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## Under What Circumstances, If Any, Do Indian Tribal Courts Have Civil Jurisdiction over Non-Indians?

by Matthew L. M. Fletcher

PREVIEW of United States Supreme Court Cases, pages 329-332. © 2008 American Bar Association.

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This is the first federal Indian law case in which the Supreme Court featuring Chief Justice Roberts and Justice Alito has granted certiorari and thus provides the first chance to see how the newest justices view Indian law.

### ISSUES

May a tribal court exercise subject matter jurisdiction over nonmembers that engage in on-reservation commercial activities with tribal members and who are alleged to engaged in discriminatory conduct arising out of the commercial activities?

Does a petitioner have standing in federal court to challenge a tribal court's jurisdiction over a question on which the petitioner prevailed before the tribal court?

### FACTS

The Long Family Land and Cattle Company is a family farming and ranching business located on fee lands within the Cheyenne River Sioux Indian Reservation, South Dakota, incorporated under the laws of the State of South Dakota. At least 51 percent of the Long Company is Indian-owned, allowing the company to receive loan guarantees from the Bureau of Indian Affairs. Plains Commerce Bank, formerly the Bank of Hoven, lent capital and operating funds to the Long Company.

In 1996, after negotiations at the tribal offices, and with federal government assistance, the parties entered into a new loan arrangement in which the Long Company deeded its land to the bank for two years in exchange for the canceling of certain debts and the promise of future operations loans. At the expiration of the term, the Long Company could repurchase the land by settling its entire debt. The Long Company alleged before a tribal

(Continued on Page 330)

PLAINS COMMERCE BANK V. LONG  
FAMILY LAND AND CATTLE  
COMPANY, INC., ET AL.  
DOCKET NO. 07-411

ARGUMENT DATE:  
APRIL 14, 2008  
FROM: THE EIGHTH CIRCUIT

# Case at a Glance

In a case arising on the Cheyenne River Sioux Tribe's reservation in South Dakota, an Indian tribal member-owned company sued a nonmember-owned bank in tribal court to prevent the foreclosure and sale of its ranching land and to assert contract and discrimination claims. This case provides the Court an opportunity to clarify the extent to which a tribal court may exercise subject matter jurisdiction over non-member defendants in accordance with *Montana v. United States*, 450 U.S. 544 (1981).



court jury that the bank initially offered a 20-year mortgage but backed out, citing the jurisdictional problem of lending to Indian-owned businesses in Indian Country. In the winter of 1996–97, the Long Company endured horrific cold weather in which most of its cattle herd perished after the bank refused to lend the company funds for operating costs during the period. After this time, the company could not settle its debt to the bank and repurchase its land.

In 1998, the bank initiated state court eviction proceedings against the Long Company and sold much of the land to others. The Long Company brought suit in the Cheyenne River Sioux tribal court, seeking an injunction preventing the sale and foreclosure. The tribal court denied the motion. The company then amended its complaint to add contract claims and a discrimination claim. The company sought a jury trial that by tribal court rule could have required a jury pool including nonmembers, while the bank did not. The jury verdict came in favoring the Long Company on the contract claim, but not the discrimination claim, assessing \$750,000 plus interest in damages.

Plains Commerce Bank then initiated a federal court action in accordance with *National Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985), seeking an injunction against the tribal court on the grounds that the court lacked jurisdiction over nonmembers. The district court rejected the claim, and the Eighth Circuit affirmed.

### CASE ANALYSIS

The case involves the application of the general rule, announced by the Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981), that Indian tribes do not have civil regulatory or adjudicatory jurisdic-

tion over nonmembers, unless one of two exceptions is met. The first exception, most relevant here, is that a tribe may exercise jurisdiction over a nonmember that engages in on-reservation consensual commercial relations with the tribe or its members. The second exception is that a tribe may exercise jurisdiction when the conduct of the nonmember has a significant impact on the political integrity, economic security, or health and welfare of the tribe. With the arguable exception of a 1983 Indian taxation case, the Court has not invoked either exception. In two cases, however, the Court has noted *in dicta* that tribal courts might have presumptive authority to assert civil jurisdiction over nonmembers for conduct that occurs on reservation lands.

Plains Commerce Bank asserts first that the Supreme Court should hold that neither of the two exceptions apply in this matter. The bank argues that the tribal court assertions of jurisdiction are strongest when the nonmember conduct occurs on Indian reservation land, and that the Long Company land is not reservation land. The bank further asserts that the Long Company is not in fact an “Indian” for purposes of tribal court jurisdiction because the company is incorporated under state law. Nine states (jointly), the American Bankers Association, and the Association of American Railroads each filed amicus briefs arguing that the Court should adopt a much stricter “consensual relations” test than that applied by the lower courts in this matter.

The bank also argues that the Court should hold that tribal courts may never exercise jurisdiction over nonmembers, eliminating the exceptions to the general rule in *Montana v. United States*. The bank argues that forcing nonmembers

into tribal courts subjects them to unfair laws and procedures, especially customary laws. Amicus briefs filed by three counties jointly and the Mountain States Legal Foundation supported the bank’s position on this point.

Long Family Land and Cattle Company argues first that the bank does not have standing in federal court to bring a jurisdiction challenge on the discrimination claim because the bank prevailed before the tribal court jury on that claim and awarded damages on the contract claim alone. According to the company, the bank waived its challenge to the tribal court’s jurisdiction over the contract claims in the courts below. As a result, the company argues, the Supreme Court should either dismiss the certiorari petition as improvidently granted or affirm the judgment on independent contract grounds.

