Walking the Straight and Narrow: Another Squeeze on Tribal Civil Jurisdiction over Nonmembers in *Smith v. Salish Kootenai College*, 378 F.3d 1048 (9th Cir. 2004)

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TABLE OF CONTENTS

I. Introduction ........................................... 1326

II. Background ........................................... 1327
   A. The Evolution of Tribal Civil Jurisdiction over Nonmembers ........................................... 1327
      1. The Early History of Tribal Court Civil Jurisdiction ........................................... 1327
      2. *Montana v. United States* ........................................... 1330
      3. Interpreting *Montana* ........................................... 1331
   B. *Smith v. Salish Kootenai College* ........................................... 1333
      1. Facts ........................................... 1333
      2. Holding ........................................... 1334

III. Analysis: The Ninth Circuit Should Not Have Narrowed Tribal Court Civil Jurisdiction by Reversing a Finding of Jurisdiction in *Smith* ........................................... 1338
   A. The Ninth Circuit Properly Rejected a Controlling Application of *Williams v. Lee* but Applied a Faulty Analysis ........................................... 1338
   B. Even Though *Williams v. Lee* Does Not Control, the Ninth Circuit Should Have Found Tribal Court Jurisdiction Under the First *Montana* Exception ... 1342

IV. Conclusion ........................................... 1344

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I. INTRODUCTION

Exercising civil jurisdiction is vital to the success of Indian tribes. No one questions the fact that an Indian tribe, unless limited by Congress, may exercise the full range of its civil jurisdiction over tribal members within the reservation. Tribal members who wish to marry, divorce, adopt children, develop their land, or engage in commercial enterprise on the reservation may do so only if they comply with tribal law.

With regard to non-Indians, the answer is more complex.1

The question of tribal jurisdiction over nonmembers is problematic, and becomes ever more so with each new holding on the issue. One thing, however, is certain. While tribes retain some ability to exercise jurisdiction over nonmembers, the extent of the ability they retain is dwindling.2 From state and federal district courts to the U.S. Supreme Court, techniques are employed—often unreasonably and inconsistently—to usurp tribal jurisdiction at nearly every opportunity. Although commentators criticize courts for inconsistently deciding tribal jurisdiction over nonmembers,3 courts continue to limit tribal civil jurisdiction.

This Note discusses the issue of tribal court civil jurisdiction over nonmembers, with specific focus on the recent Ninth Circuit case, Smith v. Salish Kootenai College.4 Part II of the Note describes the evolution of tribal court civil jurisdiction over nonmembers beginning with the early history and tracing the discussion to the Supreme Court’s decision in Nevada v. Hicks.5

Part III looks specifically at the Ninth Circuit’s recent Smith case as an example of a court’s denial of tribal court jurisdiction effected by haphazard means. This Note criticizes the Ninth Circuit’s dicta in de-

2. Thomas P. Schlosser, Tribal Jurisdiction over Nonmembers, 37 Tulsa L. Rev. 573, 573–74 (2001) (“An obvious movement away from acknowledging tribal territorial jurisdiction and inherent sovereignty continues to appear in recent cases that address the scope of tribal jurisdiction over nonmembers.”).
3. Id. (“Rulings by the federal courts, particularly the United States Supreme Court, on tribal authority over nonmembers have become erratic and standardless.”); see also Daan Braveman, Tribal Sovereignty: Them and Us, 82 Or. L. Rev. 75 (2003); David H. Getches, Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice, and Mainstream Values, 86 Minn. L. Rev. 267, 267 (2001) (“The Supreme Court has made radical departures from the established principles of Indian law. The Court ignores precedent, construing statutes, treaties, and the Constitution liberally to reach results that comport with a majority of the Justices’ attitudes about federalism, minority rights, and protection of mainstream values.”); Nancy Thorington, Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments, 31 McGeorge L. Rev. 973, 977 (2000) (“The resolution of the tribal jurisdiction question is further complicated by inconsistent federal Indian policy as reflected in both legislation and contradictory case law.”).
4. 378 F.3d 1048 (9th Cir. 2004).
terminating that Montana controls the analysis and suggests that the court should have permitted jurisdiction under the first Montana exception.

II. BACKGROUND

A. The Evolution of Tribal Civil Jurisdiction over Nonmembers

1. The Early History of Tribal Court Civil Jurisdiction

Courts have not always tried to squeeze tribal civil jurisdiction to its narrowest limits. Compared to the severe restraints placed on the criminal jurisdiction of tribal governments in the last two centuries, tribal civil jurisdiction has been relatively free from federal intrusion. Until recently, Indian tribes were viewed as inherently possessing the ability to openly exercise civil jurisdiction over non-Indians on the reservation, especially as to regulatory jurisdiction.

As early as 1904, the Supreme Court recognized that, like other governments, tribes have the right to exclude nonmembers from their territory. Therefore, the Court held, tribes should have the right to determine the conditions on which nonmembers enter and remain in the territory. In that early case, the Court held that a tribe could levy a personal property tax on nonmembers whose cattle grazed on Indian trust land. In the decades that followed, the Court used similar reasoning to affirm tribes' taxing power, and their right to regulate hunting and fishing by non-Indians on tribal lands. Even in more recent history, the Supreme Court has recognized, "[tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."

