# 14

# Tribal Economic Development and Uncertain Civil Jurisdiction

Despite the rich casino, Indian stereotype, tribal economies are often nonexistent. Indeed, most reservations lack any semblance of a private sector. This means reservation residents must drive long distances to purchase basic goods as well as find private sector jobs. The absence of a private sector helps explain Indian country's perennial 50 percent unemployment rate.[1] Low employment usually translates to high poverty, and Indian country is no exception. Reservation Indians have the highest poverty rate in the United States, 38% compared to 13% for the country as a whole.[2] Although Indians are approximately 1 percent of the population, eight of the ten poorest counties in the United States are majority Indian.

Tribes have enacted several reforms and initiatives aimed at creating private sectors on their land. For example, the Choctaw Nation Small Business Development program provides Choctaw Nation citizens with technical assistance relating to writing business plans, filing taxes, accessing capital, and more.[3] In the same vein, tribes have created

[1] *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affs.*, 111th Cong. 1 (2010) (statement of Sen. Byron L. Dorgan, Chair, S. Comm. on Indian Affs., U.S. Sen., ND).

[2] *Making Indian Country Count: Native Americans and the 2020 Census: Hearing Before the S. Comm. on Indian Affs.*, 115th Cong. 19 (2018) (statement of Jefferson Keel, President, Nat'l Cong. of Am. Indians).

[3] *Chahtapreneur*, Choctaw Nation Small Bus. Dev., https://choctawsmallbusiness.com/chahtapreneur/ [https://perma.cc/A3QZ-SFPB].

procurement preferences for their citizens as well as other Indians. Indian procurement preferences are constitutional because Indian – as used in the federal Indian law context – is a political classification deriving from tribes' sovereignty rather than a raw, racial classification. Tribes are also creating community development financial institutions to help their citizens access business capital. And approximately a dozen Indian Chambers of Commerce currently exist to provide business trainings and networking opportunities.

Most significantly, tribes have begun promulgating commercial laws. Due to years of federal paternalism and denigrations of tribal sovereignty, some tribes do not have fully developed commercial codes. Without adequate legal infrastructure, businesses do not know which rules to follow. This creates uncertainty, and uncertainty is bad for business. Accordingly, many tribes have started implementing laws designed to make their reservations more attractive business climates. Some tribes have acted alone, and others have sought the guidance of outside institutions. But of all the tribal business law reforms, tribal secured transactions laws have received the most attention.

Secured transactions laws increase investor confidence by improving lenders' likelihood of repayment upon default. Basically, the more likely the lender is to be repaid, the lower the borrower's interest rate. Lower interest rates translate to more capital, which businesses need to operate and grow. Hence, secured transaction laws are hallmarks of economic development efforts in impoverished countries. For this reason, the National Conference of Commissioners on Uniform State Laws partnered with tribes to create a secured transactions law specifically for tribes. The Model Tribal Secured Transactions Act (MTSTA) was published in 2005, and dozens of tribes have implemented it or other secured transactions laws. However, secured transactions laws have not transformed tribal economies.

Although tribal law is vital to tribal economic success, federal law undermines the effectiveness of tribal law. Due to *Oliphant* and its progeny, tribal civil jurisdiction over non-Indians is severely limited. Jurisdictional limitations hinder the force of tribal law, but the unpredictability of when tribal law applies is an equally significant problem. That is, tribal laws like the MTSTA are largely useless if the tribe cannot predictably enforce them. The constraints on tribal civil jurisdiction create uncertainty over which law applies in Indian country and hinders tribal economic development.

## 14.1 *MONTANA* V. *UNITED STATES*: A NEW PATH

Tribes long had commercial laws;[4] in fact, early Congresses openly acknowledged tribal regulations were more important to Indian commerce than federal laws.[5] Once placed on reservations, tribal laws began to wither by federal design. The United States supplanted traditional, Indigenous justice systems with Courts of Indian Offenses and even expressly abolished tribal courts during the 1890s.[6] Notwithstanding, tribal civil jurisdiction over non-Indians was consistently affirmed during the late 1800s and early 1900s.[7] The Supreme Court in 1904 determined the Chickasaw Nation had the ability to require those within its territory to follow Chickasaw regulations.[8] As part of Congress' effort to promote tribal self-government, the 1934 Indian Reorganization Act encouraged the creation of tribal courts. In 1959, the Supreme Court decided suits against Indians arising from events on a reservation must take place in tribal court.[9] Nearly twenty years later, the Supreme Court declared, "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Nonjudicial tribal institutions have also been recognized as competent law-applying bodies."[10] This strong statement in support of tribal courts and self-governance occurred two months after the Court's *Oliphant* decision; however, the Supreme Court soon changed its tune on tribal civil authority over non-Indians.

