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Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction among Tribal, State and Federal Governments

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Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments

Nancy Thorington*

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PREFACE

Although it is considered by many to be one of the greatest documents ever written in history, the United States Constitution failed to address one of the most obvious and important issues facing the newly formed government: the legal status of the various Indian tribes. Because of this oversight, tribal, state and federal governments have been engaged in a tug of war for control over the land and resources in this country for over 200 years. The Native Peoples have struggled during this time to maintain their sovereignty as distinct social and political units, while states have pressured the federal government to take land and resources from the tribes. These tensions exist today as much as they did two centuries ago.

But time has not stood still for the tribes. During the last 200 years, tribal justice systems have evolved from their pre-contact form to hybrid combinations of traditional Indian systems and modern American courts. While many see this as a change for the worse, state and federal courts have made it clear that they will not honor the decisions of tribal justice systems unless they can recognize and understand them, at least at some level. And although the tribal dispute resolution systems are not wholly traditional, they are still uniquely Indian. So, despite any hope that the tribes would assimilate and thus make the "problem" go away, the states and the federal government can no longer pretend that the tribes do not exist. There is a third judicial system: the tribal courts.

Because the tribal, federal and state systems exist in a world of mass communication and transportation, the number of controversies and crimes that cross borders will only increase. Therefore, the smooth operation of each of these sovereigns depends on cooperation among all of them. This Article first outlines the history and evolution of the tensions that have developed and then attempts to provide solutions that will address the needs and goals of the tribes, the states and the federal government.

I. INTRODUCTION

For the most part, determining the jurisdiction of a state court is a straightforward matter. If the parties to the dispute live, drive, work or otherwise conduct business in the state, any crimes, accidents or disputes that occur in the state relating to that conduct are within the jurisdiction of its police to enforce and its courts to adjudicate. But when those same crimes, accidents or disputes occur in Indian country, the question of jurisdiction becomes a complex inquiry. Instead of using the geographical boundaries of the reservation or other Indian lands as the starting point, the determination of a tribe's jurisdiction involves such questions as whether the parties are Indian or non-Indian,[1] tribal members or nonmember Indians;[2] whether the incident occurred in Indian country[3] on fee or trust land;[4] whether the crime is a "major crime";[5] and whether the tribe is subject to federal legislation limiting the tribes' jurisdiction.[6] The resolution of the tribal jurisdiction question is further complicated by inconsistent federal Indian policy as reflected in both legislation and contradictory case law.

II. HISTORY OF FEDERAL INDIAN LAW AND POLICY

A. *Source of Federal Power over Indian Affairs*

Congressional power over Indians is often described as "plenary," the literal meaning of which is "absolute" or "total."[7] Congress has this special authority over Indian affairs pursuant to the Indian Commerce Clause of the Constitution, which allows the national legislature "[t]o regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes*."[8] Today, the Indian Commerce Clause, along with the power to make treaties, is seen as the principal

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1. *See* Major Crimes Act, 18 U.S.C.A. § 1153 (West Supp. 1999) (giving the federal government jurisdiction over several "major" crimes committed by Indians in Indian country); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (holding that tribes lack criminal jurisdiction over crimes committed by non-Indians).

2. *See infra* Part VI (explaining case precedent relating to criminal jurisdiction); Part IX.A.1-2 (discussing the unresolved issues regarding the distinctions between jurisdiction over tribal members and nonmember Indians in the civil context).

3. *See* General Crimes Act, 18 U.S.C.A. § 1152 (West 1984) (providing a definition of "Indian country"); Major Crimes Act, 18 U.S.C.A. § 1153 (West Supp. 1999) (same). These statutes are discussed *infra* at Part V.C and V.E respectively.

4. *See* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (setting out the test for civil jurisdiction over non-Indians on fee land within the boundaries of the reservation); *see also infra* Part IX.B (discussing *Strate*).

