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NORTON V. UTE INDIAN TRIBE: SEEKING CONCRETE DELINEATIONS IN THE TRIBAL EXHAUSTION DOCTRINE

While American Indian tribes are ever-seeking to promote their own self-governance and right to territorial management within reservation borders, tribal judicial systems have been traditionally limited in their ability to assert civil jurisdiction over nonmembers within reservations. The Ute Tribe's desire for control within its reservation led to the Tenth Circuit Court of Appeals' decision in *Norton v. Ute Indian Tribe*,¹ in which the court found that nonmember defendants must exhaust Ute tribal remedies with respect to a tribal trespass claim, but not for other tribal tort claims asserted in the aftermath of the death of a tribal member, Todd Murray.² Murray died following a police pursuit led by Utah State Trooper Dave Swenson on April 1, 2007.³ Following Murray's death, which occurred within the Ute Reservation, Ute tribal law enforcement officers were prevented from accessing the scene.⁴ In response, Murray's parents, his estate, and the Ute Tribe sued Swenson and other officers involved for wrongful trespass, false arrest, spoliation of evidence, conspiracy, and other torts.⁵ The officers then filed a 42 U.S.C. § 1983 claim in federal district court against the Ute Tribe and a number of its branches, including the Ute Tribal Court.⁶ The United States District Court for the District of Utah then enjoined the Ute Tribal Court action, holding that the tribal court lacked civil jurisdiction over the officers.⁷ On appeal, the Tenth Circuit Court of Appeals found that the district court had erred in enjoining the suit before the officers had exhausted tribal court remedies with respect to the Tribe's trespass claim.

On the day of his death, Murray was a passenger in a vehicle that officer Swenson attempted to stop for speeding near the Ute Reservation.⁸ Instead of stopping, the driver turned into the Reservation, initiating a thirty-minute chase that ended when the driver and Murray exited the vehicle and ran.⁹ Although the driver was quickly apprehended, Murray escaped on foot.¹⁰ Upon returning to his car with the apprehended driver, Swenson was joined by a number of additional law enforcement officials, none of whom were cross-deputized to assert law enforcement authority on the Ute

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1. *Norton v. Ute Indian Tribe*, No. 15-4170 (10th Cir. July 11, 2017).
 2. *Id.* at 2.
 3. *Id.*
 4. *Id.* at 5.
 5. *Id.* at 2.
 6. *Id.*
 7. *Id.*
 8. *Id.* at 4.
 9. *Id.*
 10. *Id.*

Reservation.¹¹ Swenson and the additional officers eventually located Murray and ordered him to the ground, but Murray continued to resist capture.¹² One of the additional officers, Vance Norton, fired two shots toward Murray, who was thereafter declared dead from a gunshot wound.¹³ Shortly after Murray's death, a certified Ute tribal officer and tribal member arrived on the scene, but Swenson and the additional officers forbade him from accessing the scene.¹⁴ Because these events involved a tribal member's death within the Reservation, the Ute Tribal Court asserted civil jurisdiction over the officers with respect to claims arising from the incident.

The tribal exhaustion doctrine is judicially created and rooted in comity.¹⁵ The rule seeks to forward federal policies of promoting tribal sovereignty, including, "(1) furthering the congressional policy of supporting tribal self-government; (2) promoting the orderly administration of justice by allowing a full record to be developed by the tribal court; and (3) obtaining the benefit of tribal expertise if further review becomes necessary."¹⁶ The doctrine requires that federal courts defer to tribal courts in instances of concurrent jurisdiction in civil disputes between Indians and non-Indians for which tribal courts assert jurisdiction. In these instances, before a federal district court may address whether an Indian tribal court properly asserts jurisdiction, a party must first exhaust tribal court remedies.¹⁷ Generally, this means that parties to certain cases involving Indians or Indian land must exhaust tribal remedies prior to seeking relief in federal court.¹⁸ In requiring tribal exhaustion, federal courts need not affirmatively determine that civil jurisdiction lies with the tribe, but rather that the tribe has a colorable claim to jurisdiction.¹⁹ Tribal jurisdiction may then be challenged in federal court following tribal exhaustion.

The Tenth Circuit follows *Montana*²⁰ jurisprudence when addressing tribal assertions of civil jurisdiction. Under *Montana*, the court begins from the presumption that tribal civil jurisdiction only extends to tribal members and cannot be asserted over non-members.²¹ However, in *Montana*, the U.S. Supreme Court set forth two exceptions allowing tribal civil jurisdiction over non-members.²² First, a tribe may assert civil jurisdiction

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 5.

15. *Id.* at 7.

16. *Id.* at 6–7 (quoting *Kerr-McGee Corp. v. Farley*, 115 F.3d, 1498, 1507 (10th Cir. 1997)).

17. *Id.* at 10–11 (quoting *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. In Iowa*, 609 F.3d 927, 937 (8th Cir. 2010)).

18. *Id.* at 3.

19. *Id.* at 8 (quoting *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1238 (10th Cir. 2014)).

20. *Montana v. United States*, 450 U.S. 544 (1981).

