Court explained, "If we were to apply the *Oliphant* rule here, it is plain that any exhaustion requirement would be completely foreclosed because federal courts would *always* be the only forums for civil actions against non-Indians."[45] The *National Farmers* Court thus intentionally left open the possibility that tribal courts would be able to exercise civil jurisdiction over claims against nonmember defendants arising on non-Indian lands.

In another important case, where an Indian worker who suffered an injury on reservation land had sued his Indian employer and a non-Indian insurance company, the Court upheld tribal civil jurisdiction over the non-Indian defendant.[46] In this case, *Iowa Mutual Insurance Company v.*

40. *Id.* at 144.

41. *Id.* at 147. The precise language used by the Court is worth quoting in full, especially with regard to consent, since at least one recent decision regards absence of nonmembers' consent as critical. *See* Rolling Frito-Lay Sales LP v. Stover, No. CV 11–1361–PHX–FJM, 2012 WL 252938, at *4 (D. Ariz. Jan. 26, 2012), discussed *infra* Part II.B; *cf.* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008).

42. *See also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 325 (1983) (holding that a state may not restrict a tribal government's regulation of hunting and fishing on tribal lands in accordance with federal law).

43. 471 U.S. 845 (1985).

44. *See id.* at 855.

45. *Id.* at 854.

46. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 11, 19 (1987).

LaPlante, the Court explained the underlying policies supporting its decision. In an important passage, it explained, "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[47] This principle provides the link between tribal sovereignty (which entails the power to exclude nonmembers explained in *Merrion*) and the scope of tribal court's jurisdiction over nonmembers. The Court later cautioned that this language "does not limit the *Montana* rule,"[48] nor does it "expand or stand apart from *Montana*'s instruction on 'the inherent sovereign powers of an Indian tribe.'"[49] The *LaPlante* Court nonetheless recognized Congress's longstanding policy favoring tribal self-government and the vital importance of developing tribal courts.[50]

In contrast to *LaPlante*, in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, the Court applied *Montana* and struck down a tribal zoning regulation of reservation land held in fee by nonmembers.[51] But "[t]he issue split the Supreme Court into three separate opinions and the process of determining what the Court ultimately concluded is a complicated exercise all by itself."[52] For purposes of this Comment, *Brendale* is simply another instance in which the Court linked the location factor to the application of *Montana*'s analytic framework. The importance of the location factor was again reinforced by a later case, *Atkinson Trading Company v. Shirley*, in which the Court applied the analysis from *Montana* to a dispute over a Navajo tax on a nonmember hotel situated on alienated reservation land.[53] The Court held that *Montana*'s general rule applied to the dispute and that neither *Montana* exception was satisfied; the tribal court therefore lacked jurisdiction.[54] It explained that *Montana*'s "delineation of members and nonmembers, tribal land and non-Indian fee land, stemmed from the dependent nature of tribal sovereignty," describing the link between the location factor and the extent of a tribal court's civil jurisdiction.[55]

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47. *Id.* at 18 (citations omitted); *see also* Westesen, *supra* note 10, at 9-21.
48. Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997).
49. *Id.* (quoting Montana v. United States, 450 U.S. 544, 565 (1981)).
50. *LaPlante*, 480 U.S. at 14-15.
51. 492 U.S. 408, 428 (1989).
52. Westesen, *supra* note 10, at 9-21.
53. 532 U.S. 645, 647-48 (2001); *see also* Endreson, *supra* note 8, at 881.
54. *Atkinson Trading Co.*, 532 U.S. at 647.
55. *Id.* at 650.

Importantly, *Atkinson* also related the *Merrion* decision to the *Montana* line of cases. The Court explained, "*Merrion* . . . was careful to note that an Indian tribe's inherent power to tax only extended to 'transactions occurring on *trust lands* and significantly involving a tribe or its members.'"[56] *Atkinson* "stated the divide [between *Montana* and *Merrion*'s theories of tribal jurisdiction] as plainly as it could: *Merrion* applied to tribally-owned land, and *Montana* applied everywhere else."[57] This summary of the "divide" is important to remember because it forms the basis of the Ninth Circuit's approach in *Water Wheel*.

The connection between a tribe's power to exclude and its power to regulate nonmembers was reaffirmed in *South Dakota v. Bourland*.[58] The Cheyenne River Sioux Tribe had announced that it would prosecute anyone who hunted deer on reservation land without a license issued by the tribe and that it would not recognize state hunting licenses.[59] The hunting activities the tribe sought to regulate took place on land that had been conveyed to the United States under several acts of Congress, including the Cheyenne River Act.[60] The Court explained that the power to exclude forms a basis for regulatory power, but such power is extinguished when the land is transferred to nonmembers.[61] "*Montana*'s framework for examining 'the effect of land alienation'" was held to apply in this case because the land conveyed to the United States was sufficiently similar to the alienated land held in fee by non-Indians in *Montana*.[62]

In *Strate*, the Court tried to limit the implications of its past statements on the inherent sovereignty of tribes, especially language from *LaPlante*.[63] The petitioners argued that *Montana* should not apply because the accident giving rise to the claim in that case occurred on land held in trust for the tribes (a state highway within the reservation).[64] The Court rejected that argument, holding that *Montana* applied to the issue presented.[65] Nonetheless, it did not reach this conclusion by rejecting the distinction

56. *Id.* at 653 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982)) (internal quotation marks omitted).

57. Winter King et al., *Bridging the Divide:* Water Wheel*'s New Tribal Jurisdiction Paradigm*, 47 GONZ. L. REV. 723, 747 (2011-2012).

58. 508 U.S. 679 (1993); *see also* Westesen, *supra* note 10, at 9-25.

59. *Bourland*, 508 U.S. at 685.

60. *See id.* at 683.

61. *Id.* at 689.

62. *Id.* at 692.

63. Strate v. A-1 Contractors, 520 U.S. 438, 448-53 (1997).

64. *Id.* at 454.

65. *See id.*

between tribal land and land held by nonmembers. Rather, the Court held, "in accord with *Montana* . . . tribes retain considerable control over nonmember conduct on *tribal land*. On the particular matter before us, however, we agree with respondents: The right-of-way North Dakota acquired for the State's highway renders the 6.59-mile stretch equivalent, for nonmember governance purposes, to alienated, non-Indian land."[66] In other words, the Court preserved the distinction between tribal land and non-Indian land used in *Montana* (and subsequent cases) and found a place for the claim at hand within that framework.

On the other hand, the Court seemed to lean strongly against finding tribal jurisdiction to rest on any grounds other than the *Montana* exceptions. It explained that without federal authorization "tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances."[67] Going further, the Court cautioned that its decisions in *National Farmers* and *LaPlante* placed no new limits on the reach of *Montana*'s holding.[68] In the same breath, however, the opinion reiterated the established limit on *Montana*'s application. The Court expressly stated that *Montana* provides the rule and exceptions "[r]egarding activity on non-Indian fee land."[69]

The decision in *Plains Commerce Bank v. Long Family Land and Cattle Company*,[70] has been regarded by at least one commentator as inflicting a nearly fatal blow to tribal civil jurisdiction over nonmembers and their activities.[71] A cattle company owned by two members of the Cheyenne River Sioux Indian Tribe had sued the Plains Commerce Bank in tribal court to prevent the company's eviction from reservation land that the bank had sold to nonmembers.[72] The U.S. Supreme Court held that neither of the *Montana* exceptions applied and, consequently, the tribal court did not have jurisdiction.[73] It repeated that tribes "may . . . exclude outsiders from entering tribal land," but also explained the limits on tribal regulatory authority over nonmembers in uniquely strong terms.[74] The passage dealing

66. *Id.* (emphasis added) (citations omitted).
67. *Id.* at 445.
68. *See id.* at 453.
69. *Id.*
70. 554 U.S. 316 (2008).
71. *See* Cullen D. Sweeney, Note, *The Bank Began Treating Them Badly:* Plains Commerce Bank*, the Supreme Court, and the Future of Tribal Sovereignty*, 33 AM. INDIAN L. REV. 549 (2008-2009).
72. *Plains Commerce Bank*, 554 U.S. at 320-22.
73. *Id.* at 318.
74. *Id.* at 327-28.

with tribal sovereignty and jurisdiction over nonmembers is worth quoting at length because of its great influence:

> Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. . . . And nonmembers have no part in tribal government--they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.[75]

The Court further explained, in the omitted part of the above-quoted passage, that tribal sovereignty exists outside of the U.S. Constitution's framework and beyond the protective reach of the Bill of Rights.[76] The entire passage might seem to be in tension with the earlier explanation of the irrelevance of nonmembers' consent to jurisdiction found in *Merrion*.[77] The key difference is that the regulation upheld in *Merrion*, unlike in *Plains Commerce Bank*, was of nonmember activity on *tribal* lands.

