



TERO Presentation

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What is the Purpose of TERO?

- Tribal Employment Rights Ordinances and Offices were developed to address chronic unemployment on Indian reservations and Native Villages.



How Does TERO Accomplish Its Purpose?

- By enacting tribal laws which are adopted by tribal governmental bodies to ensure that all employers engaged in on-reservation business give preference to qualified Indians and tribal members in all aspects of employment, contracting, and other business activities.



Authority to Implement TERO

- Tribal Sovereignty Powers
 - What is sovereignty? The supreme, absolute, and uncontrollable power by which any independent state is governed; the self-sufficient source of political power, from which all specific political powers are derived; to make laws, to execute and to apply them, to impose and collect taxes, to make war or peace, to form treaties of alliance or of commerce with foreign nations.
 - --Black's Law Dictionary, 5th Ed.



Recognition of Tribal Sovereignty by the U.S. Supreme Court

- In 1831, the Supreme Court described Tribes as “domestic dependent nations.”
 - *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).
- In 1823, the Supreme Court recognized that Tribes retain the sole right of use and occupancy of lands until acquired by the U.S. by “purchase or by conquest.”
 - *Johnson v. M’Intosh*, 21 U.S. 543 (1823).



The U.S. Constitution

- There are many historical references to the federal/tribal relationship, including in the Constitution from 1787:
 - Indian Commerce Clause, article I, § 8, clause 3, grants Congress the authority “to regulate Commerce ... with the Indian Tribes.”
 - Treaty Clause, article VI, clause 2 states that “all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything the Constitution or laws of any state to the contrary notwithstanding.”



Scope of Authority

- **Tribal Jurisdiction:** The geographic scope and extent of a jurisdiction's power. The legal right by which sovereigns exercise their authority. The sovereign's power to assert authority over subject matter, persons, and issues or conflicts. (eg., in rem, in personam)
- Within the exterior reservation boundaries.



Inherent Sovereignty

- Tribal treaty rights are those inherent rights reserved by tribal leaders during the treaty-making process, as well as any additional rights negotiated.
- A treaty is a contract between two sovereigns.
- Atkinson Trading Post v. Manygoats – A Arizona district court recently ruled that:
 - Tribe’s inherent sovereignty is limited to their members and their territory to the extent necessary to protect tribal self-government or to control internal relations.
 - This is later restricted by Montana
 - Tribal sovereign immunity does not bar suits against tribal officials who seek to enforce tribal preference laws, and
 - Montana’s consensual relationship exception should not be construed as allowing the enforcement of tribal preference laws against non-Indians on non-Indian fee land.



How to Exercise Sovereignty with TERO

- Enact tribal ordinances by tribal governmental bodies to regulate the employment activities of employers operating on the reservation or within the territory over which such tribes exercise jurisdictional authority.



Federal Agencies & TERO

- Tribes are exempt from Title VII of the Civil Rights Act and the Equal Employment Opportunities Act
 - Civil Rights Act: "It shall not be a violation of the [Civil Rights Act] equal opportunity clause for a construction or non-construction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian Reservation." 41 C.F.R. § 60-1.5(a)(7) (1987).
 - Equal Employment Opportunities Act: Courts have held that Indian Preference is a political preference intended to further the cause of Indian self-government and not a racial preference, and, as such, does not violate the Equal Employment Opportunities Act. *Morton v. Mancari*, 417 U.S. 535 (1974).



TERO & The Legal Framework

- Although some Federal statutes and regulations allow for tribal preference, not all require it. For example:
 - **Indian Self-Determination and Education Assistance Act ("ISDEA"):** contractor's who administer self-determination contracts (638 – transfer of federal programs or services out of federal control into tribal control) are required to give preferences to Indians. 25 U.S.C. § 5307(b).
 - **42 USC § 2000e-2(i)** allows non-Indian employers on or near a reservation to have a tribal preference policy without employment discrimination liability.
 - **48 CFR § 1426.7005:** Department of Interior Contracting Regulation - States that “nothing in this subpart shall... preclude Tribes from” developing tribal preference programs.
 - **23 USC § 140:** US DOT Federal Highway Projects – “nothing in this section shall preclude the preferential employment of Indians on or near a reservation...”