The Supreme Court issued its "pathmarking"[11] opinion on civil jurisdiction in 1981, *Montana* v. *United States*.[12] The case was a clash between the Crow Tribe of Indians and the state of Montana over regulatory authority on the Crow Reservation. In 1973, the Crow enacted an ordinance prohibiting noncitizens from hunting or fishing on its reservation.[13] According to the federal superintendent of the Crow Reservation,

[4] For an extensive discussion of tribal precontact history, see Chapter 1.
[5] Matthew L. M. Fletcher & Leah K. Jurss, *Tribal Jurisdiction: A Historical Bargain*, 76 Md. L. Rev. 101, 107 (2017).
[6] Choate v. Trapp, 224 U.S. 665, 668 (1912).
[7] Buster v. Wright, 135 F. 947, 951–52 (8th Cir. 1905); Morris v. Hitchcock, 194 U.S. 384 (1904); Maxey v. Wright, 3 Indian Terr. 243, 54 S.W. 807, 809–10 (1900).
[8] *Morris*, 194 U.S. at 384.
[9] Williams v. Lee, 358 U.S. 217 (1959).
[10] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 (1978).
[11] Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997).
[12] Montana v. United States, 450 U.S. 544, 556 (1981).
[13] John P. LaVelle, *Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of* Montana v. United States, *in* Indian Law Stories 535, 539 (Carole Goldberg et al. eds., 2011).

the ordinance was a necessary response to the severe depletion of game within the reservation.[14] Wildlife was becoming scarce because Montana allowed non-Crow to hunt on state-owned parcels within the reservation.[15] Moreover, the superintendent claimed Montana failed to regulate the non-Crow hunters on the reservation.[16] As the number of non-Indian hunters on the Crow Reservation increased, so did the amount of pollution on the reservation.[17] Hence, the Crow Tribe sought to restrict non-Indian hunting on the reservation.

Montana saw things differently. It claimed there was no evidence of overharvesting wildlife or environmental degradation on the Crow Reservation, but the wildlife dispute was essentially a vehicle to present Montana's opposition to tribal authority.[18] Montana's attorneys argued Montanans, as well as other non-Indians, should have "rights to hunt and fish free from Indian interference on fee lands within the reservation."[19] Montana further contended allowing tribes to regulate non-Indians within a reservation jeopardized non-Indian property rights.[20] Non-Indian resistance to tribal authority was the crux of Montana's claim. One National Park Service agent reported being told by a gun-toting, non-Indian fisherman, "Damn it, I am carrying a weapon because I don't want any Indian to tell me what to do or where to fish."[21]

This jurisdictional debate eventually led to the United States filing suit against Montana on behalf on the Crow Tribe. Relying on *Oliphant*, the district court determined tribes lack jurisdiction over non-Indians absent express delegation of authority by Congress, so Montana governed non-Indian hunting and fishing on the Crow Reservation. The Ninth Circuit sided with the Crow Tribe and held the Crow Tribe could regulate non-Indians on trust land within the tribe's reservation. Nonetheless, the Ninth Circuit concluded Montana possessed concurrent authority over non-Indians on non-Indian-owned fee lands within the reservation.

The sovereign struggle reached the Supreme Court, which ruled against the Crow Tribe's authority over non-Indians on fee land within the reservation. Factoring significantly against the Crow Tribe, Montana had long asserted authority over hunting and fishing on the Crow Reservation.

[14] *Id.* at 540.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 543.
[18] *Id.* at 542.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 545.

This was true, but it ignored the federal government's efforts to destroy the Crow government. For example, during the 1920s, the federal government actively sought to eradicate Crow culture and institutions – including slaughtering approximately 50,000 Crow horses.[22] The Crow Tribe was fighting to survive until 1934. Self-government was not a plausible goal for tribes until the 1970s. Had the Court attempted to understand Crow history, it may have viewed the lack of Crow wildlife ordinances differently.

An appreciation of the Crow Tribe's history may have also prevented the Court from making one of the most bizarre statements in the Supreme Court's annals. As part of the Court's justification for denying the Crow Tribe the ability to regulate fishing on *its reservation*, the Court claimed the Crow did not need to govern fishing because "the Crow were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life."[23] This assertion by the Court is perplexing. The dissent responded by stating:

> The factual premise upon which the Court bases its conclusion is open to serious question: while the District Court found that fish were not "a central part of the Crow diet," there was evidence at trial that the Crow ate fish both as a supplement to their buffalo diet and as a substitute for meat in time of scarcity.[24]

To say the majority's "factual premise … is open to serious question" is an understatement.

Joe Medicine Crow, a Crow citizen and the Crow Tribe's official historian, testified at trial of numerous instances of the Crow fishing as well as the role of fishing in Crow culture.[25] Medicine Crow held a master's degree in anthropology and would have earned a doctorate had he not volunteered to defend the United States during World War II. Medicine Crow's military service is the stuff of legend – he is likely the last person who will ever complete the four tasks to become a Crow war chief: leading a successful war party, touching an enemy without killing him, seizing an enemy's weapon, and stealing an enemy's horse.[26] Medicine

[22] Carrie McCleary, *Of Horses and Men: Superintendent Asbury's Deadly Assault on the Crow*, Tribal C.J. Am. Indian Higher Ed. (Feb. 15, 2003), https://tribalcollegejournal.org/horses-men-superintendent-asbury%E2%80%99s-deadly-assault-crow/#:~:text=When%20the%20Office%20of%20Indian,human%20oppression%20onto%20Crow%20culture [https://perma.cc/BS3C-DWG7].

[23] Montana v. United States, 450 U.S. 544, 556 (1981).

[24] *Id.* at 570 (Blackmun, J., dissenting in part) (citation omitted).

