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Tribal Court General Civil Jurisdiction Over Actions Between Non-Indian Plaintiffs and Defendants: Strate v. A-1 Contractors

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NOTES

TRIBAL COURT GENERAL CIVIL JURISDICTION OVER ACTIONS BETWEEN NON-INDIAN PLAINTIFFS AND DEFENDANTS: *STRATE v. A-1 CONTRACTORS*

*Jamelle King**

> *The reservations, with their courts and other institutions, are destined to disappear in time. The only questions is, When? The true motivations behind, and justification for, Indian separatism are psychological. . . . [S]eparatist rhetoric may be useful in restoring a sense of personal (or "cultural," if one insists) identity and worth to the members of an ethnic minority that has a history of being suppressed, exploited, and kept dependent. That is the total role . . . .*[1]

I. Introduction

On January 7, 1997, the United States Supreme Court heard the oral arguments in *Strate v. A-1 Contractors*.[2] This case arose from a ruling adverse to tribal interests by the United States Court of Appeals for the Eighth Circuit. It involves an issue that has engendered much interest and commentary but has never been confronted directly, either by Congress or the courts. That is, whether the tribal courts may adjudicate civil actions between two non-Indians.

The incident which led to *Strate* occurred on November 9, 1990, when a truck and car, belonging to two *non-Indians*, collided on a state highway which traversed a reservation. This case focuses on an issue vitally important to the integrity and viability of tribal nations, the continuing struggle of the

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1. SAMUEL BRAKEL, INDIAN TRIBAL COURTS: THE COST OF SEPARATE JUSTICE 101-02 (1978).

2. Petitioner's Brief, Strate v. A-1 Contractor, 117 S. Ct. 1404 (1997) (No. 95-1872), *available in* 1996 WL 656356. The Supreme Court issued its opinion in this matter on April 28, 1997. Melody McCoy and Don Wharton, Native American Rights Fund (NARF) attorneys, represented the tribal interests, the Honorable William D. Strate, Associate Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, and the Tribal Court. It appears that the Fredericks, one of the non-Indian accident victims in *Strate*, obtained their own private counsel (referred to subsequently as the Fredericks and the tribal parties). *See Courts Rule in Two Landmark Cases Affecting Tribal Court Jurisdiction*, NARF LEGAL REV., Winter/Spring 1997, at 10, 10. McCoy is only one of five Indian women to ever argue a case before this country's highest Court. *Id.*

tribal courts to maintain their jurisdiction.[3] Furthermore, this case pits inherent tribal sovereignty against dominant non-Indian interests, such as matters relating to business,[4] and exemplifies the states' and judiciaries' relentless endeavors to undermine tribal authority.[5] *Strate* is the culmination

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3. For an article discussing the "contextual legitimacy" of tribal courts, see Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49 (1988).

4. Nell Jessup Newton, *In the U.S. Supreme Court: Tribal Jurisdiction Over Personal Injury Actions Between Non-Indians*, WEST'S LEGAL NEWS, Dec. 30, 1996, *available in* 1996 WL 738536 (publication page references are not available for this document).

5. For example, four amicus curiae briefs were filed in favor of A-1 Contractors. *First*, 14 states urged the Court to deny tribal expressions of civil jurisdictions. These states would like one to believe that Indian tribes are nothing more than quasi sovereigns and "not a party to the Federal Union," which is actually tripartite and incorporates the Indian tribes as one of the sovereigns. Brief Amicus Curiae for States of Montana, Arizona, California, Colorado, Idaho, Massachusetts, Mississippi, Nevada, New York, South Dakota, Utah, Washington, Wisconsin, and Wyoming in Support of Respondents at *7, Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) (No. 95-1872), *available in* 1996 WL 709324.

The states wrote:

> Since tribes and their courts are not subject to the constitutional restraints, such as the Tenth and Eleventh Amendments, which operate as a check on federal power vis-a-vis the States, accepting the broad 'territorial' view of tribal court power advanced by Petitioners and their amici may threaten to radically reshape traditional notions of state sovereignty. These concerns are heightened by the possible unavailability of federal court review with respect to the merits of claims decided by tribal courts.

Id. at *3.

Second, a conglomeration of organizations, representing a variety of state-related interests, coalesced in support of Respondent. The state and county associations mimicked the Eighth Circuit's argument that an accident on a reservation is not a "valid" interest of the tribe.

> [A]lthough the respondent contractor had a contract with a tribal entity, basing tribal jurisdiction on an attenuated but for causation arising from the contractor's travel on the highway would sweep into tribal court any cause of action based on the contractor's mere presence. Similarly, the facts do not threaten or directly affect the political integrity or welfare of the tribe.

Brief of the Council of State Governments, National Conference of State Legislatures, National Governors' Association, National Association of Counties, U.S. Conference of Mayors, International City/County Management Association, and National League of Cities as Amici Curiae in Support of Respondents at *5, *Strate* (No. 95-1872), *available in* 1996 WL 709325.

Third, a national trade association of the trucking industry, representing 51 affiliated state trucking associations, along with a motor club, representing more than 39 million motorists, and one of the nation's largest railroads formed the third group. Their members conduct business on and traverse the reservations. Therefore, they expressed serious concerns about the significant due process implications of extending tribal court jurisdiction to non-Indians.

> By their very nature, tribal courts are ill-suited to adjudicate claims by members of the tribe or their families against outsiders. Furthermore, because the extent of judicial review available outside of the tribal court system is far from clear, there are no real constraints on tribal court to ensure that all litigants, including non-Indian defendants, are afforded due process and equal protection of the law.

of non-Indian and state fears of tribal civil jurisdiction assertions over non-Indians on Indian land, the fear of local bias and tribal court incompetence.[6]

Part II of this note will examine the cases involving civil tribal adjudicatory authority. Part III details the civil tribal regulatory cases beginning with *Montana v. United States*. Part IV discusses the concept of inherent tribal sovereignty. Part V relates the factual history of *Strate v. A-1 Contractors*. Parts VI and VII consider the legal history and the decisions. Part VIII advances the proposition that the Supreme Court erred in this case, with part IX forecasting the future ramifications of this deleterious decision.

Brief for the American Trucking Associations, Inc., the American Automobile Association, and the Burlington Northern Railroad Co. as Amici Curiae in Support of Respondents at *6-*7, *Strate* (No. 95-1872), *available in* 1996 WL 711202.

Fourth, in a very well-written and persuasive piece, albeit incorrect and misinformed, several local governments overseeing land that was located in the original boundaries of the Flathead Indian Reservation consolidated to argue against tribal civil jurisdiction. Lake County vehemently opposed the argument that tribes possess "territorial jurisdiction" just as do the states. "[T]ribes are not states. They have no constitutional standing as sovereigns, lack any constitutional constraints in governing, and as a result of their status within the United States, exercise limited, quasi-sovereign powers over internal matters subject to the plenary power of Congress." Brief of Amici Curiae Lake County, Montana, and Flathead Joint Board of Control of the Mission, and Jocko Valley Irrigation Districts in Support of Respondents at *12-*13, *Strate* (No. 95-1872), *available in* 1996 WL 709326.

6. One case which is cited repeatedly for the proposition of tribal court abuse of power is *Burlington N. R.R. Co. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1997), wherein the Crow Tribal Court rendered a judgment in the amount of $250 million for a train collision which killed two tribal members at a railroad crossing on the reservation. *Id.* at 869. Of the seven jurors, six were related to the two decedents. *Id.* at 872. The tribal court judge instructed the jurors as follows:

> Now Crows, you in this room all of you. This matter you know well; you are not young. This matter we respect. There is prayer involved in this matter. Our way of life, our good way of life. A train runs through the middle of our land. Crows, you know, I don't have to tell you. Bodies, in the past, bodies are scattered along the railway. Now, this is the day. You use your better judgment. I am not telling you what to do. I am not telling you who to follow. I am not telling you who to believe. Use your better judgment. God gave you a mind. God gave you a heart. This day, even this day use it. How am able to help. You should consider if you are a Crow. I don't have to tell you, you must use your mind. Look for a good solution. If this proceeding is successful, you will not be blamed. You are right, you are correct, you are proper. In the past this bench we were ridiculed. The people who presided are called upon. The people who presided are ridiculed, mocked. That's the way you Crows are. Within our reservation there is not many. You Crows established it. Other tribes are under the government, CFR. We are lucky. We have our own court. Consider that, you men and women. If you are kind, if you love, we are interrelated. Use your better judgment. Consider your people. Consider these people, consider those people. Use your better judgment. I want the creator to guide you. We are not kidding. Remember, young men and women. You are selected today because you are honest, because of your genealogy.

Id.

Part X concludes by urging Congress to take immediate action by superseding the decision with a statutory enactment.

II. Civil Tribal Adjudicatory Jurisdiction

Tribal courts possess exclusive tribal court jurisdiction over claims "brought by or against" an Indian person that arise in Indian country.[7] *Williams* involved an action against an Indian in state court by a reservation-based non-Indian general store operator. *Williams*, reaffirming an earlier case which had laid a clear foundation, pronounced that absent some clear congressional authority, the states have no authority in Indian country except when no significant Indian interests exist.[8] Since *Williams*, many tribes have begun to exercise civil authority over non-Indians for their on-reservation activities.

In *National Farmers Union Insurance Cos. v. Crow Tribe*,[9] a default judgment was entered against the non-Indian defendants in the tribal court.[10] The Supreme Court concluded that the "extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions," and then remanded the case so the tribal court remedies could be exhausted.[11] *National Farmers* established the exhaustion requirement of tribal court remedies under section 1331 of the Judicial Code[12] before access to the federal courts becomes available. As a result, the Judicial Code restricts easy access to the federal courts when a non-Indian alleges the tribal court possesses no power to adjudicate a claim. However, the Supreme Court in *National Farmers* failed to address the civil adjudicatory powers of the tribe over non-Indians.

