American Indian Law Review

Volume 45 | Number 2

2021

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THE TRIBAL RIGHT TO EXCLUDE OTHERS FROM INDIAN-OWNED LANDS

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In May 2020, two Indian tribes in South Dakota—the Cheyenne River Sioux and Oglala Sioux Tribes—established health safety checkpoints on state and federal roads accessing the entrance to their reservations, invoking the dangers caused by COVID-19. The South Dakota Governor threatened immediate legal action, arguing that such roadblocks could only happen pursuant to an agreement with the State.[1] Later that summer, the Blackfeet Nation in northern Montana refused to open its access road to tourists wanting to visit Glacier National Park.[2] Unlike in South Dakota, the Montana Governor supported the Tribe's decision.[3]

In South Dakota, the Cheyenne River Sioux Tribe argued that the tribal checkpoints were legal because the Tribe had a "treaty right to exclude" non-members from its reservation.[4] Besides the treaty right to exclude, tribes can also claim that, as sovereign nations, they should have the inherent power to control their borders.

This Article does not focus on the COVID-19 issues facing the tribes. Others have already done this.[5] Instead, it casts a wider net and examines,

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1. That lawsuit was never filed. Instead, the Governor asked for the help of the federal government which eventually threatened to cancel a number of contracts it had with the two tribes unless they complied with the request to dismantle their roadblocks. One of these tribes eventually filed a lawsuit asking for injunctive and declaratory relief to prevent the federal government to make good on its threat. The facts as stated here are taken from the tribal complaint which was filed on June 23, 2020. *See* Complaint for Injunctive & Declaratory Relief at 3, Sioux Tribe v. Trump, No. 1:20-cv-01709 (D.D.C. June 23, 2020), https://turtletalk.files.wordpress.com/2020/06/2020-06-23-crst-v.-trump-complaint.pdf.

2. *See* Kathleen McLaughlin, *A Closed Border, Pandemic-Weary Tourists and a Big Bottleneck at Glacier National Park*, WASH. POST (Jul. 11, 2020), https://www.washingtonpost.com/national/a-closed-border-pandemic-weary-tourists-and-a-big-bottleneck-at-glacier-national-park/2020/07/10/607694f2-c2c0-11ea-b4f6-cb39cd8940fb_story.html.

3. *Id.*

4. Press Release, Cheyenne River Sioux Tribe, Chairman Harold Frazier Statement on Governor Kristi Noem Letter Regarding Health Checkpoints on Reservation (May 8, 2020), https://turtletalk.files.wordpress.com/2020/05/crst-letter-to-gov.-noem.pdf.

5. *See* Matthew L.M. Fletcher, *Indian Lives Matter: Pandemic and Inherent Tribal Powers*, 73 STAN. L. REV. 38 (2020). Ann E. Tweedy, *The Validity of Tribal Checkpoints in South Dakota to Curb the Spread of Covid-19*, 2021 U. CHI. LEGAL F. (forthcoming).

from a general perspective, the Tribes' power to exclude non-members from their reservations.

Indian tribes have been implicitly divested of the inherent sovereign power to control the activities of non-members on lands owned by non-members within the reservation.[6] This principle, announced in the Supreme Court's 1981 decision in *Montana v. United States*, stands unless one of two exceptions applies.[7] This doctrine is now known as the implicit divestiture doctrine.[8] In *Montana*, the Crow Tribe argued that because the 1868 treaty reserved the land for the exclusive use of the Tribe, "[t]he treaty, therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe the authority to control fishing and hunting on those lands . . . ."[9] The Court held, however, that once Congress allowed non-members to acquire land within the reservation, any tribal authority over non-Indian hunting and fishing could "only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation.'"[10] In addition, because neither of the two exceptions to *Montana*'s general rule were available,[11] the Crow Tribe could not control fishing activities by non-members on the Big Horn River within its reservation since the bed of the river was now owned by the State.[12]

For twenty years, *Montana*'s general rule was not applied to limit tribal jurisdiction over non-member activities taking place on tribal or Indian-owned land.[13] However, in 2001, the Supreme Court unanimously extended

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6. Montana v. United States, 450 U.S. 544, 564–65 (1981).

7. *Id.* at 565–66. The first one is known as the consensual relations exception and allows tribal jurisdiction over non-members who have entered into contracts, leases or other agreements with the tribe or its members. The second one, known as the tribal self-government exception, allows tribal jurisdiction if the activities of non-members poses a threat to the political integrity, economic security, or the health and welfare of the tribe. *Id.*

8. *See infra* notes 17–27 and accompanying text.

9. 450 U.S. at 558–59.

10. *Id.* at 559 (quoting Treaty of Fort Laramie with the Crows, art. II, May 7, 1868, 15 Stat. 650); *see id.* ("If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.").

11. *See supra* note 7.

12. *Montana*, 450 U.S. at 550–56 (holding that the ownership of the bed of the Big Horn River, where the fishing was taking place, was transferred to the State of Montana at statehood).

13. *See* South Dakota v. Bourland, 508 U.S. 679 (1993); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Brendale v. Confederated Tribes, 492 U.S. 408 (1989).

the *Montana* principle to Indian-owned land in *Nevada v. Hicks*.[14] Now, twenty years after *Hicks* was decided, an analysis of the cases shows that lower courts disagree on when to apply *Montana* to the assertion of tribal jurisdiction over non-members on Indian-owned lands.[15] Although unanimous in its holding that the tribal court did not have jurisdiction over a lawsuit involving state law enforcement officials as defendants, the *Hicks* Court was divided on the reasoning for the holding.[16] In effect, there were three opinions, consisting of three Justices each,[17] that independently adopted different views of what role the status of the land played in determining whether the Tribe had jurisdiction.[18]

Many scholars have addressed the issue of tribal jurisdiction over non-members comprehensively.[19] Notably, Professor Judith Royster, in a perceptive 2015 article, covered some of the same ground this Article will be addressing.[20] Like Professor Royster, this Article takes the position that *Montana* should not apply to lands in which tribes have retained the right to exclude.[21] However, in concluding that "the Supreme Court's decision in *Hicks* is neither intelligible nor doctrinally helpful,"[22] Professor Royster did

14. 533 U.S. 353 (2001).

15. *See infra* Part II.

16. *Hicks*, 533 U.S. at 375 (Souter, J., concurring); *id.* at 387 (O'Connor, J., concurring).

17. In addition to the Scalia opinion, Justice Souter filed a concurring opinion joined by Justices Kennedy and Thomas. *Id.* at 375–86 (Souter, J., concurring). Justice O'Connor filed an opinion concurring in part joined by Justices Breyer and Stevens. *Id.* at 387–401 (O'Connor, J., concurring).

18. There was also a concurring opinion by Justice Ginsburg, writing for herself, *id.* at 386 (Ginsburg, J., concurring), and a concurring opinion by Justice Stevens joined by Justice Breyer that echoed Justice O'Connor's opinion, which Stevens and Breyer also had joined, *id.* at 401–04 (Stevens, J., concurring).

19. *See*, *e.g.*, Matthew L. M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779 (2014); Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499 (2013); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010).

20. *See* Judith V. Royster, *Revisiting* Montana*: Indian Treaty Rights and Tribal Authority over Nonmembers on Trust Lands*, 57 ARIZ. L. REV. 889 (2015).

21. *Id.* at 892 ("Over the years, discussions of the *Montana-Hicks* line of cases seem to start and end with the question of *inherent* tribal authority over nonmembers. . . . The treaty rights approach has been lost in the discussion and needs to be revived. This Article intends to bring the treaty rights argument—that Indian tribes have rights to govern on trust lands recognized by treaty and treaty-equivalents—back to the forefront.").

22. *Id.* at 904.

not try to make sense of Justice Scalia's heavy reliance on the State's interests in law enforcement.[23] This Article attempts this task.

This Article argues, first, that Justice Scalia's opinion in *Hicks* can be conceptualized as using the state interest in law enforcement to support the finding that the Tribe had lost the right to exclude state law enforcement officials in the case. In effect, *Hicks* could be read as requiring a two-step analysis to determine if an Indian tribe has retained jurisdiction over non-members on Indian-owned lands. The first step in this analysis asks courts to determine whether a tribe has retained its right to exclude. If the tribe has retained this right, this is the end of the inquiry and the tribe has jurisdiction. If the tribe has not retained this right, step two requires courts to apply the *Montana* framework in determining whether one or both of the exceptions to *Montana*'s general rule apply to preserve tribal jurisdiction.

In addition, this Article analyzes whether there should be a difference between a tribal treaty right to exclude non-members from the reservations and the "inherent sovereign" right to exclude when it comes to deciding whether such a "right to exclude" has been abrogated. Professor Royster took the position that there should be no difference, stating that "[n]ot all Indian tribes have treaties with the federal government. When it comes to tribal jurisdiction over nonmembers on Indian lands based on treaty rights, where does that leave tribes without formal treaties? The answer, I submit, is in exactly the same place as tribes with treaties."[24] This Article takes the position that this may not necessarily be the case.