Federal Agencies & TERO

- No law prevents federal agencies from applying Indian preference to their contractors and subcontractors on or near reservations.



Case Law

- Since there isn't a federal law preventing Indian preference in contracting and employment, but there also isn't a federal law specifically requiring it, what are the parameters of TERO and how have courts regulated it?



TERO in the Beginning

- The Pre-Montana Positive Atmosphere
 - Nixon's 1970 statement on developing legislation that promotes tribal sovereignty:
 - Indian Financing Act
 - Indian Self Determination and Education Assistance Act,
 - Indian Special Tax Status Act.



The New Paradigm

- In 1980 this progress was halted by the Supreme Court.
 - Montana v. United States
 - Atkinson Trading Post (which narrowed Montana)



The Montana Exceptions

- The Supreme Court created two exceptions where Tribes retained their inherent authority to regulate non-members:
 - Activities that relate to consensual commercial relationships with the Tribe or its members, through commercial dealings, contracts, leases or other arrangements
 - Activities that threaten or have some direct effect on the political integrity, economic security, or health and welfare of the Tribe.
 - While employment matters concerning tribal members are certainly related to the economic security and welfare of the tribe, they do not have a substantial impact on the tribe as a whole. Precedent requires that the issue have a **substantial impact** on the tribe as a whole such that it poses a threat to the political integrity, economic security, health or welfare of the tribe. *Montana*, 450 U.S. at 566, 101 S.Ct. at 1258. See Also *Strate* at 459 (holding “Montana's second exception grants tribes nothing beyond what is necessary to protect tribal self-government or control internal relations.”).



Atkinson (narrowed Montana)

- The consent required to trigger the first Montana exception, however, requires much more [than consent as an employee to work]. Montana requires consent to jurisdiction, either expressed, or implied by the parties' behavior. Atkinson Trading Co. v. Manygoats, No. CIV 02-1556-PCT-SMM, 2004 WL 5215491, at *9 (D. Ariz. Mar. 17, 2004)
- An employment relationship is a consensual relationship in the sense that the employer consents to the employee working at the establishment, and the employee consents to working at the establishment. The consent required to trigger the first Montana exception, however, requires much more. Montana requires consent to jurisdiction, either expressed, or implied by the parties' behavior. Atkinson Trading Co. v. Manygoats, No. CIV 02-1556-PCT-SMM, 2004 WL 5215491, at *9 (D. Ariz. Mar. 17, 2004)
- In fact, Courts have held that tribal jurisdiction is proper where employers use giving preference to tribal members as a negotiating point in contracts. Atkinson Trading Co. v. Manygoats, No. CIV 02-1556-PCT-SMM, 2004 WL 5215491, at *9 (D. Ariz. Mar. 17, 2004)
- Thus, "to invoke the second Montana exception, the impact must be 'demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the Tribe.'" Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343, S.Ct. 2994 (1989).



Strate

- **Strate:**
 - Authority over tribal offenders, not non-Indians
 - “Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members and to prescribe rules of inheritance for members.... But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations.” 520 U.S. at 459.
 - The Court held that, absent authorization from a statute or treaty, a tribe could not govern the conduct of non-members on the highway in question. See *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997).



