2008 Caselaw Update
Indian Law Section of the Idaho State Bar
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Supreme Court Cases

Plains Commerce Bank v. Long Family Land & Cattle, 554 U.S. ___ (2008).

Important Elements of the Decision: The decision is another in a long line of cases – stemming from *Montana v. U.S.* – which limit tribal civil jurisdiction over non-Indians. Here the Court determined that the sale of the land at issue in the case, which was owned in fee by a non-Indian, was not within the Tribe's regulatory authority. The Court noted that *Montana* allows regulation of non-Indian "activities" in limited contexts, but found that the sale of non-Indian land was not an "activity" or "conduct" on the land, and was therefore not within the Tribe's authority under either *Montana* exception. The Court summarized, "*Montana* provides that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian fee land. But conduct taking place on the land and the sale of the land are two very different things."

In discussing the first *Montana* exception, the Court found the Tribal Court had no authority under the first *Montana* exception because the Bank's business and consensual relationships were not related to the discrimination claim at issue in the case. The Court largely avoided the issue of consensual commercial relationships.

However, the Court may have added a new element necessary to establish jurisdiction under the Second Montana exception: that the exercise of jurisdiction in order protect the "health and welfare" of the Tribe "must be necessary to avert catastrophic consequences" citing Cohen §4.02[3][c], at 232, n. 220.

From the Supreme Court Syllabus:

Facts:

Petitioner Plains Commerce Bank (Bank), a non-Indian bank, sold land it owned in fee simple on a tribal reservation to non-Indians. Respondents the Longs, an Indian couple who had been leasing the land with an option to purchase, claim the Bank discriminated against them by selling the parcel to nonmembers of the Tribe on terms more favorable than the Bank offered to sell it to them. The couple sued in Tribal Court, asserting, *inter alia*, discrimination, breach-of-contract, and bad-faith claims. Over the Bank's objection, the Tribal Court concluded that it had jurisdiction and proceeded to trial, where a jury ruled against the Bank on three claims, including the discrimination claim. The court awarded the Longs damages plus interest. In a supplemental judgment, the court also gave the Longs an option to purchase that portion of the fee land they still occupied, nullifying the Bank's sale of the land to non-Indians. After the Tribal Court of Appeals affirmed, the Bank filed suit in Federal District Court, contending that the tribal

judgment was null and void because, as relevant here, the Tribal Court lacked jurisdiction over the Longs' discrimination claim. The District Court granted the Longs summary judgment, finding tribal court jurisdiction proper because the Bank's consensual relationship with the Longs and their company (also a respondent here) brought the Bank within the first category of tribal civil jurisdiction over nonmembers outlined in *Montana* v. *United States*, 450 U. S. 544. The Eighth Circuit affirmed, concluding that the Tribe had authority to regulate the business conduct of persons voluntarily dealing with tribal members, including a nonmember's sale of fee land.

Held:

The Tribal Court did not have jurisdiction to adjudicate a discrimination claim concerning the non-Indian Bank's sale of its fee land. Pp. 8–24.

(a) The general rule that tribes do not possess authority over non-Indians who come within their borders, *Montana* v. *United States*, 450 U. S. 564, 565, restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians, *Strate* v. *A-1 Contractors*, 520 U. S. 438, 446. Once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it. See *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 267–268. Moreover, when the tribe or its members convey fee land to third parties, the tribe "loses any former right of absolute and exclusive use and occupation of the conveyed lands." *South Dakota* v. *Bourland*, 508 U. S. 679, 689. Thus, "the tribe has no authority itself . . . to regulate the use of fee land." *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 430. *Montana* provides two exceptions under which tribes may exercise "civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," 450 U. S., at 565: (1) "A tribe may 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," *ibid.;* and (2) a tribe may exercise "civil authority over the conduct of non-Indians on fee lands within the 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," *id.*, at 566. Neither exception authorizes tribal courts to exercise jurisdiction over the Longs' discrimination claim. Pp. 8–11.