To explore these issues, Part I of this Article explains the Court's jurisprudence regarding tribal control over non-members. Part II analyzes the ongoing debate among the federal circuit courts of appeals concerning the interpretation of *Hicks* and concludes that the approach adopted by the Ninth Circuit is the more sound one. Finally, after exploring the differences, if any, between the tribes' sovereign right to exclude and their treaty right to exclude, Part III looks at the right to exclude beyond tribal jurisdiction over non-members; namely, this Article considers the role the right to exclude plays when it comes to determining whether federal laws of general applicability should apply to Indian tribes.

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23. *See* Nevada v. Hicks, 533 U.S. 353, 364 ("The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government.").

24. Royster, *supra* note 20, at 919.

I. The Implicit Divestiture Doctrine and the Right to Exclude from Montana *to* Hicks *and Beyond*

A. Montana v. United States*: The "Pathmarking" Case*[25]

The main issue in *Montana* was whether the Tribe had the authority to regulate hunting and fishing by non-members.[26] These non-members were hunting and fishing on land determined by the Court to be non-Indian fee land located within the Crow Indian reservation.[27] The Tribe first argued that its 1868 treaty with the United States granted such authority; article II of the treaty not only established a reservation for the Crow Tribe but also provided that it be "set apart for the *absolute and undisturbed use and occupation* of the Indians herein named."[28]

The Court recognized that the "treaty . . . obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe the authority to control fishing and hunting on those lands."[29] Nonetheless, the Court held that this authority "could only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation.'"[30] Since the land in question was owned by the State, the Tribe could no longer exercise undisturbed use and occupation.[31]

Having disposed of the treaty argument, the *Montana* Court addressed whether the Tribe could nevertheless control non-members under its inherent sovereign power.[32] Writing for the Court, Justice Stewart announced what, at the time, seemed to be a new principle: "[E]xercise 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 . . . ."[33] Subsequently, Justice Stewart held that, as a general proposition, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[34]

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25. 450 U.S. 544 (1981). *Montana* was first referred to as "pathmarking" in *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

26. 450 U.S. at 547.

27. *Id.* at 556–57.

28. Treaty of Fort Laramie with the Crows, *supra* note 10, art. 2 (emphasis added).

29. *Montana*, 450 U.S. at 558–59.

30. *Id.* at 559.

31. *Id.* at 558–59.

32. *Id.* at 563–64.

33. *Id.* at 564.

34. *Id.* at 565.

The Court identified two exceptions to its general rule.[35] The first exception, now known as the "consensual relations" exception, allows tribes to "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."[36] The second exception, known as the "tribal self-government" exception, allows tribal civil authority over the conduct of non-members (even on fee lands within the reservation) "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[37] Unfortunately for the Crow Tribe, however, neither of these exceptions applied to this case.[38]

B. Strate v. A-1- Contractors*: Equating Tribal Adjudicatory Jurisdiction with Tribal Regulatory Power*

In *Strate v. A-1 Contractors*, the Supreme Court considered the tribal court's jurisdiction over a lawsuit filed by one non-member against another non-member.[39] The dispute in this case resulted from a fender-bender accident that happened within the reservation but on a road over which the State maintained a right of way.[40] The Court held that the tribal court did not have jurisdiction over the case.[41]

The *Strate* opinion brought about three important clarifications, or, perhaps, modifications, to the *Montana* analysis. First, it clarified that, in order to be considered "Indian owned" land for the purposes of the *Montana* analysis, a tribe must have retained a "gatekeeper" role in excluding non-members from the area.[42] Second, and more importantly, it held that the *Montana* analysis was applicable to both tribal regulatory and adjudicatory jurisdiction because, "[a]s to nonmembers . . . a tribe's

35. *Id.* at 565–66.

36. *Id.*

37. *Id.* at 566.

38. *Id.* ("No such circumstances, however, are involved in this case. Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction. And nothing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation.").

39. 520 U.S. 438, 442 (1997).

40. *Id.* at 442–43.

41. *Id.* at 442.

42. *Id.* at 455–56. Since the tribe had not maintained that role here, the Court ruled that the state right of way was the equivalent of non-member fee land for the purposes of the *Montana* analysis. *Id.* at 456.

adjudicative jurisdiction does not exceed its legislative jurisdiction."[43] In effect, to determine whether a tribal court has jurisdiction over a non-member defendant, courts must only ask whether the tribal council could have regulated the non-member activity on the land in question.[44] In its third clarification to *Montana*, the Court considerably narrowed the scope of the tribal self-government exception to *Montana*'s general rule. Here, it held that having jurisdiction over non-members driving on state roads within reservations was not necessary to the health and welfare of the tribes.[45]

Determining where, for the purposes of the *Montana* analysis, the crucial facts took place can be a complicated question.[46] For instance, in *Wilson v. Horton's Towing*, a tribal police officer suspected that Wilson, a non-Indian, was driving while inebriated.[47] The officer stopped Wilson on a state road within the reservation.[48] After finding drugs in the vehicle, the tribal officer called a state trooper, who arrested the non-Indian driver for a DWI and impounded the driver's truck off the reservation.[49] The next day, the Lummi Tribal Court issued a "Notice of Seizure and Intent to Institute Forfeiture"; under the Lummi Nation's tribal code, possession of marijuana over one ounce is grounds for civil forfeiture.[50] Eventually, Horton's Towing released the truck to the Tribe.[51] Wilson, the driver, brought suit in federal court against Horton's Towing and the arresting tribal officer.[52]

Finding a colorable claim of tribal jurisdiction, the Ninth Circuit held that the non-Indian driver had to exhaust his tribal remedies before bringing his suit in federal court.[53] The court stated, "In this case, the threshold question is whether Plaintiff's claim 'bears some direct connection to tribal

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43. *Id*. at 453.

44. *Id.*

45. *Id.* at 459 ("Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'") (citing Williams v. Lee, 358 U.S. 217, 220 (1959)).

46. *See* discussion *infra* note 94–98, 108–11.

47. 906 F.3d 773, 777 (9th Cir. 2018).

48. *Id.*

49. *Id.*

50. *Id.*; LUMMI TRIBAL CODE § 5.09A.110(d)(2) (2016), https://narf.org/nill/codes/lummi/5Offenses.pdf.

51. *Wilson*, 906 F.3d at 777.

52. *Id.*

53. *Id.* at 778. The requirement that a party should first exhaust the available tribal remedies before filing in federal court arguing that the tribal court did not have jurisdiction was first promulgated in *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845, 856–57 (1985), and *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9, 15–16 (1987).

lands,' such that tribal jurisdiction is colorable."[54] Because the driver was found with several containers of marijuana in his truck immediately after leaving the tribal casino,[55] the court found that, although the driver was stopped on a state road, "one could logically conclude that the forfeiture was a response to his unlawful possession of marijuana while on tribal land. So interpreted, the events giving rise to the conversion claim reveal a 'direct connection to tribal lands.'"[56]

C. Nevada v. Hicks*: The Origin of the Confusion*

Nevada v. Hicks involved a lawsuit filed in tribal court by a member of the Fallon Paiute-Shoshone Tribes of western Nevada against Nevada and its state officials.[57] Hicks alleged that state game wardens violated his civil rights and damaged his property when they entered the reservation to search his house for evidence related to his alleged off-reservation crime of hunting out-of-season.[58] The state's game wardens acted pursuant to warrants issued by both the state and tribal court.[59] Once the case reached the Supreme Court, the main issue was whether the tribal court had jurisdiction over the non-member defendants.[60] The Tribes argued that the *Montana* analysis was not applicable since the non-member state law enforcement officials' activities relevant to the lawsuit took place on Indian-owned land.[61]

Justice Scalia delivered the opinion for the Court, holding that the tribal court lacked jurisdiction.[62] Justice Souter concurred and was joined by Justices Kennedy and Thomas.[63] Therein, Souter stated:

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54. *Wilson*, 906 F.3d at 779 (quoting Smith v. Salish Kootenai C., 434 F.3d 1127, 1135 (9th Cir. 2006)).

55. *Id.* at 780.

56. *Id.*; *see also* Employer's Mut. Cas. Co. v. Branch, 381 F. Supp. 3d 1144, 1152 (2019). The *Branch* court found that none of the contracts made by a non-reservation insurance company with a non-Indian contractor, whose employees negligently caused a massive fuel leak on the reservation, were made on the reservation. *Id.* Therefore, the insurance company was not subject to the jurisdiction of the tribal court. *Id.*

57. 533 U.S. 353, 355–57 (2001).

58. *Id.*

59. *Id.* at 356.

60. *Id.* at 357.

61. *Id.* at 359 ("Respondents and the United States argue that since Hicks's home and yard *are* on tribe-owned land within the reservation, the Tribe may make its exercise of regulatory authority over nonmembers a condition of nonmembers' entry.").

62. *Id.* at 364–65.

63. *Id.* at 375 (Souter, J., concurring).

> While I agree with the Court's analysis as well as its conclusion, I would reach that point by a different route . . . . [W]hile the Court gives emphasis to measuring tribal authority here in light of the State's interest in executing its own legal process to enforce state law governing off-reservation conduct, I would go right to *Montana's* rule . . . .[64]

Joined by Justices Breyer and Stevens, Justice O'Connor also concurred because she believed the court of appeals erred in not considering the state officials' claim of sovereign immunity.[65] Nonetheless, she would have remanded to the lower courts on the issue of whether the tribe had jurisdiction under the *Montana* exceptions.[66]

The question here is why Justice Scalia did not go directly to the *Montana* rule as Justice Souter did. There are three possible interpretations of Justice Scalia's opinion.

