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The Power of Tribal Courts in Ongoing Environmental-Tort Litigation

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ABSTRACT. Cities, counties, and states across the country are bringing environmental and climate tort suits to hold environmental tortfeasors accountable. These cases are commonly brought in state and federal court, but the possibility of bringing these suits in tribal courts has largely been left out of the discussion. In the wake of attacks on tribal sovereignty in the form of tribal jurisdiction stripping, this Essay uses an original empirical analysis of 308 cases to understand the circumstances in which tribal-court jurisdiction currently exists for tribal members to sue nonmembers for environmental torts in tribal court. This Essay makes recommendations for how to strategically bring these suits and highlights important considerations for tribal sovereignty.

INTRODUCTION

Climate change, air pollution, water pollution, and other environmental issues continue to devastate communities in the United States and abroad. Litigation is one strategy that advocates use to bring accountability to those responsible for such environmental harms. For instance, cities, counties, and states in the United States have been informed by lead, asbestos, and other mass-tort suits when initiating their own tort suits related to climate change, suing fossil-fuel companies to hold them accountable for consumer deception and other harms

that they have created while exacerbating climate change.[1] In fact, entire law firms have been created to pursue similar litigation.[2]

In the United States, environmental-tort litigation in *state* and *federal* courts is common.[3] But a more multidimensional strategy is needed to address environmental harms more exhaustively. Discussions of litigation in the United States tend to suggest a federal-state dichotomy, leaving out a third player in domestic courts—tribal[4] courts.[5] Tribal courts hear environmental lawsuits but are rarely featured in environmental-law curricula or practice. Bringing novel environmental-tort suits in tribal courts represents a new opportunity for success in redressing environmental harms.

Tribal courts, as Justice Marshall articulated, "play a vital role in tribal self-government."[6] They are part of tribal government, and their jurisdiction over matters affecting the tribe reflects tribes' authority as sovereign entities. Most tribal courts today resemble their state and federal counterparts.[7] Some tribal courts integrate aspects of traditional customs into their modern court procedures, while other tribal courts more directly reflect traditional tribal dispute-resolution mechanisms.[8] When tribal courts have jurisdiction to hear issues that affect the governing tribe or its members, their jurisdiction not only respects the tribe's right to self-government and sovereignty but also allows for decisions to

1. *See* Christine Shearer, *On Corporate Accountability: Lead, Asbestos, and Fossil Fuel Lawsuits*, 25 NEW SOLS. 172, 181-85 (2015); Donald G. Gifford, *Climate Change and the Public Law Model of Torts: Reinvigorating Judicial Restraint Doctrines*, 62 S.C. L. REV. 201, 203-05 (2011). These lawsuits have had mixed success. *See* Kate Fritz, Note, *Public Pollution/Public Solution: A Framework for City-Led Toxic Tort Litigation*, 28 N.Y.U. ENV'T L.J. 319, 319-21 & nn.1-3 (2020) (describing the failures and successes of lawsuits filed against private polluters).

2. *See, e.g.*, SHER EDLING LLP, https://www.sheredling.com [https://perma.cc/5LKP-M8BA].

3. *See, e.g.*, Mayor of Balt. v. BP P.L.C., 952 F.3d 452, 457 (4th Cir. 2020); City of New York v. Chevron Corp., 993 F.3d 81, 88 (2d Cir. 2021); City of Honolulu v. Sunoco LP, 39 F.4th 1101, 1106 (9th Cir. 2022); State v. Am. Petroleum Inst., No. 62-CV-20-3837 (Minn. Dist. Ct. June 24, 2020).

4. In this Essay, I favor the term "Native," but also use "tribal member," "member," and "Indian" where appropriate in formal names, in quotations, and as legal terms of art.

5. *See* Frank Pommersheim, *"Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123, 123-24 (2000).

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

7. *See* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 2 (1997); *Tribal Courts*, TRIBAL CT. CLEARINGHOUSE, https://www.tribal-institute.org/lists/justice.htm [https://perma.cc/3BS7-V252].

8. *See* O'Connor, *supra* note 7; TRIBAL CT. CLEARINGHOUSE, *supra* note 7.

be made by individuals most familiar with the tribal nation.[9] Despite the lack of focus on tribal courts in environmental law, these courts are important fora to consider for bringing environmental-tort claims.

This Essay considers environmental-tort litigation that Native people could bring against non-Native actors like corporations. The continued deprivation of tribal jurisdiction in both civil and criminal cases over time has threatened tribal sovereignty. This deprivation has made it difficult for Native people to hold non-Native actors accountable for wrongs committed on reservations.[10] As a result, tribal-court jurisdiction is extremely limited. However, in the seminal case *Montana v. United States*, the Supreme Court outlined two exceptions of inherent sovereign power that permit tribal jurisdiction over civil cases brought by tribes and Native people against non-Natives.[11] Thus, despite the trend of jurisdiction stripping, tribes and their members may still be able to hold non-Native people accountable for environmental wrongs in tribes' own courts, on tribes' own terms.

Part I of this Essay traces the case law that provides the parameters within which tribes can sue nontribal actors for environmental torts. Part II focuses on the foundational jurisdiction question of whether environmental-tort suits would fall within the permissible exceptions set out by the Supreme Court in *Montana v. United States*. To understand how the *Montana* exceptions would apply to the environmental-tort suits on which this Essay focuses, Part II reviews an original empirical study of the application of the *Montana* exceptions to 308

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9. Aspects of federal Indian law jurisprudence recognize the inherent expertise of Native decisionmakers. For example, in interpreting tribal constitutions, the Interior Board of Indian Appeals defers to tribes' own interpretation of their constitutions. *See* United Keetoowah Band of Cherokee Indians in Okla., 22 IBIA 75, 80 (June 4, 1992) ("[U]nder the doctrines of tribal sovereignty and self-determination, a tribe has the right initially to interpret its own governing documents in resolving internal disputes, and the Department must give deference to a tribe's reasonable interpretation of its own laws."). Moreover, the Court in *National Farmers* required exhaustion of tribal-court processes before a federal court could hear a case, deferring to the expertise of tribal courts and permitting them conduct fact-finding and rule in the first instance. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) ("We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.").

10. *See* JANE M. SMITH, CONG. RSCH. SERV., R43324, TRIBAL JURISDICTION OVER NONMEMBERS: A LEGAL OVERVIEW 2-5, 8-10 (2013).

11. *See* 450 U.S. 544, 565-66 (1981). Though most cases reviewed only refer to *Montana* as having two exceptions, courts have sometimes read a third exception into *Montana*, wherein tribes have jurisdiction over nonmembers when explicitly authorized by a federal statute or treaty. *See, e.g.*, FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 932 (9th Cir. 2019) ("Third, a Tribe may regulate the conduct of nonmembers on non-Indian fee land when that regulation is expressly authorized by federal statute or treaty."). However, cases under this third exception are more directly justified and less relevant for the purposes of this Essay.

cases that cited *Montana*. Part II concludes by highlighting *Montana*'s doctrinal boundaries for future environmental-tort plaintiffs to consider. Finally, Part III takes a step back to consider the high-level strategic advantages and disadvantages of bringing environmental-tort suits in tribal courts.

This Essay clarifies the parameters for bringing a variety of environmental litigation in tribal court, with the goal of building on the trend of novel environmental-tort suits across the country, facilitating accountability for environmental harms, and enhancing tribal sovereignty.

I. THE CURRENT STATUS OF JURISDICTION FOR ENVIRONMENTAL-TORT SUITS IN TRIBAL COURTS

Case law over the last several decades has shaped the parameters of civil environmental-tort suits that can be brought in tribal courts. This Part will provide an overview of the most relevant case law to shed light on these parameters.