The judicial preservation of tribal sovereignty through grants of tribal civil jurisdiction flowed into the realm of adjudicative authority as well. In 1959, the Supreme Court heard Williams v. Lee, the first modern case to address state versus tribal court jurisdiction in conflicts involving Indians and non-Indians in disputes arising in Indian

6. Thorington, supra note 3, at 979.
7. Pevar, supra note 1, at 167.
8. "Regulatory jurisdiction is the authority of a tribe to tax, license and create laws. Often, regulatory jurisdiction implies adjudicatory jurisdiction over the same matters; however, there may be instances in which the tribe has the power to regulate a matter but lacks the authority to adjudicate it." Thorington, supra note 3, at 988.
9. Pevar, supra note 1, at 168 (citing Morris v. Hitchcock, 194 U.S. 384 (1904)).
10. See Morris, 194 U.S. 384.
country. In *Williams*, the plaintiff was a non-Indian man who operated a general store on the Navajo Indian Reservation in Arizona. The plaintiff brought an action against two Navajo Indians to collect for goods sold to them on credit. The plaintiff originally brought his action in the Superior Court of Arizona, and the Supreme Court of Arizona affirmed state court jurisdiction over the claim, deciding that because no Congressional Act explicitly restricted state court jurisdiction over civil suits by non-Indians on reservations, state courts could hear such cases.

The Supreme Court took the case on *writ of certiorari* and reversed the finding of state court jurisdiction. The Court noted the "broad principles" of the "Court's mandate in *Worcester*," and Congressional intent to maintain Indian control on reservations in holding that the Navajo tribal courts, not Arizona state courts, had jurisdiction over claims brought by non-Indians against Indians and arising on the reservation. According to the Supreme Court in *Williams*, "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority ... If this power is to be taken away from them, it is for Congress to do it."

Following the end of the Termination Era in 1958 and *Williams* the next year, "[c]ommentators, pro-Indian activists, and Indian law practitioners started to believe ... Indian tribes might actually survive the

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16. 358 U.S. at 217.
17. *Id.* at 218.
18. *Id.*
19. *Id.* at 222–23.
20. *Williams*, 358 U.S. at 219. The *Williams* Court engaged in a significant discussion of the circumstances leading up to the case of *Worcester v. Georgia*, 31 U.S. 515 (1832). The *Williams* Court describes the opinion and its effect as follows: Rendering one of his most courageous and eloquent opinions, Chief Justice Marshall held that Georgia's assertion of power [through statutes forbidding Cherokees from enacting laws or holding courts, etc.] was invalid. ... Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in *Worcester* the broad principles of that decision came to be accepted as law. Over the years this court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained.
21. *Id.* at 220 ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. To assure adequate government of the Indian tribes it enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian affairs.").
22. *Id.* at 220.
23. *Id.* at 223.
trusteeship of the federal government." 24 With the success before the Supreme Court and President Nixon’s declaration of Self-Determination in 1970, Indians and supporters had reason to be optimistic. 25 Unfortunately, despite the once-permissive approach to tribal court civil jurisdiction, several Supreme Court decisions in the last two decades have placed harsh limits on the ability of tribes to exercise civil jurisdiction. 26

Many note Oliphant v. Suquamish Indian Tribe 27 as the case that began the erosion of tribal court jurisdiction. 28 Although it held on the issue of tribal criminal jurisdiction over nonmembers, it helped set the stage for a “watershed case” 29 in the area of tribal court jurisdiction. In Oliphant, the criminal proceedings were brought against two non-Indian defendants in the Suquamish Provisional Tribal Court for assaulting a tribal officer and resisting arrest on the reservation. 30 The Supreme Court held that the tribal court did not have jurisdiction to try the non-Indian defendants, stating that, “an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.” 31 The Court further held that “Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers ‘inconsistent with their status.’” 32

This language in the Oliphant opinion shocked tribal courts that had previously been hopeful about their future ability to adjudicate claims by their people. Unfortunately, it also opened the gates for a more dramatic limiting of tribal court jurisdiction in the years to come. Not long after Oliphant, the Supreme Court heard Montana v. United States 33—a case that would change the landscape of the tribal jurisdiction discussion forever.

25. Id.
28. See Fletcher, supra note 24, at 53. See also Richard E. James, Comment, Sanctuaries No More: The United States Supreme Court Deals Another Blow to Indian Tribal Court Jurisdiction [Nevada v. Hicks, 533 U.S. 353, 121 S. Ct. 2304 (2001)], 41 WASHBURN L.J. 347, 351 (2002) (noting that Oliphant marked the beginning of the Court’s narrowing of tribal court jurisdiction).
29. James, supra note 28, at 350.
30. 435 U.S. at 194.
31. Id. at 208.
32. Id. (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)).
2. Montana v. United States

The Montana case addressed the ability of the Crow Tribe of Montana to regulate hunting and fishing by non-Indians on land within the reservation owned by non-Indians.34 The Crow Tribe passed several resolutions regarding hunting and fishing on their reservation, including one that prohibited such activities by anyone who was not a member of the tribe.35 At the same time, the State of Montana also claimed authority to determine hunting and fishing by nonmembers within the reservation.36

In October of 1975, the United States, acting for itself and as a fiduciary for the tribe, filed suit, seeking:

(1) declaratory judgment quieting title to the bed of the Big Horn River in the United States as trustee for the Tribe, (2) a declaratory judgment establishing that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation, and (3) an injunction requiring Montana to secure the permission of the Tribe before issuing hunting or fishing licenses for use within the reservation.37

The District Court refused to grant the requested relief and the Court of Appeals reversed.38 Finally, in 1981, the Supreme Court took the case and reversed the Court of Appeals.39 The Court held that the Crow Tribe did not have the authority in this instance to regulate the hunting and fishing activities of nonmembers on fee land owned by non-Indians within the reservation.40

The Court engaged in a significant discussion of the respective interests of the United States and the tribe regarding the Big Horn River bed.41 Various title claims and treaty concepts were also relevant to the Court’s analysis. The most resonant part of the opinion related to the issue of tribal court jurisdiction.