The first interpretation, followed in the Seventh and Eighth Circuits,[67] is that Scalia was, in fact, just performing a *Montana* analysis. Under that interpretation, *Hicks* stands for the proposition that *Montana*'s general rule of no-tribal jurisdiction over non-members extends to all lands within Indian reservations. To be sure, language used by Justice Scalia towards the end of the opinion suggested as much :

> [T]ribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to "the right to make laws and be ruled by them." The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government.[68]

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64. *Id.*

65. *Id.* at 401 (O'Connor, J., concurring) ("I would therefore reverse the Court of Appeals in this case on the ground that it erred in failing to address the state officials' immunity defenses.").

66. *Id.* at 396 ("If the Court were to remain true to the principles that have governed in prior cases, the Court would reverse and remand the case to the Court of Appeals for a proper application of *Montana* to determine whether there is tribal jurisdiction.").

67. *See* discussion *infra* notes 93–111.

68. *Hicks*, 533 U.S. at 364.

A second interpretation of the Scalia opinion, followed in the latest Tenth Circuit case on that issue,[69] is that the *Hicks* holding is limited to denying tribal jurisdiction over state law enforcement officials conducting criminal investigations on the reservation. Justice Ginsburg adopted this position in her short concurring opinion.[70] Also supporting this interpretation is the majority's statement in a footnote that "[o]ur 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."[71] Under this second interpretation, the Court does consider the state's interests in law enforcement, but it does so in a *Montana*-type analysis to determine whether they outweigh the tribal interest in self-government as described in the second *Montana* exception. Under that exception, a tribe has jurisdiction over the conduct of non-members when such conduct threatens the political integrity, economic security, or health and welfare of the tribe.[72]

A third possible understanding of the opinion, followed by the Ninth Circuit,[73] is that Justice Scalia first determined that the tribe had, in fact, lost the right to exclude state agents from the reservation in cases involving important state interests such as were present in *Hicks*. Thus, instead of first evaluating whether any of the *Montana* exceptions apply, courts should first debate the importance of the State's interests to determine whether the tribe has lost the right to exclude these state law-enforcement officials from Indian-owned lands. In other words, the balancing of the tribal and state interests at stake determines if the tribe has lost the right to exclude. It is only after the court has determined that the tribe had lost the right to exclude that the *Montana* analysis becomes applicable.

Thus, after stating that the Supreme Court's "cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation,"[74] Justice Scalia focused on the right of states to run "process" inside the reservations which

69. *See* Norton v. Ute Indian Tribe, 862 F.3d 1236 (10th Cir. 2017); *see also* discussion *infra* notes 124–36.

70. *Hicks*, 533 U.S. at 386 (Ginsburg, J., concurring.)

71. *Id.* at 358 n.2.

72. Montana v. United States, 450 U.S. 544, 566 (1981).

73. *See* discussion *infra* notes 137–83.

74. *Hicks*, 553 U.S. at 361.

he claimed had been recognized since the 1880s.[75] Justice Scalia added that "[w]hile it is not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes, several of our opinions point in that direction."[76]

Scalia also invoked *Washington v. Confederated Tribes of the Colville Reservation*[77] for the proposition that states can have jurisdiction even over Indian tribes and their members on Indian reservations.[78] True enough, the Court has, in the past, stated that "under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members."[79] Following this reasoning, it was expected that Justice Scalia would next argue that the State had the power to enter the reservation and assume jurisdiction over Hicks because of exceptional circumstances, thereby abrogating the Tribe's right to exclude. He did not, however, explicitly put it in these terms. Instead he rather abruptly asserted, "We conclude today, in accordance with these prior statements, that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to 'the right to make laws and be ruled by them.'"[80]

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75. *Id.* at 363–64 ("The Court's references to 'process' in *Utah & Northern R. Co.* and *Kagama*, and the Court's concern in *Kagama* over possible federal encroachment on state prerogatives, suggest state authority to issue search warrants in cases such as the one before us."); *see also Process*, BLACK'S LAW DICTIONARY (5th ed. 1979) (defining "process" as "any means used by court to acquire or exercise its jurisdiction over a person or over specific property").

76. *Hicks*, 553 U.S. at 363.

77. 447 U.S. 134 (1980).

78. *See Hicks*, 533 U.S. at 362 ("When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in *Confederated Tribes*. In that case, Indians were selling cigarettes on their reservation to nonmembers from off reservation, without collecting the state cigarette tax. We held that the State could require the Tribes to collect the tax from nonmembers, and could 'impose at least "minimal" burdens on the Indian retailer to aid in enforcing and collecting the tax' . . . .") (quoting *Confederated Tribes*, 447 U.S. at 151).

79. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 (1987) (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331–32 (1983)).

80. *Hicks*, 533 U.S. at 364. The Court also added, "The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government." *Id.*

*D. Post-*Hicks *Supreme Court Cases*

Although the Supreme Court had the opportunity to comment on *Hicks* twice since 2001, neither of those cases added much to the debate. In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, the Court contemplated a tribal court's jurisdiction over a discrimination lawsuit.[81] This suit was brought by tribal members against a non-Indian bank, claiming the bank discriminated against them in the sale of a parcel of non-Indian fee land within the reservation.[82] The Supreme Court held that the tribal court had no jurisdiction over the non-member defendant because the Tribe had lost the right to regulate the sale of non-Indian fee land on the reservation.[83] Allowing the Tribe to invoke its tort law in this case would allow the tribal court to control the sale of such non-Indian fee land.[84]

The Court hardly mentioned *Hicks* in its Opinion.[85] However, it did state that *Montana*'s "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 . . . ."[86] Thus, at the very least, the Court implied that *Montana* was applicable to activities on both Indian and non-Indian land within the reservations.

Of course, it is essential to understand that the debate is not whether the *Montana* analysis is applicable to all reservation lands. It clearly can be. The debate regards when should the analysis take place: either directly, as Justice Souter did in *Hicks*, or after the Court weighs the state interest, as Justice Scalia arguably did.

The other post-*Hicks* case, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, ended in a 4-4 draw without a decision.[87] The Court's action meant that the decision below, *Dolgencorp, Inc., v. Mississippi Band of Choctaw Indians*, which upheld tribal jurisdiction over a non-Indian corporation, was left undisturbed.[88] The Fifth Circuit, in *Dolgencorp*,

81. 554 U.S. 316, 320 (2008).

82. *Id.*

83. *Id.* at 332, 341.

84. *Id.* at 331–32.

85. *Id.* at 334–35. The Court, however, did quote from *Hicks* for the purposes of stating, "Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them." *Id.* at 335 (citing *Hicks*, 533 U.S. at 361).

86. *Id.* at 328.

87. 136 S. Ct. 2159 (2016).

88. *See* 746 F.3d 167 (5th Cir. 2014).

upheld the jurisdiction of the tribal court over a lawsuit by the Tribe against a non-Indian corporation whose employee allegedly sexually abused a minor tribal member who was working for the corporation on tribal land.[89] The circuit court upheld tribal jurisdiction under *Montana*'s commercial relationship exception.[90] The court never mentioned, let alone discussed, *Nevada v. Hicks*, even though the alleged wrongdoing occurred on land the Tribe had leased to the corporation.[91]

Needless to say, the three *Hicks* plurality opinions, and the perplexing structure of Scalia's main opinion, generated some confusion among the lower courts for the last twenty years. The Supreme Court has never revisited the issue because *Plains Commerce Bank*, the only opinion issued since *Hicks* in the area of tribal jurisdiction over non-members, involved non-Indian fee land.[92] The next Part of this Article discusses the various positions adopted by the circuit courts.

II. The Federal Circuits' Debate on When to Extend Montana *to Indian-Owned Lands Within Reservations*

A. The Seventh and Eighth Circuits' Approach: Interpreting Hicks *As Always Extending* Montana *to All Reservation Lands Owned by the Tribes or Their Members*

A number of Seventh and Eighth Circuit cases followed Justice Souter's *Hicks* concurrence and extended *Montana* directly to all lands within the reservations, Indian and non-Indian owned. In *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*,[93] the Seventh Circuit specifically disagreed with the proposition that *Hicks* was of limited applicability when it came to tribal jurisdiction over Indian owned lands.[94] This case involved a lawsuit filed by a tribal entity in tribal court seeking to invalidate a sale of tribal bonds made with a non-Indian bank.[95] Although the tribal entity pointed to "multiple meetings, during which Stifel allegedly

89. *Id.* at 169–70.

90. *Id.* at 173–74.

91. It seems that the district court in the case had adopted a broad interpretation of *Hicks* and the Tribe decided to focus its appeal on the applicability of the *Montana* exceptions. *See* Dolgencorp Inc. v. Miss. Band of Choctaw Indians, 846 F. Supp. 2d 646, 651 (S.D. Miss. 2011).

92. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 320 (2008).

93. 807 F.3d 184 (7th Cir. 2015).

94. *Id.* at 206–07.

