JONES, SKELTON & HOCHULI, P.L.C.

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Our Reference Guide covers many areas of Arizona law, highlighting the most common issues associated with civil litigation. This resource is intended to provide a general overview of the subject matter, and is a supplement to the personal service we provide to our clients. It should not be relied upon as the sole source of information, and should not be substituted for competent professional legal advice for a particular situation. Should you have any questions, we encourage you to contact the authors listed at the end of each chapter or any JSH attorney.

JSH JONES, SKELTON & HOCHULI, P.L.C.

CHAPTER 23: TRIBAL LAW

There are twenty-one (21) federally recognized Indian tribes in Arizona. They are:

- Ak-Chin Indian Community
- Cocopah Indian Tribe
- Colorado River Indian Tribes
- Fort McDowell Yavapai Nation
- Fort Mojave Indian Tribe
- Gila River Indian Community
- Havasupai Tribe
- Hopi Tribe
- Hualapai Tribe
- Kaibab Bank of Pauite Indians
- Pascua Yaqui Tribe
- Pueblo of Zuni
- Quechan Tribe
- Salt River Pima-Maricopa Indian Community
- San Carlos Apache Tribe
- San Juan Southern Paiute Tribe
- Tohono O'odham Nation
- Tonto Apache Tribe
- White Mountain Apache Tribe
- Yavapai-Apache Nation
- Yavapai-Prescott Indian Community

Generally, each tribe has its own constitution, laws, government, and courts, and each operates differently. Native American tribes are considered "sovereign governments," and as a general rule, tribes have authority to regulate their own members.

SOVEREIGN IMMUNITY

Generally, tribes can be sued only when Congress has authorized the suit or the tribe has waived its immunity. ***Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc***., 523 U.S. 751 (1998). Because of this, many tribes have tort codes or procedures that must be followed in order to sue the tribe, similar to the pre-suit requirements for suing a governmental entity in Arizona. Each one is different, and the specific procedures and rules of the tribe should be considered.

The Arizona Supreme Court recently adopted a test for determining whether a tribal entity is a "subordinate economic organization" entitled to sovereign immunity. In ***Hwal'Bay Ba: J Enterprises, Inc. v. Jantzen***, 248 Ariz. 98, 458 P.3d 102 (2020), the Arizona Supreme Court held that a rafting trip operator tribal entity failed to meet its burden of demonstrating that it was a subordinate economic organization of the Hualapai Tribe for purposes of sovereign immunity.

The test the court adopted is a test of six-non-exclusive factors: (1) the entity's creation and business form; (2) the entity's purpose; (3) the business relationship between the tribe and the entity; (4) the tribe's intent to share immunity with the entity; (5) the financial relationship between the entity and the tribe; and (6) whether immunizing the entity furthers federal policies underlying sovereign immunity. If the entity meets its burden of showing that the factors collectively weigh in favor of finding the entity is a subordinate economic organization of the tribe, the entity is cloaked with sovereign immunity, unless that protection has been waived or abrogated by Congress. If not, the entity is not immune from suit. *Id*. at 106, 458 P.3d at 110.

Congress has restricted tribal immunity when a tribe or tribal entity has liability insurance. Congress has mandated that tribes, tribal organizations, and tribal contractors must carry liability insurance. 25 U.S.C. § 5321(c)(1). Any such policy of insurance must contain a provision that the insurance carrier cannot assert sovereign immunity as a defense; but the waiver extends only to claims that are covered and within policy limits. 25 U.S.C. § 5321(c)(3)(A).

TRIBAL COURT JURISDICTION

One of the most common issues that arises in civil suits filed in tribal court between tribes or tribal members and non-Indians is whether the tribal court has jurisdiction over the case. Tribal jurisdiction is a question of federal law. ***Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians***, 471 U.S. 845, 852 (1985). The analysis can be complicated, and depends on several factors, including the status of the parties (tribal member or not), the nature of the claim (affecting Indian sovereignty or not), and the location of the incident (occurring on tribal or non-tribal property).

Principles of Tribal Court Jurisdiction over Non-Indians

Generally, Native American tribes have authority over their own tribal members and land that they control within the reservation. ***Plains Commerce Bank v. Long Family Land and Cattle Co.,*** 554 U.S. 316, 327 (2008). As part of their sovereignty, the tribes "retain power to tax activities on the reservation, including certain activities by non-members," to determine tribal membership, and to regulate domestic relations among members. *Id*.

An Indian tribe's inherent sovereign powers do not extend to the activities of nonmembers of the tribe, especially on non-tribal land within the borders of a reservation. ***Montana v. United States***, 450 U.S. 544, 565 (1981). Indian tribes' sovereign power "centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank*, 554 U.S. at 327. "By virtue of their incorporation into the United States, [a] tribe's sovereign interests are now confined to managing tribal land, protecting tribal self-government, and controlling internal relations." *Id*. at 334. There is a presumption that a tribe has no jurisdiction over a non-member. *Plains Commerce Bank*, 554 U.S. at 330.