This key distinction between tribal land and land held in fee by non-Indians was explained away in *Nevada v. Hicks*.[78] While it is not the latest case chronologically (it was handed down in 2001, before *Plains Commerce Bank*), *Hicks* is the case that diverges most clearly from the line of cases interpreting *Montana*. The dispute giving rise to the case took place on the property of a member of the Fallon Paiute-Shoshone Tribes of western Nevada, within the borders of the tribe's reservation.[79] After a search of his home by state game wardens for evidence that the tribal member, Hicks, had killed protected bighorn sheep outside of the reservation, Hicks brought a claim under 42 U.S.C. § 1983 in the tribal court.[80] The U.S. Supreme Court held that the tribal court lacked jurisdiction over the claim because the tribes did not have "legislative

75. *Id.* at 337 (citations omitted).
76. *Id.*
77. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147 (1982).
78. 533 U.S. 353 (2001).
79. *Id.* at 355-56.
80. *Id.* at 356.

authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law . . . ."[81]

The holding of *Hicks* has (potentially) placed severe limits on tribal court's civil jurisdiction over nonmembers because of its treatment of the location factor. The case's holding is identified easily enough:

> The ownership status of land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is "necessary to protect tribal self-government or to control internal relations." It may sometimes be a dispositive factor. . . . But the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers.[82]

Hicks subordinates the distinction between tribal land and non-Indian fee land to a position as one factor among many to be considered under the second *Montana* exception. But the difference in approaches among the federal circuits stems only indirectly from the quoted passage; the real point of contention is how narrowly (or broadly) *Hicks*'s holding is to be applied. More simply, does Hicks apply to every case involving a nonmember defendant, or is it limited to cases involving "the question of tribal-court jurisdiction over state officers enforcing state law"?[83]

In summary, except for in *Nevada v. Hicks*, the Supreme Court's decisions consistently describe how the *Montana* exceptions are to be applied. First, a court must decide whether the claim arose on non-Indian fee land (or other similarly alienated land) within the reservation. If the claim did indeed arise on non-Indian fee land or alienated land, then the tribal court has jurisdiction over nonmember activities on the land *only* if one of the *Montana* exceptions is satisfied. On the other hand, if the nonmember activity takes place on *tribal land*, then under *Merrion* the tribal court has civil jurisdiction based on tribal authority to exclude nonmembers. Importantly, though, this is emphatically not the case with regard to criminal jurisdiction over nonmembers; tribal courts never have jurisdiction over nonmember, non-Indian criminal conduct, even when it takes place on tribal lands.[84]

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81. *Id.* at 374.

82. *Id.* at 360 (citations omitted).

83. Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 813 (2011) (quoting *Hicks*, 533 U.S. at 358 n.2) (interpreting *Hicks* as being expressly limited to "the question of tribal-court jurisdiction over state officers enforcing state law").

84. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 197 (1978). But note an important exception statutorily created by the Violence Against Women Reauthorization Act

Under the broader reading of *Nevada v. Hicks*, the *Montana* rule would always be the test applied when a claim is brought against a nonmember in tribal court. The location factor would be considered within the framework of the *Montana* test but would not determine whether the case falls under *Montana* in the first place. This point is worth emphasizing because it is where the Ninth Circuit has departed from the Eighth and Tenth Circuits: the *Water Wheel* decision differs because it distinguishes *Hicks* as being limited to its unique factual situation.[85] The Ninth Circuit has effectively adopted the narrower analysis explained in the previous paragraph, while the Eighth and Tenth Circuits have adopted the broader approach. The development of the Ninth Circuit's approach, culminating in the *Water Wheel* decision, is described in the next part.

B. The Ninth Circuit's Approach

The Ninth Circuit has resisted treating the *Montana* exceptions as an all-purpose test for tribal jurisdiction over nonmember defendants. Rather, the location factor is a threshold issue. Under this approach, if the claim arose on reservation land held by a non-Indian, then *Montana*'s analytical framework applies: the tribal court will only have jurisdiction over the nonmember defendant if the requirements for at least one of the *Montana* exceptions are satisfied. Yet, as will be shown below, even in the Ninth Circuit there is still contention over which direction U.S. Supreme Court precedent points with regard to the location factor.[86]

The U.S. Court of Appeals for the Ninth Circuit considered the location factor as a threshold issue in *Burlington Northern Railroad Company v. Red Wolf*,[87] a pre-*Hicks* decision that helps illustrate how the Ninth Circuit's law of tribal civil jurisdiction has developed (or gone full circle) in the past decade. *Red Wolf* also involved somewhat infamous procedural problems that will bear mentioning later in this Comment.[88] The case began with the wrongful death claims brought by the estates of two Crow Tribe members who were killed when a train belonging to the defendant railroad company

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of 2013, which "recognizes tribes' inherent power to exercise 'special domestic violence criminal jurisdiction' . . . over certain defendants, regardless of their Indian or non-Indian status, who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country." Office of Tribal Justice, *Violence Against Women Act (VAWA) Reauthorization 2013*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/tribal/vawa-tribal.html (last visited July 6, 2013).

85. *See Water Wheel*, 642 F.3d at 813.

86. *See infra* Part III.B.

87. 196 F.3d 1059, 1062-63 (9th Cir. 1999).

88. *See infra* Part II.D.

collided with their vehicle at a crossing within the Crow reservation.[89] The tribal court's judgment was appealed to the U.S. Supreme Court, which remanded it to the U.S. District Court for the District of Montana for reconsideration in light of the Court's 1997 decision in *Strate*.[90] The district court held that the tribal court lacked jurisdiction and the Ninth Circuit affirmed.[91]

The location factor was treated as determinative of whether the *Montana* analysis (treated as a general rule with two accompanying exceptions) was applicable.[92] *Red Wolf* summarized "Montana's main rule" as providing "that, absent the contrary intervention of treaty or federal law, a tribe has no civil regulatory authority over non-tribal members for activities on reservation land alienated to non-Indians."[93] The location of where the claim arose was addressed as a "threshold question."[94] The Ninth Circuit held that the railroad crossing was "indistinguishable for analytic purposes from the right-of-way at issue in *Strate*."[95] The *Montana* rule therefore applied, and the Ninth Circuit held, that neither of the two *Montana* exceptions was satisfied.[96] The tribal court lacked jurisdiction over the claim, and the defendant railroad company was not required to exhaust its tribal court remedies.[97] In *Red Wolf*, the location factor was not considered under the *Montana* analysis itself; instead, it was determinative of whether *Montana*'s general rule and analytical framework applied to the claim at all.

