



Three Nations Bridge



Immigration scam



Kevin Gover

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Fletcher: An immigration policy solution for tribal governments

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The old joke about Indian tribes having bad immigration policies remains relevant to modern tribal people even as it stops being funny. Tribal governments struggle over a serious problem created by the so-called "Montana rule," where Indian tribes and their courts presumptively cannot have civil jurisdiction over nonmembers unless they consent or unless their activities all but threaten the continuing existence of the tribe. The Supreme Court has never found an instance where it would apply one of the two exceptions to the Montana rule - and lower courts have construed them as narrowly as possible, almost to the point of eliminating them. The rule itself is inconsistent with the way that states and other non-Indian governments are treated, but the court appears persuaded by the perception (and fact) that, on many reservations, nonmembers outnumber Indians. And these nonmembers rarely chose tribal government.

The impact on tribal communities is harsh, as to be expected. Tribal governments have very little authority to impose taxes on nonmembers, even if they do business or reside in Indian country, reducing the ability of governments to provide adequate services to all residents. As such, a nonmember-owned gas station doing business on tribal lands is all but exempt from tribal taxes. Tribal governments have little authority to regulate the land use patterns of Indian country, ruining the chances of creating a cohesive and effective environmental protection scheme in parts of Indian country where nonmember businesses such as mining or timber companies own significant chunks of land. Nonmember businesses can (and have) set up mines and other environmentally unfriendly operations right next door to tribal sacred sites - with the tribe being powerless to stop it.

Indian victims of car wrecks and defects in consumer goods have little chance of recovering damages in tribal courts where nonmembers are the defendants. Burlington Northern and Ford Motor Co. are multinational corporations that have successfully avoided tribal court jurisdiction over personal injury claims in recent years. Without the capacity to adjudicate serious problems in tribal courts, Indian people living in rural reservations must travel hundreds of miles just to file a simple complaint in non-Indian courts, which often serves to deny them relief if they can't travel.

Of the two exceptions to the Montana rule, the exception that states that nonmembers could consent to tribal civil jurisdiction poses the best opportunity for tribal communities to regain some control of their reservations. This exception offers an objective strategy for preserving tribal jurisdiction - a nonmember can consent to tribal jurisdiction by executing a document stating explicitly that they consent to tribal jurisdiction. Usually, these documents are business-related, such as where a tribe borrows money from a bank and the bank consents to tribal court jurisdiction over any disputes that may arise from the transaction.

But the problem with that form of consent is that the nonmember is consenting to tribal jurisdiction only in relation to the subject matter of the transaction - in this example, the loan. If that same bank in a separate transaction invested in a nonmember-owned company that polluted the reservation, the consent from the first transaction likely would not transfer over to the second transaction. The "consents" are piecemeal.

Moreover, most nonmembers in Indian country are not banks or other businesses. They are individuals who live and work on tribal lands or visit tribal business operations. Some tribes, but likely not many, require tribal employees to consent to tribal court jurisdiction in the event of a dispute, but tribes generally have no means of forcing nonmember customers to consent to tribal court jurisdiction. Again, these "consents" are piecemeal.

But Indian tribes are timeless entities. And the immigration policy of the United States and other nations offers a new way of looking at this problem. Every person seeking to work or live in another country must acquire some sort of permission to do so. Indian tribes should do this each time they can. Any nonmember hired by the tribe or any tribe or tribal member-owned business should consent to full tribal civil jurisdiction, not just in cases arising under the business relationship, as a condition of employment. Any nonmember seeking permission to live in tribal housing or on tribal lands should consent to full tribal jurisdiction as a condition for residence. And, as described above, anyone doing business with the tribe should consent. This consent is no different in principle from requiring non-citizens from seeking a visa or work permit from a host country.

Of course, these are piecemeal actions as well. But consider that on many reservations, about half of the population consists of nonmembers who haven't consented. Maybe in a decade or two, an additional one-quarter or one-third of the population will have consented to full tribal civil jurisdiction. Maybe in 50 years, all but a few nonmembers will have consented. If enough tribes take these actions, the Supreme Court's Montana rule will seem completely out of touch with the realities on the ground in Indian country, even to the justices. If enough nonmembers consent to tribal jurisdiction over time, then the Montana rule will fall by the wayside.

Tribal governments are nations and should act like nations. Adopting a form of immigration law is one possibility for solving (over the long haul) the problem created by the Montana rule.

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