In 1981, the Supreme Court in *Montana v. United States* held that tribal courts are generally divested of civil jurisdiction over non-Native people for activities conducted on nonreservation land and land held in fee by non-Natives[12]—a decision that significantly interfered with tribal sovereignty and tribal authority. However, the Court recognized two exceptions of inherent sovereign power that allow for tribal jurisdiction over nonmembers in civil cases.[13] First, tribal courts can exercise civil jurisdiction over non-Natives "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[14] Second, tribal courts "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."[15] In *Strate v. A-1 Contractors*, the Court clarified that, for the second *Montana* exception to apply, there must be a nexus between the regulated activity in question and tribal self-governance.[16]

In permitting these exceptions, the *Montana* Court declined to apply its earlier rationale in *Oliphant v. Suquamish Indian Tribe*, which held that tribal courts do not have inherent criminal jurisdiction over non-Native people unless

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12. *See Montana*, 450 U.S. at 565.

13. *See id.* at 565-66.

14. *Id.* at 565.

15. *Id.* at 566. Fee land refers to "[a]n interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs." *Fee Simple*, BLACK'S LAW DICTIONARY (9th ed. 2009).

16. *See* Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997).

authorized by Congress,[17] to tribal-court civil jurisdiction over non-Native people.[18] As a result, to have their cases heard, Native individuals seeking to sue nonmember actors in tribal court for civil matters must show that their claims fall within one or both *Montana* exceptions.

Four years after the Court decided *Montana*, it decided *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*.[19] In *National Farmers*, the Court considered a preliminary-injunction suit brought by a school district and its insurer to prevent an injured student (a Crow Indian minor) from executing on a tribal court's default judgment against the school district.[20] The Court held that the question of whether a tribal court has exceeded the limits of its jurisdiction is a question "arising under" federal law[21] but that parties to such litigation must first exhaust remedies in tribal court before seeking injunctive relief in federal court.[22] This decision created what is commonly referred to as the "*National Farmers* exhaustion requirement."[23] The Court stated:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
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> We believe that examination should be conducted in the first instance in the Tribal Court itself.[24]

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17. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978). *Oliphant* has since been superseded in part by statute. *See* Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1892 (1990) (codified as amended at 25 U.S.C. § 1301(2) (2000), *as recognized in* United States v. Lara, 541 U.S. 193, 194, 197 (2004).

18. *See Montana*, 450 U.S. at 565 ("Though *Oliphant* only determined inherent tribal authority in criminal matters . . . 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.").

19. 471 U.S. 845 (1985).

20. *See id.* at 847-48.

21. *See* 28 U.S.C. § 1331 (2018) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

22. *See Nat'l Farmers*, 471 U.S. at 856-57.

23. *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 439 (1997) ("National Farmers' exhaustion requirement does not conflict with Montana . . . ."); Julie A. Pace, Comment, *Enforcement of Tribal Law in Federal Court: Affirmation of Indian Sovereignty or a Step Backward Towards Assimilation?*, 24 ARIZ. ST. L.J. 435, 463 n.235 (1992) ("The *National Farmers* exhaustion requirement mirrors the abstention rationale developed in Younger v. Harris, 401 U.S. 37 (1971).").

24. *Nat'l Farmers*, 471 U.S. at 855-56.

The Court did, however, outline limited circumstances in which exhaustion would not be necessary. It asserted that exhaustion would not be required if a claim of tribal jurisdiction "'is motivated by a desire to harass or is conducted in bad faith,' . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."[25]

In 1987, the Supreme Court held in *Iowa Mutual Insurance Co. v. LaPlante* that: (1) tribal courts must be afforded the opportunity to determine their jurisdiction in the first instance; (2) the *National Farmers* exhaustion requirement stems from comity, as opposed to a jurisdictional prerequisite; (3) the *National Farmers* exhaustion requirement requires exhausting remedies in tribal appellate courts as well as lower courts; and (4) allegations of a tribal court's incompetence do not qualify as an exception to the exhaustion requirement.[26] The case dealt with an insurer who sought declaratory relief, asserting that it did not have a duty to defend or indemnify its insured in relation to a suit brought against the insurer in a tribal court.[27] In dicta, the Court stated that "[t]ribal courts play a vital role in tribal self-government, . . . and the Federal Government has consistently encouraged their development,"[28] and that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."[29] *Iowa Mutual* not only clarified the *National Farmers* exhaustion requirement but also acknowledged the importance of tribal sovereignty and respect for tribal authority when dealing with questions of jurisdiction and the role of tribal courts.

In 2016, the Supreme Court considered whether punitive damages could be sought in tribal-court tort suits by Native people against non-Native people. In *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, an equally divided Court affirmed the Fifth Circuit's decision[30] that tribal courts have jurisdiction over tort claims with punitive damages against nonmembers.[31] The case concerned a suit brought by several Choctaw individuals against a non-Native actor that operated a business on the reservation, alleging sexual molestation by the

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25. *See id.* at 856 n.21 (quoting Juidice v. Vail, 430 U.S. 327, 338 (1977)).

26. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16-20, 16 n.8, 19 n.12 (1987) (citing *Nat'l Farmers*, 471 U.S. at 856 n.21 (1985)).

27. *See Iowa Mut. Ins. Co.*, 480 U.S. at 13.

28. *Id.* at 14-15.

29. *Id.* at 18.

30. Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014).

31. *See* Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 579 U.S. 545, 546 (2016) (per curiam), *aff'g by an equally divided court*, *Dolgencorp, Inc.*, 746 F.3d 167. The evenly divided Court was the result of Justice Scalia's death, after which only eight Justices were able to decide the case. The Court's decision is binding in the Fifth Circuit and persuasive in other jurisdictions.

business's manager during job training.[32] Relying in part on *Montana*, the Fifth Circuit cited the Court's "acknowledg[ment] that by entering certain consensual relationships with Indian tribes, a nonmember may implicitly consent to jurisdiction in a tribal court that operates differently from federal and state courts."[33] Though the case ultimately supports tribes' ability to hold non-Native tortfeasors accountable in civil suits—at least in the Fifth Circuit—the case also highlighted the reality that four Supreme Court Justices were ready to strip tribal courts of this jurisdiction. The strategic consequences of that reality are further discussed in Part III.

These cases provide the general parameters for when tribal courts have jurisdiction over environmental-tort claims. Under *Montana*, courts generally require either the first *Montana* exception regarding consensual agreements or the second *Montana* exception regarding tribal welfare to be met.[34] Under *National Farmers*, parties to a civil suit against a non-Native individual must first exhaust their remedies in tribal court before invoking federal-question jurisdiction and seeking injunctive relief in federal court.[35] In *Iowa Mutual*, the Court clarified that the *National Farmers* exhaustion requirement included exhaustion of remedies in tribal appellate courts.[36] Lastly, *Dollar General* affirmed the civil jurisdiction of tribal courts over civil tort suits against non-Native individuals, but the balance of the Court left open the risk of the Court overturning the decision in the future.[37] The *National Farmers* exhaustion requirement guarantees tribal courts' availability to hear environmental-tort cases—precluding the possibility that the proceedings could be enjoined in federal court—while *Dollar General* provides limited approval for hearing tort cases in tribal courts. Thus, the most pressing threshold question for bringing an environmental-tort suit in tribal court is whether the suit would fit within at least one of the two main *Montana* exceptions. Part II seeks to understand how viable such suits are for qualifying within the exceptions through an empirical analysis of 308 environmental cases in which federal courts considered applying the *Montana* exceptions.

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32. *See Dolgencorp, Inc.*, 746 F.3d at 169.

33. *Id.* at 177.

34. *See* Montana v. United States, 450 U.S. 544, 565-66 (1981).

35. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853-57 (1985).

36. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16-17 (1987).

37. *See* Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 579 U.S. 545, 546 (2016).

