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## SPECIAL FEATURE

### NEVADA V. HICKS: NO THREAT TO MOST NEVADA TRIBES

Ronald Eagleye Johnny\*

In *Nevada v. Hicks*,<sup>1</sup> the justices of the U.S. Supreme Court "explicitly '[left] open the question of tribal-court jurisdiction over nonmember defendants in general,' . . . , including state officials engaged on tribal land in a venture or frolic of their own. . . .,"<sup>2</sup> while foreclosing any "tribal authority to regulate state officers in executing process related to the violation, off-reservation, of state laws" as "not essential to tribal self-government or internal relations."<sup>3</sup>

While some governing bodies of tribes have reacted to the *Hicks* decision by directing their attorneys general to draft ordinances enforcing Treaty provisions prohibiting state officials from entering their tribe's lands for the purposes of executing process,<sup>4</sup> the above holdings of the Court do not offend most Northern Paiute and Western Shoshone nations' tribes in northern Nevada or the others with Courts of Indian Offenses and therefore are not as great a threat to most tribes with land holdings in northern Nevada.

Except for those tribes with Courts of Indian Offenses, the requirement of a non-Indian's or a non-member's stipulation or consent to the exercise of civil jurisdiction by a Northern Paiute or Western Shoshone court is found in the tribe's constitution or tribal law and order code.<sup>5</sup>

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1. 121 S. Ct. 2304 (2001).

2. *Id.* at 2309 n.2 (Ginsberg, J., concurring).

3. *Id.* at 2313.

4. See, e.g., Steve Young, *Tribes Say Ruling on Arrests Hurts Sovereignty*, ARGUS LEADER (Sioux Falls, S.D.), July 6, 2001, at 1A (explaining the decision of the Oglala Sioux Tribe to require tribe's attorney general to draft ordinance requiring state "law enforcement to comply with the extradition procedures in the 1868 Fort Laramie Treaty in order to arrest Indians on the reservation").

5. Arguably, these requirements are self-imposed by the members of several tribes. As a former northern Nevada tribal chairman, I do acknowledge that tribal members may have been duped by federal Indian officials to vote for the boiler-plate constitutions offered them. As late as January 13, 1976, the majority of tribal council resolutions were still handwritten. See Resolution of the Governing Body of the Fort McDermitt Paiute-Shoshone Tribe (Jan. 13, 1976) ("grant[ing] the Ft. McDermitt Livestock Association the authority to use [] tribal lands for grazing purposes" and authorizing the association "to sign an exchange of use agreement with the [BLM] . . .") (on file with author). Thus typed tribe-prepared documents were rare as late as 1976 and probably nonexistent in 1936. As the U.S. Supreme Court noted in *Kerr-McGee Corp.*

The Constitution of the Fort McDermitt Paiute-Shoshone Tribe, unamended since it was approved by the vote of a large majority of tribal members on May 30, 1936, and approved by the Secretary of the Interior on July 2, 1936, states:

Article V — Tribal Court (Judicial Code)

Section 1. (a) It shall be the duty of the Council to provide through the necessary bylaws or ordinances, for the establishment of a Tribal Court upon the reservation.

....

(c) This court shall have jurisdiction over all Indians upon the reservation and over such disputes or lawsuits as shall occur between Indians on the reservation or between Indians and non-Indians where such cases are brought before it by stipulation of both parties.<sup>6</sup>

The Constitution of the Pyramid Lake Paiute Tribe had an identical provision until its amendment in 1976,<sup>7</sup> however, other Northern Paiute and or Western Shoshone tribes' constitutions adopted by tribal members and approved by the federal government, circa 1936, do not have such provisions.<sup>8</sup>

The statutory language used by northern Nevada tribes in limiting the jurisdiction of their courts in cases involving opposing parties, who are non-Indians or nonmembers, are not uniform.

The declarations of the Reno-Sparks Indian Colony and Winnemucca Indian Colony state: "Personal jurisdiction shall exist over all defendants, Indians and non-Indians, served within the territorial jurisdiction of the court or consenting to such jurisdiction . . . ."<sup>9</sup>

v. *Navajo Tribe*, "Thus the most that can be said about this period of constitution writing is that the Bureau of Indian Affairs, in assisting the drafting of tribal constitutions, had a policy of including provisions for Secretarial approval; but that policy was not mandated by Congress." *Kerr McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198-99 (1975).