In reaching its decision in Montana, the Supreme Court noted “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”42 But the Court did not stop there. “To be sure,” said the Court, “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.”43 The Montana Court pointed to two categories under which tribes may exercise jurisdiction over nonmembers. The first

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34. Id. at 547.
35. Id. at 548–49.
36. Id. at 549.
37. Id.
38. Id. at 549–50.
39. Id. at 567.
40. Id. at 566–67.
41. See id. at 550–57.
42. Id. at 565.
43. Id.
category includes a tribe's ability to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements."44 Second, the Court determined that "[a] tribe may also 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."45

The Montana Court's analysis has come to be known as the Montana framework.46 The case initially seemed to stand for the proposition that Indian tribes could regulate nonmember activity on non-Indian fee land within a reservation only under the two limited instances established—"the first and second Montana exceptions."47 Since the case was first decided, however, the Supreme Court has relied on Montana and promulgated interpretations that have expanded the holding beyond its original applicability.

3. Interpreting Montana

Montana made waves at the time the Court announced its holding in 1981, but since then, the doctrine has developed substantially. Montana is now a "pathmarking case," on the issue of tribal court jurisdiction, although it was not declared as such until 1997, sixteen years after it was first decided.48 Since 1981, the Court has used the Montana framework to consistently chip away at tribal court jurisdiction over nonmembers.

According to one commentator, "Montana went through a few road bumps on its way to being the most feared Supreme Court case in Indian Country. . . . but the Montana doctrine came to full maturity with the Supreme Court's opinion in Strate v. A-1 Contractors."49 In Strate, the conflict involved two non-Indian parties and arose from an auto accident on a right-of-way maintained by the State of North Dakota through the Fort Berthold Reservation.50 In Strate, the Court focused on the ownership of land in its analysis of jurisdiction. The Court held that tribal courts do not have jurisdiction over claims of

44. Id.
45. Id. at 566.
46. See Nevada v. Hicks, 533 U.S. 353, 380 (2001) ("In Strate, we expressly extended the Montana framework . . . .").
47. Montana, 450 U.S. at 545-46 ("Exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes . . . .").
48. Fletcher, supra note 24, at 65 (noting that the Supreme Court declared Montana a "pathmarking case" in Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997)).
49. Id. at 65-66 (citing Strate, 520 U.S. 438).
50. 520 U.S. at 442-43.
non-Indians arising on state lands running through the reservation.\(^\text{51}\) Because the highway was state-owned, said the Court, it was non-Indian land and the tribal court could not exercise jurisdiction.\(^\text{52}\) The Court also held that the jurisdiction of tribal courts could not be greater than the tribe’s regulatory authority.\(^\text{53}\)

*Nevada v. Hicks* is the most recent case to take aim at tribal court jurisdiction over nonmembers.\(^\text{54}\) "Reading *Strate* along with its predecessors, it is clear that the Supreme Court jurisprudence already favored limiting Indian tribal court jurisdiction at the time the court heard *Nevada*.\(^\text{55}\) In *Nevada*, the Indian plaintiff argued that state officials violated his civil rights in their search of his on-reservation residence.\(^\text{56}\) The Supreme Court applied the *Montana* framework to determine that the tribal court did not have jurisdiction in *Nevada*.\(^\text{57}\) While the Court acknowledged that *Montana* and *Strate* dealt with nontribal land within the reservation, the *Nevada* Court went on to find that the *Montana* framework applies to the analysis of tribal court jurisdiction irrespective of the status of the land on which the claim arises.\(^\text{58}\) The Court said land status is only one factor to consider in deciding the application of the *Montana* factors.\(^\text{59}\) "From *Nevada* on, questions of tribal civil authority over non-members must be analyzed pursuant to *Montana*.\(^\text{60}\)"

Following the Supreme Court’s lead, many federal and state courts have addressed the issue of tribal jurisdiction over nonmembers in a way that profoundly limits tribal jurisdiction.\(^\text{61}\) Already narrow permission is squeezed even further in attempts to cut off tribes’ ability to adjudicate claims. One such case, *Smith v. Salish Kootenai College*,\(^\text{62}\) was decided recently by the Ninth Circuit.

\(^{51}\) *Id.* at 454–56.

\(^{52}\) *Id.*

\(^{53}\) *Id.* at 453.

\(^{54}\) 533 U.S. 353 (2001).

\(^{55}\) *James*, *supra* note 28, at 351.

\(^{56}\) 533 U.S. at 356–57.

\(^{57}\) *Id.* at 364–66.

\(^{58}\) *Id.* at 359.

\(^{59}\) *Id.*


\(^{62}\) 378 F.3d 1048 (9th Cir. 2004).
B. Smith v. Salish Kootenai College

1. Facts

At all times relevant to the case, James R. Smith ("Smith") was a member of the Umatilla Tribe in Oregon and a citizen of Oregon. When the claim arose, Smith was a student at SKC located on the Flathead Reservation in Montana. On May 12, 1997, as part of his training in a vocational course at SKC, Smith was driving a dump truck owned by the college on United States Highway 93 within the Flathead Reservation. Two passengers, who were also students at SKC, rode in the truck as Smith drove. As the truck proceeded across the highway, the right rear main leaf spring broke, and the vehicle veered harshly to the left. Despite Smith's attempts to maintain control of the dump truck, it rolled—killing one passenger and injuring Smith and another passenger.