5. Major Crimes Act, 18 U.S.C.A. § 1153. *See infra* Part V.E (discussing the Major Crimes Act).

6. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C.A. § 1162 (West 1984), 25 U.S.C.A. §§ 1321-1326 (West 1983 & Supp. 2000), 28 U.S.C.A. § 1360 (West 1993)). *See generally infra* notes 62-65 and accompanying text (specifying the provisions of Public Law 83-280).

7. Talton v. Mayes, 163 U.S. 376, 384 (1896); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

8. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

basis for broad federal power over Indians.[9] The concept of Congress' plenary power over Indian affairs is a basic premise of Indian law and policy.

B. Federal Preemption Doctrine

Under the federal preemption doctrine,[10] federal law may supersede state law in two situations. The first is when Congress intends to legislate exclusively in an area of law, thus occupying the entire field.[11] The second situation arises when enforcing the state law would frustrate the purpose behind the federal legislation.[12] With respect to Indian law, because Congress has plenary power over Indian affairs,[13] Congress has clearly indicated an intent to occupy the field. Thus, any state legislation that purports to cover Indian affairs will likely be preempted by the federal scheme.[14]

C. Tribal Sovereignty

Historically, the European nations and the United States federal government recognized the sovereign status of Indian tribes. First, the European governments used this status as the basis of making treaties with the tribes, which were treated as independent nations. Then, after the Revolutionary War, the newly created federal government continued to make treaties with the tribes. But it was not long after the federal government was established that tribal sovereignty began to be eroded. The Supreme Court took the first step in diminishing tribal sovereignty in *Johnson v. M'Intosh*.[15] In this case, the Court held that America had been "discovered" and the tribes "conquered," leaving Indians with the right to occupy but not possess the land.[16] Next, in *Cherokee Nation v. Georgia*,[17] the Supreme Court held that the tribes were neither states nor foreign nations, but rather were "domestic dependent nations."[18] In spite of these rulings, the Court consistently acknowledged the tribes' inherent sovereignty. In *Worcester v. Georgia*,[19] the Court

9. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 211 (1982).

10. U.S. CONST. art. VI, cl. 2 (Supremacy Clause); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 19 (1824).

11. Northwest Central Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 509 (1989).

12. *Id.*

13. Talton v. Mayes, 163 U.S. 376, 379-80 (1896); COHEN, *supra* note 9, at 207.

14. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (noting that federal preemption is one of "two independent but related barriers to the assertion of state regulatory authority over tribal reservations or members"). Most of the difficult issues of federal preemption with respect to Indian affairs arise when a state enacts a law that is not directed at the tribe, such as an environmental law, but that impact on tribal sovereignty if that law is enforced in Indian country.

15. 21 U.S. (8 Wheat.) 543 (1823).

16. *Id.* at 594.

17. 30 U.S. (5 Pet.) 1 (1831).

18. *Id.* at 17.

19. 31 U.S. (6 Pet.) 515 (1832).

stated that the "Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights"[20] and that the use of the word "nations" in the Constitution with reference to the tribes confirmed their status as separate sovereigns.[21] The Court held that, because tribes were separate sovereigns, state laws could not be enforced within reservation boundaries.[22] Later, in *Talton v. Mayes*,[23] the Court confirmed that the tribes' sovereign powers predated the Constitution.[24]

In addition to the broad inherent sovereignty rights retained by the tribes, more specific rights can be set out in treaties or statutes. For example, a treaty might specify that tribal members have rights to hunt or fish in certain off-reservation areas, and the tribe may enforce its laws with respect to tribal members when they are engaged in those off-reservation activities. The treaty might also specify that the state's laws cannot be enforced against the tribal members in that situation. Another example of such treaties or laws is the Indian Child Welfare Act,[25] which specifically grants tribes exclusive jurisdiction over custody matters when Indian children live on the reservation.[26]

But Congress and the federal courts have placed severe restraints upon the criminal jurisdiction of tribal governments over the past two hundred years. Federal statutes have limited the types of crimes over which the tribes may assert or exercise criminal jurisdiction.[27] At the same time, the United States Supreme Court has limited the criminal jurisdiction of tribal courts to matters involving tribal members.[28] Although Congress affirmed inherent tribal sovereignty over criminal matters involving nonmember Indians,[29] there has been at least one challenge in a lower court to the constitutionality of such congressional actions.[30]

