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3 IN THE COURT OF APPEALS  
4 OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
5 OF THE FLATHEAD INDIAN RESERVATION

5 BRIAN W. HITCHCOCK and ALBERT L. ) Cause No. AP 94-284-CV  
6 HITCHCOCK, )  
7 Plaintiffs and Appellants, )  
8 vs. ) OPINION  
9 SHAVER MANUFACTURING COMPANY )  
10 and TRIPLE W EQUIPMENT, INC., )  
11 Defendants and Appellees. )

11 Argued October 23, 1995

12 Decided May 7, 1996

13 Douglas Donald Harris, Esquire, Harris & Callaghan, P.O. Box 7937, Missoula,  
14 Montana 59807, for Brian W. Hitchcock and Albert L. Hitchcock, plaintiffs and  
appellants.

15 W. Carl Mendenhall, Esquire, Worden, Thane & Haines, P.O. Box, 4747, Missoula,  
16 Montana 59806, for Triple W. Equipment, Inc., defendants and respondents.

17 Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes,  
William J. Moran, Tribal Judge, Presiding.

18 Before: BROWN, GAUTHIER, AND WHEELIS, Associate Justices.

19 WHEELIS, Justice:

20 INTRODUCTION

21 Brian W. Hitchcock, and his father, Albert L. Hitchcock, who is a member of the  
22 Confederated Salish and Kootenai Tribes, filed their action in the Tribal Court of the  
23 Confederated Salish and Kootenai Tribes on July 21, 1994. The complaint alleged that  
24 Brian Hitchcock was injured when he operated a hydraulic post driver manufactured by  
25 the defendant Shaver Manufacturing Company (Shaver) and sold in Missoula to the  
26 Hitchcocks by Triple W. Equipment, Inc., a Montana corporation (Triple W). Albert  
27 Hitchcock claimed damages for the emotional distress occasioned by his son's injury.  
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1 With Raymond and Leonard Hitchcock, Albert Hitchcock operates a ranch and  
2 farm near Arlee, on the Flathead Reservation. The Hitchcocks purchased a new Shaver  
3 Hydraulic Post Driver on April 17, 1991, from Triple W. The post driver was  
4 manufactured by Shaver in Iowa. According to the complaint, it was sold without a  
5 hand guard in front of the smash plate, and without a safety post holder. The price of  
6 the post driver was \$1,450.00; Triple W allowed \$200.00 for a mower traded in by the  
7 Hitchcocks, and Leonard Hitchcock paid the balance of \$1,250.00 with a check.

8 On August 1, 1992, Brian Hitchcock was working with his father driving posts on  
9 the Hitchcock land; his father was driving a tractor, and Brian, who was then twenty  
10 years old and who has a cognitive impairment, was operating the post driver. As Brian  
11 was holding a post to be driven, the smash plate struck his left hand, cutting off the long  
12 and the ring fingers and injuring his left index finger.

13 In their complaint, the Hitchcocks sought redress for Brian's injuries and Albert's  
14 emotional distress through claims based on negligence and products liability. Their  
15 complaint asserted that Shaver had submitted itself to the jurisdiction of the Tribal  
16 Court by purposefully placing manufactured equipment into interstate commerce,  
17 including commerce within Montana and within the exterior boundaries of the Flathead  
18 Reservation. Similarly, the Hitchcocks asserted that the Tribal Court had jurisdiction of  
19 Triple W because it had purposefully sold equipment intended for use both in Montana  
20 and on the Reservation.

21 Both Triple W and Shaver filed motions to dismiss on the grounds that the Tribal  
22 Court lacked both subject matter and personal jurisdiction over the defendants. Triple  
23 W argued that its principal place of business was in Montana, but that it had sold the  
24 hydraulic post driver in Missoula without transacting for that business on the  
25 Reservation. It argued that because the sale of the equipment was completed off the  
26 Reservation, the sale was not a matter arising on the Reservation; it further argued that  
27 the Hitchcocks had not demonstrated that Triple W had engaged in the minimum  
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1 contacts with the Reservation, which due process would require before personal or  
2 subject matter jurisdiction could be established. Shaver made similar arguments.