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7. Williams v. Lee, 358 U.S. 217, 220 (1959). The court stated that "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* The so-called "infringement test" established in *Williams* was further clarified in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). *McClanahan* involved the state taxation of a reservation Indian for income earned exclusively on the reservation. *Id.* at 165-66. The court limited the *Williams* test to situations principally involving non-Indians and held the state possessed no jurisdiction to impose such a tax over a reservation Indian. *Id.* at 179-81.

8. *Williams* carries the basic core of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), into the 1970s — the inability of state law and power to intrude into Indian country. *Williams*, 358 U.S. at 223. Therefore, the basic policy of *Worcester* remains, although, with some modification.

9. 471 U.S. 845 (1985).

10. *Id.* at 845.

11. *Id.* at 855-57.

12. 28 U.S.C. § 1331 (1994) (federal question jurisdiction). The statute reads as follows: "The district courts shall have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

Once again in *Iowa Mutual Insurance Company v. LaPlante*,[13] the Court skirted around the issue of tribal civil authority over non-Indians.[14] The Court was afforded the opportunity to directly answer the question; however, the Court declined to settle the controversy.[15] In *Iowa Mutual Insurance*, an

13. 480 U.S. 9 (1987).

14. One must also consider whether we want the judicial branch or the legislative branch making these types of decisions. Incoherence and inconsistency evolves when both fail to address the issue; therefore, one is left to make the decision to act, this in turn, forces the other branch to take reactionary measures as occurred with *Duro v. Reina*, 495 U.S. 676, 695-96 (1990), superseded by statute 25 U.S.C. 1301(1) & (2) (1994), wherein the Court determined that tribal criminal jurisdiction did not exist over nonmember Indians. Congress later promulgated a statute superseding this fatuous decision.

15. The Court made it very plain during oral argument in *Strate v. A-1 Contractors* that a dispute exists as to the true meaning of *Iowa Mutual*. The following questions illustrate this most powerfully:

> QUESTION: Isn't there, Ms. McCoy, some dispute about the second case [*Iowa Mutual*] that you mention, whether it meant anything more than you have to exhaust the tribal court process? It didn't make an ultimate determination that there was tribal court jurisdiction. Isn't that so?
>
> ANSWER-MS. McCOY: No, I don't think there is any dispute.
>
> QUESTION: Is it not so that subsequent cases of this Court have said that about *Iowa Mutual*? (referring to Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989)).
>
> ANSWER-MS. McCOY: I believe that the reference there was in the plurality opinion in the Brendale case, a 1989 case. But that arose dealing with the issue in Brendale of the tribe's authority to regulate the private property of non-Indians. That's not the case here.
>
> QUESTION: But whatever *Brendale* involved, it did distinguish *Iowa Mutual* on the basis that it was merely an exhaustion, that there was not determination that the tribe as opposed to the State had jurisdiction.
>
> ANSWER-MS. McCOY: To the extent the plurality in Brendale did hold that, that was not necessary to the Brendale ruling and I think also the proper way to read Iowa Mutual is that — I realize it set the exhaustion rule.
>
> It also set the rule by which exhaustion would be conducted, or else exhaustion itself would be meaningless exercise, because as this Court said in National Farmers Union, where it expressly rejected the argument that respondents make here now for a rule of general and implicit divestiture of tribal court jurisdiction over reservation-based civil actions, that was unanimously rejected in National Farmers Union.
>
> And 2 years later in Iowa Mutual, when it again dealt with the issue of how to exhaust, Iowa Mutual set a clear rule that tribal courts presumptively have jurisdiction over reservation-based civil actions against non-Indians, and the lower courts have relied on that —
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> QUESTION: That was dicta, though, was it not? You didn't have to say that in order to decide the question that the Court took the case to decide.
>
> ANSWER-MS. McCOY: I think that was the rule of that case by which exhaustion was to be conducted, because it gives guidance to the tribal courts and the Federal courts on that very issue, and we don't have Congress divesting this tribe's jurisdiction.

action was instituted in the Blackfeet Tribal Court by LaPlante, a member of the Blackfeet Indian Tribe, against Iowa Mutual Insurance Company for injuries incurred within the reservation boundaries.[16] The Court concluded that a federal court may not exercise diversity jurisdiction[17] before the tribal court system has had an opportunity to determine its own jurisdiction.[18]

> Both *National Farmers* and *Iowa Mutual Insurance* involved defendants who tried to leap-frog tribal courts by proceeding directly to federal court upon being served with papers to appear in tribal court. After these cases, then, defendants must contest jurisdiction in the tribal court before going to federal court. *A-1 Contractors* is the first case to come to the Supreme Court after exhaustion in tribal court.[19]

III. Civil Tribal Regulatory Authority

Several cases have denied the extension of tribal civil regulatory jurisdiction over non-Indians, that is, the application of tribal law to the given situation. In *Montana v. United States*,[20] a case which severely restricted tribal sovereignty, the Court determined that the Crow Tribe of Montana did not possess the authority to prohibit hunting and fishing on lands owned in fee simple within the reservation by non-members.[21] As a result of this decision, the *Montana* Court established the general rule that tribes may not regulate non-Indian activity on fee land within the reservation.

The *Montana* Court created two exceptions where the tribe may properly exercise its authority. First, the Court stated, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members."[22] Second, "[a] tribe may . . . retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[23] "In short, *Montana* established a

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Oral Arguments Transcripts at *12-*14, Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) (No. 95-1872), *available in* 1997 WL 10398.

16. *Iowa Mutual*, 480 U.S. at 11.

17. 28 U.S.C. § 1332 (1994).

18. *Iowa Mutual*, 480 U.S. at 19. "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities *presumptively* lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18 (emphasis added) (citations omitted).

19. Newton, *supra* note 4.

20. 450 U.S. 544 (1981).

21. *Id.* at 566-67.

22. *Id.* at 565.

23. *Id.* at 566.

presumption against tribal regulation of conduct by non-Indians under certain circumstances, absent proof that one of the two *Montana* exceptions had been met."[24]

Eight years later, in a case which can, at best, be described as employing the *Montana* analysis, the Supreme Court examined the issue of tribal zoning of fee land within the reservation. In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,[25] the Supreme Court, presenting a fractured 4-2-3 opinion,[26] determined that the tribes possessed zoning authority over the closed part of the reservation, including the non-Indian fee lands.[27] Only three percent of the closed area land was owned in fee simple.[28] The open area consisted of mostly agricultural areas with almost fifty percent being owned in fee by non-Indians.[29] This fractionation in the open area resulted in major checkerboarding and an integrated community that had lost its Indian character.

Applying the *Montana* test, the Court in *Brendale* further limited the tribes' ability to rely on these exceptions when asserting tribal regulatory jurisdiction as against a state's exercise of such authority. Basically, *Brendale* resulted in an application of the *Montana* standard with an added, somewhat subtle, variation: "The impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe."[30] As a result of this variation, the *Montana* exceptions now rest on shakier ground.

Several years later, the Supreme Court, in *South Dakota v. Bourland*,[31] once again altered the scope of the *Montana* exceptions. *Bourland* involved the governmental taking of 104,420 acres of trust land belonging to the

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24. Newton, *supra* note 4.

25. 492 U.S. 408 (1989).

26. Justices White, Rehnquist, Scalia, and Kennedy agreed that no tribal authority existed over fee lands in the open area. *Id.* at 425. Justices Steven and O'Connor joined in the concurrence, *id.* at 433-48, with Justices Blackmun, Brennan, and Marshall dissenting, *id.* at 448-68. Justice Steven's opinion functioned as the decision as to the closed area of the reservation, while Justice White's opinion served as the decision relating to the open area of the reservation. As to the closed area, Justices Stevens and O'Connor believed the tribe possessed exclusive tribal jurisdiction, with Justices Blackmun, Brennan, and Marshall concurring. *Id.* at 444. Justices White, Rehnquist, Scalia, and Kennedy dissented. This resulted in a 5-4 split as to the tribe's authority to zone in the closed area. Justice White concluded that the zoning decision resided with the county after it received the information from the environmental impact statement (EIS). *Id.* at 432. Justice Blackmun would have affirmed tribal authority over the entire reservation. *Id.* at 460. Justice White decided that the tribe could not rely on treaty rights as enumerated in the *Montana* decision. *Id.* at 421-25. "Congress ha[d] not expressly delegated to the Yakima Nation the power to zone fee lands of nonmembers of the tribe." *Id.* at 428.

27. *Id.* at 431-32.

28. *Id.* at 415.

29. *Id.*

30. *Id.* at 430.

31. 508 U.S. 679 (1993).

