

U.S. Supreme Court Decisions Impacting Native Americans

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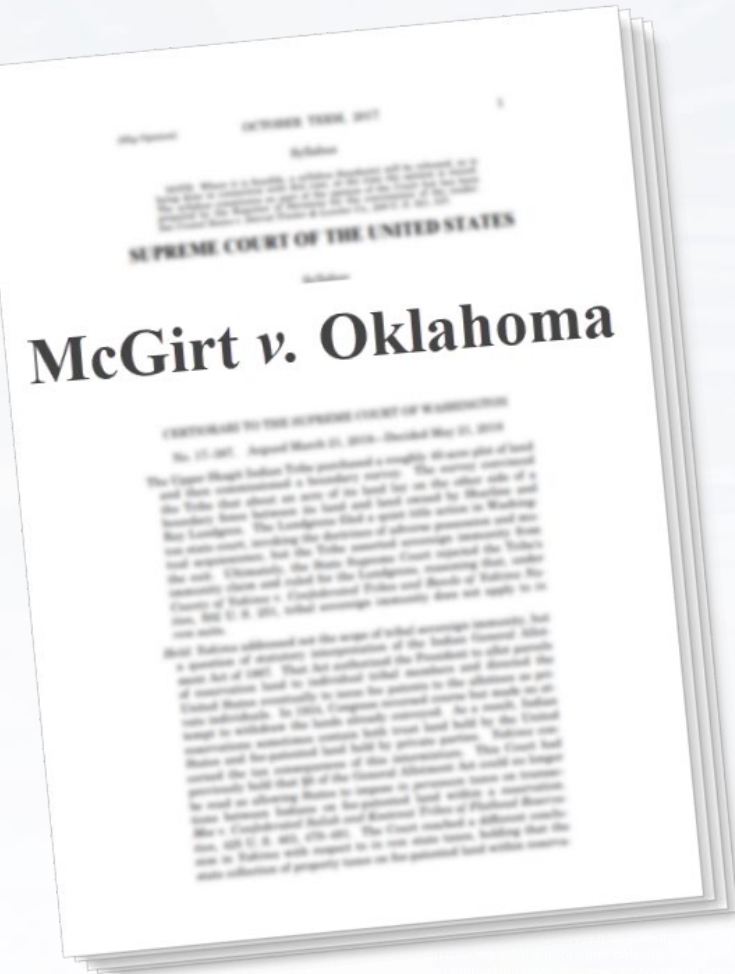
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Agenda

- » *McGirt v. Oklahoma*
- » *Upper Skagit Indian Tribe v. Lundgren*
- » *Herrera v. Wyoming*
- » *Carcieri v. Salazar*
- » *Montana v. United States*
- » *Dollar General Corp v. Mississippi Band of Choctaw Indians*
- » *Williams v. Big Picture Loans LLC* (U.S. District Court case)



McGirt v. Oklahoma



- » United States Supreme Court decision issued July 9, 2020.
- » Jimcy McGirt was an enrolled member of the Seminole Nation who was convicted of a sex crime in Oklahoma state court under state law.
- » McGirt asserted that because he had committed his crime on an Indian reservation he should not have been tried in state court due to a lack of jurisdiction, but instead should have been tried in federal court pursuant to the Federal Major Crimes Act.
- » The State of Oklahoma in turn asserted that the Muscogee reservation had been disestablished by Congress many years ago during the allotment era.



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McGirt v. Oklahoma

“Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.”

Justice Gorsuch



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McGirt v. Oklahoma

- » The court ruled that the Muscogee Reservation was established by an 1833 treaty between the tribe and the United States, and while the boundaries of the treaty were slightly modified by a subsequent 1866 treaty, the reservation was never disestablished.
- » The tribe was not awarded land in fee as a result of the decision, however, regardless of who holds the fee ownership those properties were established to be within the boundaries of a reservation.



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McGirt v. Oklahoma

- » This has resulted in significant confusion regarding jurisdiction over the land inside the reservation.
 - What land will the tribe assert jurisdiction over?
 - Will the tribe impose taxes inside the reservation?
 - What impact does the *Montana* case have on jurisdiction?
 - Are tribal compacts an option?