After the U.S. Supreme Court's decision in *Hicks*, the Ninth Circuit was seemingly at an impasse with regard to the location factor, but it hesitated to take a definitive stance, as illustrated by its reasoning in *Smith v. Salish Kootenai College*.[98] In that case, the Ninth Circuit upheld tribal civil jurisdiction when a nonmember filed a claim against a tribal entity (Salish and Kootenai College) in tribal court and, after receiving an unfavorable verdict, challenged the subject matter jurisdiction.[99] The court failed to unequivocally state what the *Hicks* decision meant for the location factor, or how the Ninth Circuit might decide in the future with regard to tribal

89. *Burlington N. R.R. Co.*, 196 F.3d at 1062.
90. *Id.*
91. *Id.*
92. *See id.* at 1062-63.
93. *Id.* at 1062.
94. *Id.* at 1062-63.
95. *Id.* at 1066.
96. *Id.* at 1064-65.
97. *Id.* at 1065-66.
98. 434 F.3d 1127 (9th Cir. 2006).
99. *Id.* at 1128-29.

jurisdiction over nonmember defendants when the claim arose on tribal land. Citing *Hicks*, it explained,

> [W]here the nonmembers are *defendants*, the Court has thus far held that the tribes lack jurisdiction, irrespective of whether the claim arose on Indian lands. . . . Our own cases, however, suggest that whether the tribal courts may exercise jurisdiction over a nonmember defendant may turn on how the claims are related to tribal lands.[100]

Unlike courts in the Eighth and Tenth Circuits, the Ninth Circuit was thus far unwilling to interpret *Hicks* to stand for a definitive rejection of the location factor, leaving room for further interpretation. Although the Ninth Circuit seemed to shift to a theory of tribal civil jurisdiction based on status of the litigants in *Philip Morris USA, Inc. v. King Mountain Tobacco Company*,[101] it did not address the location factor. Instead, it considered only whether *Montana* was limited in its application to nonmember defendants, an issue separate from the one under consideration in this Comment.[102]

The Ninth Circuit took a more affirmative stance in *Water Wheel Camp Recreational Area, Inc. v. LaRance*.[103] In this important case, the Ninth Circuit adopted a narrow interpretation of *Hicks* and based the tribal court's civil jurisdiction on the tribes' power to exclude nonmembers from tribal land rather than the *Montana* exceptions.[104] The facts of the case were as follows: the Colorado River Indian Tribes ("CRIT") leased tribal lands to a non-Indian resort, Water Wheel Camp Recreational Area, Inc.[105] When the time came to renegotiate the lease, the parties failed to reach an agreement, and the resort subsequently refused to vacate the property, stopped paying rent, and continued to serve patrons.[106] The CRIT then sued both the non-Indian resort and its non-Indian owner in tribal court.[107]

The *Water Wheel* opinion relies on an interpretation of the Supreme Court precedents that recognizes the distinction between tribal land and non-Indian land, treating the location factor as a threshold issue. The *Water*

100. *Id.* at 1132 (citations omitted).
101. 569 F.3d 932 (9th Cir. 2009).
102. *Id.* at 940.
103. 642 F.3d 802 (9th Cir. 2011).
104. *Id.* at 805.
105. *Id.*
106. *Id.*
107. *Id.*

Wheel court interpreted *Montana* as "limit[ing] the tribe's ability to exercise its power to exclude only as applied to the regulation of non-Indians on non-Indian land, not on tribal land."[108] Perhaps most importantly, the opinion distinguishes *Hicks* as limited to its own narrow circumstances: "*Hicks* expressly limited its holding to 'the question of tribal-court jurisdiction over state officers enforcing state law' and left open the question of tribal court jurisdiction over nonmember defendants generally."[109] By interpreting *Hicks* narrowly, the Ninth Circuit was able to preserve the distinction between tribal lands and non-Indian fee lands for purposes of its analysis.

Commentators have argued that the *Water Wheel* decision "resolved a long-standing divide between two lines of U.S. Supreme Court precedent" namely, the progeny of the *Montana* and *Merrion* decisions, respectively.[110] The Ninth Circuit's decision in *Water Wheel*, "[w]hile recognizing the limited exception for competing state interests that the Supreme Court created in Nevada v. Hicks . . . recognized that a tribe's status as landowner is sufficient in and of itself to support tribal regulatory and adjudicatory jurisdiction over those who enter tribal lands."[111] In so doing, *Water Wheel* resolved the question (for the Ninth Circuit at least) of whether *Montana*'s analysis applies to tribal land or, alternatively, whether the tribal power to exclude articulated by *Merrion* could serve as an independent basis for tribal civil jurisdiction after *Hicks*.[112]

The U.S. District Court for the District of Arizona declined to follow the *Water Wheel* decision in *Rolling Frito-Lay Sales LP v. Stover*.[113] In this case, a non-Indian (Stover) filed an action in tribal court after slipping on a box at the On–Auk–Mor Trade Center and suffering an injury.[114] The On–Auk–Mor Trade Center was owned by a tribal member and was located within the borders of the Salt River Pima-Maricopa Indian Reservation.[115] The district court characterized the *Water Wheel* decision as inconsistent "with the [U.S. Supreme] Court's post-*Montana* decisions."[116] It went on to

108. *Id.* at 810.

109. *Id.* at 813. *Cf.* Ford Motor Co. v. Kayenta Dist. Ct., 7 Am. Tribal Law 652, 659 (Navajo 2008) (interpreting *Hicks* as being expressly limited "to the question of tribal court jurisdiction over state officials enforcing state law").

110. King et al., *supra* note 57, at 724.

111. *Id.* at 757.

112. *See id.* at 724-25.

113. No. CV 11-1361-PHX-FJM, 2012 WL 252938 (D. Ariz. Jan 26, 2012).

114. *Id.* at *1.

115. *Id.*

116. *Id.* at *2.

add that "[*Montana*] could hardly be pathmarking if it did not apply to tribal land within a reservation."[117] Under *Hicks* and *Plains Commerce Bank*, the court reasoned, the contention that *Montana* was to be read narrowly as applying only to non-Indian fee land was untenable.[118] Additionally, the district court stated, "subjecting non-Indians to the jurisdiction of a tribal court without their consent would subject them to an entity outside the Constitution. . . . Government with the consent of the governed is everything in America."[119] The *Rolling Frito-Lay* court seemed to echo the language of *Plains Commerce Bank*, but applied its reasoning to claims arising on tribal lands per the holding from *Hicks*.

The law in the Ninth Circuit has therefore been unstable at best. The Ninth Circuit has seemingly come full circle from *Red Wolf* to *Water Wheel*. However, it is easy to cast the Ninth Circuit's decision in *Water Wheel* in too radical a light. Setting aside, for the moment, the *Rolling Frito-Lay* court's interpretation of *Water Wheel* as unfaithful to Supreme Court precedent, one can recognize restraint in the Ninth Circuit's approach. The Ninth Circuit's approach, even in allowing tribal jurisdiction over nonmembers more easily than a broad reading of *Hicks* would permit, does not expand tribal jurisdiction beyond its traditional limits. It certainly does not suggest that a doctrine based on tribal sovereignty could ever extend to nonmembers beyond reservation land, or even beyond reservation lands held by the tribe. Instead, it purports to maintain the limits on tribal jurisdiction set by *Montana*.

As the Ninth Circuit has summarized, tribal jurisdiction is "cabined by geography."[120] If the claim arises on tribal land, under *Water Wheel*, the tribe's power to exclude nonmembers provides a basis for tribal civil jurisdiction. If the claim arises on reservation lands held in fee by nonmembers, then the tribe only has civil jurisdiction if one of the *Montana* exceptions is satisfied. If the claim arises outside of reservation lands, the tribal court has no jurisdiction over the nonmember. Ultimately, under the Ninth Circuit's approach, tribal jurisdiction is limited to claims arising on reservation lands.

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117. *Id.*

118. *See id.* at *2-3.

119. *Id.* at *3 (citation omitted).

120. Philip Morris USA, Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 938 (9th Cir. 2009).

C. The Eighth & Tenth Circuits' Approach

The Eighth and Tenth Circuits (as well as the U.S. District Court for the District of Arizona in the *Rolling Frito-Lay* case) have taken a different path than the Ninth Circuit. These courts have adopted a broad interpretation of the *Hicks* and *Plains Commerce Bank* decisions, effectively ignoring both the location factor and the related tribal power to exclude non-Indians as a basis for civil jurisdiction over nonmembers. By the time *Water Wheel* was decided in the Ninth Circuit, the settled rule in the Eighth and Tenth Circuits was that *Montana*'s analytical framework would always apply to the issue of whether a tribal court had jurisdiction over a nonmember defendant, regardless of where the claim arose.

