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Black Snake on the Periphery: The Dakota Access Pipeline and Tribal Jurisdictional Sovereignty

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BLACK SNAKE ON THE PERIPHERY: THE DAKOTA ACCESS PIPELINE AND TRIBAL JURISDICTIONAL SOVEREIGNTY

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ABSTRACT

"[W]hen one strips away the convoluted statutes, the technical legal complexities, the elaborate collateral proceedings, and the layers upon layers of interrelated orders and opinions from this Court . . . what remains is the raw, shocking, humiliating truth at the bottom: After all of these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal."[1]

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1. Cobell v. Norton, 229 F.R.D. 5, 7 (D.D.C. 2005), *vacated*, 455 F.3d 317 (D.C. Cir. 2006).

I. INTRODUCTION

The Lakota[2] had prophesied this: a great and evil black snake would someday descend and reap destruction, rendering their homeland uninhabitable to hunt and fish and their waters unsuitable for religious ceremony.[3] The black snake would disrupt the Lakota's sacred connection to their land.[4]

Now that prophesy may become a reality in the form of the Dakota Access Pipeline ("DAPL"), operated by Dakota Access, LLC (a subsidiary of Energy Transfer Crude Oil Company, LLC).[5] If allowed to proceed, the

2. *Lakota Indians*, INDIANS.ORG, (last visited May 8, 2017), http://www.indians.org/articles/lakota-indians.html. The term "Lakota" refers to the cluster of tribes—including the Standing Rock Sioux and Cheyenne River Sioux Tribes—located in North and South Dakota. This Article focuses on the rights of the Standing Rock Sioux Tribe, a federally recognized tribe and a direct lineage of the Great Sioux Nation. Plaintiff Standing Rock Sioux Tribe's Memorandum in Support of its Motion for Partial Summary Judgment at 2, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F.Supp.3d 77 (D.D.C. 2017) (No. 1:16–cv–1534–JEB), [hereinafter Standing Rock Sioux Tribe's Motion for Summary Judgment].

3. *Standing Rock Sioux Tribe*, 239 F.Supp.3d at 82.

4. *Id.*

5. *Id.*

DAPL will span roughly 1100 miles from North Dakota to Illinois,[6] and will transport approximately half-a-million barrels of crude oil per day.[7] As currently planned, it will cross the bed of Lake Oahe, a portion of the Missouri River a half-mile upstream from the Standing Rock Sioux Tribe Reservation in North Dakota.[8] The DAPL has, unsurprisingly, sparked outrage from both the Standing Rock Sioux Tribe and the international human rights community. A protest site at the Cannonball River in North Dakota became emblematic of this resistance.[9]

In July 2016, as part of the effort to block or re-route the DAPL, the Standing Rock and the Cheyenne River Sioux Tribes brought an action in the United States District Court for the District of Columbia.[10] This ongoing suit attempts to enjoin the Army Corps of Engineers ("Corps") from granting the DAPL an easement to cross Lake Oahe.[11] The Tribes allege the Lake Oahe crossing will result in treaty rights violations, religious infringement, and environmental degradation in violation of the National Historic Preservation Act (NHPA); the Clean Water Act (CWA); and the National Environmental Preservation Act (NEPA).[12] In addition, the Tribes brought a later claim under the Religious Freedom Restoration Act

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6. Memorandum from Hilary C. Tompkins, Solicitor, United States Dep't of the Interior, to Sec'y, United States Dep't of the Interior (Dec. 4, 2016) (on file with author) [hereinafter M-Opinion].

7. Gabrielle Regney & Hillary Hoffmann, *Vermont Law Top 10 Environmental Watch List 2017: Dakota Access Pipeline: The Calm Between the Storms*, VT. J. ENVTL. L., http://vjel.vermontlaw.edu/topten/dakota-access-pipeline-calm-storms/ (last visited May 5, 2017).

8. M-Opinion, (Dec. 4, 2016) (on file with author). In addition, the DAPL will cross seventy miles upstream from the Cheyenne River Sioux Reservation. *Id.* For an excellent visual of the DAPL route, and its proximity to the Standing Rock and Cheyenne River Reservations, *see* Gregor Aisch & K.K. Rebecca Lai, *The Conflicts Along 1,172 Miles of the Dakota Access Pipeline*, N.Y. TIMES (Mar. 20, 2017), https://www.nytimes.com/interactive/2016/11/23/us/dakota-access-pipeline-protest-map.html?_r=0.

9. Mitch Smith, *Standing Rock Protest Camp, Once Home to Thousands, is Razed*, N.Y. TIMES (Feb. 23, 2017), https://www.nytimes.com/2017/02/23/us/standing-rock-protest-dakota-access-pipeline.html.

10. Complaint, Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, 205 F.Supp.3d 4 (D.D.C. 2016) (No. 1:16-cv-01534), 2016 WL 4734356. [Hereinafter Standing Rock Sioux's Complaint].

11. Interestingly, and somewhat surprisingly, almost the entirety of the DAPL requires no federal permitting as ninety-nine percent of its proposed route crosses privately held land. But because the DAPL crosses Lake Oahe, a federally regulated water, the Army Corps of Engineers must permit this crossing. Samantha L. Varsalona, *Pipelines, Protests, and General Permits*, GEO. ENVTL. L. REV. ONLINE 1, 1 (Oct. 28, 2016), https://gelr.org/2016/10/28/pipelines-protests-and-general-permits/*; see also Standing Rock Sioux Tribe*, 239 F.Supp.3d at 82. The Corps conducts this review under § 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 408, and § 185 of the Mineral Leasing Act. 30 U.S.C. § 185. *See also* M-Opinion at 1.

12. Standing Rock Sioux's Complaint, *Standing Rock Sioux Tribe*, 205 F.Supp.3d 4 (No. 1:16-CB-01534).

(RFRA)[13] due to the DAPL's potential to damage religious artifacts in Lake Oahe.[14] They argue that an "oil spill affecting Lake Oahe would pose an existential threat to the Tribe's rights, culture, and welfare, and would fundamentally undermine its Treaty-protected rights to the integrity of its homelands and the waters that sustain the Tribe."[15]

Although the court denied a preliminary injunction in September 2016,[16] the Corps recognized the need to assess the potential impact on treaty rights, and stated that it would withhold an easement until the conclusion of this assessment.[17] In December 2016, the Corps promised that it would prepare an environmental impact statement to address oil spill risks, tribal treaty rights in and around Lake Oahe, and possible alternative pipeline routes.[18] However, after his inauguration in January 2017, one of President Trump's first orders of business was to sign an executive order approving the DAPL Lake Oahe crossing.[19] Subsequent to the executive order, and despite its prior assurances of a new environmental impact statement, the Corps determined that its prior assessments "satisfied the NEPA requirements for evaluating the easement required for the DAPL to cross Corps-managed federal lands at Lake Oahe and supported a decision to grant an easement."[20] The Corps thus granted the easement, and in June 2017, the DAPL was completed.[21] Soon after, the court granted in part Standing Rock's motion for partial summary judgment, concluding that while the Corps "substantially complied with NEPA in many areas . . . it did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline's effects are likely to be highly controversial."[22] The court ordered the Corps to "reconsider those sections of its environmental analysis" and requested the parties

13. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 (1993). *et seq*.

14. *See generally* Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, No. 16–1534, 2017 WL 908538 (D.D.C. Mar. 7, 2017) (denying Tribe's motion for preliminary injunction).

15. Standing Rock Sioux Tribe's Motion for Summary Judgment at 1.

16. Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, No. 16-1534 (JEB), 2016 WL 4734356, at *1 (D.D.C. Sept. 9, 2016).

17. Standing Rock Sioux Tribe's Motion for Summary Judgment at 1.

18. *Id*.

19. *Id*. at 1–2.

20. Standing Rock Tribe v. U.S. Army Corps of Eng'rs, No. 16–1534 (JEB), 2017 WL 2573994, at *7 (D.D.C. June 14, 2017).

21. *Id*.

22. *Id*. at *1.

submit "further briefing" on whether pipeline operations can continue during such time.[23] The case continues to play out in federal court.