II. APPLICATION OF THE *MONTANA* EXCEPTIONS TO ENVIRONMENTAL SUITS

In order to understand what kinds of environmental suits can be tried in tribal court, it is helpful to examine how courts have applied the *Montana* exceptions in environmental cases. For this study, I reviewed all 33 Supreme Court and 222 Court of Appeals cases that cited *Montana* as of April 15, 2022, prioritizing these higher courts' applications of *Montana*. I also reviewed a sampling of 44 district-court, 6 state-court, and 3 tribal-court cases.[38] I coded all of the cases based on whether they could be considered "environmental," defining "environmental" broadly to include issues such as gas leases, electrical services, hunting and fishing rights, hazardous waste, gasoline leaks, water rights, and zoning and land use. I use a broad definition of "environmental" to make this research as comprehensive as possible for litigants and attorneys looking to employ the litigation strategy in question.

Of the 308 cases that cited *Montana* I ultimately reviewed, 15 were both environmental and reached the issue of the *Montana* exceptions. Of the cases reviewed, 74 were coded as environmental cases. Only a minority—15—of these 74 cases reached the issue of the *Montana* exceptions and were, therefore, relevant to this study. Most of the other 59 environmental cases did not reach the issue of the *Montana* exceptions or cited *Montana* for other propositions. Though the sample size is limited, the cases reviewed cover a wide array of environmental issues that frequently appear in environmental-tort cases and that would be likely to appear in future environmental-tort cases.

Of the 15 cases, ten courts found that tribal courts had jurisdiction over the environmental issues under the *Montana* exceptions, while five did not. Notably, some of the cases reviewed are the same factual case on appeal. In these situations, both cases were included top add a more expansive understanding of how courts approach the *Montana* exceptions in environmental cases. An overview of the resulting cases is provided below:

CITATION	JURISDICTION	ENVIRONMENTAL ISSUE	EXCEPTION 1: CONSENSUAL RELATIONSHIP	EXCEPTION 2: IMPACT ON TRIBAL WELFARE
Kodiak Oil & Gas (USA) Inc. v. Burr, 932 F.3d 1125 (8th Cir. 2019)	8th Circuit	Gas Lease	No	No

38. I reviewed 53 cases in these courts that were most relevant according to Westlaw, at which point it seemed the following cases had diminishing returns in terms of substantively dealing with the *Montana* exceptions.

Big Horn Cnty. Elec. Coop., Inc. v. Big Man, No. 21-35223, 2022 WL 738623 (9th Cir. Mar. 11, 2022)	9th Circuit	Electrical Services	Yes	N/A
Lower Brule Sioux Tribe v. South Dakota, 104 F.3d 1017 (8th Cir. 1997)	8th Circuit	Hunting and Fishing	No	No
South Dakota v. Bourland, 39 F.3d 868 (8th Cir. 1994)	8th Circuit	Hunting and Fishing	No	No
FMC Corp. v. Shoshone-Bannock Tribes, No. 14-CV-489, 2017 WL 4322393 (D. Idaho Sept. 28, 2017), *aff'd*, 942 F.3d 916 (9th Cir. 2019)	District of Idaho	Hazardous Waste	Yes	Yes
FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916 (9th Cir. 2019)	9th Circuit	Hazardous Waste	Yes	Yes
Town Pump, Inc. v. LaPlante, 394 F. App'x 425 (9th Cir. 2010)	9th Circuit	Gasoline Leak	No	No
Elliott v. White Mountain Apache Tribal Ct., 566 F.3d 842 (9th Cir. 2009)	9th Circuit	Forest Fire	N/A	Yes
Confederated Salish & Kootenai Tribes of Flathead Rsrv., Mont. v. Namen, 665 F.2d 951 (9th Cir. 1982)	9th Circuit	Water Rights	N/A	Yes
Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998)	9th Circuit	Water Rights	N/A	Yes
United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)	9th Circuit	Water Rights	No	No
Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981)	9th Circuit	Water Rights	N/A	Yes
Knight v. Shoshone & Arapahoe Indian Tribes of Wind River Rsrv., Wyo., 670 F.2d 900 (10th Cir. 1982)	10th Circuit	Zoning & Land Use	N/A	Yes
Confederated Tribes & Bands of Yakima Indian Nation v. Whiteside, 828	9th Circuit	Zoning & Land Use	N/A	Yes

F.2d 529 (9th Cir. 1987), *aff'd in part, rev'd in part sub nom.* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989)				
Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989)	Supreme Court	Zoning & Land Use	No	Yes (in part)

The research reveals several key takeaways that can assist environmental advocates in strategically shaping their litigation. High-level insights include: (1) courts have broad discretion to frame which issue in a case to analyze under *Montana* to determine tribal authority; (2) plaintiffs must sue on behalf of a tribe as a whole or on behalf of most of its members; and (3) an underlying contract in a case can enable the litigation to fit within the first *Montana* exception. Regarding jurisdiction, the Ninth Circuit heard all but one of the environmental cases where a court found that either *Montana* exception was met. The research also revealed several key insights into how courts have applied the *Montana* doctrine to various substantive environmental issues. For example, cases involving water quality and water rights, along with cases involving hazardous waste, had a high likelihood of success—75% and 100%, respectively. On the other hand, hunting and fishing issues were not viewed in any of the cases to fit within either exception.

The rest of this Part is divided into four Sections organized by outcome under the *Montana* analysis, reviewing the cases that courts found to fit within both exceptions, only the first exception, only the second exception, or neither exception. Except for cases concerning water rights, the cases that dealt with a single environmental issue all had the same outcome under the *Montana* analysis. The analysis below sheds light on the courts' reasoning behind each outcome and provides an understanding of how courts treated different substantive environmental issues under the *Montana* doctrine.

A. *Cases That Fit Within Both* Montana *Exceptions*

Only two opinions reviewed—a lower court decision about hazardous waste and the same case on appeal—were found to fit within both *Montana* exceptions, even though it would seem plausible that more of the environmental cases that reached the *Montana* issue would fall within both exceptions. Though only one exception is needed to allow a case to fall within tribal jurisdiction, falling under

both exceptions is advantageous in case one of the exceptions is denied on appeal.

The *Montana* case law for hazardous-waste issues is friendly to tribal courts. The Ninth Circuit and a district court have both held that cases involving large quantities of hazardous waste fall within both *Montana* exceptions. *FMC Corp. v. Shoshone-Bannock Tribes* considered whether tribes could enforce a tribal-court decision against a company for $19.5 million in past damages and $1.5 million per year for future damages.[39] The damages resulted from hazardous waste sourced from a phosphorus production plant that was radioactive, carcinogenic, and poisonous.[40] The district court ruled that both *Montana* exceptions applied to give the tribe regulatory and adjudicatory jurisdiction. However, the tribal-court judgment was enforceable under only the first exception, not the second.[41] The Ninth Circuit agreed that both exceptions applied to the original tribal-jurisdiction question but held that the tribal-court judgment was enforceable under *both* exceptions.[42]

With respect to the first exception, the Ninth Circuit found that "FMC entered a consensual relationship with the Tribes, both expressly and through its actions, when it negotiated and entered into a permit agreement with the Tribes, requiring annual use permits and an annual $1.5 million permit fee to store 22 million tons of hazardous waste on the Reservation."[43] The court further determined that "[t]he conduct that the Tribes seek to regulate through the permit fees at issue – the storage of hazardous waste on the Reservation – arises directly out of this consensual relationship."[44] Regarding the second exception, the Ninth Circuit found that the millions of tons of hazardous waste that FMC stored on the reservation satisfy the second exception in so far as it "'imperil[s] the subsistence or welfare' of the Tribes."[45]

This case suggests that hazardous-waste suits are relatively likely to qualify for tribal jurisdiction, particularly if there are significant and clear negative impacts on the welfare of the tribe or ties to a consensual agreement between the tribe and the non-Native company. Moreover, the limited number of cases that

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39. FMC Corp. v. Shoshone-Bannock Tribes, No. 14-CV-489, 2017 WL 4322393 at *8 (D. Idaho Sept. 28, 2017), *aff'd*, 942 F.3d 916, 944 (9th Cir. 2019).