The U.S. Court of Appeals for the Tenth Circuit held that the Navajo tribal court lacked jurisdiction over nonmember defendants in *MacArthur v. San Juan County*,[121] applying the same interpretation of *Hicks* as the U.S. District Court for the District of Arizona in *Rolling Frito-Lay*. The case arose from a dispute over alleged time-card fraud between several employee-plaintiffs and the defendant-employer, San Juan County Health Services District, which operated a clinic at which the plaintiffs worked.[122] The clinic was located within the Navajo Reservation on fee land held by the state of Utah, and subsequently turned over to the Utah Navajo Health Systems, a tribal entity.[123] The plaintiffs, some of whom were Navajo members, filed their complaint in Navajo tribal court against several defendants, almost all of whom were nonmembers.[124] After an evidentiary hearing, the Navajo court issued several orders, including an injunction; failure to fully follow the tribal court's orders triggered a penalty of $10,000 per day for every day after a certain date that the defendants failed to comply.[125]

The *MacArthur* court reasoned that the only circumstance, which triggers the application of *Montana*'s analytical framework, is the attempt by a tribal court to assert jurisdiction over a nonmember.[126] It made clear that, in its view, *Hicks* had diminished the importance of the location factor: "The notion that *Montana*'s applicability turns, in part, on whether the regulated activity took place on non-Indian land was finally put to rest in *Hicks*."[127]

121. 497 F.3d 1057 (10th Cir. 2007).
122. *Id.* at 1061-62.
123. *Id.* at 1061.
124. *Id.* at 1060-62.
125. *Id.* at 1062-63.
126. *Id.* at 1069-70.
127. *Id.* at 1069.

The *MacArthur* court also discussed the power to exclude nonmembers as a basis for tribal civil jurisdiction; it noted that even if the location factor still determined applicability of *Montana*'s analysis, *Montana* would apply because the clinic was operated on non-Indian land.[128]

In 2011, the same year *Water Wheel* was decided, the Tenth Circuit's interpretation of *Montana* was again applied in *Crowe & Dunlevy, P.C. v. Stidham*.[129] Simply stated, the dispute in *Crowe & Dunlevy* was over whether Crowe & Dunlevy, a law firm with no tribal affiliation, could be required by a tribal court to refund payments it received from its Indian client.[130] The applicability of *Montana*, because it involved a nonmember over whom a tribal court sought to exert jurisdiction, was undisputed here and therefore not discussed at length, unlike in the earlier *MacArthur* case.[131] Also unlike in *MacArthur*, the court did not discuss, even in dictum, the power to exclude nonmembers as a basis for jurisdiction.[132] But the court cited *Montana*, *Hicks*, and *Plains Commerce Bank* for the rule that "[t]here is a presumption against tribal civil jurisdiction over non-Indians," except when the *Montana* exceptions apply.[133] In this case, neither of the two exceptions was found to apply, so the tribal court lacked jurisdiction.[134] The *Crowe & Dunlevy* decision, in its simplicity, represents the settled nature of the question in the Tenth Circuit: *Montana*'s analysis always applies if a tribal court attempts to exercise jurisdiction over a nonmember.

The Eighth Circuit has similarly adopted a broad interpretation of *Montana* in light of *Hicks* and *Plains Commerce Bank*. The shift toward an analysis based on the status of the litigants is readily apparent from a comparison of the following cases. In *Hornell Brewing Company v. Rosebud Sioux Tribal Court*,[135] a pre-*Hicks* decision, the Court of Appeals for the Eighth Circuit held that the tribal court lacked jurisdiction over nonmember defendant breweries. The dispute originally arose from the nonmember breweries naming a malt liquor they manufactured after a revered Indian leader, Crazy Horse.[136] The Eighth Circuit viewed the

128. *Id.* at 1070 n.7.
129. 640 F.3d 1140 (10th Cir. 2011).
130. *Id.* at 1145-46.
131. *See id.* at 1151.
132. *See* King et al., *supra* note 57, at 762 (emphasizing that the Tenth Circuit did not apply *Merrion*).
133. *Crowe & Dunlevy, P.C.*, 640 F.3d at 1150.
134. *Id.* at 1153.
135. 133 F.3d 1087 (8th Cir. 1998).
136. *Id.* at 1088-89.

dispute as being over the "manufacture, sale, and distribution of Crazy Horse Malt Liquor," rather than the property rights of Crazy Horse's estate.[137] Because all of the breweries' activities took place completely outside of the reservation, the *Montana* exceptions were held not to be applicable.[138]

The post-*Hicks* decision in *Nord v. Kelly*[139] illustrates a shift in the Eighth Circuit's application of the *Montana* rule and a new, special emphasis on the second of the two *Montana* exceptions. Factually, this case was very similar to *Strate* because it too involved an accident on a public right-of-way within the limits of a reservation.[140] The original lawsuit was commenced by a member of the Red Lake Band of Chippewa Indians in tribal court against a nonmember truck driver and its nonmember owner.[141] The plaintiff alleged that the nonmember defendant was responsible for injuries that occurred in an automobile accident on a state highway within the Red Lake Indian Reservation.[142] The court explained that the location factor ("the ownership status of land") had been made one of several considerations that factored into application of the second *Montana* exception.[143] "[T]he key concept," it reasoned, "is that the tribal authority to regulate nonmember activities [and therefore to have adjudicatory jurisdiction over such activities] exists where it is necessary to protect tribal self-government or to control internal relations."[144]

Even more recently, in *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*,[145] the Eighth Circuit applied a *Montana* analysis that considered the location factor under the second *Montana* exception. The claim in that case arose from the dramatic dispute between two factions vying for control of the Sac & Fox of the Mississippi in Iowa and the lucrative Meskwaki Bingo Casino Hotel.[146] The dispute culminated in one faction occupying the casino and the other hiring Attorney's Process and Investigation Services ("API"), which forcibly

137. *Id.* at 1091.
138. *Id.*
139. 520 F.3d 848 (8th Cir. 2008).
140. *See id.* at 851.
141. *Id.*
142. *Id.*
143. *Id.* at 853.
144. *Id.* (internal quotation marks omitted).
145. 609 F.3d 927 (8th Cir. 2010).
146. *Id.* at 931.

intervened with thirty agents.[147] After the dispute ended, the recognized government of the tribe sued API, a nonmember entity in tribal court.[148]

The Eighth Circuit applied *Montana*'s analytical framework despite the claim clearly arising on tribal land, citing *Hicks* for the principle that "*Montana* applies to both Indian and non-Indian land."[149] The court nonetheless found that the tribal court had jurisdiction over the nonmember defendant, API, because the second *Montana* exception was satisfied; API's raid on the Meskwaki Bingo Casino Hotel and subsequent conduct threatened the tribe's "political integrity," "economic security," and "health and welfare."[150] Furthermore, in its analysis of the second *Montana* exception, the court held that since the claim arose on tribal land, the tribe's traditional retained power to exclude nonmembers also supported tribal civil jurisdiction over the nonmember conduct.[151]

The Eighth and Tenth Circuits have, unlike the Ninth Circuit, interpreted the Supreme Court's decisions as diminishing the importance of the location factor and tribe's power to exclude nonmembers. Applying *Hicks* broadly, as illustrated by the aforementioned cases, the location factor has been buried in the *Montana* analysis rather than considered as a threshold issue. Also, along with the location factor, the traditional power to exclude nonmembers from tribal land as a basis for tribal civil jurisdiction has diminished in importance. In summary, in the Eighth and Tenth Circuits there has been a clear shift away from a theory of civil jurisdiction based on the location of where the claim arose, in favor of a theory based on the status of the litigants.

D. Overview of Policy Considerations

The issue of tribal jurisdiction over nonmembers implicates several sensitive interests and risks. It would be unrealistic to address this complex issue in isolation from the interests and policies underlying the problem. This subpart draws on the background material described above and outlines the relevant interests, beginning with the interests of nonmember defendants and briefly addressing the corresponding interests of Indian plaintiffs, tribal courts, and the federal government.

Nonmember defendants undoubtedly have several reasons to resist the assertion of jurisdiction by a tribal court. The worst-case scenario for a

147. *Id.* at 931-32.
148. *Id.* at 932.
149. *Id.* at 936 (quoting Nevada v. Hicks, 533 U.S. 353, 360 (2001)).
150. *Id.* at 939.
151. *Id.* at 940.

nonmember defendant in tribal court is that he or she will be "subjected to a hostile forum, a small and insular jury pool, and a lack of constitutional safeguards."[152] A defendant may also have heard "[h]orror stories of multi-million dollar judgments, unfamiliar laws, and limited appeal rights . . . ."[153] Commentator Westesen's horror story of choice is drawn from the case *Burlington Northern Railroad Company v. Red Wolf*,[154] a case in which he was involved.[155] *Red Wolf* arose from a wrongful death action that pitted a nonmember defendant, the Burlington Northern Railroad Company, against a biased tribal judge and jury who eventually awarded the plaintiffs $250 million in damages.[156] Before the trial, the tribal court judge gave a speech to the jury in the Crow language, telling them, "Crows, you know, I don't have to tell you, bodies in the past, bodies are scattered along the railway. Now is the day . . . This is the Crow's proceedings. This is our means of survival."[157] As described above, the tribal court's judgment was eventually reversed by the U.S. District Court for the District of Montana, whose decision was affirmed by the Ninth Circuit,[158] but this outcome did not make up for the actions of the trial court in *Red Wolf*. At the very least, the case shows that defendants' interests in not having claims adjudicated by a tribal court should be taken seriously.