But if the Standing Rock Sioux Tribe ("Standing Rock Tribe") had attempted to assert its own civil jurisdictional authority over the DAPL—either regulatory or adjudicative—what would the result have been? If the DAPL produces civil claims in the future, can the Standing Rock Tribal Court hear them? If left simply to the Standing Rock Tribe, there would be no question. According to the Standing Rock Tribal Code of Justice, the Standing Rock Tribe retains civil jurisdiction over:

> (a) All cases in law and equity arising under the Tribal Constitution, Tribal custom and tradition, or the laws of the Tribe as set forth in the Standing Rock Sioux Tribal Code of Justice or properly-adopted regulation or policy of the Tribe; and/or (b) *to any case in which the Tribe, a member of the Tribe, and Indian residing on the reservation or a corporation or entity owned in whole or in substantial part by any Indian shall be a party*.[24]

Per its Code, the Standing Rock Tribe would have jurisdiction over the DAPL just by virtue of the Tribe, or a member of the Tribe, being a party.

This Article attempts to explore whether United States federal courts would recognize this same jurisdictional right.[25] The analysis focuses on two key issues, prevalent in any tribal jurisdiction claim: (1) land—i.e., whether the cause of action occurred in "Indian Country,"[26] and (2) membership—i.e., whether one party is a non-member of the tribe. As explored

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23. *Id*.

24. Standing Rock Sioux Tribal Code of Justice, tit. 1, ch. 1, § 1–107.

25. From this point forward, when this Article discusses the Tribe's *ability* to assert jurisdiction, it refers to jurisdiction that a federal court would recognize—bearing in mind that tribes often do not seek guidance from the federal judiciary in recognizing their own civil jurisdiction.

26. "Indian Country" is shorthand for the territory upon which a tribe may assert its own criminal or civil jurisdiction. The parameters of Indian Country are found in 18 U.S.C. § 1151. *See* DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist., 420 U.S. 425, 428 n.2 (1975) ("While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction."). Under § 1151, tribes may assert jurisdiction if the cause of action falls on (1) a reservation, (2) federal trust allotments, or (3) land that is part of a "dependent Indian Community." *Id*.; *see also* Alaska v. Native Village of Venetie, 522 U.S. 520, 528 (1998). In short, tribes lose any possibility of federal recognition of jurisdiction for causes of action that occur on lands outside the three categories in § 1151. *See* Philip Morris USA, Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 938 (9th Cir. 2009) ("[T]ribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries.") (citing Atkinson Trading Co. v. Shirley, 532 U.S. 645, 658 n. 12 (2001)).

more fully below, both are critical issues in determining federal recognition of tribal jurisdiction to regulate behavior or redress a particular civil wrong.

Tribal legal jurisdiction is important in a number of respects. To begin, there are the routine advantageous and disadvantages attendant in most forum decisions. Assuming the court in question can meet the venue requirements—e.g., personal jurisdiction and subject matter jurisdiction—the initial choice of forum belongs to the plaintiff.[27] This decision often involves weighing such things as convenience of location and the plaintiff's "home-court" advantage of being in a friendly jurisdiction around like-minded peers who may sit on a jury.[28]

Yet, when it comes to tribal jurisdiction, something much deeper is at stake: sovereignty. A tribe's right to assert legal jurisdiction over that which affects its people or land forms a fundamental precept of sovereignty.[29] Here, the stakes include jurisdiction over an oil pipeline that will have a large impact on the people and land within Sioux territory, and a commodity that accounts for much of the Native American economy.[30] This case truly represents a struggle for control over important issues with direct bearing on tribal land; it demonstrates the adage that tribal sovereignty equates to tribal identity.[31] Unfortunately, over the last forty years, the

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27. A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 281 (4th ed. 2014).

28. *See* Kimberly Jade Norwood, *Shopping for A Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 272 (1996) ("In making the where-to-file decision, the lawyer—normally the plaintiff's lawyer, because the plaintiff normally is the filing party—takes many factors into account.").

29. *See, e.g.*, Lisa M. Slepnikoff, *More Questions than Answers: Plains Commerce Bank v. Long Family Land and Cattle Company, Inc. and the U.S. Supreme Court's Failure to Define the Extent of Tribal Authority over Nonmembers on Non-Indian Land*, 54 S. D. L. REV. 460, 461 (2009) ("Since the issue of tribal sovereignty was first addressed in 1832 by Chief Justice John Marshall, tribes have been recognized to possess the powers of inherent sovereignty over their land and people."); *see also* Robert B. Porter, *Strengthening Tribal Sovereignty through Government Reform: What are the Issues?*, *in* SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS: A READER 55, 55 (Robert Odawi Porter ed., 2005) ("Tribal sovereignty is dependent upon three things: (i) the degree to which Indians believe in the right to define their own future; (ii) the degree to which Indians have the power to carry out their beliefs, and (iii) the degree to which tribal sovereign acts are recognized both within the tribe and the outside world").

30. *See Native American Lands and Natural Resource Development*, NATURAL RESOURCE GOVERNANCE INSTITUTE (2011), http://www.resourcegovernance.org/analysis-tools/publications/native-american-lands-and-natural-resource-development (noting "American Indian lands are estimated to include . . . up to 20 percent of the [United States'] known natural gas and oil reserves"); *see also Indian Country Demographics*, NATIONAL CONGRESS OF AMERICAN INDIANS (last visited Apr. 8, 2017); *see also* NATIONAL CONGRESS OF AMERICAN INDIANS, http://www.ncai.org/about-tribes/demographics (explaining "undeveloped reserves of coal, natural gas, and oil on tribal land could generate nearly $1 trillion in revenues for tribes and surrounding communities.").

31. Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 77 (2003) ("[D]ebates about tribal sovereignty quickly become debates about Indian identity." (quoting Bar-

United States Supreme Court has slowly eroded the scope of tribal legal jurisdiction.[32] A shift back to greater tribal civil jurisdiction in the Twenty-First Century will prove pivotal for tribal sovereignty.

Part II of this Article explores the history of the Standing Rock Tribe as part of the Lakota People in the Dakotas, including a history of its land and treaty rights. Part III parses the history of the United States' recognition of tribal civil jurisdiction, and the recent approach of federal courts to curtail this jurisdiction. Part IV examines two possible routes for the Standing Rock Tribe to achieve civil jurisdiction over the DAPL: (1) its Lake Oahe crossing, and (2) its crossing through lands to the north of the current Standing Rock Reservation, lands that the Standing Rock Tribe never actually ceded, but are now privately held. This Article concludes by noting that, while the Standing Rock Tribe may find difficulty in asserting jurisdiction, the federal judiciary should reverse course and allow for greater tribal sovereignty.

II. THE MODERN HISTORY AND TREATY RIGHTS OF THE STANDING ROCK SIOUX TRIBE

Before any other discussion, it is important to consider the history of the Standing Rock Tribe in the Dakota lands. This section will focus, in particular, on events surrounding the Fort Laramie Treaties of 1851[33] and 1868,[34] and thereafter. These treaties, and their aftermath, form the basis for the Standing Rock Tribe's modern land claims and the potential for jurisdiction over the DAPL.[35]

In the late 1700s, the Great Sioux Nation resided in what is present-day Minnesota, and began to migrate west in search of buffalo, fanning out as far west as Wyoming and as far south as Kansas.[36] Despite these nomadic hunting patterns, "the core area of the Sioux Nation was not in dispute."[37] Prior to the mid-1800s, the Great Sioux Nation's territorial reign and economic development remained largely uninhibited by their white neigh-

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bara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power over Children*, 83 MINN. L. REV. 927, 937 (1999)).

32. *See infra* Part II.

33. 1851 Ft. Laramie Treaty, Sept. 17, 1851, 11 Stat. 749 [hereinafter 11 Stat. 749].

34. 1868 Ft. Laramie Treaty, April 29, 1868, 15 Stat. 635 [hereinafter 15 Stat. 635].

35. *See supra* Introduction n. 22 (discussing the tests for Indian Country); *infra* Part II (same).

