

# **LIBRARY**

*Acme Resources, Inc. v. Black Hawk et al.*



## **Article IV, Black Eagle Tribal Constitution**

### **Section 1**

The land forms part of the soul of the Black Eagle Tribe. The land of the Black Eagle Reservation shall be preserved in a clean and healthful environment for the benefit of the Tribe and future generations. The Tribal Council shall have power to enforce, by appropriate legislation, the provisions of this section.

### **Black Eagle Tribal Code**

#### **§ 23-5 Protection of Reservation Environment**

(1) Recognizing that a clean and healthful environment is vital to the economic security of the Black Eagle Tribe, no person shall pollute or otherwise degrade the environment of the Black Eagle Reservation.

(2) Any person harmed by a violation of subsection (1) may bring a civil action in Black Eagle Tribal Court for damages and other appropriate relief against the person responsible for the violation.

**AO Architects v. Red Fox et al.**  
United States Court of Appeals (15th Cir. 2005)

The question in this appeal is whether a tribal court may exercise civil jurisdiction over a nonmember of the tribe in a wrongful death action arising from injuries on nonmember fee land.<sup>1</sup>

The Church of Good Hope, composed of tribal members, owns a parcel of land in fee simple on the Red River Indian Reservation in the State of Columbia. The Church built a meeting hall designed by AO Architects, a firm with offices in Columbia City, Columbia. The Church acted as its own general contractor for the project. AO was not asked to, and did not, supervise the construction. The meeting hall served the Church. However, from time to time the Red River Tribe leased the hall for general tribal meetings where tribal leaders were elected and other tribe business was conducted.

After a very heavy snowfall in January 2003, the meeting hall's roof collapsed during a general tribal meeting. Five tribe members were killed and many more were injured. The families of those killed brought wrongful death actions in tribal court against AO Architects alleging negligence in the design of the meeting hall roof. Before responding to the complaint filed in tribal court, AO filed a complaint in federal district court

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1. The terms "nonmember fee land" and "non-Indian fee lands" refer to reservation land acquired in fee simple by persons who are not members of the tribe.

claiming that the tribal court did not have jurisdiction over it or the action pending in tribal court. The district court granted a preliminary injunction to AO Architects against further proceedings in the tribal court. The tribe members appealed. For the reasons set forth below, we vacate the preliminary injunction and remand for further proceedings consistent with this opinion.

**Standard of Review**

Whether a tribal court may exercise civil jurisdiction over a nonmember of the tribe is a federal question. *National Farmers Union Ins. Cos. v. Crow Tribe* (U.S. 1985). We review questions of tribal court jurisdiction and exhaustion of tribal court remedies de novo. A district court's order regarding preliminary injunctive relief is reviewed for abuse of discretion.

**Governing Law**

Analysis of Indian tribal court civil jurisdiction begins with *Montana v. United States* (U.S. 1981). In *Montana*, the United States Supreme Court held that, although the tribe retained power to limit or forbid hunting or fishing by nonmembers on land still owned by or held in trust for the tribe, an Indian tribe could not regulate hunting and fishing by non-Indians on non-Indian-owned fee land within the reservation. In what is often referred to as *Montana's* "main rule," the Court stated that, absent express authoriza-

tion by federal statute or treaty, the inherent sovereign powers of an Indian tribe do not, as a general proposition, extend to the activities of nonmembers of the tribe.

The Court acknowledged, however, that “Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.” *Id.* The Court set out two instances in which tribes could exercise such sovereignty: (1) “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 dealings, contracts, leases, or other arrangements”; and (2) “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 and welfare of the tribe.” *Id.*

In *Strate v. A-1 Contractors* (U.S. 1997), the Court held that a tribal court had no jurisdiction to hear a personal injury lawsuit between non-tribal members arising from a car accident that occurred on a state highway running through a reservation. The road upon which the accident took place, although on tribal land, was subject to a right-of-way held by the State of North Dakota. The Court determined that this right-of-way rendered the stretch of road “equivalent, for nonmember governance purposes, to alienated, non-

Indian land.” The Court declined to comment on the proper forum when an accident occurs on a tribal road within a reservation.

