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NUCLEAR INCIDENTS ON INDIAN RESERVATIONS: WHO HAS JURISDICTION? TRIBAL COURT EXHAUSTION VERSUS THE PRICE-ANDERSON ACT

James W. Kuntz*

Introduction

While the "Cold War" nuclear threat may be over, litigation in the arena of nuclear-related incidents is heating up. Surprisingly, Native Americans may find themselves intimately involved in this litigation in the near future. This is because much of Native American lands contain facilities that mine and produce uranium for the United States' nuclear energy programs.

In the wake of these uranium production facilities are five thousand Native American employees¹ and thousands of other Indian families that live dangerously close to the facilities.² William Rowe, former Deputy Assistant Administrator for Radiation Programs of the Environmental Protection Agency, testified in congressional hearings that radon gas is so highly carcinogenic that radioactive levels at uranium mill sites would approximately double the lung cancer rate for nearby residents.³ While it may take many years for unsuspecting Native Americans and their families to recognize they have been injured, it is only a matter of time before some seek compensation for their injuries in court.

But which court do Native Americans turn to for help? Tribal court? State court? Federal court? One would suspect Indians could go to their own reservation tribal court to seek recompense for their injuries. Under the tribal court exhaustion doctrine, the tribal court should have jurisdiction over the action because the injury occurred to an Indian on reservation land.⁴ The only

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Second-place winner, 1995-96 *American Indian Law Review* Writing Competition.

1. Meyers, *Uranium Industry Labor Market Analysis*, San Juan Basin Regional Uranium Study, Working Paper No. 10, at 7 (May 1, 1978).

2. The Nuclear Regulatory Commission found radionuclide exposure from radon gas and particulates increased by as much as sixty percent for people living within a fifty mile radius of a uranium mill. Nuclear Regulatory Comm'n, *Draft Environmental Impact Statement on Uranium Milling*, at 6-47 (Apr. 1979).

3. *Uranium Mill Tailings Radiation Control Act of 1978: Hearings on H.R. 1480 Before the Subcomm. on Energy and Power, Comm. on Interstate Commerce*, 95th Cong. 400 (1978).

4. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

exception to the exhaustion doctrine is when the federal government expressly precludes tribal court jurisdiction.⁵ Enter the Price-Anderson Act.

Congress enacted the Price-Anderson Act in 1957 to protect the public from nuclear accidents by mandating regulatory standards for private businesses and providing compensation for the public in the event of a nuclear incident.⁶ The 1988 Amendments to the Act give original jurisdiction to federal courts and provide for an absolute right of removal from a state court to the federal district court where the nuclear incident takes place.⁷ Noticeably absent from the entire Act is any express mention of tribal courts or tribal court jurisdiction. Without an express preclusion, one would believe that Indians could bring Price-Anderson claims to their tribal court without contention. However, as is the case with many statutory readings, the law is not as clear as it first appears. There are signs Congress intended there to be an express prohibition against tribal court jurisdiction within the Price-Anderson Act.

The purpose of this article is to explore jurisdictional authority over nuclear-related incidents that take place on Indian land. This article will first discuss the historical aspects of the Price-Anderson Act, including a look at the pertinent jurisdictional sections of the Act. Next, the article will consider the Native American sovereignty perspective. The Native American sovereignty perspective is that tribal court exhaustion applies to nuclear incidents that take place on reservation land because there is no express jurisdictional prohibition stated within the Price-Anderson Act. The article will then consider the Price-Anderson perspective. Legislative history, case law, and statutory interpretation of Price-Anderson will be reviewed to demonstrate Congress may have intended to create an express tribal court jurisdictional prohibition.

Finally, the article will consider the future implications of the Price-Anderson Act on tribal court jurisdiction. In this author's opinion, the Price-Anderson Act, as written today, only ensures nuclear-related incidents are consolidated and decided in a single forum — the Act does not preclude tribal court jurisdiction. However, a wise tribal court may defer jurisdiction to federal court because of the complexity of nuclear regulatory litigation and the potential problems associated with presiding over claims from numerous federal, state, and possibly other Native American tribal jurisdictions. Moreover, the absence of any language concerning tribal court jurisdiction within the Price-Anderson Act may be a legislative oversight. Consequently, a tribal court accepting jurisdiction over a Price-Anderson claim may lose administration over the complaint through a subsequent amendment to the Act by Congress.

5. *Id.* at 18.

6. 42 U.S.C. § 2210 (1994).

7. *Id.* § 2210(n)(2).

History of the Price-Anderson Act

Congress initiated regulation of the nuclear power industry with the enactment of the Atomic Energy Act of 1946. While that statute reflected Congress' determination that the nuclear power industry would be a government monopoly, Congress later concluded that it would be in the national interest to permit private sector involvement in the industry under a system of federal licensing and regulation. This policy decision was implemented in the Atomic Energy Act of 1954.⁸ However, the private actors entering the nuclear power industry were still required to confront the risks associated with potentially devastating liability which might be imposed in the event of a major nuclear accident. "[W]hile repeatedly stressing that the risk of a major nuclear accident was extremely remote, spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation."⁹

Congress responded in 1957 by passing the Price-Anderson Act.¹⁰ The Act had the dual purpose of "protect[ing] the public and . . . encourag[ing] the development of the atomic energy industry."¹¹ The Act contained three central elements. First, the Act set a ceiling on the aggregate liability that could be imposed upon those engaged in the use and handling of radioactive material "either through contract with the Federal Government or under a license issued by the Federal Government for the private development of such activities."¹² The second important feature of the Act involved the "channeling of liability." Under this provision, any entity exposed to potential liability for activity resulting in a nuclear incident,¹³ even if it was not a direct participant in the activity, was entitled to indemnification. Finally, the Price-Anderson Act established that all public liability claims above the amount of required public insurance protection "would be indemnified by the Federal Government, up to the aggregate amount on liability."¹⁴

In 1966, prior to the scheduled expiration of the Price-Anderson Act, the liability limitation portions of the Act were extended for an additional ten years

8. *Id.* §§ 2211-2281.

9. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 64 (1978).

10. 42 U.S.C. § 2210 (1994).

11. *Id.* § 2012(i).

12. S. REP. NO. 100-218 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1477.

13. A nuclear incident is defined as

any occurrence . . . within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material

42 U.S.C. § 2014(q) (1994).

14. S. REP. NO. 100-218, *reprinted in* 1988 U.S.C.C.A.N. at 1477.

and a new provision was added which required that those indemnified waive the defenses of negligence, contributory negligence, charitable or governmental immunity, and assumption of risk in the event of an action arising from the result of an extraordinary nuclear occurrence.¹⁵ The 1966 amendments also provided for the transfer of all claims arising out of an extraordinary nuclear occurrence to a federal district court.¹⁶ These provisions grew out of congressional concern that state tort law dealing with liability for nuclear incidents was generally unsettled and some way of ensuring a common standard of responsibility for all jurisdictions was needed.¹⁷

In 1975, Congress amended the Price-Anderson Act a second time. These amendments extended the Act's coverage and made certain liability limitation adjustments. Provision was also made to phase out the federal indemnity portion of the Price-Anderson scheme.

In 1988, Congress amended the Price-Anderson Act for a third time, enacting the Price-Anderson Amendments Act of 1988. The decision to amend and extend the Price-Anderson Act grew out of the congressional conclusion that:

The Price Anderson system, including the waiver of defenses provisions, the omnibus coverage, and the predetermined sources of funding, provides persons seeking compensation for injuries as a result of a nuclear incident with significant advantages over the procedures and standards for recovery that might otherwise be applicable under State tort law. The Act also provides a mechanism whereby the federal government can continue to encourage private sector participation in the beneficial uses of nuclear materials.¹⁸

The Amendments Act included an expansion of the reach of section 2210(n)(2) to provide for removal of, and original federal jurisdiction over, claims arising from any "nuclear incident."¹⁹ Section 2210(n)(2) was amended to read as follows:

15. 42 U.S.C. § 2210(n)(1) (1994). An extraordinary nuclear occurrence is defined as any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the . . . Commission . . . determines to be substantial, and which the . . . Commission . . . determines has resulted or will probably result in substantial damages to persons offsite or property offsite.