On the merits, the company asserts that the transaction complained of meets the first *Montana* exception in that the bank consensually engaged in a long-term, on-reservation business relationship with an Indian company. The company argues that its “Indian” character is proven by the fact that the Bureau of Indian Affairs required Indian ownership in order to provide loan guarantees over the various loans made by the bank to the company. The company further argues that the bank had the opportunity to seek a tribal court jury consisting in part of nonmembers but refused to do so. Amicus briefs filed by the United States and the National Congress of American Indians supported the company’s argument that the bank’s conduct brought it within the first *Montana* exception.

Amicus briefs filed by the Cheyenne River Sioux Tribe and the National



American Indian Court Judges Association, as well as the brief filed by the federal government, supported the company's claim that tribal courts are fair to nonmembers and competent to adjudicate complex claims. A final amicus brief filed by the National Network to End Domestic Violence argued that curtailing tribal court jurisdiction over nonmembers may undermine efforts to prevent nonmember domestic violence within Indian Country by limiting tribal courts' authority to use civil remedies against nonmember domestic violence offenders.

### SIGNIFICANCE

The major significance of *Plains Commerce Bank v. Long Family Land and Cattle Co.* turns on whether the Supreme Court, assuming it rules in favor of the petitioner, will use this case as a vehicle to hold that Indian tribes and tribal courts are automatically barred from asserting any form of civil jurisdiction over nonmembers. The Court has held in no fewer than four major cases since 1993 that the asserted jurisdiction by Indian tribes or tribal courts over nonmembers did not meet one of the two *Montana* exceptions. In a previous case involving tribal criminal jurisdiction, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that Indian tribes may never prosecute nonmembers, although Congress legislated away a portion of that decision involving the category of nonmember Indians. See *United States v. Lara*, 541 U.S. 183 (2004).

The loss of all forms of civil jurisdiction over nonmembers would be a considerable blow to tribal governance and business activities. Tribes already enter into numerous business and intergovernmental relationships with nonmembers and nonmember governments that allow for exclusive or shared civil authori-

ty over nonmembers, all of which would become suspect. These agreements include gaming management contracts, land lease arrangements, law enforcement and public safety cross-deputization agreements, tax collection and revenue sharing agreements, and many other forms of negotiated agreements. State and tribal court cooperation and reciprocal comity may decline if the Court concludes that tribal court procedures and tribal laws are presumptively unfair to nonmembers. Moreover, as the amici for the respondent assert, the authority of tribes and tribal courts to exercise jurisdiction to prevent and remedy domestic violence and other nonmember civil torts might be jeopardized. More likely than not, tribal interests would actively seek assistance from Congress in overturning at least some aspects of the ruling via legislation.

However, a ruling that merely favors Plains Commerce Bank, reverses the lower courts, and holds that the Cheyenne River Sioux tribal court did not have jurisdiction in this particular case might not have a great deal of significance. Still, such a ruling, keeping open the possibility that nonmembers could expressly consent to tribal civil jurisdiction, would require tribes to acquire written and specific proof of nonmember consent to tribal jurisdiction. The bargaining power of tribal interests in negotiating with nonmembers in this context would almost certainly decline.

A ruling favoring the respondent and affirming the lower courts on the merits would be the first time the Supreme Court has invoked one of the two *Montana* exceptions. The significance of that outcome might be muted by the particular facts of the tribal court adjudication in this case. The Court could focus on the fact that the bank could have

requested a jury trial that featured a jury pool including nonmembers, and that in this case the trial judge and two-thirds of the tribal appellate court were nonmembers. The Court could then hold that future assertions of tribal court jurisdiction must also feature procedural safeguards for nonmembers along those lines. Many tribal courts do not guarantee jury trials in civil matters, let alone jury trials featuring a jury pool including nonmembers.

A ruling reaffirming and perhaps clarifying the *Montana* general rule and its exceptions to the benefit of tribal interests will likely portend more persistent attempts by Indian tribes and businesses to exercise jurisdiction over nonmember business activities and property and to exercise increasing taxing authority over nonmembers. Tribal courts likely will be encouraged to assert civil jurisdiction over a greater number of cases involving nonmember defendants. Such a ruling may also lead to future cases in which nonmembers assert due process, equal protection, and takings claims, among other foundational constitutional claims, that question the very sovereignty of Indian tribes in the American constitutional structure.

Finally, the Supreme Court could hold that the petition for certiorari was improvidently granted, rendering moot the entire question and leaving the underlying question open for yet another case.

### ATTORNEYS FOR THE PARTIES

**For Petitioner Plains Commerce Bank** (Paul Anthony Banker (612) 371-3969)

**For Respondent Long Family Land and Cattle Company, Inc., et al.** (David C. Frederick (202) 326-7951)

(Continued on Page 332)



## **AMICUS BRIEFS**

### **In Support of Petitioner Plains Commerce Bank**

American Bankers Association,  
et al. (Brett M. Koenecke (605) 224-  
8803)

Association of American  
Railroads (Lynn H. Slade (505) 848-  
1800)

Idaho et al. (Clay R. Smith (208)  
334-2400)

Idaho County and Lewis County,  
Idaho, and Cass County and  
Mahnomen County, Minnesota  
(Scott Gregory Knudson (612) 977-  
8400)

Mountain States Legal  
Foundation (J. Scott Detamore  
(303) 292-2021)

### **In Support of Respondent Long Family Land and Cattle Company, Inc., et al.**

Cheyenne River Sioux Tribe  
(Mark I. Levy (202) 824-1437)

National American Indian Court  
Judges Association et al. (William R.  
Stein (202) 721-4600)

National Congress of American  
Indians et al. (Virginia A. Seitz  
(202) 736-8000)

National Network to End  
Domestic Violence et al. (Fernando  
R. LaGuarda (202) 730-1300)

United States (Paul D. Clement,  
Solicitor General (202) 514-2217)