40. *See FMC Corp.*, 2017 WL 4322393 at *8.

41. *See id.* at *9-12 (holding that the Tribes had jurisdiction under *Montana*'s first and second exception, though refusing to enforce the judgment under the second exception because the Tribes failed to explain why $1.5 million was needed annually).

42. *See FMC Corp.*, 942 F.3d at 944 (9th Cir. 2019).

43. *Id.* at 933.

44. *Id.*

45. *Id.* at 935.

courts found to fit within both exceptions might be due to the fact that upon finding one exception to apply, some courts refrained from addressing the other exception.[46]

B. Cases That Fit Within Only the First Montana *Exception*

Only one of the cases reviewed was found to satisfy only the first *Montana* exception, which concerns consensual relationships. The case, *Big Horn County Electric Cooperative v. Big Man*, concerned the termination of electrical services.[47] The court found that providing electrical services to the tribe and the relevant contracts were sufficient to create a consensual relationship under *Montana*'s first exception.[48] The specific regulation at issue aimed to protect the public health and well-being of the tribal population by preventing the company from terminating electrical services in the winter months. The court determined that the regulation at issue "has a nexus to the activity that is the subject of the consensual relationship" between the non-Native company and the tribe; thus, the tribal court had jurisdiction.[49] The court did not reach the second *Montana* exception since it found that the first applied.[50] This case illustrates a basic application of the first exception to a claim regarding the regular and contractual provision of services to a tribe.

C. Cases That Fit Within Only the Second Montana *Exception*

The most common outcome was a finding that only the second *Montana* exception, concerning activity that directly threatens the tribe, applied to a case. In seven of the cases reviewed, including three water-rights cases, three zoning and land-use cases, and one forest-fire case, the court applied the second exception and either chose not to apply or did not reach the first exception. While the first *Montana* exception is somewhat more straightforward in being contingent on a consensual relationship—often a contract—the second exception, with language

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46. *See, e.g.*, Big Horn Cnty. Elec. Coop. v. Big Man, No. 21-35223, 2022 WL 738623, at *1 (9th Cir. Mar. 11, 2022).

47. *See id.* at *1.

48. *See id.*

49. *See id.* ("'Title 20 prevents termination of electrical service during winter months without approval of the tribal health board.' The unlawful termination of Big Man's electrical services is directly related to the consensual relationship. BHCEC provides electrical service to tribal members on the reservation and the Tribe is seeking to regulate the manner in which BHCEC provides, and stops providing, that service. Put simply, the winter electric regulation conditions one aspect of the consensual relationship.").

50. *See id.*

referring to broad concepts such as "political integrity," "economic security," and "the health or welfare of a tribe,"[51] leaves a great deal of room for interpretation. The seven cases with this outcome illustrate how courts have interpreted cases concerning different environmental issues to implicate one or more of these concepts, such that jurisdiction should remain with the tribe.

The Ninth Circuit has held in three different cases that water rights fall within the second *Montana* exception. In *Confederated Salish & Kootenai Tribes v. Namen*, the Confederated Tribes of the Flathead Reservation sued landowners by a lake on the reservation for trespassing on reservation lands through construction and management of docks and similar structures.[52] The court did not address the first *Montana* exception, but it determined that the second exception applied because "the use of the bed and banks of the south half of Flathead Lake[] has the potential for significantly affecting the economy, welfare, and health of the Tribes."[53] The court went on to state that "[s]uch conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources," and concluded that the ordinance implicated by the Tribes' claims "falls squarely within" the second exception.[54] The *Namen* court seemingly applied the second *Montana* exception expansively, recognizing the negative impacts of water pollution and interference with tribal water rights, even when the source of harm—the maintenance of docks and a lakeside structure—is less flagrant. *Namen* also highlights the particular concern that courts seem to attach to issues related to water quality and water rights when evaluating impacts on tribal welfare.

The second case, *Colville Confederated Tribes v. Walton*, dealt with a dispute regarding water rights in which the Colville Confederated Tribes sought to enjoin a non-Native landowner from accessing surface and land water.[55] Like *Namen*, the *Walton* decision did not discuss the first *Montana* exception, but *Walton* did provide a strong statement of support for the inclusion of a tribe's water rights within the second exception, which has been cited in later cases.[56] Notably, the court highlighted the significance of the downstream and

51. *See* Montana v. United States, 450 U.S. 544, 566 (1981).

52. *See* Confederated Salish & Kootenai Tribes of Flathead Rsrv. v. Namen, 665 F.2d 951, 953-54 (9th Cir. 1982).

53. *See id.* at 964.

54. *Id.*

55. *See* Colville Confederated Tribes v. Walton, 647 F.2d 42, 44 (9th Cir. 1981).

56. *See id.* at 52.

widespread impacts of water rights.[57] The court asserted that "[r]egulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power."[58]

In *Montana v. Environmental Protection Agency* (*EPA*), the most recent case, the Ninth Circuit considered the second *Montana* exception to determine whether a tribe had authority "to be treated as a state" in promulgating water-quality standards under the Clean Water Act; EPA regulations had adopted the inherent-tribal-authority standard from *Montana*.[59] The court found that this was not a matter of agency deference but rather a matter of law in interpreting the scope of tribal authority on the issue under the *Montana* doctrine. The court found that the authority to regulate the water-quality standards at issue fell within the second *Montana* exception. The court noted that it previously recognized in *Walton* that "threats to water rights may invoke inherent tribal authority over non-Indians"[60] when it stated that "conduct that involves the tribe's water rights" amounts to "conduct [that] threatens or has some direct effect on the health and welfare of the tribe."[61] Broadly speaking, in the Ninth Circuit, precedent suggests that issues impacting water quality are likely to satisfy the second *Montana* exception.

In all three zoning and land-use cases, courts found that only the second *Montana* exception applied. The first case, *Confederated Tribes & Bands of Yakima Indian Nation v. Whiteside*, was a case in the Ninth Circuit that dealt with the authority of the Yakima Indian Nation to apply its own zoning and land-use laws on fee land owned by non-Native people on the reservation.[62] The court found the second *Montana* exception to apply because "[z]oning, in particular, traditionally has been considered an appropriate exercise of the police power of a local government, precisely because it is designed to promote the health and welfare of its citizens."[63] The court also cited the negative impacts that uncontrolled

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57. *See id.* ("A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users. The Colvilles' complaint in the district court alleged that the Waltons' appropriations from No Name Creek imperiled the agricultural use of downstream tribal lands and the trout fishery, among other things.").

58. *Id.*

59. *See* Montana v. EPA, 137 F.3d 1135, 1138 (9th Cir. 1998) (quoting 33 U.S.C. § 1313 (1986)).

60. *Id.* at 1141.

61. *Id.* (quoting Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981)).

62. *See* Confederated Tribes & Bands of Yakima Indian Nation v. Whiteside, 828 F.2d 529, 530 (9th Cir. 1987), *aff'd in part*, *rev'd in part sub nom.* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989).