In *Montana*, the Court laid out two exceptions to the general rule that an Indian tribe has no adjudicative authority over a non-member. 450 U.S. at 565. First, 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." This exception requires not only a consensual relationship between the non-member and the tribe or its member, but also non-member conduct on the reservation that implicates the tribe's sovereign interests. *Plains Commerce Bank*, 554 U.S. at 332.

The second *Montana* exception allows tribal jurisdiction over non-member conduct that threatens or has a direct impact on "the right of reservation Indians to make their own laws and be ruled by them." ***Strate v. A-1 Contractors***, 520 U.S. 438, 457-58. This exception is a narrow one and applies only to conduct that "imperil[s] the subsistence of the tribal community." *Plains Commerce Bank*, 554 U.S. at 341.

Having said that, the U.S. Supreme Court in ***United States v. Cooley***, __ U.S. __, 141 S. Ct. 1638 (2021), recently reiterated that tribal officers have authority under *Montana*'s second exception to detain temporarily and to search non-Indian persons traveling on public rights-of-way running through a reservation for potential violations of state or federal law. When the "jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." And ancillary to the authority to transport a non-Indian suspect is the authority to search that individual prior to transport. More importantly, recognizing a tribal officer's authority to investigate potential violations of state or federal laws that apply to non-Indians whether outside a reservation or on a public right-of-way within the reservation protects public safety without implicating concerns about applying tribal laws to non-Indians.

The Ninth Circuit recognizes a third basis under which a tribal court may exercise jurisdiction over a non-member. That is the "right to exclude" analysis. The right to exclude stems from the tribe's right, as a landowner, to occupy its land and exclude all others. *See* ***Strate v. A-1 Contractors***, 520 U.S. at 438 (tribes lack power to "assert [over non-Indian fee land] a landowner's right to occupy and exclude"); ***Nevada v. Hicks***, 533 U.S. 353, 359 (2001) ("Both *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."). Not surprisingly, then, to date the Ninth Circuit has applied the right to exclude analysis to cases where a non-member was occupying or physically present on tribal land. *See, e.g.,* ***Water Wheel Camp Recreational Area, Inc. v. LaRance***, 642 F.3d 802, 813 (9th Cir. 2011) (tribal jurisdiction existed where non-member lessee of tribal land failed to pay rent); ***Window Rock Unified Sch. Dist. v. Reeves***, 861 F.3d 894, 898 (9th Cir. 2017) (finding plausible tribal jurisdiction over non-member school districts operating on tribal property).

The U.S. Supreme Court has stated that the power to exclude analysis does not exist independent of the *Montana* presumption against jurisdiction discussed above. *See* ***Nevada v. Hicks***, 533 U.S. at 360 (*Montana* test applies regardless of land ownership; overturning the Ninth Circuit's refusal to use the *Montana* presumption in favor of a "power to exclude" analysis). *See also Plains Commerce Bank*, 554 U.S. at 331 ("[t]he status of the land is relevant insofar as it bears on the application of *Montana*'s exceptions."). The Ninth Circuit, however, is of the opinion that ***Nevada v. Hicks***—which held there was no tribal jurisdiction over state officers enforcing state law on

tribal property—should be narrowly limited to its facts. *See, e.g.*, ***Window Rock Unified Sch. Dist. v. Reeves***, 861 F.3d at 896 (exhaustion of tribal court remedies required for claims against state school district operating on tribal land; claims "implicate[d] no state criminal law enforcement interests," so tribal jurisdiction was plausible "under our court's interpretation of ***Nevada v. Hicks***."). Other courts do not agree with the Ninth Circuit's very narrow interpretation of ***Nevada v. Hicks***. *See, e.g.*, ***Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians***, 807 F.3d 184, 207 (7th Cir. 2015) (Ninth Circuit's conclusion that the *Montana* test applies only to conduct on non-Indian land cannot "be reconciled with the language that the Court employed in *Hick*s and *Plains Commerce Bank*.").

In the ***Cooley*** case, supra, the U.S. Supreme Court relied on *Montana*'s second exception, rather than the right to exclude, to support the tribal officer's authority to stop and detain a potential criminal suspect on a public roadway within the reservation. *Id*. at 1444.

Two recent federal cases in our jurisdiction applied these precepts. In ***Knighton v. Cedarville Rancheria of N. Paiute Indians***, 922 F.3d 892, 894–95 (9th Cir. 2019), the Ninth Circuit held that the tribal court had jurisdiction to adjudicate tribal claims against a nonmember tribal administrator who had engaged in fraud and malfeasance to the tribe's great detriment. The tribe's jurisdictional authority over these claims derived from its sovereign power to exclude non-members, from its "inherent sovereign power to protect self-government and control internal relations," from the employment relationship between the administrator and the tribe (under *Montana*'s first exception), and because the administrator's conduct imperiled the subsistence of the tribal community (under *Montana*'s second exception).

