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An Effective Smoke Screen? - The Muscogee (Creek) Nation's Civil Complaint Against Big Time Tobacco and the Battle of Subject Matter Jurisdiction

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RECENT DEVELOPMENTS

AN EFFECTIVE SMOKE SCREEN? — THE MUSCOGEE (CREEK) NATION'S CIVIL COMPLAINT AGAINST BIG TIME TOBACCO AND THE BATTLE OF SUBJECT MATTER JURISDICTION

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Introduction and Background

On June 25, 1997, the Muscogee (Creek) Nation (the Nation), its members and citizens, by and through their Principal Chief, R. Perry Beaver, filed a lawsuit[1] in the Nation's tribal court against the tobacco industry.[2] In its complaint, the Nation[3] alleges that the tobacco industry injured the Nation and its members by: (1) diminution of available health care dollars when allocated health care dollars are expended treating smoking-related illnesses and diseases; (2) increased health insurance premiums for its employees; and (3) decreased productivity of its employees.[4] The Nation contends that tobacco products directly threaten the Nation's economic security because of the expenditures the Nation must make to combat the illnesses related to tobacco products.[5] The Nation also alleges that the adverse health affects of tobacco products on tribal members directly threaten the Nation's health and welfare because tobacco products have been affirmatively linked to multiple diseases and cancer.[6] Further, the Nation contends that Defendant's tobacco products have injurious health affects on the Nation's "full citizens,"[7] and

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1. Muscogee (Creek) Nation v. American Tobacco Co., No. CV 97-27 (Muscogee (Creek) Nation Tribal Ct. filed June 25, 1997).

2. The tobacco industry, as referenced in this article, refers to the following companies and subsidiaries: American Tobacco Company c/o Brown & Williamson; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company; Philip Morris Incorporated; Lorillard Tobacco Company, Lorillard Inc.; and United States Tobacco Company. On October 9, 1997, Petitioner filed a voluntary dismissal of the four non-manufacturing defendants named in the original suit: Philip Morris Company, Inc., UST, Inc., the Tobacco Institute, and the Council for Tobacco Research U.S.A., Inc.

3. The Nation, as referenced in this article, includes: the Muscogee (Creek) Nation, its members, citizens, and the Principal Chief, R. Perry Beaver, all located in northeastern Oklahoma.

4. *See* Petitioner's Complaint, Muscogee (Creek) Nation v. American Tobacco Co., No. CV 97-27, ¶¶ 17, 288 (Muscogee (Creek) Nation Tribal Ct., filed June 25, 1997).

5. *See* Petitioner's Opposition to Motion for Protective Order at 4, *American Tobacco Co.* (No. CV-97-27).

6. *Id.*

7. Full citizens of the Muscogee (Creek) Nation must have the requisite quantum of

therefore, the tribe's political integrity is in jeopardy because only full citizens are allowed to hold tribal offices.[8]

Part I addresses the Nation's tribal court structure. The progression starts with the 1856 Treaty (Treaty of 1856) between the Muscogee (Creek) Nation and the United States. It continues by discussing how the Oklahoma Indian Welfare Act,[9] passed by Congress in 1936, altered the Treaty of 1856. This part proceeds to discuss how the Nation became a recognized independent Indian community[10] with bylaws and a constitution governing the Muscogee (Creek) Nation in Okmulgee, Oklahoma.[11] The next part looks at the tribal court's infrastructure. Finally, this part concludes with the operable provisions of the Nation's Constitution and Judicial Code of 1982 which confer general jurisdiction on the tribal court.

Part II discusses the Nation's case against the tobacco industry and why it was filed. This part begins with allegations made in the complaint. The complaint alleges negligence, fraud on the Nation's people, and detrimental health affects to the Nation's people from tobacco products. The tobacco settlement,[12] proposed by various states' attorneys general and presented to Congress, did not include the sovereign nations of the Indian communities in Oklahoma or in any other State that has federally recognized Indian tribes. The Nation was the first Indian tribe to file a lawsuit in response to being overlooked by the tobacco settlement negotiations.

Part III outlines the tobacco industry's objections to being subjected to the Muscogee (Creek) Nation's tribal court jurisdiction. The tobacco industry's denial of jurisdiction stems from arguments that the Nation lacks tribal jurisdiction over non-Indian defendants: (1) by treaty implications, or alternatively, (2) because tribal jurisdiction is presumed not to exist according to *Montana*,[13] under its general rule denying jurisdiction to the tribal court over nonmembers unless exceptions are available.[14]

Part IV presents analysis of relevant United States Supreme Court subject matter jurisdiction cases.[15] This part discusses the importance of the *Montana*

Muscogee (Creek) Indian blood (at least one-fourth), and are the only citizens eligible to hold elected offices in the Nation. However, those citizens with less than the requisite blood quantum may still participate in elections by voting. MUSCOGEE (CREEK) NATION CONST. art. 3, § 4.