Cheyenne River Sioux Tribe for the Oahe Dam and Reservoir Project.[32] This case possesses little precedential value outside of this context. However, the Supreme Court, in discussing *Montana* and *Brendale*, stated that these two cases "establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands."[33] The Court concluded that the Flood Control Act's open-access mandate and the Cheyenne River Act's applicable provisions positively abrogated the Tribe's authority to enforce gaming and fishing regulations in the taken area.[34]

IV. Inherent Tribal Sovereignty

Throughout this nation's political history, a struggle has existed between the federal, state, and tribal governments as to which respective sovereign properly possesses the right to govern in any given situation. Indian tribes maintain all the sovereign powers which have been rightfully theirs since time immemorial except those that have been "qualified or limited by treaties, agreements, or specific acts of Congress."[35] Tribes do not act only when Congress has so deemed it. "The point to remember is that all of the powers were once held *by the tribes*, not the U.S. government."[36] These inherent powers include the following:

(1) The power to determine the form of government.
(2) The power to define conditions for membership in the nation.
(3) The power to administer justice and enforce laws.
(4) The power to tax.
(5) The power to regulate domestic relations of its members.
(6) The power to regulate property use.[37]

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32. *Id.* at 682.
33. *Id.* at 689.
34. *Id.* at 690.
35. Kirke Kickingbird et al., *"Indian Sovereignty", in* 6 NATIVE AMERICANS AND THE LAW 7-8 (John R. Wunder ed., 1996). Congress' ability to control Indian affairs is referred as the "plenary power." Vine Deloria, Jr., writes,

> Conservative judicial activism now threatens to create a new set of criteria limiting what Congress can do for and on behalf of Indians. We can see no effort to limit the power of Congress to deprive Indians of their rights because the judicial system is already at work on that problem.

Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 979 (1996) (critiquing the reliance on *Felix S. Cohen's Handbook of Federal Indian Law* in a searing and scathing commentary; a handbook originally designed *for* the Department of Justice to be used *against* Indians).
36. Kickingbird, *supra* note 35, at 8.
37. *Id.*

V. The Factual History of Strate v. A-1 Contractors

The Three Affiliated Tribes[38] reside on the Fort Berthold Indian Reservation in west central North Dakota. The population consists of 2999 enrolled tribal members, 62 nonmember Indians, and 2396 non-Indians.[39] In 1970, the Secretary of the Interior granted the State a "limited easement[40] to pave and maintain a 6.59 mile stretch of Highway 8 within the Reservation."[41] All the land Highway 8 traverses constitutes Indian trust land.[42] Indeed, no non-trust land within the reservation is even intruded upon.[43] A sign, along with the State speed limit sign, is posted at the entrance of the Reservation, alerting those travelling on Highway 8 that they are entering Fort Berthold Indian Reservation.[44]

Since the 1940s, the highway operated as a Bureau of Indian Affairs gravel service road that ran to the tribal headquarters.[45] The building of the Garrison Dam and Lake Sakakawea forced the tribal headquarters to move. Today, Highway 8 terminates at the shores of Lake Sakakawea.[46] Due to the lake, the Tribes desired to pave this road to serve the isolated Twin Buttes tribal community.[47] The highway functions as a passage way to the two dock sites located at or around Twin Buttes; however, it is not a major thoroughfare.[48]

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38. The Mandan, Hidates, and Arikara. Petitioner's Brief at *2, Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) (No. 95-1872), *available in* 1996 WL 656356.

39. *Id.* (citing U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS: AMERICAN INDIAN AND ALASKA NATIVE AREAS at 6 (1992)).

40. Brief of the Council of State Governments, National Conference of State Legislatures, National Governors' Association, National Association of Counties, U.S. Conference of Mayors, International City/County Management Association, and National League of Cities as Amici Curiae in Support of Respondents at *16, *Strate* (No. 95-1872), *available in* 1996 WL 709325 (citing Indian Rights-of-Way Act, Act of Feb. 5, 1948, 62 Stat. 17 (codified at 25 U.S.C. §§ 323-328 (1994)). The Secretary of the Interior must obtain consent of the landowner, 25 U.S.C. § 324 (1994), and must pay just compensation for the interest granted, *id.* § 325.

41. Petitioner's Reply Brief at *4, *Strate* (No. 95-1872), *available at* 1996 WL 739255.

42. *Id.* at *3.

43. Petitioner's Brief at *3, *Strate* (No. 95-1872), *available in* 1996 WL 656356.

44. Oral Argument Transcript at *7, *Strate* (No. 95-1872), *available in* 1997 WL 10398. This road continues for approximately seven miles. *Id.*

45. *Id.* at *9.

46. *Id.*

47. Twin Buttes has the following attributes: a population of 300, a K-8 tribal school, an Indian Health Service satellite clinic, and a tribal community center (which A-1 Contractors helped to build).

48. Oral Arguments Transcript at *11, *Strate* (No. 95-1872), *available in* 1997 WL 10398. Twin Buttes itself is located three miles below the lake on the highway. *Id.* The use of the highway constitutes primarily "seasonal use." *Id.* However, many other roads on the Reservation serve as major access for recreational and other purposes to the Lake. *Id.*

Both the Tribe and the State are responsible for setting the rules and regulations applicable to driving on Highway 8 within the Reservation.[49] The Bureau of Indian Affairs, tribal, and State police patrol this 6.59 mile stretch of road. However, the primary enforcers are the Bureau of Indian Affairs and the Tribe.[50]

Gisela Fredericks, the non-Indian accident victim, has long resided on the Reservation, and was "hence an imbedded member of the community with a recognizable social and economic value to the tribal community."[51] She is the widow of a deceased tribal member, Kenneth Fredericks, and mother to their five children. All five of her adult children claimed tribal membership.[52] Further, Mrs. Fredericks owned property located on the Reservation.

A-1 Contractors operated a non-Indian owned subcontracting company located off the Reservation in Dickinson, North Dakota. At the time of the accident, A-1 Contractors was performing work on the Reservation under a $12,400 subcontract agreement for LCM, a corporation wholly owned by the Tribe. In the contract, A-1 agreed to be bound by the tribal building codes, employment rights codes and the regulations and directives of applicable governing authorities.[53] Lyle Stockert, a non-Indian, was part owner of A-1 Contractors and an employee. A-1 Contractors performed certain tasks relating to the excavating, berming and recompacting work in association with the construction of the Twin Buttes tribal community center, all within the Reservation boundaries.

On November 9, 1990, a two-vehicle collision occurred on the Fort Berthold Indian Reservation. Stockert, while operating a gravel truck owned by A-1 Contractors, collided with the vehicle driven by Gisela Fredericks. Mrs. Frederick's extensive injuries required hospitalization for twenty-four days, incurring medical bills in the amount of $30,000.

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49. *Id.* at *4-5.

50. *Id.* at *5-6. A State police officer possesses the authority to issue a citation for a violation on this stretch of highway. If a BIA staff person or a tribal police officer issues a criminal traffic citation, then the subsequent prosecution would occur in State court if a non-Indian perpetrator was involved. When a civil traffic offense arises, such as speeding and open containers-punishable by fine, the violator, whether Indian or non-Indian, must answer to the tribal court, even when cited by non-tribal or non-Federal law enforcement. *Id.* at *5-7.

51. Strate v. A-1 Contractors, 76 F.3d 930, 940 (8th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1404 (1997).

52. Lyndon Benedict Fredericks, Kenneth Lee Fredericks, Paul Jonas Fredericks, Hans Christian Fredericks, and Jeb Pius Fredericks.

53. Strate v. A-1 Contractors, Civ. No. A1-92-24, 1992 WL 696330, at *4 (D.N.D. Sept. 16, 1992), *aff'd*, No 92-3359, 1994 WL 666051 (8th Cir. Nov. 29, 1994), *rev'd en banc*, 76 F.3d 930 (8th Cir. 1996), *aff'd*, 117 S. Ct. 1404 (1997).

VI. The Legal History of Strate v. A-1 Contractors

In May 1991, Mrs. Fredericks and her five adult children instituted an action in the Tribal Court of the Three Affiliated Tribes[54] against Stockert and A-1 Contractors,[55] seeking damages for personal injury (Mrs. Fredericks) and loss of consortium (children), exceeding $13 million.[56] A-1 Contractors subsequently entered a special appearance and moved to dismiss based upon lack of subject matter and personal jurisdiction.[57]

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54. Pursuant to the Tribal Constitution, the Tribe established its own tribal court. Petitioner's Brief, at *3, Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) (No. 95-1872), *available in* 1996 WL 656356 (citing CONST. & BY-LAWS OF THE THREE AFFILIATED TRIBES art. IV, § 3). The tribal court is financed by the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n, with supplementing funds from the Tribe. The Tribe adopted and the Secretary of the Interior approved a code of laws under which the tribal court functions. *Id.* (citing Tribal Business Council, Resolution 82-192 (Oct. 22, 1982)).

55. These parties will be subsequently referred to collectively as A-1 Contractors.

56. *Strate*, 1992 WL 696330, at *1.

57. One noted scholar described the issues of personal and subject matter jurisdiction as follows:

> Personal jurisdiction, the authority to bring a particular defendant before a court, is not at issue in this case. Rather, the case potentially involves two other kinds of jurisdiction: (1) civil adjudicatory jurisdiction, sometimes known as subject matter jurisdiction, the authority to decide a particular type of case; and (2) regulatory or legislative jurisdiction, the authority to apply a state's or tribe's law to conduct occurring within the state or tribe.

Newton, *supra* note 4.

The applicable tribal code provisions involved in the instant case are set out below:

> Chapter 1, Section 3: Jurisdiction of the Courts
>
> Subsection 3.2 — Jurisdiction — Territorial
>
> The jurisdiction of the court shall extend to any and all lands and territory within the Reservation boundaries, including all easements, fee patented lands, rights of way; and over land outside the Reservation boundaries held in trust for Tribal members or the Tribe.
>
> Subsection 3.3 — Jurisdiction — Personal
>
> Subject to any limitations or restrictions imposed by the constitution or laws of the United States, the Court shall have civil and criminal jurisdiction over all persons who reside, enter, or transact business within the territorial boundaries of the reservation; provided that criminal jurisdiction over non-Indians shall extend as permitted by case law.
>
> Subsection 3.5 — Jurisdiction — Subject Matter
>
> The Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation, and over all criminal offenses which are enumerated in this Code, and which are committed within the exterior boundaries of the Reservation.
>
> Chapter 2, Section 3(f): Long Arm Statute
>
> Any person subject to the jurisdiction of the Tribal Court during any of the following acts:
>
> 1) The transaction of any business of the Reservation;

The tribal court denied the motion to dismiss for three reasons. First, Mrs. Fredericks was a resident of the Fort Berthold Indian community with the right to avail herself of the tribal court system. Second, the "consensual" business relationship between A-1 contractors and the tribe made jurisdiction proper over A-1 Contractors. Third, no federal law, treaty or constitutional provisions precluded an exercise of jurisdiction.