[25] LaVelle, *supra* note 13, at 551–53.

[26] Ben Thompson, *Badass of the Week: Joe Medicine Crow*, Military.com, www.military.com/army-birthday/badass-of-the-week-joe-medicine-crow.html [https://perma.cc/4TDJ-GU7F].

Crow's work as a historian and his World War II heroics earned him the Presidential Medal of Freedom.[27] Nevertheless, his testimony about Crow culture was given no weight by a majority of the Supreme Court. In case Joe Medicine Crow's knowledge about whether the Crow ate fish remains in doubt, recent archaeological excavations of Crow land have discovered "numerous fish bones show[ing] that another staple was cutthroat trout."[28]

Ignoring facts that support tribal sovereignty was used to undercut tribal jurisdiction in *Oliphant*, and the Court relied on *Oliphant* to legitimize its assault on tribal sovereignty in *Montana*. Building upon *Oliphant*, the Court claimed: "[T]he Indian tribes have lost any 'right of governing every person within their limits except themselves.'"[29] The Court was clear in stating *Oliphant* only applied to criminal jurisdiction; indeed, the legal authorities the Supreme Court relied on in *Oliphant* admitted tribes retained civil jurisdiction over all cases arising in Indian country.[30] Nonetheless, the Court believed the spirit of *Oliphant* applied to tribal civil authority over non-Indians too, meaning tribes presumptively lack authority over the non-Indians who enter tribal land.

The Court provided two exceptions to this general rule, known as the "*Montana* Exceptions." *Montana* One enables tribes to assert jurisdiction over non-Indians who enter a consensual relationship with the tribe or its citizens. *Montana* Two permits tribes to exercise jurisdiction over non-Indians engaged in "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[31] Neither exception was met in *Montana* because the non-Indians did not enter consensual relationships with the tribe nor was tribal authority needed because the state had long asserted jurisdiction over hunting and fishing on allotted lands within the reservation.

The *Montana* exceptions remain the benchmark for tribal civil authority over non-Indians. *Montana* One seems clear, and *Montana* Two seems broad. Neither has proven to be the case. Plus, the *Montana* exceptions applicability is subject to debate. *Montana* was specifically about tribal

[27] *Id.*

[28] Steve Platt & Alan Woodmansey, *Unearthing Crow Tribal History*, U.S. Dep't of Transportation, Fed. Highway Admin. (July/Aug. 2012), https://highways.dot.gov/public-roads/julyaugust-2012/unearthing-crow-tribal-history [https://perma.cc/NTV7-CA7L].

[29] Montana v. United States, 450 U.S. 544, 565 (1981).

[30] Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 855 n.17 (1985).

[31] *Montana*, 450 U.S. at 566.

authority over non-Indians on fee lands within a reservation. Subsequent decisions have seemingly stretched *Montana* to trust lands, but this has never been decisively determined. Accordingly, some courts do not apply *Montana* when disputes arise on reservation trust land.[32] Then *Montana* and subsequent cases have distinguished between members and nonmembers of the tribe. Making the distinction, the Supreme Court has relied upon nonmembers' lack of political status in other tribes, contending, "For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation."[33] This reasoning makes little sense given tribes can criminally prosecute nonmember Indians. Thus, ambiguity reigns over how to apply the *Montana* exceptions.

Not knowing when tribal law applies creates significant uncertainty, and uncertainty is bad for economies. Additionally, not being able to consistently enforce tribal law inhibits the force of law. Placing limits on the scope of tribal law undermines tribes' ability to function as governments.

## 14.2 THE PATH IS NOT CLEAR: *DOLLAR GENERAL* V. *MISSISSIPPI BAND OF CHOCTAW INDIANS*

Because tribal jurisdiction over non-Indians is limited, non-Indians can contest tribal jurisdiction in federal court. Non-Indians routinely challenge tribal jurisdiction, but before the case can enter federal court, non-Indians must exhaust their tribal court remedies. Essentially, the only way to bypass the tribal court system is to establish the tribal court is acting in bad faith. This rarely happens. As a result, parties must work their way through each level of the tribal court system prior to entering federal court, which can take years. The case may then spend years in the federal court system. During this time, businesses are mired in uncertainty and spending money on legal fees, not to resolve the suit but merely to discern where to file the lawsuit. *Dollar General* v. *Mississippi Band of Choctaw Indians*[34] epitomizes this issue.

The facts of the case are simple enough. Dollar General opened a store on trust land within the Mississippi Band of Choctaw Indians (MBCI) Reservation. To do so, Dollar General leased land from the tribe. The lease agreement stated Dollar General agreed to "comply with all

[32] Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802 (9th Cir. 2011).
[33] Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 161 (1980).
[34] Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 579 U.S. 545 (2016) (per curiam).

codes and requirements of all tribal and federal laws and regulations" governing leased area.[35] Likewise, the lease contained a clause noting the lease would be construed according to MBCI law and the lessee "is subject to the Choctaw Tribal Tort Claims Act."[36] The lease also clearly stated the MBCI court had "[e]xclusive venue and jurisdiction" over actions arising from the lease.[37]

The MBCI had a job training program for tribal youth and placed them in internships with businesses. In 2003, Dollar General accepted a thirteen-year-old Choctaw boy as an intern at its reservation store. Allegedly, the store's manager molested the boy during the internship. The tribe lacked criminal jurisdiction under *Oliphant*, and federal prosecutors did not pursue the case. Seeking some measure of justice, the child's family filed a tort suit in MBCI court against Dollar General and the store manager in 2005. The defendants contested the tribal court's jurisdiction.