63. *Id.* at 534.

development could have on the residents of the reservation and the reservation itself, the unique relationship of the Yakima people to their lands, and the importance of zoning authority in the tribe's ability to conduct comprehensive planning.[64]

The second zoning and land-use case was *Knight v. Shoshone & Arapahoe Indian Tribes*, which concerned the validity and applicability of a zoning ordinance imposed by the Shoshone and Arapahoe Indian tribes on non-Indians on fee lands within the reservation.[65] The Tenth Circuit applied the second exception primarily because there were no applicable local or state ordinances affecting land use on non-Indian fee land on the reservation.[66] The Tenth Circuit further clarified that "[t]he absence of any land use control over lands within the Reservation and the interest of the Tribes in preserving and protecting their homeland from exploitation justifies the zoning code," adding also that the inability of the non-Native individuals to participate in the tribal government was not of import in determining the validity of the zoning ordinance.[67] While the Ninth Circuit's more recent opinion in *Whiteside* was more expansive in its categorical endorsement of zoning as being within tribal authority, the Tenth Circuit's holding in *Knight* was limited to the circumstances of having no competing ordinances from state or local authorities.

In the third case, *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, the Supreme Court reviewed the Ninth Circuit's decision in *Whiteside* regarding a zoning conflict between a tribe and a county.[68] The parties agreed that the first *Montana* exception did not apply.[69] In considering the second exception, the Court upheld tribal authority to zone fee lands owned by nonmembers in the section of the reservation closed to the general public.[70] The plurality did, however, deny tribal authority to zone fee lands owned by nonmembers on

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64. *See id.*

65. *See* Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 900, 902 (10th Cir. 1982).

66. *See id.* at 903; Craighton Goeppele, *Solutions for Uneasy Neighbors: Regulating the Reservation Environment After* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, *109 S. Ct. 2994 (1989)*, 65 WASH. L. REV. 417, 420 (1990).

67. *Knight*, 670 F.2d at 903.

68. *See* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 420-21 (1989).

69. *Id.* at 428.

70. *Id.* at 447-48; *see also* Goeppele, *supra* note 66, at 422 ("The two concurring justices, however, joined the three dissenting justices to uphold tribal zoning of non-member land in the closed area." (footnote omitted)).

parts of the reservation open to the public.[71] In its partial reversal, the Court rejected the Ninth Circuit's "overbroad . . . categorical acceptance of tribal zoning authority over lands within reservation boundaries."[72] The Court also emphasized that the second *Montana* exception states only that a tribe *may* exercise its inherent authority over non-Natives on fee lands on the reservation that threaten tribal welfare, not that it *must*, and that this must be a case-by-case analysis depending on the circumstances.[73] The case-by-case analysis is meant to "protect Indian tribes while at the same time avoiding undue interference with state sovereignty and providing the certainty needed by property owners."[74] These dicta highlight that there is a great deal of judicial discretion allowed in the *Montana* analysis. Thus, though there does not seem to be a general entitlement for tribal authority over zoning rights, it is possible on a case-by-case basis that a tribe's interests can outweigh the interests of state sovereignty such that tribal authority could be granted.

The Ninth Circuit has also ruled that forest-fire damages fall within the second *Montana* exception. In *Elliott v. White Mountain Apache Tribal Court*, the court found that the consequences of the alleged violations of the relevant regulations—"the destruction of millions of dollars of the tribe's natural resources"—threatened the tribe's political and economic well-being and found that the second *Montana* exception applied to the case.[75] Though the court applied *Montana* as a belts-and-suspenders justification for finding tribal-court authority over the case at hand, and though its discussion of the issue was brief, the opinion contained dicta suggesting the destruction of the tribe's natural resources was sufficient to threaten the tribe's political and economic well-being under the second *Montana* exception. This is favorable dicta for use in future litigation seeking relief for harm to a tribe's natural resources, such as pollution of land or water resources or damage to forest or farmland.

The case review reveals several themes in how courts apply the second exception. First, all of the zoning and land-use cases and three of four water-rights cases were found to satisfy the second *Montana* exception. There were variations among the cases dealing with a given environmental issue—for example, the Ninth Circuit zoning and land-use decision used the broadest application of the second exception, categorically affirming tribal authority over zoning issues,

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71. *See Brendale*, 492 U.S. at 432-33; *see also* Goeppele, *supra* note 66, at 422 ("A plurality of four justices, joined by two concurring justices, held that the Tribe lacked authority to zone non-member lands in the open area." (footnotes omitted)).
72. *Brendale*, 492 U.S. at 428.
73. *Id.* at 428-29.
74. *Id.* at 431.
75. Elliott v. White Mountain Apache Tribal Ct., 566 F.3d 842, 850 (9th Cir. 2009).

while the Tenth Circuit and Supreme Court zoning and land-use cases employed more limited applications. However, the broader consistency among these categories is still meaningful and encouraging for the possibility of courts affirming tribal jurisdiction over cases dealing with water-rights issues and zoning and land-use issues. Also, the broad concepts explicitly named in the second exception can envelop many different environmental issues, from water rights and other issues discussed in this Section to hazardous waste, discussed in Section II.A. Environmental advocates would likely argue that most, if not all, environmental issues implicate at least one of the concepts named in the second exception, making this exception particularly conducive to potential environmental-tort claims.

D. Cases That Fit Within Neither Montana *Exception*

In five cases, courts found neither *Montana* exception to apply. Both hunting- and fishing-rights cases, one of the four water-rights cases, and the gas-lease and gas-leak cases are discussed in this Section. Courts' rationales in these cases reveal the most about which cases—dealing with which environmental issues and under which circumstances—are least likely to fall under tribal jurisdiction according to the *Montana* analysis. These cases form a minority among the cases reviewed, two-thirds of which found tribal jurisdiction to apply under at least one exception.

According to precedent, hunting- and fishing-rights issues do not typically fall under either *Montana* exception. In *Lower Brule Sioux Tribe v. South Dakota*, the Lower Brule Sioux Tribe brought an injunction to prevent South Dakota from enforcing the state's hunting and fishing laws on reservation land taken for flood-control projects by the Army Corps of Engineers, or in nonmember-owned fee lands.[76] The Eighth Circuit affirmed the lower court in rejecting both exceptions. The circuit court agreed with the lower court that the first *Montana* exception did not apply because "[n]either the original title deeds for the lands nor the purchase of hunting and fishing licenses give rise to the requisite consensual relationship between the Tribe and nonmembers who hunt and fish on the fee lands."[77] The Eighth Circuit also affirmed the district court's finding that the second exception did not apply. The district court had "found no evidence on the record to support a determination that the harvesting of deer on nonmember fee lands threatened the overall welfare of the Tribe."[78] This was in part because "there [was] no evidence that a significant number of tribal members

76. Lower Brule Sioux Tribe v. South Dakota, 104 F.3d 1017, 1019-20 (8th Cir. 1997).

77. *Id.* at 1023.

78. *Id.*

depend on wild game for their sustenance or livelihood."[79] Thus, the Eighth Circuit did not find that contested hunting and fishing rights could satisfy either *Montana* exception. The Eighth Circuit also held three years earlier that neither *Montana* exception applied in a similar case regarding hunting and fishing rights.[80]

In one unusual water-rights case, the Ninth Circuit focused on whether the tribe had jurisdiction over a water-rights dispute between the tribe and the state.[81] In that case, the court found that neither *Montana* exception applied when the water rights of the tribe had uniquely been predetermined by a federal master[82] and would be protected by the master.[83] The court held first that there was "no consensual agreement between the non-Indian water users and the Tribe which would furnish the basis for implication of tribal agreement regulatory authority" and second that the tribe's right to self-government and economic welfare were not threatened.[84] The court emphasized that the tribe's welfare under the second exception would not be infringed upon by the state having jurisdiction over the matter. This is because the tribe's "[water] rights [had already] been quantified and [would] be protected by the federal water master."[85] Though water rights have generally been considered by courts to fall within the second exception, the court in *Anderson* deemed that the predetermined water quantifications allotted to the tribe and the protective role of the federal water master prevented any potential negative impact on tribal welfare.