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McGirt v. Oklahoma



» The Supreme Court ruling resolves any question about establishment of the Muscogee Reservation, however, there are four other tribes in Oklahoma who have similarly benefitted from this decision, as follows:

1. Cherokee Nation
2. Chickasaw Nation
3. Choctaw Nation
4. Seminole Nation



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McGirt v. Oklahoma

- » The impact of *McGirt* extends beyond Oklahoma.
- » Any tribe engaged in a dispute pertaining to tribal jurisdiction and/or reservation boundaries may ask the court to consider the precedent established in *McGirt*.
 - *Oneida Nation v. Village of Hobart* (Wisconsin, 7th Circuit)
 - *Yakama Nation v. Klickitat County* (Washington State, 9th Circuit)
 - *Little Traverse Bay Bands of Odawa Indians* (Michigan, 6th Circuit)
 - *Mille Lac Band of Ojibwe v. City of Mille Lacs* (Minnesota, 8th Circuit)



Oklahoma v. Victor Manuel Castro-Huerta

- » Child neglect case; Neglect occurred within the historical boundaries of the Cherokee reservation.
- » Perpetrator is not Native American, but the child is.
- » Under *McGirt*, the state would not have jurisdiction (feds would).
- » In January of 2022 SCOTUS agreed to hear an appeal in this case.
- » Over 30 separate petitions were filed by the state in an attempt to overturn *McGirt*.
- » SCOTUS did not agree to review whether *McGirt* should be overturned.
- » They will consider whether the state has concurrent jurisdiction when non-Native Americans victimize Native Americans on reservation land.



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Surface Mining and Reclamation

- » After the McGirt decision The U.S. Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSMRE) informed state agencies that control and oversight of mining and environmental regulations in eastern OK are within the jurisdiction of the federal government.
- » OSMRE sent letters to the OK Department of Mines and the OK Conservation Commission notifying them of this decision.

"...the State may no longer exercise regulatory jurisdiction under the Surface Mining Control and Reclamation Act of 1977 on Indian Lands within the State."



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Surface Mining and Reclamation - Timeline

- » **April 2021:** OSMRE declares that they have regulatory authority over surface coal mining and reclamation of abandoned mines (rather than the Oklahoma Department of Mines and Oklahoma Conservation Commission).
- » **June 2021:** OSMRE cuts federal funding.
- » **July 2021:** State of Oklahoma sues the Department of the Interior in U.S. District Court for “unlawfully” stripping Oklahoma of its regulatory jurisdiction, taking the position that *McGirt* is limited to federal criminal jurisdiction under the Major Crimes Act.
- » **August 2021:** State files a Motion for Preliminary Injunction seeking to enjoin the feds from enforcing their regulatory authority.
- » **December 2021:** State’s motion is denied.
- » **January 2022:** State files Amended Complaint, DOI files Answer and Counterclaim.
- » **February 2022:** State files Answer to Counterclaim.



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State Income Tax

“...taxation doesn’t attach to individual Native Americans who live on reservations.”

Cherokee Nation Principal Chief Chuck Hoskin, Jr.

- » These comments were made to a panel on state tax and budget issues hosted by the Oklahoma policy institute.
- » Hoskin noted that this will result in “revenue gaps” for state government.
- » Recommends solving issue through state-tribal compacts, which could result in share of income tax collections going to tribal governments.



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Oklahoma Tax Commission

- » First post-McGirt income tax protest to complete the Tax Commission adjudication process decided December 8, 2021. Decision released publicly January 24, 2022.
- » Oklahoma Tax Commission issued a final order denying the appeal of a Muscogee Nation citizen who cited McGirt as grounds to qualify for an exempt tribal income exclusion on state income taxes.
- » Petitioner is a citizen of the Muscogee Nation but works at the Golden Pony Casino operated by and on trust land of the Thlopthlocco Tribal Town.
- » Administrative law judge focused on the fact that the Muscogee petitioner doesn't have Thlopthlocco citizenship.
- » Future petitions could be less convoluted and may have different results.