Apart from the risk of unfairness, a defendant may have other strategic reasons for wanting the case to be brought in a different forum. "The competition for civil jurisdiction takes on immediacy because sometimes the substantive law rules for the resolution of a given case or controversy may vary depending on which courthouse--state or tribal--issues the final judgment."[159] Moreover, the procedures and attitudes, some of which are derived from pre-Columbian principles, in tribal courts may seem foreign and unfamiliar to nonmember defendants.[160]

Against the interests of nonmember defendants, naturally, weigh the interests of tribal plaintiffs, who may favor tribal courts for the mirror-

152. Westesen, *supra* note 10, at 9-9.

153. *Id.* at 9-1.

154. 196 F.3d 1059 (9th Cir. 1999).

155. *See supra* Part II.B.

156. *See* Westesen, *supra* note 10, at 9-6 to -10. *See generally* Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999).

157. Westesen, *supra* note 10, at 9-7 (alteration in original).

158. *See Burlington N. R.R. Co.*, 196 F.3d 1059.

159. Dale Beck Furnish, *Sorting out Civil Jurisdiction in Indian Country After* Plains Commerce Bank*: State Courts and the Judicial Sovereignty of the Navajo Nation*, 33 AM. INDIAN L. REV. 385, 387 (2008-2009).

160. *See id.* at 390-91.

opposite reasons defendants wish to avoid them: the familiarity of the laws and procedures, hope of trying the case before a favorable jury, and the possibility of winning large damages. Tribes also have interests that should be considered, including an interest in protecting their members, promoting their legitimate regulatory interests, and providing a forum that is aware of tribal members' values.[161] And, finally, the federal government's interests in promoting tribal self-government and the development of tribal court systems must be considered.[162]

III. Thesis

A. Introduction

This part will show that the Ninth Circuit's approach to the application of the analytical framework derived from *Montana*, as explained in its decision in *Water Wheel*, is most consistent with the U.S. Supreme Court precedent and best supported by policy considerations. As in *Water Wheel*, the issue of whether a tribal court has civil jurisdiction over a nonmember should be addressed first by considering where the claim arose. Under the Ninth Circuit's approach in *Water Wheel*, if the claim arises on tribal lands within the borders of the reservation, the tribal court has jurisdiction over the nonmember defendant based on the inherent power of the tribe to exclude nonmembers. But if the claim arose on alienated lands within the reservation held in fee by a nonmember, then the tribal court is presumed, under *Montana*'s general rule, to lack jurisdiction unless one of the exceptions apply. If the claim arose outside of the reservation altogether, then the tribal court cannot have civil jurisdiction over a nonmember defendant.

In order to show that the Ninth Circuit's approach should be favored over the Eighth and Tenth Circuits' interpretation, this part's analysis will first explain, in subpart B, that *Montana* and its progeny consistently uphold tribes' inherent power to exclude nonmembers as a basis for civil jurisdiction, regardless of nonmembers' consent. Second, subpart C will show that the decision in *Hicks* should be interpreted narrowly, both under the *Montana* line of cases and under the limited language of the *Hicks*

161. *See* EXC, Inc. v. Kayenta Dist. Ct., 9 Am. Tribal Law 176, 188 (Navajo 2010) (explaining that the Navajo Nation has an interest in "provid[ing] public safety to those living in, visiting, and traveling through the Navajo Nation" and an interest in enabling Navajo family members to bring an action concerning their children in a Navajo Nation court).

162. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987).

opinion itself. Finally, subpart D shows that policy considerations favor the widespread adoption of the Ninth Circuit's approach in *Water Wheel*, over that of the Eighth and Tenth Circuits.

B. The Power to Exclude & Nonmember Consent: Interpreting Montana's *Progeny*

Some commentators have argued that an approach is needed which will reconcile the *Montana* and *Merrion* lines of cases, suggesting that they are in conflict or diverge.[163] Another has argued that the line of cases handed down by the U.S. Supreme Court over the past thirty years (and especially *Plains Commerce Bank*) spell the slow but certain decline of tribal civil jurisdiction and tribal sovereignty.[164] This subpart argues in favor of the contrary conclusions for both arguments: first, that tribal civil jurisdiction over nonmembers remains feasible and, second, that *Montana* and *Merrion* are in fact consistent with both one another and subsequent Supreme Court decisions. Finding the correct approach to tribal civil jurisdiction over nonmembers when the claim arises on tribal land is not a matter of balancing *Montana* against *Merrion* or any other case, but of discerning how the U.S. Supreme Court's decisions regarding tribal civil jurisdiction fit together.

"While the Court has turned back claims of civil jurisdiction in [the cases following *Montana*], it has done so without foreclosing the possibility of a different result in another case involving different facts."[165] This view of the cases is supported by a review of the holdings, at least as viewed through the lens of the issue at hand. The Court has consistently upheld tribes' power to exclude nonmembers from tribal lands. The decision in *Montana*, for instance, took for granted the tribal power to exclude nonmembers from tribal land. Its reasoning was that because non-Indians could no longer be excluded from the land in question, land held in fee by nonmembers, the tribe had lost its authority to regulate activates on the land.[166]

Merrion explained, "Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued

163. *See* King et al., *supra* note 57, at 724-25 (describing *Montana* and *Merrion* as leading to "competing lines of analysis," which the Ninth Circuit's decision in *Water Wheel* resolved).

164. *See* Sweeney, *supra* note 71.

165. Endreson, *supra* note 8, at 874.

166. Montana v. United States, 450 U.S. 544, 559 (1981).

presence, or on reservation conduct . . . ."[167] Applying this principle, the Court held that the power to exclude non-Indians from the reservation would have been sufficient by itself to support a tax on nonmember activities on tribal.[168] The authority to regulate, explained by *Merrion*, creates the presumption that the tribal courts have a corresponding adjudicatory civil jurisdiction over the activities. Under *LaPlante*, "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[169]

The Court also emphasized the compatibility of *Montana* and *Merrion* in *Atkinson Trading Company*. There the Court explained, "*Merrion* involved a tax that only applied to activity occurring on the reservation, and its holding is therefore easily reconcilable with the *Montana-Strate* line of authority."[170] Keeping in mind the compatibility of *Merrion* and the *Montana* line of cases can help resolve a concern raised by the U.S. District Court for the District of Arizona in its *Rolling Frito-Lay* decision, when it declined to follow *Water Wheel*. The district court stated, "[S]ubjecting non-Indians to the jurisdiction of a tribal court without their consent would subject them to an entity outside the Constitution. . . . Government with the consent of the governed is everything in America."[171] The district court's assertion that a nonmember can never be subjected to tribal jurisdiction absent consent is puzzling in light of *Merrion*, which flatly contradicts this idea. The *Merrion* Court, in no uncertain terms, explained, "Indian sovereignty is not conditioned on the assent of a nonmember . . . ."[172] In other words, when a basis for tribal jurisdiction exists, nonmembers' lack of consent is irrelevant. The district court's flat contradiction of *Merrion* only makes sense if *Hicks* is allowed to refute what the court has repeatedly asserted: that its decisions on tribal jurisdiction are consistent and compatible with one another. As seen in practice, then, in the *Rolling Frito-Lay* opinion, a broad reading of *Hicks* means taking the awkward step of sweeping some U.S. Supreme Court precedents under the rug, ignoring their plain language and muddling their rules.