Another case concerned a gas lease, but it did not reveal how courts treat the substantive topic of gas leases, specifically the improper environmental and public harms that result from them, under the *Montana* exceptions. Instead, it revealed the role that issue framing can play in these cases. *Kodiak Oil & Gas v. Burr* concerns a breach-of-contract action between a tribe and a non-Native oil-and-gas company regarding the royalties from a mining lease. The tribe alleged it was entitled to the royalties after an improper practice of flaring occurred on the oil-

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79. *Id.* at 1023-24.

80. South Dakota v. Bourland, 39 F.3d 868, 869-71 (8th Cir. 1994).

81. United States v. Anderson, 736 F.2d 1358, 1360 (9th Cir. 1984).

82. Prior to this case, there was a water-rights adjudication that "quantifie[d] and preserve[d] tribal water rights" and "appointed a federal water master whose responsibility it is to administer the available waters in accord with the priorities of all the water rights adjudicated." *Id.* at 1365. Since the tribe's water rights were predetermined and the court presumed the federal water master would adequately protect the tribe's interests, the court found that the tribe's rights were not threatened in a way that would implicate the *Montana* exceptions. *Id.*

83. *Id.* at 1366.

84. *Id.* at 1365.

85. *Id.* at 1366.

and-gas company's operation.[86] Despite the environmental issue underlying the demand for royalties – the company allegedly improperly burned off natural gas on tribal lands – the court separated the contract from its substance. Instead of framing tribal-court jurisdiction according to the substantive issue of hazardous environmental activity from an oil-and-gas mining lease, the court evaluated it under *Montana* according to the payment of royalties via contract.[87] The Eighth Circuit held that neither *Montana* exception applied. The court found that an application of the first exception requires more than the mere existence of a consensual relationship – the relationship must also "stem[] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations."[88] Here, the court found that "complete federal control of oil and gas leases on allotted lands . . . undermines any notion that tribal regulation in this area is necessary for tribal self-government."[89] The court did, however, acknowledge that "[t]ribal court enforcement of tribal laws relating to public health and safety or environmental protection may sometimes fall within the second *Montana* exception."[90] This case demonstrates the discretion courts have in determining how to frame the issue that will be evaluated under the *Montana* framework. Potential plaintiffs and environmental lawyers should consider this discretion in deciding whether bringing a case in tribal court under *Montana* is a strategy worth pursuing for a particular environmental issue. For instance, if there is another issue in the case to which the court could instead apply the *Montana* analysis, such as a contract, the court can dodge the substantive environmental issue.

In a case involving gasoline leaks, the narrow class of plaintiffs dissuaded the court from finding that either *Montana* exception applied.[91] This outcome leaves open the possibility that a case involving gasoline leaks could succeed if brought by a tribe as a whole or a large portion of a tribe's members. In *Town Pump v. LaPlante*, a member of the Blackfeet Nation – LaPlante – appealed a district-court decision permanently enjoining the member from bringing suit against a local gas station under a toxic-discharge personal-injury claim and granting the gas station summary judgment.[92] The Ninth Circuit affirmed the lower-court decision, finding that neither *Montana* exception applied to the case. The court determined that LaPlante did not allege that the gas station entered into a

86. Kodiak Oil & Gas v. Burr, 932 F.3d 1125, 1130 (8th Cir. 2019)

87. *Id.* at 1138.

88. *Id.* (quoting Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 336 (2008)).

89. *Id.*

90. *Id.*

91. Town Pump, Inc. v. LaPlante, 394 F. App'x 425, 427 (9th Cir. 2010).

92. *Id.* at 426.

consensual relationship akin to that required by the first *Montana* exception and that none of the gas station's activity in tribal court, such as filing an indemnity action, amounted to consent to jurisdiction.[93] The court also found that the second *Montana* exception did not apply because LaPlante is but one person, and the second exception requires that the action in question have a "direct effect on the political integrity, the economic security, or the health or welfare of *the tribe*."[94] The court explained that the Supreme Court in *Strate v. A-1 Contractors* rejected the assertion that a negative impact on one member of a tribe is an impact on all of the tribe.[95] Clearly, a toxic discharge of gasoline from a gas station could impact the well-being of the tribe as a whole; however, the application of *Strate* in this case suggests that a potential lawsuit must claim to concern an impact on the tribe as a whole, as opposed to an individualized harm on an individual tribal member.

III. STUDY IMPLICATIONS

A. Key Takeaways

These cases reveal several key takeaways regarding tribal courts' jurisdiction over environmental-tort litigation. First, courts have discretion in determining how to frame the issue that will be evaluated under the *Montana* framework. This discretion could preclude the substantive environmental issue in the case from being the focal point of the analysis and enable courts to frame issues in a manner that disadvantages tribes. Second, though the first exception seems more limited and straightforward in requiring a consensual relationship, not all consensual relationships are sufficient for the exception to apply. Third, courts may require the impacts of a claim under the second exception to apply to the whole tribe or a significant number of members, given the courts' assumption that an individual's interests cannot implicate the interests of the whole tribe.[96] But if a contract that impacts a tribe's inherent powers exists at the core of the issue the individual is litigating, the first *Montana* exception could provide for jurisdiction.[97]

The analysis also reveals that courts have been largely consistent in how they have applied the *Montana* exceptions to different substantive environmental

93. *Id.* at 427.

94. *Id.* (quoting Montana v. United States, 450 U.S. 544, 566 (1981)) (emphasis added).

95. *Id.* (citing Strate v. A-1 Contractors, 520 U.S. 438, 458-59 (1997)).

96. *See, e.g.*, *id.* at 427.

97. *See* Big Horn Cnty. Elec. Coop., Inc. v. Big Man, No. 21-35223, 2022 WL 738623 at *1 (9th Cir. Mar. 11, 2022).

issues. Though there is general consistency within a single environmental issue, the case review also illustrated how courts vary in their application of *Montana* to *different* environmental issues. In two Eighth Circuit cases, the panels found neither *Montana* exception to apply to issues of contested hunting and fishing rights, noting the lack of evidence that the hunting and fishing rights would impact a "*significant* number of tribal members."[98] On the other hand, the cases show that where a negative environmental impact at issue has *significant* and *clear* negative impacts on the welfare of the tribe, such as in the dumping of millions of tons of hazardous waste, tribal-court jurisdiction under *Montana* is likelier.[99]

Though the dumping of significant hazardous waste and millions of dollars of damage to tribes' natural resources each seem to fall squarely within the second *Montana* exception—and potentially the first as well, if there is a relevant consensual agreement—less flagrant causes of environmental harms, such as the building and maintenance of docks and similar lakeside structures, have been found to satisfy the second exception.[100] In general, environmental issues with a tangible impact on water quality or water rights seem consistently to satisfy the second *Montana* exception.[101] Only one out of four cases concerning water rights did not find the second *Montana* exception was satisfied, in part because the court determined that a preexisting decision governing the water rights of the tribe—a federal water master's water-quality assessment—precluded the potential negative impacts on the tribe.[102]

Lastly, courts seem hesitant to grant tribes broad zoning authority but seem inclined to do so if tribal interests outweigh the interests of the implicated state.[103] More generally, only the Ninth and Tenth Circuits had favorable case law where the *Montana* exceptions were applied—with the Ninth Circuit

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98. Lower Brule Sioux Tribe v. South Dakota., 104 F.3d 1017, 1023 (8th Cir. 1997) (emphasis added); *see also* South Dakota v. Bourland, 39 F.3d 868, 870 (8th Cir. 1994) ("These incidents undeniably are vexatious to the individual Indians affected, but we think it is plain that they do not amount to a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe as a whole, and we are satisfied the District Court did not err in finding that they do not threaten these tribal concerns such that tribal regulatory authority over non-Indians attaches under the second *Montana* exception.").

99. *See, e.g.*, FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 935 (9th Cir. 2019).