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Meashintubby v. Paulk, et al

- » On February 18, 2022 Harold and Nellie Meashintubby filed a complaint in U.S. District Court asking the court to determine if *McGirt* applies to civil tax matters.
- » The Meashintubbys are enrolled members of the Choctaw Nation.
- » The couple asked for an exemption from state taxes for 2020 and 2017 after the *McGirt* decision.
- » The Oklahoma Tax Commission rejected the exemption requests.
- » They paid their taxes under protest after notifying the state of their intent to sue.
- » The Complaint cites a 1973 U.S. Supreme Court opinion that found that a state could not subject a tribal member living on a reservation whose income was derived from reservation sources to a state income tax.
- » It also cites a September 2020 Oklahoma Tax Commission report stating that tribal members who seek exclusion from state taxes under McGirt could cost the state \$72.7 mill per year.



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Retroactive Application

- » SCOTUS declined to hear three cases questioning whether *McGirt* applies retroactively to cases in which a final verdict has been reached.
 - *Parish v. Oklahoma*
 - *Compelleebee v. Oklahoma*
 - *Davis v. Oklahoma*
- » Result – OK Court of Criminal Appeals Ruling that the decision is not retroactive remains in these cases.



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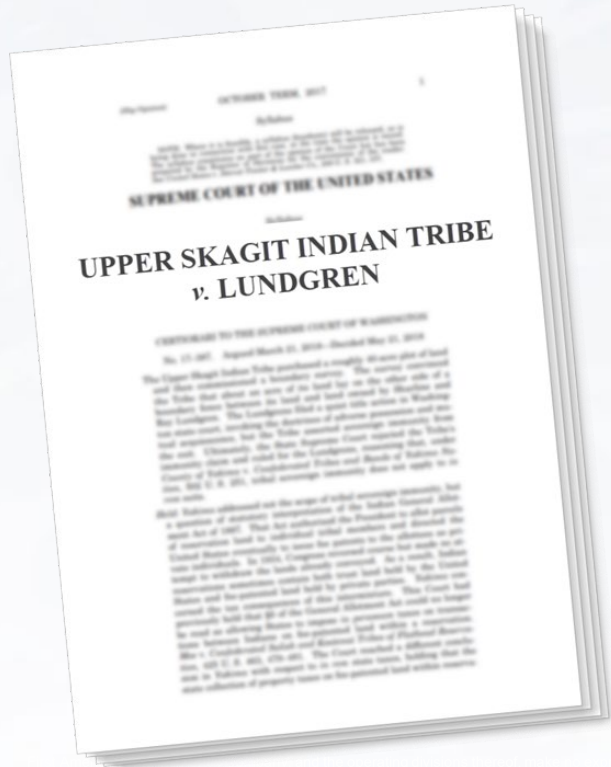
Martinez v. Oklahoma

- » Oklahoma Court of Criminal Appeals Case
- » Martinez is a Comanche citizen, and his crime occurred in Comanche County in 2012. Murder victims were non-Native American.
- » In September of 2020 Martinez filed an application for post-conviction relief, arguing for application of McGirt, saying the crimes occurred “within the undiminished boundaries of the Kiowa Comanche Apache Reservation” and the state had no jurisdiction to prosecute him.
- » Court pointed to evidence of Congressional intent to disestablish the reservation by the Act of June 6, 1900, which provides “...the said Comanche, Kiowa and Apache Indians hereby cede, convey transfer, relinquish, and surrender, forever and absolutely, all their claim, title, and interest, of every kind and character..”
- » Court concluded that the reservation was disestablished.
- » Conclusion: Each tribe must be evaluated independently.



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Upper Skagit v. Lundgren



- » United States Supreme Court decision issued May 21, 2018.
- » In 2013 the tribe purchased a 40-acre piece of land believed to contain a tribal burial site adjacent to their reservation in Washington state.
- » Survey of the land showed a barbed-wire fence running approximately 1,300 feet inside the boundary of the parcel.
- » About one acre of the parcel was contained within the neighbor's (Lundgren's) yard.
- » Tribe wanted to tear down the fence and rebuild it on the boundary line, but Lundgren claimed to be the owners of the land as a result of adverse possession long before the tribe purchased it.
- » Lundgren filed a quiet title action in Washington state court stating that they had occupied the land since 1947. The tribe asserted sovereign immunity from suit and requested the action be dismissed.



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Upper Skagit v. Lundgren

- » The Washington Supreme Court ruled that while it lacked personal jurisdiction over the tribe due to its sovereign immunity, the adverse possession case could proceed under “in rem” jurisdiction against the property itself.
 - The court primarily relied upon *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992) in making this determination.
- » Washington court ruled for Lundgren.