21. Norton, No. 15-4170 at 8 (quoting *Montana*, 450 U.S. at 566 (1981)).

22. *Id.* at 8 (citing *Montana*, 450 U.S. at 566 (1981)).

in instances in which the tribe is regulating consensual activities between nonmembers and the tribe or its members.²³ Second, a tribe may assert civil jurisdiction when the conduct of non-Indians “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²⁴

Both the officers and district court relied upon *Hicks* to support a finding against tribal jurisdiction over of the officers. The Tenth Circuit, however, disagreed. In *Hicks*, the U.S. Supreme Court held that a tribal court lacked jurisdiction over nonmember law enforcement officers that allegedly conducted an illegal search and seizure of a tribal member’s home on reservation land.²⁵ The Court reasoned, “The State’s interest in pursuing off-reservation violations of its laws outweighed the tribe’s sovereign right to make their own laws and be governed by them.”²⁶ The Tenth Circuit distinguished *Norton* from *Hicks*, however, by pointing out that Murray was not suspected of committing any off-reservation crime.²⁷ Although Murray was in the car fleeing the police, he was merely a passenger.²⁸ Therefore, *Hicks* was unable to shield the officers from tribal jurisdiction, as Murray’s death did not implicate any state interest in pursuing off-reservation violations. The court then moved to a *Montana* analysis to determine whether the tribal court could colorably assert civil jurisdiction over the officers. The court found that the Tribe’s trespass claim did fit within *Montana*’s second exception, as the particular allegations of the claim potentially qualified as a critical undermining of the Tribe’s ability to manage its territory and to engage in self-government.²⁹ With respect to all other claims including false arrest, spoliation of evidence, and conspiracy, the court found no plausible tribal jurisdiction, as they did not meet either of the *Montana* exceptions.

In finding that the district court erred in excusing the officers from exhaustion of tribal remedies regarding the Tribe’s trespass claim, the Tenth Circuit Court of Appeals clearly seems to have come to the proper conclusion. Notwithstanding the physical threats to tribal property posed by trespassers, the foundation tribe’s political sovereignty is endangered when it is unable to enforce its right to exclude from tribal territory. Indeed, the U.S. Supreme Court once noted that a “hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands.”³⁰ Surely, then, it

23. *Id.* (quoting *Montana*, 450 U.S. at 566).
24. *Id.* at 8–9 (quoting *Montana*, 450 U.S. at 566).
25. *Id.* at 17 (citing *Nevada v. Hicks*, 533 U.S. 353, 361 (2001)).
26. *Id.* at 17 (quoting *Nevada*, 533 U.S. at 361).
27. *Id.*
28. *Id.*
29. *Id.* at 13.
30. *Merrión v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1981).

seems that an impingement of a hallmark of tribal sovereignty must constitute a threat to tribal political and physical integrity and therefore require tribal exhaustion under *Montana*'s second exception.

Beyond requiring the officers to exhaust tribal remedies for the Tribe's trespass claim, the court's holdings that foreclose jurisdiction for the Tribe's additional claims raise a number of considerations. The court found that the Tribe's additional claims including false arrest, spoliation of evidence, and conspiracy did not implicate the Tribe's core sovereign interests at a level sufficient to require tribal exhaustion under the second *Montana* exception.³¹ Supporting its conclusion, the court cited a Ninth Circuit precedent which notes that any tort committed on or against Indians on Indian land can threaten a tribe's political integrity, economic security, or the health and welfare of the tribe and, therefore, tribal claims must rise above a "generalized threat" before requiring tribal exhaustion under the second *Montana* exception.³² The court found that the additional claims failed to meet this threshold and did not require exhaustion. Specifically, the court found the facts analogous to *Strate*,³³ in which the U.S. Supreme Court found a lack of tribal civil jurisdiction where the personal injury claims concerned only an individual and not the Tribe as a whole. However, the similarities between *Norton* and *Strate* appear debatable. Unlike the mere personal injury claim asserted in *Strate*, *Norton* involved nonmember obstruction of tribal law enforcement officers' access to a tribal member's death. The court's holdings are particularly concerning considering that the officers were not cross-deputized to exercise law enforcement authority within the Reservation. It seems entirely plausible that the forceful and unlawful assertion of law enforcement authority leading to claims of false arrest, spoliation of evidence, and conspiracy are threats to the Ute Tribe's political integrity that extend well beyond "generalized threats" in that they clearly undermine the Tribe's ability to enforce its laws and control its territory. These facts, in the context of the Tribe's additional claims, appear to be more-than-sufficient to meet the second *Montana* exception, thereby requiring tribal exhaustion.

The *Norton* decision first highlights that the Tenth Circuit views the right to exclude as fundamental to notions of tribal sovereignty and that future tribal trespass claims are likely to be subject to tribal civil jurisdiction. Although the court refused to affirmatively state that the tribal court possessed jurisdiction over the trespass claim, the opinion provided strong language in support of tribal trespass claims fitting within the second *Montana* exception. Second, the *Norton* decision highlights the inherent tensions within the tribal exhaustion doctrine and the difficulties associated with applying it. The policy considerations behind the tribal exhaustion doctrine imply a trust in tribal courts and a support for tribal sovereignty.

31. *Norton*, No. 15-4170 at 14.

32. *Id.* at 15, (quoting *Philip Morris USA Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 943 (9th Cir. 2009)).

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

However, the starting point of a *Montana* analysis is a presumption against jurisdiction over nonmember activity on tribal land, which undermines the ability of tribes to adequately govern within reservation borders. Further, the evolution of *Montana* jurisprudence has led to difficulties in application across civil claims and fact patterns. It has led to blanket generalizations regarding the nature of civil claims, which may inhibit a federal court's ability to protect seemingly rightful claims of tribal jurisdiction. By forcing arbitrary comparisons such as the Ute Tribe's claims of false arrest, spoliation of evidence, and conspiracy to the personal injury facts of *Strate*, the *Montana* progeny of cases may, at times, lack the nuance necessary to adequately protect the integrity of tribal courts.

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