Id. § 2014(j).

16. *Id.* § 2210(n)(2).

17. A waiver of defenses approach was thought to be preferable since it entailed less interference with state tort law than would the enactment of a federal statute prescribing strict liability. See S. REP. NO. 89-1605 (1966), reprinted in 1966 U.S.C.C.A.N. 3201.

18. S. REP. NO. 100-218, reprinted in 1988 U.S.C.C.A.N. at 1479.

19. See *supra* note 13.

With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on . . . [the date of the enactment of the Price-Anderson Amendments Act of 1988]) or United States district court shall be removed or transferred to the United States district court having venue under this subsection.²⁰

It is the language and the legislative history of this section which generates the questions concerning tribal court jurisdiction over Price-Anderson claims.

Public Liability

Section 2014(hh) of the Price-Anderson Act defines a public liability action as "any suit asserting public liability."²¹ Under the terms of the 1988 Amendments Act, the "public liability action" encompasses "any legal liability" of any person who may be liable because of a nuclear incident.²² Given the breadth of this definition, the consequences of a determination that a particular plaintiff has failed to state a public liability claim potentially compensable under the Price-Anderson Act is that he has no claim at all.

After the Amendments Act, no state cause of action based upon public liability exists. *A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or it is not compensable at all.* Any conceivable state tort action which might remain available to a plaintiff following the determination that his claim could not qualify as a public liability action, would not be based on 'any legal liability' of 'any person who may be liable on account of a nuclear incident.' It would be some other species of tort altogether, and the fact that the state courts might recognize such a tort has no relevance to the Price-Anderson scheme.²³

20. 42 U.S.C. § 2210(n)(2) (1994).

21. *Id.* § 2014(hh). Public liability is a concept which was not changed by the 1988 Amendments Act. Public liability was defined in the original Price-Anderson Act as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation . . ." *Id.* § 2014(w).

22. *Id.* § 2014(w).

23. *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854-55 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992) (emphasis added) (*TMI II*).

Consequently, there can be no action for injuries caused by a nuclear incident separate and apart from the federal public liability action created by the 1988 Amendments to the Price-Anderson Act. Thus, all claims against a party concerning a nuclear incident fall under the auspices of the Price-Anderson Act and must be tried according to the federal statute.²⁴

Jurisdiction Over Nuclear Incidents

Native American Sovereignty Perspective

The issue as to whether a Native American tribal court has jurisdiction to adjudicate a lawsuit involving injuries to Indians arising from a nuclear incident that takes place on Indian territory has been overlooked since the Price-Anderson Act was enacted in 1957. This is a major oversight considering the highest concentration of uranium mining and milling activity occurs on Indian reservations in the San Juan River Basin of northern New Mexico and southern Colorado.²⁵ Potential claims of uranium contamination and subsequent cancer are just now beginning to surface in Native American families.²⁶ Each of

24. Congress recognized that Article III of the Constitution limited the types of cases that federal courts created under the Article may hear. For this reason, House Bill 1414 expressly states that any suit asserting public liability shall be deemed to be an action under the Price-Anderson Act, thereby making suits asserting public liability "[c]ases . . . arising under . . . the laws of the United States" within the meaning of Article III. Rather than design a new body of substantive rules for decision in nuclear incident actions, the bill provides the substantive rules for decision shall be derived from the law of the state in which the nuclear incident occurs unless such law is inconsistent with the Price-Anderson Act. H.R. REP. NO. 100-104, pt. 1, at 18 (1987). The constitutionality aspect of the Price-Anderson Act is beyond the scope of this article.

25. Almost half of the area within the basin, the Grants Mineral Belt, lies on lands belonging to the Navajo Nation, Laguna Pueblo, Acoma Pueblo, and Canonicito Pueblo. Uranium production on Indian lands in the Grants Mineral Belt and elsewhere in New Mexico account for nearly fifty percent of the total uranium oxide mined in the United States since 1977. The leased Navajo Nation land account for fifteen percent of the mineral belt contributions and the bulk of the uranium oxide production. OFFICE OF THE SECRETARY, SOUTHWEST REGION, U.S. DEPT OF THE INTERIOR, STATUS REPORT: URANIUM DEV. ON FED. AND INDIAN LANDS, NORTHWEST N.M. AREA 1 (1976).

26. *See* Kerr-McGee Corp. v. Kee Tom Farley, No. Civ. 95-0438 MV (D.N.M. filed May 25, 1995) (Motion for Preliminary Injunction) (Motion denied). There are uranium mills which operate on Indian country but not on a reservation. Title 18 U.S.C. § 1151 explicitly includes certain off-reservation lands as Indian country. The United States Code defines "Indian country" as:

- (a) [a]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United States, . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1994). Therefore, even if an issue arises outside the reservation, but still on Indian country, it can arguably be pursued in the tribal court prior to being considered by the federal courts due to the tribal court exhaustion doctrine.

these claims would assert public liability and therefore would need to be brought under the Price-Anderson Act.²⁷

Tribal Court Exhaustion Doctrine

According to federal law, tribal courts are presumed to have jurisdiction for injuries to Indians occurring on the reservation, and such jurisdiction is retained until Congress expressly states otherwise.²⁸ In *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*,²⁹ the United States Supreme Court established what is now commonly referred to as the "tribal exhaustion doctrine."³⁰ In *National Farmers*, the Crow Tribal Court entered a default judgment against a school district and in favor of a Crow Tribe for injuries resulting from a motorcycle accident in a school parking lot.³¹ The school was located on the Crow Reservation.³² The school and its insurer subsequently filed an action in federal court, seeking an injunction against the tribal member pursuing the claim, arguing that the Crow Tribal Court had no jurisdiction over non-Indians.³³ The Supreme Court held that the federal court had subject matter jurisdiction to adjudicate the school district's motion for injunction because the issue as to whether or not the tribal court had jurisdiction over non-Indians was a federal question.³⁴ Nevertheless, the Court held the federal court should not hear the case because to do so would be an impermissible infringement upon the sovereignty of the Crow Tribe.³⁵ Specifically, the Court stated:

Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by

In 1985, the Navajo Tribal Council amended the Navajo Tribal Code (with Resolution CJY-57-85) to clarify the definition of territorial jurisdiction. This was done in order to bring the definition of "Navajo Indian country" in line with the federal definition of "Indian Country" found in case law interpreting 18 U.S.C. § 1151. Navajo Indian country is defined as: All land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Tribe or any Band of Navajo Indians. NAVAJO NATION CODE tit. 7, § 254 (Equity 1986).

27. See *supra* text accompanying note 23.

28. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

29. 471 U.S. 845 (1985).

30. *Id.* at 857.

31. *Id.* at 847.

32. *Id.*

33. *Id.* at 848.

34. *Id.* at 857.