Following the accident, the injured passenger and the deceased passenger's estate brought claims against both Smith and SKC in tribal court. In addition to these claims, SKC and Smith brought cross-claims against one another. All claims were settled without a trial, except for Smith's claim against the college, which argued SKC's liability for the accident in addition to a claim of spoliation of evidence. The tribal court of the Salish and Kootenai Tribes heard the case, and a jury returned a verdict for SKC.

Following the trial, Smith sought postjudgment relief with the tribal court and also filed an appeal with the tribal appeals court, arguing that the court lacked jurisdiction over his claim. The Court of Appeals of the Confederated Salish and Kootenai Tribes of the Flathead Reservation remanded Smith's claims to the tribal trial court on the question of jurisdiction. The tribal court held that it did have jurisdiction and Smith appealed again. This time, Smith also filed a federal court action in the United States District Court for the District

63. Id. at 1050.
64. Brief of Appellee at 2, Smith v. Salish Kootenai College, 378 F.3d 1048 (9th Cir. 2004) (No. 03-35306).
65. Smith, 378 F.3d at 1050; Brief of Appellee at 7, Smith (No. 03-35306).
66. Smith, 378 F.3d at 1050; Brief of Appellee at 7, Smith (No. 03-35306).
67. Brief of Appellee at 7, Smith (No. 03-35306).
68. Smith, 378 F.3d at 1050.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
of Montana seeking to litigate his claims and an injunction against the tribal courts based on lack of jurisdiction. The tribal appellate court issued its opinion first, affirming the tribal court: "[f]or purposes of determining jurisdiction, [SKC] must be treated as a tribal entity." A few weeks later, the federal district issued its jurisdictional order, also finding that "SKC [is] a tribal entity for jurisdictional purposes and that Smith's claims arose on the reservation." The district court then dismissed Smith's case. Smith appealed again and the Ninth Circuit Court of Appeals reversed.

2. Holding

The Ninth Circuit ultimately held that due to Smith's status as a nonmember of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the tribal courts could only exercise jurisdiction over Smith if one of the two Montana exceptions applied to the case. The court determined that neither exception applied to the claims, and thus, the federal district court would instead be the court to decide the case on its merits.

The Ninth Circuit began its Smith analysis by flatly stating, "[a]ny time a tribal court wishes to exercise civil subject matter jurisdiction over a non-member of a tribe, the framework in Montana v. United States, must be satisfied." The Smith court noted the argument that the Montana analysis applies only when there are nonmembers and the claim arose on nontribal land, but quickly refuted that stance based on the Ninth Circuit's rejection of "such a narrow reading of Montana," and the idea that "[t]he Supreme Court has likewise rejected a cramped reading of Montana." The Smith court stated:

For the purposes of invoking and satisfying Montana's pathmaking [sic] principles, the important variable is that there is a non-member of the tribe that is party to the specific claim being litigated. In the case before us, where it is not disputed that Smith is a non-member of the Confederated Salish and Kootenai Tribes, it does not matter whether SKC is a non-member, and it also does not matter whether the action arose on tribal land. Montana applies in

77. Id. at 1050–51.
78. Id. at 1051 (quoting the tribal appellate court opinion).
79. Id. at 1051.
80. Id.
81. Id.
82. Id. at 1059.
83. Id.
84. Id. at 1051 (citation omitted). The court noted that "[n]on-members' include non-Indians and Indians who are members of other tribes." Id. at 1051 n.2.
85. Id. at 1052 (citing Yellowstone County v. Pease, 96 F.3d 1169, 1174 (9th Cir. 1996)). The Smith court stated that, "[i]n Pease, we held that a contention that Montana applies only when there are non-members and the activity arose on non-tribal land was 'unpersuasive.'" Id.
86. Id. (citing Nevada v. Hicks, 533 U.S. 353, 360–61 (2001)).
any event because Smith is not a member, and that fact alone impels the need for scrutiny of tribal court jurisdiction under the principles set by Montana.87

The Smith court reiterated its application of Montana by rejecting the argument that Williams v. Lee, but not Montana, applies to a suit involving a nonmember that arises on tribal land.88 The court said, "[i]n Strate, the Supreme Court made it clear that, after Montana, Williams is best understood as an example of Montana’s first exception—not as a separate jurisdictional doctrine."89

After the court determined that it would use the Montana framework to assess jurisdiction in the Smith case, the Smith court applied the framework starting with a presumption that the tribal court did not have jurisdiction.90 "The Supreme Court has set some guideposts," said the Ninth Circuit in Smith, "[a]t one extreme, Strate holds that when a claim arose on non-Indian land and both parties were non-members, the tribe had no adjudicative authority."91 "At the other extreme, if a plaintiff were a non-member, a defendant were a member, and the claim were to arise on tribal land, then the first Montana exception may apply."92 The Smith court also noted that Ninth Circuit cases provide similar direction. For this reason, the court analyzed the specific facts to determine the applicability of the Montana exceptions.93