Appeals from the tribal court are taken to the Northern Plains Intertribal Court of Appeals. After an adverse finding in the tribal court, A-1 Contractors appealed the jurisdictional finding to the intertribal appeals court, which affirmed the lower court's ruling. The court of appeals then remanded the case for further proceedings consistent with their ruling.

Before any further action occurred in the tribal court, A-1 Contractors filed an action in the United States District Court for District of North Dakota on September 16, 1992. A-1 Contractors named the Fredericks and the tribal parties as defendants.[58] A-1 Contractors sought a declaratory judgment that the tribal court lacked jurisdiction and injunctive relief prohibiting any further action in the tribal court. All parties moved for summary judgment, whereupon the Honorable Patrick A. Conmy, Chief Judge, found summary judgment was an appropriate disposition of the matter and granted both the Fredericks' and the tribal parties' motions.[59]

On June 16, 1993, A-1 appealed to United States Court of Appeals for the Eighth Circuit. A three-judge panel, in a 2-1 opinion, decided in favor of the Fredericks and the tribal parties, thereby affirming the district court's ruling. A-1 Contractors raised only one issue, whether the tribal court could exercise subject matter jurisdiction over Fredericks' claim.[60] Judge McMillian drafted the majority opinion with Judge Floyd R. Gibson joining, and Judge Hansen dissenting.[61]

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2) The commission of any act which results in accrual of a tort action within the Reservation;

3) The ownership, use or possession of any property, or any interest therein, situated within the Reservation.

Strate, 1992 WL 696330, at *4.

58. *See supra* note 2 and the discussion therein.

59. *Strate*, 1992 WL 696330, at *2.

60. Petitioner's Brief at *5 n.3, Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) (No. 95-1872), *available in* 1996 WL 656356.

The issue of personal jurisdiction of the Tribal Court over A-1 was raised in and reached by the Tribal Court (citation omitted), the Tribal Court of Appeals (citation omitted), and the federal district court (citation omitted). All of these courts found that the Tribal Court has personal jurisdiction over A-1. Before the Court of Appeals, A-1 raised only the issue of subject matter, not personal, jurisdiction (citation omitted).

Id.

61. *See* A-1 Contractors v. Strate, No. 92-3359, 1994 WL 666051, at *1 (8th Cir. Nov. 29, 1994), *rev'd en banc*, 76 F.3d 930 (8th Cir. 1996), *aff'd*, 117 S. Ct. (1997).

Upon A-1's request, the Eighth Circuit decided to rehear the case en banc.[62] In an 8-4 decision, the Court reversed the judgment of the district court and determined that the tribal court did not possess subject matter jurisdiction. Judge Hansen authored the majority opinion, joined by Judges Richard S. Arnold, Fagg, Bowman, Wollman, Magill, Loken, and Morris Shepard Arnold, with Judges McMillian, Floyd R. Gibson, Beam and Murphy dissenting.

On May 16, 1996, the Fredericks and the tribal parties petitioned for a writ of certiorari to the United States Supreme Court.[63]

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62. Strate v. A-1 Contractors, 76 F.3d 930 (8th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1404 (1997).

63. Four amicus curiae briefs were filed in support of the Fredericks and the tribal parties. *First*, the United States authored an opinion supporting the petitioners, a fact that did not tip the balance in favor of tribal jurisdiction. United States Supreme Court Amicus Brief of the United States in Support of the Petitioner, Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) (No. 95-1872), *available in* 1996 WL 666742. Deputy Solicitor General Jonathan E. Nuechterlein argued before the United States Supreme Court on their behalf. One of the major themes from the opinion dealt with a tribal court's exercise of adjudicatory jurisdiction. The "courts of one sovereign often adjudicate disputes using the substantive law of another sovereign. That practice reflects the constitutional principle that a sovereign's adjudicatory jurisdiction commonly exceeds its power to impose substantive rules of conduct." *Id.* at *20-21.

Second, the Northern Plains Tribal Judges Association wrote a very nice and succinct piece. United States Supreme Court Amicus Brief of the Northern Plains Tribal Judges Association in Support of the Petitioner, *Strate* (No. 95-1872), *available in* 1996 WL 658740. This organization of tribal judges from North Dakota, South Dakota, Minnesota, and Nebraska represents twenty-five tribal court systems. *Id.* at *1. The Tribal Judges Association was particularly concerned with their ability to perform their duties if the lower court's decision was upheld. "The Court below has emasculated the ability of tribal courts to provide remedies for both Indians and non-Indians in routine domestic relations cases, tort actions, consumer matters and other disputes that are brought before tribal courts on a daily basis." Language espoused in the en banc decision also caused a deep concern to arise.

> Throughout the lower court's opinion the terms non-Indian and non-member are used almost interchangeably. For example, the Court below announces the tribal court subject matter jurisdiction rule of an Indian tribal court as follows: "a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember . . . ." This rule is announced despite the fact that this case does not involve the question of a tribal court's jurisdiction over non-member Indians from other Tribes.

Id. at *9.

Third, due to the increased business activities and other economic endeavors occurring on their Reservations, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Confederated Tribes of the Colville Reservation, Ho-Chunk Nation, St. Croix Band of Chippewa Indians and the Standing Rock Sioux Tribe co-sponsored a supporting brief. United States Supreme Court Amicus Brief of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, et al., in Support of the Petitioner, *Strate* (No. 95-1872), *available in* 1996 WL 658760. Among their many concerns, the one concerning the limitation of the sovereign's ability to govern was expressed best by the following:

> Accidents on highways implicate the interests of a government in promoting safety on its roads for all who use them. An accident may highlight other social

VII. The Decisions

A. The District Court Decision

The district court, referring generally to *Iowa Mutual Insurance*, held that tribal courts possess civil jurisdiction over non-Indians unless specifically restricted by treaty or federal statute.[64] In this case, the court declared, such a limitation over civil causes of action arising on the reservation had not occurred.[65] The court relying on *Oliphant*[66] concluded that tribal civil jurisdiction had not been similarly limited, and determined that "the development of the principles governing civil jurisdiction have been different than those governing criminal jurisdiction."[67] The tribal code clearly provided

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> problems that concern the sovereign, such as high rates of drug or alcohol use among drivers, underage drivers, or uninsured drivers. The may also indicate a need for safety belt laws, child restraint requirements, or modifications in the roads or road signage. Accidents also implicate the government's interest because they frequently require governmental services to address the effects of such accidents. The injured may require ambulance services, medical attention, or other services.

Id. at *13.

Fourth, many other Tribes expressed concern about this case because it may affect their own tribal court systems. The Shakopee Mdewakanton Sioux (Dakota) Community, Sisseton-Wahpeton Sioux Tribe, Spirit Lake Sioux Tribe and Red Lake Band of Chippewa joined to support the petitioners. United States Supreme Court Amicus Brief of the Shakopee Midewakanton Sioux (Dakota) Community, et al., in Support of the Petitioner, *Strate* (No. 95-1872), *available in* 1996 WL 658737. All of these Tribe's possess their own tribal courts and exercise general civil jurisdiction. For this reason, the Tribes stated,

> Unsafe conduct of this sort has the potential to damage property or injure or kill people on the Reservation, whether those people are tribal members, nonmember residents, or visitors to the Reservation. . . . The Eighth Circuit's decision establishes a rule whereby a nonmember driving negligently on the Reservation who hits and injures a tribal member is subject to Tribal Court jurisdiction, but a nonmember driving negligently on the Reservation who hits and injures a nonmember escapes the jurisdiction of the Tribal Court. The conduct at issue — negligent driving — is the same in each case, yet the Tribal Court's authority to address the conduct is determined by the status of the victim.

Id. at *8.

64. Strate v. A-1 Contractors, Civ. No. A1-92-24, 1992 WL 696330, at *5 (D.N.D. Sept. 16, 1992), *aff'd*, No. 92-3359, 1994 WL 666051 (8th Cir. Nov. 29, 1994), *rev'd en banc*, 76 F.3d 930 (8th Cir. 1996), *aff'd*, 117 S. Ct. 1404 (1997).

65. *Id.*

66. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). *Oliphant* precluded Tribes from exercising criminal jurisdiction over non-Indians because such jurisdiction had been preempted by congressional action granting the federal courts jurisdiction. *Id.* at 204.

67. Strate v. A-1 Contractors, Civ. No. A1-92-94, 1992 WL 696330, at *3 (D.N.D. Sept. 16, 1992) (citing National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 855 (1985) (refusing to extend *Oliphant* to case involving tribal civil jurisdiction)), *aff'd*, No. 92-3359, 1994 WL 66051 (8th Cir. Nov. 29, 1994), *rev'd en banc*, 76 F.2d 930 (8th Cir. 1996), *aff'd*, 117 S. Ct. 1404 (1997).

for personal and subject matter jurisdiction and, therefore, the tribal court could properly exercise both.[68]

B. The First Three-Judge Appellate Court Decision

First, the three-judge appellate court held that it was not erroneous for the district court to determine that the tribal court had subject matter jurisdiction.[69] Second, the court held that *Montana*, and the *Montana* exceptions, were not applicable to the case at bar.[70] Dismissing the *Montana* exceptions as inapplicable, the court proclaimed that the general divestiture of general civil jurisdiction as found in *Montana* related only to fee land owned by non-Indians, a circumstance not found here.