35. *Id.* at 856.

allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.³⁶

The Supreme Court went on to hold that "[w]hether the federal action should be dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings, is a question that should be addressed in the first instance by the District Court."³⁷

Similarly, in *Iowa Mutual Insurance Co. v. LaPlante*,³⁸ the Supreme Court addressed the issue of whether the tribal court exhaustion requirement announced in *National Farmers*, a federal question case, also applied to cases in which federal court jurisdiction was predicated on diversity of citizenship. The Supreme Court held the tribal court exhaustion doctrine applied to diversity of citizenship cases because "[t]he diversity statute, 28 U.S.C. § 1332, makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government."³⁹ The Court emphasized that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. . . . Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact."⁴⁰ Thus, because nothing in 28 U.S.C. § 1332 demonstrated an intent by Congress to limit tribal jurisdiction, "the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'⁴¹

Courts with jurisdiction in the San Juan River Basin have referred to the tribal court exhaustion doctrine as an inflexible bar to consideration by the federal court. In *Texaco, Inc. v. Zah*,⁴² the Tenth Circuit Court of Appeals noted:

When the activity at issue arises on the reservation, these policies [to promote tribal self-determination] almost always dictate that the parties exhaust their tribal remedies before resorting to the federal forum. Thus, we have characterized the tribal exhaustion rule as 'an inflexible bar to consideration of the merits of the petition by the federal court.'⁴³

36. *Id.*

37. *Id.* at 857.

38. 480 U.S. 9 (1987).

39. *Id.* at 17.

40. *Id.* at 18 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982)) (referring to sovereign power to tax).

41. *Id.* at 16 (quoting *National Farmers*, 471 U.S. at 857).

42. 5 F.3d 1374 (10th Cir. 1993).

43. *Id.* at 1378; *see also* *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991) (requiring a

Similarly, in *United States v. Tsosie*,⁴⁴ the New Mexico District Court stated, "When the dispute is a 'reservation affair' . . . there is no discretion not to defer."⁴⁵

On the basis of courts' views of the tribal court exhaustion doctrine, one can assert the only way a tribal court could lose its jurisdiction for injuries to Indians occurring in Indian country is by Congress expressly stating there is no tribal court jurisdiction.⁴⁶ This is where the Price-Anderson Act fits in. The Price-Anderson Act arguably preempts the field of nuclear-related injuries.⁴⁷ Thus the questions become: (1) whether the Price-Anderson Act provides an express prohibition to tribal court jurisdiction; and (2) whether tribal courts have concurrent jurisdiction over Price-Anderson claims.

Tribal Court Jurisdictional Prohibition

Principles of Native American sovereignty always begin with the tribal court maintaining jurisdiction over claims which occur in their country. While the Price-Anderson Act may determine who can exercise regulatory control over nuclear licensees, the Act does not determine whether a tribal court is capable of adjudicating a nuclear incident. A tribal court, just as much as a state court, has the ability to apply federal law to reach a decision. The Supreme Court in *Iowa Mutual* emphatically rejected the argument that tribal courts are somehow biased or not competent enough to render just decisions.⁴⁸ Similarly, in *Tsosie*, the district court in the San Juan River Basin jurisdiction stated that "a tribal court, presumably, is as competent to interpret federal law as it is state law."⁴⁹

Cases concerning Price-Anderson speak in terms of the federal government's preemptory right to regulate the nuclear industry.⁵⁰ None of the cases discuss preemptory rights for jurisdictional matters. For example, in *In re Three Mile Island Litigation Cases Consolidated II (TMI II)*,⁵¹ the court held as a result of Price-Anderson, "states are precluded from regulating the safety aspects of nuclear energy,"⁵² and the federal government has "exclusive regulatory authority."⁵³ The court went on to hold that although damage actions under Price-Anderson are governed by state law, state standards of liability were nevertheless void if they "frustrate[d] the objectives of the federal law."⁵⁴ The

petition to be dismissed when it appears there has been a failure to exhaust all tribal remedies).

44. 849 F. Supp. 768 (D.N.M. 1994).

45. *Id.* at 772 (quoting *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1408 (9th Cir. 1991)).

46. *Iowa Mut. Ins. Co.*, 480 U.S. at 18.

47. See *supra* notes 21, 24 and accompanying text.

48. *Iowa Mut. Ins. Co.*, 480 U.S. at 19.

49. *Tsosie*, 849 F. Supp. at 773.

50. This includes the issuing of nuclear licenses, imposing operation standards, etc.

51. 940 F.2d 832 (3d Cir. 1991).

52. *Id.* at 859 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 240-41 (1984)).

53. *Id.* (quoting *Silkwood*, 464 U.S. at 254).

54. *Id.* (quoting *Silkwood*, 464 U.S. at 256).

Price-Anderson Act itself states the "substantive rules for decision in [an action for damages] shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [the Price-Anderson Act]."⁵⁵

In other words, "states are preempted from imposing a non-federal duty in tort, because any state duty would infringe upon pervasive federal regulation in the field of nuclear safety, and thus would conflict with federal law."⁵⁶ These are choice of law issues which have no bearing on the issue of which courts have jurisdiction to adjudicate causes of action arising under Price-Anderson. The Act may preempt the field of nuclear energy and may create a "new and independent, indeed exclusive, cause of action,"⁵⁷ but preemption, in the context of Price-Anderson, only means the tribal court adjudicating the case must apply federal law.

Concurrent Jurisdiction

Tribal self-government advocates also contend Price-Anderson does not create exclusive jurisdiction in the federal courts. When Congress intends to provide for an exclusively federal forum, it knows how to say so. In the Securities Exchange Act of 1934,⁵⁸ the United States Code expressly states that "[t]he district courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder."⁵⁹ Contrary to this specific language by Congress, Price-Anderson provides:

With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have *original jurisdiction* without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in *any* State court . . . or United States district court shall be removed or transferred to the United States district court having venue under this subsection.⁶⁰

From the Native American sovereignty perspective, this section of the Price-Anderson Act completely and unambiguously refutes any contention that

55. 42 U.S.C. § 2014(hh) (1994).

56. *TMI II*, 940 F.2d at 859 (citing *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983)).

57. *O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994).

58. 15 U.S.C. § 78a (1994).

59. *Id.* § 78aa.

60. 42 U.S.C. § 2210 (n)(2) (1994) (emphasis added).

Congress intended for federal courts to be the exclusive forum for adjudicating actions under the Act.

The Act expressly acknowledges state courts may adjudicate Price-Anderson cases. The fact such cases are subject to removal does not eliminate the existence of concurrent state jurisdiction. Moreover, the fact that section 2210 (n)(2) speaks only in terms of state courts cannot be read to mean only state courts, and not tribal courts, have concurrent jurisdiction. Tribal courts are presumed to have jurisdiction over matters arising on reservation lands, unless Congress expressly and affirmatively takes such jurisdiction away.⁶¹ Because the terms of section 2210 (n)(2) of Price-Anderson provide for concurrent state jurisdiction, tribal courts should be read to have concurrent jurisdiction as well. If Congress intended anything to the contrary, it would have expressly stated so in the Act itself.

Civil tribal court jurisdiction over non-Indians on Indian lands is presumed unless Congress expressly takes it away. Neither the text nor the legislative history of the Price-Anderson Act specifically address how the Act would affect Indian tribes or tribal courts. The contention that tribal courts have no jurisdiction because the Price-Anderson Act does not specifically delegate such jurisdiction to tribal courts misapplies the rule in *Iowa Mutual*.

Congress does not have to delegate jurisdictional authority to tribal courts. In fact, the opposite is true. The Supreme Court made this clear in *Iowa Mutual* when it stated: "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."⁶² Similarly, the Tenth Circuit stated with respect to non-Indians on reservation lands, that "[j]urisdiction presumptively lies in the tribal court, therefore, unless Congress has expressly limited that jurisdiction."⁶³

The only exceptions to the tribal court exhaustion doctrine can be found in footnote 21 in the *National Farmers* case.⁶⁴ In *National Farmers*, the Supreme Court stated it did "not suggest that exhaustion would be required . . . where the action is patently violative of express jurisdictional prohibitions";⁶⁵ however, the Court insisted in the later opinion of *Iowa Mutual* that the jurisdictional prohibition be express.⁶⁶ Thus, when a federal statute fails to address issues pertaining to tribal court jurisdiction, "the proper inference from [congressional] silence . . . is that the sovereign power . . . remains intact."⁶⁷

61. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

62. *Id.*

63. *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991).

64. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985).

65. *Id.*

66. *Iowa Mut. Ins. Co.*, 480 U.S. at 18.

67. *Id.* (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982)).

The removal provisions of the Price-Anderson Act does not guarantee a right to a federal forum.⁶⁸ To the extent there is any guarantee, it is only that a defendant in state court may remove the case to federal court. Nothing in section 2210(n)(2) authorizes, much less guarantees, that actions in tribal court may also be removed to federal court.

The Federal Circuit Court in the San Juan River Basin held actions in tribal courts cannot be removed. In *Becenti v. Vigil*,⁶⁹ the issue was whether 28 U.S.C. § 1442(a)(1), which authorizes removal of cases involving actions against officers of the United States, applied to actions initially filed in tribal court.⁷⁰ The Tenth Circuit held tribal court actions could not be removed because 28 U.S.C. § 1442 (a)(1) did not expressly authorize removal of tribal court actions.⁷¹ The United States contended the purpose of the removal statute was to ensure that "a Federal officer or agent shall not be forced to answer for conduct assertedly within his duties in any but a Federal forum."⁷²

In rejecting the federal forum argument, the Tenth Circuit held "[t]he question before us, however, is not whether Congress has the power to authorize removal of actions commenced in tribal courts . . . but rather whether Congress has in fact done so. We must be careful not to expand the jurisdiction of federal courts beyond Congressional mandates."⁷³ Hence, the fact 28 U.S.C. § 1442(a)(1) did not expressly authorize removal from tribal court was dispositive.

The reasoning of *Becenti* also applies to the Price-Anderson Act. If Congress desired to guarantee a federal forum for all Price-Anderson-related incidents, including those cases filed in tribal court, Congress would have stated so expressly. It did not. Had Congress desired to confer exclusive federal jurisdiction over Price-Anderson incidents, Congress would have said so expressly. It did not. Accordingly, the Price-Anderson Act does not guarantee a federal forum.

Summary

From the Native American sovereignty perspective, the Price-Anderson Act does not contain an express prohibition of tribal court jurisdiction nor compel

68. See *supra* text accompanying note 20.

69. 902 F.2d 777 (10th Cir. 1990).

70. *Id.*

71. *Id.* at 781.

72. *Id.* at 779 (quoting *North Carolina v. Carr*, 386 F.2d 129, 131 (4th Cir. 1967)).

73. *Id.* at 780. However, it can be argued the Tenth Circuit never reached the second jurisdictional issue of whether the tribal court could entertain a suit against a federal officer acting within the scope of their governmental authority. When the same issue has been properly presented through a direct federal action for injunction, the Ninth Circuit has twice held tribal court exhaustion is unnecessary. *United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986); *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); see also *infra* text accompanying note 97.

exclusive federal jurisdiction. Thus, tribal court jurisdiction remains intact. *National Farmers, Iowa Mutual*, and their progeny leave no choice: the question of tribal court jurisdiction over nuclear incidents occurring within Indian country must be decided initially by the tribal court itself.

Price-Anderson Perspective

The foregoing Native American sovereignty views of jurisdictional issues in the case law context of the Price-Anderson Act could lead one to argue there can be no "express jurisdictional prohibition" under *National Farmers and Iowa Mutual* unless exclusive federal jurisdiction is explicitly reserved within the text of the statute at issue.⁷⁴ Predictably however, the law is not so crisp. Instead, courts have recognized a jurisdictional prohibition may be made "express" through (1) legislative history, (2) interpretive case law, or (3) contextual interpretation of the statute itself. The jurisdictional prohibition contained within 42 U.S.C. § 2210(n)(2) of Price-Anderson can be independently demonstrated through each of these means. The resulting conclusion from these interpretations is that tribal courts may not have jurisdiction over nuclear incidents that occur on their territory under the Price-Anderson Act.

Legislative History

The United States Supreme Court relied on legislative history to determine whether there were jurisdictional prohibitions in the very cases that established the tribal court exhaustion doctrine. In *Iowa Mutual*, the Supreme Court held tribal courts had jurisdiction over diversity cases based upon the legislative history of 28 U.S.C. § 1332:

The diversity statute, 28 U.S.C. § 1332, makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government. Tribal courts in the Anglo-American mold were virtually unknown in 1789 when Congress first authorized diversity jurisdiction, see Judiciary Act of 1789, § 11, 1 Stat. 78-79; and the original statute did not manifest a congressional intent to limit tribal sovereignty.⁷⁵

Similarly, in *National Farmers*, the Supreme Court inferred a legislative intent to allow tribal courts federal question jurisdiction over non-Indians by comparing the absence of federal legislation governing such civil suits with preemptive legislation that gives federal courts jurisdiction over non-Indians charged with crimes in Indian country.⁷⁶ Although there are federal statutes punishing crimes by non-Indians on the reservation, the court noted that "there

74. See, e.g., 15 U.S.C. § 78aa (1994); see also *supra* text accompanying note 28.

75. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987).

76. *National Farmers*, 471 U.S. at 854.

is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation.⁷⁷ Accordingly, the Court found a lack of a congressional intent to create the same exclusive federal jurisdiction over non-Indians in civil cases as it had for reservation criminal cases through the Major Crimes Act.⁷⁸

Uniformly, the legislative history of 42 U.S.C. § 2210(n)(2) demonstrates a clear congressional intent that any defendant, or the Nuclear Regulatory Commission itself, has an absolute right to have Price-Anderson case in federal court has been true from the beginning of Price-Anderson. When section 2210(n)(2) was first enacted in 1966, Price-Anderson covered only Extraordinary Nuclear Occurrences (ENOs);⁷⁹ then the statute was written so all claims arising from the same ENO could be consolidated before a single federal court.

New Section 170(n)(2) [42 U.S.C. § 2210(n)(2)] establishes the applicable venue and jurisdiction for public liability actions arising out of or resulting from an "extraordinary nuclear occurrence."

. . . .

An action may be instituted in a State court or another U.S. district court, and, indeed, may be permitted to continue in such court if the circumstances of the occurrence and the action do not appear to the defendant or the Commission to necessitate removal. However, *the absolute right of removal or transfer by the defendant or the Commission to the U.S. district court having venue under subsection 170(n)(2) [42 U.S.C. § 2210 (n)(2)] would be assured.*⁸⁰

The consequences of limiting Price-Anderson claims to ENOs became apparent when over three thousand claims arising from the Three Mile Island accident were filed in different state and federal courts.

The Three Mile Island nuclear accident⁸¹ was the primary impetus for the 1988 revisions of section 2210(n)(2) of the Price-Anderson Act. Over three thousand claims were filed as a result of the Three Mile Island incident, however because of the 1966 ENO limitation in section 2210(n)(2), the Third

77. *Id.*

78. *Id.* at 854-55. The Major Crimes Act provides that Indians committing any of the enumerated offenses "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." 18 U.S.C. § 1153 (1994). Courts of appeals have read this language to exclude tribal jurisdiction over the Indian offender. *See, e.g., Felicia v. United States*, 495 F.2d 353, 354 (8th Cir.), *cert. denied*, 419 U.S. 849 (1974); *Sam v. United States*, 385 F.2d 213, 214 (10th Cir. 1967).

79. *See supra* note 15.