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Upper Skagit v. Lundgren

- » Tribe appealed to the U.S. Supreme Court.
- » In a post-certiorari brief the tribe argued that Washington's courts ruling would establish an exception to tribal immunity based on in rem jurisdiction that the court didn't have the power to create.
- » At oral argument Lundgren asserted that a sovereign has no immunity for actions involving "immovable property" located in the territory of another sovereign.
 - Immovable property doctrine has been recognized by the Supreme Court for more than 200 years.
- » If this was the case, the tribe would have no immunity from Lundgren's action since the parcel in dispute is outside the boundaries of the Upper Skagit reservation.



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Upper Skagit v. Lundgren

- » SCOTUS declined to consider this argument because it was raised very late in the case.
 - Lundgren did not raise the argument during the litigation in Washington court or in their initial brief to the U.S. Supreme Court.
 - It was raised after the tribe, the United States and several friends of the court had filed amicus briefs.
- » Instead, the court found only that the Washington Supreme Court erred in relying on the *Yakima* case because it related to “in rem” property taxes and the Indian General Allotment Act of 1887, not tribal sovereign immunity.
- » It remanded the case to the Washington Supreme Court for further consideration regarding the application of tribal sovereign immunity to cases involving immovable property.



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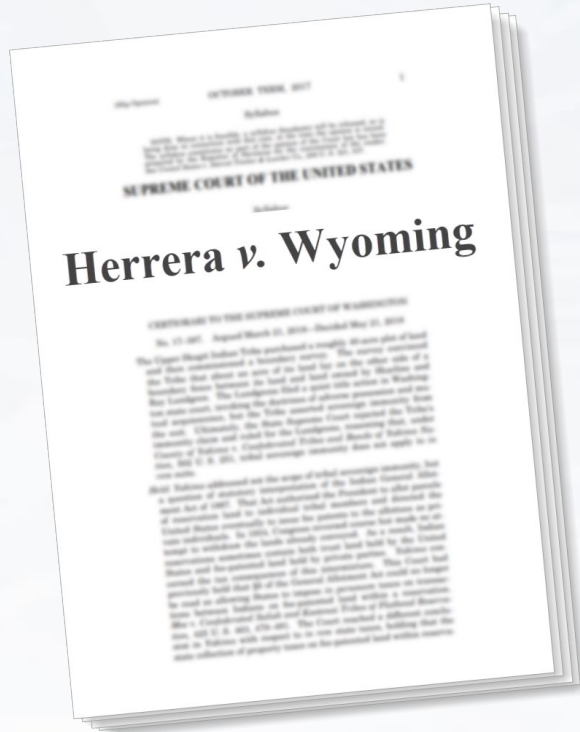
Upper Skagit v. Lundgren

- » The parties settled the litigation before further proceedings in Washington Supreme Court.
- » The issue of immovable property and sovereign immunity will likely come up again. American cases on this issue have generally involved foreign sovereigns (other nations) rather than Native American Tribes.



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Herrera v. Wyoming



- » U.S. Supreme Court decision issued May 20, 2019.
- » Herrera is a member of the Crow tribe in Montana. While hunting, he pursued elk from the tribe's Montana reservation across the state line and into Wyoming.
- » Herrera was prosecuted by Wyoming officials for taking elk out of season and without a license.



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Herrera v. Wyoming

- » A Wyoming state trial court denied his request to present treaty hunting rights as a defense. He was convicted.
- » A Wyoming appellate court affirmed the conviction, the Wyoming Supreme Court denied review, and the U.S. Supreme Court took the case.
- » The Crow tribe traditionally resided and hunted on lands now located in both Montana and Wyoming.
- » In their 1868 treaty with the United States, the tribe ceded 30,000,000 acres of land to the U.S.



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Herrera v. Wyoming

- » The tribe retained a reservation in what is now Montana. With respect to the ceded land, the treaty provided that tribal members would “have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon . . . and peace subsists . . . on the borders of the hunting districts.”
- » The Wyoming Territory was established in 1868. It was admitted as state in 1890 “on equal footing with the original states in all respects.” There was no reference to Native American treaty rights in the act of admission.
- » In 1897 the portion of the Crow tribe’s ceded lands located within Wyoming were made part of the Bighorn National Forest.