Three years later, the case reached the MBCI Supreme Court, which opined it had jurisdiction over both parties under both *Montana* exceptions. Regarding *Montana* One, the MBCI court explained, "The alleged tort in this case took place on the leased premises that are subject of the consensual agreement and the individual tortfeasor was an employee, indeed the manager of the leased premises. Thus there is a considerable nexus between the alleged tort and the commercial lease."[38] The MBCI court also believed *Montana* Two was fulfilled because the tort at issue directly impacted the health and welfare of the tribe because the tribe is composed of its citizens, one of whom was allegedly sexually assaulted while in the employment of a business located on the Choctaw Reservation.[39]

After the MBCI Supreme Court issued its opinion, Dollar General was able to contest tribal jurisdiction in federal court. The federal district court did not think *Montana* Two provided a plausible claim for tribal jurisdiction, asserting the child sexual assault in this case did not imperil

[35] Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167, 174 n.4 (5th Cir. 2014).
[36] *Id.*
[37] *Id.*
[38] Doe v. Dollar General Corp. No. CV-02-05 (Mississippi Band of Choctaw Indians Sup. Ct. Feb. 8, 2008), https://sct.narf.org/documents/dollar_general_v_choctaw/miss_choctaw_supreme/mississippi-choctaw-supreme-court-opinion.pdf [https://perma.cc/7S2G-DN4D].
[39] *Id.*

tribal welfare.[40] Turning to *Montana* One, the court believed there was no conceivable basis for a consensual relationship between the store manager and MBCI or the child because the store manager never directly contracted with the tribe.[41] Consequently, the federal district court let the store manager elude tribal jurisdiction. However, in 2011, the district court concluded Dollar General's contractual relationship with MBCI permitted the tribal court to exercise jurisdiction over Dollar General under *Montana* One.

In 2014, the federal Fifth Circuit Court of Appeals issued a two-to-one opinion in favor of tribal civil jurisdiction over Dollar General.[42] The majority explained jurisdiction existed under *Montana* One because the events in question arose from Dollar General's business relationship with the tribe. Hence, "[h]aving agreed to place a minor tribe member in a position of quasi-employment on Indian land in a reservation, it would hardly be surprising for Dolgencorp to have to answer in tribal court for harm caused to the child in the course of his employment."[43] On the other hand, the dissenting judge thought allowing the MBCI court to adjudicate the dispute involving Dollar General was "alarming and unprecedented."[44] The dissenter stated, "The elements of Doe's claims under Indian tribal law are unknown to [Dollar General] and may very well be undiscoverable by it."[45] The majority responded to this contention by asserting, "Doe has brought two specific claims, both of which are based on the alleged sexual molestation of a child by a store manager. We suspect that Dolgencorp could have easily anticipated that such a thing would be actionable under Choctaw law."[46]

Dollar General appealed this decision to the United States Supreme Court. The Court granted certiorari in June of 2015.[47] In its brief to the Supreme Court, Dollar General was candid in its belief that tribes should

[40] Dolgen Corp. v. The Mississippi Band of Choctaw Indians, No. 4:08CV22TSL-JCS, 2008 U.S. Dist. Lexis 103409, at *10 (S.D. Miss. Dec. 19, 2008), *disapproved in later proceedings sub nom.*, Dolgencorp Inc. v. Mississippi Band of Choctaw Indians, 846 F. Supp. 2d 646 (S.D. Miss. 2011), *aff'd*, 732 F.3d 409 (5th Cir. 2013), *opinion withdrawn and superseded*, 746 F.3d 167 (5th Cir. 2014).

[41] *Dolgen Corp.*, 2008 U.S. Dist. Lexis 103409, at *22–23.

[42] Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014), *aff'd by equally divided court*, 579 U.S. 545 (2016).

[43] *Id.* at 174.

[44] *Id.* at 177–78 (Smith, J., dissenting).

[45] *Id.* at 181.

[46] *Id.* at 174 n.4 (majority opinion).

[47] Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 576 U.S. 1021 (2015).

be treated as lesser governments. Dollar General even quoted a passage from the 1891 case of *In re Mayfield*,[48] declaring, "The policy of congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact ...."[49] On the other hand, Mississippi and five other states submitted a brief in support of MBCI, alleging Dollar General's position would undermine the rights of all sovereigns.[50] Ultimately, the case reached an unsatisfactory conclusion, with the Supreme Court split four-to-four over whether Dollar General's lease with MBCI satisfied *Montana* One; consequently, the Fifth Circuit's opinion was affirmed. The four-to-four tie occurred because Justice Antonin Scalia died while the case was pending.

Perhaps more troubling than the case's result, over a decade was spent litigating *where to litigate* the case. Ordinarily, parties can avoid disputes over where to sue by placing a clause in the contract stating the parties agree to litigate disputes arising from the contract in a designated forum. However, a forum selection clause existed in Dollar General's lease. The forum selection clause named the MBCI courts as the exclusive forum. Nonetheless, the Supreme Court was divided on whether this clause carried any weight, which is confusing given the Supreme Court enforces forum selection clauses naming foreign tribunals as the adjudicatory body. The Court's refusal to honor the forum selection clause naming the MBCI court as the forum is a symptom of the Court viewing tribes as lesser governments.