80. S. REP. NO. 89-1605, at 645, *reprinted in* 1966 U.S.C.C.A.N. at 3228 (emphasis added).

81. The accident was not designated as an ENO by the Nuclear Regulatory Commission.

Circuit in *Stibitz v. General Public Utilities Corp.*⁸² held there was no basis under Price-Anderson to remove the various multiparty Three Mile Island state cases to a single federal court.⁸³ Accordingly, all of the cases, which initially had been removed to federal district court, were returned to the various state courts in which they had been filed.⁸⁴

The 1988 Amendments to the Price-Anderson Act addressed this problem by: (1) expanding Price-Anderson to include all nuclear-related torts ("nuclear incidents"); (2) reaffirming the absolute right of defendants or the Nuclear Regulatory Commission to have all related cases consolidated before a single federal district court; and (3) making the changes retroactive so *Stibitz* cases could become consolidated in *TMI II*.⁸⁵

The need for these changes was the subject of congressional testimony by lawyers representing both sides of the Three Mile Island controversy. John Harkins, an attorney representing multiple *TMI II* defendants, addressed the *Stibitz* decision:

The effect of [the Third Circuit Court's decision in *Stibitz*] was to send the [TMI] litigation, in effect, back to the State court systems and, as it has gradually evolved, into other State court systems, and other Federal courts as well. . . . Jurisdiction is, therefore, a key question in terms of transactional efficiency.⁸⁶

The Price-Anderson Act had worked well, with the exception of this jurisdictional issue. The problem that arose from varying jurisdictions handling a nonserious nuclear accident, like TMI, was that it could spawn thousands of claims in hundreds of different jurisdictions. Consequently, the cost to determine the appropriate level of compensation in each jurisdiction becomes extraordinarily high. This would be true unless some means was provided to consolidate the litigation in one federal court. David Berger, an attorney for multiple *TMI II* plaintiffs, addressed the need for consolidation in terms of judicial economy: "[W]e should have a minimizing of transactional costs. Instead of having thousand of cases brought all over the fifty states and six territories . . . there would be one court, one case to resolve the matter."⁸⁷

In the *Nuclear Regulation Hearing* itself, specific questions regarding compensation for claimants and federal jurisdiction were asked by the presiding senators. The responses to these questions are persuasive in demonstrating that

82. 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985).

83. *Id.* at 997.

84. *Id.*

85. *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854-55, 861 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992) (*TMI II*); *see supra* text accompanying notes 18-20.

86. *Reauthorization of the Price-Anderson Act, May 13, 1986: Hearings on S. 445, S. 1225, and S. 1761 Before the Subcomm. on Nuclear Regulation on the Comm. on Env't and Pub. Works, 99th Cong. 4* (1986) [hereinafter *Nuclear Regulation Hearing*].

87. *Id.* at 13.

it was the legislature's intent to create "exclusive" federal jurisdiction for claims falling under the Price-Anderson Act. Each of the witnesses at the hearing answered that they favored exclusive federal jurisdiction in a single court in order to expedite and handle compensation issues. The following is a brief excerpt of the *Nuclear Regulation Hearing*:

Senator Simpson: If you could . . . [I would like you to] expand on what impact the presence of multiple defendants has on the prosecution of a case, or proceeding with a case, comment specifically on how litigation affects the ability of claimants to recover. . . .

Berger (response in part): I think that if you had a *single court, a Federal court, and it must be a Federal court, with the exclusive jurisdiction to hear and determine the cases arising out of a nuclear incident*, that . . . the court would be ordered to handle the question of compensation for victims, and that can be taken care of very swiftly⁸⁸

Senator Mitchell addressed the same issue of federal jurisdiction immediately following Senator Simpson's questions:

Senator Mitchell: What about a single federal court with exclusive jurisdiction?

Mr. Harkins: Yes, absolutely, Senator, I believe that is highly necessary. We had it until the Third Circuit ruled there wasn't Federal question jurisdiction [in *Stibitz*]. We had it and we had the efficiencies that go with it. I think that we should get it back legislatively.

Senator Mitchell: It would be better for the defendants as well as the plaintiffs wouldn't it?

Mr. Harkins: For both sides, absolutely. It makes all of the advantages for the system, and it doesn't give any unusual advantage to either party.

Mr. Kennedy (of the Nuclear Regulatory Commission): I would subscribe to what Mr. Harkins has said. We, long ago concluded in other connections that in the mass case, *the right solution is exclusive Federal jurisdiction in a single Federal court*.⁸⁹

Additional support for consolidation of nuclear claims in a single federal court can be found from statements by Senator McClure, the ranking minority member in the State Energy Committee at the time, who read a statement by one of the witnesses of the same *Nuclear Regulation Hearing* into the *Congressional Record* during debates on the Price-Anderson Amendments Act.

88. *Id.* at 13-14 (emphasis added).

89. *Id.* at 17-18 (emphasis added).

Kenneth Feinberg, an attorney for multiple plaintiffs in asbestos litigation and former staff member of the Judiciary Committee, stated:

To avoid confusion, inconsistency, and duplicative litigation in large-scale accidents, the [Price-Anderson] Act *requires* that all victims' claims be consolidated and tried in a single federal court. This sharply contrasts with the experience in the asbestos litigations, in which tens of thousands of lawsuits have been scattered throughout the state and federal courts across the United States. As a consequence, the asbestos litigations have defied coherent resolution, and have fostered unfair and disparate judgments and settlements at great expense to all parties, and only after considerable delay. In addition to conserving funds for victims that would otherwise go to legal fees, consolidated claims in one court helps assure that victims with similar injuries are treated alike.⁹⁰

Senate Bill 1865 comprised the recommended 1988 amendments to the Price-Anderson Act.⁹¹ After hearing recommendations in the *Nuclear Regulation Hearing*, the Environment and Public Works Committee wrote Senate Report 218, recommending that Senate Bill 1865 be passed and setting forth its recommendations. These recommendations and much of the Senate bills' text were then incorporated into House Bill 1414.⁹² This bill was subsequently passed by both houses of the Congress and signed into law by the President.⁹³ There was no conference report generated.

Senate Report 218 specifically discusses: (1) the problem created by *Stibitz* as addressed in the *Nuclear Regulation Hearing*; (2) the testimony of the attorneys representing both plaintiffs and defendants in the TMI litigation from the *Nuclear Regulation Hearing*; and (3) the need to make it possible to consolidate all claims arising out of any nuclear incident in a single federal district court as discussed in the *Nuclear Regulation Hearing*.

While Committee hearings are technically not part of a legislative history because they do not contain congressional deliberations, the adaptation of language from those hearings into the Senate Report is persuasive as to why Congress enacted the Price-Anderson Amendments Acts of 1988. Senate Report 218 says:

90. 134 CONG. REC. S2301, S2322-23 (daily ed. Mar. 15, 1988) (statement of Sen. McClure) (emphasis added).

91. S. 1865, 100th Cong. (1987). Senate Bill 748 also contained some recommendations for Price-Anderson amendments. S. 748, 100th Cong. (1987).

92. H.R. 1414, 100th Cong. (1987). Congress passed the Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (codified as amended at 42 U.S.C. § 2210 (1994)).

93. See *supra* note 92.

Under current law, only claims arising from an ENO may be consolidated in federal court. In litigation following the Three Mile Island accident, the U.S. Court of Appeals for the Third Circuit held that federal courts do not have subject matter jurisdiction for claims arising out of a non-ENO nuclear incident. *Stibitz v. GPU*, 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1187 (1985). *The bill expands existing law to allow for the consolidation of claims arising out of any nuclear incident in federal district court.*

The experience with claims following the TMI accident demonstrates the advantages of the ability to consolidate claims after the nuclear incident. *Attorneys representing both plaintiffs and defendants in the TMI litigation testified before the Committee that the ability to consolidate claims in federal court would greatly benefit the process for determining compensation for claimants.* The TMI accident, which was not an ENO, has resulted in over 150 separate cases against TMI defendants, with over 3,000 claimants, in various state and Federal courts. Many of the issues in these cases are similar. *The availability of the provisions for consolidation of claims in the event of any nuclear incident, not just an ENO, would avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation.*

Accordingly, the bill provides the federal district court in which the nuclear incident occurred [with] subject matter jurisdiction over claims arising from the nuclear incident. Any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act, and the substantive law of decision shall be derived from the law of the State in which the incident occurred, in order to satisfy the Article III requirement that federal courts have jurisdiction over cases arising under the Constitution or under the laws of the United States.⁹⁴

Based on the language within the Senate Report, which appears to be adopted directly from the *Nuclear Regulation Hearing*, the 1988 amendments to the Price-Anderson Act are designed to prevent multiple, separate, nuclear tort claims from taking place in various tribal and state courts by uranium mill workers, neighbors, and members of families — regardless of whether the tort was committed on Indian country or not.

