Title:
Evans v. Shoshone-Bannock Land Use Policy Com'n, 736 F.3d 1298 (9th Cir.) (Dec. 5, 2013).

Introduction:

In Evans v. Shoshone-Bannock Land Use Policy Com'n, the 9th Circuit held that land on a reservation owned in fee simple by a non-Indian was clearly not in the jurisdiction of tribal courts. The court narrowly applied the rules formulated by *Brendale*, finding that the nature of the reservation area including the 'non-Indian land' was not closed to the public in a way that would allow it to fit the narrow zoning exception that would uphold tribal jurisdiction. This decision demonstrates the narrow application of *Montana*.

History:

David Evans, Plaintiff-Appellant, inherited land in the boundaries of the Forks Hall area, which is reservation area for Shonone-Bannock (hereinafter "Tribe"). He inherited the land in fee simple, and is not a member of the tribe. Evans obtained a building permit for a single-family home from Power County, but upon beginning construction the Compliance Offer for the Tribes' Land Use Policy Commission requested that Evans apply for a building permit through the tribes, as well as pay permit fees. The tribe posted a Stop Work order on the site, and filed suit against Evans and the involved contractors in Shoshone-Bannock Tribal Court for the violation of land use ordinances and other business licensing requirements.

Evans sought a Declaratory Judgment in federal district court to assert that the tribal court did not have jurisdiction. The tribe was granted dismissal on the grounds that tribal remedies had not been exhausted, the court holding that Evans' suit was premature and that the tribal court did not plainly lack jurisdiction. Evans appealed the dismissal, resulting in the 9th Circuit decision reversing the district court's decision.

Decision:

Although the court agreed that Evans did not exhaust all tribal remedies, the failure did not prohibit the declaratory judgment because it was "plain" that the tribal court did not have jurisdiction.[1] The court looked to the plausibility of jurisdiction, and in turn to the regulatory authority of the tribal court to determine the scope of its jurisdiction as it pertained to Evans and his property. [2] The scope of tribal court jurisdiction is limited, since tribal courts are not courts of general jurisdiction; Evans, as a non-member owner of fee land, was presumptively not under the tribe's jurisdiction.[3] Likewise, Evans did not fall under any of the exceptions that would give a tribal court jurisdiction over a non-member listed in *Montana v. United States*.[4] Neither party alleged that Evans had entered a consensual relationship with the tribe or one of its members, which is an exception to the general rule. The court found that Evans also did not fall under the second exception, which allows tribe to regulate non-member activity that threatens or "directly affects the tribe's

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[1] *Evans v. Shoshone-Bannock Land Use Policy Com'n*, 736 F.3d 1298, 1302 (9th Cir.) (Dec. 5, 2013).
[2] Id.
[3] Id. at 1303.
[4] 450 U.S. 544, 565 (1981).

political integrity, economic security, health, or welfare."[5] The court characterized the test as narrow and holding a high burden for the Tribe to overcome for non-member fee landowners. The Court also recognized an exception to the high burden: tribes may regulate land through zoning where the land, although owned in fee simple, was located within the boundaries of a reservation otherwise closed to the general public, where the "Tribes maintained ownership and control" over the area.[6] In order to uphold tribal court jurisdiction, the 'non-Indian land' would have to be (1) similar to the land in *Brendale* and (2) use of the land would jeopardize or threaten the reservation area.[7]

Law as Applied:

The Court found that Evans parcel of land bore virtually no resemblance to the land zoned in *Brendale*. The land in *Brendale* was at the heart of the reservation, which was guarded and patrolled. Evans parcel was in an area that included other non-Indian land with single-family homes, and near a government road and a heavily trafficked airport.[8] Additionally, a single-family home would not pose any real specific threat to the reservation.

The court also specifically did not hold that the tribal court had jurisdiction over Evans under a theory of more general threat to the reservation, such as affects on groundwater, from the construction of a single family home. The court cited ample authority stating that the tribe had a heavy burden of showing that Evans activity posed some "catastrophic" risk to tribal government, not merely any affect on the tribe or surrounding land.[9]

Relevance:

The 9th Circuit demonstrates that development of tribal courts and interactions between non-members and members on tribal land can have vastly different results depending on whether tribal courts have jurisdiction over an action or claim. Determining which authority or government is the regulating agency, and finding which government has jurisdiction over an action, is the first question to address in any action involving tribal law, people or land. The ability of tribal courts to gain jurisdiction over non-members, as this 9th Circuit case demonstrates, is sometimes only available narrowly.

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[5] *Id.* quoting *Strate*, 520 U.S. at 446.
[6] *Id*. quoting *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation* 492 U.S. 408, 438-44 (1989).
[7] *Evans* at 1304.
[8] Id. at 1304, citing *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation* 492 U.S. 408, 438-44 (1989).
[9] Id. at 1306.