*Strate* also considered whether either of the two *Montana* exceptions conferring tribal court jurisdiction applied. In determining that the case was not closely related to any consensual relationship between a nonmember and the tribe or a tribe member, the Court noted that the event at issue was a commonplace state highway accident between two non-Indians. Therefore, even though it occurred on a stretch of highway running through the reservation, it was “distinctly non-tribal in nature.” (*Cf. Franklin Motor Credit Co. v. Funmaker* (15th Cir. 2005), also finding no consensual relationship under *Montana* because there was no “direct nexus” between the lease entered into by Franklin Motor Credit and the tribe and the subsequent products liability claim against Franklin Motor Credit by a tribe member injured while driving one of the leased vehicles.)

Turning to the second *Montana* exception for activities that directly affect the tribe’s political integrity, economic security, or health and welfare, the Court in *Strate* also concluded that the facts did not establish tribal civil jurisdiction. The Court recognized that careless driving on public highways running through the reservation would threaten the safety of tribal members. However, if the assertion of such broad public safety interests were all that *Montana* required for

jurisdiction, the exception would swallow the rule. Instead, the exception must be interpreted with its purpose in mind, which was to protect tribal self-government and control of internal relations. “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.’” *Strate* (quoting *Montana*).

### **Exhaustion of Tribal Remedies**

In *National Farmers*, the Supreme Court applied a tribal exhaustion doctrine requiring that a party exhaust its remedies in tribal court before seeking relief in federal court. This doctrine is based on a “policy of supporting tribal self-government and self-determination,” and thus a federal court should ordinarily stay its hand “until after the tribal court has had a full opportunity to determine its own jurisdiction.” *Id.* In other words, the tribal court should be given the first opportunity to address its jurisdiction and explain the basis (or lack thereof) to the parties. In such cases, the proceedings in federal court are stayed (or dismissed without prejudice) while the tribal court determines whether it has jurisdiction over the matter.

The Supreme Court has emphasized that the exhaustion doctrine is based on comity. The comity doctrine reflects a practice of deference to another court and is not a jurisdictional prerequisite. Thus, where it is clear that a tribal court lacks jurisdiction, the exhaustion doctrine gives way for it would serve no

purpose other than delay. *See Strate*. In the present case, tribe members allege that there has been no exhaustion of tribal remedies because AO Architects commenced this federal action without affording the tribal court the opportunity to consider the jurisdictional issues.

### **Disposition**

Here, the accident occurred on nonmember fee land, and AO Architects is not a member of the tribe. This would suggest under *Montana*’s main rule that the tribal court would lack jurisdiction. Moreover, on the record before us, it appears that AO Architects did not perform any services on the reservation, and that its contract was with a nonmember of the tribe, the Church of Good Hope.

Yet AO Architects must have known that it was designing a building for use of large gatherings on the reservation, and it may well have known that the facility would be used by the tribe for general meetings involving governance functions. The consequences of AO Architects’ actions in designing the building would certainly be felt on the reservation. We are mindful of the two exceptions to *Montana*’s general rule against extending a tribe’s civil jurisdiction to nonmembers of the tribe in the absence of express Congressional authorization or any treaty provision granting a tribe jurisdiction.<sup>2</sup> As discussed above, those exceptions are that a tribe may have

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2. The parties concede that no federal statute or treaty bears on the question before us.

jurisdiction over (1) nonmembers who enter into consensual relationships with the tribe or its members, or (2) activities that directly affect the tribe's political integrity, economic security, or health and welfare. Either or both of the exceptions may have application here.

The record comes to us on appeal from a preliminary injunction. The proceedings were abbreviated, and we are uncertain on the record before us whether the tribal court would have jurisdiction under either of the *Montana* exceptions and whether AO Architects must first exhaust its tribal court remedies before seeking relief in federal court.

Therefore, we vacate the preliminary injunction and remand to the district court to develop a record and reach a reasoned conclusion on these issues of jurisdiction and exhaustion. We express no opinion on these questions.

Vacated and remanded.