



Tribal Tax Powers: Federal Common Law Rules

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

- Royalty Payments = “paid to the Tribe in its role as partner in [the] commercial venture”
- Severance Tax = “[a] contribution ‘to the general cost of providing governmental services’”



Merrion (cont'd)

"The **power to tax** is an **essential attribute of Indian sovereignty** because it is a **necessary instrument of self-government and territorial management**. . . . The power does not derive solely from the tribe's power to exclude non-Indians from tribal lands. . . . [I]t **derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services.**"



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

“The 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.”

- “**general proposition** that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe”

- “**general presumption** against regulatory jurisdiction over non-members on fee lands”



Montana (cont'd) – Exception 1

Consensual Relationship:

“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.”



Montana (cont'd) – Exception 2

Economic, Political, Health, Welfare:

“A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its 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.”



Atkinson v Shirley, 532 U.S. 645 (2001)

"There are undoubtedly parts of the *Merrion* opinion that suggest a broader scope for tribal taxing authority But *Merrion* involved a tax that only applied to activity occurring on the reservation **An Indian tribe's sovereign power to tax** – whatever its derivation – **reaches no further than tribal land.**"



Atkinson (cont'd) – Exception 1

- "The consensual relationship must stem from 'commercial dealing, contracts, leases, or other arrangements,' and a **nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection.** If it did, the exception would swallow the rule"
- "*Montana's consensual relationship* exception **requires** that the tax or regulation imposed by the Indian tribe have a **nexus to the consensual activity itself.** A nonmember's consensual relationship in one area does not trigger tribal civil authority in another"



Atkinson (cont'd) – Exception 2

- "Montana's second exception 'can be misperceived'" (Strate v A-1 Contractors, 520 U.S. 438 (1998))
- "The exception is only triggered by *nonmember conduct* that threatens the tribe, it does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government. Thus, **unless** the drain of the **nonmember's conduct** upon tribal services **and resources is so severe that it actually 'imperils' the political integrity** of the Indian tribe, there can be no assertion of civil authority beyond tribal lands."



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

Exception 1

“Read in context, an **‘other arrangement’** is clearly another **private consensual relationship**”



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

Exception 2

“The **conduct must** do more than injure the tribe, it must ‘**imperil the subsistence of the tribal community.**’ One commentator has noted that ‘th[e] elevated threshold for application of the second *Montana* exception suggests that **tribal power must be necessary to avert catastrophic consequences.**”



Exception 1 - Montana

“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.”



Exception 1 - Now

“A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter **private** consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”



Exception 2 - Montana

“A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its 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.”



Exception 2 - c. 2001

“A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians ~~on fee lands within its reservation~~ when that conduct ~~threatens imperils or has some direct effect on~~ the political integrity, the economic security, or the health or welfare of the tribe.”



Exception 2 - Now

“A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians . . . **when that conduct** [drains tribal services and resources so severely that it actually] **imperils the subsistence of the tribal community . . . i.e., when tribal power must be necessary to avert catastrophic consequences.**”



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

“The ownership **status of the 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. Hitherto, the **absence of tribal ownership has been virtually conclusive of the absence of tribal jurisdiction**; with one minor exception we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.”



Hicks (cont'd) - Souter, Kennedy, Thomas

- “[L]and status within a reservation is not a primary jurisdictional fact, but is **relevant only insofar as it bears on the application of one of *Montana’s* exceptions** to a particular case.”

- “After *Strate*, . . . a **tribe’s . . . jurisdiction . . . depends in the first instance on the character of the individual** over whom jurisdiction is claimed, **not on the title to the soil** on which [s]he acted.”



Hicks (cont'd) - O'Connor, Stevens, Breyer

“Today, the Court resolves that *Montana* . . . governs a tribe’s civil jurisdiction over nonmembers regardless of land. . . . [T]he majority is quite right that *Montana* should govern our analysis of a tribe’s civil jurisdiction over nonmembers both on and off tribal land.”