Part of the trouble with forum selection clauses in tribal courts is a forum selection clause cannot imbue a court with the power to hear a case. For example, parties cannot agree to adjudicate their car wreck in bankruptcy court because bankruptcy courts can only hear matters relating to bankruptcy. As a result, non-Indian parties cannot consent to tribal court jurisdiction for matters outside of *Montana* One or Two, which is flummoxing because *Montana* One's jurisdictional requirement is consent. A forum selection clause is a prime example of consent.

[48] *In re* Mayfield, 141 U.S. 107 (1891).

[49] *Id.* at 115; Brief for Petitioner at 35, Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 579 U.S. 545 (2016) (per curiam) (No. 13–1496), www.scotusblog.com/wp-content/uploads/2015/09/13-1496-ts1.pdf [https://perma.cc/QF82-RY7W].

[50] Brief for the States of Miss. et al. as Amici Curiae in Support of Respondents at 1, Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 579 U.S. 545 (2016) (per curiam) (No. 13–1496), www.scotusblog.com/wp-content/uploads/2015/10/13-1496_amicus_resp_States.authcheckdam.pdf [https://perma.cc/HF5E-8LEF].

Similarly, the parties may not be able to avoid tribal court jurisdiction if the event arises in Indian country and an Indian is a defendant because tribal courts ordinarily have exclusive jurisdiction over civil actions filed against Indian defendants that arise in Indian country. Federal courts have reached varying results in the effectiveness of forum selection clauses in Indian country.

The jurisdictional issues extend to simple matters of court procedure. Serving process across reservations borders can be tricky. Tribes probably cannot drag non-Indians from states into reservations for trials. In fact, non-Indians sometimes file suit in tribal court then hop across the reservation border and claim the tribal court lacks jurisdiction if their suit turns sour.[51] States may also have issues when trying to serve process on Indians within Indian country.[52] Then counterclaims – when the defendant chooses to file a lawsuit against the person suing the defendant – may not be possible because of Indian country's peculiar jurisdictional rules. Likewise, the tribal court may have jurisdiction over a breach of contract claim but not discrimination or negligence claims arising from the contract. This means parties will have to file the breach of contract claim in tribal court and the other claims in state court. This is inefficient.

Similarly, the ability of tribes to govern their lands free from state interference is unclear, so there is confusion over which government has authority to regulate activities on tribal lands. To discern whether states can assert jurisdiction over reservation activity, courts balance the tribal, state, and federal interests involved in the activity, known as the *Bracker* balancing test for its namesake case.[53] Chief Justice John Roberts recently opined of this query, "This test mires state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all."[54] Uncertainty prevails, but the scales have clearly tipped in favor of state authority.

[51] Joseph Chilton, *The Jurisdictional "Haze": An Examination of Tribal Court Contempt Powers Over Non-Indians*, 90 N.C. L. Rev. 1189 (2012).

[52] William Canby, Jr., Indian Law in a Nutshell 231–32 (7th ed. 2020); Katosha Belvin Nakai, *Red Rover, Red Rover: A Call for Comity in Linking Tribal and State Long-Arm Provisions for Service of Process in Indian Country*, 35 Ariz. St. L.J. 633, 635 (2003); Raymond Cross, *De-federalizing American Indian Commerce: Toward a New Political Economy for Indian Country*, 16 Harv. J.L. & Pub. Pol'y 445, 466 (1993). These sources note the difficulty with service of process in Indian country. Contrast these with the Supreme Court's deliberations regarding state court's service of process in Indian country in Nevada v. Hicks, 533 U.S. 353, 663–65 (2001).

[53] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

[54] McGirt v. Oklahoma, 591 U.S. 894, 972 (2020) (Roberts, C.J., dissenting).

## 14.3 TAXATION OR THEFT?

The scales have tipped farthest in favor of states in the realm of taxation. While tribes have the inherent sovereign right to tax activities occurring within their borders, states can usually tax Indian country commerce. There are two exceptions to this rule: States cannot tax tribes nor can states tax tribal citizens within the borders of their tribes' Indian country. Otherwise, the *Bracker* balancing test is used to determine whether state taxation of Indian country commerce is preempted. Courts typically hold states have the right to tax tribal commerce if the state *alleges* it provides a service within Indian country. Quil Ceda Village, located on the Tulalip Tribes' reservation, is a particularly egregious example of this injustice.

The Tulalip Tribes purchased an undeveloped tract of land located within its reservation in 1949.[55] Tulalip built all of the infrastructure on the site, including roads, water, gas, and telecommunications, with financial assistance from the federal government. Tulalip planned and controlled all the development on the land. To bolster its chances of preempting state taxes, Tulalip had the tract incorporated as a federal municipality – Quil Ceda Village (QCV)[56] – making it the only federal municipality besides Washington, DC. QCV has a government that is independent of the Tulalip Tribes. According to a federal district court in 2018, Tulalip spent more than $150 million developing QCV. This was approximately 76% of the project cost. The federal government contributed 19% while Washington State and Snohomish County together contributed 5%.