3 The Hitchcocks argued that Triple W purposefully advertises on the Reservation  
4 and in publications that are distributed on the Reservation, as well as actually selling  
5 equipment that is transported to and used on this Reservation. The Hitchcocks argue  
6 that discovery was not complete, and that further discovery would establish that Triple  
7 W actively pursues the sale of agricultural equipment throughout western Montana,  
8 including the Flathead Reservation.

9 On April 21, 1995, the Tribal Court issued separate rulings on the defendants'  
10 motions to dismiss. The Tribal Court determined that it had subject matter jurisdiction  
11 over the claims stated in the complaint as to both defendants; it concluded, however,  
12 that though it had personal jurisdiction over Shaver, it did not have personal  
13 jurisdiction over Triple W. The Tribal Court distinguished a seller from a manufacturer,  
14 reasoning that a manufacturer intends its products to be distributed as widely as  
15 possible, but that the record did not show Triple W in this instance had taken any action  
16 to sell the post driver for use on the Reservation. It noted that the record showed no  
17 evidence of Triple W having had any contact with the Hitchcocks, except for selling  
18 them the post driver at its store in Missoula. There was no allegation that Triple W had  
19 entered the Reservation to solicit the sale or even deliver the equipment; nor was there  
20 any allegation that Triple W had reached into the Reservation by mailing any  
21 advertisement or brochure to the plaintiffs.

22 The Hitchcocks appealed the order dismissing Triple W. Triple W moved to  
23 dismiss the appeal, arguing that the notice of appeal was premature. The basis of Triple  
24 W's motion was that the Tribal Court was obligated to follow Rule 54(b), Federal Rules  
25 of Civil Procedure, which it argued would not have permitted the appeal because there  
26 were multiple parties in the action, one remaining before the Tribal Court. The Court of  
27 Appeals dismissed that motion on September 22, 1995, having concluded that although  
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1 the Federal Rules of Civil Procedure are important guidelines for the Tribal Court, the  
2 Court was not obligated to follow the certification requirements of Rule 54(b) absent its  
3 enactment by the Tribal Council.

#### 4 DISCUSSION

5 The basic due process requirements placed on tribal courts stem from tribal law  
6 and the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq. Ordinance 36-B, codified as  
7 Chapter II, Civil Actions, Section 1(2)(a) of the Law and Order Code of the  
8 Confederated Salish and Kootenai Tribes states:

9 To the fullest extent possible not inconsistent with federal law, the Tribes  
10 may exercise their civil regulatory and adjudicatory powers. To the fullest  
11 extent possible not inconsistent with federal law, the Tribal Court may  
12 exercise subject matter and personal jurisdiction. The jurisdiction over all  
13 persons of the Tribal Court may extend to and include, but not by way of  
14 limitation, the following:

- 15 (1) All persons found within the Reservation.
- 16 (2) All persons subject to the jurisdiction of the Tribal Court  
17 and involved directly or indirectly in:
  - 18 (i) The transaction of any business within the  
19 Reservation;
  - 20 (ii) The ownership, use or possession of any  
21 property or interest therein, situated within the  
22 Reservation;
  - 23 (iii) The entering into of any type of contract  
24 within the Reservation or wherein any aspect  
25 of any contract is performed within the  
26 Reservation;
  - 27 (iv) The injury or damage to property of the  
28 Tribes or a Tribal member.

22 We agree with the holding below that the Tribal Court has subject matter  
23 jurisdiction in this cause. The complaint alleges an injury to a tribal member that  
24 occurred on the Reservation because of defective equipment used on the Reservation.  
25 This action falls squarely within Ordinance 36-B and is a matter arising on a reservation.  
26 *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994).

