



## Ninth Circuit: Physical Presence on Tribal Land Not Required for Tribal Jurisdiction over Nonmember

SEPTEMBER 23, 2024

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On September 16, 2024, the Ninth Circuit Court of Appeals upheld the exercise of tribal court jurisdiction over a nonmember insurance company without a physical presence on tribal land. The underlying dispute involved the Suquamish Tribe’s lawsuit against nonmember off-reservation insurance companies that participated in an insurance program tailored to and offered exclusively to tribes. The Tribe’s lawsuit alleged breach of contract concerning insurance claims for lost business and tax revenue and other expenses arising from the suspension of business operations during the COVID-19 pandemic. The insurance companies argued the Suquamish Tribal Court lacked jurisdiction.

Citing *Montana v. United States*, 450 U.S. 544, 565 (1981), *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982), and *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 902 (9th Cir. 2019), the Ninth Circuit noted that whether a tribe has jurisdiction over a nonmember turns on whether the nonmember’s conduct at issue occurred within the boundaries of the reservation. A nonmember conducting business with a tribe that is directly connected to tribal lands can be subject to tribal jurisdiction.

The Court noted that the insurance company tailored its insurance policies specifically for tribes and tribal businesses and knowingly contracted with the Tribe and its chartered economic development entity over a series of years to provide coverage for properties and businesses on Tribal trust lands. In examining whether the conduct occurred on tribal land, the Court determined that, because the insurance companies and their employees lacked any physical presence on tribal land, the key question was whether *conduct* on tribal land requires *physical presence* on the land. The Ninth Circuit affirmed it does not.

The Court recognized that in the modern world, nonmembers no longer have to enter tribal lands to engage in commerce with tribes. Instead, “nonmembers regularly conduct business with tribes over the phone, the Internet, and email.” Although prior cases involved some sort of physical presence on tribal land, the Court found no requirement for such presence. Likewise, the capacity of tribes to adjudicate disputes involving nonmembers and businesses has changed over time, with many tribes now having organized trial and appellate court systems, law-trained judges, extensive codes, and other due process protections.

While this decision is significant for tribal sovereignty, the ruling is limited. The Court distinguished cases from other circuits rejecting tribal jurisdiction over disputes involving Internet advertising on grounds those transactions did not implicate a tribe’s sovereign interest in its land. Notably, however, the Ninth Circuit did not consider, and this case did not involve, the extent of tribal jurisdiction over non-member conduct occurring off tribal lands when that conduct implicates other inherent tribal sovereign interests, such as tribal economic development and self-government.

The Court also rejected arguments that it was required to consider under *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), whether the nonmember had consented, either expressly or by action, to imposition of tribal laws and regulations, and whether those laws and regulations stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. The Court noted that only the Seventh Circuit requires courts to apply the *Plains Commerce* test as a separate inquiry into a tribe's authority for a regulation. In the Ninth and Fifth Circuits, *Plains Commerce* has been interpreted as requiring both a nonmember's consent to tribal law and tribal regulatory authority.

The decision is *Lexington Ins. Co. v. Smith*, No. 22-35784, 2024 WL 4195334 (9th Cir. Sept. 16, 2024). The vote to deny rehearing *en banc* and uphold the authority of the Tribal Court was 16-5.

Van Ness Feldman routinely advises tribes, tribal businesses, and others doing business in Indian Country on matters related to tribal jurisdiction and dispute resolution. For more information about this decision, please contact [Patrick Daugherty](#), [Charlene Koski](#), [Nakia Arrington](#), or any member of the firm's Native Affairs practice.

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