36. IMRE SUTTON, IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 123-24 (Imre Sutton et al. eds., 1985).

37. *Id*. at 124.

bors.[38] However, the exploding American westward expansion brought emigrants with accompanying population pressures and new disease.[39] The Fort Laramie Treaties marked a transition for the Sioux's relationship with European settlers and the federal government.[40] The Treaties "imposed European American ideas about property ownership on the landscape, and in the process, they introduced a new dimension into Indian-White relationships that would profoundly affect the nature of tribal ties" to the Dakotas.[41]

In 1851, the federal government began negotiations at Fort Laramie, Wyoming with a group of tribes representing the upper Missouri and Platte River regions.[42] The eventual treaty brokered a peace between these tribes, and delineated a large mass of land for the Great Sioux Nation, including much of the Dakota Territory.[43] After the 1851 Treaty, the Sioux Territory was bordered on the north by the Heart River (in what is now southern North Dakota), and on the east by the Missouri River.[44] Furthermore, the United States agreed to "protect the [Sioux Nation] against commission of all depredations by the people of the said United States."[45]

The United States, however, quickly broke its promise of protection. From 1851 through 1867, the Lakota became "unsettled about the growing presence of emigrants and military commands in their shared territories."[46] Hostilities increased between the Sioux tribes, American soldiers, and region settlers.[47] To quell this conflict, the United States and the tribes met once again and formed the 1868 Fort Laramie Treaty.[48] The Treaty established the Great Sioux Reservation, and drew its eastern boundary as the eastern bank of the Missouri River; its southern boundary as the northern border of Nebraska; its northern boundary as the "forty-sixth parallel of

38. PATRICIA C. ALBERS, THE HOME OF THE BISON: AN ETHNOGRAPHIC AND ETHNOHISTORICAL STUDY OF TRADITIONAL CULTURAL AFFILIATIONS TO WIND CAVE NATIONAL PARK 88 (2003).

39. *Id*.

40. *Id*.

41. *Id*.

42. *Id*. at 89.

43. 11 Stat. 749, art. 5.

44. *Id*. These lands include the current site of the DAPL crossing. *See also* Jeffery Ostler & Nick Estes, '*The Supreme Law of the Land': Standing Rock and the Dakota Access Pipeline*, INDIAN COUNTRY MEDIA NETWORK (Jan. 16, 2017), https://indiancountrymedianetwork.com/news/opinions/supreme-law-land-standing-rock-dakota-access-pipeline/. For the tribes, however, "the territorial boundaries drawn on the 1851 treaty map were largely meaningless as local tribes continued to move across the landscape in complex ways that encouraged the sharing of jointly held territories." ALBERS, *supra* note 38, at 90.

45. 11 Stat. 749, art. 3.

46. ALBERS, *supra* note 38, at 96.

47. *Id*. at 99.

48. *Id*.

north latitude;" and its western boundary as "the one hundred and fourth meridian of west longitude, in addition to certain reservations already existing east of the Missouri."[49] The United States additionally agreed "that no [unauthorized] person shall ever be permitted to pass over, settle upon, or reside in the territory described in this article."[50] The Treaty guaranteed hunting rights for large swaths of lands outside the reservation boundaries.[51] And it stated that "lands north of the North Platte River and east of the summits of the Big Horn mountains shall be held and considered to be unceded."[52] In 1978, the Indian Claims Commission found that these unceded northern lands stretched to the Heart River—land that the DAPL is currently slated to cross.[53] Finally, the Treaty stipulated, "no treaty for the cession of any portion or part of the reservation . . . shall be [valid] . . . unless executed and signed by at least three-fourths of the adult male Indians occupying or interested in the same."[54]

Shortly after ratification of the 1868 Treaty, white speculators found gold in the Black Hills region of the Great Sioux Reservation.[55] In 1874, in order to confirm the presence of this gold, Lieutenant Colonel George Armstrong Custer led a 1000 strong military brigade through the Reservation and into the Black Hills.[56] Custer's reports of gold, mineral, timber, and fertile land became widely reported back east, and ignited new pressure to open the Black Hills for white settlement.[57] The Fort Laramie Treaty stood in the way.[58] So, in 1875, President Grant met privately with the Secretary

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49. United States v. Sioux Nation of Indians, 448 U.S. 371, 374-75 (1980); *see also* 15 Stat. 635, art. 2.

50. 15 Stat. 635, art. 2.

51. *Id*. at art. 11.

52. *Id*. at art. 16.

53. Ostler & Estes, *supra* note 44; *see also* SUTTON, *supra* note 36, at 122 (showing map of "Sioux cessions and claims.")

54. Ostler & Estes, *supra* note 44. Interestingly:

> The [1868] Fort Laramie Treaty was considered by some commentators to have been a complete victory for Red Cloud and the Sioux . . . it was described as the only instance in the history of the United States where the government has gone to war and afterwards negotiated a peace conceding everything demanded by the enemy and exacting nothing in return.

Sioux Nation of Indians, 448 U.S. at 371, 376 n. 4.

55. *Sioux Nation of Indians*, 448 U.S. at 376; ALBERS, *supra* note 38, at 120-21.

56. *Sioux Nation of Indians*, 448 U.S. at 376-77.

57. *Id*. at 377.

58. *Id; see also* SUTTON, *supra* note 36, at 125 ("As settlement pushed west in Dakota Territory, the Great Sioux Reserve stood in the path of expansion . . . .").

of the Interior and the Secretary of War and declared that he would no longer protect the Black Hills from white intruders.[59]

During the following winter of 1876, the Commissioner of Indian Affairs notified Sioux hunting on the unceded northern lands that they must return to the Reservation, or they would be classified as "hostile."[60] Due to the severity of the winter conditions, the Sioux hunters could not comply.[61] The United States Army attacked these "hostiles," and the ensuing war led to Custer's defeat to Sitting Bull at the Battle of Little Big Horn the following June.[62] But Sitting Bull's victory was "short-lived, and those Indians who surrendered to the Army were returned to the reservation, and deprived of their weapons and horses, leaving them completely dependent for survival on rations provided them by the Government."[63]

Congress quickly grew impatient with providing the Sioux with food rations, so it passed a bill ending appropriations for subsistence.[64] Additionally, Congress directed the President to form a commission for retrieving the Black Hills.[65] In 1876, the commission arrived at the Great Sioux Reservation and relayed to tribal leaders that the United States had abrogated its responsibility regarding the rations.[66] The parties formed a new agreement, in which the Sioux relinquished the Black Hills to the west and unceded lands to the north.[67] In return, the United States would continue to provide rations.[68] Notably, contrary to the express provision of the 1868 Fort Laramie Treaty, only ten percent of the adult male Sioux population signed the 1876 Agreement.[69] To that end, not only did the United States use coercive tactics in cementing the agreement—i.e., threatening the Sioux with starvation—it also violated previous treaty rights by failing to secure the requisite signatures. Congress subsequently enacted the 1876 Agree-

59. *Sioux Nation of Indians*, 448 U.S. at 378; *see also* ALBERS, *supra* note 38, at 123 ("In 1875, the military had largely abandoned its efforts to keep prospectors and settlers out of the Black Hills, and even before this, they never prosecuted any of the trespassers.").

60. *Sioux Nation of Indians*, 448 U.S. at 379.

61. *Id.*

62. *Id.*

63. *Id.*

64. Act of Aug. 15, 1876, 19 Stat. 176.

65. *Sioux Nation of Indians*, 448 U.S. at 381.

66. *Id.*

67. *Id.*

68. *Id.*; *see also* Ostler & Estes, *supra* note 44 (explaining that the 1876 Agreement purported to abrogate "the 1868 Article 16 unceded lands" to the north of the current Standing Rock Reservation).

69. *Sioux Nation of Indians*, 448 U.S. at 381-82.

ment into law,[70] formally abrogating the 1868 Fort Laramie Treaty as it pertained to the aforementioned lands.[71]

The United States Supreme Court eventually held that the 1876 agreement was an unconstitutional taking and awarded the Sioux monetary compensation, but not an actual return of the land.[72] In so holding, the Court noted that "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history."[73] The Sioux have never accepted this monetary award, instead demanding "the return of the majority of the Black Hills lands that are under federal ownership."[74]

In 1889, during a national period of tribal land allotment,[75] Congress passed the Act of March 2, 1889.[76] This Act "removed a substantial amount of land from the [r]eservation and divided the remaining territory into several smaller reservations for various Sioux bands, including the Cheyenne River, Standing Rock, and Lower Brule."[77] The 1889 Act stipulated, however, that provisions of the Ft. Laramie Treaty that were "not in conflict" remained.[78] In addition, the Act delineated the "eastern border of the Standing Rock, Cheyenne River, and Lower Brule Sioux Tribes as 'the center of the main channel of the Missouri River.'"[79] The United States

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70. Act of Feb. 28, 187, 19 Stat. 254 (1877).

71. *Sioux Nation of Indians*, 448 U.S. at 382-83.

72. *Id*. at 424.

73. *Id*. at 388.