8. *Id.*

9. Oklahoma Indian Welfare Act, ch. 831, 49 Stat. 1967 (1936) (codified as 25 U.S.C. §§ 501-510 (1994)).

10. An independent Indian community is an Indian tribe that is federally recognized by the Secretary of the Interior.

11. This article is concerned with the Muscogee (Creek) Nation headquartered in Okmulgee County, Oklahoma.

12. *See infra* note 80 for details of the tobacco settlement.

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

14. *See* Defendant's Memorandum at 2, *American Tobacco Co.* (No. CV 97-27).

15. This article deals only with subject matter jurisdiction with references to criminal jurisdiction and does not discuss the aspects of in personam jurisdiction.

Rule[16] and its two exceptions, and how those exceptions apply in the Nation's case. Finally, this part discusses the implications of the *Strate v. A-1 Contractors*[17] decision handed down by the United States Supreme Court.

The final part discusses aspects of Public Law 280.[18] Oklahoma is a non-Public Law 280 state; thus, the State of Oklahoma would lack subject matter jurisdiction over the current case or a case brought by an Indian against the tobacco industry in state court. Therefore, a hypothetical comparison is made, showing how tribal court jurisdiction is analogous to state court jurisdiction. Consequently, this article concludes that the Nation retains tribal court subject matter jurisdiction and the case should be adjudicated in that forum.

I. Muscogee (Creek) Nation's Tribal Court Structure and Jurisdictional Grants through Treaty and Statute

The United States, through treaties[19] (especially the Treaty of 1856), permitted the Nation jurisdiction over civil matters within tribal boundaries between Indians, but not with "white men."[20] Therefore, the Treaty of 1856 divested the Muscogee (Creek) Nation of its jurisdictional powers over anyone that was not a tribal member. In 1936, Congress enacted the Oklahoma Indian Welfare Act (OIWA),[21] which empowered the Nation to "organize for its common welfare and to adopt a constitution and bylaws."[22] The Nation did that in 1979 by creating the Nation's Constitution.[23] The Nation's Constitution established three branches of government: executive, legislative, and judicial[24] and took the same form as the United States Constitution. The Nation's Constitution, set within the boundaries of the OIWA, confers on the tribal courts, general jurisdiction over criminal and civil actions that occur within the Muscogee (Creek) Nation's tribal boundaries.[25] The Nation's Constitution was approved by the United States Secretary of the Interior[26] in 1979 and became effective immediately.[27]

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16. *Montana*, 450 U.S. at 544.

17. Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997).

18. 28 U.S.C. § 1360 (1994).

19. 2 INDIAN AFFAIRS, LAWS AND TREATIES, at 25-29, 756-63, (Charles J. Kappler, ed., 1904) (discussing Treaties of 1790 and 1856 signed by the United States Government and the Muscogee (Creek) Nation); *see* Treaty with the Creeks, Aug. 7, 1790, 7 Stat. 35; Treaty with the Creeks, Aug. 7, 1856, 11 Stat. 699.

20. *Id.* at 761.

21. Ch. 831, 49 Stat. 1967 (1936) (codified as 25 U.S.C. §§ 501-510 (1994)).

22. *Id.* § 503.

23. MUSCOGEE (CREEK) NATION CONST. (Constitution Act, 1979). The Nation's Constitution was approved by the Nation's members on October 6, 1979, by a vote of 1896 for and 1694 against.

24. *Id.* at art. 7 (establishing the judicial branch).

25. *Id.* at art. 7, § 206.

26. 25 U.S.C. § 503 (1994).

27. *Id.*

The Nation further developed the Judicial Code of 1982[28] (Judicial Code) as authorized under the Nation's Constitution. The district judge of the tribal court hears juvenile, criminal, and civil cases. Issues of fact are tried before the court or a jury[29] and issues of law are heard by the court.[30] The only court of appeal in the Muscogee Nation is the Nation's Supreme Court.[31] There must be at least four supreme court justices sitting together as a body to hear any appeal.[32] In the Judicial Code, the Nation's district court has "exclusive jurisdiction of *all* matters not otherwise limited to tribal ordinance."[33] The importance of the Nation's constitution and its judicial code is that it brings the tobacco industry within the jurisdictional limits of the Nation's tribal courts. No subsequent treaty or statute has lessened the effects of the Nation's jurisdiction.