95. *Id.* at 189–90.

"misrepresented material terms of the Bond Transaction,"[96] the Seventh Circuit noted that the District Court had found that there was "no evidence presented that any *negotiations* with respect to the Bond Transaction or Documents took place on tribal land."[97]

Although the Seventh Circuit never concluded that no non-member activities took place on tribal lands, that fact ended up not being essential to its analysis of tribal jurisdiction. For instance, answering the tribal argument that *Montana* only applies to situations in which tribes attempt to regulate nonmember conduct on non-Indian fee land, as opposed to tribal trust land, the court stated it "do[es] not believe that these conclusions can be reconciled with the language that the Court employed in *Hicks* . . . ."[98] The court first focused on language in *Hicks*, stating that "[t]he 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.'"[99] The court then analyzed *Plains Commerce Bank* and concluded that the statement that *Montana*'s "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"[100] left no doubt that "*Montana* applies regardless of whether the actions take place on fee or non-fee land."[101]

The Eight Circuit also adopted a broad definition of *Hicks*. In *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe*, the non-Indian defendant sent a group of armed men to take over the tribal casino on behalf of a competing tribal political faction.[102] The Sac and Fox Tribe sued the non-Indian security firm in tribal court for trespass and other intentional torts as well as damages to tribal property incurred during the take-over.[103] The non-Indian defendant brought a lawsuit in federal court asking for a declaratory judgment that the tribal court lacked jurisdiction over this case. Although the Eight Circuit relied on the second *Montana* exception (threat

96. *Id.* at 207.

97. *Id.* at 193.

98. *Id.* at 207 n.60.

99. *Id.* at 206 (quoting Nevada v. Hicks, 533 U.S. 353, 360 (2001)).

100. *Id.* at 207 (citing Plains Commerce Bank v. Long Family Land & Cattle Co., 544 U.S. 316, 328 (2008)).

101. *Id.* at 208. The Seventh Circuit went on to uphold the District Court's decision that there was no likelihood that the tribal court had jurisdiction over the non-member parties. *Id.* at 208–09.

102. 609 F.3d 927, 931–32 (8th Cir. 2010).

103. *Id.* at 933.

to tribal health and welfare, political integrity, and economic security) to uphold the jurisdiction of the tribal court,[104] it also stated

> Although the issue in the *Montana* case was about tribal regulatory authority over nonmember fee land within the reservation, *Montana's* analytic framework now sets the outer limits of tribal civil jurisdiction—both regulatory and adjudicatory—over nonmember activities on tribal and nonmember land. . . . The Court has also indicated that "*Montana* applies to both Indian and non-Indian land."[105]

Toward the end of its opinion, the court mentioned that the Tribe had a right to exclude non-members from Tribe-owned land, but it only invoked that right as part of the *Montana* framework.[106]

More recently, in *Belcourt Public School District v. Davis,* the Eighth Circuit applied *Montana* to deny tribal jurisdiction over a school district on what may have been Indian-owned land.[107] This case involved multiple employment-related claims by tribal employees against the school district.[108] Although the status of the land as Indian- or non-Indian-owned was not clear, the court disposed of this issue, stating

> [T]here is scant evidence in the record what, if any, land and facilities relevant to this case were owned by the Tribe. Nevertheless, even if the Tribe owned all of the land and facilities relevant to this case—which is not supported by the

104. *Id.* at 940 ("[B]ecause API's forceful intervention on October 1, 2003 threatened the 'political integrity, the economic security, [and] the health [and] welfare' of the Tribe, as well as its rights as a landowner, the tribal courts may exercise jurisdiction over the claims that arise out of that conduct.") (quoting Montana v. United States, 450 U.S. 544, 566 (1981)) (second and third alterations in original).

105. *Id.* at 936 (citing *Hicks*, 533 U.S. at 360).

106. *Id.* at 940 ("Finally, there remains 'the critical importance of land status' to questions of tribal jurisdiction under *Montana.* Here, the Tribe does not seek to assert jurisdiction over non Indian fee land. The facilities API raided are on tribal trust land. The Tribe's trespass and trade secret claims thus seek to regulate API's entry and conduct upon tribal land, and they accordingly 'stem from the tribe's "landowner's right to occupy and exclude."' A 'tribe's "traditional and undisputed power to exclude persons" from tribal land . . . gives it the power to set conditions on entry to that land.'") (internal citations omitted).

107. 786 F.3d 653, 657 (8th Cir. 2015).

108. *Id.* at 656.

> record—*Montana* would still apply, and our analysis would not change . . . .[109]

The court never mentioned the tribal right to exclude and held that the two *Montana* exceptions (consensual relations and tribal self-government) did not provide the tribal court with jurisdiction in this case.[110]

The first part of the Supreme Court's analysis in *Hicks* tends to support the Seventh and Eighth Circuits' position. Thus, after stating that "[b]oth *Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude,'"[111] and remarking that the land status was central to the analysis of the Court in previous cases, the Court concluded that "the reason that was so was *not* that Indian ownership suspends the 'general proposition' . . . that 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'"[112] Justice Scalia also noted that the *Montana* Court implied that its general rule was applicable throughout the reservation when it stated that Indian tribes retain "some forms of civil jurisdiction over non-Indians . . . even on non-Indian fee lands."[113] Finally, after remarking that who owns the land is only one factor to consider in determining whether tribal regulation of non-members is necessary to protect tribal self-government, Justice Scalia stated "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers."[114]

These statements imply that the Court did engage in a "*Montana* analysis." For instance, later in the Opinion, when Justice Scalia criticized Justice O'Connor's concurrence for asserting that the Court's "reasoning 'gives only passing consideration to the fact that the state officials'

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109. *Id.* at 660 n.5 (internal citation omitted). For an almost identical Eighth Circuit case, see *Fort Yates Public School District No. 4 v. Murphy*, 786 F.3d 662, 670 n.6 (8th Cir. 2015) ("[T]his court is aware that '[t]he ownership status of land' is '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."' As noted above, however, there is scant evidence in the record what land and facilities relevant to this case were owned by the Tribe. Nevertheless, even if the Tribe owned all of the land and facilities relevant to this case—which is not supported by the record—*Montana* would still apply, and our analysis would not change for the reasons stated herein.") (internal citation omitted).

110. *Davis*, 786 F.3d at 660–61.

111. *Hicks*, 533 U.S. at 359 (quoting Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997)).

112. *Id.*

113. *Id.* at 360 (citing Montana v. United States, 450 U.S. 544, 565 (1981)).

114. *Id.*

activities in this case occurred on land owned and controlled by the Tribes.'"[115] He responded:

> To the contrary, we acknowledge that tribal ownership is a factor in the Montana analysis, and a factor significant enough that it "may sometimes be . . . dispositive." We simply do not find it dispositive in the present case, when weighed against the State's interest in pursuing off-reservation violations of its laws.[116]

But why did Justice Scalia mention Nevada's interest in law enforcement before concluding that the tribal court did not have jurisdiction in the case? The State's interests were never part of any *Montana* analysis under which courts should evaluate whether jurisdiction of non-members is necessary to tribal self-government. For this reason, I believe there are two other interpretations of the Court's *Hicks* opinion that make more sense of Scalia's invocation of the state interests.

B. The Tenth Circuit Approach: From a Broad Interpretation of Hicks *to One Limiting It to Cases Involving Strong State Law Enforcement Interests*

In 2007, the Tenth Circuit decided *MacArthur v. San Juan County*.[117] This case involved tribal members, employed by a health clinic, who were challenging certain administrative actions taken by the clinic.[118] Whether the alleged wrongful conduct of the non-members occurred on what can be classified as Indian or non-Indian fee land was debatable because although the clinic started out as part of a County Health Services district, the County relinquished operation of the Clinic on January 1, 2000.[119] At this time, the Utah Navajo Health Systems, an entity affiliated with the Navajo Tribe, took over operations.[120] Although the Tenth Circuit took the position that "[t]he record indicates that the land on which the Clinic is located is fee land owned by the State of Utah as part of the Navajo Trust Fund,"[121] the court did address *Hicks*' extension to Indian-owned land:

> 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*. . . . Because the activities occurred on Indian

115. *Id.* at 370.
116. *Id.*
117. 497 F.3d 1057 (10th Cir. 2007).
118. *Id.* at 1062.
119. *Id.* at 1061.
120. *Id.*
121. *Id.*

> land, Hicks argued that *Montana* had no relevance. In rejecting that argument, the Court explained that . . . language from *Montana* itself clearly implied that the general rule announced in that case applies to Indian and non-Indian land alike.[122]

In a more recent decision, however, the Tenth Circuit in *Norton v. Ute Indian Tribe* took a much narrower view of *Hicks*.[123] In *Norton*, the Ute Tribe sued state police officers who trespassed onto tribal land while chasing a car occupied by a pair of tribal members.[124] In the ensuing pursuit, Murray—a passenger in the fleeing car—died from a gunshot wound to the head.[125] The parties disagreed as to whether Murray committed suicide, as the state police claimed, or whether he was shot by the police.[126]