(b) The Tribal Court lacks jurisdiction to hear that claim because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land, and "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *Strate*, *supra*, at 453. *Montana* does not permit tribes to regulate the sale of non-Indian fee land. Rather, it permits tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. 450 U. S., at 564–565. With only one exception, see *Brendale*, *supra*, this Court has never "upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land," *Nevada* v. *Hicks*, 533 U. S. 353, 360. Nor has the Court found that *Montana* authorized a tribe to regulate the sale of such land. This makes good sense, given the limited nature of tribal sovereignty and the liberty interests of nonmembers. Tribal sovereign interests are confined to managing tribal land, see *Worcester* v. *Georgia*, 6 Pet. 515, 561, protecting tribal selfgovernment, and controlling internal relations, see *Montana*, *supra*, at 564. Regulations approved under *Montana* all flow

from these limited interests. See, *e.g.*, *Duro* v. *Reina*, 495 U. S. 676, 696. None of these interests justified tribal regulation of a nonmember's sale of fee land. The Tribe cannot justify regulation of the sale of non-Indian fee land by reference to its power to superintend tribal land because non-Indian fee parcels have ceased to be tribal land. Nor can regulation of fee land sales be justified by the Tribe's interest in protecting internal relations and self-government. Any direct harm sustained because of a fee land sale is sustained at the point the land passes from Indian to non-Indian hands. Resale, by itself, causes no additional damage. Regulating fee land sales also runs the risk of subjecting nonmembers to tribal regulatory authority without their consent. Because the Bill of Rights does not apply to tribes and because nonmembers have no say in the laws and regulations governing tribal territory, tribal laws and regulations may be applied only to nonmembers who have consented to tribal authority, expressly or by action. Even then the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve self government, or control internal relations. There is no reason the Bank should have anticipated that its general business dealings with the Longs would permit the Tribe to regulate the Bank's sale of land it owned in fee simple. The Longs' attempt to salvage their position by arguing that the discrimination claim should be read to challenge the Bank's whole course of commercial dealings with them is unavailing. Their breach-of-contract and bad-faith claims involve the Bank's general dealings; the discrimination claim does not. The discrimination claim is tied specifically to the fee land sale. And only the discrimination claim is before the Court. Pp. 11–22.

(c) Because the second *Montana* exception stems from the same sovereign interests giving rise to the first, it is also inapplicable here. The "conduct" covered by that exception must do more than injure a tribe; it must "imperil the subsistence" of the tribal community. *Montana*, 450 U. S., at 566. The land at issue has been owned by a non-Indian party for at least 50 years. Its resale to another non- Indian hardly "imperil[s] the subsistence or welfare of the tribe." *Ibid.* Pp. 22–23.

Circuit Court Cases

- **Sovereign Immunity**
    - ***Native American Distributing v. Seneca-Cayuga Tobacco Company,* 546 F.3d 1288 (10th Cir. 2008)**
        - **Synopsis:** Tobacco distributor brought action against tobacco manufacturer, a tribal enterprise, and individuals, alleging breach of contract and civil conspiracy. The United States District Court for the Northern District of Oklahoma, Kern, J., *491 F.Supp.2d 1056*, granted defendants' motions to dismiss, and distributor appealed.
        - **Holding:** (*from the opinion, internal citations omitted)* Indian tribes are "domestic dependent nations" with sovereignty over their members and territories. As sovereign powers, federally-recognized Indian tribes possess immunity from suit in federal court. Tribal immunity

extends to subdivisions of a tribe, and even bars suits arising from a tribe's commercial activities. While the Supreme Court has expressed misgivings about recognizing tribal immunity in the commercial context, the Court has also held that the doctrine "is settled law" and that it is not the judiciary's place to restrict its application. To the extent the plaintiffs have argued that we should abrogate the scope of the doctrine in the present case due to SCTC's commercial activities, we decline this request.

- ***Cook v. AVI Casino Enterprises, Inc.***, 548 F.3d 718 (9th Cir. 2008)

  - **Synopsis:** Motorcyclist involved in traffic accident with employee of casino, a tribal corporation, sued tribal corporation and several of its employees, asserting claims for negligence, dram shop liability under Arizona's liquor liability statute, and violations of tribal law. The United States District Court for the District of Arizona, Paul G. Rosenblatt, J., 2006 WL 3694859, granted defendants' motion to dismiss, and motorcyclist appealed.

  - **Holding:** (*from the opinion, internal citations omitted)* We conclude that a corporation organized under tribal law should be analyzed for diversity jurisdiction purposes as if it were a state or federal corporation…We hold that, for diversity purposes, a tribal corporation formed under tribal law is not a citizen of a state merely because its incorporation occurred inside that state. ACE is thus only a citizen of Nevada, the location of its principal place of business.