The court addressed two other issues. The first regarded the exhaustion of tribal remedies, and the second issue involved federal court abstention. The tribal remedies had been exhausted, thereby benefitting the three-judge appellate court because they now had advantage of the tribal court's expertise and analysis.[71] As a result of the policies expressed in *Iowa Mutual Insurance*[72] and *National Farmers Union*,[73] this additional benefit correlated to the federal government's long-standing policy of supporting tribal self-government, including tribal courts and self-determination.

An explicit finding of *no limiting* treaty provision or federal statute allowed a conclusion that the tribal court's exercise of civil jurisdiction over non-Indians in Indian country had not been restricted.[74] Thus, the court was able to reason,"'[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.'"[75]

In the alternative under the *Montana* analysis, the panel determined that both exceptions had been met. First, a consensual relationship existed because of the subcontract.[76] Second, the tribe had an important and legitimate interest in protecting the health and safety of its members and residents on the roads and highways within the Reservation.[77]

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68. *Id.* at *5.

69. Strate v. A-1 Contractors, No. 92-3359, 1994 WL 666051, at *2 (8th Cir. Nov. 29, 1994), *rev'd en banc*, 76 F.3d 930 (8th Cir. 1996), *aff'd*, 117 S. Ct. 1404 (1997).

70. *Id.*

71. *Id.* at *4.

72. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987).

73. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856 (1985).

74. *Strate*, 1994 WL 666051, at *5.

75. *Id.* (citations omitted).

76. *Id.* at *5.

77. *Id.* at *6.

C. The Second En Banc Appellate Court Decision

A-1 Contractors, displeased by the three-judge appellate court's decision, appealed to the Second Circuit for an en banc ruling. The en banc appellate court held that the tribe does not retain the inherent sovereign power to exercise subject matter jurisdiction.[78] The court announced that the standards articulated in *Montana*[79] governed the outcome of this case, along with the subsequent cases utilizing those standards.[80] The tribal court could not exercise jurisdiction unless the Fredericks' and the tribal parties could establish a tribal interest under either one of the *Montana* exceptions.[81] *Iowa Mutual Insurance*, *National Farmers Union*, and *Williams v. Lee*, and *Merrion v. Jicarilla Apache Tribe*[82] did not support the contentions of the Fredericks' and the tribal parties.[83] *Iowa Mutual Insurance* only discussed tribal exhaustion, nothing more. "Hence, *Iowa Mutual* should not be read to expand the category of activities which *Montana* described as giving rise to tribal jurisdiction over non-Indians or nonmembers. Instead, we read it within the parameters of *Montana*."[84]

In an almost indecipherable and somewhat circular argument, the court determined that *Montana* specifically broadened the general principles underlying *Oliphant*[85] to civil jurisdiction.[86] "Thus, when *National Farmers Union* state[d] that civil tribal jurisdiction over nonmembers [was] not foreclosed by *Oliphant*, that observation [was] perfectly consistent with *Montana*, which provides for broader tribal jurisdiction over non-Indians than does *Oliphant*."[87] Furthermore, the court found that *Williams v. Lee* fit squarely with the consensual agreement exception because *Montana* specifically cited to *Williams* when creating the two exceptions.[88]

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78. Strate v. A-1 Contractors, 76 F.3d 930, 940 (8th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1404 (1997).

79. Montana v. United States, 450 U.S. 544 (1981).

80. *Strate*, 76 F.3d at 934.

81. *Id.* at 935.

82. 455 U.S. 130 (1982). *Merrion* is the seminal case on tribal taxation of non-Indian activities on a reservation, wherein the Court concluded that "Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.'" *Id.* at 140-41. They "are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Id.* Also, "the Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such person, but is an inherent power necessary to tribal self-government and territorial management." *Id.*

83. *Strate*, 76 F.3d at 935.

84. *Id.* at 936.

85. Oliphant v. Suquamish Indian Tribes, 435 U.S. 191 (1987).

86. *Strate*, 76 F.3d at 937.

87. *Id.*

88. *Id.* The court stated that the Fredericks and the tribal parties also placed too much emphasis on the footnote in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982).

The en banc appellate court asserted that *Montana* and *Brendale* did not limit their discussions or rationales to only jurisdictional issues arising on fee lands.[89] Rather, "*Montana* explicitly addressed the authority of tribes to exercise civil jurisdiction on the reservation, as well as on non-Indian fee lands."[90] The court, therefore, concluded that any effort to limit *Montana* and *Brendale* to fee land jurisdictional issues was not supported by either one of these cases.[91]

Next, a discussion ensued concerning the distinctions between the *Iowa Mutual Insurance* tribal adjudicatory jurisdiction line of cases versus the *Montana* tribal regulatory jurisdiction line of cases. The court noted that this distinction *did* appear in some commentaries, irregardless such a "distinction [did] not appear explicitly, or even implicitly, anywhere in the case law."[92] However, in *Montana* and those line of cases involving regulatory jurisdiction, nothing suggests that their reasoning was limited to a consideration of tribal authority being regulatory in nature. Actually, those cases involved civil jurisdiction in broad and unqualified terms.[93] The en banc court went on to suggest that "some of the language in *Iowa Mutual*, *Williams*, and *Merrion* can be viewed in isolation to create tension with *Montana*."[94]

All of these cases read together established one broad, comprehensive scheme:

> [A] valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.[95]

> The Court made the observation in isolation in a case dealing with the tribe's authority to impose a severance tax on non-Indians on the reservation. The Court found this taxation power was derived either from the tribe's inherent power of self-government or the power to exclude . . . both of which are consistent with the inherent powers the tribe retains over nonmembers described in Montana. *Both Merrion and Iowa Mutual say essentially the same thing: the inherent attributes of sovereignty that an Indian tribe retains, which under Montana are very limited when dealing with non-Indians, remain intact unless affirmatively limited by the federal government.*

Strate, 76 F.3d at 937 (emphasis added).

89. *Strate*, 76 F.3d at 937.

90. *Id.*

91. *Id.* at 938.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

D. The Supreme Court Decision

On April 28, 1997, the United States Supreme Court affirmed the lower court's ruling, in one of the most anti-Indian and deleterious decisions of recent vintage.[96] The court declared that tribal courts may not exercise jurisdiction when an accident occurs on a public highway maintained by the State pursuant to a federally granted right-of-way over Indian reservation land.[97] Indeed, the Supreme Court maintained that a nonmember civil action of this type fell under the state or federal regulatory and adjudicatory governance.[98] Hence, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers driving on the State's highways, the tribal court was without authority to act.[99] The Court made clear, however, that they were not addressing the issue of the governing law or proper forum when an accident arises on a tribal road within a reservation.[100]

The Court relied on three basic premises to justify its decision. First, absent express authorization by federal statute or treaty, tribal jurisdiction over nonmembers' conduct exists only in limited circumstances.[101] Second, *Montana* controlled the disposition of this case, and neither *Iowa Mutual* nor *National Farmers* established a rule contrary to *Montana*.[102] Third, the right-of-way North Dakota acquired resembled and was equivalent to, for nonmember governance purposes, non-Indian owned land within the reservation.[103]

Prior to beginning their legal analysis, the Court reiterated a fact completely superfluous to the issue at hand, "'the state forum is physically much closer by road to the accident scene . . . than [was] the tribal courthouse.'"[104] Citing to *Oliphant v. Suquamish Tribe*[105] for the proposition of limited tribal jurisdiction over the conduct of nonmembers, the Court, thus, leads into their discussion of *Montana v. United States*.[106] As a general rule, *Montana* only established that Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within the reservation, subject to the two exceptions.[107] The Court went on to address the petitioner's

96. Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997). Justice Ginsberg delivered the opinion of the unanimous Court.

97. *Id.* at 1407.

98. *Id.* at 1407-08.

99. *Id.* at 1408.

100. *Id.*

101. *Id.*

102. *Id.* at 1409.

103. *Id.* at 1410.

104. *Id.* at 1413.

105. 435 U.S. 191 (1978).

106. 450 U.S. 544 (1981); *Strate*, 117 S. Ct. at 1411.

107. *Strate*, 117 S. Ct. at 1413.

argument that *Montana* did not apply to the case at bar by discussing *National Farmers* and *Iowa Mutual*.[108] "*National Farmers* and *Iowa Mutual* . . . are not at odds with, and do not displace, *Montana*. Both decisions describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction; neither establishes tribal-court adjudicatory authority, even over the lawsuits involved in those cases."[109]

The general rule and the exceptions announced in *Montana* only apply in the absence of a delegation of tribal authority by treaty or statute. Nothing more may be extracted from *National Farmers* than this: "a prudential exhaustion rule, in deference to the capacity of tribal courts 'to explain to the parties the precise basis for accepting [or rejecting] jurisdiction.'"[110]

An examination of *Iowa Mutual* followed to show that the exhaustion rule pronounced in *National Farmers* was a prudential rule, not a jurisdictional rule, based on comity.[111] The statement relied on heavily by the petitioners and the United States that "civil jurisdiction over such activities presumptively lies in the tribal courts,"[112] did not limit the *Montana* rule. Rather, it only stood for the unremarkable proposition that in such cases where nonmembers enter into consensual relationships with the tribe or tribal members, or where the on-reservation activity of nonmembers affects the political integrity, the economic security, or the health or welfare of the tribe, then civil jurisdiction presumptively lies within the tribal courts.[113]

The Court held that absent congressional direction enlarging tribal-court jurisdiction, as to nonmembers, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.[114] "Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts, with respect to non-Indian fee lands, generally 'does not extend to the activities of nonmembers of the tribe.'"[115]

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108. *Id.* at 1410.