The legislative history of the 1988 Price-Anderson Amendments Act demonstrates a congressional intent that every defendant facing liability under the Act has an absolute right to have its case heard in federal court. Everything from congressional hearings to congressional floor debate to Senate Reports

94. S. REP. NO. 100-218, *reprinted in* 1988 U.S.C.C.A.N. at 1488 (emphasis added).

state the Amendments Act was to provide an exclusive federal forum for Price-Anderson defendants. Providing tribal courts with concurrent jurisdiction over nuclear incidents would defeat this congressional purpose.

Case Law

Express tribal court jurisdictional prohibitions are also created by case law. In *United States v. White Mountain Apache Tribe*⁹⁵ and *United States v. Yakima Tribal Court*,⁹⁶ the Ninth Circuit Court of Appeals found tribal court exhaustion was unnecessary to enjoin tribal court actions brought against government officials because tribal court jurisdiction was precluded by the judicially recognized doctrine of sovereign immunity.⁹⁷

*Oliphant v. Suquamish Indian Tribe*⁹⁸ is even more instructive when considering jurisdictional prohibitions. In *Oliphant*, the Supreme Court "concluded that federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly preempted tribal jurisdiction."⁹⁹ The important point taken from *Oliphant* is there is no "express" statutory jurisdictional prohibition which precludes non-Indians from being tried for crimes in tribal court. Yet by finding an implicit federal preemption and making it explicit through its decision in *Oliphant*, the United States Supreme Court created an "express jurisdictional prohibition." No one can doubt if, in disregard of *Oliphant*, a non-Indian were criminally charged in tribal court today, he would be entitled to have his prosecution enjoined by a federal court without the necessity of tribal exhaustion.¹⁰⁰

And so it is with the Price-Anderson Act. In *Oliphant*, the Supreme Court announced a rule of law based upon its judicial determination that Congress intended to take away criminal jurisdiction over non-Indians from Indian tribes. Similarly, *TMI II* and *O'Connor v. Commonwealth Edison Co.*¹⁰¹ have judicially announced that section 2210(n)(2) of Price-Anderson must be interpreted so all cases from a nuclear incident can be consolidated before a single federal district court. Consequently, like *Oliphant*, the courts have created an "express federal preemption" against hearing Price-Anderson claims in tribal court.

95. 784 F.2d 917 (9th Cir. 1986).

96. 806 F.2d 853 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987).

97. *See White Mountain Apache Tribe*, 784 F.2d at 920; *Yakima Tribal Court*, 806 F.2d at 861.

98. 435 U.S. 191 (1978).

99. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-54 (1985); *see Oliphant*, 435 U.S. at 204.

100. *See, e.g., United States v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986); *United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *see supra* text accompanying note 97.

101. 13 F.3d 1090 (7th Cir. 1994), *cert. denied*, 114 S. Ct. 2711 (1994).

The reasoning processes of *Oliphant*, *TMI II*, and *O'Connor* are similar. The *Oliphant* court relies heavily on Senate Report 1686 in finding its jurisdictional prohibition.¹⁰² Similarly, *TMI II* and *O'Connor* discuss Senate Report 218 in rendering their decisions.¹⁰³ The Third Circuit in *TMI II* explains:

[T]he [1988 Amendments to the Price-Anderson Act] included an expansion of the reach of section 2210(n)(2) to provide for removal of, and original federal jurisdiction over, claims arising from any "nuclear incident."¹⁰⁴

* * *

The [1988 Amendments to the Price-Anderson Act] ensures that every claim originating in a single nuclear incident may be considered with other similar claims. Where, as here, an incident results in multiple claims with cases filed in several counties in several states, consolidation in federal court serves to reduce uncertainty, expenditure of resources in dealing with duplicative issues, and the possibility of inconsistent outcomes.¹⁰⁵

O'Connor makes the same consolidation point expressly:

The [1988 Amendments to the Price-Anderson Act] create[] a federal cause of action which did not exist prior to the Act, establishes federal jurisdiction for that cause of action, and channels all legal liability to the federal courts through that cause of action. By creating this federal program which requires the application of federal law, Congress sought to effect uniformity, equity, and efficiency in the disposition of public liability claims. With the federal jurisdiction and removal provisions set forth in the [1988] Amendments Act, Congress ensured that all claims resulting from a given nuclear incident would be governed by the same law, provided for the coordination of all phases of litigation and the orderly distribution of funds¹⁰⁶

In the face of these express judicial pronouncements, it is difficult to maintain that Congress intended consolidation under Price-Anderson to be thwarted by lawsuits filed in tribal courts. If an express jurisdictional prohibition against tribal courts did not exist before the 1988 Amendments to Price-Anderson, the amended statute, supported by Third Circuit opinion in

102. *Oliphant*, 435 U.S. at 204-06 (discussing S. REP. NO. 86-1686, at 2-3 (1960)).

103. *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 844 n.8 (3d Cir. 1991), cert. denied, 503 U.S. 906 (1992) (*TMI II*) (discussing S. REP. NO. 100-218, at 13); *O'Connor*, 13 F.3d at 1102 (same).

104. *TMI II*, 940 F.2d at 853.

105. *Id.* at 861.

106. *O'Connor*, 13 F.3d at 1101 (emphasis added).

TMI II and the Seventh Circuit opinion in *O'Connor*, may create a tribal court jurisdictional prohibition today.

Statutory Interpretation

The Native American sovereignty perspective which holds all express jurisdictional prohibitions must say federal jurisdiction is "exclusive" or "tribal court jurisdiction is precluded" within the statute itself is an unreasonable interpretation of statutory construction in the jurisdictional area of the law. As we have already seen in *Oliphant*, the law is not so uniformly literal.

For example, in 28 U.S.C. § 1346(a), which governs jurisdiction of lawsuits brought against the United States, the statute says "district courts shall have original jurisdiction" and also acknowledges the existence of "concurrent [jurisdiction] with the United States Court of Federal Claims."¹⁰⁷ The language is equivalent to that found in section 2210(n)(2) of the Price-Anderson Act.¹⁰⁸

With respect to concurrent jurisdiction, the Price-Anderson Act is confined to state courts with an absolute right of removal.¹⁰⁹ For section 1346(a) concurrent jurisdiction is vested in the United States Court of Federal Claims. Even though 28 U.S.C. § 1346(a), like section 2210(n)(2) of Price-Anderson, does not explicitly restrict jurisdiction to federal district courts and federal court of claims, it has been universally interpreted as excluding jurisdiction by other courts.¹¹⁰ Moreover, courts generally recognize when a statute commits review of a specific class of claims to a certain court, like the federal district court in Price-Anderson, the jurisdiction of that court over the claims is

107. 28 U.S.C. § 1346(a) (1994).

108. See *supra* text accompanying note 20.

109. 42 U.S.C. § 2210(n)(2) (1994).

110. See 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3527 n.12 (2d ed. 1984) (stating that in 28 U.S.C. §1346(a) "it is only by implication that federal jurisdiction is exclusive").