74. Ostler & Estes, *supra* note 44.

75. The allotment period, beginning with the General Allotment Act of 1887—also known as the Dawes Act:

> Grant[ed] each [tribal] family head 160 acres of land, 80 acres to each person over 18 years of age and to each orphan under 18, and grant[ed] all other single persons under eighteen 40 acres of land. Generally, the land was held in trust for 25 years by the United States, with an unencumbered patent in fee issuing at the close of the trust period . . . The General Allotment Act provided that citizenship would be conferred on the allottees at the conclusion of the trust process.

CAROLE E. GOLDBERG ET AL, AMERICAN INDIAN LAW: NATIVE AMERICANS AND THE FEDERAL SYSTEM 26 (7th ed. 2015).

Although the general allotment period attempted to foster tribal independence over the land, the federal government ended up pilfering massive amounts of land from the tribes:

> Section 5 of the Act also contemplated that 'surplus' land, not needed for the fixed-acreage allotment to tribal members, would be ceded to the federal government for compensation through negotiations with the tribe. Such lands were thereafter opened to non-Indian settlement under the public lands program; thus, Indian reservations were opened to non-Indian settlement for the first time.

Id. From 1887 to 1934, the allotment era reduced tribal ownership of land from 138 million acres to 48 million acres—a two-thirds reduction. *Id*. at 30.

76. 25 Stat. 888.

77. M-Opinion at 6.

78. *Id*. (citing South Dakota v. Bourland, 508 U.S. 679, 682 (1993)).

79. *Id*. (citing 25 Stat. 889).

Supreme Court has interpreted statutory terms such as "center of the main channel" as referring to "the middle of the main channel of a river."[80] As a result, after the 1889 Act, the newly minted Standing Rock Sioux Tribe Reservation's eastern boarder extended to the middle of the Missouri River, and what would eventually become Lake Oahe.

Lake Oahe was a direct result of the 1944 Flood Control Act,[81] another important event in the history of the Standing Rock Tribe. The Act created a flood control plan for the Missouri River by, in part, creating dams to corral seasonal flooding.[82] The Act "did not authorize the acquisition of Indian property," but subsequent statutes created "limited takings."[83] These statutes also recognized "the Tribes' right to 'hunt and fish in and around on the aforesaid shoreline and reservoir created by the Acts, subject, however, to regulations governing use by other citizens of the United States.'"[84] Compensation for the land was "'in settlement of all claims, rights,' and demands of the Tribe and individual Indians associated with the Act."[85] Moreover, the statutes took "title to any interest Indians may have in the bed of the Missouri River so far as it is within the boundaries of the reservation at issue."[86]

However, notwithstanding the Flood Control Act of 1944, the Standing Rock Sioux Tribe Reservation continues to extend into the middle of Lake Oahe. The 1889 Act and, as explored above, relevant Supreme Court jurisprudence establishes the eastern boundary of the Standing Rock Sioux Tribe Reservation as the middle of the Missouri River. As the Department of the Interior has explained, "a significant portion of Lake Oahe remains within the outer boundary of the Standing Rock and Cheyenne River Sioux Reservations."[87] This is so because the Flood Control Act of 1944, and

80. *Id*. at 7 (citing Iowa v. Illinois, 147 U.S. 1, 10-11 (1893)).

81. Pub. L. No. 78-534, 58 Stat. 887 (1944).

82. M-Opinion at 6. "These dams created huge lake-like reservoirs to control the Missouri River's seasonal flooding and to end periodic devastation caused downstream." *Id*. (quoting Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 813 (8th Cir. 1983)). In a deeply sad twist of irony, the Flood Control Act of 1944 actually *created* large flooding that displaced and devastated many tribal families. *See* Hearing on Impact of the Flood Control Act of 1944 on Indian Tribes along the Missouri River Before the S. Comm. on Indian Affairs, United States Senate, 110th Cong. First Session (Nov. 1, 2007) (Statement of Hon. Bryon L. Dorgan, Senator, North Dakota) ("The loss of these lands has been devastating to the Indian communities. More than 900 Indian families were relocated, but the fact is we have had entire communities inundated by water.").

83. M-Opinion at 6 (quoting Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 813 (8th Cir. 1983)).

84. *Id*. (quoting 76 Stat. 701; 72 Stat. 1774; 72 Stat. 1764; 68 Stat. 1193).

85. *Id*. (quoting 72 Stat. 1173; 68 Stat. 1191).

86. *Id*. at 6–7 (quoting 76 Stat. 698; 72 Stat. 1762; 68 Stat. 1191).

87. *Id*. at 7.

subsequent statutes, took land but ultimately did not reduce the size of the Standing Rock and Cheyenne River Sioux Tribe Reservations.[88] Consequently, the Standing Rock Tribe now has possible land connections to the DAPL through: (1) unceded lands to the north of the Reservation, and (2) Lake Oahe.

III. THE HISTORY AND CURRENT STATE OF TRIBAL CIVIL JURISDICTION

The examination above of the Standing Rock Tribe's history and ties to land can help establish the parameters of "Indian country" necessary for any jurisdictional claim. But whether a tribe can ultimately assert civil jurisdiction over a non-member warrants a close examination of federal caselaw. As explored below, since *Montana v. United States*,[89] federal recognition of tribal civil jurisdiction over non-members has shrunk.[90]

A. TRIBAL SOVEREIGNTY PRE-*MONTANA*

Any exploration of tribal sovereignty in post-Revolutionary War America must begin with the *Marshall Trilogy*, a series of Supreme Court decisions from 1823 to 1832, which provided the cornerstone for federal Indian law.[91] Tribal sovereignty emerged from the *Marshall Trilogy* greatly diminished in many regards—the tribes certainly did not obtain absolute recognition as a nation-state—but affirmed in others: the Marshall Court's explanation of tribal rights appears almost progressive next to the federal jurisprudence and policy that would follow.

Tribes lost important rights under the *Marshall Trilogy*. The Court refused to recognize tribal ownership of territorial land in fee simple absolute, applying the doctrine of discovery to explain that the land now belonged to

88. *See id*. ("[C]ourts have recognized that the Flood Control Act takings statutes did not diminish their associated reservations.").

89. Montana v. U.S., 450 U.S. 544 (1981).

90. *See* Lisa M. Slepnikoff, *supra* note 29, at 460 (noting that the *Marshall Trilogy* recognized tribal power "of inherent sovereignty over their territory and people," but since the late 1970s, "the U.S. Supreme Court began to depart from traditional notions of tribal sovereignty"); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 643 (2003) ("Over the last twenty years, the Supreme Court has led a massive assault on tribal sovereignty. Although it has acted to affirm expansive powers over tribal members, it has substantially curtailed tribal power over nonmembers . . . .").

91. Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).

the federal government.[92] Moreover, the Court held, under Article III of the Constitution, that tribes lacked any standing in federal court.[93] But perhaps the most indelible restriction on sovereignty came from the Court labeling tribes as *domestic dependent nations* within the greater federal framework, rather than independent nation-states within the United States' geographic boundary.[94] The Court famously explained that tribes "[were] in a state of pupilage" with "[t]heir relations to the Unites States resemble[ing] that of a ward to his guardian."[95] This guardian-ward summation necessarily led to a precipitous imbalance in the tribal/federal power dynamic.[96]

The *Marshall Trilogy*, however, also established some important tribal rights. First, the Court held that, although tribes did not own their lands in fee simple, they retained the rights of occupancy and exclusion.[97] And while tribal sovereignty existed within the larger federal framework, the Court found that tribes retained the sovereign right of self-governance over their territory—an inherent right that pre-dated the formation of the United States.[98] The Marshall Court cemented a lasting principal that tribes retain these inherent powers, as long as the two sides did not terminate the power through an agreement.[99] The tribes also gained assured federal protection against encroachment by state governments into tribal sovereignty or territory.[100]

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92. *See M'Intosh*, 21 U.S. at 574 ("[Tribal] power to dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principal, that discovery gave exclusive title to those who made it.").

93. *Cherokee Nation*, 30 U.S. at 20.

94. *Id*. at 17.

95. *Id*.

96. *Id*.

97. *See M'Intosh*, 21 U.S. at 574 (1823) (explaining that tribes are "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion . . . ."). This right of exclusivity, however, was ultimately limited by federal control over the underlying land.

98. *See* Worcester v. Georgia, 31 U.S. 515, 520 (1832) ("A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.").