In its analysis of this case, the court first addressed the right to exclude.[127] "In light of these repeated confirmations of tribes' right to exclude nonmembers from tribal lands, we think it plausible that the Tribal Court possesses jurisdiction over the trespass claim."[128] The court then addressed the argument that *Hicks* changed the legal landscape.[129] After noting that the *Hicks* Court had "expressly limited its holding to 'the question of tribal-court jurisdiction over state officers enforcing state law,'"[130] the Tenth Circuit stated that "the question before us is whether this case sufficiently mirrors *Hicks* so as to compel its narrow holding to apply."[131]

The *Norton* court observed that "[t]he facts in this case differ from those in *Hicks* in a critical way" since the tribal member who died from the gun shot was not suspected of having committed any off-reservation crime.[132] "Although the driver of the car was speeding outside of the Reservation, Murray (the tribal member who died) was merely a passenger."[133] Thus, the

122. *Id.* at 1069–70.
123. 862 F.3d 1236 (10th Cir. 2017).
124. *Id.* at 1241–42.
125. *Id.* at 1242.
126. *Id.*
127. *Id.* at 1244–45.
128. *Id.* at 1245.
129. *Id.* at 1248–49.
130. *Id.* at 1248 (quoting Nevada v. Hicks, 533 U.S. 353, 358 n.2 (2001)).
131. *Id.*
132. *Id.*
133. *Id.*

court concluded by stating that "[t]o the extent that Murray's running away from State Trooper Swenson could be considered an offense, *see* Utah Code § 41-6a-209 (disobeying a lawful order of a law enforcement officer), this crime does not fit within *Hicks*' confines."[134] In effect, the Tenth Circuit in *Norton* took the position that, in order for *Hicks* to be controlling, a state must put forth a substantial law enforcement interest.[135]

C. The Ninth Circuit Approach: From a Narrow Interpretation of Hicks *to Rejecting the Application of* Montana *When Tribes Have Preserved the Right to Exclude*

The third category of cases comes from the Ninth Circuit. The first Ninth Circuit case to discuss the meaning of *Hicks* was *McDonald v. Means*.[136] This case involved an assertion of tribal court jurisdiction over a tort resulting from a collision on a federal Bureau of Indian Affairs'(BIA) road.[137] The non-member defendant argued that *Hicks* extended *Montana* to all lands within the reservation.[138] After noting that the *Hicks* Court limited its holding to the question of tribal court jurisdiction over state officers enforcing state law, the Ninth Circuit concluded that the limited nature of *Hicks*'s holding was inapplicable to this case.[139] Among the distinguishing factors was the fact that the Tribe here continued to exercise control over the road where the incident took place.[140]

Perhaps the first Ninth Circuit decision to discuss the role of the right to exclude in a *Montana* analysis was *Elliott v. White Mountain Apache Tribal Court*.[141] The issue in *Elliot* was whether the tribal court had jurisdiction to

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134. *Id.*

135. *Id.* at 1249 ("Given that the chief concern driving the Court in *Hicks* was the state's paramount interest in investigating off-reservation crimes, we cannot say that a similar state interest is implicated when state officers pursue a tribal member on tribal land for an on-reservation offense over which they lack authority.").

136. 309 F.3d 530 (9th Cir. 2002).

137. *Id.* at 535–36.

138. *See id.* at 540.

139. *Id.*

140. *Id.*

141. 566 F.3d 842 (9th Cir. 2009). An earlier case, *Smith v. Salish Kootenai College*, discussed *Hicks* but, instead of discussing whether the tribe had kept its right to exclude, it focused on how the claims were related to tribal land, stating,

> The interaction of these factors—the status of the parties and the connection between the cause of action and Indian lands—is complex . . . . Our own cases, however, suggest that whether tribal courts may exercise jurisdiction over a nonmember defendant may turn on how the claims are related to tribal lands.

hear a case brought by the Tribe against a non-member.[142] This non-member set a signal fire after she got lost on the reservation.[143] The fire ended up burning 400,000 acres of tribal timber.[144] After acknowledging that determining the scope of tribal court jurisdiction was not an easy task, the court only needed to determine whether tribal jurisdiction was plausible; the issue, here, was whether the non-member had to first exhaust her tribal remedies before filing her case in federal court.[145] In deciding that tribal jurisdiction was plausible, the Ninth Circuit examined Supreme Court precedent and noted:

> The Supreme Court has strongly suggested that a tribe may regulate nonmembers' conduct on tribal lands to the extent that the tribe can "assert a landowner's right to occupy and exclude." The tribal regulations at issue stem from the tribe's "landowner's right to occupy and exclude." . . . Accordingly, the tribe's ownership of the land may be dispositive here.[146]

The court further rejected the argument that *Hicks* precluded tribal jurisdiction.[147] Although the *Hicks* Court held that the tribal court lacked jurisdiction notwithstanding tribal ownership of the land, the Ninth Circuit stated that "the crux of the Court's reasoning was that the state's strong interest in executing its criminal warrants concerning an off-reservation crime outweighed the tribe's interest in regulating the activities of 'state wardens.'"[148]

The Ninth Circuit adopted a somewhat different approach in 2011 in what would become its leading case: *Water Wheel Camp Recreational*

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434 F.3d 1127, 1132 (9th Cir. 2006). A later Ninth Circuit opinion, *Window Rock Unified School District v. Reeves*, acknowledged that

> although *Smith v. Salish Kootenai College* could arguably be read to extend the *Montana* framework [to Indian owned land], the jurisdictional question in *Smith* arose in a different context from the one presented here. In *Smith*, a nonmember challenged a tribal court's authority to adjudicate a claim that he had filed as a plaintiff in tribal court. We held that by filing the claim, the nonmember had consented to tribal jurisdiction.

861 F.3d 894, 914 n.9 (9th Cir. 2017) (citations omitted).

142. 566 F.3d at 844–45.

143. *Id.* at 844.

144. *Id.*

145. *Id.* at 849. *See supra* note 53–56 (discussing exhaustion of tribal court remedies).

146. *Elliot*, 566 F.3d at 849–50 (quoting Nevada v. Hicks, 533 U.S. 353, 359 (2001)).

147. *Id.* at 850.

148. *Id.* (citing *Hicks*, 533 U.S. at 370).

Area, Inc. v. LaRance.[149] This case arose out of a dispute involving a lease between the Colorado Indian Tribe and its lessee, Water Wheel, which operated a recreational resort on leased tribal lands.[150] After the lease expired and Water Wheel refused to vacate the premises, the Tribe sued Water Wheel and its owner in tribal court.[151] Water Wheel challenged the jurisdiction of the tribal court in federal court.[152] Although the Ninth Circuit first stated that *Hicks* was limited to cases involving strong state law enforcement interests,[153] the court upheld tribal court jurisdiction over the non-Indian lessee based on a slightly different rationale, stating:

> In this instance, where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*.[154]

The Ninth Circuit revisited the issue two years later in *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc*.[155] In that case, a non-Indian corporation, Grand Canyon Skywalk, brought a lawsuit in federal court against a tribally chartered corporation of the Hualapai Indian Tribe.[156] The plaintiff corporation sought a declaratory judgment that the Hualapai Tribe lacked the authority to condemn Grand Canyon Skywalk's property rights in a revenue-sharing contract with a tribally chartered corporation.[157] The Ninth Circuit held that the non-Indian corporation had to exhaust its tribal remedies before bringing an action in federal court because the tribal court did not plainly lack jurisdiction over that corporation so as to avoid the tribal exhaustion mandate.[158]

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149. 642 F.3d 802 (9th Cir. 2011).

150. *Id.* at 805.

151. *Id.*

152. *Id.* at 807.

153. *Id.* at 813 ("To summarize, Supreme Court and Ninth Circuit precedent, as well as the principle that only Congress may limit a tribe's sovereign authority, suggest that *Hicks* is best understood as the narrow decision it explicitly claims to be. Its application of *Montana* to a jurisdictional question arising on tribal land should apply only when the specific concerns at issue in that case exist.").

154. *Id.* at 814.

155. 715 F.3d 1196 (9th Cir. 2013).

156. *Id.* at 1199.

157. *Id.*

158. *Id.* at 1204–06. The *Grand Canyon Skywalk* court further stated,

In extending *Water Wheel* to the present case, the *Grand Canyon Skywalk* court stated that "[a]lthough this case involves an intangible property right within a contract, rather than a leasehold as in *Water Wheel*, the contract in this case equally interfered with the Hualapai's ability to exclude GCSD from the reservation."[159] Summarizing its interpretation of *Hicks*, the Ninth Circuit stated: "When deciding whether a tribal court has jurisdiction, land ownership may sometimes prove dispositive, but when a competing state interest exists, courts balance that interest against the tribe's."[160]

Extending *Hicks* to the activities of non-members on tribal land was also examined in *Window Rock Unified School District v. Reeves*.[161] There, employees of two school districts filed complaints with the Navajo Tribal Labor Commission and argued both that the districts owed them merit pay and that the districts violated the Navajo Preference in Employment Act.[162] Before the Commission held evidentiary hearings, the school districts filed a lawsuit in federal court, arguing that the Commission and the Navajo tribal courts had no jurisdiction over the school districts' employment decisions.[163] As in *Grand Canyon Skywalk*, the issue before the Ninth Circuit was whether the school district should exhaust its tribal remedies before filing in federal court.[164]

The Ninth Circuit first remarked that caselaw recognizes two distinct frameworks for deciding tribal jurisdiction over non-members on Indian owned lands: "(1) the right to exclude which generally applies to nonmember conducts on tribal land; and (2) the exceptions articulated in *Montana v. United States*, which generally apply to nonmember conduct on non-tribal land."[165] Answering arguments that *Hicks* eliminated the right-to-exclude framework, the court stated:

> We have interpreted *National Farmers* as determining that tribal court exhaustion is not a jurisdictional bar, but rather a prerequisite to a federal court's exercise of its jurisdiction. "Therefore, under *National Farmers,* the federal courts should not even make a ruling on tribal court jurisdiction . . . until tribal remedies are exhausted."