109. *Id.*

110. *Id.* at 1411 (citing National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 857 (1985)). Also, referred to was a footnote from *National Farmers* indicating that exhaustion was not an unyielding requirement:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

Id. at 1411 n.7 (citing *National Farmers*, 471 U.S. at 856 n.21 (citation omitted)).

111. *Id.* at 1411.

112. *Id.* at 1412 (citing *Iowa Mutual*, 480 U.S. at 18).

113. *Id.*

114. *Id.*

115. *Id.* at 1413 (citing Montana v. United States, 450 U.S. 544, 565 (1981)).

The next argument confronted by the Court involved the assertion that *Montana* did not pertain to this case because the land underlying the scene of the accident was trust land.[116] It was decided that *Montana* applied because the Court equated the right-of-way at issue with land alienated to non-Indians within the reservation.[117] Furthermore, the authority of tribal police officers to patrol roads within the reservation, including the rights-of-way made part of a state highway, was severely restricted.[118] A painful conciliatory revelation was made that the tribal police only possess the power to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law.[119]

To prevail, the petitioner had to fulfill the two *Montana* exceptions. The petitioners failed to meet this burden under either exception to the Court's satisfaction. The kinds of cases that fell under the first *Montana* exception, a consensual relationship, comprise the following: the on-reservation sales transaction between nonmember plaintiffs and member defendants,[120] tribal permit tax on nonmember-owned livestock within reservation boundaries,[121] tribal permit tax on nonmembers for the privilege of conducting business within reservation borders,[122] and the tribal tax of on-reservation cigarette sales to nonmembers.[123]

These type of cases also reflect the category of nonmember activities contemplated by the second *Montana* exception.[124] Nonmembers who recklessly drive on such a road endanger all in the area, and undoubtedly imperil the security and safety of tribal members. "But if *Montana*'s second exception requires no more, the exception would severely shrink the rule." The Court concluded with the following pronouncement in footnote 14:

> When . . . it is plain that no federal grant provided for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion

116. *Id.*
117. *Id.* at 1414.
118. *Id.* at 1414 n.11.
119. *Id.*
120. *Id.* at 1415 (citing Williams v. Lee, 358 U.S. 217, 223 (1959)).
121. *Id.* (citing Morris v. Hitchcock, 194 U.S. 384 (1904)).
122. *Id.* (citing Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905)).
123. *Id.* (citing Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 152-54 (1980)).
124. *Id.* at *35.

requirement must give way, for it would serve no purpose other than delay.[125]

VIII. Analysis

A. Why Montana Differs Theoretically

Montana is inapplicable to *Strate v. A-1 Contractors* because of the vast differences between tribal adjudicatory and regulatory authority. Tribal adjudicatory authority concerns the power of a tribal court to decide a particular type of case. Whereas, tribal regulatory authority stems from the application of tribal laws to the facts of the case.[126] *Montana* and the cases employing a similar line of reasoning are simply incompatible with *Strate*. The regulatory cases concerned issues intricately tied to non-Indian owned land and the regulation thereof by the tribes. *Montana* and *Brendale* simply establish a premise based upon land formerly owned by the tribe. That is, once an Indian tribe conveys its land to non-Indians, the former right of absolute and exclusive use and occupation of the conveyed lands was lost. "The general divestiture of tribal civil jurisdiction over the activities of non-Indians recognized in *Montana* is applicable only to fee lands owned by non-Indians."[127]

It is not an unusual occurrence for the court of one state to apply the law of another under choice-of-law rules, nor is it peculiar for adjoining states to possess concurrent jurisdiction over a matter.[128] Citizens of one state travel

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125. *Id.* at 1416 n.14 (citations omitted).

126. Newton, *supra* note 4.

127. A-1 Contractors v. Strate, Civ. No. A1-92-94, 1992 WL 696330, at *4 (D.N.D. Sep. 16, 1992), *aff'd*, No. 92-3359, 1994 WL 666051 (8th Cir. Nov. 29, 1994), *rev'd en banc*, 76 F.3d 930 (8th Cir. 1996), *aff'd*, 117 S. Ct. 1404 (1997).

128. Oral Argument Transcript for Tuesday, Jan. 7, 1997, at *21-*30, Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) (No. 95-1872), *available in* 1997 WL 10398 (Jonathan E. Nuechterlein on behalf of the United States, as amicus curiae).

One of the Court's primary concerns discussed in *Strate* was the unavailability of appellate review. *Id.* at *22-*23. No review process of tribal court decisions exists, either in the federal court or the Supreme Court. As a matter of comity, the federal court might exercise a review. The tribes and states use the legal principle of comity to enforce foreign judgments as a matter of courtesy and respect rather than an as obligatory right. Hon. William D. Johnson, *Honor and Respect: Recognition and Enforcement of Court Judgments in Indian Country, in* TRIBAL COURT RECORD, Spring/Summer 1996, at 29, 32. To date, no common law or federal statute authorizes such appellate jurisdiction. Congress also prohibits sister states from challenging the first State's choice of law in a collateral attack under the Due Process, U.S. CONST. amend. XIV, § 1, and Full Faith and Credit Clauses, U.S. CONST. art. 4, § 1, of the Constitution. Although if a valid basis for the action exists, then Due Process will not enable review of every such collateral attack. Congress needs to address this issue to advance their espoused policy of tribal court promotion.

The implementing statute for the Full Faith and Credit Clause is 28 U.S.C. § 1738 (1994), which requires: "Such . . . judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or

through other states frequently with the understanding that such conduct makes them subject to that sovereign's laws. No distinction should arise when such activity leads them into reservation boundaries. In the instant case, a sign had been posted alerting travellers that they were entering the reservation. This should function as sufficient notice for all concerned. Prohibiting tribal court jurisdiction emasculates the ability of the tribal police to effectively patrol and enforce the relevant laws against violators. At the very least, concurrent jurisdiction ought to exist between the tribe and the state.

B. How Montana Differs Factually

The Supreme Court strained to apply *Montana*; however, the facts do not support its contentions. By equating the right-of-way, *only a limited easement*, with the non-Indian owned fee land at issue in *Montana*, *Brendale*, and *Bourland*, the Court struggled to thrust this case into the general rule of *Montana*. The road operated as a BIA gravel service road to the tribal headquarters. The federal water resource project under control of the Army Corp of Engineers forced the tribal headquarters to move. Also, as a result, existing Indian communities were isolated. Due to this isolation, the tribe desired to have this road paved. Indeed, Highway 8 does not even function as a major thoroughfare.

According to the Court, this road, along with the right-of-way, was created only for access to the federal water resource project. The facts simply do not support this contention! The Court went on to further reason that the "right-of-way [was] open to the public, and traffic on it [was] subject to State control. The Tribes have consented to, and received payment for, the State's use of the 6.59-mile stretch for a public highway. They have retained no gatekeeping right."[129] Noticeably absent from the Court's factual summation were the facts leading up to the tribe's displacement, isolation and reasons for acquiescing to the limited easement.

Foremost, this road was paved for access to the isolated Indian communities, and then for accessibility to the federal water resource project. Therefore, the Court's alignment of the right-of-way with land alienated to non-Indians should not suffice to skirt around *Montana*, *Brendale*, and *Bourland*. Hence, *Montana* should not apply using this land-based approach, as the government still held the land underlying the right-of-way in trust for the Tribe. Furthermore, this factual narration appeared more in line with the

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usage in the courts of such State, Territory or Possession from which they are taken." Under the Full Faith and Credit Act, 28 U.S.C. § 1738 (1994), Professor Robert Clinton argues that tribal court judgments fall within the meaning of "territories and possessions," and, therefore, such judgments should receive full faith and credit and recognize foreign judgments accordingly. Johnson, *supra*, at 32 n.13 (citing Robert N. Clinton, Full Faith and Credit, Comity and Tribal Courts, Address Before the Judicial Conference, National American Indian Court Judges Association (Apr. 1996)).

129. Strate v. A-1 Contractors, 117 S. Ct. 1404, 1414 (1997).

dual tribal and state rules and regulations applicable to the highway. The BIA, tribe, and state police all take responsibility for enforcing the relevant rules and regulations and patrolling the highway, with the BIA and the tribe acting as the primary enforcers.

The Court further declared that absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers driving on the State's highways, the tribal court lacked the authority to act. *However*, Congress has repeatedly implemented broad mandates relating to Indian people, which the Court obviously ignored in *Strate*, signaling that the tribe not only should have, but must have, general civil jurisdiction to survive as a politically self-sufficient entity. Additionally, congressional action should not even be necessary, as the tribes retain all those inherent powers not expressly revoked. However, since the *Strate* Court decided otherwise, Congress must now enact legislation authorizing tribal jurisdiction over accidents.

C. Congressional Affirmation of the Tribal Courts

Beginning with the Indian Reorganization Act (IRA) of 1934,[130] Congress sought to encourage tribal entities to rebuild, thus "laying the foundation for Indian tribal governments after years of domination by the federal government."[131] Congress' intent was to protect the tribe's political integrity and powers of self-governance. Under the IRA, many tribes adopted constitutions or organized pursuant to their inherent sovereign power. Tribes set up their own court systems and code of laws or elected to remain under the Bureau of Indian Affairs Courts of Indian Offenses (CFR Courts).[132]

In 1975, the Indian Self-Determination and Education Assistance Act[133] was enacted. This Act has been the cornerstone of the Federal Government's Indian policy for over two decades. The tribes were given the authority to contract with the federal government to operate programs serving their tribal members.[134] Self-determination promotes the tribal operation of federal programs and services administered by the BIA and the Indian Health Service.[135]

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130. Pub. L. No. 73-383, 48 Stat. 984 (codified at 25 U.S.C. 461-479 (1994)).

131. ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 366 (3d ed. 1991).

132. TRIBAL COURT HANDBOOK: FOR THE 26 FEDERALLY RECOGNIZED TRIBES IN WASHINGTON STATE at 2 (Prof. Ralph W. Johnson & Rachael Paschal eds., 2d ed. 1992).

133. Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. § 450a (1994)).

134. *Indian Self-Determination & Education Assistance Act: Oversight Hearing Before the Subcomm. on Native American Affairs of the House Comm. on Natural Resources on the Implementation of the Indian Self-Determination Act, and Development of Regulations Following Passage of the 1988 Amendments to the Act*, 103d Cong. 33 (1994) (prepared statement of Sen. John McCain) [hereinafter *1994 Oversight Hearing*].

135. *Id.*

The origins of Self-Determination, more commonly referred to as P.L. 93-638 or "638", can be traced back to President Nixon's 1970 "Special Message to the Congress on Indian Affairs" which stated:

> For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. Part of the reason for this situation has been the threat of termination. But another reason is the fact that when a decision is made as to whether a federal program will be turned over to Indian administration, it is the federal authorities and not the Indian people who finally make that decision.
>
> This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing to assume administrative responsibility for a service program which is presently administered by a federal agency.[136]

In 1974, Congress responded to President Nixon's message by passing the Indian Self-Determination and Education Assistance Act. This Act was signed into law by President Ford on January 4, 1975.[137]

The Tribal Self-Governance Demonstration Project was first authorized by the 1987 Amendments to Public Law 93-638.[138] This Demonstration Project applied only to the Department of the Interior. Considered an experimental approach, self-governance increased the tribes' flexibility and authority in the administration of programs, services, activities or functions previously performed for the tribe by federal employees.[139] In 1994, Congress made the Self-Governance permanent for the Department of the Interior under Title IV, known as the Tribal Self-Governance Act of 1994.[140]

The statute of most recent import signifying Congress' intent to promote tribal court systems is the Indian Tribal Justice Act of 1993.[141] The dire needs of the tribal court justice systems spurred the enactment of this

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136. *Id.* at 34.

137. S. REP. NO. 374, 103rd Cong. 2 (1994).

138. S. REP. NO. 392, 102d Cong. 42 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3943, 3984-85. For a more in-depth discussion of the self-governance issue, see Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251 (1995).

139. Statement of Sen. John McCain, Senate Committee on Indian Affairs (Federal Documents Clearing House, Inc. May 2, 1995), *available in* 1995 WL 253279 (supporting tribal self-governance generally).

140. The 1994 Amendments to the Indian Self-Determination Act included the Tribal Self-governance Act of 1994, Pub. L. No. 103-413, tit. 2, §§ 201-204, tit. 4, §§ 401-408, 108 Stat. 4250, 4270, 4272.

141. Pub. L. No. 103-76, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601-3631 (1994)).

legislation.[142] This act authorized the appropriation of more than $50 million over a seven year period to support the tribal courts.[143]

Janet Reno, in 1994, issued a statement pertaining to the Department of Justice' position in regard to the tribal justice systems:

> The Department is committed to strengthening and assisting Indian tribal governments in their development and promoting Indian self-governance. Consistent with federal law and Departmental responsibilities, the Department will consult with tribal governments concerning law enforcement priorities in Indian country, support duly recognized tribal governmental powers in coordination with the Department of Interior and other federal agencies, investigate government corruption when necessary, and support and assist Indian tribes in the development of their law enforcement systems, tribal courts, and traditional justice systems.[144]

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142. Hon. William C. Canby, Jr., *Tribal Courts, Viewed from a Federal Judge's Perspective*, TRIBAL COURT RECORD, Spring/Summer 1996, at 15, 17. To date, Congress had never appropriated the money. *Id.*

143. *Id.* During oral argument, Nuechterlein argued that the "Indian Tribal Justice Act, which commits essential Federal resources to the development of tribal courts on the premise embraced by this Court in Iowa Mutual that tribal jurisdiction over events arising on a reservation presumptively does lie in tribal court." Oral Argument Transcript for Tuesday, Jan. 7, 1997, at *25, Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997) (No. 95-1872), *available in* 1997 WL 10398 (arguments before United States Supreme Court).

144. Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113 n.3 (1995). This statement was made pursuant to President Clinton's 1994 mandate requiring federal agencies to deal with Indian governments on a government-to-government basis when treaty or tribal government rights are in contention. 1 PUB. PAPERS 800-03 (1994).

> In every relationship between our people, our first principle must be to respect your right to remain who you are, and to live the way you wish to live. And I believe the best way to do that is to acknowledge the unique government-to-government relationship we have enjoyed over time. Today I reaffirm our commitment to self-determination for tribal governments.
>
> . . . .
>
> This then is our first principle — respecting your values, your religions, your identity and your sovereignty. This brings us to the second principle that should guide our relationship. We must dramatically improve the federal government's relationships with the tribes and become full partners with the tribal nations.
>
> I don't want there to be any mistake about our commitment to a stronger partnership between our people. Therefore, in a moment, I will also sign an historic government directive that requires every executive department and agency of government to take two simple steps: first, to remove all barriers that prevent them from working directly with tribal governments; and second, to make certain that if they take action affecting tribal resources, they consult with tribal governments prior to that decision. It is the entire government, not simply the Department of the Interior, that has a trust responsibility with tribal governments. And it is time the entire government recognized and honored that responsibility.

D. Congressional Limitations on Tribal Expressions of Self-Government

When Congress has intended to permit a restraint on tribal self-government and the punishment of offenses, it has done so specifically. Four statutes in particular reflect this preemption of tribal authority by the assumption of federal jurisdiction. The applicable statutes govern criminal jurisdiction and are set out in sections 1151, 1152, 1153, and 13 of Title 18 of the United States Code. A number of federal statutes that have nothing to do with any of the above mentioned statutes will also govern conduct in Indian country because federal jurisdiction will remain generally applicable everywhere.[145]

Section 1151 gives the definition of Indian country. Three different types of Indian country exist: reservations, dependent Indian communities, and Indian allotments.[146]

Section 1152 involves the Federal Enclaves, the General Crimes Act, and the Interracial Crimes Act. Through section 1152, the body of federally defined crimes now extends to Indian country, exclusive of state jurisdiction; for example, the laws generally applicable to military bases and federal parks.

Five exceptions have arisen from the various twists and interpretations given to this statute. First, this section does not apply to offenses of crimes between Indians, generally referred to as intra-Indian crime. Second, due to a judicially created exception in *McBratney*,[147] section 1152 does not reach crimes between non-Indians committed upon Indian land. In such circumstances, the state possesses exclusive jurisdiction. Third, if a defendant has already been punished under tribal law, then the federal government has no jurisdiction; a double jeopardy type of exception. However, federal jurisdiction is not exclusive of the Tribe. Concurrent jurisdiction between the Tribe and the federal government has been interpreted to apply only to

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President's Remarks to American Indian and Alaska Native Tribal Leaders, Apr. 29, 1994, 30 WEEKLY COMP. PRES. DOC. 941, 941-42 (May. 9, 1994), *available in* 1994 WL 157598, at *1-*2 (remarks by President Clinton in historic meeting with American Indian and Alaska Native tribal leaders).

145. An example of this is the federal statute addressing treason.

146. 18 U.S.C. § 1151 (1994). Specifically the statute says the following:

> [The] term Indian country . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, *including rights-of-way* running through the same.

Id. (emphasis added). One should note that Indian country as defined in section 1151 includes rights-of-way running through the reservation, which is exactly the issue we are confronted with in *Strate*.

147. United States v. McBratney, 104 U.S. 621 (1881) (overturning federal court decision for lack of jurisdiction for crime committed on reservation by two non-Indians).

defendants convicted in tribal court. If no conviction is obtained in tribal court, then the federal government may proceed in a prosecution of the individual. Fourth, exclusive tribal jurisdiction continues if it is set out by treaty stipulation. This has little viability toady, as few treaties exist that could arguably apply. The last exception concerns victimless/consensual crime; the crime of adultery is an example of this exception.

Section 1153 denies tribal jurisdiction over fourteen listed offenses. This section was enacted in 1885 in response to the Supreme Court decision in *Crow Dog*.[148] The Major Crimes Act extended federal jurisdiction, exclusive of the states, to Indian defendants for those crimes enumerated in section 1153 and committed within Indian country as defined in section 1151.[149]

The Assimilative Crimes Act[150] was designed to fill the gaps in the federal statutory scheme. This Act incorporates lesser state crimes into section 1152 when such crimes are not defined by an enactment of Congress. This only applies to interracial crimes. The federal courts retain jurisdiction but utilize the applicable state law. Upon examination, an argument exists that the Assimilative Crimes Act was never meant to apply to Indian country.[151]

Two relatively recent cases decided by the Supreme Court limited tribal criminal misdemeanor jurisdiction over non-Indians and non-member Indians; *Oliphant*[152] and *Duro v. Reina*.[153] In response to *Duro*, Congress amended

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148. *Ex parte* Crow Dog, 109 U.S. 556 (1883) (discussing the murder of an Indian by an Indian in Indian country). Justice Brennan surmised that "it is implausible to conclude that Congress did not consider the situation of intertribal crimes when passing the Indian Major Crimes Act." Duro v. Reina, 495 U.S. 676, 704 (1990).