99. *See id*. at 556-57 (noting that prior congressional acts "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive . . . ."); Braveman, *supra* note 31, at 83 (showing that the Marshall Court "provided the foundation" for the principle "that the 'powers of Indian tribes are, in general, inherent powers of a limited sovereignty which has never been extinguished.'") (quoting United States v. Wheeler, 435 U.S. 313, 322-23 (1978)).

100. *See Worcester*, 31 U.S. at 520 ("The Cherokee nation, then, is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.").

After the Marshall Court, the next wave of groundbreaking cases came under the more conservative Court of the late Nineteenth Century. This era ushered the "rise of federal plenary power" over tribal affairs, significantly expanding federal control.[101] In *United States v. Kagama*,[102] for example, the Court examined congressional power to establish duel federal-tribal jurisdiction over "major" crimes committed in Indian Country.[103] The Court determined that, while the Constitution contained no provision granting Congress this authority, Congress derived the necessary authority from its role as guardian.[104] Aside from expanding the powers of the federal government, however, the Court largely left intact tribal legal jurisdiction over their territories—assuming, of course, Congress did not intervene.[105]

Seventeen years later, in *Lone Wolf v. Hitchcock*, the Court expanded congressional power further by finding that Congress held the unilateral right to abrogate past treaties, if in the best interest of the United States.[106] The Court explained that "[p]lenary authority over tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[107] The concept of congressional plenary power over tribal affairs persists today.[108]

With the Twentieth Century came multiple important federal policy shifts. First, the Allotment Era,[109] which had spanned the late Nineteenth through early Twentieth Century, ended in 1934 with the Indian Reorganization Act.[110] The Indian Reorganization Act "reversed the allotment policy and sought to revitalize tribal government rather than destroying it."[111] However, in the 1940s, the federal government reversed course again and

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101. GOLDBERG ET AL., *supra* note 75, at 86.

102. United States v. Kagama, 118 U.S. 375 (1886).

103. *Id*. at 379.

104. *Id*. at 382.

105. *See id*. at 381-82 ("[Tribes] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.").

106. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

107. *Id*. at 565.

108. *See, e.g.*, United States v. Lara, 541 U.S. 193, 194 (2004) (explaining that "the Constitution, through the Indian Commerce and Treaty Clauses, grants Congress plenary and exclusive powers to legislate in respect to Indian tribes") (quoting Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 470-71 (1979)).

109. *See supra* Part I n. 75 (exploring the Dawes Act).

110. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934).

111. Singer, *supra* note 90, at 649-50.

began a policy of terminating federal recognition of tribes, thereby severing—in many instances at least—the inter-governmental relationship between the federal government and federally recognized tribes.[112] This policy proved brief and unsuccessful and, since 1960, the federal government has officially "supported tribal sovereignty and affirmed the government-to-government relationship existing between federally recognized tribes and the United States."[113]

During this period of transition, the Supreme Court decided *Williams v. Lee*.[114] *Lee* featured a debt recovery claim in Arizona state court against members of the Navajo Nation, brought by a non-tribal member who operated a business on the Navajo Reservation. The Court held that the Navajo Nation, rather than Arizona, had jurisdiction by stating:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. *It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with the Indian took place there*.[115]

The Court "reinforced the post-1934 Congressional policy of leaving the governance of Indian country with Indian tribes, even when non-Indians were involved."[116]

However, only twenty years later, *Oliphant v. Suquamish Indian Tribe* signaled a new era of Supreme Court hesitancy in allowing tribal jurisdiction over non-members.[117] *Oliphant* questioned the Suquamish Tribe's criminal jurisdiction over acts committed by non-Indians on tribal land.[118] The Court eventually held that the Suquamish Tribe lacked jurisdiction, even if the crime occurred on tribal land.[119] Tribes, "by submitting to the overriding sovereignty of the United States," lost the "power to try non-

112. *Id*. at 650.
113. *Id*.
114. Williams v. Lee, 358 U.S. 217 (1959).
115. *Id*. at 223 (emphasis added).
116. Robert N. Clinton, *There is no Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113, 209 (2002).
117. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
118. *Id*. at 194.
119. *Id*. at 209.

Indian citizens of the United States except in a manner acceptable to Congress."[120]

Without explicitly stating, *Oliphant* reflected the Court's general distrust of tribal courts. To reach its conclusion, *Oliphant* looked to *Ex parte Crow Dog*—an 1883 case regarding federal criminal jurisdiction over tribal members on tribal land—for the potential injustice in allowing tribal courts to try non-Indians.[121] It quoted *Crow Dog* for the proposition that tribal courts try non-Indians "not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception."[122] That *Oliphant* used this excerpt to justify restrictions on tribal jurisdiction is shocking enough, but it gets worse. The Court omitted language from the full quote that would have demonstrated its true discriminatory basis. Here is the quote in full, in which *Crow Dog* examines problems with federal criminal jurisdiction over tribal members:

> It tries them not by their peers, nor by the customs of their people, nor the law of their land, *but by superiors of a different race*, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, *to the strongest prejudices of their savage nature*; one which measures the red man's revenge by the maxims of the white man's morality.[123]

Therefore, in relying on *Crow Dog*, the *Oliphant* opinion relays that "just as it is unfair to subject 'savages separated by race and tradition' to the law of the United States, it is unfair to subject non-Indians to the laws of 'savage Indians.'"[124] *Oliphant's* fundamental distrust of tribal courts, and the historic racism predicating this distrust, influenced *Montana* just two years later, and continues to reverberate today.[125]

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120. *Id*. at 210.

121. *Id*.

122. *Id*. at 210-11.

123. Ex Parte Crow Dog, 109 U.S. 556, 571-72 (1883) (emphasis added).

124. Braveman, *supra* note 31, at 107.

125. *See* Duro v. Reina, 495 U.S. 676, 693 (1990) ("While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often subordinate to the political branches of tribal governments, and their legal methods may depend on unspoken practices and norms . . . .") (citation and internal quotation marking omitted), *holding superseded by* 25 U.S.C. § 1301(2); Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167, 181 (5th Cir.

B. *MONTANA* AND ITS EFFECT ON TRIBAL CIVIL JURISDICTION

In 1981, the Supreme Court decided *Montana v. United States*,[126] now regarded as "the pathmarking case concerning tribal civil authority over nonmembers."[127] *Montana* examined the Crow Tribe of Montana's regulation of non-member hunting and fishing within the Reservation.[128] At the onset, the Court explained that the Crow Tribe could regulate hunting and fishing of non-members "on land belonging to the Tribe or held by the United States in trust for the Tribe."[129] The remaining issue was whether the Crow Tribe could regulate non-member hunting and fishing on the private fee simple land within the Reservation.[130]

In determining the extent of the Crow Tribe's ability to regulate hunting and fishing by non-members on reservation fee land, the Court relied on *Oliphant*—and, as explored above, its racist underpinnings—for the "general proposition that the inherent sovereign powers of an Indian Tribe do not extend to the activities of nonmembers of the tribe."[131] The Court, however, formulated two exceptions to this general rule. First, tribes retain the power to regulate non-members who engage in a "consensual relationship[] with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[132] Second, tribes retain the power to regulate non-member behavior "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."[133] Either of these exceptions will afford tribal jurisdiction. Here, the Court found that hunting and fishing failed under both exceptions.[134] The hunters did not enter a consensual relationship with the Crow Tribe, and a lack of control over

2014) (Smith, J., dissenting) ("There is no reason [defendant] should have reasonably anticipated that . . . it would be subject to the entire—and largely undefined—body of Indian tribal tort law."); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 800 (2007) (explaining the tension between "Indian nations' inherent right to live and govern beyond the reach of the dominant society" and those that feel "imposing liberalism onto Indian nations is necessary to prevent intrusions on individual rights by tribal governments.").

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

127. Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997).

128. *Montana*, 450 U.S. at 557.

129. *Id.* (quoting United States v. Montana, 604 F.2d 1162, 1165-1166 (9th Cir. 1979) *rev'd sub nom.* Montana v. United States, 450 U.S. 544 (1981)).

130. *Id.*

131. *Id.* at 565.

132. *Id.*

133. *Id.* at 566.

134. *Montana*, 450 U.S. at 566

hunting and fishing would not "threaten the Tribe's political or economic security as to justify regulation."[135]

Montana left several questions in its wake. While some of the questions have been answered definitively, others linger. As addressed below, these have included: (1) whether the extent of tribal civil adjudicative jurisdiction parallels the civil regulatory authority that *Montana* addressed; (2) the scope of *Montana's* second exception; and (3) the significance of land—i.e., whether *Montana* applies to non-member conduct on tribally owned land.