    - On the sovereign immunity point, Court determined that the Casino was an entity of the Tribe, and therefore within the Tribe's sovereign immunity from suit. The Court also determined that Accordingly, we hold that tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority.

- ***Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.3d 224 (8th Cir. 2008)**

  - **Synopsis:** Indian tribe brought action to enjoin contractor's state court action against it arising from dispute over road construction project. The contracts at issue contained the following term:

    - "The Oglala Sioux Tribe grants a limited waiver of its immunity for any and all disputes arising from this Contract, including the interpretation of the agreement and work completed or to be completed under the Contract; provided, however, that such waiver extends only to the Oglala Sioux Tribe and Transportation's specific obligations under the Contract; and further provided that such waiver shall extend only to the extent necessary to permit enforcement by the Subcontractor."

- The contracts also contained mediation and arbitration terms.

- **Holding:** (*from the opinion, internal citations omitted*) The Court found, as this Circuit has done previously, that an arbitration clause alone was sufficient to expressly waive sovereign immunity to a state court enforcement action…We find that, in the three contracts containing an explicit waiver of immunity and an agreement to arbitrate, the Tribe has waived sovereign immunity with respect to a suit brought to enforce an arbitral award…Wholly mindful that a waiver of sovereign immunity must be clearly expressed, we hold that, under these conditions, where there are contractual arbitration agreements and a tribe actively participates in that arbitration, and in the course of that arbitration raises its own affirmative claims involving a clearly-related matter, the Tribe voluntarily and explicitly waives any immunity respecting that related matter.

  We reject the Tribe's contention that it waived immunity only to suit in Tribal Court - that is not what the contracts say. The parties could have made such an agreement, but did not do so. Indeed, the text of the contract[s] makes this precise choice. And any express limitation imposed by the Tribe on its consent to suit would have been duly recognized. Once a party opts for, and participates in, arbitration, however, it is bound by the arbitrator's decisions.

- Regarding state court enforcement of the arbitration decision, the Court stated: "Once a waiver of immunity is established, state court jurisdiction depends on whether state law provides jurisdiction over a given subject matter. Here, the state court has jurisdiction because the arbitration occurred in South Dakota."

- **Exhaustion of Tribal Court Remedies**

  - ***Marceau v. Blackfeet Housing Authority,* 540 F.3d 916 (9th Cir. 2008) (this case has been appealed to the U.S. Supreme Court)**

    - **Synopsis:** Native American homeowners and lessees who resided in homes built pursuant to the Mutual Help and Homeownership Opportunity Program (MHHOP) brought class action against Department of Housing and Urban Development (HUD), tribal housing authority, and its members, alleging breach of contract and other claims. The United States District Court for the District of Montana, Sam E. Haddon, J., dismissed. Plaintiffs appealed.

    - **Holding:** Exhaustion (*from the opinion, internal citations omitted*) Principles of comity require federal courts to dismiss or to abstain from deciding claims over which tribal court jurisdiction is "colorable," provided that there is no evidence of bad faith or harassment. Exhaustion of tribal remedies is "mandatory." The parties failed to raise this issue until after we issued our opinion. Nevertheless, "[a] district court has no discretion to relieve a litigant

from the duty to exhaust tribal remedies prior to proceeding in federal court." Although Plaintiffs' contract claim has not yet been brought in tribal court, "[t]he absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement."

Tribal court jurisdiction over the contract disputes here is unquestionably colorable: Plaintiffs are tribal members, Defendant Blackfeet Housing Authority is a tribal entity, and at least some key events—construction of the homes, for instance—occurred on tribal lands. Because there is no evidence of bad faith or harassment, we hold that Plaintiffs must exhaust their tribal court remedies. Accordingly, we remand the case…Whether or not the Tribe waived tribal immunity, the tribal court must have the first opportunity to address all issues within its jurisdiction, including that one.

Trust Responsibility (*from the opinion, internal citations omitted*) No statute has imposed duties on the government to manage or maintain the property, as occurred in *Mitchell II*, nor has any HUD regulation done so. Unlike in *White Mountain Apache Tribe*, here no statute has declared that any of the property was to be held by the United States in trust, nor did the United States occupy or use any of the property. In the present case, there is plenary control of neither the money nor the property. Instead, this case most closely resembles *Navajo Nation*. Just as the Indian Mineral Leasing Act required Secretarial approval of leases, but did not oblige the Secretary to negotiate them, the United States Housing Act gave HUD a right of final inspection with respect to construction and design materials, but did not oblige HUD to select them. Here, as there, the statute failed to include a federal managerial role. Here, as there, Congress expressed the aim of giving the lead role to an entity other than the government.