Id. at 1200 (quoting Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 837 F.2d. 1221, 1228 (9th Cir. 1989)).

159. *Id.* at 1204.
160. *Id.* at 1205.
161. 861 F.3d 894 (9th Cir. 2017).
162. *Id.* at 896.
163. *Id.* at 896–97.
164. *Id.* at 897–98.
165. *Id.* at 898.

> [T]oday we reaffirm that the right-to-exclude framework continues to exist. Our court has read *Hicks* as creating only a narrow exception to the general rule that, absent contrary provisions in treaties or federal statutes, tribes retain adjudicative authority over nonmember conduct on tribal land—land over which the tribe has the right to exclude. We have held that *Hicks* applies "only when the specific concerns at issue in that case exist."[166]

One of the issues in *Window Rock Unified School District* was whether Arizona's interests in regulating education were sufficiently important to meet the *Hicks* threshold. The court first rejected the position adopted by the district court, that "any state interest in this case plainly defeats [tribal] jurisdiction under *Hicks*."[167] However, it acknowledged that state interests beyond those affecting criminal law enforcement could at times trigger application of *Hicks*.[168] The Ninth Circuit concluded that "because our caselaw leaves open the question of what state interests might be sufficient to preclude tribal jurisdiction over disputes arising on tribal land, tribal jurisdiction is plausible enough here that exhaustion is required."[169]

Judge Christen delivered a strong dissent.[170] Although the dissent argued against a narrow interpretation of *Hicks*,[171] the more interesting part of the dissenting opinion was its argument that, even if the majority was correct in adopting a narrow interpretation of *Hicks*, the Tribe still did not have jurisdiction.[172] First, the Tribe had ceded its right to exclude the school district from the reservation.[173] Secondly, even if *Hicks* is interpreted as requiring a strong state interest before the *Montana* framework can be invoked, Arizona did have a substantial interest relating to education.[174]

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166. *Id.* (quoting Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 813 (9th Cir. 2011)).

167. *Id.* at 899.

168. *Id.*

169. *Id.*

170. *See id.* at 911–12 (Christen, J., dissenting).

171. *Id.*

172. *Id.* at 921–22 (concluding, unlike the majority, that exhaustion of tribal remedies was not required).

173. *Id.* at 914–16.

174. *Id.* at 916–18.

> The Navajo Nation Supreme Court's amicus brief asserts interests in protecting Navajo employees and students, and the tribal court's opening brief asserts interests in hearing complaints arising from employment decisions of all-Navajo school boards. But the school boards are political subdivisions of the

The *Reeves* dissent considered the state interest, but not as part of its right to exclude analysis or the *Montana* analysis.[175] Instead, it analyzed the state interest in distinguishing previous cases, such as *Water Wheel*.[176] Either the state interest can be discussed as opening the door for a *Montana* analysis or it can be conceived as having eliminated the right to exclude. It is normatively more consistent to discuss the state interests in order to determine whether a tribe has lost the right to exclude.

The most recent Ninth Circuit decision in this area of the law is *Knighton v. Cedarville Rancheria*.[177] This case involved a lawsuit filed in tribal court by the Tribe against a former non-member employee who was accused of defrauding the Tribe.[178] The employee sought declaratory and injunctive relief in federal court, claiming the tribal court did not have jurisdiction.[179] In upholding tribal jurisdiction, the Ninth Circuit rejected the employee's claim that *Hicks* eliminated "the right-to-exclude framework as an independent source or regulatory power over non-member conduct on tribal land . . . ."[180] The court also rejected the argument that tribal jurisdiction is "limited to conduct that directly interferes with a tribe's inherent power to exclude and manage its own lands."[181] Finally the court clarified the meaning of *Water Wheel*, stating:

> *Water Wheel* and our subsequent cases . . . do not exclude *Montana* as a source of tribal regulatory authority over nonmember conduct on tribal land. Rather, our caselaw states that an Indian tribe has power to regulate nonmember conduct on tribal land incident to its sovereign power to exclude nonmembers from tribal land, regardless of whether either of the *Montana* exceptions is satisfied . . . . [A] tribe's power to regulate nonmember conduct on tribal land flows from its

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> State of Arizona, and Arizona has vitally important competing interests in the finality of its state-court judgments and its ability to enforce them. Further, Arizona's constitution mandates "the establishment and maintenance of a general and uniform public school system," a requirement of the Arizona Enabling Act. It cannot be questioned that Arizona has a compelling interest in complying with its statutory and state constitutional mandate.

Id. at 917 (internal citations omitted).

175. *See id.* at 910–14.

176. *Id.* at 916–18.

177. 922 F.3d 892 (9th Cir. 2019).

178. *Id.* at 894.

179. *Id.* at 895.

180. *Id.* at 900.

181. *Id.* at 901.

> inherent power to exclude and is circumscribed only to the limited extent that the circumstances in *Hicks*—significant state interests—are present.[182]

D. Conclusion to Part II

Ultimately, the Ninth Circuit position, as clarified in *Knighton v. Cedarville Rancheria*, is the more doctrinally sound approach among the circuits. Justice Scalia's opinion in *Hicks* should be interpreted as creating a two-step analysis before tribal jurisdiction over non-members *on Indian-owned land* could be said to have been divested. First, a court should determine if the tribe has lost the right to exclude. If the answer is yes, the court should determine if the tribe can exercise jurisdiction under one of the two *Montana* exceptions.

Conceptualizing *Hicks* in this manner makes the most sense out of Justice Scalia's invocation of the state interest. Although considering the state interests either as a divestment of the tribes' right to exclude or as part of the *Montana* analysis may lead to the same result, there is no doctrinal basis to construe Scalia's opinion as integrating a state interest into the *Montana* analysis. The implicit divestiture doctrine was never about tribes losing inherent sovereignty because of a state interest. The state interest should only be taken into consideration when determining whether a tribe has lost its inherent right to exclude.

There is hardly any law on what kind of state interest is sufficient or important enough to overcome a tribe's right to exclude. Whether the important state interest has to be related to law enforcement is debatable. For instance, Justice O'Connor argued that the Court's opinion in *Hicks* would "give nonmembers freedom to act with impunity on tribal land based solely on their status as state law enforcement officials,"[183] Justice Scalia responded that the state officers cannot be regulated only in the performance of their law enforcement duties.[184] He then added, "Action unrelated to that is potentially subject to tribal control depending on the outcome of the *Montana* analysis."[185] Although a state interest does not

182. *Id.* at 903–04. The Ninth Circuit also added that a "tribe also has sovereign authority to regulate nonmember conduct on tribal lands independent of its authority to exclude if that conduct intrudes on a tribe's inherent sovereign power to preserve self-government or control internal relations." *Id*. at 904.

183. Nevada v. Hicks, 533 U.S. 353, 401 (2001) (O'Connor, J., concurring).

184. *Id.* at 373 ("We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law enforcement duties.").

185. *Id*.

have to be tied to law enforcement, as it was in *Hicks*, the state interest should somehow be connected to state officials needing to be on Indian-owned land and having the legal right to be on such lands.

III. The Treaty Right to Exclude Beyond Montana *and* Hicks

A. Is the Treaty Right to Exclude Different from the Sovereign Right to Exclude?

Although tribes are surprisingly successful in getting the Supreme Court to uphold their treaty rights, the same cannot be said for cases relying on inherent tribal sovereignty to control the conduct of non-tribal members.[186] The question, therefore, is whether tribes with a treaty right to exclude may be better off focusing on their treaty rights rather than on an "inherent" sovereign power to exclude. One of the more forceful statements for treating both treaty and non-treaty reservations alike was made by Professor Royster when she noted that all tribes with reservations have the same right to water and other natural resources whether these reservations were established by treaties, statutes, or executive orders.[187] Therefore, while particular treaties may clarify rights implicit in the establishment of the reservation, she argues that whether these rights "arise from an actual treaty or treaty-equivalent of a statute or executive order should make no differences."[188]

The difference between an inherent sovereign power and a treaty right to exclude, if there is any, may become important when a court has to determine whether the right to exclude has been lost. Under this Article's interpretation of *Hicks*, without a treaty, a court would have to decide whether there are state interests that are important enough that the tribe loses the right to exclude. If the right to exclude is based on a treaty, however, the question should be whether there are clear indications of congressional intent to abrogate the treaty right to exclude.[189]

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186. *See* Alex Tallchief Skibine, *The Supreme Court's Last 30 Years of Federal Indian Law: Looking for Equilibrium or Supremacy?*, 8 COLUM. J. RACE & L. 277, 287–89 (2018).