100. *See* Confederated Salish & Kootenai Tribes of the Flathead Rsrv. v. Namen, 665 F.2d 951, 964-65 (9th Cir. 1982).

101. *See id.*; Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981); Montana v. EPA, 137 F.3d 1135, 1141 (9th Cir. 1998).

102. *See* United States v. Anderson, 736 F.2d 1358, 1364-65 (9th Cir. 1984).

103. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 420, 432-33 (1989); Confederated Tribes & Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529, 534-35 (9th Cir. 1987), *aff'd in part, rev'd in part sub nom.* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

deciding eight of the nine such cases. The Eighth Circuit, which also heard some of the cases reviewed in this study, did not affirm tribal jurisdiction in any cases that applied the *Montana* exceptions. Thus, environmental-tort suits seem more likely to fall within the *Montana* exceptions and thus within tribal-court jurisdiction if they take place in the Ninth Circuit.

From these takeaways, one can hypothesize potential environmental litigation that is likelier to succeed in returning jurisdiction to tribal courts when on appeal in federal court. One potential case could be brought in tribal court within the Ninth Circuit's jurisdiction to litigate torts caused by water use under the second *Montana* exception. Under *Colville Confederated Tribes v. Walton*, *Montana v. EPA*, and *United States v. Anderson*, the Ninth Circuit strongly upheld the applicability of the second *Montana* exception to water rights, articulating the fundamental importance of water to tribes' economy, welfare, health, and sovereignty. For example, a suit could be brought on behalf of a tribe or a significant number of members[104] located in California's San Joaquin Valley regarding the documented water pollution affecting tribes as a result of oil and gas extraction on public lands.[105] Alternatively, a case could be brought in the Ninth Circuit by a tribe or a significant number of members regarding torts caused by hazardous waste. For example, the Crow Creek Band of the Umpqua Tribe of Indians could sue Formosa Mine in Oregon, which "has leaked millions of gallons of acidic water and toxic metals into waterways near [their] homeland."[106] The Ninth Circuit's decision in *FMC Corp. v. Shoshone-Bannock Tribes* suggests that harm caused by large quantities of hazardous waste is likely to fall within *both Montana* exceptions.[107] These are just two examples among the many possible suits that could be strategically designed and brought with the above research and analysis in mind.

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104. *Cf.* Lower Brule Sioux Tribe v. South Dakota, 104 F.3d 1017, 1023-24 (8th Cir. 1997) (reasoning that the welfare of the tribe was not threatened because the suit did not show that a significant number of members would be affected by the alleged harm).

105. *See Oil and Gas Permits on Public Lands in California Routinely Violate Federal Law*, EARTHJUSTICE (Sept. 8, 2022), https://earthjustice.org/news/press/2022/oil-and-gas-permits-on-public-lands-in-california-routinely-violate-federal-law [https://perma.cc/V228-7WMU].

106. Cody Nelson, *The Dizzying Scope of Abandoned Mine Hazards on Public Lands*, HIGH COUNTRY NEWS (Jan. 28, 2022), https://www.hcn.org/articles/south-mining-the-dizzying-scope-of-abandoned-mine-hazards-on-public-lands [https://perma.cc/K5H6-JYRC].

107. *See* FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 944 (9th Cir. 2019).

B. *Strategic Considerations*

In addition to understanding how courts have applied the *Montana* exceptions, it is also helpful to consider the broader advantages and disadvantages of pursuing a litigation strategy of bringing environmental-tort suits in tribal courts. The disadvantages are particularly important to consider, given the implications this strategy could have on tribal sovereignty: an unfavorable court ruling could not only narrow the *Montana* exceptions but also further strip tribal courts of what little jurisdiction they have left. The sovereignty of tribal courts is an important dimension of tribal sovereignty more broadly, and this Essay does not advocate pursuing environmental accountability at the cost of tribal sovereignty. Bringing environmental-tort suits in tribal courts requires tribes or a significant number of members to serve as plaintiffs—inherently requiring a decision by tribes or their members that the benefits of pursuing the strategy outweigh the costs.

From a normative point of view, the benefits of the litigation strategy are relatively straightforward. The premise of this litigation strategy is that, in a world in which federal courts are inhospitable to environmental-tort suits and plaintiffs struggle to keep these suits in friendlier state courts, tribal courts pose a potentially promising alternative. State courts present a less favorable forum for tribes as plaintiffs when compared to their state, county, and city counterparts. For example, state courts, as facets of competing sovereigns with tribes, have exhibited biases favoring state interests over tribal interests.[108] As a result, cities', counties', and states' existing strategy of keeping environmental-tort suits in state court is not as suitable for tribes. Thus, tribal courts not only provide an additional avenue to hold environmental tortfeasors accountable in a more comprehensive strategy, but they provide a forum that is more suitable to the tribes and tribal members who would bring the suits themselves.

Allowing tribal courts to hear these cases and be responsible for fact-finding provides Native plaintiffs with an authority respectful of tribal sovereignty. The Supreme Court itself has recognized that allowing tribal courts to hear a case in the first instance and to be responsible for fact-finding is more respectful of tribal

108. Though state courts' biases in favor of the state and its citizens are common knowledge, state court bias against tribes is particularly charged as states and tribes compete over jurisdiction and property. *See* JOSEPH P. KALT & JOSEPH WILLIAM SINGER, MYTHS AND REALITIES OF TRIBAL SOVEREIGNTY: THE LAW AND ECONOMICS OF INDIAN SELF-RULE 19 (2004) ("[S]tate courts may be unfair to tribal members, especially in states where state court judges are elected and subject to political pressure to limit tribes' jurisdiction and property rights.").

sovereignty and self-government.[109] Many environmental-tort claims will likely be grounded in the inherent rights of the tribe, potentially resulting from specific treaties. Integral to this context is the complex history of each tribe, with which tribal courts themselves are more familiar and better able to consider. On the whole, tribal courts provide Native litigants an ostensibly more hospitable forum than state or federal courts.

Though rulings on the side of environmental advocates in tribal court will not be binding on state and federal courts, there is value to tribal courts serving as an additional avenue for environmental-tort litigation in order to strengthen a multipronged strategy to address environmental harms and hold tortfeasors accountable. Environmental crises, climate change chief among them, form some of the most pressing issues of our time. Much like the Biden Administration's "Whole-of-Government"[110] approach to addressing climate change, environmental advocates must pursue relief through litigation across *all* domestic courts to mitigate environmental harms and increase accountability.

Additionally, since tribal courts are not mired in the same case law as state and federal courts, they provide a forum that can provide greater success for creative litigation strategies to address environmental harms. The core of environmental law today is shaped by a handful of environmental laws that were passed around the 1970s but that cannot serve as a means for addressing all of the environmental challenges of today.[111] Creative litigation strategies are needed to address a broad range of environmental issues, from climate change to workers' rights. Climate-change tort litigation, for example, uses tort claims such as private and public nuisance and trespass to seek redress for harmed communities. Tribal courts, with distinct tort law and policy, could provide traction through means state or federal courts cannot.

One disadvantage of this litigation strategy is that, despite the potential benefits for tribal sovereignty and for holding environmental tortfeasors accountable, it also has the potential to overburden tribes, their court systems, and Native plaintiffs. Philip J. Smith argues that "the effect of *National Farmers* on tribal institutions is to usurp tribal court authority and relegate tribal courts to the

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109. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985). For additional information on the inherent expertise of Native decisionmakers, see *supra* note 9 and accompanying text.

110. *See* Press Release, White House Briefing Room, FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government (Jan. 27, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government [https://perma.cc/Q8VB-P5H8].