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Herrera v. Wyoming

- » In *Herrera* the state of Wyoming argued that the tribe's treaty hunting rights terminated upon the state's admission.
- » It relied upon the 1896 U.S. Supreme Court decision in *Ward v. Race Horse*. That case involved a Shoshone-Bannock treaty from 1868 which contained language regarding hunting rights identical to that used in the Crow treaty from the same year.
- » In *Race Horse*, the court held that Wyoming's admission as a state negated the treaty hunting rights because to do otherwise would deprive Wyoming of its "equal footing" with the other states by leaving it unable to regulate the taking of game within its boundaries.



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Herrera v. Wyoming

- » In 1995 rights under the Crow tribe's treaty were at issue in the 10th Circuit case of *Crow Tribe v. Repsis*. Applying *Race Horse*, the 10th Circuit held that the hunting rights in the Crow treaty were terminated upon Wyoming's admission as a state.
- » Four years later the question of whether a state's admission terminated treaty rights was again considered in the Supreme Court in the case of *Minnesota v. Mille Lacs Band of Chippewa Indians*.
- » The court rejected the "equal footing" reasoning of *Race Horse* and the idea that treaty rights could be implicitly repealed.



Herrera v. Wyoming

- » Instead, Congress had to “clearly express” an intent to terminate treaty rights.
- » The *Mille Lacs* decision also considered and rejected a second basis for the holding in *Race Horse*, that treaty rights only survive statehood if they are “of such a nature as to imply their perpetuity.”
- » Following *Mille Lacs*, the *Herrera* court rejected *Race Horse’s* “equal footing” reasoning and further held that there the Crow tribe’s treaty lacked language indicating the intention that treaty rights would terminate upon statehood.



Herrera v. Wyoming

- » **Wyoming had also argued that even if the 1868 treaty remained in effect, it applied only to “unoccupied lands of the United States.”**
- » **According to the state, its admission in 1890 marked the “arrival of civilization,” thus rendering all lands within the state “occupied.”**
- » **In the alternative, it claimed that placing land within the Bighorn National Forest in 1896 made those lands “occupied.”**
- » **The court rejected both approaches.**



Herrera v. Wyoming

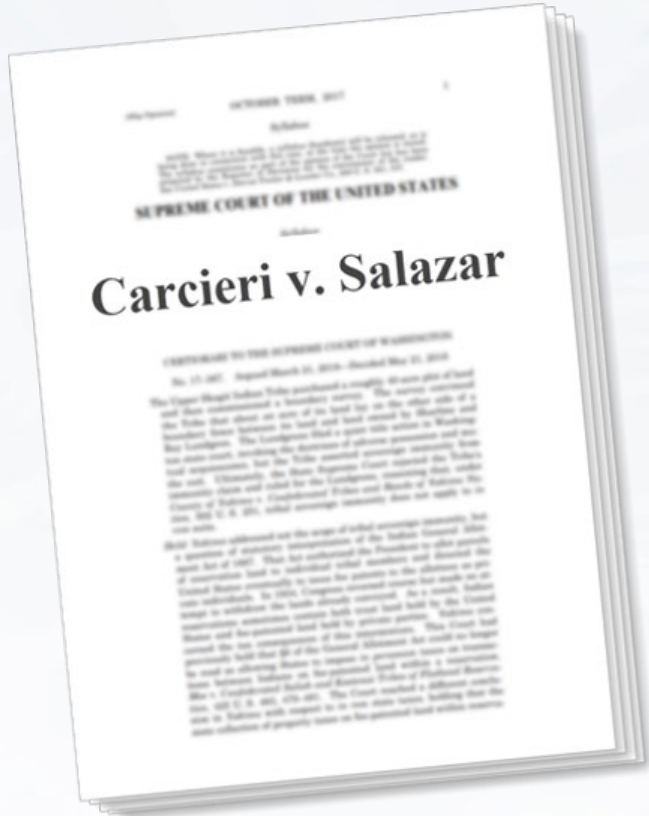
- » **The Supreme Court reversed the prior decisions and remanded the case for further proceedings. On remand Wyoming would be free to argue that the specific location within the national forest where Herrera had hunted was “occupied.” The court also noted that Wyoming retained the right to regulate the exercise of treaty hunting rights in the interest of conservation.**

- » ***Herrera* affirmed the principle that termination of treaty rights depends upon the explicit language of either the treaty or an act of Congress. Termination cannot be implied.**



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Carcieri v. Salazar



- » U.S. Supreme Court case decided in 2009.
- » Narragansett Tribe in Rhode Island applied for federal recognition in 1979, which was granted in 1983.
- » At that time, all the land owned by the tribe was taken into trust by the United States for the tribe.