In *Muscogee (Creek) Nation v. Hodel*,[34] the federal court for the District of Columbia stated that the OIWA and Black's Law Dictionary define constitution to "encompass the power to create courts with general civil and criminal jurisdiction."[35] The court continued that inherent in self-government is the power to make laws and to create mechanisms to enforce them,[36] citing the Supreme Court case *United States v. Wheeler*.[37] The court concluded that by reasonable inference, the OIWA conferred *all powers* associated with self-government, limited of course by statutes of general applicability.[38] It emerges from the discussion in the *Hodel* case that the OIWA is not displaced by any other acts or statutes.[39] Thus, the argument can be made that the bylaws and Constitution of the Muscogee (Creek) Nation should stand unfettered because Congress has not specifically legislated that Indian nations do not have civil jurisdiction over non-Indian members on tribal lands.

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28. Ordinance of the Muscogee (Creek) Nation adopting the Judicial Code of 1982 (Nat'l Council Amend. 82-30), enacted Aug. 28, 1982 and effective Sept. 9, 1982.

29. *Id.* §§ 119-120.

30. *Id.* § 118.

31. *Id.* § 201.

32. *Id.* § 202.

33. *Id.* § 101(B) (emphasis added).

34. 851 F.2d 1439 (D.C. Cir. 1988).

35. *Id.* at 1445.

36. *Id.*

37. 435 U.S. 313 (1978).

38. *Hodel*, 851 F.2d at 1445 (emphasis added).

39. The Respondents argue in their brief that the court's opinion in *Hodel* does not suggest that the limitations on tribal jurisdiction over non-Indians has been changed from the 1856 Treaty, thus implying that the OIWA did not in fact give the Nation power to create the bylaws and constitution of the Muscogee (Creek) Nation with civil jurisdiction over defendants. *See* Defendant's Memorandum at 7, *American Tobacco Co.* (No. CV 97-27).

II. Overview of Complaint CV 97-27 — Muscogee (Creek) Nation v. American Tobacco Company

The Nation filed its original complaint against the tobacco industry setting out numerous counts of negligent conduct against the tribe and its members. The Nation alleges acts of conspiracy in a coverup by the industry to defraud the Nation and its members into believing that tobacco products do not cause adverse health risks.[40] The Nation alleges that the welfare of the Nation is directly affected because diseases and other illnesses related to tobacco products have cost the Nation in health care dollars. The Nation relies on industry studies and numerous reports to detail their case against the industry in general.[41] Most of the Nation's complaint is similar in shape and form, from an informational and accusational position, to the forty states that have filed litigation against the tobacco industry, including the State of Oklahoma. However, the Nation is the first Indian Nation to file a complaint against the tobacco industry.[42]

III. The Tobacco Industry's Response to Being Subjected to Subject Matter Jurisdiction in Tribal Court

The tobacco industry contested the Nation's tribal court jurisdiction on two grounds. First, the tobacco industry argued that the grant of authority from the OIWA never changed the Treaty of 1856, stating that tribal courts did not have jurisdiction over "white men"[43] and, thus, the Nation did not have jurisdiction in this case. Second, the tobacco industry plead in the alternative, that even if jurisdiction was granted by the OIWA, the United States Supreme Court had divested the Nation of its civil jurisdiction over non-Indian defendants through rulings in *Montana v. United States*[44] and *Strate v. A-1 Contractors*.[45] The tobacco industry contended that they lacked consensual relations with the Nation (first exception in *Montana*[46]) and that the Nation itself was not "directly" affected by the smoking of "some individuals"[47] of the Nation and, therefore, the Nation's political integrity, health, or welfare had not been harmed[48] (second exception in *Montana*).[49] The tobacco

40. *See* Petitioner's Complaint, *American Tobacco Co.* (No. CV 97-27), ¶¶ 17, 288.
41. *Id.*
42. To date, three tribes have filed complaints against the tobacco industry.
43. *See* Defendant's Memorandum of Points of Authorities in Support of Motion to Dismiss at 7, *American Tobacco Co.* (No. CV 97-27).
44. 450 U.S. 544 (1980).
45. 117 S. Ct. 1404 (1997).
46. *Montana*, 450 U.S. at 565.
47. *See* Defendant's Memorandum at 7-9, *American Tobacco Co.* (No. CV 97-27).
48. *Id.*
49. *Montana*, 450 U.S. at 565.

industry alleged that just because "some" members of the nation may have been harmed, the second exception to the *Montana* rule cannot be invoked. However, what the tobacco industry failed to address was a subsequent holding, by the United States District Court in Montana, which recently interpreted *Montana's* second exception. The second exception will be triggered when there is "direct injury to a *single* tribal member and it takes place on that member's reservation."[50] It is evident that this federal court did not align with the position taken by the tobacco industry in this litigation.

