

**JULY 2007**  
**MULTISTATE PERFORMANCE TEST (MPT)**

The MPT Question administered by the State Board of Law Examiners for the July 2007 bar examination was *Acme Resources, Inc. v. Black Hawk et al.*. Two representative good answers selected by the Board are included here.

The National Conference of Bar Examiners publishes the MPT Question and the “point sheet” describing the issues and the discussion expected in a successful response to the MPT Question. The “point sheet” is analogous to the Board’s Analysis prepared by the State Board of Law Examiners for each of the essay questions.

The NCBE does not permit the Board to publish the MPT Question or the “point sheet” on the Board’s website. However, the NCBE does offer the MPT Question and “point sheet” for sale on its website, usually in mid-December for a July examination question.

**An unsuccessful applicant:** An applicant who was unsuccessful on the July 2007 Maryland bar examination may obtain a copy of the MPT Question, his or her MPT answer, representative good answers selected by the Board, and the “point sheet” for the July 2007 MPT Question administered as a component of the Maryland bar examination. This material is provided to each unsuccessful applicant who requests, in writing, a copy of the answers in accordance with instructions mailed with the results of the bar examination. The deadline for an unsuccessful applicant to request this material is January 3, 2008

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## REPRESENTATIVE ANSWER 1

### I. Arguments.

- a. Black Eagle tribal court has jurisdiction over the matter, both because Acme and Black Hawk entered a consensual relationship on extraction of methane, and because the case involves the loss of water caused by Acme directly affecting economic security of the tribe.

i. Black Eagle Tribal Court has proper jurisdiction because Acme and Black Hawk entered a consensual relationship by contracting to sell methane extraction.

In AO Architects, the Fifteenth Circuit addressed whether a tribal court had jurisdiction. Applying the test from Montana, the court stated that one way to create the tribal court jurisdiction is to demonstrate that the tribe entered a consensual relationship with the non-tribal member. Such relationship could occur by commercial dealings, contracts, or leases, Here the Black Eagle tribe entered a contractual agreement with Acme for the methane rights under Mulroneys (a non-tribal member's) land. Although Mulroneys is not a member of the Black Eagle tribe, the Black Eagle tribe owns the minerals under his land. In 2005, the Black Eagle tribe entered a contractual lease with Acme to lease its rights in the land, so that Acme could extract coal bed methane See Black Hawk Affidavit.

By entering the lease with the Black Hawk tribe, Acme arguably entered a consensual relationship with the tribe. According to AO Architects, this consensual relationship should support the tribal court's exercise of jurisdiction over the dispute.

As a note, in Funmaker, the Fifteenth Circuit found not consensual relationship existed where a tribe member sued Franklin Motor Credit for product's liability, as the case lacked a direct nexus with a lease entered by Franklin Motor Credit and the tribe. In the present case, the lease to Acme for methane drilling is the direct cause of the water loss, which Black Hawk and the other plaintiffs are suffering, See Bellingham Affidavit. According to Bellingham, Acme's methods are directly causing a decrease in the tribe's water supply.

Hence, unlike Funmaker, a direct nexus exists between the injury and the lease. Based on the facts, the district court should find that the Black Eagle tribal court has jurisdiction, based on the consensual relationship between Acme and the tribe. Montana.

ii. Black Eagle tribal court has proper jurisdiction because Acme's conduct directly affects the tribe's economic security.

The Fifteenth Circuit has recognized that a tribal court may have jurisdiction over activities directly affecting the tribe's economic security. AO Architects. The Black Eagle Tribal Code § 23-5 states that "a clean and healthful environment is vital to the economic security of the... tribe."

Here, Acme and the tribe have a lease allowing Acme to remove methane. Although Mulroneys own the land, the tribe owns the minerals below. Unfortunately, Acme's methane extraction has wasted huge water quantities, and over the next five years will run the tribe's wells dry. Bellingham Affidavit. Many tribal members rely on the water to farm and otherwise engage in their livelihood. Black Hawk, for instance, has 3,000 acres of land to water, Black Hawk Affidavit. Hence, Acme's methane extraction is directly affecting the tribe's security—its ability to farm.