In ***Employers Mut. Cas. Co. v. Branch***, 381 F. Supp. 3d 1144, 1146 (D. Ariz. 2019), *aff'd sub nom.* ***Employers Mut. Cas. Co. v. McPaul***, 2020 WL 2316616 (9th Cir. May 11, 2020), the Arizona district court held there was no tribal jurisdiction over an insurance company that simply sold a policy to a tribal member. Instead, said the court, jurisdiction over non-members has been limited to instances in which a non-member was physically present on tribal land and thereafter engaged in the conduct giving rise to liability. To the extent the Ninth Circuit has suggested an insurance company may be sued in tribal court despite the absence of any physical presence on tribal land, its decisions have been limited to circumstances where the policyholder was a tribal member and the insurance company engaged in conduct specifically directed toward the reservation. The Ninth Circuit affirmed, reasoning that the insurance company's "relevant conduct—negotiating and issuing general liability insurance contracts to non-Navajo entities—occurred entirely outside of tribal land, tribal court jurisdiction cannot be premised on the Navajo Nation's right to exclude."

Exhaustion of Tribal Court Remedies

If a non-Indian defendant who has been sued in tribal court wants to challenge the tribal court's jurisdiction, generally that challenge must first occur in tribal court. In other words, the defendant is required to "exhaust his tribal court remedies" before seeking relief in federal court. To exhaust one's tribal court remedies means challenging tribal court jurisdiction in the tribal trial court and

then appealing to the tribal appellate court. ***Iowa Mut. Ins. Co. v. LaPlante***, 480 U.S. 9, 17 (1987) ("At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.").

Tribal court exhaustion is not a jurisdictional bar, but rather a prerequisite to a federal court's exercise of its jurisdiction. In other words, if a tribal court defendant files a suit in federal court challenging the tribal court's exercise of jurisdiction over him, and the federal court believes the defendant must first exhaust his tribal court remedies, the federal court can stay its proceedings and retain jurisdiction pending the exhaustion of tribal court remedies. ***Burlington Northern R. Co. v. Crow Tribal Council***, 940 F.2d 1239, 1245 n. 3 (9th Cir. 1991). This rarely happens as a practical matter, however, because it can take years to fully exhaust tribal court remedies.

There are four exceptions to the exhaustion requirement:

> (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or (4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule.

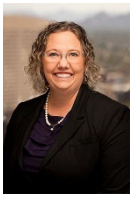
Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19, n.12 (1987); ***Strate v. A-1 Contractors***, 520 U.S. 438, 459 n. 14 (1997); ***Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Wa Inc***., 715 F.3d 1196, 1200 (9th Cir. 2013). Under the fourth exception, first enunciated in *Strate*, exhaustion is not required when "tribal court jurisdiction does not exist under [the federal cases of] *Montana* and *Strate*," and remand would only delay a final judgment. ***Burlington N. R. Co. v. Red Wolf***, 196 F.3d 1059, 1065 (9th Cir. 1999), *as amended on denial of reh'g* (Jan. 6, 2000). This seems to be the most frequently-used argument by parties looking to avoid the exhaustion requirement.

Federal Courts Can Ultimately Decide the Tribal Jurisdiction Issue

After exhausting tribal court remedies (or if exhaustion is not required), the non-member defendant who has been sued in tribal court may file a complaint in federal court seeking a declaration of no tribal jurisdiction, and an injunction preventing the tribal court proceedings from going forward. *See, e.g.,* ***Window Rock Unified Sch. Dist. v. Reeves***, 861 F.3d 894 (9th Cir. 2017). Whether the tribal court possesses jurisdiction necessarily turns on the allegations contained in the tribal court complaint; and the federal court will decide the issue as a matter of federal law, based on the record established in tribal court. ***Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation***, 862 F.3d 1236, 1245 n.3 (10th Cir. 2017).

If you have questions regarding the information in this chapter, please contact the authors or any JSH attorney.

CONTRIBUTING AUTHORS:



DIANE ELSTON, PARTNER Diana Elston represents clients in the areas of general civil litigation and insurance defense, personal injury, premises liability, homeowners association defense, and tribal law. Her tribal defense practice includes representing tribes and their enterprises (including casinos) in premises liability, conservatorships, and wrongful death and personal injury claims.
delston@jshfirm.com | 602.263.1729 | jshfirm.com/delston

EILEEN GILBRIDE, PARTNER Eileen GilBride leads the firm's Appellate Department, and focuses her practice on representing clients in federal and state appellate matters and dispositive motions. She also counsels and assists trial lawyers in the substantive areas of their practices, from the answer stage through the post-trial motion stage. Eileen has handled over 500 appeals at every level of the state and federal courts, in Arizona and other states, which have resulted in more than 80 published decisions.
egilbride@jshfirm.com | 602.263.1787 | jshfirm.com/egilbride