1. Civil Regulatory versus Adjudicative Jurisdiction

After *Montana*, some speculated that its holding applied merely to civil regulatory jurisdiction, rather than civil adjudicative jurisdiction.[136] Civil adjudicative jurisdiction concerns the ability to redress civil claims against individual defendants.[137] Whereas, civil regulatory authority[138] concerns the ability to regulate conduct within a geographic location—land use regulation or taxing authority, for example.[139] *Strate v. A-1 Contractors*, however, laid this speculation to rest.[140]

In *Strate*, the Supreme Court considered tribal civil jurisdiction over a negligence claim resulting from a car accident on a North Dakota state highway in the Fort Berthold Reservation.[141] The Court found that, although located in the Reservation, the state highway was the "equivalent, for nonmember governance purposes, to alienated, non-Indian land."[142] And while *Strate* addressed the Tribe's civil adjudicative jurisdiction over a tort claim, as opposed to civil regulatory jurisdiction, the Court still applied *Montana*.[143] It determined that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed it legislative jurisdiction."[144] Accordingly,

135. *Id*.

136. *See* Joseph William Singer, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 S.D. L. REV. 1, 27 (1996) ("The ruling in Montana related to legislative jurisdiction not adjudicative jurisdiction.").

137. *Id*. at 28.

138. Civil regulatory jurisdiction is commonly known as "legislative jurisdiction."

139. Singer, *supra* note 136, at 27-28.

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

141. *Id*. at 442.

142. *Id*. at 454.

143. *Id*. at 453.

144. *Id*.

Montana controls for non-member conduct on fee land within a reservation, whether the jurisdictional question is regulatory or adjudicative.[145]

2. *Interpretation of Montana's Second Exception*

Unlike the more open and shut question of civil adjudicative versus regulatory jurisdiction, application of *Montana's* second exception[146] has been a continuing source of inconsistency and confusion within the federal judiciary. *Strate* is illustrative of where the Supreme Court has taken *Montana's* second exception. In applying the first *Montana* exception, *Strate* quickly dismissed the car accident as a nonconsensual act.[147] The Court then provided an extremely narrow interpretation of *Montana's* second exception. As explored, *Montana's* original second exception language addressed potential infringement upon the "political integrity, the economic security, or the health or welfare of the tribe."[148] If the non-member's action met this criterion, the tribe could assert civil jurisdiction.[149] On its face, "political integrity, economic security, or the health and welfare of the tribe" might encompass many behaviors—including a tribe's ability to address negligent driving.[150] Nevertheless, *Strate* explained that the second exception isn't nearly so broad.[151] This exception only comes into play when the non-member's action threatens the tribe's ability "to protect tribal self-government" or control "internal relations."[152] In other words, *Montana* didn't really mean what it said.

In the end, the Court found that negligent driving failed to meet *Montana's* second exception because "[n]either regulatory nor adjudicatory authority over the state highway accident is needed to preserve the right of reservation Indians to make their own laws and be ruled by them."[153] It reasoned that "those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the

145. S*ee id*. at 459.

146. This Article explores *Montana's* second exception, as it is most germane to the Standing Rock Tribe's potential for jurisdiction over the DAPL—the Standing Rock Tribe would have a hard time arguing with a straight face that it entered into a consensual relationship with Dakota Access, LLC. However, rest assured that *Montana's* first exception has produced no shortage of litigation. *See, e.g.*, Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 176 (5th Cir. 2014).

147. *Strate*, 520 U.S. at 457.

148. *Montana*, 450 U.S. at 544, 566.

149. *Id*.

150. *Strate*, 520 U.S. at 459.

151. *Id*.

152. *Id*. (quoting *Montana*).

153. *Id*. (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

safety of tribal members . . . [b]ut if *Montana's* second exception requires no more, the exception would severely shrink the rule."[154] In reality, by interpreting *Montana* so narrowly, the Court signals that the second exception exists only on paper. In fact, the Court has explained in subsequent jurisprudence that the action "must do more than injure the tribe, *it must imperil the subsistence of the tribal community*."[155] Thus, at this point, a non-member action that threatens tribal self-governance may not even suffice.

This narrowness was on full display in *Atkinson Trading Company, Inc. v. Shirley*.[156] *Shirley* evaluated the Navajo Nation's ability to tax a non-member owned hotel located on fee land within the Navajo Reservation.[157] The Court held that the Navajo lacked jurisdiction because the loss of the Nation's ability to tax this one hotel would not threaten "or [have] some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[158] *Montana*, the Court explained, gives "nothing beyond what is necessary to protect tribal self-government or to control internal relations."[159] The Court further stated, "[w]hatever effect the petitioner's operation of the [hotel] might have on surrounding Navajo land, it [did] not endanger the Navajo Nation's political integrity."[160]

Shirley stands in stark contrast to the Court's prior holding in *Merrion v. Jicarilla Apache Tribe*, a case that dealt with the Jicarilla Apache Tribe's power to tax non-member oil operations on its New Mexico Reservation.[161] In affirming the Jicarilla Apache Tribe's right to issue this tax, the Court noted:

> The power to tax is an essential attribute of Indian sovereignty *because it is a necessary instrument of self-government and territorial management*. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the Tribe's general authority, as sovereign, to control economic activity within its jurisdiction,

154. *Id.* at 457-58.

155. Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 341 (2008) (emphasis added) (quoting *Montana*, 450 U.S. at 566).

156. Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

157. *Id.* at 649.

158. *Id.* at 656.

159. *Id.* at 658.

160. *Id.*

161. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

> and to defray the cost providing governmental services by requiring contributions from persons within its jurisdiction.[162]

Notably, *Merrion* did not apply *Montana*—probably because the tax took place on tribally owned land, rather than privately owned fee land. Indeed, the difference in land was *Shirley's* justification for declining to apply *Merrion* to a tax on businesses located on reservation fee land.[163]

But this difference in land does not explain why *Shirley* declined to apply *Merrion* once it reached *Montana's* second exception. *Merrion* clearly states that the power to tax is essential to tribal self-government.[164] If the "political integrity, economic security, and health and welfare" that *Montana* references really boils down to tribal self-government, nothing is more essential to self-government then the power to tax. Yet *Shirley's* analysis was so narrow that, even though the true right at stake was a broad power to tax non-member business on reservation fee lands, the Court examined the mere effect of not being able to tax the petitioner's one business.[165] This analytical singularity, however, could apply to *any* strand of governmental sovereignty.

For instance, the Internal Revenue Service's power to tax is clearly essential to the United States' ability to self-govern—in terms of both generating revenue and structuring societal behavior.[166] Under *Shirley's* mode of analysis, a single taxpayer could argue that the IRS's essential function is not so essential as it pertains just to them. And if you accumulate all of the individual taxpayers who could make this same argument, eventually the government completely loses its ability to tax. By contrast, *Merrion* analyzed tribal ability to tax, not as it pertained to one plaintiff, but rather as it pertained to anyone within the Tribe's territory. *Shirley* should have done the same, and is now representative of just how high the *Montana* bar has been set. Because if the power to tax is not enough to meet *Montana's* second exception, it is hard to fathom that *anything* would be.

Lower federal circuit courts, however, are not always perfect in taking the Supreme Court's lead. Even though the Supreme Court has been explicit in narrowing *Montana's* second exception, federal circuit courts have been inconsistent in their approach. Some circuit courts continue to apply

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162. *Id.* at 136 (emphasis added).
163. *Shirley*, 532 U.S. at 653-54.
164. *Merrion*, 455 U.S. at 136.
165. *See Shirley*, 532 U.S. at 656-59.
166. JOSEPH BANKMAN ET AL., FEDERAL INCOME TAXATION 2-8 (16th ed. 2012).

the second exception broadly, while others track the High Court and apply it narrowly—this discrepancy sometimes even occurs within the same circuit.[167] The result lends to uncertainty in how a federal court might apply *Montana* in addressing tribal jurisdiction over the effects of an oil pipeline.