QCV is now a thriving municipality and home to dozens of major businesses such as Walmart, Home Depot, Bank of America, and restaurant chains. Tens of thousands of people visit QCV each day. Despite QCV and Tulalip providing all government services at QCV, the state of Washington and Snohomish County collect more than $40 million per year from QCV in tax revenue. The state and county tax prevented QCV and Tulalip from collecting a single cent in tax revenue. After all, if the state and county are levying taxes, any additional tax imposed by QCV or the tribe would make goods more expensive at QCV than off the reservation. Thus, QCV merely collected lease payments from QCV tenets.

[55] Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046, 1051 (W.D. Wash. 2018).

[56] *Welcome to Quil Ceda Village*, Consolidated Borough of Quil Ceda Village, www.quilcedavillage.org/ [https://perma.cc/MY38-W62C].

In 2015, Tulalip filed suit alleging Washington and Snohomish County had no right to tax the commerce occurring at QCV. Tulalip and QCV argued they were responsible for creating and operating QCV. They further argued the state and county levies prohibit QCV from assessing taxes because these taxes plus the tribal tax resulted in higher prices on than off Tulalip. The resulting higher prices would drive consumers away from QCV. The United States joined Tulalip and wrote, "In imposing taxes on Quil Ceda sales, services, and business activities, the State and County seek to raise revenues from activities that cost them nothing, and over which they exercise no control."[57] Washington and Snohomish County countered by asserting they added value to QCV, though they could not provide a dollar value.

The federal district court held Washington and Snohomish County had the power to tax QCV. Although the court acknowledged the federal government's policy of promoting tribal economic development and self-government, the court thought construing these policies as preempting the state and local taxes would read the federal policy too broadly. Curiously, the court interpreted federal legislation granting Tulalip greater control over tribal lands as reducing the federal interest in Tulalip and evincing a federal desire to permit the state taxes of QCV. The court also believed QCV and the federal government's failure to micromanage the privately owned businesses at QCV as a sign both governments had little interest in the businesses. Additionally, the court pointed to QCV's success to show the state and local taxes had not impeded the federal or tribal interest in tribal economic development – so maybe the court was crafting a tribal success tax?

The court could not identify a state interest other than collecting taxes from QCV. The court admitted Washington did not provide any direct services at QCV; indeed, it would have been disingenuous to denote any value contributed by the state or county. As Tulalip Tribal Board Chairwoman Teri Gobin said, "To date, we have never received a dollar, yet we have been 100% responsible for the costs of all the infrastructure and governmental services that allow those businesses to operate."[58] Instead, the court pointed to services Washington and Snohomish County provide *outside of* QCV. This is little more than deflection

[57] United States' Complaint in Intervention at 20:3–6, Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046 (W.D. Wash. 2018) (No. 2:15-cv-00940).

[58] Jerry Cornfield, *Deal Ends Legal Fight and Allows Tulalips a Cut of Sales Tax*, HeraldNet (Jan. 29, 2020), www.heraldnet.com/news/deal-ends-legal-fight-and-allows-tulalips-a-cut-of-sales-tax/ [https://perma.cc/CY2P-DUVY].

because QCV provided value off reservation by directly employing more than 8,000 people. These employees pay state and local taxes when they leave QCV. Although Washington and Snohomish County prevailed at the district court, they both chose to enter a tax sharing agreement with QCV. Tulalip will ultimately end up with about half the tax revenue collected at QCV.[59] This is an improvement for QCV; nevertheless, the state and county should have no ability to collect any tax revenue from tribal lands, particularly when the state and county contribute no value.

## 14.4 WHAT IS LEGAL?

Which government has authority to tax does not impact the legality of the underlying activity, and debates over whether an activity is lawful within Indian country arise from time to time. Without question, the most famous example is gaming. Tribes began opening bingo parlors and gaming within the borders of their reservations during the late 1960s. Disputes with the surrounding state and county often arose because gaming was usually subject to strict regulation at the state level. Tribes claimed their sovereignty enabled them to legalize gaming on tribal lands. States vigorously opposed tribes' choice to legalize gaming on *their* land.

The litigation reached its climax in the 1987 Supreme Court case *California* v. *Cabazon Band of Mission Indians*.[60] California claimed it had authority to regulate gaming on tribal lands, but the Supreme Court disagreed. The Court reasoned gaming furthered federal interests by generating revenue to fund tribal governments. To support this proposition, the Court noted the Secretary of the Interior approved the tribal gaming ordinances at issue and financed Indian gaming operations. Additionally, the Secretary of the Interior approved gaming management contracts. The Court also acknowledged tribes created value on their reservations by constructing and operating casinos on their lands; that is, tribes were not passively marketing an exemption from state law. California's only argument was state regulation was needed to prevent tribal gaming from being infiltrated by criminal syndicates. While the Court accepted this as a legitimate state interest, the Court noted California could point to no example of organized crime's involvement in Indian gaming.