In contrast, the civil jurisdiction of tribes has been comparatively free from federal intrusions. Tribal governments have traditionally exercised extensive authority over civil disputes that occur on-reservation. But, over the past two

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20. *Id.* at 559.
21. *Id.* at 559-60.
22. *Id.* at 595.
23. 163 U.S. 376 (1896).
24. *Id.* at 383.
25. 25 U.S.C.A. § 1911 (West 1983).
26. *Id.* § 1911(a).
27. *See* 18 U.S.C.A. § 1152 (West 1984) (applying the general laws of the United States to Indian country); *id.* § 1153 (West Supp. 1999) (requiring exclusive federal jurisdiction over "major crimes," including murder, rape, kidnaping, etc.)
28. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Duro v. Reina, 495 U.S. 676 (1990).
29. 25 U.S.C.A. §§ 1301-1303 (West 1983 & Supp. 2000).
30. United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998), *rev'd en banc*, 165 F.3d 1209 (8th Cir. 1999).

decades, several Supreme Court decisions have severely limited the tribes' ability to exercise full civil jurisdiction.[31]

D. Trust Relationship

A special relationship between the federal government and Indian tribes exists as a result of the unique legal status of the tribes. Although they are neither states nor foreign countries, the tribes have elements of both.[32] Because the Constitution never defined the legal status of the tribes, Congress and the Supreme Court have been left to do so. In one of its earliest decisions involving Indian affairs, the Court held that the federal government has a duty to protect the interests of the tribes.[33] This duty, initially described as resembling the relationship of a guardian to a ward,[34] has become known as the "trust relationship" between the federal government and the Indian tribes. Pursuant to this responsibility, the federal government owes a fiduciary duty to the tribes to protect their interests.[35]

E. Prior to 1871: Acknowledgment of Traditional Modes of Justice

Prior to 1871, the federal government did not interfere with the traditional modes of justice administered by Indian tribes. During this era, the power of tribes to employ their own systems of justice was recognized in treaty documents or in the treaty-making process.[36] Because the relationship was essentially government-to-government, the United States made no judgments upon the justice systems of the Indian tribes in governing the conduct of tribal members. Most tribes used banishment, community scorn, and/or restitution as methods for controlling behavior, including internal tribal enforcement groups.[37]

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31. *See, e.g., Oliphant*, 435 U.S. at 195 (ruling that the tribes lacked criminal jurisdiction over non-Indians for any acts committed by non-Indians in Indian country). The Supreme Court used the reasoning in *Oliphant*, which was based on the conclusion that tribes have no inherent criminal jurisdiction over non-Indians, to justify its recent holding in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), in which it held that the tribes lacked civil adjudicatory jurisdiction over an on-reservation accident between two non-Indians. *See also* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (stating that the tribe could not zone "open" land owned by a nonmember in fee within the reservation boundaries); Montana v. United States, 450 U.S. 544, 566-67 (1981) (holding that the tribe lacked civil jurisdiction to regulate hunting and fishing by nonmembers on fee land within the reservation boundaries).

32. For example, like states, tribes enjoy sovereign immunity from suit, and like foreign nations, tribes have inherent sovereignty to govern their internal affairs—but unlike either states or foreign countries, tribes do not have jurisdiction based on the outer boundaries of their territories.

33. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831).

34. *Id.*

35. COHEN, *supra* note 9, at 207.

36. AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., JUSTICE IN INDIAN COUNTRY 1 (Carrie Small ed., 1980) [hereinafter JUSTICE IN INDIAN COUNTRY].