149. 18 U.S.C. § 1153 (1994). The statute lists the following offenses:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offenses referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Id.

150. 18 U.S.C. § 13 (1994).

151. Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 520-52 (1976), *reprinted in* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 282 (3d ed. 1991).

152. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (denying tribal court criminal jurisdiction over crimes committed by non-Indians).

153. Duro v. Reina, 495 U.S. 676 (1990) (determining that Indian tribes lack criminal

Title 25 section 1301 of the United States Code, thereby affirming inherent tribal powers to exercise criminal jurisdiction over *all* Indians.[154]

The tribes retain all the powers not limited by treaties, agreements, or specific acts of Congress. It is clear that these inherent powers include the right to exercise civil jurisdiction over non-Indians and non-member Indians when such persons enter the territory under a tribe's control. Without this basic right, the tribes' ability to maintain law and order within their territories will be virtually paralyzed. This right is fundamental to their survival. The Supreme Court shifted this presumption to that of non-jurisdiction absent an express congressional statute or treaty granting such jurisdiction, which clearly goes against one of the basic tenets underlying the inherent sovereignty concept and stands in direct conflict with prevailing congressional policy.

Many of the tribal courts currently in existence originated from the 1934 Indian Reorganization Act. One expression of sovereignty arises from the creation of tribal judicial systems.[155] In the last fifteen to twenty years, tribal court systems have evolved and developed significantly.[156] Many issues, such as domestic relations, child custody, probate, tort, and criminal prosecutions, may achieve a more satisfactory resolution in tribal judicial systems because of their special strengths.[157] The methods utilized by tribal courts should not be limited to only intra-tribal disputes. These methods lend themselves to the resolution of conflicts "between one tribe and another, and between a tribe and the State and Federal government, political units, private investors, or contractors."[158] As the role of the tribal courts proceeds to develop, these courts have an "increasingly important role to play in the administration of the laws of our nation."[159]

Montana should not apply because of the differences previously mentioned between regulatory and adjudicatory jurisdiction. However, if one must proceed under the general rule of *Montana*, then an exception ought to exist

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misdemeanor jurisdiction over nonmember Indians).

154. 25 U.S.C. § 1301 (1994). The relevant portion of the statute states:

> "[P]owers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians . . . .

Id. § 1301(2).

155. Johnson, *supra* note 128, at 29.

156. Hon. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, TRIBAL COURT RECORD, Spring/Summer 1996, at 12, 12.

157. *Id.* at 13. "The special strengths of the tribal courts — their proximity to the people served, the closeness of the relations among the parties and the court, their often greater flexibility and informality — give tribal courts special opportunities to develop alternative methods of dispute resolution." *Id.*

158. *Id.*

159. *Id.* at 14.

to the strict non-Indian distinction. "Civil jurisdiction on the reservation is almost entirely tribal."[160] Tribal courts possess civil jurisdiction in matters involving Indians, and when incidents affect tribal interests.

It is presumed that tribes do not possess criminal jurisdiction over non-Indians because of the judicially created premise of *Oliphant*.[161] As to civil jurisdiction, the opposite presumption governs.[162] That is, when the activities of non-Indians affect the tribe's political integrity, economic security, or health and welfare, then the tribe may properly exercise jurisdiction.[163] However, when such activity by non-Indians does not impact tribal interests, then the tribe may not properly exercise jurisdiction.[164] "If two non-Indians, for example, are in a traffic accident on the reservation, a lawsuit by one driver against the other has to be brought in state and not in tribal court."[165] If just one of the parties is Indian, then this should suffice to confer jurisdiction upon the tribal judicial system.[166] Thus, essentially every reservation-based activity by a non-Indian affecting Indians or Indian property exposes one to the tribe's civil jurisdiction.[167]

If *Montana* does apply to the instant case, then the Court should have developed an examination to discover the reasons that the tribal interests are affected when the subject of the suit involves two non-Indians. Gisela Fredericks was married to a deceased tribal member. For many years, Gisela Fredericks had lived on the reservation. She was an imbedded member of the community with verifiable ties to the Indian community. Her monetary loss, pain, and suffering detrimentally impacted her five children, who claimed tribal membership. Any adverse action against Gisela Fredericks substantially threatened the tribal interests and the Indian community. Additionally, the tribe had a considerable interest in protecting the health and safety of those traveling on their roads and highways within the reservation.

A-1 Contractors entered into a consensual relationship with the tribe by entering upon and transacting business within reservation. More than likely, A-1 employed tribal members because the contractual relationship required A-1 to follow the employment rights code. A lawsuit against A-1 might have caused layoffs and other negative repercussions, thus directly affecting the economic security of the community in which A-1 worked. Accordingly, both non-Indian parties have extensive ties to the community. Therefore, *Montana* should not apply because Indian issues are implicated, even though technically the accident arose between two non-Indians.

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160. STEPHAN PEVAR, THE RIGHTS OF INDIANS AND TRIBES 154 (2d ed. 1992).
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 155.
165. *Id.*
166. *Id.*
167. *Id.*

IX. Future Ramifications of This Decision

The Court made an egregious error when it maintained that tribal jurisdiction over *nonmembers* only exists subject to an express authorization or treaty.[168] Up to this point, the converse had been the policy. All of the powers were once held by the tribes. Indian tribes' sovereign powers include all those that have not been limited or qualified by treaties, agreements, or specific acts of Congress. This Court's decision shifts the presumption away from tribal jurisdiction to one that only allows tribal action when a federal statute or treaty has so deemed it.

The Court pronounced that *National Farmers* and *Iowa Mutual* did not expand or stand apart from *Montana's* main rules and its exceptions, which delineated the bounds of the tribes' power when exercising civil jurisdiction over non-Indians.[169] Thus, the Court made *National Farmers* and *Iowa Mutual* virtually useless, reducing them to standing for nothing more than a *prudential* rule based upon comity. In fact, the Court articulated that neither *National Farmers* nor *Iowa Mutual* established "tribal-court adjudicatory authority, even over the lawsuits involved in those cases."[170]

Essentially, ignoring the difference between tribal regulatory and adjudicatory jurisdiction, the Court empowers the general rule of *Montana* even further by declaring that when it does apply, then the exhaustion requirement must give way. It defies reason and logic for the Court to establish a rule requiring tribal exhaustion, and then pronounce a directive limiting this to only tribal members. According to the Court, both decisions only establish an exhaustion requirement "allowing tribal courts initially to respond to an invocation of their jurisdiction."[171]

Once again, the line has been blurred between nonmember Indians and tribal members. The Court repeatedly made references to *nonmembers*, rather than just to non-Indians. Thus, reinstating the underpinnings evident in *Duro v. Reina*. Hence, this case encompasses both non-member Indians and non-Indians alike. Many nonmember Indians reside outside their own tribal jurisdictions and within the areas controlled by other tribes. This inauspicious reference will cause turmoil in all tribal territories.

This would certainly create more of a "jurisdictional void" in Indian country than presently exists, resulting in a situation where everyone refuses to act, including the tribes, states, and federal government-hurting both Indian and non-Indian alike. It seems unlikely that Congress would extend to the tribes criminal jurisdictional powers over nonmember Indians, and then

168. Strate v. A-1 Contractors, 117 S. Ct. 1404, 1409 (1997).
169. *Id.* at 1413.
170. *Id.* at 1410.
171. *Id.*

preclude an exercise of civil jurisdiction, a much less intrusive exercise of jurisdiction.

X. Conclusion

"The federal judiciary is embracing the conservative, indeed, reactionary posture of the 1890s, and as the pendulum swings even further to the right, there is a danger that *Plessy v. Ferguson* will once again become mainstream constitutional law."[172] In 1866 when Congress enacted the first Civil Rights Act outlawing segregation, the United States Supreme Court struck it down, thereby allowing people to discriminate based on public accommodations. The Supreme Court frustrated Congress' intent, and the Jim Crow laws were allowed to persist, finally being struck down in *Brown v. Board of Education*.[173] The Supreme Court stymied progress in this area for over one hundred years.[174] Just as in this case, the Court has successfully frustrated the federal government's long-standing policy of supporting tribal self-government, including tribal courts and self-determination.

The Supreme Court granted certiorari on two issues: (1) whether *Montana* standards apply to adjudicatory jurisdiction; and (2) if *Montana* does apply, what is the appropriate application. The proper conclusion to draw between the *National Farmers Union* line of cases and the *Montana* lines of cases is this: *National Farmers Union*, and subsequent cases, concerned tribal civil adjudicatory jurisdiction, whereas, the *Montana* case, and those relying on its rationale, should be limited to areas where tribal-state regulatory jurisdiction conflicts arise on non-Indian owned fee land, such as over hunting and fishing permits.

Many non-Indian plaintiffs have brought suits in tribal courts against Indian defendants since the *Williams v. Lee* decision without suffering adversely or needlessly. Today, in 1997, it should not matter whether the defendant is Indian or non-Indian. The Supreme Court should not have endorsed nor allowed such a deleterious decision to stand.

An analysis of Indian issues needs to occur involving those with the most to lose, Indian people, to fit the realities of this day and age, instead of relying on stale law and perpetuating the discrimination of old on a new generation of Indian people. The time has come for those in power to listen to the leaders of the Indian Nations. Congress should act immediately to restore some *sanity* to this area of the law.

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172. Deloria, Jr., *supra* note 35, at 963 (citing Plessy v Ferguson, 163 U.S. 537 (1896) (upholding the state prosecution of Plessy when he refused to leave the coach reserved for whites)).

173. 347 U.S. 483 (1954) (concluding that in the field of public education the doctrine of "separate but equal" has no place).

174. Can nine unelected people really do better than the legislature through the people?