27 Triple W argues that there are insufficient allegations in the complaint (or in what  
28 discovery is of record) to show it had the minimum contacts with the Reservation that

1 are necessary to support a finding of personal jurisdiction over Triple W by the Tribal  
2 Court. The Hitchcocks argue that the lack of evidence before the Tribal Court at the time  
3 of the Court's order was not their doing, and they request that the matter be remanded  
4 to Tribal Court for further discovery or an evidentiary hearing on the issue of personal  
5 jurisdiction. There is support for such a course—see *Harrington v. Holiday Rambler Corp.*,  
6 165 Mont. 32, 525 P.2d 556 (1974)—and as a matter of general principle decisions on  
7 disputed personal jurisdiction should await a full development of the evidence on that  
8 point. In this case, however, it is not necessary to remand this cause for that purpose.

9       It is clear that this case involves issues that are distinct from what has become a  
10 recurrent Indian law issue: whether a tribal court has jurisdiction over a non-Indian  
11 defendant in a reservation-based cause of action, whether tort or contract. Increasingly,  
12 federal courts have found no general impediment to that jurisdiction in federal law. In  
13 each instance, tribal courts are required to determine whether in specific situations there  
14 has been any diminishment of tribal court jurisdiction under federal statutes, treaties, or  
15 in a tribe's own constitutional and statutory law. *National Farmers Union Ins. Cos. v. Crow*  
16 *Tribe*, 472 U.S. 845, 85 L.Ed.2d 818, 105 S.Ct. 2447 (1985); *Williams v. Lee*, 358 U.S. 217,  
17 220, 3 L.Ed.2d, 251, 79 S.Ct. 269 (1959). See also *New Mexico v. Mescalero Apache Tribe*, 462  
18 U.S. 324, 76 L.Ed.2d 611, 103 S.Ct. 2378 (1983); *White Mountain Apache Tribe v. Bracker*,  
19 448 U.S. 136, 65 L.Ed.2d 665, 100 S.Ct. 2578 (1980); *Crawford v. Genuine Parts Co., Inc.*, 947  
20 F.2d 1405 (9th Cir. 1991); *Stock West Corp. v. Taylor*, 942 F.2d 655 (9th Cir. 1991) (*Stock*  
21 *West II*); *Wellman v. Chevron*, 815 F.2d 577 (9th Cir. 1987).

22       Here, we are asked to decide whether an off-Reservation defendant, allegedly at  
23 fault in providing equipment without a necessary safety device and, consequently,  
24 responsible for an injury to a tribal member's son occurring within the Reservation, is  
25 subject to the personal jurisdiction of the Tribal Court. It is of note that Triple W has not  
26 suggested that its off-Reservation location or its non-Indian identity automatically  
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1 shields it from Tribal Court civil jurisdiction. Instead, battle has been joined on the field  
2 of long-arm statute due process considerations.

3 The Tribal Court based its emphasis on a manufacturer's submission to  
4 jurisdiction in distant forums on a case arising in Montana and brought in federal court  
5 in that state in 1972. *Scanlan v. Norma Projektil Fabrik*, 345 F.Supp. 292 (D.Mont. 1972). The  
6 *Scanlon* Court held that due process was not denied when a Swedish corporation that  
7 manufactured ammunition intended for use by the general public was required to  
8 appear in Montana when the plaintiff was injured in Montana by defective ammunition  
9 purchased in an Idaho supermarket.

10 Generally, when *sellers* of defective equipment are found to be not subject to a  
11 distant forum's jurisdiction, the distance from the forum to the seller's location is  
12 usually great, and the courts have emphasized that the seller in these instances had  
13 none of the "contacts, ties, or relations" with the forum state required by the seminal  
14 decision of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Illustrative is *World-*  
15 *Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1979), holding that an Oklahoma court  
16 did not have jurisdiction over an Audi distributor in New York after the plaintiffs were  
17 injured in Oklahoma in an accident en route from New York to Arizona. The Court  
18 stressed the distributor's absence of activity in Oklahoma: there was no evidence that it  
19 had services in Oklahoma, nor that it solicited business through sales or advertising  
20 reasonably calculated to reach that state.