Furthermore, *Atkinson Trading Company* is only one in a series of cases interpreting *Montana* that consistently confirm tribes' power to exclude

167. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982).
168. *Id.* at 149.
169. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).
170. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 (2001).
171. Rolling Frito-Lay Sales LP v. Stover, No. CV-11-1361-PHX-FJM, 2012 WL 252938, at *3 (D. Ariz. Jan. 26, 2012) (citation omitted).
172. *Merrion*, 455 U.S. at 147.

nonmembers. As will be recalled, *Bourland* confirms, at least through negative implication, that tribes have "the right to exclude and to regulate" lands of which they have the "absolute and undisturbed use."[173] In *Strate*, the Court also stated, "We 'can readily agree,' in accord with *Montana* . . . that tribes retain considerable control over nonmember conduct on tribal land."[174] As in *Bourland*, the *Strate* opinion confirms the tribal power to exclude by negative implication, as it rejects its application to the case at hand. In holding the stretch of highway involved in *Strate* to be the equivalent of non-Indian fee land, the Court summarizes that the tribes therefore "have retained no gatekeeping right. So long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude."[175] From *Montana* and *Merrion* through *Bourland*, *Strate*, and *Atkinson Trading Company* there is a clear pattern. The Court has consistently maintained the coherency of its *Montana* line of cases and the principle, articulated in *Merrion* and *LaPlante*, that tribes' power to exclude nonmembers forms a basis for tribal jurisdiction.

Even *Plains Commerce Bank* fits this pattern, despite initial criticisms that it was particularly destructive of tribal sovereignty. Although one commentator has criticized *Plains Commerce Bank* as "a decision that works to the undeniable detriment of tribes while lavishing ill-gained benefits on possibly exploitative outsiders,"[176] the real effect of the decision was probably less dire. For example, the same commentator argued that *Plains Commerce Bank*'s treatment of the second *Montana* exception would essentially render it useless.[177] He interpreted it as "creating impossible standards for the application of the second *Montana* exception."[178] As it turned out, only a short time after this criticism, the Eighth Circuit held that the "absurdly high standard"[179] had been satisfied in *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa*.[180] Quite simply, this example shows that the *Plains*

173. South Dakota v. Bourland, 508 U.S. 679, 690-92 (1993).

174. Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997) (citation omitted) (quoting Montana v. United States, 450 U.S. 544, 557 (1981)).

175. *Id.* at 456.

176. Sweeney, *supra* note 71, at 550.

177. *Id.* at 574.

178. *Id.*

179. *Id.* at 573.

180. 609 F.3d 927 (8th Cir. 2010).

Commerce Bank decision has not foreclosed the possibility of finding tribal civil jurisdiction.

Instead, the *Plains Commerce Bank* decision maintains the Court's reliance, from *Montana* onward, on the location factor and the related power to exclude nonmembers from tribal lands as a basis for tribal civil jurisdiction. It is important to remember the factual differences between *Plains Commerce Bank* and *Merrion*: the regulation upheld in *Merrion* was of nonmember activity on tribal lands, not the sale of alienated lands held by a nonmember. Under the circumstances of *Plains Commerce Bank*, it was appropriate for the court to analyze the case under *Montana*'s general rule and exceptions. While the power to exclude nonmembers forms part of tribes' authority over nonmember activities on tribal land, it does not form a basis for tribal court's civil jurisdiction when the claim arises on alienated land or off reservation. Importantly, tribal jurisdiction (and indeed tribal sovereignty) is "cabined by geography."[181]

Additionally, *Plains Commerce Bank* might only have a very narrow application. One commentator favors this interpretation, writing that "in *Plains Commerce Bank*, as in *Hicks* and *Strate*, the Court avoided ruling on the fundamental question of tribal court jurisdiction over non-Indian defendants."[182] Additionally, the Court may be adopting an intentionally narrow approach so as to allow tribal jurisdiction to mature and develop naturally, without extensive judicial interference.[183] The unremarkable truth may be that the Court intended only to "carve[] out the regulation of the sale of non-Indian fee land from *Montana*'s domain,"[184] rather than "commit[] an error that staggers somewhere between a blunder and a crime," as another commentator argues.[185] As Freud reportedly said, "sometimes a cigar is just a cigar."

Contrary to the view that *Montana* and *Merrion* are in opposition to one another, the Supreme Court has neither completely repudiated the significance of where a claim arose (the location factor) nor rejected tribal power to exclude nonmembers from tribal lands. The *Rolling Frito-Lay* court was therefore incorrect in concluding that the power to exclude nonmembers from tribal land was rejected by *Montana* as a basis for civil jurisdiction. On the contrary, *Montana* itself is fully compatible with a

181. Philip Morris USA, Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 938 (9th Cir. 2009).

182. Endreson, *supra* note 8, at 892.

183. *Id.*

184. *Id.* at 891.

185. Sweeney, *supra* note 69, at 581.

conception of tribal civil jurisdiction based on tribes' power to exclude nonmembers. This is because *Montana* and its progeny apply to nonmember activities on alienated reservation lands, land held in fee by non-Indians. The Supreme Court's decision in *Merrion* and its language in *Plains Commerce Bank* (on the importance of nonmember consent to tribal regulation) are inconsistent if *Montana*'s analytical framework applies to tribal and alienated lands alike. *Montana* and the line of cases that have interpreted it over the past thirty years have consistently upheld tribes' inherent power to exclude nonmembers from reservation lands that have not be alienated. This principle is accurately described in the Ninth Circuit's *Water Wheel* decision and, properly understood, provides a basis for tribal civil jurisdiction over nonmember defendants when the claim arises on tribal land.

C. The Location Factor: Interpreting Nevada v. Hicks

The location factor has importance not because it possesses some talismanic significance, but rather because it has historically been an important part of the rationale underlying tribal court's jurisdiction. Tribal jurisdiction is derived conceptually from the tribe's control over a specific geographic area, among other sources, and the conditional right of entry allowed to nonmembers.[186] The Ninth Circuit's decision in *Water Wheel*, which interprets *Hicks* as being limited to the specific issue in that case and not applicable to the question of tribal civil jurisdiction over nonmember defendants in general,[187] is the most accurate interpretation of both *Hicks* and the *Montana* line of decisions.

The opposite assumption is central to the U.S. District Court for the District of Arizona's reasoning in the *Rolling Frito-Lay* decision. As discussed above, the district court reasoned that *Montana* would not be regarded as "the pathmarking case" if it did not apply broadly to tribal land as well as non-Indian land.[188] The district court's reasoning in the *Rolling Frito-Lay* opinion relies especially on the Supreme Court's opinion in *Hicks*.[189] Specifically, the district court points to the passage in *Hicks* in

186. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 142 (1982).

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

188. Rolling Frito-Lay Sales LP v. Stover, No. CV-11-1361-PHX-FJM, 2012 WL 252938, at *2 (D. Ariz. Jan. 26, 2012).

189. *Id.*

which the Court interprets language from *Montana* as clearly "imply[ing] 'that the general rule . . . applies to both Indian and non-Indian land.'"[190]

Contrary to the *Rolling Frito-Lay* decision, *Montana* did not repudiate the significance of the location of where a claim arose; rather it preserves this factor and thereby protects tribal jurisdiction. This is clear from the opinion itself, when the Court explained that the *Montana* exceptions would allow tribal civil jurisdiction over nonmembers "even on non-Indian fee lands."[191] The Court merely stated that the *Montana* exceptions are effective on non-Indian lands, leaving undisturbed the distinction between Indian land and non-Indian land.[192] It is therefore misguided to assume that favoring tribal sovereignty must be in contradiction of the *Montana* holding. If *Hicks* must be interpreted broadly, as rejecting the location factor as a threshold issue, then it is clearly inconsistent with the actual text of *Montana*.

Such an interpretation of *Hicks* would also be inconsistent with *Montana*'s progeny, the cases that have explained the Supreme Court's analysis of tribal civil jurisdiction. The location factor was determinative of whether *Montana*'s analytical framework applied in *Bourland*, where *Montana* was held to be applicable because the land that the tribe sought to regulate had been alienated.[193] Similarly, in *Strate*, *Montana* was applicable precisely because the right-of-way within the borders of the reservation was held to be "equivalent, for nonmember governance purposes, to alienated, non-Indian land."[194] Relying on the location factor, the Court concluded, "Our decision in *Montana*, accordingly, governs this case," and proceeded to apply *Montana*'s analytical framework.[195]

On the other hand, language in *Hicks* would seem, at first glance, to mandate the reordering of the *Montana* analysis with the location factor diminished to a place as one among several circumstances considered under the second *Montana* factor. For instance, the Court explains *Montana* as "apply[ing] to both Indian and non-Indian land," seeming to disregard the location factor as a threshold issue determining whether *Montana*

190. Id. (quoting Nevada v. Hicks, 533 U.S. 353, 359-60 (2001)).

191. Montana v. United States, 450 U.S. 544, 565 (1981).

192. *Id.*

193. South Dakota v. Bourland, 508 U.S. 679, 691-92 (1993) (explaining that "when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control").

194. Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997).

195. *Id.* at 456.

applies.[196] "The ownership status of land," the Court continues, "in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'"[197] The Court seemed firmly set against making the location factor determinative of whether *Montana* applies, and this is the interpretation of *Hicks* that the Eighth and Tenth Circuits have adopted.

But given *Hicks*'s apparent inconsistency with the rest of *Montana*'s progeny, it makes sense to distinguish it, as the Ninth Circuit does in *Water Wheel*.[198] Distinguishing the case does not mean denouncing it as erroneous or hostile to tribal interests; there are several reasons for limiting *Hicks* to the issue and circumstances that it addressed. As a commentator points out, *Hicks* involved two factors that make it "unique": (1) "the State's interest in prosecuting crimes off-reservation, which was the dispositive factor," and (2) the risk tribal courts would "effectively control state officers acting under state law."[199] Furthermore, as both the *Water Wheel* court and the commentator point out, the *Hicks* opinion expressly limited its holding to the issue addressed.[200] As the *Hicks* Court explains, in a footnote, "Our holding in this case 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."[201] In *Hicks*, as sweeping and portentous as some of its language may have been interpreted to be, the Court was simply unwilling to take the radical step of altering *Montana*'s analytical framework. As the Ninth Circuit concludes, "*Hicks* is best understood as the narrow decision it explicitly claims to be."[202]

Under both the Court's case law and the test of *Hicks* itself, the approach taken by the Ninth Circuit in *Water Wheel* more accurately reflects the current law than the approach taken by the Eighth and Tenth Circuits, which have interpreted *Hicks* as applying to tribal jurisdiction over nonmember defendants in general. Such a broad interpretation goes against the text of the *Hicks* opinion and contradicts the reasoning in three decades worth of Supreme Court opinions.

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196. Nevada v. Hicks, 533 U.S. 353, 360 (2001).

197. *Id.*

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

199. Endreson, *supra* note 8, at 886-87.

200. *Water Wheel*, 642 F.3d at 813; Endreson, *supra* note 8, at 887.

201. *Hicks*, 533 U.S. at 358 n.2.

202. *Water Wheel*, 642 F.3d at 813.

D. Policy Considerations Favoring the Ninth Circuit's Approach

The policy considerations identified above in Part II.D, with the exception of furthering defendants' interests, are promoted by the approach adopted by the Ninth Circuit in *Water Wheel*. The Ninth Circuit's approach avoids undercutting the policies advanced in *Hicks*, protects the unique interests of Indian plaintiffs, promotes tribal self-government, and encourages the development of tribal court systems. When given closer examination, even the interests of nonmember defendants do not suffer as greatly as one might expect, especially with regard to the procedural safeguards available to them in tribal courts. Overall, the Ninth Circuit's approach offers the best balance of interests and furthers the policies that inform decisions such as *Montana*, *Merrion*, and *Hicks*.

From a policy perspective, the *Hicks* Court was primarily concerned about striking the proper balance between state interests and tribal interests, not the balance between member and nonmember parties' interests. *Hicks* held that the tribe lacked the authority to limit state officials in their investigation of an offense under state law that had taken place outside of the reservation.[203] A narrow reading of *Hicks* that limits its holding to its circumstances does just as adequate a job of preserving the proper balance between tribal interests and state authority to conduct investigations as a very broad reading would. Each interpretation protects state officials from the undue interference of tribal regulations, but the broader interpretation gives a windfall to nonmember defendants whose interests do not necessarily coincide with the interests of state governments.

Giving a more limited reading to the *Hicks* decision and upholding tribal civil jurisdiction over nonmember defendants when the claim arises on tribal lands is certainly, in itself, not favorable to defendants. As a result of the *Water Wheel* decision, nonmember defendants will be more frequently and somewhat more easily subjected to the risks that come with being sued in tribal court. But to the extent that defendants' fears are potentially realized in any particular case, they are matters separate from the question at hand, the issue of tribal civil jurisdiction. Bias and runaway damages are of course lamentable, but limitation of tribal jurisdiction is not a solution to these problems. Especially considering the rarity of extreme cases such as *Red Wolf*, the curtailment of tribal jurisdiction for the sake of protecting nonmember defendants is simply overkill.

Furthermore, concerns about nonmember defendants being subjected to unjust procedures or denied due process are probably unrealistic. As the

203. *Hicks*, 533 U.S. at 374.

Supreme Court noted in *LaPlante*, "the Indian Civil Rights Act, 25 U.S.C. § 1302, provides non-Indians with various protections against unfair treatment in the tribal courts."[204] That statute specifically provides that defendants are entitled to equal protection of the laws and due process.[205] This makes the fretful language in *Plains Commerce Bank* (describing tribal sovereignty as existing outside the U.S. Constitution and beyond the reach of the Bill of Rights) seem slightly exaggerated, if not mistaken and alarmist.[206] Fortunately for nonmember defendants, their interests have not been neglected by Congress, as evidenced by the existence of Section 1302.

In point of fact, nonmembers' interests have not been forgotten by tribal governments either. For example, the Supreme Court of the Navajo Nation has stated, "While our laws are not covered under the Constitution, they are American laws of a unique American sovereign governing system. . . . [T]he Navajo Nation has safeguards in place to afford due process to all individuals subject to our jurisdiction."[207] The Navajo Court also commented that "[t]hroughout the *Montana–Strate* line of cases, there runs the implicit notion that tribes and tribal laws are, somehow, foreign, and consequently hostile to non-members."[208] In refuting this implication, the Navajo Court then cited numerous laws passed by the Navajo Nation, which closely mirror the protections offered by the U.S. Constitution and Bill of Rights.[209] Nonmember defendants in tribal court thus enjoy the protection of not only federal law, but also tribal law. Furthermore, the geographically limited nature of tribal jurisdiction and the general rule of *Montana* provide extra barriers to tribal court jurisdiction over nonmember defendants.

Moreover, Indian plaintiffs' interests in pursuing their claim in tribal court should not be sacrificed with so little consideration for what they stand to lose. As the Supreme Court of the Navajo Nation has noted, the Navajo Nation has an interest in providing Indian plaintiffs with a forum that shares their values.[210] Beyond the unique interest Indian parties might have, Indian plaintiffs' interests in choosing a tribal forum are no different

204. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987).

205. 25 U.S.C. § 1302(a)(8) (2012).

206. *See* Endreson, *supra* note 8, at 894 (making the same point with regard to "the concern over the inapplicability of the Bill of Rights to Indian tribes expressed by Justice Souter in *Hicks* . . . ."); *see also supra* Part II.A.

207. EXC, Inc. v. Kayenta Dist. Ct., 9 Am. Tribal Law 176, 190 (Navajo 2010).

208. *Id.*

209. *See id.*

210. *Id.* at 188.

than those hopes or concerns that influence any other plaintiff's choice of forum--factors such as convenience of location and familiarity with the laws and procedures. Plaintiffs might often have the choice of more than one forum in which to bring their claims; this is simply a fact of life in a country with a federal system of government.

A narrow reading of *Hicks* also encourages the development of tribal courts and supports tribal self-government. As the Court recognized in *LaPlante*, the federal government has a "longstanding policy of encouraging tribal self-government."[211] Going even further, the Court stated, "Tribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development. Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation . . . their civil jurisdiction is not similarly restricted."[212] Interpreting *Hicks* so broadly as to fence in tribal court jurisdiction, limiting the power of court to decide even disputes arising on tribal lands within the reservation when *Montana*'s exceptions cannot be satisfied, would place a substantial limitation on tribal civil jurisdiction. It would blunt the effectiveness of tribal courts, reducing their utility to tribal members and frustrating the goals of the federal government.