IV. Tribal Jurisdiction of Non-Indian and Nonmember Defendants as seen through Supreme Court Rulings

In *United States v. Mazunie*,[51] the Supreme Court reiterated its holding in *Williams v. Lee*,[52] that authority of tribal courts could extend general civil jurisdiction over non-Indians, whose transactions on reservations with Indians created causes of action.[53] The Court continued that it [the Court] "has consistently guarded the authority of Indian governments over their reservations"[54] and that "if their power was to be taken away from them, it was for Congress to do so."[55] The understanding of *Mazunie* is that unless Congress has specifically legislated away jurisdictional authority from the Nation, the Nation should still be vested with civil jurisdiction over the tobacco industry because the harm took place on the Nation's land, through the tobacco industry's transactions of marketing, targeting, advertising, distributing, and selling their products to tribal members.

Arguably, the single most influential Supreme Court ruling defining inherent sovereignty of tribal courts over non-Indians is *Montana v. United States*.[56] *Montana* stands for the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.[57] However, the Court in *Montana* realized that Indian tribes do retain some civil jurisdiction over nonmembers and delineated two exceptions to its general rule.[58] The first exception stated that "a tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members through commercial dealings, contracts, leases, or other

50. Montana v. Bremmer, 971 F. Supp 436, 438 (D. Mont. 1997) (emphasis added).
51. 419 U.S. 544 (1975).
52. 358 U.S. 217 (1959).
53. *Mazunie*, 419 U.S. at 557.
54. *Id.*
55. *Id.*
56. 450 U.S. 544 (1980).
57. *Id.* at 565.
58. *Id.*

arrangements."[59] The Court's second exception "is when the conduct *threatens* or has some *direct* effect on the political integrity, the economic security or the health or welfare of the tribe."[60]

In citing its two exceptions, the *Montana* Court cited cases to which it felt the exceptions might apply. The first exception cited to *Williams v. Lee*;[61] *Morris v. Hitchcock*;[62] *Buster v. Wright*;[63] and *Washington v. Confederated Tribes of Colville Indian Reservations*.[64] Each case shows that the defendant's relationship with the Indian plaintiff was a consensual relationship and the conduct at issue in the preceding cases was either contractual or through commercial dealings.[65] The tobacco industry alleges that they have no relationship, consensual or otherwise, with the Nation to be brought under the first *Montana* exception.[66] Nevertheless, the tobacco industry voluntarily advertised, distributed and sold its tobacco products within the Muscogee Nation's stream of commerce within tribal boundaries. The tobacco industry also knew that its products were being used by Indians within the Nation, because the industry continued to distribute its products in the Nation's stores, smoke shops, gas stations, and restaurants and continued to do so even after the tobacco industry became aware of harmful effects of smoking and the numerous health risks associated with tobacco products.[67]

The second *Montana* exception[68] cited to *Fisher v. District Court*;[69] *Montana Catholic Missions v. Missoula County*;[70] *Williams v. Lee*;[71] and *Thomas v. Gay*.[72] Each case analyzed whether a state or territory asserting jurisdiction would unduly harm the political integrity of the tribal court's jurisdiction if the actions were not maintained in tribal arenas.[73] It is obvious that the Muscogee Nation's political integrity would be endangered if jurisdiction is not maintained in the tribal court because the Nation's tribal court is best able to ascertain and apply the Nation's law to the litigation. The Nation's health and welfare would also be damaged if the case were not maintained in the tribal court because any other forum: (1) would be unable to adjudicate the litigation based on the Nation's bylaws and constitution, and

59. *Id.*
60. *Id.* at 566 (emphasis added).
61. 358 U.S. 217 (1959).
62. 194 U.S. 384 (1904).
63. 135 F. 947 (8th Cir. 1905).
64. 447 U.S. 134 (1980).
65. Strate v. A-1 Contractors, 117 S. Ct. 1404, 1407 (1997).
66. *See* Defendant's Brief at 7, 8, *American Tobacco Co.* (No. CV 97-27).
67. *See* Nation's Complaint *passim*, *American Tobacco Co.* (No. CV 97-27).
68. *Montana*, 405 U.S. at 565-66.
69. 424 U.S. 382 (1976).
70. 200 U.S. 118 (1906).
71. 358 U.S. 217 (1959).
72. 169 U.S. 264 (1898).
73. Strate v. A-1 Contractors, 117 S. Ct. 1404, 1407 (1997).