Aside from the balancing of tribal, state, and federal interests, the Court reasoned gaming did not violate California's public policy. The

[59] *Id.*
[60] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

state did not prohibit gaming; rather, several forms of gaming were legal in California. In fact, there were more than 400 card rooms lawfully operating within the state. The Court further pointed out that "California itself operates a state lottery, and daily encourages its citizens to participate in this state-run gambling."[61] Thus, gaming was not prohibited in California – California merely regulated gaming. Lawful gaming, even if strictly regulated, indicated California had no public policy objection to tribal gaming, essentially a difference between activities a state criminally prohibits and civilly regulates. Accordingly, the Court refused to allow California to impose its gaming ordinances on tribal lands. This resulted in tribes winning the case.

Upset by the tribal victory, states lobbied Congress to enact the Indian Gaming Regulatory Act (IGRA) in 1988.[62] The Act grants states significant influence over tribes' ability to engage in gaming on tribal lands; in fact, IGRA forces tribes to negotiate a compact with states for the right to engage in Vegas-style gaming on tribal lands. Although IGRA does not authorize state taxation of tribes, IGRA grants states the power to insist that tribes make a voluntary contribution to state coffers.[63] If the Secretary of the Interior thinks the state demands are too steep, the Secretary will not approve the compact, thereby preventing the tribe from opening a casino.[64] Tribes have no recourse if states refuse to negotiate in good faith.[65]

IGRA only supersedes *Cabazon* with regard to gaming, so *Cabazon*'s criminal/prohibitory versus civil/regulatory distinction remains the law. This framework has created uncertainty. Cannabis provides a prime example. During the early 2010s, states began legalizing various cannabis products. Following the *Cabazon* rationale, a state's legalization of medical marijuana paved the way for recreational marijuana in Indian country. However, this did not work because cannabis production was illegal under federal law. Tribal efforts to legalize cannabis ahead of the surrounding state uniformly failed. States pressured federal prosecutors to pursue tribal cannabis cultivation, and the feds generally obliged.

[61] *Id.* at 210.
[62] 25 U.S.C. §§ 2701–2721 (2024).
[63] 25 U.S.C. § 2701(d)(d)(C)(iii) (2024); Cohen's Handbook of Federal Indian Law § 12.05[2] (Nell Jessup Newton et al. eds., 2012 ed.).
[64] Cohen's Handbook, *supra* note 63, at § 12.05[2] n.16.
[65] Steven Andrew Light et al., *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. Rev. 657, 666 (2004).

Debates over cannabis are coming to an end as states increasingly move toward legalization, but many gray areas in the law remain, including can tribes craft different gun laws than the surrounding state and can tribes legalize healthcare practices the surrounding state forbids?

## 14.5 TRIBAL SOVEREIGNTY AND THE DIGITAL FRONTIER

Although federal Indian law is often unclear in many areas, tribal sovereignty in the digital sphere is largely uncharted territory. Part of the reason is e-commerce is a relatively new phenomenon; consequently, foundational legal issues are still being resolved outside of Indian country. However, the resolutions often ignore Indian country. For example, in 2018, the Supreme Court addressed taxation in e-commerce, holding retailers conducting substantial quantities of business in states where they lack physical presence may be required to pay taxes in those states.[66] The National Congress of American Indians submitted a brief urging the Court to address tribal e-commerce in its opinion,[67] but the Supreme Court failed to touch on the issue. Thus, the law surrounding Indian country e-commerce is a mystery.

Online lending is the current battleground for tribal sovereignty in the digital world. Tribal sovereignty enables tribes to promulgate their own financial laws; indeed, the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank)[68] is pellucid in defining federally recognized tribes as states for financial purposes.[69] Accordingly, about two dozen tribes have entered the lending industry. These tribes have crafted their own lending laws and even their own financial regulatory bodies. Tribes offer their financial products over the internet. Like most modern contracts, the tribal loan agreements contain choice of law and forum selection clauses. Tribal loan agreements select tribal law as the governing law. As the forum, the loan agreements either choose

[66] South Dakota v. Wayfair, Inc., 585 U.S. 162 (2018).

[67] Brief for the Nat'l Cong. of Am. Indians and Indian Tribes in S.D. as *Amici Curiae* in Support of Neither Party, South Dakota v. Wayfair, Inc., 585 U.S. 162 (2018) (No. 17–494), www.supremecourt.gov/DocketPDF/17/17-494/37574/20180305121111767_17-494%20ac%20NCAI.pdf [https://perma.cc/47LB-Q2ES].

[68] Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1376, *partially repealed by* Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018, Pub. L. No. 115–174, 131 Stat. 1296.

[69] Consumer Financial Protection Act of 2010, Pub. L. No. 111–203, Title X, § 1002(27), 124 Stat. 1955, 1963.

arbitration or tribal court. Customers are usually non-Indians who have never visited the tribe's Indian country.