37. *Id.*

F. 1871-1934: Weakening of Tribal Judiciaries

The customary and traditional laws of Indian tribes began to erode after 1871.[38] The reservation system was controlled first by the military and then by civilian federal agents. These "Indian agents" developed the "Indian police" to maintain law and order on reservations.[39] By the 1880's, some agents had begun to use Indians as judges in cases which violated the regulations enacted by the agents. These Indian judges had the confidence of the agents but often lacked the confidence of their people.[40]

In 1883, the Secretary of the Interior authorized the establishment of the Courts of Indian Offenses.[41] Although very meager, this authorization provided funding for the Indian judges already at work and increased funding for Indian police. The judges in the Courts of Indian Offenses were under the practical control of the Indian agents.[42] These courts operated under an 1884 law and order code which contained minimal procedures for processing civil disputes.[43] The code provided for the use of state laws in resolving civil disputes and limited jurisdiction to Indian litigants.[44]

In the late 1800's, congressional policy focused largely upon the assimilation of Indian people into American society. In 1887, Congress passed into law the General Allotment Act,[45] which sought to promote individual ownership of land among Indians and dissolve communal landholdings. By dividing the tribal lands into 160-acre parcels, the practical effect, and the underlying intent of the Act, was to create a huge "surplus" of Indian lands. The "surplus" lands were then opened up to non-Indian settlement.[46] Under the statute, the trust relationship between individual Indian landowners expired after twenty-five years, at which time they became subject to state regulation.[47] Conservative estimates indicate that the General Allotment Act caused a loss of some 90 million acres of Indian lands.[48] In

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38. Note that in the case of *Ex parte* Crow Dog, 109 U.S. 556 (1883), the U.S. Supreme Court recognized the inherent sovereignty of the tribes and their criminal jurisdiction over Indians in Indian country. However, Congress significantly curtailed that holding by enacting the Major Crimes Act, 18 U.S.C.A. § 1153 (West Supp. 1999), which took away tribal criminal jurisdiction over several "major" crimes such as murder and rape. *Id.*

39. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 114 (1983).

40. *Id.* at 114-15.

41. 25 C.F.R. §§ 11.100-11.1115 (1999); DELORIA & LYTLE, *supra* note 39, at 115. These courts are also known as "C.F.R. courts" because they are governed by the Code of Federal Regulations (C.F.R.).

42. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES, THE BASIC ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 97 (2d ed. 1992).

43. *Id.*

44. *Id.*

45. 25 U.S.C.A. §§ 331-358 (West 1983 & Supp. 2000). This Act is also known as the Dawes Act.

46. PEVAR, *supra* note 42, at 5.

47. 25 U.S.C.A. §§ 331-358 (West 1983 & Supp. 2000).

48. PEVAR, *supra* note 42, at 5-6.

addition, the establishment of the Courts of Indian Offenses eliminated traditional methods of justice and initiated the intrusion of state law into tribal conflicts.

G. 1934-1953: The Establishment of Courts Under Tribal Authority

For approximately fifty years, the federal government failed to address the decaying conditions in Indian country. Huge land losses occurred. The health of Indian people had deteriorated to a deplorable state, and the tribal governments were without practical authority.[49] In 1928, the Meriam Report[50] revealed these dire conditions of Indian country; the American public was alarmed, and an embarrassed Congress took action to revitalize Indian country.[51]

In 1934, Congress passed into law the Indian Reorganization Act (IRA),[52] which halted the allotment of Indian land and permitted tribes to adopt written constitutions and codes.[53] A model constitution, prepared by the Department of Interior and adopted by most tribes, provided for the creation of tribal courts to replace the Courts of Indian Offenses.[54] Under a model code, also adopted by most tribes to govern their new tribal courts, Indian judges continued to be appointed by the Bureau of Indian Affairs (BIA) if paid with federal funds.[55]

The model codes and constitutions adopted by IRA tribes allowed the Department of the Interior to exert substantial influence over the development of Indian judiciaries.[56] Most critical were limitations imposed on the scope of tribal jurisdiction. For example, in the civil area, the model code restricted jurisdiction to suits where the defendant was a member of the tribe, or suits between members and nonmembers brought by the stipulation of both parties.[57] Thus, non-tribal members were subject to tribal jurisdiction only where they consented to such authority, regardless of the type or situs of the offense. Although these model constitutions and codes continue to be used by some tribes, many tribes have developed their own law and order codes and rules of court.