(2) may not be as expedient, precise, or strive to achieve equality in any possible settlement negotiations. Furthermore, because the tobacco industry conspired to keep the adverse health affects and risks associated with tobacco use from the public and the Muscogee Nation, the Nation's welfare and health has been unduly harmed.

In the Nation's case against the tobacco industry, it appears *both* exceptions could apply. First, the tobacco industry entered into consensual relationships with the tribe and its members by allowing product advertising in newspapers, magazines, and billboards within the Nation's boundaries, and by allowing the distribution and sale of its products in the tobacco shops and retail establishments. Second, the Nation can also argue that these relationships were consensual because the tobacco industry knew that its products were within the Muscogee Nation's stream of commerce due to continued sales and advertisements in the region and that the tobacco industry targeted and marketed in this area, especially to the Muscogee Nation's children by such advertising gimmicks as Joe Camel and the Marlboro Man. In the settlement agreement between the tobacco industry and states' attorneys general, it agreed not to continue advertising with Joe Camel or the Marlboro Man since there were so many reports that the industry's advertising and marketing efforts were aimed at teens.[74]

The second exception to the *Montana* rule, however, offers the better argument. The second exception pertains to conduct that threatens or has some direct effect on the Tribe's political integrity, economic security or the Tribe's health or welfare.[75] With this exception, the Nation can argue that health, welfare, and the political integrity of the tribe is at risk if the tobacco litigation is not sustained in the tribal court. First, the repayment of past and future costs to the Nation for substantial health care disbursements for its employees and members is in jeopardy if the tobacco industry is allowed to dismiss the claim. Reports and national studies indicate that smoking tobacco products has been linked to various diseases, including cancers of the mouth, lungs, larynx, esophagus, pancreas, kidney, and other vital organs.[76] Tobacco and tobacco products are also linked to other diseases such as emphysema and severe upper respiratory afflictions and are also attributable to some stroke and heart attack victims deteriorated conditions.[77] Particularly disturbing is the fact that smoking is being linked to pregnancy problems, including miscarriage, low birth weight babies, and abnormalities of the fetus.[78] These

74. *See supra* note 80 for details of settlement agreement.

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

76. *American Cancer Society Study Finds the Incidence of Adenocarianoma of the Lung is Increasing* (visited Jan. 22, 1998) <http://www.cancer.org/media/story110497.html>.

77. *Id.*

78. Marjorie R. Sable & Allen A. Herman, *The Relationship Between Prenatal Health Behavior Advice and Low Birth Weight*, 112 PUB. HEALTH REP. 332 (1997).

health problems are not unique to any one set of American citizens. However, it is estimated by the Center for Disease Control that 40% of all adult Native American and Alaskan Indians smoke an average of twenty-five or more cigarettes a day.[79] Therefore, if civil jurisdiction is not maintained in the tribal court, it is possible that the Nation will not be in control of its own destiny and may be lost in the shuffle in any settlement agreement that the tobacco industry has agreed to with the other States in the Union.[80]

Any settlement agreement currently being addressed in Congress and the White House may circumvent any settlement attempts by the Nation or the tobacco industry. It is evident from the *Congressional Record*[81] that the Indian Nations were not apprised of, or a party to, any settlement agreements. Thus, the Nation's political interests were not protected in the settlement negotiations which could directly affect the Muscogee Nation's political integrity, because no representation by the Nation or any other Indian Nation at the initial settlement negotiations meant the Indian Nations did not have any say in how the settlement money would be appropriated. The Indian Nations would be forced to comply with any agreement the states' attorneys

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79. *See infra* note 80.