6. CONST. OF THE FORT MCDERMITT PAIUTE-SHOSHONE TRIBE art. V, § 1.

7. See PYRAMID LAKE PAIUTE BY-LAWS art. V, § 1(c) (adopted by a vote of tribal members on December 14, 1935, and approved by the Secretary of the Interior on January 15, 1936); see also *id.* amend. VI (approved by Area Director, Phoenix Area Office, Bureau of Indian Affairs as delegate of Secretary of the Interior, on November 3, 1976) (author has text of amendment, and proof of federal approval but no information on vote by tribal members).

8. See, e.g., CONSTITUTION AND BY-LAWS OF THE SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, NEVADA AND IDAHO (1936).

9. See RENO-SPARKS INDIAN COLONY LAW AND ORDER CODE tit. 1, § 1-20-020(b); see also WINNEMUCCA INDIAN COLONY LAW AND ORDER CODE tit. 1, § 1-20-020(b). Given the nature of the small northern Nevada tribal police force departments or small detachments of U.S. Department of the Interior, Bureau of Indian Affairs (BIA) police in northern Nevada, it has been my experience that service of a summons and complaint within the territorial jurisdiction of a tribal court, even a small Indian colony, by tribal or BIA police is rare.

Yerington Paiute law states: "Personal jurisdiction shall exist over all persons who are Indians or who consent to the jurisdiction of the Tribal Court . . . ."<sup>10</sup>

Walker River Paiute law states: "Personal jurisdiction shall exist over all defendants, Indians or non-Indians, served within the territorial jurisdiction of the court, or consenting to such jurisdiction . . . ."<sup>11</sup>

Likewise, the federal regulations governing the Courts of Indian Offenses for the lands of the four constituent bands of the Te-Moak Tribe of Western Shoshone of Nevada at Battle Mountain, Elko, Wells, Lee, Ruby Valley, and the Odgers Ranch, and the Yomba Shoshone and Lovelock Paiute Tribes of Nevada,<sup>12</sup> since at least 1979,<sup>13</sup> declare:

Except as otherwise provided in this title, each Court of Indian Offenses shall have jurisdiction over any civil action arising within the territorial jurisdiction of the court in which the defendant is an Indian, and of all other suits between Indians and non-Indians which are brought before the court by stipulation of the parties.<sup>14</sup>

In my thirteen years of experience as a judge for Western Shoshone and Northern Paiute tribes, and representing clients in the courts of those tribes when not a judge, most Indian and non-Indian defendants consent to the jurisdiction of the tribal court for a variety of reasons, including the fact that

10. YERINGTON PAIUTE LAW AND ORDER CODE tit. 1, § 1-20-020(b).

11. WALKER RIVER PAIUTE LAW AND ORDER CODE tit. 1, § 1-20-020.

12. At the time of the writing of this article, the Courts of Indian Offenses for Yomba and Lovelock had not been officially abolished. See 63 Fed. Reg. 32,631, 32,631 (1998) ("[c]orrection to proposed regulations" not a final rule change stating "[t]he Assistant Secretary-Indian Affairs, or his designee, has received [a] law and order code[] adopted by . . . the Yomba Shoshone Tribe in Nevada, in accordance with their constitution and by-laws and approved by the appropriate bureau official"). However, the Yomba and Lovelock Tribes remain on the 25 C.F.R. § 11.100(a) list. See 25 C.F.R. § 11.100(a)(3), (5) (2000) (listing the Lovelock and Yomba Tribes, respectively).

13. See 25 C.F.R. pt. 11, § 11.22 (1979) ("The Court of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and nonmembers which are brought before the courts by stipulation of both parties. No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense . . . ."); see also 25 C.F.R. § 11.22C (1979) (same provision applicable only to the Court of Indian Offenses for the Crow Tribe, Montana); *id.* § 11.22CA (section applicable to the Court of Indian Offenses for the Coeur d'Alene Indians, Idaho, "reserved").