In summary, under the Housing Act, Indian housing authorities (such as the Blackfeet Housing Authority) applied to HUD for loans to enable *the housing authority* to develop low-income public housing designed to be sold to eligible members of the tribe. Under NAHASDA, block grants could be used *by the tribe* or its designated housing entity to repair or replace housing. As with any grant of federal funds, certain requirements had to be met to obtain and spend the funds. But the federal government held no property—land, houses, money, or anything else—in trust. The federal government did not exercise direct control over Indian land, houses, or money by means of these funding mechanisms. The federal government did not build, manage, or maintain any of the housing. For these reasons, we adhere to our earlier ruling that the district court properly dismissed Plaintiffs' claim that HUD violated a trust responsibility.

- ***Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943 (9th Cir. 2008)**

  - **Synopsis:** Non-Indian father sued his Indian daughter's maternal aunt, who was seeking custody of his daughter after death of her Indian mother, and the Tribal Court that had granted temporary custody to child's maternal grandmother, challenging jurisdiction of Tribal Court, alleging substantive due process violation, and seeking injunctive relief. The United States District Court for the District of Montana, Richard F. Cebull, J., granted defendants' motion to dismiss. Father appealed.

  - **Holding:** (*from the opinion, internal citations omitted*) **"**In dismissing the case, the district court also relied on the fact that Plaintiff had not exhausted tribal court remedies. Under the doctrine of exhaustion of tribal court remedies, relief may not be sought in federal court until appellate review of a pending matter in a tribal court is complete. "[T]he exhaustion rule . . . [i]s 'prudential,' not jurisdictional." As a matter of discretion, a district court may either dismiss a case or stay the action while a tribal court handles the matter. Because the parties do not dispute that the custody issue is still pending before the Tribal Court, the district court properly exercised its discretion and dismissed this case due to Plaintiff's failure to exhaust tribal court remedies.

    Although the Supreme Court has crafted narrow exceptions to the exhaustion rule, none applies here. There has been no showing that Defendant Hanson asserted tribal jurisdiction in bad faith or that she acted to harass Plaintiff. Nor can it be said that requiring exhaustion in this case "would serve no purpose other than delay." *Id.* (internal quotation marks omitted).

    Finally, it is not "plain" that tribal court jurisdiction is lacking. We have equated that inquiry with whether jurisdiction is "colorable" or "plausible." Here, tribal court jurisdiction almost certainly is proper and therefore unquestionably is "plausible." First, the 1998 custody agreement (the validity of which Plaintiff does not challenge) states that the Tribal Court "shall continue to have jurisdiction over this matter." Second, Plaintiff availed himself of that forum voluntarily when the original custody dispute arose in 1997, which is at least a "colorable" basis for jurisdiction, even though the current tribal court case was not initiated by Plaintiff. Third, the suit primarily concerns Lexie, who *is* a member of the tribe. Although the rights of non-member Plaintiff are affected, it is not clear that that fact alone would strip the Tribal Court of jurisdiction.

- **Religious Freedom Restoration Act (non-Eagle Cases)**

  - ***Navajo Nation v. U.S. Forest Service,* 535 F.3d 1058 (9th Cir. 2008)**

    - **Synopsis:** Numerous Indian tribes, their members, and environmental organization brought action challenging the Forest Service's decision to authorize proposed use of recycled wastewater to make artificial snow for commercial ski resort located in national park on mountain considered sacred by tribes. Following bench trial, the District Court held that the proposed use did not violate the Religious Freedom Restoration Act (RFRA) and granted Forest Service's motion for summary judgment on claims brought under National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). Appeal was taken. The Court of Appeals, W. Fletcher, Circuit Judge, affirmed in part, reversed in part and remanded, and application for rehearing en banc was granted.

    - **Holding:** The Court announced a new test for when a government action should be seen as a substantial burden on the practice of religion.

      (*from the opinion, internal citations omitted*) "for RFRA to apply, a government enactment first *burden* the exercise of religion and then do so *substantially*. We emphasized that "the government is not required to prove a compelling interest for its action or that its action involves the least restrictive means to achieve its purpose, *unless* the plaintiff first proves the government action substantially burdens his exercise of religion

      Under RFRA, a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or [are] coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*).