Other examples abound of jurisdictional prohibition without there being express statutory language contained within the statute. For example, 15 U.S.C. § 15 says nothing about exclusive jurisdiction, but it is well settled that federal courts enjoy "exclusive jurisdiction over federal anti-trust actions." *Englehart v. Bell & Howell Co.*, 327 F.2d 30, 35 (8th Cir. 1964). Similarly, in *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436 (1920), the Supreme Court considered the meaning of section 7 of the Sherman Anti-Trust Act, which "created a cause of action in favor of any person to recover by suit in any District Court of the United States." *Id.* at 440. Moreover, in *General Investment Co. v. Lake Shore & Michigan Southern Railway Co.*, 260 U.S. 261 (1922), the Court considered the meaning of section 16 of the Clayton Act, which states that "any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties." *Id.* at 287; see 15 U.S.C. § 26 (1994). The Court found the right to sue granted by the Act is stated in "terms which show that it is to be exercised only in a 'court of the United States.'" *General Investment*, 260 U.S. at 287.

exclusive.¹¹¹ This is true even in the absence of an express statutory command of exclusiveness.¹¹²

Similarly, in *Possessky v. National Flood Insurers Ass'n*,¹¹³ which considered an early version of the National Flood Insurance Program,¹¹⁴ the court held the mere grant of "original jurisdiction" to the federal district courts under the National Flood Insurance Act divested state courts of concurrent jurisdiction over suits brought against the government under the Act.¹¹⁵ The court reasoned exclusive federal jurisdiction is appropriate when a statute authorizes suits to be brought against the government.¹¹⁶

The exclusive jurisdiction afforded under 28 U.S.C. § 1346(a) and the reasoning process by the court in *Possessky* further buttress the argument against tribal court jurisdiction over Price-Anderson claims. Under the indemnification plans built into Price-Anderson, the federal government is often the ultimate financially responsible party in a Price-Anderson action.¹¹⁷ This is why the Nuclear Regulatory Commission has an absolute right of removal under the Act.¹¹⁸ On major liabilities, the federal government requires it have the option of having its own financial responsibility decided by a federal court.¹¹⁹

In *Blue Legs v. United States Bureau of Indian Affairs*,¹²⁰ the Eighth Circuit Court of Appeals considered a claim that Indian reservation garbage dumps violated the Resource Conservation and Recovery Act of 1976 (RCRA).¹²¹ Tribal court exhaustion was one of the issues raised on appeal. The Tribe argued respect for tribal self-government required the suit initially

111. *Public Util. Comm'r of Or. v. Bonneville Power Admin.*, 767 F.2d 622 (9th Cir. 1985).

112. *Id.* at 627; *see also Pleasant Broad. Co. v. FCC*, 564 F.2d 496, 500-01 (D.C. Cir. 1977) ("[E]ven where Congress has not expressly conferred exclusive jurisdiction, a special review statute vesting jurisdiction in a particular court cuts off other courts' original jurisdiction in all cases covered by the special statute.")

113. 507 F. Supp. 913 (D.N.J. 1981).

114. 42 U.S.C. § 4072 (1994).

115. *Possessky*, 507 F. Supp. at 915.

116. *Id.*

117. *See* 42 U.S.C. § 2210(d)(e)(2-3) (1994).

118. *See id.* § 2210(n)(2).

119. In a few instances, Congress has made explicit its intent to provide state court jurisdiction over claims that would otherwise fall within the exclusive federal jurisdiction of 28 U.S.C. § 1346. For example, the McCarren Amendment gives state courts conditional jurisdiction to adjudicate federal water rights. 43 U.S.C. § 666 (1994). These separate statutes provide further support for the proposition, but for express delegation of state court jurisdiction by Congress, the federal government consents to be sued only in federal courts. *See, e.g.*, 15 U.S.C. § 364(b)(1) (1994); *see also Mar v. Cleppe*, 520 F.2d 867, 871 (10th Cir. 1975) ("It could hardly have been intended by Congress that suits . . . against the [Small Business] Administrator could be brought in any state court of general jurisdiction, but in the federal jurisdiction only in the Court of Claims . . .") (quoting *Ferguson v. Union Nat'l Bank*, 126 F.2d 753, 756 (4th Cir. 1942)).

120. 867 F.2d 1094 (8th Cir. 1989).

121. 42 U.S.C. §§ 3251-3259 (1994).

be brought in tribal court.¹²² While the court acknowledged the tribal court exhaustion rule as set out in *National Farmers* and *Iowa Mutual*, the Eighth Circuit determined exhaustion was not required because RCRA gave federal courts exclusive jurisdiction.¹²³ It held there was exclusive federal jurisdiction even though there is no mention of exclusive jurisdiction in the statute: "Any action under paragraph (a)(1) of this subsection [as this case is] shall be brought in the district court for the district in which the alleged violation occurred . . ." ¹²⁴ The finding of exclusive jurisdiction in *Blue Legs* flatly refutes any contention that tribal court jurisdiction exists unless explicitly excluded by statute.

Statutory interpretation of the Price-Anderson Act also demonstrates the government wanted to preempt the field of nuclear energy. Due to our nation's vital interest in nuclear energy, "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers *expressly ceded* to the States."¹²⁵ "When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done [with nuclear safety], the test of pre-emption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" ¹²⁶ As a consequence, it necessarily follows the only jurisdiction allowed under section 2210(n)(2) of Price-Anderson is that ceded to any "state court" subject to an absolute right of removal which can be exercised by the defendant to a nuclear claim or the Nuclear Regulatory Commission.¹²⁷

Moreover, private industry has been understandably reluctant to respond enthusiastically to the government's call for nuclear contractors. Given the staggering potential liabilities that can result from a nuclear accident, Price-Anderson was enacted partially as a result of "spokesmen for the private [nuclear] sector inform[ing] Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation."¹²⁸ Thus one of the announced purposes of Price-Anderson was "to protect the

122. *Blue Legs*, 867 F.2d at 1097.

123. *Id.* at 1098.

124. *Id. Compare id.* (quoting 42 U.S.C. § 6972(a) (1994) with 42 U.S.C. § 2210(n)(2) (1994) ("With respect to any public liability action arising out of . . . a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy.").

125. *Pacific Gas & Elec. Co. v. State Energy Resources Conversation & Dev. Comm.*, 461 U.S. 190, 212 (1983) (emphasis added).

126. *Id.* at 212-13 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)).

127. 42 U.S.C. § 2210(n)(2) (1994).

128. *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 64 (1978) (citing *Hearings Before the Joint Comm. on Atomic Energy on Gov't Indemnity for Private Licensees and AEC Contractors Against Reactor Hazards*, 84th Cong. 9, 109-10, 115, 120, 136-37, 148, 181, 195, 240 (1956)); see also *O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090, 1095 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994) (quoting *Duke Power Co.*).

public and . . . encourage the development of the atomic energy industry."¹²⁹ Furthermore, the "Price-Anderson System" is a package which includes omnibus coverage and provisions to simplify litigation, and "also provides a mechanism whereby the federal government can continue to encourage private sector participation in the beneficial uses of nuclear materials."¹³⁰ The ability to simplify and limit the transaction costs of litigation through the 1988 Amendments to section 2210 of the Price-Anderson Act is a vital part of this "System": "Thus, the [1988] Amendments Act is the latest installment in nearly fifty years of congressional work. During that time, Congress has attempted to encourage the development of domestic nuclear power to the fullest extent through licensing, indemnification, limitation of liability, and *consolidation of litigation*."¹³¹ As demonstrated by the legislative history of the 1988 Amendments, reducing the cost of nuclear incident litigation by providing for consolidation in a single federal district court is an essential part of the atomic energy regulatory function achieved through Price-Anderson's federal preemption. Statutory interpretation of the Price-Anderson Act leads to the conclusion that tribal court jurisdiction was designed to be preempted by the Act.