111. *See* Jedediah Purdy, *The Long Environmental Justice Movement*, 44 ECOLOGY L.Q. 809, 812 (2018).

status of adjuncts to the federal judiciary."[112] According to Smith, tribes will have to evaluate whether it is worthwhile for them to invest in creating or building out an appellate court in their tribal-court system to handle increased appeals under the *National Farmers Union* exhaustion requirement. If tribes decide environmental-tort litigation is nonetheless worthwhile, they will be faced with the significant costs associated with expanding their court system. For Native plaintiffs, the *National Farmers* exhaustion requirement means that their cases might last impractical periods of time once tribal remedies are exhausted and defendants appeal in federal court.[113] The prospect of exhaustion and later appeal in federal courts also imposes significant costs on Native litigants.[114] All of the Native plaintiffs in the cases discussed in Part II had to not only engage in litigation in tribal court to seek relief, but they also had to be hauled into federal court at their own expense and "wait for the federal judiciary to perform its obligations."[115] Engaging in this kind of litigation strategy risks exacerbating the harms of the *National Farmers* doctrine on the tribal-court system and engaging tribes and Native plaintiffs in litigation that could remain unresolved after years of appeals.

Second, in addition to possibly overburdening courts, these doctrines of deference implicated in this strategy risk inducing assimilation. As Professor Judith Resnik describes, "deference to tribal court jurisdiction and decisions . . . may also be a vehicle for attempting to assimilat[e] tribal courts' jurisdiction into federal norms because, in practice, doctrines of deference may be predicated on tribal court adoption of federal views on the kind and nature of process 'due.'"[116] Though the doctrines of deference exist without this strategy, bringing this litigation with the hopes of succeeding where litigation in federal court could not may increase federal courts' desire to reign in tribal-court jurisdiction, ultimately pressuring tribal courts to assimilate.[117]

Third, this strategy is only possible insofar as the Supreme Court does not reverse or overturn *Dollar General*. The Court in *Dollar General* affirmed the Fifth Circuit's holding that tribal courts have jurisdiction over tort suits when Native

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112. Philip J. Smith, *National Farmers Union and Its Progeny: Does It Create a New Federal Court System?*, 14 AM. INDIAN L. REV. 333, 334 (1989).

113. *See id.* at 350.

114. *See id.* at 349-50.

115. *Id.* at 350.

116. Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1050 n.129 (1994).

117. *See id.*

plaintiffs seek punitive damages against non-Native individuals.[118] Though the Court effectively affirmed the Fifth Circuit's decision allowing tribal-court jurisdiction over these tort suits, the case demonstrated that four Justices were ready to strike down tribal-court jurisdiction over these issues. Given the current composition of the Court, it is unlikely that the issue would come out in favor of tribal jurisdiction if it were raised again.[119] Though there is clearly precedent for environmental issues to be litigated in tribal court, a new or creative environmental-tort strategy could attract the wrong kind of attention and result in a grant of certiorari that would ultimately reverse *Dollar General*. Moreover, environmental-tort litigation in tribal courts that could threaten millions of dollars in damages against corporate entities would also be likely to aggravate corporate interests—and their lobbyists—who could seek a legislative remedy to their exposure to risk through tribal-court litigation.

Fourth, the Supreme Court could more broadly apply *Oliphant*'s denial of tribes' inherent criminal jurisdiction over non-Native people to civil jurisdiction and strip tribal courts of *any* civil jurisdiction over non-Native individuals. This would go further than overturning *Dollar General*, which would only implicate litigating tort suits against non-Native individuals in tribal courts. Given the current composition of the Court, there is a decent chance that, if raised as an issue in any case that implicates tribal civil jurisdiction, the Court would end tribal courts' civil jurisdiction over non-Natives.[120] Because environmental-tort cases could have tangible and monetary impacts on corporations and government entities, they might be higher profile and induce Supreme Court review.

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118. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 579 U.S. 545, 546 (2016) (per curiam); *see also supra* text accompanying notes 30-33 (describing the Court's evenly split decision in *Dollar General*).

119. In a recent Supreme Court case from June 2022 dealing with tribal-court jurisdiction, five Justices—Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, and Barrett—signed onto a decision that deprived tribes of jurisdiction and impinged on tribal sovereignty. *See* Oklahoma v Castro-Huerta, 142 S. Ct. 2486 (2022) (holding that states have concurrent jurisdiction with the federal government to prosecute crimes by non-Native people against Native people in Native territories and, in turn, depriving tribes of this jurisdiction and their associated sovereignty). *See also NARF/NCAI Joint Statement on SCOTUS Ruling on Castro-Huerta v. Oklahoma*, NATIVE AM. RIGHTS FUND (July 7, 2022), https://narf.org/castro-huerta-v-oklahoma-scotus-ruling ("The Supreme Court's decision today is an attack on tribal sovereignty and the hard-fought progress of our ancestors to exercise our inherent sovereignty over our own territories.").

120. In a recent opinion, the Court "undermine[d] tribal sovereignty by allowing a state government to exercise jurisdiction—that is, enforce the state's laws—on tribal lands in some instances." Theodora Simon, *Tribal Sovereignty Under Attack in Recent Supreme Court Ruling*, ACLU NORCAL (July 12, 2022), https://www.aclunc.org/blog/tribal-sovereignty-under-attack-recent-supreme-court-ruling [https://perma.cc/KT22-XPZ9]; *see* Elizabeth Hidalgo Reese, *Conquest in the Courts*, NATION (July 6, 2022), https://www.thenation.com/article/society/supreme-court-castro-huerta [https://perma.cc/99JP-VWRF].

Therefore, bringing environmental-tort litigation in tribal courts would also increase the risk of a much broader stripping of tribal jurisdiction over non-Natives for civil suits—thus infringing upon tribal sovereignty and the interests of Native peoples.

One way to avoid these disadvantages would be to litigate with the goal of settlement in tribal courts. This would lessen the burden on tribal courts and plaintiffs, as well as the risks of overturning *Dollar General* or having the Court apply *Oliphant* to civil jurisdiction. Anecdotally, one plaintiff's lawyer has reported litigating the negative impacts of pollution from an industrial animal-agriculture facility sited on a reservation but owned by a nontribal entity. The tribal plaintiffs settled the claims for monetary damages and injunctive relief. While the settlement did not create legal precedent, this outcome was simpler in getting relief for the tribal plaintiffs suing the facility.[121] Settlement avoids the risks of negatively altering the doctrines described above, and though it precludes the possibility of legal precedent, such precedent would not necessarily be beneficial. Settlement, however, is never guaranteed and can be difficult to achieve due to the competing interests and difficulty of reaching an agreement to which both parties would consent. Settlement also could face the issue of businesses lobbying the legislature for relief against these suits. Still, litigating toward settlement is a strategy that could lower the risk of scaling back precedent supportive of tribal jurisdiction.

This litigation strategy—bringing environmental-tort claims in tribal courts—provides a unique opportunity to mitigate and secure redress for environmental harms while also enhancing Native peoples' ability to hold tortfeasors who harm their environment and health accountable. Given the disadvantages discussed and the possibility of overturning precedent that supports tribal sovereignty, it is important for environmental advocates to defer to and center tribes themselves in determining whether the benefits outweigh the risks in pursuing a particular claim.

CONCLUSION

Whether environmental-tort litigation is used to hold tortfeasors accountable for local land and water pollution or for climate change, environmental-tort suits present a compelling addition to the suite of litigation strategies environmentalists can employ to hold actors who damage the environment and people accountable. Though this Essay highlights the parameters that existing case law draws for permissible environmental suits in tribal court under the *Montana*

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121. *See* Interview with Corrie Yackulic, Of Counsel, Sher Edling (Aug. 5, 2021) (on file with author).

exceptions, the potential for success determined therein should be balanced against the potential strategic disadvantages discussed above; these disadvantages could have negative consequences not only for the environment and public health but also for tribal sovereignty.

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