3. The Importance of Land

As explored above, *Montana* examined tribal jurisdiction over non-member conduct on fee land within a reservation, and articulated a general presumption against such jurisdiction, absent two exceptions.[168] But *Montana* additionally explained that had the hunting and fishing in question occurred "on land belonging to the Tribe or held by the United States in trust for the Tribe" the Tribe would have retained jurisdiction.[169] As a result, immediately after *Montana*, tribes would have safely assumed, at the very least, that they retained the sovereignty to address non-member conduct *on tribal land*.

Nevada v. Hicks upended this assumption.[170] The petitioner in *Hicks* was a member of the Fallon Paiute-Shoshone Tribe, and resided on its Reservation in Nevada.[171] The petitioner sued a Nevada state game warden in tribal court, alleging that the warden had illegally searched his residence.[172] In assessing the tribal court's jurisdiction, the United States Supreme Court explained that while the cause of action occurred on tribally owned land—as opposed to private fee land—land status was not dispositive of whether

167. *Compare* Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 817 (9th Cir. 2011) (holding land lease dispute between tribe and non-member corporation met *Montana's* second exception because the business venture "constituted a significant economic interest for the tribe"), *and* Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Mississippi in Iowa, 609 F.3d 927, 939 (8th Cir. 2010) (finding private non-member corporation's tortious actions and "seiz[ure] of sensitive information" within tribal casino met *Montana's* second exception by "menac[ing] the political integrity, the economic security, and the health and welfare of the tribe to such a degree that it imperiled the subsistence of the tribal community." (internal brackets omitted) (quoting *Plains Commerce Bank*, 554 U.S. at 341)), *with* Fort Yates Pub. Sch. Dist. No. 4 v. Murphy *ex rel.* C.M.B., 278 F.3d 663, 665-66, 669-70 (8th Cir. 2015) (holding that tribe lacked jurisdiction because allegation of breach of public school's "duty to provide safe learning environment" and negligent hiring practices did not "imperil the subsistence of the Tribe"), *and* Evans v. Shoshone-Bannock Land Use Policy Comm'n, 736 F.3d 1298 1306 (9th Cir. 2013) (holding tribe lacked jurisdiction over construction project that would allegedly cause groundwater contamination because the project did not "pose[] catastrophic risks"), *and* MacArthur v. San Juan Cty., 497 F.3d 1057, 1075 (10th Cir. 2007) (explaining that tribal "interest in regulating employment relationships between its members and non-Indian employers on the reservation" did not meet *Montana's* second exception).

168. *Montana*, 450 U.S. at 565-66.

169. *Id.* at 557.

170. Nevada v. Hicks, 533 U.S. 353 (2001).

171. *Id.* at 355-56.

172. *Id.* at 356-57.

Montana applied.[173] In a marked departure from past caselaw, the Court found that "[t]he ownership status of land . . . is only one factor to consider when determining whether regulation of the activities of nonmembers is 'necessary to protected tribal self-government or to control internal relations.'"[174] Moreover, "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over non-members."[175] The Court applied *Montana* and held that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government."[176]

Still, *Hicks* left more questions than answers. To start, the case had addressed a narrow circumstance: namely, tribal jurisdiction over nonmembers on tribal land when there is an important competing state interest. *Hicks* clearly held that *Montana* applies in this specific instance. And *Hicks* stated explicitly that its holding extended only to the facts in front of the Court.[177] The Court stated, "[o]ur holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general."[178] Both Justice Souter and Justice Ginsburg's concurring opinions echoed this exact sentiment.[179]

The Court, however, has also provided some clues that *Hicks* may have broader implications. For example, Justice O'Connor's concurring opinion proclaimed that the Court "finally resolv[ed] that *Montana* . . . governs a tribe's civil jurisdiction over nonmembers regardless of land ownership."[180] Stronger yet, dicta in *Plains Commerce Bank*—a case featuring a nonmember action on reservation fee land—explained that *Montana* "restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmembers activity occurs on land owned in fee simple by non-Indians—what we have called 'non-Indian fee land.'"[181]

Regardless of the language in *Plains Commerce Bank*, federal circuit courts are split regarding the significance of land ownership. The Ninth Circuit has interpreted *Hicks* as applying only to instances where there is a

173. *Id*. at 359-60.
174. *Id*. at 360.
175. *Id*.
176. *Hicks*, 533 U.S. at 364.
177. *Id*. at 558.
178. *Id*. at 404 n.2.
179. *Id*. at 376 (Souter, J., concurring); *Id*. at 386 (Ginsburg, J., concurring).
180. *Id*. at 387 (O'Connor, J., concurring).
181. Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 328 (2008).

competing state interest, and limits *Montana* to non-member actions occurring off of tribal land.[182] Conversely, other circuits now apply *Montana* to all actions involving non-members, whether or not it occurs on non-tribal land.[183] Some courts do not even bother to examine where the action took place and automatically apply *Montana* if it involves a non-member.[184] Hence, the prevailing trend seems to be moving farther and farther away from *Williams v. Lee* and the traditional notion that there is "no doubt" regarding tribal jurisdiction over non-member action on tribal land.[185]

IV. PATHS FOR TRIBAL JURISDICTION OVER THE DAPL

Two potential options have been proposed for the Standing Rock Tribal Court to gain jurisdiction—either regulatory or adjudicative—over the DAPL. First, the pipeline crosses through lands north of the current Reservation[186] expressly reserved by the Standing Rock Tribe under the 1868 Ft. Laramie Treaty.[187] And although these lands were taken by an 1876 "agreement," the Supreme Court subsequently declared this an unconstitutional taking and awarded compensation that the Tribe has flatly rejected.[188] Accordingly, the Standing Rock Tribe may argue that the pipeline runs through Sioux territory, thereby providing civil jurisdiction.

Second, the DAPL will cross underneath Lake Oahe, and a substantial portion of Lake Oahe falls within the Standing Rock Sioux Tribe Reservation.[189] The pipeline passes a half-mile north of the Reservation boundary, and does not physically cross through the Reservation portion of the lake. But a pipeline crossing underneath a lake located partially on a reservation

182. *See* Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 813 (9th Cir. 2011) ("Supreme Court and Ninth Circuit precedent, as well as the principal that only Congress may limit a Tribe's sovereign authority, suggest that *Hicks* is best understood as the narrow decision it claims to be . . . Its application of *Montana* to a jurisdictional question arising on tribal land should apply only when the specific concerns at issue in that case exist. Because none of those circumstances exist here, we must follow precedent that limits Montana to cases arising on non-Indian land.")

183. *See* Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians, 807 F.3d 184, 207 (7th Cir. 2015) (explaining that "*Montana* applies regardless of whether the actions take place on fee or non-fee land").

184. *See, e.g.,* Belcourt Pub. Sch. Dist. v. Davis, 786 F.3d 653 (8th Cir. 2015); Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014).

185. Williams v. Lee, 358 U.S. 217, 223 (1959).

186. *See supra* Part I.

187. *See supra* Part I.

188. United States v. Sioux Nation of Indians, 448 U.S. 371, 371 (1980); Ostler & Estes, *supra* note 44.

189. *See supra* Part I.

might lead to tribal jurisdiction over any negative future effects. Both arguments will be explored in turn.

A. LANDS TO THE NORTH

The Standing Rock Tribe may have an uphill battle if it attempts to gain jurisdiction by arguing that the pipeline passes through unceded lands to the north of the Reservation. This land *seems* like it meets the definition of Indian Country, as the Standing Rock Tribe never formally ceded it. The 1876 Agreement was gained through duress and failed to carry the requisite number of signatures, as mandated for any land cession under the 1868 Ft. Laramie Treaty.[190] Furthermore, the Standing Rock Tribe has never accepted court-awarded compensation for this taking.[191] In a sane and just world, this land is Standing Rock Sioux Territory—albeit now owned in fee. Alas, federal Indian law is often not sane or just.

In *Lone Wolf v. Hitchcock*, the Supreme Court explored a class claim by the Kiowa, Apache, and Comanche Tribes arguing that the United States had taken their land illegally by a fraudulent agreement that lacked the required number of signatures.[192] The Tribes contended that the subsequent federal statute immortalizing the agreement was therefore void.[193] The Court ultimately determined that Congress had plenary authority over tribal affairs,[194] which included the unilateral power to abrogate treaties "in the interest of the country."[195] In 1986, the Supreme Court re-visited congressional power to abrogate treaties and determined that Congress has this ability as long as its "intentions" are "clear and plain."[196]

The federal taking of lands to the north of the Standing Rock Sioux Tribe Reservation was evil, but it was also a clear congressional abrogation of past treaty rights. Under federal law, Congress had this plenary authority.[197] That the 1876 Agreement failed to carry the correct number of signatures, that it was cemented through coercive tactics, and that it lacked any semblance of fair consideration was enough for the Supreme Court to deem the agreement an unconstitutional taking.[198] Merely holding that the

190. *See supra* Part III.B.1.