» In 1991 the tribe purchased 31 acres of land to be used for housing for elderly tribal members and applied to have the land transferred to trust.



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Carcieri v. Salazar

- » In 1998 the BIA notified Rhode Island of its intent to take the 31-acre parcel into trust status. The state appealed the decision to the Interior Board of Indian Appeals which ruled in favor of the tribe and BIA.
- » The state filed suit in U.S. District Court with the governor of the state, Donald Carcieri, named as Plaintiff and the Secretary of the Interior, Ken Salazar named as Defendant. The District Court ruled in favor of the BIA and the tribe.
- » The state appealed the U.S. District Court Decision to the U.S. Court of Appeals for the First Circuit, who affirmed the District Court's judgment. The state then appealed to the U.S. Supreme Court.



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Carciari v. Salazar

- » U.S. Supreme Court determined that the authority to take tribal land into trust hinged on the phrase “now under Federal jurisdiction” in 25 U.S.C. 479.
- » The court determined that phrase limited the Secretary of the Interior’s authority to take land into trust only if the tribe was federally recognized in 1934 when the Indian Reorganization Act was enacted.
- » Since the Indian Reorganization Act says “tribes **now** under federal jurisdiction” but it was enacted in 1934, the court ruled that “now” actually meant 1934.
- » This excluded the Narrangansett tribe from transferring land into trust since they were not federally recognized until 1983.



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Carciari v. Salazar

- » This decision has been controversial because it does not clearly define the term “under federal jurisdiction”.
- » A tribe may have been federally recognized in 1934 based on a treaty or some other format, but the question of whether the tribe was “under federal jurisdiction” may remain.



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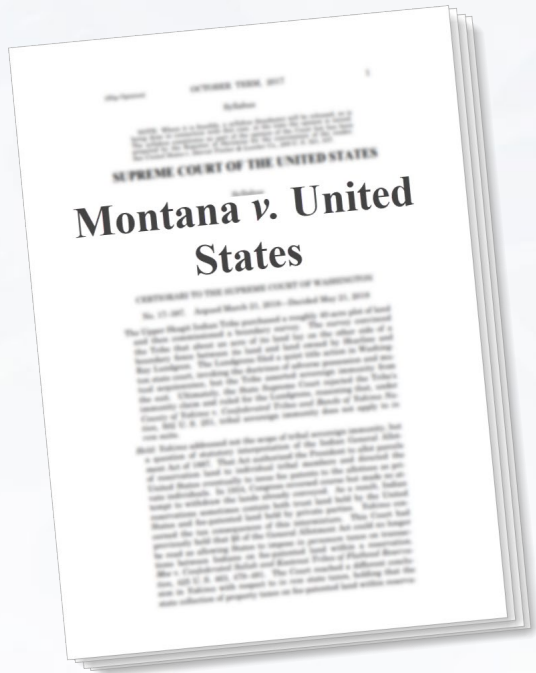
Carcieri v. Salazar

- » Upon receipt of a Fee to Trust application the BIA must make a determination as to whether the tribe was under federal jurisdiction in 1934.
 - This is a required part of their review process.
- » The BIA may consult with the Office of the Solicitor to prepare a Carcieri Opinion to rely upon when there is some question.
 - This can be a long and complicated analysis.
- » Prompted other lawsuits over the validity of already completed fee to trust transfers.
 - *Big Lagoon Rancheria v. California*
- » Multiple Carcieri fix bills have been presented in an effort to overturn this decision, but none have been successfully implemented.