Tribal financial laws have proven to be extremely controversial. The major reason is the borrowers are usually subprime; that is, tribes have become lenders of last resort. Subprime borrowers present a high risk of default, so lenders charge high interest rates to account for the risk. And high interest rates are the source of the controversy as tribal lenders may charge in excess of 400% interest. Most states set a usury limit of around 30 percent. These low rates are intended to protect consumers, but many economists question this. If individuals with bad credit cannot obtain a loan through conventional means, then those with bad credit have nowhere to turn when an unfortunate event occurs. For example, a person's car breaks down, and she lacks the cash on hand to pay for repairs. Without her car, she may not be able to travel to work. She may lose her job as a result. Preventing people from taking out high interest loans does not improve their condition – it merely limits their choices. Also worth noting, a 400% annual percentage rate is high, but in the short term, this usually amounts to $15 for every $100 borrowed.[70] Most of the controversy around tribal lending involves short-term loans, and the annual percentage rate only becomes relevant if the loan is paid over a year.[71]

Tribal lending has faced staunch opposition. Ironically, those who borrow from tribal lenders often claim tribal law does not apply to them although tribal law is the very thing that enabled the borrower's loan. Courts have usually sided with borrowers. The following passage from a 2014 Seventh Circuit Court of Appeals case summarizes the sentiments of many courts:

> [T]he Plaintiffs have not engaged in *any* activities inside the reservation. They did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents. They applied for loans in Illinois by accessing a website. They made payments on the loans and paid the financing charges from Illinois.

[70] Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 Drake L. Rev. 1, 6 (2018).

[71] Tom Barkley, *Predatory Lending Laws: What You Need to Know*, Investopedia (updated Aug. 25, 2022), www.investopedia.com/predatory-lending-laws-what-you-need-to-know-5114539 [https://perma.cc/AP67-QDVS]; *My Payday Lender Said My Loan Would Cost 5 Percent but My Loan Documents Say the Annual Percentage Rate (APR) Is Almost 400 Percent. What Is an APR on a Payday Loan and How Should I Use It?*, Consumer Fin. Protection Bureau, www.consumerfinance.gov/ask-cfpb/my-payday-lender-said-my-loan-would-cost-15-percent-but-my-loan-documents-say-the-annual-percentage-rate-apr-is-almost-400-percent-what-is-an-apr-on-a-payday-loan-and-how-should-i-use-it-en-1625 [https://perma.cc/A6KR-BAPP].

Because the Plaintiffs' activities do not implicate the sovereignty of the tribe over its land and its concomitant authority to regulate the activity of nonmembers on that land, the tribal courts do not have jurisdiction over the Plaintiffs' claims.[72]

Courts have followed this line of reasoning to conclude tribal courts lack jurisdiction over loans with non-Indians under *Montana* One's consensual relationship jurisdictional hook.

This is curious. The Supreme Court has been clear that consent is a basis for tribal jurisdiction over non-Indians, and a loan is unquestionably a consensual relationship – the lender *consents* to transfer money to a borrower on the condition the borrower *consents* to repay the money at a set rate of interest. Furthermore, the borrower *consents* to adjudicate the loan in a particular forum in the loan contract, often arbitration or a tribal court. Forum selection clauses and arbitration agreements are almost always unblinkingly enforced by courts. While consumer advocates have raised concerns about forum selection clauses, the Supreme Court has consistently affirmed forum selection clauses and arbitration agreements in consumer cases.[73]

Concerns over non-Indians being mistreated by tribal courts lack basis as loans usually turn on a simple question – was timely payment made? Clear written evidence can conclusively answer the question. On top of this, borrowers purposely seek out tribal law to obtain the loans. Pursuing the benefits of tribal law then asking a third party to annul the costs is disingenuous. State and federal courts have also emphasized the non-Indian borrowers do not actually visit the reservation to take out the loan and use this fact to negate the loan. However, consumers regularly purchase goods across state lines without ever leaving their home, and there is little controversy over jurisdiction in these cases. It is unclear why tribal courts should face a different jurisdictional standard. Plus, the consumers in lending cases are merely seeking cash. Cash is legal in every single state, so the end result of the transaction does not result in an illegal substance being transferred into states.

To be fair, much of the jurisprudence relating to tribal lenders developed under shady auspices. Too many cases to count involved Western Sky and other lenders owned by Martin Webb, and Webb's enterprises created a bad first impression of tribal lending. While Martin Webb was an enrolled citizen of the Cheyenne River Sioux Tribe, Western Sky was

[72] Jackson v. Payday Fin., LLC, 764 F.3d 765, 782 (7th Cir. 2014) (emphasis in original).
[73] Adam Crepelle, *Legal Issues in Tribal E-Commerce*, 10 Am. U. Bus. L. Rev. 410–11 (2022); *id*, at 425–26.

incorporated under South Dakota law. Hence, the company was a run-of-the-mill South Dakota business for legal purposes. The loan contracts with Webb's company named arbitration as the dispute mechanism but did not name a qualified arbitrator. The Cheyenne River Sioux Tribe had not promulgated any rules relating to lending either. Accordingly, federal courts rightfully decried Western Sky's arbitration clause as "a sham from stem to stern."[74] Factors like this have contributed to federal and state courts' reluctance to recognize tribal authority over non-Indians in online lending disputes. Alas, a few bad actors should not prevent tribes from exercising their sovereign right to craft financial laws.

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Uncertain jurisdiction harms tribal economies by creating lengthy delays to determine basic issues, like which law applies: tribal or state? Uncertainty over tribal jurisdiction also undermines tribes' ability to function as governments. The constraints on tribal jurisdiction are a consequence of viewing tribes not as sovereigns but as a minority group that happens to possess land. Expanding tribal jurisdiction is essential if tribes are to become nations again.

[74] *Payday Fin, LLC*, 764 F.3d at 779.