FMC

- The Ninth Circuit held in *FMC v. Shoshone* that Shoshone–Bannock Tribes could enforce a Tribal Employment Rights Ordinance which required all employers working on the reservation to give mandatory hiring preferences to Indians. 905 F.2d 1311 (9th Cir.1990).
 - The non-member Plaintiff in *FMC* challenged the Tribe's ability to enforce the Tribe's Employment Ordinance against him. However, in *FMC*, the court pointed to several factors used to determine that FMC had formed a consensual relationship with the Tribe and its members. To name a few:
 - FMC had “wide ranging mining leases and contracts; FMC has also explicitly recognized the Tribes' taxing power' in one of its mining agreements; FMC agreed to royalty payments and had entered into an agreement with the Tribes relating specifically to the [Tribal Employment Rights Ordinance's] goal of increased Indian Employment and training ... the plant is within reservation boundaries; FMC signed numerous contracts with the Tribes, including one particularly related to employment.”
 - "FMC's presence on the reservation is substantial, both physically and in terms of money involved....FMC actively engaged in commerce with the Tribes and so has subjected itself to the civil jurisdiction of the Tribes." *FMC* at 1314



FMC Continued

- In contrast, Atkinson alleges that it buys all of its goods, services, merchandise, foodstuffs, and utilities from sources off the Navajo reservation, which are delivered to Atkinson's fee land by means of public roads; that Atkinson's business deals almost exclusively with tourists and other nonmembers of the Navajo Nation; and that Atkinson's sole contact with Navajo Nation members on its property consists of employing, and selling a "small amount" of goods to, members of the Navajo Nation. (Compl.¶ 11, 29, 32). Thus, contrary to the Plaintiff in FMC, Atkinson has purposefully limited its relationship with the Tribe. Atkinson Trading Co. v. Manygoats, No. CIV 02-1556-PCT-SMM, 2004 WL 5215491, at *11 (D. Ariz. Mar. 17, 2004)



Other Limitations

- Dawavendewa v. Salt River Project – The Ninth Circuit held that tribal preference laws which give preference to members of one tribe over members of another tribe is unlawful national origin discrimination under the US Constitution's Equal Protection Clause.



Key Takeaway From Caselaw

- To enforce TERO, determine whether the nature of the relationship alone can serve as consent to jurisdiction.
- An employment contract alone is not sufficient.
 - "Of course, a member of the Navajo Nation is free to negotiate jurisdictional issues when hired, but an employer who does nothing to subject himself to tribal jurisdiction other than hiring a tribal member has not expressly or impliedly consented to jurisdiction."
Atkinson Trading Co. v. Manygoats, No. CIV 02-1556-PCT-SMM, 2004 WL 5215491, at *8 (D. Ariz. Mar. 17, 2004)



What We Know for Certain

- Tribes have the power to regulate (enforce tribal preference):
 - On trust lands
 - Cloningers in Kamiah Idaho – initially ignored the Tribe, tribal leadership had police shut the development down, and then Cloningers complied with the Tribe. So if you know of a project on trust lands, you have authority.
 - Other parties who enter significant consensual relationships with the Tribe, where there is a nexus between the regulation and the consensual relationship to tribal jurisdiction.
- “Tribal preference is not allowed on state or federal contracts, or in the private employer situation [on non-Indian fee lands].” See The Council for Tribal Employment Rights, Quick Reference Guide, Page 5.
- It is possible that the Tribe may be able to regulate activities that may **significantly threaten** the health and welfare of the Tribe under the second Montana exception.
 - However, this argument usually loses in court, and the Supreme Court, in Atkinson, has already stated that the operation of a business on non-Indian fee land does not by itself threaten... the health and welfare of the Tribe as required to satisfy the second Montana exception.



Exploring Alternative Pathways to Promote TERO

- TERO should seek to negotiate voluntary consensual agreements between contractors and employers on the reservation.
 - This achieves the goal of employing tribal members and builds a positive relationship with employers, while avoiding regulatory jurisdiction problems.
- Tribal leadership could vest TERO with other employment law powers to give it a broader scope, e.g. workplace safety laws, anti-sexual harassment laws, etc...
- Other Ideas???
 - Re-examine TERO's goals and purpose. Focus on training? Visit this purpose every year to best serve community.