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Montana v. United States



- » U.S. Supreme Court decision issued March 24, 1981.
- » The Crow Tribe of Montana, by tribal resolution, prohibited hunting and fishing within its reservation by anyone who was not a member of the tribe.
- » However, Montana continued to assert its authority to regulate hunting and fishing by non-Indians within the reservation.



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Montana v. United States

- » In an effort to resolve conflict between the Tribe and the State of Montana, the U.S. tried to quiet title to the bed of the Big Horn River in the U.S as Trustee for the Tribe and to establish the Tribe and U.S. sole authority to regulate hunting and fishing on the Reservation.
- » The Second Treaty of Fort Laramie of 1868 established the Crow reservation, including land through which the Big Horn River flows.



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Montana v. United States

The Supreme Court held:

- » Title to the bed of the river passed to Montana upon its admission into the Union in 1889 (equal footing doctrine).
 - Treaty did not expressly refer to the riverbed.
 - Treaty did not expressly and clearly declare or make plan an intention to convey the riverbed.
 - Crow Indians, at the time of the Treaty, presented no public need which would have required Congress to depart from its policy of reserving ownership of the beds of a navigable water for future states.
- » Crow Tribe did not have the power under the treaty or under inherent Indian sovereignty to regulate non-Indian fishing and hunting on reservation land owned in fee by non-members of the Tribe.
 - No consensual relationships existed between the Crow Tribe and the non-member sportsman.
 - Non-tribal members were not endangering the tribe.
- » Although the Supreme Court ruled against the Crow Tribe, important guidelines were established regarding Native American sovereignty, and the power which tribes had over non-members.



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Montana v. United States

Regulation of non-Indians on fee land within the reservation:

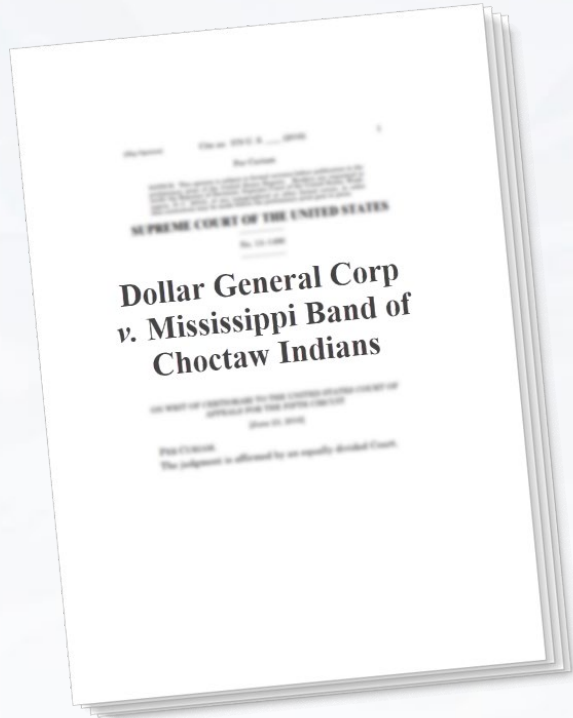
1. First, look at treaties or federal statutes that may affirm/vest jurisdiction
2. If none, presumption is *against* tribal regulatory authority **unless**:
 - The non-Indian has consensual relations with the tribe or its members, through commercial dealing, contracts, leases or other arrangements
 - When a non-Indian's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe

This is referred to as the “Montana Exception”.



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Dollar General Corp v. Mississippi Band of Choctaw Indians



- » U.S. Supreme Court case decided June 23, 2016.
- » In 2000 Dollar General entered into a lease with the Mississippi Band of Choctaw Indians to operate a store on land held in trust for the tribe by the federal government.
- » In 2003 a 13-year-old tribal member working at the store as an intern was allegedly sexually abused by the store manager. The manager was not prosecuted by the United States Attorney.



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Dollar General Corp v. Mississippi Band of Choctaw Indians

- » In 2005 the victim sued the store manager and Dollar General in tribal court.
- » Defendants asked for a dismissal, claiming the tribal court did not have jurisdiction over non-Indians.
- » Tribal court declined the request to dismiss (which was affirmed by the Choctaw Supreme Court) due to the Montana case, which allows tribes to exercise civil jurisdiction over non-Indians on tribal land when the non-Indian enters a consensual relationship with the tribe.