187. *See* Royster, *supra* note 20, at 921.

188. *Id.*

189. *See* United States v. Dion, 476 U.S. 734, 739–40 (1986) ("[W]here the evidence of congressional intent to abrogate is sufficiently compelling, 'the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute.' What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.") (citation omitted)

B. The Treaty and Sovereign Right to Exclude at the Supreme Court

1. Merrion v. Jicarilla Apache Tribe:[190] *The Right to Exclude as a Sovereign Right*

One year after *Montana*, the Court debated the right to exclude as an inherent sovereign right.[191] The issue in *Merrion* involved the Jicarilla Apache Tribe's power to impose an additional tax on a non-Indian corporation, Merrion, that leased lands from the Tribe for the purpose of energy development.[192] Merrion argued that, because its lease with the Tribe did not provide for the imposition of new taxes, the tribal tax was precluded.[193] The Court upheld the new tribal tax.[194] The difference between the majority opinion, penned by Justice Marshall, and the dissent, by Justice Stevens, centered on the nature of the power to exclude and whether the tribal power to tax derived solely from the power to exclude.[195]

Justice Marshall took the position that the tribal power to tax could be derived from either inherent tribal sovereignty or the right to exclude, which includes other lesser rights such as regulating the terms under which anyone not excluded can remain on tribal lands.[196] Justice Stevens argued that the power to tax non-members derived solely from the power to exclude; since the lease did not provide for additional taxes, Merrion could not be excluded for refusing to pay such taxes.[197] Regarding the dissent's argument, Justice Marshall stated:

> [T]he dissent confuse[s] the Tribe's role as commercial partner with its role as sovereign . . . Confusing these two… denigrates Indian sovereignty. Indeed, the dissent apparently views the tribal power to exclude, as well as the derivative authority to tax, as merely the power possessed by any individual landowner or any social group to attach conditions, including a "tax" or fee, to

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(quoting FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 223 (Rennard Strickland et al. eds., 1982)).

190. 455 U.S. 130 (1982).

191. *Id.* at 145–47.

192. *Id.* at 133.

193. *Id.* at 136–37.

194. *Id.* at 149 ("The Tribe has the inherent power to impose the severance tax on petitioners, whether this power derives from the Tribe's power of self-government or from its power to exclude.").

195. *Id.* at 140–41, 144; *id.* at 182–90 (Stevens, J., dissenting).

196. *Id.* at 140–41, 144.

197. *Id.* at 182–90 (Stevens, J., dissenting).

> the entry by a stranger onto private land or into the social group, and not as a sovereign power.[198]

As noted by Justice Marshall, in the language just quoted, the difference between the majority and the dissent centered on whether the tribal right to exclude was an inherent "sovereign" right or a property owner's right. The tribal right in *Merrion* was, however, a non-treaty right to exclude since the Jicarilla Apache reservation had not been created pursuant to a treaty. In the next examined case, the tribe relied on a treaty right to exclude.

2. South Dakota v. Bourland:[199] *The Right to Exclude as a Treaty Right*

The issue in *Bourland* was whether the Cheyenne River Sioux Tribe could regulate non-member hunting and fishing on land that was still within the Tribe's reservation but had been taken from the Tribe pursuant to a federal flood control project.[200] The Tribe acknowledged that even if it no longer had a complete right to exclude, its original treaty rights still allowed the tribe to regulate non-members fishing on these lands.[201] The Court, in an opinion authored by Justice Thomas, acknowledged that the Tribe's treaty right to exclude non-members from the reservation was implicit in its rights of "absolute and undisturbed use and occupation" of such lands.[202] Furthermore, the Court noted that the greater power to exclude comprised "the lesser included, incidental power to regulate non-Indian use of, the lands later taken for the Oahe Dam and Reservoir Project."[203] However, the Court concluded that this right was implicitly abrogated when the United States took the lands pursuant to the Flood Control Act and the Cheyenne River Act, while giving regulatory power to the Secretary of the Army, and opening such lands for the use of the general public.[204]

The Court also insisted that its decision was not in contravention of *United States v. Dion*.[205] There, the Court held that a treaty right can only be abrogated if there is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty

198. *Id.* at 145–46.
199. 508 U.S. 679 (1993).
200. *Id.* at 681–82.
201. *Id.* at 691.
202. *Id.* at 687–88 (quoting Treaty of Fort Laramie with the Crows, *supra* note 10, art. 2).
203. *Id.* at 688.
204. *Id.* at 689–90; *see also* Flood Control Act of 1944, ch. 655, § 4, 58 Stat. 887, 889–90 (codified as amended at 16 U.S.C. 460d); Cheyenne River Act of 1954, Pub. L. No. 83-776, § 2, 68 Stat. 1191, 1191.
205. *Bourland*, 508 U.S. at 693–94.

rights on the other, and chose to resolve that conflict by abrogating the treaty."[206] However, the *Bourland* Court could not explain section 10 of the Cheyenne River Act and section 4 of the Flood Control Act except as "indications that Congress sought to divest the Tribe of its right to 'absolute and undisturbed use and occupation' of the taken area."[207] The *Bourland* dissent objected strongly to that conclusion, stating that the majority

> points not even to a scrap of evidence that Congress actually considered the possibility that by taking the land in question it would deprive the Tribe of its authority to regulate non-Indian hunting and fishing on that land. Instead, it finds Congress' intent implicit in the fact that Congress deprived the Tribe of its right to exclusive use of the land . . . .[208]

The *Bourland* dissent remarked that, although the Court acknowledged the application of cases like *Dion* to this case, "the majority adopt[ed] precisely the sort of reasoning-by-implication that those cases reject."[209]

In short, *Merrion* involved the tribal right to tax non-members pursuant to a right to exclude over lands still owned by the tribe. *Bourland*, on the other hand, dealt with the tribal right to regulate hunting and fishing by non-members over land no longer owned by the tribe but still within the exterior boundaries of the reservation.

C. The Treaty Right to Exclude Beyond Jurisdiction over Non-Members: Applying Federal Laws of General Applicability to Indian Tribes

Besides its relevance in determining tribal jurisdiction over non-members, the distinction between inherent sovereign rights and treaty rights plays a role in the ongoing circuit debate about extending federal laws of general applicability to Indian tribes. These are general federal laws that do not mention Indian tribes in either the text or the legislative history.[210] There are currently three official approaches employed by the circuit courts in deciding whether to apply a general federal law to Indian tribes. Under the prevailing approach, first formulated by the Ninth Circuit in *Donovan v.*

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206. United States v. Dion, 476 U.S. 734, 740 (1986).

207. *Bourland*, 508 U.S. at 693 (quoting Treaty of Fort Laramie with the Crows, *supra* note 10, art. 2).

208. *Id.* at 700 (Blackmun, J., dissenting).

209. *Id.*

210. *See* Alex T. Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 123, 126 (2016).

Coeur d'Alene Tribal Farm,[211] there is a presumption that federal laws that are generally applicable to everyone are also applicable to Indian tribes.[212] The tribes can, however, rebut this presumption by showing that the general federal law would interfere with "purely intramural" aspects of tribal sovereignty.[213]

Under the D.C. Circuit's approach, as formulated in *San Manuel Indian Bingo & Casino v. NLRB*,[214] the focus is on whether the general federal law would interfere with *traditional* powers of tribal self-government.[215] Lastly, the Tenth Circuit's approach assumes that any federal law applied to tribes would interfere with tribal self-government and, therefore, requires clear indications of congressional intent to apply the law to the tribes.[216]

All three approaches acknowledge that general federal laws should not be applied to Indian tribes if they interfere with some aspects of tribal self-government. They differ on which aspect of tribal self-government has to be interfered with. Every approach also agrees that a general federal law should not be applied if it interferes with a specific treaty right unless there is clear evidence that Congress considered the matter and decided to abrogate the treaty right.[217] This indicates that, in this area of the law, tribes with a treaty right to exclude may be better off than those with just a sovereign right to exclude. Finding clear evidence of congressional intent to abrogate a treaty can, however, be a subjective inquiry. The Supreme Court, in both *Montana* and *Bourland*, for instance, found clear indications of congressional intent to eliminate the treaty right to exclude as to non-Indian owned land when Congress had either transferred the land to non-Indian

211. 751 F.2d 1113 (9th Cir. 1985).

212. *Id.* at 1115–17 (relying on FPC v. Tuscarora, 362 U.S. 99 (1960)).

213. *Id.* at 1116.

214. 475 F.3d 1306 (D.C. Cir. 2007).

215. *Id.* at 1313.

216. *See* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1196 (10th Cir. 2002) ("The correct presumption is that silence does not work a divestiture of tribal power."). More recently, a fourth approach was suggested by the Sixth Circuit in *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015). Although the panel acknowledged that it was bound by a previous panel's decision to follow the *Coeur d'Alene* framework, it severely criticized that approach and argued that a much better approach would be to adopt what could be termed a "*Montana* framework" in determining whether application of federal regulatory laws to a reservation-based tribally owned enterprise would infringe on tribal sovereignty. *Id.* at 662. The *Soaring Eagle* court took the position that the question to be answered in such cases was "whether a tribe has the inherent sovereign authority necessary to prevent application of a federal statute to tribal activity." *Id.* at 666.