In Strate, the Supreme Court held that highway safety on a road over a tribal reservation did not directly affect the tribe's political security, economic security, welfare or health. Here, however, Acme's methane extraction threatens the tribe's economic infrastructure and health. It is causing pollution and degrading the environment. § 23-5. If allowed to continue, then within five years the tribe will lack its own water sufficient for farming or other purposes. Bellingham Affidavit.

As noted in the Black Eagle constitution, "[T]he land forms part of the soul of the Black Eagle tribe." If Acme is to continue methane extraction, the land will suffer as will the tribe. Here, Acme's activities affect (directly) the tribe's political and economic security, and health. Jurisdiction should be granted to the Black Eagle tribal court.

iii. The case should be dismissed or stayed, as Acme must be required to exhaust its remedies, granting tribal self government to the Black Eagle tribe on its own contractual issue.

In AO Architects, the Fifteenth Circuit noted that applying Supreme Court precedent, the tribal court should have the opportunity to determine jurisdiction. This rule is based on the policy of the "tribal self-government and self determination" National Farmer. Here, Black Hawk and the other plaintiffs seek adjudication of a lease executed by the tribe and granting Acme an interest in tribal minerals. The rights being argued for are those of Black Eagle tribe members. Unlike in AO Architects, where the defendant contracted with a non-tribal member, Acme expressly entered a contract with the Black Eagle tribe. Black Hawk Affidavit. Even though the surface land owner is not a tribe member, the mineral owner was the tribe.

Additionally in this case, the access to the Black Eagle tribal court will serve a greater purpose than mere delay. AO Architects. Here, in conformity with the Black Eagle Constitution and Statutes, the plaintiffs are attempting to litigate the rights regarding their land, their farms, and their livelihoods in their own tribal courts. As there has been no exhaustion of tribal remedies, the district court should stay or dismiss the action.

## II. Conclusion.

Applying the principles of United States v. Montana, as articulated in AO Architects, the plaintiff's motion for summary judgment should be granted. The tribal courts have jurisdiction based both on (a) the consensual relationship of Acme and the tribe, and (b) that Acme's actions directly affect the tribe's economic interest. In addition, the district court should dismiss or stay the action, to allow the tribal court to determine its own jurisdiction.

## REPRESENTATIVE ANSWER NO. 2

I. The Black Eagle Tribal Constitution gives the Plaintiffs the right to bring the Instant Suit in Black Eagle Tribal Court.

As an initial matter, the plaintiffs have the right and the ability to bring this action in the Black Eagle Tribal Court, if they are permitted to by this court, and the Black Eagle Tribal Court has the right to afford complete relief.

See Black Eagle Tribal Code Section 23-5 (giving any person harmed by a pollution or degradation of the environment of the Black Eagle Reservation the ability to bring a civil action for damages and against the person (here Acme) responsible for the violation.

### II. Motion for Summary Judgment

A. There exists no genuine issue of material fact with regard to the jurisdiction of the trial court of Black Eagle due to Acme's entrance into a consensual relationship with the Tribe through the Tribe's grant of the power to extract minerals that are owned by the Tribe.

Here, Acme is causing significant harm to the Tribe when it extracts massive amounts of water from the ground to release the methane gas in the coal stream (see affidavit of Dr. Bellingham.)

Acme was only afforded the power to extract the methane gas from Patrick Mulrone's land because of a contract which Acme entered into with the Tribal Council that gave Acme the right of extraction in exchange for a 20% royalty of production.

In Montana v. United States, the U.S. Supreme Court stated that while as a general rule the sovereign powers of an Indian Tribe do not extend to non-members, there are two ways for the Tribes to exercise their inherent sovereign power to exercise civil jurisdiction over non-members.

The Court stated that the first way is through regulation over the activities of non-members who enter into consensual relationships with the tribe or its members "through commercial dealings, contracts, leases or other engagements."