80. On June 20, 1997, 40 states, led by Mississippi Attorney General, Mike Moore, and the tobacco industry came to a settlement agreement. This proposed agreement included a $368.5 billion dollar trust fund (established and funded by the tobacco industry) over the next 25 years to fund damage claims, treatment projects and health care costs to smokers. The parties also agreed to new advertising criteria, which included the abandonment of advertising on billboards, store promotions and displays, and over the Internet. The agreement also eliminated the use of Joe Camel and the Marlboro Man as icons of the industry that induced younger American's to think that smoking was "cool." The agreement also called for the FDA to have regulatory authority over tobacco products. The tobacco industry in agreeing to these stipulations would be relieved from future class action law suits unless the class action suits currently pending settled before legislation was enacted. This agreement was put before Congress and the White House; however, President Bill Clinton refused to sign the agreement because he felt the agreement was not strong enough in deterring the American young from smoking. On November 13, Sen. Orrin Hatch (R.-Utah) proposed Senate Bill 1530, titled "Placing Restraints on Tobacco's Endangerment of Children and Teens Act" (PROTECTS Act). This bill proposes to enact the settlement agreement as offered with a few added provisions. Ironically, the bill calls for specific Native American and Alaskan Indian provisions. These provisions stem from an October 6, 1997, oversight hearing on the tobacco settlement by the Committee on Indian Affairs. Senator Hatch, being present at the meeting, proposed these new provisions. He noted that the Indian Health Services testified that in some parts of the country 80% of Native American high school students either smoke or chew tobacco. Testimony included a report from the Center for Disease Control that estimates 40% of all adult American and Alaskan Indians smoke an average of 25 or more cigarettes a day. In light of this information, Senator Hatch stated that provisions would be made in his proposed bill to ensure that tribal governments would have regulatory authority to address issues of health concerns and continue to maintain the sovereign authority over activities occurring on reservations. The proposed legislation will be debated upon Congress' return to session in January. 143 CONG. REC. S12,576-602 (daily ed. Nov. 13, 1997) (statement of Sen. Hatch).

81. *Id.*

general and tobacco industry made, possibly losing out on any settlement money for their respective tribes altogether.

Secondly, if subject matter jurisdiction is not retained in tribal court and the case is dismissed or removed to federal court, the Nation will lose the opportunity to apply its own laws for the welfare and political integrity of its people. This would leave the Nation at the mercy of a different court in adjudicating a claim that by all rights should be adjudicated in the Muscogee Nation's tribal courts. Third, if the case is taken out of the Nation's jurisdiction, it defeats the purpose of having a tribal court and tribal self-government by ignoring the treaties the United States signed with the Muscogee Nation. It would also defeat provisions of the Oklahoma Indian Welfare Act, which gave the Nation power to establish a constitution and bylaws, by ripping from them, the very power these provisions gave the Nation to adjudicate a case such as this. Also, the federal government's policy is to promote tribal self-government.[82]

Finally, if the Nation's tribal court is not allowed to adjudicate the case on the merits in its own court, the political integrity of the Nation will have taken a severe blow to its status as a sovereign who has the right to control commerce and actions resulting from negligence in commerce. The adjudication process would be meaningless to subsequent potential tortfeasors.

Montana left open a question, however. The Court stated that the issue before the court was a "regulatory issue" and a very narrow one at that.[83] In being a regulatory issue, that means that the Supreme Court did not address the question of whether *civil* (subject matter) jurisdiction was to fall under the general rule or any of the exceptions. Five years after deciding *Montana*, the Supreme Court heard and decided *National Farmers Union Insurance Co. v. Crow Tribe of Indians.*[84] In *National Farmers*, the Court held that *Oliphant*[85] could not be stretched to a case concerning civil jurisdiction.[86] The Court stated that there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on Indian reservations.[87] Congress extended criminal jurisdiction to the federal courts instead of tribal courts, but, the Court continued, "by all possible rules of construction the inference is clear that jurisdiction is left to the Choctaw themselves of civil controversies arising strictly within the Choctaw Nation."[88] The *National Farmers* Court concluded that whether a

82. *See generally* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (explaining that the federal government's long-standing policy is to encourage tribal self-government).

83. Montana v. United States, 450 U.S. 544, 557 (1980).

84. 471 U.S. 845 (1985).

85. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that Indian tribal courts did not have *criminal* jurisdiction over non-Indian defendants) (emphasis added).

86. *National Farmers*, 471 U.S. at 854.

87. *Id.*

88. *Id.* at 855.

tribal court has the power to exercise civil subject matter jurisdiction is not foreclosed by an extension of the *Oliphant* rule.[89] The Court cautioned that it must first look to see if there are any relevant statutes, Executive Branch policies embodied in treaties, or any other administrative or judicial decisions, to determine if a tribal court's jurisdiction has been altered, divested, or diminished.[90]

National Farmers then seems to stand for the assumption that a tribal court will continue to have civil jurisdiction unless specific treaty provisions, statutes, or court rulings have stripped it of its jurisdiction. The Nation has not been divested of its civil jurisdiction by any treaty or statute, quite the contrary. The Nation was given authority in the 1936 Oklahoma Indian Welfare Act to establish and maintain bylaws, statutes and a constitution. Further, the *Montana* rule and its two exceptions reference *regulatory* jurisdiction and not civil jurisdiction. In the litigation before the Nation, the Nation is not exercising regulatory powers. Therefore, the Nation has civil jurisdiction over the tobacco industry to hear the case in question.