217. *See* Skibine, *supra* note 210, at 130.

ownership or provided a mechanism for non-Indians to acquire land within Indian reservations.[218]

When it comes to invoking a treaty right to prevent the application of a federal law of general applicability, the debate centers on what kind of treaty right qualifies. Is a treaty reserving the reservation "for the exclusive use" of the tribe and its members specific enough to qualify under the approaches described above? In *United States v. Farris*, for instance, the Ninth Circuit stated that the treaty exception applied "only to subjects specifically covered in treaties, such as hunting rights . . . . To bring the special rule into play here, general treaty language such as that devoting land to a tribe's 'exclusive use' is not sufficient (although such language does suffice to oust state jurisdiction) . . . ."[219]

The Ninth Circuit continues to follow this position. For instance, in *Department of Labor v. Occupational Safety & Health Review Commission*, the issue was the application of the Occupational Safety and Health Act (OSHA) to a tribally owned enterprise.[220] The treaty created the reservation for the exclusive use of the tribe and stated: "[N]or shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent."[221] The Occupational Safety and Health Commission concluded that the treaty "'evidence[d] [] an intent of the parties to exclude the white man from the reservation lands for any and all purposes except as therein enumerated.'"[222] Therefore, according to the Commission, the application of OSHA to the Tribe would infringe on the Tribe's right to exclusive use.[223]

On appeal, the Ninth Circuit disagreed because it did not find a great enough conflict between the Tribe's right to exclude and the entry necessary to enforce OSHA to the Warm Springs mill. Instead it concluded that "[t]he conflict must be more direct to bar the enforcement of statutes of general applicability."[224]

The Seventh Circuit followed the lead of the Ninth Circuit. In *Smart v. State Farm Insurance Co.*, where the issue revolved around application of the Employee Retirement Income Security Act of 1974 (ERISA) to a tribal

218. *See* discussion *supra* notes 18–23 & 126–40.
219. 624 F.2d 890, 893 (9th Cir. 1980).
220. 935 F.2d 182, 183 (9th Cir. 1991).
221. *Id.* at 184 (quoting Treaty with the Tribes of Middle Oregon, art. 1, June 25, 1855, 12 Stat. 963).
222. *Id.* at 184–85.
223. *Id.* at 185.
224. *Id.* at 186–87.

healthcare center. The Seventh Circuit stated "[s]imply because a treaty exists does not by necessity compel a conclusion that a federal statute of general applicability is not binding on an Indian Tribe . . . . The critical issue is whether application of the statute would jeopardize a right that is secured by the treaty."[225] The court concluded that the treaty in question did not delineate specific rights.[226] The treaty just conveyed land to be "within the exclusive sovereignty of the Tribe."[227]

The Tenth Circuit, on the other hand, adopted a different position on the treaty exception. In *Donovan v. Navajo Forest Products Industries*, the Tenth Circuit held that OSHA was not applicable to the Tribe because the treaty of 1868 with the Navajo Nation provided that only expressly authorized officials could enter the Navajo reservation.[228] Since applying OSHA would allow federal employees to enter the reservation at any time to enforce the statute, the court stated:

> The Navajo Treaty recognizes the Indian sovereignty of the Navajos and their right of self-government . . . . [A]pplication of OSHA to NFPI [Navajo Forest Products, Inc.] would constitute abrogation of Article II of the Navajo Treaty relating to the exclusion of non-Indians not authorized to enter upon the Navajo Reservation. Furthermore, it would dilute the principles of tribal sovereignty and self-government recognized in the treaty.[229]

The Tenth Circuit applied *Navajo Forest Products* in *EEOC v. Cherokee Nation*,[230] where the court considered an application of the Age Discrimination in Employment Act (ADEA) to the Cherokee Nation.[231] Remarking that in *Navajo Forest Products* the court found that application

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225. 868 F.2d 929, 934–35 (7th Cir. 1989)

226. *Id.* at 935 ("The treaties to which the Chippewa Tribe are signatory do not delineate specific rights.").

227. *Id.*

228. 692 F.2d 709, 712 (10th Cir. 1982). Article II of the treaty states,

> [T]he United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents and employees of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

Treaty with the Navaho, art. 2, June 1, 1868, 15 Stat. 667.

229. *Navajo Forest Prods. Indus.*, 692 F.2d at 712.

230. 871 F.2d 937 (10th Cir. 1989).

231. *Id.* at 937–38.

of OSHA would dilute the principles of tribal sovereignty and self-government recognized in the treaty, the *Cherokee Nation* court concluded that "[t]he treaty's language clearly and unequivocally recognizes tribal self-government."[232] As a result, the ADEA did not apply "because its enforcement would directly interfere with the Cherokee Nation's treaty-protected right of self-government."[233]

The difference of opinion between the Ninth and Tenth Circuits concerning how specific a treaty right must be before it can prevent the application of a general federal law came to the fore more recently in *Soaring Eagle Casino & Resort v. NLRB*.[234] This case involved application of the National Labor Relations Act (NLRA) to a tribal casino.[235] After acknowledging a split between the Ninth and Seventh Circuits on one side, and the Tenth on the other, the Sixth Circuit recognized that "the question is a close one."[236] Nonetheless, it concluded that a treaty right to exclude was insufficient to bar application of federal regulatory statutes of general applicability, at least in the absence of a "direct conflict between a specific right or exclusion and the entry necessary for effectuating the statutory scheme."[237]

Judge White, concurring in part and dissenting in part, took a different view. Judge White began by acknowledging that, under circuit precedent, the Tribe's inherent sovereignty could not prevent the application of general federal law.[238] However, the Tribe's treaty right was another matter.[239]

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232. *Id.* at 938.

233. *Id.*

234. 791 F.3d 648 (6th Cir. 2015).

235. *Id.* at 651.

236. *Id.* at 661.

237. *Id.* ("Although, given the protective language employed by the Supreme Court when assessing tribal treaty rights, the question is a close one, ultimately we conclude that a general right of exclusion, with no additional specificity, is insufficient to bar application of federal regulatory statutes of general applicability. Unless there is a direct conflict between a specific right of exclusion and the entry necessary for effectuating the statutory scheme, we decline to prohibit application of generally applicable federal regulatory authority to tribes on the existence of such a treaty right alone.").

238. *Id.* at 675 (White, J., concurring in part and dissenting in part).

239. As Judge White put it,

> It well may be that when a tribe's inherent sovereignty rights are broadly interpreted, its treaty-based exclusionary right (general or specific) has little work to do. But out of necessity, the treaty-based right assumes a paramount role when a tribe's inherent sovereignty has been judicially narrowed, and the treaty should not be narrowly interpreted.

Id. at 677.

Disagreeing with the majority that the treaty right to exclude was not specific enough, Judge White noted that, after ceding a large amount of land to the federal government for the right to the exclusive use and occupancy of the remaining land, the Indian signatories to the treaty

> would not have understood their right to the "exclusive use, ownership, and occupancy" of their remaining land to be . . . subject to regulation regarding the conditions the Tribe might impose on those it permitted to enter. On the contrary, the Tribe would reasonably have understood this provision to mean that the federal government could not dictate, in any way, what the Tribe did on the land it retained.[240]

Judge White concluded by stating that "[a]bsent Congress's express direction to the contrary, the Tribe's treaty-based exclusionary right is sufficient to preclude application of the NLRA to the Tribe's on-reservation Casino."[241]

Conclusion

A treaty right to exclude is valuable to the tribes because for this right to be abrogated, a party must show clear evidence of congressional intent to that effect. The Supreme Court has, however, found such clear evidence when Congress has allowed Indian land to be transferred to non-members. In addition, most courts generally require treaty rights to have a certain level of specificity before acknowledging that they may give more rights than what tribes retained under their inherent sovereign powers. Finally, while tribes have been successful in defending their treaty rights before the Supreme Court, just about all of the Indian treaty cases involved off-reservation hunting, fishing, or gathering rights.[242] Although one of the later cases involved a treaty right to avoid state fuel taxes on tribal trucks using state highways to reach the reservation, that case also involved off-reservation activities. Moreover, none of the cases involved using a treaty right to control the activities or non-tribal members as would be the case when invoking the treaty right to exclude.[243]

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240. *Id.* at 676.

241. *Id.* at 676–77.

242. *See, e.g.*, Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 433 U.S. 658 (1979); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Herrera v. Wyoming, 139 S. Ct. 1686 (2019).

243. Wash. State Dep't of Licensing v. Cougar Den, Inc., 193 S. Ct. 1000 (2019).

Justice Scalia's opinion in *Hicks* is not a model of clarity. Rather, it lends itself to different interpretations. While each of the three interpretations can find support in the language used in *Hicks*, the most doctrinally sound interpretation among the circuits is that adopted by the Ninth Circuit.[244] Under that version, before the *Montana* analysis can be applied to potentially divest Indian tribes of some jurisdiction over Indian-owned reservation lands, the tribal jurisdiction opponents must show a state interest important enough to neutralize the tribal right to exclude.

244. *See supra* Section II.D.