In its discussion of the facts of the Smith case as they relate to the Montana framework, the Ninth Circuit noted "two relevant variables"—(1) whether SKC is a tribal member and (2) where the claims arose.94 As to the first variable, the court declined to make a determination of the college’s status as a tribal member or nonmember. It noted that such a decision may have repercussions for the college or the state beyond the scope of the present claim.95 The Smith court went on to say that "[w]hether SKC is a tribal member vel non does not affect our ultimate determination on tribal court jurisdiction, because . . . even if we were to view SKC as a tribal member, we would still find that the tribal courts lacked jurisdiction."96 The court assumed, but did not decide, that SKC was a tribal member.97

87. Id.
88. Id.
89. Smith, 378 F.3d at 1052 (citing Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997)).
90. Id. at 1053.
91. Id. (citing Strate, 520 U.S. at 456–59).
92. Id. (citing Strate, 520 U.S. at 457).
93. Id.
94. Id. at 1053–54.
95. Id. at 1054.
96. Id.
97. Id.
Regarding the issue of where the claims arose, the court held that the negligence/products liability claim arose on U.S. Highway 93, and thus, on nontribal land.\textsuperscript{98} "Both Montana law and tribal law conform to the understanding that a tort claim cannot arise until all of the elements of the tort (including damages) are present," said the \textit{Smith} court.\textsuperscript{99} The court rejected SKC's argument that the claim arose on tribal land because the negligent maintenance occurred on tribal land.\textsuperscript{100} "[I]n the context of highway accidents," said the court, "the cause of action typically arises, for tribal jurisdiction purposes, where the accident took place, not where the underlying negligent conduct took place."\textsuperscript{101} The analysis was similar for the spoliation of evidence claim. "The action arises where the last necessary predicate act for the tort is complete."\textsuperscript{102} But "[i]n any event," the Ninth Circuit said, "even if the spoliation claim arose on the reservation, it does not affect our decision on whether there is tribal jurisdiction."\textsuperscript{103} Similar to its decision to assume the tribal membership of the college, the court assumed, but did not decide, that the spoliation of evidence claim arose on the reservation.\textsuperscript{104}

Viewing SKC as a tribal entity and viewing the spoliation of evidence claim as arising on tribal land, the Ninth Circuit proceeded to apply the \textit{Montana} framework to the facts in the \textit{Smith} case. First, the \textit{Smith} court assessed the case under the first \textit{Montana} exception that "covers activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."\textsuperscript{105} The court noted that Smith's status as a student at SKC is "the only apparent qualifying relationship,"\textsuperscript{106} and recognized the argument that "the accident arose in Smith's capacity as a student of SKC, and Smith would not have been in the dump truck apart from his course [at the college]."\textsuperscript{107} Despite this solid argument, however, the court refused to fit the case under the first \textit{Montana} exception. Instead, the Ninth Circuit in \textit{Smith} said that the exception applies only when the tribe directly regulates nontribe activity on tribal land or to "lawsuits between a private party and the tribe or tribal members arising from an on-

\textsuperscript{98} Id.
\textsuperscript{99} Id. (citing Gabriel v. Sch. Dist. Number 4, 870 P.2d 1351, 1353 (Mont. 1994); \textsc{Laws of the Confederated Salish and Kootenai Tribes, Codified § 4-1-105(1)} (Jan 1, 2000), available at http://www.cskt.org/documents/laws-codified.pdf.).
\textsuperscript{100} Id. at 1055.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 1056.
\textsuperscript{104} Id.
\textsuperscript{105} Id. (quoting Strate v. A-1 Contractors, 520 U.S. 438, 456–57 (1997)).
\textsuperscript{106} Id.
\textsuperscript{107} Id.
reservation transaction or agreement.”108 Because of this language, the Smith court announced a “narrow view” of “on-reservation transaction or agreement,” and said there could not be tribal jurisdiction “for a tort action that derives, at best, indirectly from the ‘on-reservation agreement.’”109 If the court accepted that tribal jurisdiction over tort actions arises from the consensual student relationship itself, the court said, the implications for thousands of college students would be “broad and undue.”110 Because SKC failed to ask students to consent to tribal jurisdiction on any dispute with the college, the Smith court said that SKC cannot effect an application of the first Montana exception on the student relationship alone.111

The court also refused to find that the spoliation claim arose from the relationship between SKC and Smith. Because the claim underlying the evidence claim does not trigger a Montana exception, the Smith court reasoned, the spoliation claim does not change the result.112

Finally, the Smith court discussed the second Montana exception, which “concerns conduct that ‘threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.’”113 The court swiftly rejected the tribal court’s finding that the availability of higher education is a tribal interest sufficient to sustain the second Montana exception in the Smith case.114 Further, the court dismissed the tribe’s argument that its political integrity would be eroded if it was not allowed jurisdiction over the college, “an arm of the tribe.”115 The Smith court attributed its arguments to a fear that validation of these general interests as an example of the second Montana exception would turn the exception into the rule.116 “Because neither exception applies,” said the Ninth Circuit, “we hold that the tribal court lacked civil jurisdiction over Smith’s claims against SKC.”117 The court reversed and remanded to the district court to consider Smith’s claims.118

108. Id. at 1057 (quoting County of Lewis v. Allen, 163 F.3d 509, 515 (9th Cir. 1998)).
109. Id.
110. Id.
111. Id. at 1057.
112. Id. at 1058.
113. Id. (quoting Montana v. United States, 450 U.S. 544 (1981)).
114. Id.
115. Id.
116. Id.
117. Id. at 1059.
118. Id.
III. ANALYSIS: THE NINTH CIRCUIT SHOULD NOT HAVE NARROWED TRIBAL COURT CIVIL JURISDICTION BY REVERSING A FINDING OF JURISDICTION IN SMITH