      The use of recycled wastewater on a ski area that covers one percent of the Peaks does not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit, as in *Sherbert*. The use of recycled wastewater to make artificial snow also does not coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions, as in *Yoder*. The Plaintiffs are not fined or penalized in any way for practicing their religion on the Peaks or on the Snowbowl. Quite the contrary: the Forest Service "has guaranteed that religious practitioners would still have access to the Snowbowl" and the rest of the Peaks for religious purposes. The only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities. To plaintiffs, it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain. Nevertheless, under Supreme Court precedent, the diminishment of spiritual fulfillment—serious though it may be—is not a "substantial burden" on the free exercise of religion.

- ***Snoqualmie Indian Tribe v. Federal Energy Regulatory Commission,* 545 F.3d 1207 (9th Cir. 2008)**

  - **Synopsis:** Indian Tribe filed petition for review of an order of the Federal Energy Regulatory Commission (FERC) granting operator of hydroelectric power plant a license to operate for another 40 years. The Tribe challenged the relicensing under Religious Freedom Restoration Act, and for failure to property consult with the Tribe under the National Historic Properties Act.

  - **Holding:** The Court applied the new formulation of the substantial burden test from RFRA.

    (*from the opinion, internal citations omitted*) RFRA provides that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

    [The Tribe argued that] the continued operation of the hydroelectric project prevents the Tribe from having necessary religious experiences in three ways: its operation deprives the Tribe of access to the Falls for vision quests and other religious experiences, eliminates the mist necessary for the Tribe's religious experiences, and alters the ancient sacred cycle of water flowing over the Falls.

    [The Court looked to the Rule announced in Navajo Nation, *supra*]

    The Tribe's arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant to whether the hydroelectric project either forces them to choose between practicing their religion and receiving a government benefit or coerces them into a Catch-22 situation: exercise of their religion under fear of civil or criminal sanction. After reviewing the voluminous record in this case, we have not found any evidence demonstrating that Snoqualmie Tribe members will lose a government benefit or face criminal or civil sanctions for practicing their religion.

    The Tribe argues that FERC failed to engage in government-to-government consultation with the Tribe as required by NHPA and its own regulations [for impacts to the falls a traditional Cultural Property eligible for listing under NHPA. The Court found that] Because the Snoqualmie Indians were not federally recognized before the closure of the administrative record, we need not evaluate the sufficiency of FERC's government-to-government consultation efforts or reach the Tribe's claim that FERC cannot delegate its tribal consultation obligations to [the power company].

- **Possession of Eagle Feathers/Parts Cases (Religious Freedom Restoration Act)**

  - ***United States v. Vasquez-Ramos,* 531 F.3d 987 (9th Cir. 2008) (this case has been appealed to the U.S. Supreme Court)**

    - **Synopsis:** Defendants, two Native Americans who were not members of federally recognized Indian tribes, were charged by information for possessing feathers and talons of bald and golden eagles and other migratory birds without a permit, in violation of the Bald and Golden Eagle Protection Act (BGEPA) and the Migratory Bird Treaty Act (MBTA). Defendants moved to dismiss, claiming that they used feathers during Native American religious ceremonies, and that prosecution impermissibly burdened their religious practice under the Religious Freedom Restoration Act (RFRA).

    - **Holding:** (*from the opinion, internal citations omitted*) Under RFRA the government cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless it demonstrates that "the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

      We faced the same issue in *United States v. Antoine*. There, the defendant was charged with violating BGEPA after he brought feathers and eagle parts from Canada into the United States and then swapped them for money and other goods as part of the native trading custom of "potlatch." The defendant moved to dismiss his prosecution, claiming that he was exempt from BGEPA under RFRA. We rejected his claim, holding that "[t]he government has a compelling interest in eagle protection that justifies limiting supply to eagles that pass through the repository, even though religious demand exceeds supply as a result. Any allocation of the ensuing religious burdens is least restrictive because reconfiguration would necessarily restrict *someone's* free exercise."