21 The language in *World-Wide Volkswagen* appears to blur any firm distinction  
22 between a manufacturer and seller when examining a defendant's purposeful direction  
23 of activities at residents of another forum:

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25 ...Hence if the sale of a product of a manufacturer or distributor  
26 such as Audi or Volkswagen is not simply an isolated occurrence,  
27 but arises from the efforts of the manufacturer or distributor to  
28 serve, directly or indirectly, the market for its product in other  
States, it is not unreasonable to subject it to suit in one of those

1 States if its allegedly defective merchandise has been the source of  
2 injury to its owners or to others....  
3 *World-Wide Volkswagen*, 444 U.S., at 297.

4 We do not believe that, in this case, any distinction between the manufacturer and the  
5 seller of machinery that causes injury in another jurisdiction is sufficient to vary the  
6 result on the question of personal jurisdiction over one as opposed to the other.

7 The test applied by the Ninth Circuit Court of Appeals in determining whether  
8 the jurisdiction of one state extends to a non-resident defendant without denying due  
9 process is the following:

10 (1) The non-resident defendant must do some act or consummate  
11 some transaction with the forum or perform some act by which he  
12 purposefully avails himself of the privilege of conducting activities  
13 in the forum, thereby invoking the benefits and protections of its  
14 laws.

15 (2) The claim must be one which arises out of or results from the  
16 defendant's forum-related activities.

17 (3) Exercise of jurisdiction must be reasonable.

18 *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474 (9th Cir.  
19 1986).

20 We adopt this test.

21 In the pertinent cases from the Ninth Circuit and the United States Supreme  
22 Court, the focus in due process analysis is on the defendant's relationship to the forum  
23 and the litigation. Part of the analysis is to ascertain whether the defendant's conduct  
24 and connection with the forum are such that he should reasonably anticipate being  
25 haled into court there.

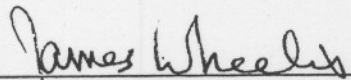
26 The Flathead Reservation is at the heart of western Montana. Its boundaries  
27 overlap those of four counties, Flathead, Lake, Mineral, and Missoula. There is a  
28 common economic base in western Montana, largely in farming, ranching, timber, and  
tourism. The people of western Montana, both Indian and non-Indian, whether living  
on or off the Reservation, share that base. It is not plausible to argue that equipment and  
materials sold within the land between the Rocky Mountains, Idaho, and Canada is not

1 intended for the use of any person living there. The sale of agricultural equipment in  
2 Missoula for Reservation use by a tribal member is sufficient to establish ties with the  
3 Reservation, meeting all the requirements of *Hirsch* and of Ordinance 36-B.

4 Accordingly, we reverse the order of the Tribal Court dismissing Triple W  
5 Equipment, Inc., for lack of personal jurisdiction.

6 REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT  
7 WITH THIS OPINION.

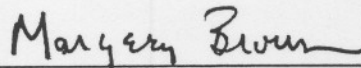
8 IT IS SO ORDERED THIS 7<sup>th</sup> DAY OF MAY, 1996.

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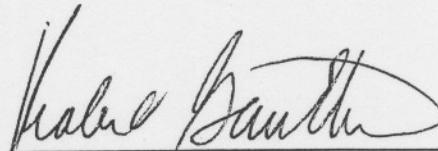
11 James Wheelis  
12 Associate Justice



13 We concur:

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16 Margery Brown  
17 Associate Justice

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Robert Gauthier  
Associate Justice



**CERTIFICATE OF MAILING**

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the **OPINION** to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 14th day of May, 1996.

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