The Ninth Circuit in *Smith v. Salish Kootenai College* fell in line with a disturbing trend among courts determining tribal court jurisdiction. Rather than taking the opportunity to find tribal court jurisdiction where it could legitimately have been found, the court denied jurisdiction to the tribal courts of the Confederated Salish and Kootenai Tribes and turned the case over to the federal system. While the Ninth Circuit properly rejected the argument of the defendant and the district court that *Williams v. Lee*, and not *Montana*, is the controlling authority, the Ninth Circuit could have affirmed the district court’s finding of tribal court jurisdiction under the first exception of *Montana*. The requisite relationship was present in the facts of *Smith*, and the court improperly reasoned around the exception to the detriment of the tribe. The court also promulgated an inaccurate classification of *Williams*. The court’s language may prove to limit tribal jurisdiction even further.

A. The Ninth Circuit Properly Rejected a Controlling Application of *Williams v. Lee* but Applied a Faulty Analysis

The Ninth Circuit properly rejected the argument that *Williams v. Lee*, and not *Montana*, controls the decision in *Smith*, because the Supreme Court has explicitly determined that *Montana* controls on the issue of tribal jurisdiction over nonmembers. Following *Strate* and *Nevada*, parties would be hard-pressed to argue convincingly that *Montana* does not control the discussion regarding tribal jurisdiction over a nonmember. In its rejection, however, the *Smith* Court failed to discuss *Williams* correctly and generated some potentially dangerous *dicta* that may further limit tribal jurisdiction in the Ninth Circuit.

In its brief to the Ninth Circuit Court of Appeals, SKC argued that *Williams* was the controlling authority over the case because “this case involves a lawsuit filed against a tribal entity alleging claims that arose on tribal land.” SKC went on to argue against the application of *Montana*, stating that, “Smith’s argument that *Montana* applies to this case is easily refuted by the first sentence of the Supreme Court’s opinion in that case: *This case concerns the sources and scope of the power of an Indian tribe to regulate hunting and fishing by* non-Indians *on lands within its reservation owned in fee simple* 119. *Id.*

120. Brief of Appellee at 10, *Smith* (No. 03-35306).
by non-Indians." This factual distinction makes Montana inapplicable, said SKC, because "[t]he present case neither involves a claim against a non-Indian, nor conduct occurring on land owned by non-Indians." The district court seemed to agree with SKC’s logic, because that court relied solely on Williams to dismiss Smith's claim against SKC.

Unfortunately for the Confederated Salish and Kootenai Tribes, and others hoping to maintain some grasp on their tribal court civil jurisdiction, the argument that Montana is not the controlling authority when the tribal court is seeking to exercise jurisdiction over a nonmember seems futile. Montana is now the "pathmarking case" that governs Indian tribes’ regulatory authority over nonmembers, according to the Supreme Court. Montana has also been called a "convenient case for the Supreme Court to rely upon in its quest to eradicate an Indian tribe’s ability to govern within its own reservation boundaries," and a case that should not “mean what its does to the Court.”

But, despite one's feelings about Montana and its progeny, the Supreme Court maintains that the framework of the case controls the discussion of tribal jurisdiction over nonmembers.

Where Williams, for a time, gave tribes jurisdiction over nonmembers in claims arising on the reservation, the Court diminished the relevance of the “on reservation” factor in Nevada. In Nevada, the Court stated:

Montana, after announcing the general rule of no jurisdiction over nonmembers, cautioned that “[t]o be sure, 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,”—clearly implying that the general rule of Montana applies to both Indian and non-Indian land. The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is “necessary to protect tribal self-government or to control internal relations.”

Since the Court’s decision in Nevada, issues of tribal authority over nonmembers are subject to analysis under the Montana framework. Thus, it seems much more worthwhile to argue for tribal court jurisdiction through one of the Montana exceptions—the only narrow window remaining.

While the Ninth Circuit properly designated Montana as the controlling case for Smith, the court applied a faulty analysis in making its determination. The court stated that “[i]n Strate, the Supreme

122. Id. at 29 (quoting Montana v. United States, 450 U.S. 544, 547 (1981)).
123. Id. at 29–30.
124. Smith, 378 F.3d at 1051.
125. Nevada, 533 U.S. at 358.
126. Fletcher, supra note 24, at 65.
127. 533 U.S. at 359–60.
128. Id. (citation omitted) (quoting Montana v. United States, 450 U.S. 544, 564–65 (1981)).
Court made clear that, after Montana, Williams is best understood as an example of Montana's first exception—not as a separate jurisdictional doctrine.129 While Williams may act as an example of the first Montana exception as it relates to the issue of tribal court jurisdiction, the principles in Williams still stand for a separate jurisdictional doctrine as they relate to state court jurisdictional principles.130 There is not necessarily a colorable argument that Williams, and not Montana, controls in Smith. On slightly different facts, however, Williams would have been the controlling authority. If Smith had brought his claim in Montana state court such that the problem at issue was state jurisdiction, Williams would have provided an argument. Where the discussion involves state court jurisdiction, Williams is still the controlling case. One commentator has noted that “[i]f the Indian party is the defendant and the suit is filed in state court, then the Williams infringement test definitely applies, and the tribe has exclusive jurisdiction.”131 The Ninth Circuit was incorrect to state Williams is not an independent doctrine.