      We are bound by circuit precedent unless there has been a substantial change in relevant circumstances… Defendants also argue that the Supreme Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, "constitutes a significant shift in the legal terrain surrounding the appropriate application of . . . RFRA," which undermines our holding in *Antoine*. We disagree. O Centro Espírita Beneficente União do Vegetal is a 130-member religious group with its roots in the Amazon rainforest that drinks a sacramental tea, *hoasca*, containing a hallucinogen regulated under the Controlled Substances Act. When the government threatened prosecution, the group filed suit seeking declaratory and injunctive relief, arguing that applying the Controlled Substances Act to its use of *hoasca* violated RFRA. The government "conceded that the challenged application of the Controlled

Substances Act would substantially burden a sincere exercise of religion by the [group]," but claimed that this burden did not violate RFRA. The Supreme Court rejected the government's primary contention on appeal—"that [the government] has a compelling interest in the *uniform* application of the Controlled Substances Act, such that no exception to the ban on the use of the hallucinogen can be made to accommodate the sect's sincere religious practice." The Court held that "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law . . . [to the] particular claimant whose sincere exercise of religion is being substantially burdened." The Court explained that RFRA requires courts to "look[ ] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize the asserted harm of granting specific exemptions to particular religious claimants."

We agree with the district court that *O Centro Espirita* and *Antoine* are not clearly irreconcilable. First, in *Antoine* we considered whether application of BGEPA to the particular defendant, a member of a non-federally-recognized tribe, violated RFRA and thus engaged in the type of "focused inquiry" required by *O Centro Espirita*. Additionally, *O Centro Espirita* dealt with the pursuit of a secular interest, drug prohibition, in a manner that burdened religion; granting an exemption to the Controlled Substances Act for the 130-member group did not have any effect on other people's religion. Granting an exemption for Defendants would alleviate the burden on Defendants' religion but would place additional burdens on members of federally-recognized tribes in the exercise of their religious practices. Nothing in *O Centro Espirita* undercuts the ruling in *Antoine* that this redistribution of burdens does not raise a valid RFRA claim. Congress and the Department of the Interior have chosen a means of allocating scarce eagle parts that is "least restrictive" while still protecting our important national symbol.

- The Court went on to find that the fact that there is a limited supply of eagle feathers and parts does not change this calculus.

- ***United States v. Friday*, 525 F.3d 938 (10th Cir. 2008) (this case has been appealed to the U.S. Supreme Court)**

  - **Synopsis:** Defendant, a member of the Northern Arapaho Tribe of Wyoming, was charged with violating Bald and Golden Eagle Protection Act after he shot bald eagle, without permit, for use in Sun Dance. Defendant responded that prosecution was precluded by Religious Freedom Restoration Act (RFRA). The United States District Court for the District of Wyoming, Downes, J., 2006 WL 3592952, dismissed information. Government appealed.

  - **Holding:** The Court of Appeals, McConnell, Circuit Judge, held that: (1) both prongs of RFRA's strict scrutiny test were legal questions; (2) Court of

Appeals was required to engage in independent review of "constitutional facts"; (3) permit process for taking eagles was not futile, such that prohibition on taking eagles would be effectively without exception, thus resulting in substantial burden on tribal religious practices in violation of RFRA; (4) permitting process did not facially violate RFRA; (5) Fish and Wildlife Service (FWS) was not required to engage in affirmative outreach for permitting process to be least restrictive means of preserving eagles; and (6) any difference in government's treatment of Native Americans taking eagles for religious purposes and power companies whose power lines killed eagles did not indicate that government failed to protect eagles in least restrictive manner.

- **Tax Issues**

  - ***Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008)**

    - **Synopsis:** Indian tribe brought action against California State Board of Equalization (SBE), seeking declaratory relief from imposition of state sales tax on construction materials purchased by non-Indian electrical subcontractor from non-Indian vendor and delivered to Indian land pursuant to contract for $75 million casino expansion. The United States District Court for the Southern District of California, Dana M. Sabraw, J., granted tribe's motion for summary judgment, and the SBE appealed.

    - **Holding:** The Tribe attempted to use contract language to effect the incidence of the tax determination: [the contract contained an "Attachment O," which stated, *inter alia*, "that any purchase made by [the electrical company] and its subcontractors should only become officially consummated, with title transferring, on the Tribe's property" [and that the Tribe would reimburse the company for any sales tax they were required to pay].

      (*from the opinion, internal citations omitted*) "In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule." On the narrow question of whether a state can tax Indian activity on an Indian reservation, the law is clear. "[W]e adhere to settled law: when Congress does not instruct otherwise, a State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country."