Iowa Mutual Insurance Co. v. LaPlante,[91] decided in 1987, confirms the holding in *National Farmers* because the Supreme Court again recognizes the federal government's long-standing policy of encouraging tribal self-government.[92] *Iowa Mutual* also reiterated that tribal courts are subject to extensive limitations when criminal jurisdiction is invoked[93] per *Oliphant*, but that "civil jurisdiction does not have such stringent limitations."[94] The Court continued in *Iowa Mutual* that they [the Court] "refused to foreclose tribal court jurisdiction over a dispute involving a non-Indian."[95] It stands to reason then that the Supreme Court has not disparaged the Muscogee (Creek) Nation of its civil jurisdiction over the tobacco litigation currently pending. Although *Iowa Mutual* is seen as an exhaustion rule,[96] it still stands to reason that the Nation's tribal court has direct authority to establish its general subject matter jurisdiction over the litigation.

Iowa Mutual also stands for the proposition that no matter what type of civil jurisdiction is invoked (federal question or diversity of citizenship),[97]

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89. *Id.*
90. *Id.* at 855-56.
91. 480 U.S. 9 (1987).
92. *Id.* at 14.
93. *Id.* at 15.
94. *Id.*
95. *Id.*
96. The Supreme Court in *Iowa Mutual* stated that (as in *National Farmers*) the "tribal legal institutions require that they be given a 'full opportunity' to consider the issues before them and to 'rectify any errors.'" The Court continued, "at a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Id.* at 16-17. This has become known as the "exhaustion rule." *See also infra* note 104.
97. 28 U.S.C. § 1331 (1994) (federal question); *id.* § 1332 (as amended 1996) (diversity).

federal policy supporting tribal self-government directs a federal court to stay out of the dispute until a tribal court has had the opportunity to determine its own jurisdiction.[98] If this is not the policy, the Court stated, the defendants would be able to have unlimited access to the federal courts and would impair the tribal court authority over reservation affairs.[99] The Court continued that the adjudication of such matters by non-tribal courts also infringes upon tribal lawmaking authority because the tribal courts are the best interpreters of tribal laws and how they should be applied.[100]

Iowa Mutual also reiterated that tribal court's jurisdiction over non-Indians on reservation lands is an important part of tribal sovereignty.[101] "Civil jurisdiction over activities of non-Indians lies in tribal courts unless Congress has limited jurisdiction by a federal statute or there is a specific treaty provision."[102] Most importantly, the Court stated that "because the Tribe retains all inherent attributes of sovereignty that have not been divested by the federal government, the proper inference from silence is that the sovereign power remains intact."[103] Accordingly, the Muscogee (Creek) Nation has its sovereign powers intact and, therefore, has civil jurisdiction over the tobacco industry. The Supreme Court has applied an exhaustion rule[104] in non-Indian defendant's cases versus individual Indians or Indian nations, but in so ruling, the Court has *not* divested the tribal courts of civil jurisdiction.

One of the major cases that the tobacco industry cites to challenge the Nation's jurisdiction is *Strate v. A-1 Contractors.*[105] In *Strate,* the Supreme Court reiterated its holding in *Montana* and its two exceptions.[106] The Court concluded, however, that *National Farmers* and *Iowa Mutual* "[we]re not at odds with, and d[id] not displace, *Montana.*"[107] *Strate* held that a "tribe's adjudicative jurisdiction d[id] not exceed its legislative jurisdiction."[108] The Court also stated that subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana,* the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally does not extend to the activities of nonmembers of the tribe.[109]

However, because the Nation's complaint alleges that the harm caused by

98. *Iowa Mutual,* 480 U.S. at 16.
99. *Id.*
100. *Id.*
101. *Id.* at 18.
102. *Id.*
103. *Id.*
104. A defendant must exhaust all tribal remedies from the tribal court level through the appellate process and the tribal supreme court, if applicable, before a defendant may seek review by a federal (or state) court.
105. Strate v. A-1 Contractors, 117 S. Ct. 1404, 1404 (1997).
106. *Id.* at 1413.
107. *Id.* at 1410.
108. *Id.* at 1413.
109. *Id.*

the non-Indian defendants (the tobacco industry) was on tribal land within tribal jurisdiction, which the Nation's bylaws and constitution control, civil jurisdiction *does* continue to exist as against the Defendant tobacco companies. This is so because the Court's exceptions in *Montana* apply to the litigation at hand. *Strate*, confirmed *Montana's* general rule and two exceptions and held that *Iowa Mutual* and *National Farmers* did not extend or displace *Montana*. Thus, *Strate* did not take away the Nation's jurisdictional grounds for hearing the case. Civil jurisdiction still exists for the Nation's tribal court to hear the litigation.