The Supreme Court of North Dakota recently heard a case with facts very similar to Smith and commented that Williams is controlling on the issue of state court jurisdiction for a claim brought by a non-Indian plaintiff against an Indian defendant and arising on the reservation.132 The Ninth Circuit cited this case in Smith, as an example of a holding in opposition to the Smith court's argument that most courts addressing jurisdiction over a nonmember have applied the Montana framework.133 This description was not completely accurate, as the Ninth Circuit failed to point out the critical distinction—the Supreme Court of North Dakota was making a determination of state court jurisdiction.134

A discussion of the case illustrates the point. In Winer v. Penny Enterprises, Inc.,135 the Indian defendant and the non-Indian plaintiff were involved in a car accident on North Dakota Highway 20 within

129. Smith, 378 F.3d at 1052 (citing Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997)).
130. See Winer v. Penny Enters., Inc., 674 N.W.2d 9, 15 (N.D. 2004) (finding that “Williams v. Lee is [t]he seminal United States Supreme Court decision concerning state civil adjudicatory authority in Indian country.”) (quoting CONFERENCE OF W. ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK, 154 (2d ed. 1998)).
131. Thorington, supra note 3, at 1007.
133. Smith, 378 F.3d at 1052-53 (“Most courts addressing jurisdiction in cases where a party is a non-member have reached the same result, applying the Montana framework even when the underlying claim arose on tribal land.”). But see Winer, 674 N.W.2d at 16-17 (holding that Williams controls when determining state court jurisdiction over an action brought against an Indian arising within an Indian reservation).
134. Winer, 674 N.W.2d at 10.
135. 674 N.W.2d 9 (N.D. 2004).
WALKING THE STRAIGHT AND NARROW

1341

the exterior boundaries of the Spirit Lake Indian Reservation.136 The
plaintiff sued in state district court and the defendant moved for lack of
subject matter jurisdiction.137 The court granted the motion, deciding it did not have jurisdiction, and the plaintiff appealed.138

The plaintiff in Winer relied on Strate, "where the Court held a
tribal court in North Dakota did not have jurisdiction over an action
brought by a non-Indian plaintiff against a non-Indian defendant
seeking damages arising out of an auto accident on a state highway
within the exterior boundaries of a reservation," to argue that the tri-
bal court should not have jurisdiction in the action.139 The North Da-
kota Supreme Court refuted the application of Strate, first by stating
in Winer:

“There are two categories of claims over which the United States Supreme
Court has held tribal courts have exclusive civil jurisdiction under the in-
fringement test. Included in the first category are those claims in which a
non-Indian asserts a claim against an Indian for conduct occurring on that
Indian's reservation. In the second category, are those claims in which all the
parties are members of the same Indian tribe and the claim involves conduct
occurring on that tribe's reservation." Under the infringement test of Wil-
liams v. Lee, state courts have no jurisdiction over claims if it "would under-
mine the authority of the tribal courts over Reservation affairs and hence
would infringe on the right of the Indians to govern themselves."140

The Winer court next pointed out that it had previously relied on
Williams in a similar case decided in 1975,141 and also that it deter-
mined previously that state courts do not have jurisdiction where an
accident occurred on a highway within an Indian reservation.142 The
court refused to deviate from its precedent in the present case despite
plaintiff's argument that the law had changed.

In response to the plaintiff's argument that Strate changed the law
to apply Montana and support state court jurisdiction in Winer, the
Winer court pointed to the facts of Strate.143 "In Strate," said the
Winer court, "the Supreme Court held 'tribal courts may not entertain
claims against nonmembers arising out of accidents on state high-
ways, absent a statute or treaty authorizing the tribe to govern the
conduct of nonmembers on the highway in question.'"144 The North Dak-
ota Supreme Court pointed out that Strate dealt with an auto ac-
cident between two non-Indians on a portion of a North Dakota state

136. Id. at 10.
137. Id. at 11.
138. Id.
139. Id. at 12 (discussing Strate v. A−1 Contractors, 520 U.S. 438 (1997)).
140. Id. at 13 (citations omitted) (quoting Roe v. Doe, 649 N.W.2d 566, 569 (N.D.
2002); Williams v. Lee, 358 U.S. 217, 223 (1959)).
141. Id. at 13 (citing Schantz v. White Lightning, 231 N.W.2d 812 (N.D. 1975)).
142. Id. (citing Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973)).
143. Winer, 674 N.W.2d at 14.
144. Id. at 14 (quoting Strate, 520 U.S. at 442).
highway maintained on a right-of-way held in trust. But further and "[f]oremost," said the Winer court, "Strate analyzed a tribal court's jurisdiction, rather than a state court's jurisdiction, involving an action between non-Indians." The Supreme Court of North Dakota specifically pointed out that for tribal court jurisdiction issues, the Montana test applies, but that was not the Winer case. The Winer court noted in that instance:

We have not found any case wherein the Strate analysis has been used to determine whether a state court has jurisdiction over a tort action arising on a right-of-way within the exterior boundaries of a reservation. . . . Courts have refused to apply Strate beyond the context in which it was decided.

If Strate signals a drastic departure from the state court jurisdictional principles enunciated in Williams v. Lee and its progeny, it is well hidden in the Strate decision. Strate is distinguishable from the situation in this case, and until the United States Supreme Court declares otherwise, we conclude Strate does not govern our analysis here.