      The dispositive question for per se analysis is who the state is taxing and where. "[U]nder our Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequences. We have determined that '[t]he initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of [the] tax.' "

The party bearing the legal incidence of a state tax may well differ from the party bearing the economic burden of that tax. For instance, under Attachment "O" to the prime contract, the Tribe will be the economically burdened party due to its promise to indemnify Hensel Phelps and Helix Electric for any state sales tax they are required to pay if the Board prevails. That the Tribe will pay the tax, however, does not resolve the question of who bears the tax's legal incidence.

The Tribe attempts an end-run around the "legal incidence" test by structuring its contract to designate subcontractors as "purchasing agents" for the tax-exempt Tribe. Along with the district court, we decline to extend the per se test, rooted in due respect for Indian autonomy, to provide tax shelters for non-Indian businesses. The parties may not alter the economic reality of a transaction—a subcontractor performing electrical work for a general contractor—to reap a windfall at the public's expense. "The incidence of taxation depends upon the substance of a transaction. . . . To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of . . . tax policies." The legal incidence of the sales tax falls on Helix Electric, a non- Indian entity which purchased the construction materials, and the structuring of the expansion as set forth in Attachment O fails to per se exempt non-Indians from a valid state tax.

- **Jurisdiction Over Non-Indians**

  - ***BNSF Railway Company v. Ray*, 2008 WL 4710778 (9th Cir. 2008)**

    - **Synopsis:** Railway company and its employees filed action seeking to permanently enjoin chief judge of tribal court and tribal court clerk from taking further action in wrongful death action filed in tribal court by decedents of automobile passengers against railway company and its employees. The United States District Court for the District of Arizona, David G. Campbell, J., granted injunction. Defendants appealed.

    - **Holding:** (*from the opinion, internal citations omitted*) This action is permissible under *Ex parte Young,* because it seeks prospective injunctive relief against the tribal officers acting in their official capacities. Because Plaintiffs have alleged an ongoing violation of federal law-the unlawful exercise of tribal court jurisdiction-and seek prospective relief only, tribal sovereign immunity does not bar this action.

      The district court correctly held that exhaustion of tribal court remedies is not required because it is plain that the tribal courts lack jurisdiction. [The Court looked to the line of precendent from *Strate,* involving accidents between Tribal members and a non-Indian on non-Indian owned fee land, and found]

The impacts urged by the Tribal Defendants are not distinguishable from those that we have held insufficient to satisfy the second *Montana* exception. Further, the Supreme Court has instructed that the presence of an alternate adjudicatory system for the resolution of civil lawsuits involving non-tribal members arising out of accidents on non-tribal land does not affect the political integrity, the economic security, or the health or welfare of the tribe within the meaning of the second *Montana* exception…For these reasons, the tribal court plainly lacks jurisdiction in this case, and exhaustion of tribal remedies is not required

- ***Nord v. Kelly*, 520 F.3d 848 (8th Cir. 2008)**

  - **Synopsis:** Non-Native American driver of semi-truck, and his father, whose business owned semi-truck, brought action against member of Red Lake Band of Chippewa Indians and Red Lake Nation Tribal Court, seeking declaration that Tribal Court lacked personal jurisdiction over driver and father, who were sued by member in Tribal Court for personal injuries sustained by member in automobile accident that occurred on state highway within reservation.

  - **Holding:** The central holding in the case follows *Strate*, and expounds on the importance of the gatekeeping right, but in analyzing the *Montana* exceptions, the Court somewhat limited the applicability of the first exception.

    (*from the opinion, internal citations omitted*) This case is controlled by the Supreme Court's decision in Strate, holding that "tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question." The Tribal Court argues on appeal that the district court's "categorical" application of Strate ignores the Supreme Court's reasoning, which carefully considered the nature of the particular right-of-way at issue. We respectfully disagree. To the contrary, consistent with the analysis set out in Strate, the district court properly considered, and gave effect to, the relevant public records and pertinent regulations that established the federally granted right-of-way.

    Specifically, the record contains Minnesota's 1955 stipulation and application to the Department of the Interior, pursuant to federal regulations, seeking permission to open and establish a public highway on this stretch of Indian land and stating that it will be part of the state trunk highway system pursuant to the Constitution of the State of Minnesota. The record also contains the 1955 tribal resolution, unanimously approved by the Red Lake Band's General Council, referencing Minnesota's right-of-way application to construct the stretch of public highway at issue. The resolution indicates that the road improvement will benefit the tribe, that the tribe waives compensation for damages, and that fair damages should be paid to individual tribal members.