Strate did state that a "tribes adjudicative jurisdiction d[id] not exceed its legislative jurisdiction;"[110] however, the Nation would not exceed its legislative jurisdiction because legislative jurisdiction is "exclusive jurisdiction over all matters not otherwise limited to tribal ordinance."[111] The Supreme Court continues in *Strate* that "we 'can readily agree' in accord with *Montana* that tribes retain considerable control over nonmember conduct on tribal land."[112] The issue in *Strate* concerns *two non-Indians* having an accident on a highway running through tribal property. However, the present litigation between the Nation and the tobacco industry is readily distinguishable. Jurisdiction lies with the Nation's tribal court to hear the litigation because the harm alleged in the complaint is by *non-member* conduct on *tribal lands* against *members of the Nation.*

V. Oklahoma as a Non-Public Law 280 State

Public Law 280[113] establishes states that have jurisdictional authority over Indians and Indian lands within their territory. Oklahoma opted not to become a Public Law 280 state.[114] In not becoming a Public Law 280, the state has opted not to exercise civil jurisdiction over any Indian tribal matter.[115] In *Indian Country U.S.A., Inc. v. Oklahoma Tax Commission*,[116] the Tenth Circuit discussed the concept of "Indian Country":

> The touchstone for allocating authority among the various governments has been the concept of "Indian Country," a legal term delineating the territorial boundaries of federal, state and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian Country have been matters of federal and tribal concern. Outside Indian Country,

110. *Id.*
111. MUSCOGEE (CREEK) NATION CONST. § 206 (Constitution Act, 1979).
112. *Strate*, 117 S. Ct. at 1413 (citations omitted).
113. 28 U.S.C. § 1360 (1994).
114. *Id.*
115. *See* OKLA. CONST. art. I, § 3.
116. 829 F.2d 967 (10th Cir. 1987).

state jurisdiction has obtained.[117]

It is clear that from this discussion by the court that jurisdiction lies within the tribal courts even within the State of Oklahoma. The court explained that Congress has the authority to define Indian country and in so doing also may exclude state jurisdiction.[118] Therefore, it is important to note that relief for tribal members will not come at the State level since the State of Oklahoma does not have jurisdiction to hear a claim brought by an Indian suing the tobacco industry to obtain a money judgment as a result of any tobacco settlement the State may make.

The hypothetical argument can be made that the Nation's tribal court has the same civil jurisdictional grants as the State of Oklahoma.[119] Therefore, the tribal court should be afforded the same opportunity to adjudicate the claim brought by the Nation against the tobacco industry.[120]

VI. Conclusions and Final Thoughts

The pending matter before the Nation's tribal court is whether the court has civil jurisdiction to hear the claims the Nation has brought against the tobacco industry. *Montana v. United States* is the controlling precedent for this litigation with its two exceptions to the general rule that tribal courts do not have jurisdiction over non-Indian defendants. First, the tobacco industry and the Nation have consensual commercial dealings through the buying and selling of tobacco products on tribal lands. Secondly, the marketing, targeting, advertising, and selling of tobacco products directly influences the Nation's citizens and its political integrity, health, and welfare in so far as the proven harmful health effects of tobacco products have caused increased health care costs, diminution in service of the Nation's employees, and increased tobacco related illnesses which can cause death. It is therefore important to the integrity of the Nation, its members and citizens, that this litigation proceed in the tribal forum.[121]

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117. *Id.* at 973 (citing Ahboah v. Housing Auth. of the Kiowa Tribe, 660 P.2d 625, 627 (Okla. 1983)).

118. *Id.* at 974.

119. *See generally* Oklahoma Enabling Act of June 16, 1906, Pub. L. No. 234, 34 Stat. 267.

120. *See supra* note 78. In proposed Senate Bill 1530, Senator Hatch states that Indian nations would be treated just like states in any agreements made with the tobacco industry.

121. The United States Supreme Court granted certiorari to hear the case of the Kiowa Tribe of Oklahoma v. Manufacturing Techs., *cert. granted*, 117 S. Ct. 2506 (1997). Oral arguments were heard on January 12, 1998, addressing sovereign immunity of Indian Nations.