191. *See supra* Part III.B.1.

192. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

193. *Id.* at 563-64.

194. *See id.* at 565 ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning . . . .").

195. *Id.* at 566.

196. United States v. Dion, 476 U.S. 734, 738 (1986).

197. *Id.*

198. United States v. Sioux Nation of Indians, 448 U.S. 371(1980).

agreement was an illegal taking, however, did not translate into a return of the land, or the land morphing back to tribal territory. The Tribe's rejection of monetary compensation does not change this equation.

B. LAKE OAHE

A second potential route for tribal jurisdiction over the DAPL could come from the pipeline's crossing through Lake Oahe, a half-mile upstream from the Standing Rock Sioux Tribe Reservation. An analysis of this route will need to differentiate between an attempt for civil regulatory jurisdiction versus an attempt for civil adjudicative jurisdiction for suits against the Dakota Access, LLC[199] individually for monetary damage in the event of an oil spill.

The civil regulatory course would be nearly impossible. First, the pipeline route does not cross through Standing Rock territory—it passes just to the north.[200] The Standing Rock Tribe would have difficulty gaining regulatory authority over activity that occurs outside of its territory.[201] Second, even if the Standing Rock Tribe could show that the pipeline runs through actual reservation territory, it would face the additional roadblock of federal preemption; the ability to grant permits for pipelines to cross federally regulated waters—such as Lake Oahe—falls within the sole province of the Army Corps of Engineers.[202]

The more realistic road to tribal jurisdiction would come through civil adjudicative jurisdiction. Although the pipeline will not cross through the Standing Rock Sioux Tribe Reservation, it will cross underneath a lake partly on reservation territory, and any resulting problems with the pipeline—an oil spill, for example—could have disastrous consequences for its

199. If the Standing Rock Tribe attempted to sue the Army Corps of Engineers in tribal court, it would face the obstacle of sovereign immunity. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2005 EDITION 649 (2005) ("The general principle immunizing the United States from suit without [its] consent extends to suits filed by Indian nations against the United States in tribal courts . . . .").

200. *See supra* Introduction.

201. *See* Philip Morris USA, Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 938 (9th Cir. 2009) (explaining that tribal jurisdiction is limited to Indian country) (citing *Atkinson Trading Co.*, 532 U.S. at 658 n. 12).

202. *See supra* note 11. However, the Standing Rock Tribe may be able to side-step federal preemption by arguing that: "(1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations." Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (internal brackets and quotation omitted). Here, the Standing Rock Tribe may have a legitimate argument under abrogation of treaty rights. But, as the pipeline does not pass through tribal territory, this argument is largely academic.

land and water. The Standing Rock Tribe may have a chance of asserting jurisdiction if anything goes wrong, depending on whether, and how, a federal court applies *Montana*.

South Dakota v. Bourland is a good place to start in answering this question.[203] *Bourland* looked at the Cheyenne River Sioux Tribe's regulation of hunting and fishing by non-members on land and water still located within Reservation boundaries.[204] However, the federal government had acquired this land and water for construction of the Oahe Dam.[205] This case resembled *Montana* in that the Cheyenne River Tribe was attempting to regulate non-member hunting and fishing on land within the reservation, but no longer owned by the Cheyenne River Tribe.[206] The Court found that a tribe's ability to regulate stems from its power to exclude.[207] In this case, Congress had eliminated the Cheyenne River Tribe's power to exclude by taking the land for the Oahe Dam Project "and broadly opening up those lands for public use,"[208] thereby ending "the Tribe's pre-existing regulatory control over non-Indian hunting and fishing."[209] The Court noted, however, that the loss of the right to exclude created just a presumption that the Cheyenne River Tribe had lost regulatory control, and it remanded the case for application of *Montana's* exceptions.[210]

The *Bourland* holding applies to the Standing Rock Tribe's jurisdiction over the portion of Lake Oahe that falls on reservation territory. Much like the section of the Missouri River that the Cheyenne River Tribe attempted the regulate in *Bourland*, the Lake Oahe section of the Standing Rock Sioux Tribe Reservation was taken by Congress for the Oahe Dam project.[211] And, even though *Bourland* dealt with civil regulatory jurisdiction, its holding applies to civil adjudicative jurisdiction because tribal adjudicative authority does not exceed regulatory authority.[212] Therefore, under *Bourland*, a court would likely apply *Montana* to the Standing Rock Tribe's civil ad-

203. South Dakota v. Bourland, 508 U.S. 679 (1993).
204. *Id*. at 681-82.
205. *Id*.
206. *Id*. at 688.
207. *Id*. at 689.
208. *Id*.
209. *Bourland*. 508 U.S. at 695.
210. *Id*. at 695-98. On remand, the Eight Circuit found that tribal ability to regulate hunting and fishing did not meet either *Montana* exception. *See generally* South Dakota v. Bourland, 39 F.3d 868 (8th Cir. 1994).
211. M-Opinion at 8-9.
212. *Strate*, 520 U.S. at 453.

judicative jurisdiction over the Standing Rock Sioux Tribe Reservation waters of Lake Oahe.

How a court might apply *Montana* to the Standing Rock Tribe's civil adjudicative authority over the DAPL is unpredictable, and ultimately depends on the proclivities of the specific federal circuit, or even individual judges within that circuit.[213] An oil pipeline is obviously a different matter than hunting and fishing, both in terms of its potential for environmental calamity, and the ability of the Standing Rock Tribe to address the effects of an important natural resource. However, under the Supreme Court's increasingly restrictive application of *Montana*, the effects of an oil pipeline may not be enough. If the Court found that the ability to levy taxes was not essential to tribal self-government,[214] it remains doubtful that an oil pipeline would. Unless the Standing Rock Tribe received a federal circuit court's more liberal reading of *Montana's* second exception, its claim for jurisdiction would likely fail. This, in and of itself, is enough to signal that *Montana's* second exception really is no exception at all. *Montana* has become window dressing for the growing assumption within federal courts that tribes cannot assert jurisdiction over non-members, period.

The potential source of trouble that would occur off-reservation provides another wrinkle. If there were an oil spill, the spill itself would have originated off of tribal territory, and thus normally would be off limits entirely for tribal jurisdiction.[215] In this instance though, the effects of the spill would potentially occur on the reservation itself, leaving the Standing Rock Tribe with a strong argument that it could apply its jurisdictional authority.[216] This is especially so if the potential oil spill affected the reservation land. Most of the reservation land had not been taken for the Oahe Dam; therefore, the Standing Rock Tribe retains the right to exclude, and, theoretically, the inherent right to assert jurisdiction over the conduct of members and non-members alike. This right would include jurisdiction over the disastrous effects of an oil spill on Reservation land. As noted above, however, in the wake of *Hicks*, the growing trend for federal courts is to apply *Montana* regardless of land status.[217] Even if the particular action took place on tribal land, this claim would involve a non-member. A

213. *See supra* Part II.B.

214. *Atkinson Trading Co., Inc.*, 532 U.S. at 658.

215. *See supra* Part I.

216. *See* Wisconsin v. E.P.A., 266 F.3d 741, 749 (7th Cir. 2001) ("There is no case that expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation . . . .").

217. *See supra* Part II.B.3.

court might just apply *Montana*, and the chances of success would become more difficult.

V. CONCLUSION

The Standing Rock Tribe's best hope of asserting jurisdiction over the DAPL would come through civil adjudicative jurisdiction over any resulting negative effects. Federal courts have increasingly applied *Montana* if a case involves a non-member, regardless of the status of the land, and have increasingly narrowed *Montana's* second exception to the point of nullity. As such, any claim for tribal jurisdiction over the effects of the DAPL may be met with *Montana*, and may ultimately wither under *Montana's* extremely steep test. The DAPL, therefore, provides a great demonstration of how federal courts apply *Montana* in too many situations, and how its test has become too onerous. If a tribe cannot assert jurisdiction over the territorial effects of a nearby pipeline, merely because the pipeline is owned and operated by a non-member, what non-member activity would suffice? The federal judiciary should rewind back to a time when it recognized greater tribal civil jurisdictional sovereignty.