Consistent with the reasoning of Strate, we give effect to the plain language of the right-of-way granting instruments. There is no indication in the public records that the Red Lake Band retained any "gatekeeping right" over the public highway, no assertion that the right-of-way is no longer maintained as part of the State's highway, and no assertion that any statute or treaty grants or retains tribal authority over nonmembers in this situation. Therefore, the Red Lake Band has no "right of absolute and exclusive use and occupation" of that land, and the public highway at issue, as in Strate, is the equivalent of alienated, non-Indian land for purposes of regulating the activities of nonmembers.

[The Tribe attempted to argue that contemporaneous evidence and course of dealings proved that the state did not think they were obtaining adjudicative jurisdiction over the right-of-way, but the Court declined to look examine this evidence, instead stating a bright line rule that Tribes have no gatekeeping right, and therefore no adjudicative authority over rights-of-way granted to states which are part of the state highway system]

[In reviewing the first Montana exception – consensual commercial relationships - the Court found that] The record indicates that Nord was driving a semi-truck owned by Nord Trucking, a company that had a consensual commercial relationship with the Red Lake Band to haul and remove timber from the reservation, but the accident gave rise to a simple tort claim between strangers, not a dispute arising out of the commercial relationship. The accident did not involve the Red Lake Band itself, and although the individual injured was a member of the Red Lake Band, he was not a party to the commercial relationship.

- **Hunting Regulations**
  - ***Roberts v. Hagener,* 287 Fed.Appx. 586 (9th Cir. 2008).**
    - **Synopsis:** Man challenged a Montana hunting regulation which allowed only "tribal members" to hunt big game on Montana Indian Reservations as violating the Equal Protection Clause.
    - **Holding:** (*from the opinion, internal citations omitted*) Randy Roberts appeals the district court's grant of summary judgment in favor of the State of Montana and numerous Montana government officials (collectively "Defendants" or "Montana") in his suit alleging that a Montana big game hunting regulation violates the Equal Protection Clause of the Fourteenth Amendment. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

Both the United States Supreme Court and this court have long held that classifications based on membership in a federally recognized Indian tribe are political, rather than racial, and thus subject to rational basis review. The challenged regulation permits only "tribal members" to hunt big game on Indian reservations in Montana. The regulation clearly classifies based on tribal membership rather than racial status as an Indian. Accordingly, the district court correctly reviewed the regulation under the rational basis standard.

FN1. We reject Roberts's assertion that Montana lacked the power to enact the regulation. The regulation does not "indirectly" regulate hunting and fishing by members of the Crow Tribe on Indian lands nor does it discriminate against or impede any authorized regulation of the Crow Tribe.

- **Aboriginal Title**

  - ***Western Shoshone National Council v. United States*, 279 Fed.Appx. 980 (Fed Cir. 2008)**

    - **Synopsis:** Governing body of the Western Shoshone Nation and Western Shoshone bands brought suit against the United States seeking declaratory judgment that judgment of the Indian Claims Commission (ICC) was not enforceable against them, or that the ICC judgment was void because of alleged due process violations.

    - **Holding:** The Court made two findings of interest to Indian law.
      - **1)** With respect to the plaintiffs' claim for the value of interest ($14 billion) from the time of the taking of their lands (1872) to the ICC determination, the Court found that the Western Shoshone Treaties did not "recognize" valid title to the lands. Rather, the Court found that the Treaties simply "acknowledged" the claim to title.
      - **2)** The Court found that the plaintiffs claims for breach of fiduciary duty, related to the management of aboriginal lands and involving minerals withdrawn before the Treaty was signed, were barred by the Indian Court of Claims Act. The Court stated: "Assuming that the Treaty imposed a fiduciary duty on the Government, the finality provision of the ICCA and the Court of Claims' affirmance of the ICC's final determination with respect to the Western Shoshone's aboriginal rights to the territory extinguished any claim for an accounting or breach of fiduciary duty with respect to that territory or such revenue."

[i] With thanks to NARF and the National Indian Law Library, which supplied the synopsis for each case. (http://www.narf.org/nill/bulletins/cta/2008cta.htm)