Based on the foregoing analysis, the court in Smith properly declined to apply Williams as the controlling case in that instance. However, the Ninth Circuit incorrectly cited the recent Winer case, and in so doing it improperly categorized Williams. The Ninth Circuit should have noted that Williams still stands as a separate doctrine for state court jurisdiction and by failing to address this distinction, the court generated some potentially dangerous dicta that may further limit tribal jurisdiction in the Ninth Circuit. Williams is still a separate jurisdictional doctrine, contrary to the dicta in Smith.

B. Even Though Williams v. Lee Does Not Control, the Ninth Circuit Should Have Found Tribal Court Jurisdiction Under the First Montana Exception

In addition to its faulty analysis of Williams, the Ninth Circuit also held incorrectly when it determined that the facts of Smith do not fall within the first exception of the Montana framework. Under Montana, tribes have authority over nonmembers "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Smith entered such a relationship with the tribe in this case. Rather than applying the law to allow tribal jurisdiction where it is clearly allowed by current tribal jurisdiction precedent, the court unconvincingly reasoned

145. Id. at 14.
146. Id. at 15.
147. Id. The Winer court held that "[t]ribal court jurisdiction is dependent upon application of the Montana test, which governs an 'Indian tribes' [sic] regulatory authority over nonmembers." Id. (quoting Nevada v. Hicks, 533 U.S. 353, 358 (2001)).
148. Id. at 16 (internal citations omitted).
around this conclusion. This part of the *Smith* opinion is transparent in its attempt to further the court’s agenda of denying civil jurisdiction to tribes.

The court admitted that because Smith was operating the dump truck as part of his education at SKC, and may have actually been receiving instruction at the time of the accident, “[i]t could be argued that the accident arose in Smith’s capacity as a student of SKC, and Smith would not have been in the dump truck apart from his course.”150 This should have been enough for the court to end the discussion and admit that *Montana* requires tribal jurisdiction in this case. The *Smith* court previously insisted on calling *Williams* “an example of *Montana’s* first exception,”151 but it failed to assess *Smith* under *Williams*. If it had done this analysis, the Ninth Circuit would not have been able to avoid permitting tribal jurisdiction.

Just as the plaintiff in *Williams* entered the reservation to conduct business with the tribal members and receive personal gain, the plaintiff in *Smith* entered the Flathead Reservation to conduct the business of his education with the tribe to receive personal gain. The *Williams* plaintiff had a contract with the tribe, and the *Smith* plaintiff had a “contract” with the tribe in his application for admission and his records as an enrolled student at the College. Additionally, where the claim in *Williams* arose from the relationship between the plaintiff and the tribe, the claim in *Smith* also arose from such a relationship. As the Ninth Circuit admitted, Smith was on the highway, acting in his capacity as a student of the college when the accident occurred.152 Smith would not have been on the reservation or in the dump truck if he had not been in a consensual, contractual relationship with the tribe regarding his education.

Instead of accepting this straightforward analysis, the *Smith* court cited language of an earlier Ninth Circuit case holding that the first *Montana* exception applies to “lawsuits between a private party and the tribe or tribal members arising from an on-reservation transaction or agreement.”153 The *Smith* court called this a “narrow view” of “on-reservation transaction or agreement,” and said a finding of no tribal jurisdiction “for a tort action that derives, at best, indirectly from the on-reservation agreement,” was the necessary result.154 As previously mentioned, this is not a convincing argument, because the very circumstances of the claim were a direct result of Smith’s relationship with the college. The court tries to reason that the claim arose from duties SKC owed Smith arising out of tort law. But again, the rela-

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150. Smith v. Salish Kootenai College, 378 F.3d 1048, 1056 (9th Cir. 2004).
151. *Id.* at 1052.
152. *Id.* at 1050.
153. *Id.* at 1057 (quoting County of Lewis v. Allen, 163 F.3d 509, 515 (9th Cir. 1998)).
154. *Id.* (internal quotation marks omitted).
tionship between the parties, in fact, gave rise to the claim. But for Smith’s coursework in dump truck operation, the accident would not have occurred, and the claim would never have “arisen” in the first instance. Because Smith’s relationship with the tribe allows the case to fit within the first Montana exception, the Ninth Circuit was incorrect to squeeze the case out. The Supreme Court still recognizes two areas where tribal courts can adjudicate claims by non-Indians and lower courts must oblige. Tribal court civil jurisdiction over nonmembers is not dead yet.

IV. CONCLUSION

The question of tribal jurisdiction over nonmembers is clearly complicated and concerning. Despite this reality, the solution is not simply to eliminate any opportunity for tribes to adjudicate claims that affect their people. The Montana case, while severely limiting tribal jurisdiction, still permits it to an extent, and the lower federal courts have the responsibility to interpret Montana’s permission carefully and reasonably.

In recent decades, courts have taken it upon themselves to usurp tribal jurisdiction at nearly every opportunity and the limiting trend appears as though it is here to stay. This trend is not an excuse for courts to be careless and unreasonable. The Ninth Circuit in Smith is an example of a court’s attempt to cut off tribal court jurisdiction, and it illustrates the danger in quickly dismissing tribal jurisdiction. The Ninth Circuit should have been more careful in determining that Montana controls the analysis. The court engaged in an inaccurate discussion of Williams that is potentially dangerous. Williams still stands as an independent principle as it relates to state court jurisdiction. Further, the court should have permitted jurisdiction under the first Montana exception because the requisite relationship was present on the facts. A more careful approach to these cases, while not a solution to the problem of disappearing tribal court jurisdiction, is a more fair way to treat the parties involved.

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