Summary

The 1988 Price-Anderson Amendments were enacted to serve the interests of judicial economy. Consequently, actions growing from operations of uranium mills in Indian country are compelled to federal courts. No purpose is served by forcing plaintiffs or defendants of nuclear incidents to exhaust their jurisdictional arguments in a multitude of different tribal courts. As a result of complete federal preemption in the area of nuclear safety, there is an express jurisdictional prohibition against Price-Anderson actions in any court but the United States federal district court for the district in which the event occurred or in state court with an absolute right of removal and transfer to that federal venue.

Future Implications

Who has jurisdiction in nuclear incidents that take place in Indian country? The simple answer, when one only looks at a few courts holdings, is that the tribal court maintains jurisdiction. Both the *National Farmers* and *Iowa Mutual* decisions appear to support the conclusion that tribal courts are presumed to have jurisdiction for injuries to Indians occurring on Indian reservations. Moreover, the language of Price-Anderson does not explicitly assert a jurisdictional prohibition against tribal courts, nor does the Act assert tribal

129. *O'Connor*, 13 F.3d at 1095 (quoting 42 U.S.C. § 2012 (1994)).

130. *Id.* at 1095-96; *see also supra* text accompanying note 18.

131. *O'Connor*, 13 F.3d at 1096 (emphasis added).

courts do not have concurrent jurisdiction over nuclear-related actions. From a cursory analysis, courts and attorneys would probably claim Price-Anderson does not preempt tribal jurisdiction. However, one cannot ignore all of the subtleties of the tribal exhaustion cases and the Price-Anderson Act.

Once the tribal court exhaustion doctrine and the Price-Anderson Act are looked at in their entirety, the congressional desire to recognize tribal courts jurisdiction under all but express circumstances becomes extremely unclear. Each of the tribal court exhaustion cases have left themselves open to interpretation. There are subtle inferences contained within the exhaustion doctrine opinions which could lead the legal community to believe "express" language within a statute is not necessary to overcome tribal exhaustion if the congressional intent to prohibit such jurisdiction is clear from the legislative history of the statute. The legislative intent of the Amendments to the Price-Anderson Act and historical statutory interpretation of similar statutes make it appear Congress is not always as "express" in its prohibition against tribal courts jurisdiction as judges and attorneys would like.

The Federal Government has the ability to take away tribal court jurisdiction over Price-Anderson claims if it desires to do so. The legislative history, case law and statutory interpretation of the Price-Anderson Act may point to such a motive, but the language to preclude tribal jurisdiction is far from crystal clear. Consequently, to take away the tribal court's ability to be the first to determine if it wants jurisdiction over nuclear-related incidents taking place on its territory would be patently violative of the tribal court exhaustion doctrine which requires an express statement by Congress to preclude such jurisdiction.¹³² Moreover, courts have consistently held tribal sovereign powers remain intact when a federal statute, like Price-Anderson, fails to address issues pertaining to tribal court jurisdiction.¹³³

It is important to note, however, that tribal court exhaustion does not mean the tribal court will or should accept jurisdiction over Price-Anderson claims. The legislative history of the 1988 amendments to Price-Anderson and prior case law affirmatively state Congress' desire to consolidate all nuclear-related incidents in a single forum to avoid confusion, inconsistency, and the duplicative litigation experienced in the TMI litigation.¹³⁴ Thus, if a tribal court does decide to accept jurisdiction over a Price-Anderson claim it is arguably assuming the responsibility to adjudicate all claims arising from the respective nuclear incident irrespective of where those claimants come from.¹³⁵

132. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

133. *Id.*; see also *Merrion*, *supra* note 40, at 149 n.14.

134. See *supra* text accompanying notes 85-90.

135. The Three Mile Island incident resulted in over 150 individual cases with 3000 claimants. S. REP. NO. 100-218, *reprinted in* 1988 U.S.C.C.A.N. at 1477.

While a tribal court is as competent to interpret federal law and the Price-Anderson Act as a state or federal court, it is this author's belief that a wise tribal court would refuse jurisdiction over Price-Anderson claims. Tribal courts probably would not want to get involved in the atomic energy regulatory function as delineated in Price-Anderson or the other complexities inherent in the atomic industry and associated litigation. In declining jurisdiction, a tribal court's tribal member will still have the same statutory protection under Price-Anderson in a federal court as it would in tribal court and the members of their respective tribes will benefit in the ability to simplify and limit the transaction costs of litigation by consolidating their cases with other claimants in a single federal forum and by ensuring consistent outcomes with nontribal litigants.

Moreover, in the event, a tribal court were to accept jurisdiction over a Price-Anderson claim, litigants from multiple states and other Native American tribes could conceivably end up in this single local tribal court.¹³⁶ Acceptance could create problems in some cases where one tribal court does not have jurisdiction over other claimants being consolidated within the court. For example, a tribal court from one tribe within San Juan River Basin may not have jurisdiction over members from another tribe within the same river basin.¹³⁷ Similarly, not all tribal courts have addressed the issue of whether they would have jurisdiction over claimants for an incident taking place outside their respective reservation boundaries.¹³⁸ Each of these problems could be avoided if the tribal court declines jurisdiction over the Price-Anderson claim in favor of jurisdiction in a single federal district court.

Since a tribal court has not accepted jurisdiction over a Price-Anderson-related incident, there is no right or wrong answer today. However, with potentially thousands of claims in the future, the jurisdiction issue is ripe for Congress to address. It would be very easy for Congress to add a single line to section 2210(n)(2) of Price-Anderson claiming to "preclude tribal jurisdiction" and resolve all of the conflicts described above. However, until the time when a tribal court accepts jurisdiction over a Price-Anderson case, one should not expect Congress to modify the Act.

136. For example, the Laguna Pueblo, Acoma Pueblo, Canoncito Pueblo, and Isleta Pueblo all share common reservation borders and are all within a fifty mile radius of the same major uranium production facility. *See also supra* note 2 and text accompanying notes 2-3.

137. For example, the Isleta Pueblo Tribal Court does not have jurisdiction over members of the Canoncito Pueblo. Similarly, the Acoma Pueblo Tribal Court does not have jurisdiction over members of the Laguna Pueblo. In each of these circumstances, the litigants seeking recompense must bring their claim in their own tribal court. Telephone Interviews with Isleta Pueblo and Acoma Pueblo Tribal Counsel (Jan. 3, 1996).

138. For example, the Isleta Pueblo has not considered jurisdictional issues concerning litigants outside the reservation boundary. "Jurisdictional issues are generally limited to incidents occurring on the reservation land but are subject to change at the court's discretion." Telephone Interview with Isleta Pueblo Tribal Counsel (Jan. 3, 1996).

Price-Anderson is subject to review in the year 2002.¹³⁹ In the event a tribal court accepts jurisdiction over a Price-Anderson-related incident before this time, Congress would likely resolve the problem with an immediate amendment to the Act as it did after the Third Circuit court's decision in *Stibitz*.¹⁴⁰ Given the history of nuclear-related claims in the Three Mile Island incident and the problems of having the government be financially responsible for multiple claims in multiple jurisdictions,¹⁴¹ Congress would likely create a clear "express prohibition" against tribal court jurisdiction.

Only Congress knows what it intended when writing the 1988 Amendments to the Price-Anderson Act. Until Congress clarifies Price-Anderson jurisdictional issues, the tribal exhaustion doctrine will continue to live in the penumbra of the Price-Anderson Act and lawyers and judges will only be left with conjecture about which court or courts have proper jurisdiction over nuclear-related injuries occurring on Indian reservations.

139. 42 U.S.C. § 2210(d) (1994).

140. *See supra* text accompanying notes 81-85.

141. *See supra* text accompanying notes 81-87.