Missing in the IRA constitutions were three key concepts from the Anglo justice systems. Neither separation of powers, separation of church and state, nor the power of judicial review were included.[58] These missing ingredients have

49. COHEN, *supra* note 9, at 144.

50. INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (L. Meriam ed., John Hopkins Press 1928). This private Report, commissioned by Congress, is commonly referred to as the "Meriam Report."

51. DELORIA & LYTLE, *supra* note 39, at 12-13.

52. 25 U.S.C.A. §§ 461-479 (West 1983 & Supp. 2000).

53. *Id.* § 476 (West Supp. 2000).

54. JUSTICE IN INDIAN COUNTRY, *supra* note 36, at 2-3.

55. *Id.* at 3.

56. *Id.* at 45.

57. 25 C.F.R. § 11.103(a) (1999).

58. JUSTICE IN INDIAN COUNTRY, *supra* note 36, at 45.

caused concern for the state and federal judiciaries and have been detrimental to the interface between tribal, state and federal courts. The non-tribal courts view tribal courts as less legitimate because tribal courts are based on different values and assumptions. On the other hand, the inclusion of these elements into tribal justice systems tends to undermine what is left of the traditional systems, which were based on notions of making the community whole, as opposed to the adversarial system of the Anglo courts.

H. 1953-1968: The Termination Era

In the early 1950's, Congress again turned to a policy of assimilation and the dismantling of tribal governments.[59] The government terminated federal benefits for many tribes and dissolved several reservations. But certainly the most devastating actions of Congress involved the termination of the tribes as legal and political entities.[60] Without such legal status, tribal members lost their ability to exist as distinct sovereign people. The terminated tribes were forced to distribute their lands, and the trust relationship ceased to exist upon termination.[61]

In addition to the direct termination of tribes, in 1953, Congress passed Public Law 83-280 (P.L. 280).[62] P.L. 280 required six states to assume most criminal and some civil jurisdiction over Indian country without a provision for tribal consent.[63] Although this federal law did not actually terminate tribal courts, tribes were discouraged from developing their judiciaries.[64] In addition, P.L. 280 increased tension between tribes and states in the six "mandatory" states. The tribes resented having state jurisdiction imposed on them while the states were unhappy because P.L. 280 forced them to bear the financial burden of exercising this jurisdiction.[65]

Because of public outrage both on- and off-reservation, the termination era was short-lived. However, those tribes that were affected by termination paid an enormous price. The financial burden of pursuing federal re-recognition as tribes remains a problem for many terminated tribes today.[66] Land holdings were lost and

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59. COHEN, *supra* note 9, at 152.

60. *Id.* at 171-75; PEVAR, *supra* note 42, at 7.

61. COHEN, *supra* note 9, at 171-75; DELORIA & LYTLE, *supra* note 39, at 20.

62. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C.A. § 1162 (West 1984) (criminal jurisdiction), 25 U.S.C.A. §§ 1321-1326 (West 1983 & Supp. 2000) and 28 U.S.C.A. § 1360 (West 1993) (civil jurisdiction)); *see also infra* Part X.

63. 18 U.S.C.A. § 1162 (criminal jurisdiction); 28 U.S.C.A. § 1360 (civil jurisdiction).

64. JUSTICE IN INDIAN COUNTRY, *supra* note 36, at 3.

65. Joseph Myers, *Cooperation, Appreciation and Understanding: Building Positive Relationships Among Federal, State and Tribal Courts*, TRIBAL CT. REC., Winter 1999, at 5.

66. The process for re-recognition is long and frustrating because the Bureau of Indian Affairs, U.S. Dept. of the Interior (BIA), requirements are often vague (e.g., 25 C.F.R. § 83 (1999)), and there is a significant backlog of work at the BIA. This author has worked on cases in which the applications for re-recognition had been pending for 10 years or more.

resources exploited with minimal benefit to tribal members.[67] Furthermore, funding for tribal courts was stopped, which resulted in a complete crippling of tribal courts.