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Dollar General Corp v. Mississippi Band of Choctaw Indians

- » The Manager and Dollar General sued the tribe in U.S. District Court for the Southern District of Mississippi in an attempt to block the suit in tribal court.
- » Eventually the Manager was dismissed from the case but the District Court held that the Dollar General had been in a consensual relationship and subject to the tribe's jurisdiction.
- » Dollar General appealed to the Fifth Circuit which affirmed the decision of the district court.



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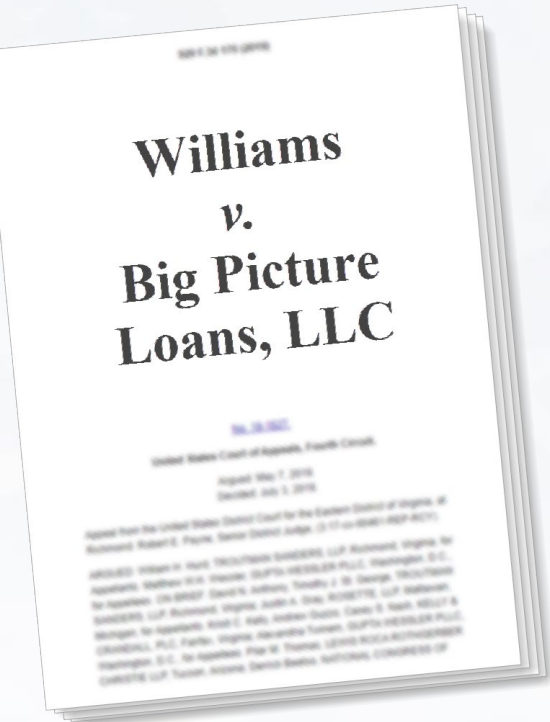
Dollar General Corp v. Mississippi Band of Choctaw Indians

- » Dollar General then appealed to the U.S. Supreme Court.
- » The decision of the Fifth Circuit was affirmed by an equally divided court (4-4). The death of Justice Antonin Scalia had left the court with only 8 members.
- » Cases which are equally divided result in lower case ruling standing, without any precedent being established.



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Williams v. Big Picture Loans, LLC



- » Fourth Circuit Court of Appeals case decided in 2019.
- » In 2003 the U.S. Supreme Court determined that tribes engaging in commerce through separate entities could enjoy sovereign immunity but provided no guidance on how to determine that. The Circuit courts took it upon themselves to establish the criteria.
- » The Fourth Circuit was asked whether entities set up to make payday loans were able to claim sovereign immunity if owned or controlled by a tribe.

» The Lac Vieux Band of Lake Superior Indians had established two entities, Big Picture Loans LLC and Ascension Technologies LLC, to run their lending business.



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Williams v. Big Picture Loans, LLC

- » Big Picture had 15 tribal members employed, while Ascension employed 31 persons that were off reservation. The tribal council members co-managed both entities. Big Picture's CEO was a member of the tribe, while Ascension's was not.
- » The plaintiffs were individuals in Virginia claiming that Big Picture charged interest rates 50 times more than allowed by Virginia Law. The tribe responded by asserting sovereign immunity, claiming the LLCs were an arm of the tribe.
- » The District Court initially held that the entities had not met their burden of establishing sovereign immunity.



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Williams v. Big Picture Loans, LLC

- » The Fourth Circuit instead followed the lead of the Tenth Circuit who established a six-factor test in 2010, and the Ninth Circuit followed their lead but instead used only five of the factors.

- » The Fourth Circuit used the five factors as well:
 1. Method of the entities' creation;
 2. Their purpose;
 3. Their structure, ownership, and management;
 4. The tribe's intent to share its sovereign immunity; and
 5. The financial relationship between the tribe and the entities.



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Williams v. Big Pictures Loans, LLC

- » The court closely examined each of the five factors.
- » For example, the district court had decided that the percentage of the tribe's revenue received from Big Picture was too low for the entity to qualify as an arm of the tribe. The Fourth Circuit was not concerned with the specific percentage, but instead with the fact that the tribe was able to state the percentage of profits that it received and how the tribe spent that money.
- » The court decided that both Big Picture and Ascension met the criteria and were entitled to sovereign immunity as arms of the tribe. The court reversed the district court decision and ordered it to dismiss the action against both entities.



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Questions?

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