14. 25 C.F.R. pt. 11, § 11.103(a) (2001). There were public recommendations to remove the stipulation requirement from 25 C.F.R. Part 11 during the public comment period prior to the majority re-write of that Part, however, the Assistant Secretary-Indian Affairs did not adopt that recommendation. See 58 Fed. Reg. 54,406, 54,407 (1993) (administrative history for 25 C.F.R. § 11.103). In the *Hicks* case, the Court cited to this section. See *Nevada v. Hicks*, 121 S. Ct. 2304, 2322 (2001) (Souter, Kennedy & Thomas, JJ.).

state law prohibits state courts from exercising jurisdiction in Indian country absent the governing body consenting to such jurisdiction by Public Law 280,<sup>15</sup> the time to resolve a dispute is shorter, and filing and other fees are lower than the fees in federal and state courts.<sup>16</sup> There is at least one reported case where a non-Indian defendant in a divorce matter unsuccessfully attempted to defeat the jurisdiction of a northern Nevada tribal court. In 1988, the trial court for the Winnemucca Indian Colony held that the filing of an answer to the divorce complaint devoid of any defenses to tribal court jurisdiction, drafted by a local state-admitted attorney for the pro-se tribal court defendant, constituted a stipulation or consent to the jurisdiction of the tribal court.<sup>17</sup>

In my experience in northern Nevada, if there is a contest to a tribal court's jurisdiction, where tribal law requires consent or stipulation, it is usually a nonmember Indian defendant that refuses to consent or stipulate,<sup>18</sup> with the primary reason for refusing to consent being who the judge is in the case.

It is also worth noting that although no northern Nevada tribe has enacted legislation expressly addressing the jurisdiction of its court over state officials, the federal regulations governing the Courts of Indian Offenses for the four constituent bands of the Te-Moak Tribe of Western Shoshone of Nevada at Battle Mountain, Elko, Wells and Lee, the Yomba Shoshone, and the Lovelock Paiute Tribes, and for all other Courts of Indian Offenses through the United States, state: "No Court of Indian Offenses may exercise any jurisdiction over a Federal or state official that it could not exercise if it were a tribal court."<sup>19</sup>

### Conclusion

The U.S. Supreme Court's decisions in *Nevada v. Hicks* are of no threat to most tribes of the Northern Paiute and Western Shoshone nations because the

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15. NEVADA REV. STAT. 41.430(4); *see also* *Snooks v. Ninth Judicial District Court*, 919 P.2d 1064 (1996) (granting writ of prohibition issued by Nevada Supreme Court after state district court judge denied motion to dismiss tort action stemming from injury on Nevada lands of the Washoe Tribe of Nevada and California for lack of jurisdiction). The California lands of the Washoe Tribe are subject to California's Public Law 280 jurisdiction.

16. *See* Ronald E. Johnny, *Nevada Indian Courts: Viable Alternatives for Resolving Client Disputes*, INTER ALIA (State Bar of Nev.), May/June 1989, at F1.

17. *See* *Hunt v. Hunt*, 16 Indian L. Rep. 6039, 6040 n.1 (Ft. McDermitt Paiute-Shoshone Tribal Ct., Dec. 28, 1988) ("This court interprets the submission of an answer in a civil matter, not contesting any of the allegations contained in the complaint, to be a stipulation to this court's jurisdiction. Such being required by tribal law. *See* Fort McDermitt Const., By-Laws art. V, § 1(c).").

18. *See* Order of Dismissal, *Bonta v. Bonta*, No. 96-433 (Reno-Sparks Tribal Ct., Feb. 3, 1997) (dismissing a divorce action before the Reno-Sparks Tribal Court which was granted, in part, because the wife-defendant would not stipulate to the jurisdiction of the court).

19. 25 C.F.R. § 11.104(a).

laws governing those tribes (constitutional, statutory, or other) currently require a non-member defendant to consent or stipulate to their court's jurisdiction.

Moreover, because of the State of Nevada's Indian policy statutes, and the expense and time needed to resolve disputes in federal courts, northern Nevada courts of Western Shoshone and Northern Paiute nations's tribes will still likely be the forums where most litigants bring their disputes.

