

**MODRALL SPERLING
CLIENT ALERT:**

PLAINS COMMERCE BANK v. LONG FAMILY LAND & CATTLE COMPANY

U.S. Supreme Court Clarifies the Scope of Tribal Civil Jurisdiction Over Nonmembers

On June 25, 2008, the United States Supreme Court issued its decision in [*Plains Commerce Bank v. Long Family Land and Cattle Company*, Supreme Court Cause No. 07-411.](#)¹ The Court reversed the decision of the U.S. Court of Appeals for the Eighth Circuit² and held that the Cheyenne River Sioux Tribal Court lacked jurisdiction to award money damages against an off-reservation bank on claims asserted by a tribal member-owned company that the Bank discriminated against tribal members while engaging in the sale of privately owned land within the reservation. The opinion continues the Court's trend toward defining limits on tribal jurisdiction through narrow, fact-specific determinations denying tribal jurisdiction.³

The Court's decision provides further guidance on what types of "consensual relationships" entered into by nonmembers of an Indian tribe may support tribal judicial or regulatory jurisdiction under the standards of *Montana v. United States*.⁴ *Montana* holds that, as a general rule, tribes lack jurisdiction over nonmembers. However, *Montana* recognized two exceptions to its general rule. First, tribal civil jurisdiction may exist over "nonmembers who

¹ Available at: <http://www.scotusblog.com/wp/wp-content/uploads/2008/06/07-411.pdf>. Modrall Sperling filed a brief *amicus curiae* in the case on behalf of the Association of American Railroads.

² 491 F.3d 878 (8th Cir. 2007).

³ See *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); and *Nevada v. Hicks*, 533 U.S. 353 (2001).

⁴ 450 U.S. 544, 565 (1981).

enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Second, tribes may exercise civil authority over nonmembers conduct that “threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.” *Plains Commerce Bank* focused on the first exception, relating to “consensual relationships.”

Plains Commerce Bank is significant for several reasons:

- **Relationship between the “consensual relationship” and the regulated “activity:”** The Bank had extensive, long-term dealings with the Long Family Land and Cattle Company (“Long Company”), a North Dakota corporation, majority-owned by members of the tribe. However, the Court considered only the transaction related directly to the plaintiff’s discrimination claim, the Bank’s sale of non-Indian owned fee land to another non-Indian, on terms more favorable than those offered to the Indian-owned corporation. Even though the Bank acquired its fee land as part of the lengthy prior dealings with the Long Company, the majority held those dealings were not material to defining the relevant consensual relationship under *Montana*. A dissent by Justice Ginsburg, joined by Justices Stevens, Souter and Breyer, advocated a broader focus.
- **Scope of protectable tribal interests:** The Court sent ostensibly mixed messages regarding the interests tribes may protect as against nonmembers. In a holding that seems fundamental it stated that, by

virtue of “their incorporation into the United States, the tribe’s sovereign interests are now confined to managing tribal land, protecting tribal self government, and controlling internal relations.”⁵ To support tribal jurisdiction, a consensual relationship must relate to one of these three “sovereign interests.”⁶ However, it also observed that “certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule”.⁷ Justice Roberts also observed a tribe may “quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same”.⁸ While these examples may suggest fairly broad jurisdiction, they must be read in light of the majority’s assertions that tribal jurisdiction is limited to the three “sovereign interests” and that any regulation must fall “within the limits set forth in our cases.”⁹ The majority observed that a transfer of land may not implicate those sovereign interests to the same degree as actual activities on the surface of the land.

- **Effect of Land Transfers:** The Court held that transfers of land from federal government trust status into fee ownership reduced or eliminated

⁵ Slip Op. at 16 (Citations and quotation marks omitted).

⁶ Slip Op. at 19.

⁷ Slip Op. at 16.

⁸ Slip Op. at 18.

⁹ Id. These almost certainly are the limits defined in *Montana* and the cases following it. See, e.g., *Strate v. A-1 Contractors*, 520 U.S. at 457-59; *Atkinson Trading Co. v. Shirley*, 532 U.S. at 657-59; and *Nevada v. Hicks*, 533 U.S. at 359-73, and cases imposing other limitations on tribal jurisdiction. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 453 U.S. 191, 209 (1978) (tribes lack criminal jurisdiction over non-Indians).

a tribe's sovereign interest in the lands. Land that has "been alienated from the tribal trust" is different for jurisdictional purposes because "the tribe cannot justify regulation of such land's sale by reference to its power to superintend tribal land" Consequently, the Court held that the tribe's regulatory interest in controlling the transfer of its lands was lost when the land was conveyed to non-Indians.¹⁰ While a tribe's power to exclude non-Indians can support jurisdiction over tribal trust lands, it provides no support with respect to nonmember fee lands.

- **"Commensurate consent" to support tribal jurisdiction:** The Court held that tribal regulation of fee land sales "runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent." Recognizing tribal sovereignty is "a sovereignty outside the basic structure of the Constitution . . .," and there are significant differences between tribal courts and traditional American courts, the Court held that tribal "laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." The majority also found it relevant whether the nonmember "may reasonably have anticipated" that its dealings would "trigger tribal authority."¹¹ Even if the nonmember has adequately consented, "[t]he regulation must stem from the tribe's inherent

¹⁰ Slip Op. at 17-18.

¹¹ Slip Op. at 19.

sovereign authority to set conditions on entry, preserve tribal self government, or control internal relations.”¹²

Undoubtedly, these passages will become the subject of further analysis. One interpretation is that tribal jurisdiction under the “consensual relationship” exception arises only when the nonmember expressly, or perhaps impliedly, consents to the tribe’s exercise of jurisdiction, as by a contract that includes provisions for exercise of tribal taxation, regulation, or tribal court jurisdiction. An alternative interpretation is that the existence of any contractual relationship could impliedly indicate the “expression” of consent to tribal jurisdiction. The former interpretation would seem the more logical in light of Justice Ginsburg’s opinion, concurring and dissenting in the judgment. There, Justice Ginsburg stated that “forum selection, choice-of-law, or arbitration clauses” could have been included in an agreement that would provide for jurisdiction other than tribal jurisdiction.¹³ We believe the better reading is that the mere existence of a contract or commercial relationship would not be sufficient under the Court’s majority opinion to support the exercise of tribal authority.

- **Montana’s Second Exception:** The Court reaffirmed earlier decisions requiring that impact on the “political integrity, the economic security or the health and welfare of the tribe” under *Montana* must be so severe as

¹² Slip Op. at 18-19.

¹³ Ginsburg, concurring and dissenting, at 5.

to “imperil the subsistence” of the tribal community that it would be “catastrophic.”¹⁴

- **Consent by Litigation Actions:** The Court held that by asking the tribal court to appoint a process server able to serve the Bank’s complaint on the Long Company in the state court eviction proceeding it initiated, the Bank did not “consent to future litigation in the Tribal Court.”¹⁵ This holding provides some support for the proposition that defending one’s interests and rights in tribal courts may not subject one to tribal jurisdiction for all purposes. It also may shed light on the Court’s “consensual relationship” analysis.

CONCLUSION

The Court’s opinion in *Plains Commerce Bank* provides further guidance to those doing business with Indian Tribes and to those operating on or near Indian Reservations. However, given the narrow limitations of the facts of the case, there remain further questions to be resolved by the Court and the lower federal courts.

¹⁴ Slip Op. at 23.

¹⁵ Slip Op. at 23