Policy considerations therefore weigh heavily in favor of adopting the Ninth Circuit's approach and distinguishing *Hicks* from the main line of cases descending from *Montana*. A measured interpretation of *Hicks* strikes the correct balance between the interests of state and tribal governments' interests, thus fulfilling the main concerns manifested in that case, without giving nonmember defendants a windfall. In any case, the interests of non-member defendants are by no means disregarded or left unprotected under the Ninth Circuit's approach. Finally, preserving tribal civil jurisdiction over claims arising on tribal lands has the effect of promoting self-government, protecting the interests of Indian plaintiffs, and protecting the legitimate interests of tribal governments.

IV. Critique of Thesis

The approach offered in the Ninth Circuit's *Water Wheel* decision and advocated in Part III of this Comment is not without problems, chief among them being the potentially incompatible language in *Plains Commerce Bank*. Furthermore, the *Water Wheel* decision could be criticized as relying too heavily on a property-based theory of jurisdiction and as perpetuating

211. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987).
212. *Id.* at 14-15 (citations omitted).

the complexity of the current analysis applied to determine when a tribal court has jurisdiction. Perhaps even more importantly in this context, as a practical matter, increasing the reach of tribal court's jurisdiction is arguably disadvantageous to other tribal interests (such as tribes' economic interests). Each of these critiques should be given a fair hearing, but none of them are completely substantiated, as will be shown.

The first and perhaps most important criticism to take note of is the opinion, or at least one reading of the opinion, in *Plains Commerce Bank*. The validity of the Ninth Circuit's analysis in *Water Wheel* is difficult to reconcile with language from *Plains Commerce Bank* regarding the location factor. For example, the *Plains Commerce Bank* Court stated, "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders."[213] In even stronger language, the Court explained that the "general rule restricts tribal authority over nonmember 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 . . . ."[214] These passages, citing *Montana* and *Oliphant*, could be interpreted as implying that *Montana*'s analysis applies to all reservation lands regardless of ownership.

As damaging as these implications could be for the Ninth Circuit's interpretation of the *Montana* line of cases in *Water Wheel*, the treatment of the location factor in *Plains Commerce Bank* must also be recognized as rather ambiguous. The location factor is, after all, considered in the *Plains Commerce Bank* analysis, but *not* where the Eighth or Tenth Circuit would have considered it. Instead, the Court considers the location factor (albeit briefly) in its analysis of *Montana*'s first exception.[215] Thus, while the Court does cite *Hicks* for the principle that "[t]he status of the land is relevant 'insofar as it bears on the application of . . . *Montana*'s exceptions to [this] case,'"[216] its analysis reflects a slightly different take on *Hicks* than either the Eighth or Tenth Circuit employs. The reason for this may be that the key distinction in *Plains Commerce Bank* is not between regulation of tribal lands versus non-Indian fee lands, but rather a dichotomy between tribal regulation of non-Indian conduct and tribal regulation of the sale of

213. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328 (2008).

214. *Id.*

215. *See id.* at 331-32.

216. *Id.* at 331 (alteration in original) (quoting in part Nevada v. Hicks 533 U.S. 353, 376 (2001) (Souter, J., concurring)).

non-Indian land.[217] In short, if the analysis of the location factor in *Plains Commerce Bank* departs from the norm, it may be because of the unique (and distinguishable) circumstances of the case.[218]

Beyond the issues presented by Supreme Court decisions, another problem is that in many jurisdictions the drift over the last three decades seems to have been in favor of making *Montana*'s exceptions the general test for tribal jurisdiction over nonmembers. The shift illustrated by the distance between the Eighth Circuit's decisions in *Hornell Brewing Company v. Rosebud Sioux Tribal Court*[219] (a pre-*Hicks* decision) and in *Nord v. Kelly*[220] (a post-*Hicks* decision) has emphasized the status of the litigants rather than ownership of the land where the claim arose.[221] Consequently, a transition to the approach taken in *Water Wheel*, even if favored by policy considerations, might create greater uncertainty and inconsistency, even as it attempts to resolve the present confusion. The undesirable result of straying from the beaten path would be more litigation and squandering of judicial resources to settle a basic procedural issue. While this Comment takes the stance that a broad interpretation of the decision in *Hicks* raises more questions than it answers, the broader interpretation has deeply influenced both the Eighth and Tenth Circuits' application of *Montana*'s analytical framework.

Another critique could be aimed at the apparent arbitrariness of the location factor, which hitches the jurisdiction analysis to property ownership. The view that the applicability of *Montana*'s analysis should not turn on the ownership of the property where the claim arose ignores the fact that the location factor has not been completely dropped from even the Eighth and Tenth Circuit's approach. Rather, under the broadest reading of *Hicks*, the location factor has only been relegated to the analysis of the second *Montana* exception. The location factor has thus diminished in its importance in the Eighth and Tenth Circuits' interpretation, but it has never been completely rejected. On the other hand, though, critics of the *Water*

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217. *See id.* at 332 (explaining that "*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land. *Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests.").

218. Endreson, *supra* note 8, at 891-92 (concluding that *Plains Commerce Bank*, *Hicks* and *Strate* "are narrow rulings"). *Contra* Sweeney, *supra* note 71, at 581 (denouncing *Plains Commerce Bank* as an erroneous interpretation of *Montana* and concluding that "the belabored distinction between sales of land and activities upon such land suffocates in its own speciousness.").

219. 133 F.3d 1087 (8th Cir. 1998).

220. 520 F.3d 848 (8th Cir. 2008).

221. *See* MacArthur v. San Juan County, 497 F.3d 1057, 1069-70 (10th Cir. 2007).

Wheel approach could correctly point out that under the Ninth Circuit's approach, a tribal court might have jurisdiction over one nonmember defendant when the claim arises on tribal lands but, strangely, lack jurisdiction over an identical claim arising on non-Indian lands within the same reservation.

In addition to this legal concern, there could be concerns about the practical and economic consequences of making nonmember defendants more susceptible to the civil jurisdiction of tribal courts. Because giving greater weight to the location factor makes it somewhat easier to obtain jurisdiction over nonmember defendants, it is possible that nonmembers may be discouraged from entering into business relationships with Indians on tribal lands. This would mean that an approach, which seems to empower Indian tribes and support self-determination, actually has the ironic effect of isolating reservation businesses and entrepreneurs from nonmember investors and developers.

On the other hand, the opposite conclusion has been urged with equal confidence. Commentators have argued that the uncertainty over the scope of tribal jurisdiction has "[n]o doubt . . . increased tribal reluctance to enter potentially economically beneficial relationships with nonmembers for fear they would lack the jurisdiction necessary to regulate and adjudicate action against nonmembers living, working, or doing business on tribal lands."[222] From an economic policy perspective, the difference between Ninth Circuit's approach in *Water Wheel* (higher risks for nonmember defendants) and the broad reading of *Hicks* favored by the Eighth and Tenth Circuits (creating greater uncertainty for everyone) remains unclear at best.

While the approach offered by the Ninth Circuit in *Water Wheel* has several advantages, its compatibility with *Plains Commerce Bank* is at least questionable. Furthermore, the *Water Wheel* approach could expose nonmember defendants to an increased risk of being sued in tribal court when they enter business relationships, offer services, or even travel through tribal lands. When such lawsuits do occur, critics of *Water Wheel* could correctly label the differing results, depending on property ownership, as somewhat arbitrary. Finally, critics might argue that *Water Wheel* will lead to just as much economic harm, due to the risks it imposes on nonmembers, as the previous uncertainty over how to determine tribal civil jurisdiction.

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222. King et al., *supra* note 57, at 758.

V. Conclusion

The Ninth Circuit's recent decision in *Water Wheel* provides the approach to tribal civil jurisdiction over nonmember defendants that (compared to the approaches of the Eighth and Tenth Circuits) most accurately reflects Supreme Court precedents, protects tribal sovereignty, and advances Congress's interest in promoting tribal self-government. As the Ninth Circuit has interpreted the law, application of the analytical framework from *Montana* (consisting of a general rule and its two exceptions) hinges on the distinction between Indian and non-Indian land, a distinction which the U.S. Supreme Court has repeatedly held to be of pivotal importance. The existence of the *Montana* test and the decision in *Hicks* must not be interpreted as extinguishing tribal power to exclude nonmembers from tribal land as a separate basis for tribal civil jurisdiction. Any other approach will contradict precedents such as *Merrion*, the overwhelming majority of *Montana*'s progeny, and the federal government's stated interest in promoting tribal self-determination.