The Court in Strate v. A-2 Contractors further explained this basis for jurisdiction over non-members when it explained that the consensual relationship must be "tribal" in nature. In Strate, the Court failed to find that a highway accident that occurred on Tribal land between two

non-Indians was tribal in nature. Here, however, the consent-related contract was very clearly tribal in nature in that the contract was made directly with the Black Eagle Tribal Council, and the subject matter was granting Acme the rights to remove minerals that are owned by the Tribe. There are few matters that are more “tribal in nature” than contracts to dispose of land that Tribes rightfully own.

Also, in a 15<sup>th</sup> Circuit case, the Court held that with regard to the injury sustained as a result of the consensual contract, the contract and the injury must be part of a “direct nexus” of conduct (Funmaker, finding no direct nexus between a car lease and an injury sustained in the car by a tribal member). Here, the injury sustained is a direct result of Acme’s conduct—through the extraction contract, Acme is withdrawing massive amounts of water, leaving very little water for tribal members for crops and animals.

**B. IN THE ALTERNATIVE, BLACK HAWK ET AL. IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE EXISTS NO GENUINE ISSUE OF MATERIAL FACT THAT THE TRIBAL COURT HAS JURISDICTION BECAUSE THE CONDUCT OF ACME DIRECTLY THREATENS THE POLITICAL INTEGRITY, ECONOMIC SECURITY AND THE HEALTH AND WELFARE OF THE BLACK HAWK TRIBE.**

The U.S. Supreme Court in Montana gave a second exception to the general rule that the jurisdiction of the tribal courts do not extend to non-members: instances where the conduct of non-members on fee land within the reservation, which the Court held included reservation land acquired in fee simple by persons who are not members of the tribe, “threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”

The US Supreme Court in Strate further explained the standard “must be interpreted with its purpose in mind, which was to protect tribal self-government and control of internal regulations.

The Court in Strate failed to find civil jurisdiction for the Tribal Court as a result of a traffic accident on tribal land, because the Court did not find that the activity threatened tribal self-government and control of internal relations. Strate can be distinguished, however, because of the relatively small size of the harm in that case. One traffic accident does not threaten a tribe’s future.

Here, however, according to the affidavit of Dr. Bellingham, the activities of Acme will “likely [cause] all wells on the Reservation [to run] dry over the next five years if Acme’s coal bed methane development continues.” If Black Eagle Indian Tribe has no water, they will have no ability to raise livestock or grow crops. The tribe will have no food of its own. This will result

in the destruction of the tribe or at the *very least*, the destruction of the ability of the tribe to continue to be self-sustaining. It is clear that this result would do great harm to tribal self-government and control of internal regulations.

**C. IN THE ALTERNATIVE, THE COURT SHOULD GRANT A STAY, BECAUSE A PARTY MUST EXHAUST ITS TRIBAL REMEDIES BEFORE SEEKING RELIEF IN FEDERAL COURT.**

The U.S. Supreme Court announced the standard in National Farmers that a Federal Court should “stay its hand ‘until after the tribal court has had a full opportunity to determine its own jurisdiction.’” After the stay is granted, the tribal court will have the opportunity to explain what jurisdiction it may have.

The Court further announced that where it is clear that the tribal court does not have jurisdiction, the Federal Court need not respect the comity doctrine, and may instead retain jurisdiction.

Here, Acme has not exhausted its tribal remedies—the tribal court has yet to rule on whether it may or may not have jurisdiction and on what basis. Therefore, the Federal Court should grant a stay and allow the tribal court to hear the matter unless it is clear that the tribal court does not have jurisdiction.

In AO Architects, a 15<sup>th</sup> Circuit case, the court there granted a stay on much weaker grounds than here. There, the Tribal members were killed when a roof designed and not built by AO Architects collapsed on tribal members, who were merely leasing the hall from the Church of Good Hope. There, AO Architects had never even set foot on the Indian Reservation in question, had no contact with any Indian member, and only indirectly, through a design defect, harmed a tribal member.

Here, there is a direct contract with the tribe and direct harm is caused by Acme’s activities. It is clear that the basis for granting a stay is greater here than in AO Architects. The Court here should respect this standard and grant a stay of Acme’s Federal Proceedings and allow the Tribal Court to rule on their own jurisdiction and bases thereon.