In 1959, the United States Supreme Court decided the landmark case of *Williams v. Lee*.[68] This case marked the end of the termination era. In *Williams*, the Court held that tribal courts have exclusive jurisdiction over suits by non-Indians against Indians where the dispute arises in Indian country.[69] While acknowledging that prior cases had established the principle that state law has no effect in Indian country,[70] the Court in *Williams* also asserted that this rule had been softened by later cases.[71]

In *Williams*, the Court set out a crucial test for determining whether a state court has jurisdiction to hear a matter involving a non-Indian that arises in Indian country.[72] The test concerns the question of whether a state infringes "on the right of reservation Indians to make their own laws and be ruled by them" if the state court hears the case.[73] It should be noted that the *Williams* test only applies in situations in which the dispute involves a non-Indian.[74] Much of the law of civil jurisdiction over non-Indians in Indian country revolves around the application of this test.

Subsequently, the Supreme Court affirmed exclusive tribal court jurisdiction over matters involving tribal members residing on the reservation.[75] The Court held that the *Williams* test did not apply because any assertion of state jurisdiction in such situations necessarily infringes on the right of tribal self-government.[76]

I. 1968: The Indian Civil Rights Act—Further Limitations

Based in part on a concern for the protection of the rights of criminal defendants in Indian country and in part on the shock of the non-Indian public that the U.S. Constitution had no direct application in Indian country, Congress passed

67. DELORIA & LYTLE, *supra* note 39, at 21.

68. 358 U.S. 217 (1959). Specifically, the Court held that tribal courts in non-P.L. 280 states possess exclusive jurisdiction over civil disputes brought by non-Indians against Indians concerning transactions in Indian country. *Id.* at 223.

69. *Id.* at 223.

70. *Id.* at 218-19 (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).

71. *Id.* The Court justified these incursions on state power because "essential tribal relations were not involved and . . . the rights of Indians would not be jeopardized." *Id.* at 219.

72. *Id.* at 220.

73. *Id.*

74. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973) (noting further that the "Indian sovereignty doctrine . . . provides a backdrop against which the applicable treaties and federal statutes must be read").

75. *Id.* at 172-73.

76. *Id.* at 179-81.

the Indian Civil Rights Act of 1968 (ICRA).[77] The ICRA reaffirmed tribal powers of self-government, including the authority to establish courts.[78]

The "Indian Bill of Rights" in the ICRA requires that criminal defendants in tribal courts be afforded many of the due process rights afforded to criminal defendants in state and federal courts pursuant to the U.S. Constitution.[79] The rights enumerated in the ICRA take into consideration the unique conditions of tribal courts, including the lack of funding of tribal courts and the impoverished communities that many serve. For example, the ICRA does not require court-appointed attorneys for indigent defendants. Such a requirement would effectively drain tribal court resources. The requirements of the ICRA raise the question of whether tribal courts can remain unique institutions or whether they must be modeled after Anglo courts and Anglo concepts of justice.[80] The ICRA also subjects tribal court and tribal council decisions to federal review by way of writ of habeas corpus.[81]

Later ICRA amendments also modified P.L. 280. First, a provision was added requiring tribal consent before states could assume P.L. 280 jurisdiction over Indian country after 1968.[82] In addition, the ICRA added a mechanism for states to relinquish P.L. 280 jurisdiction.[83] Unfortunately, this mechanism cannot be initiated by the tribes.

J. 1970-1980: Revitalizing Tribal Governments and Courts

In the 1970's, the federal policy in Indian affairs focused on the promotion of tribal self-determination.[84] During this era, the Bureau of Indian Affairs established the Branch of Judicial Services, and funding for tribal court activities increased. However, the increase in funds failed to meet the tribes' needs because the previous underfunding was so extreme.[85] The financial and technical resources necessary to effectively develop tribal courts were not available.

During this period, several U.S. Supreme Court decisions affirmed tribal jurisdiction over civil matters within Indian country. In particular, the Court held

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77. 25 U.S.C.A. §§ 1301-1341 (West 1983 & Supp. 2000).

78. *Id.* § 1301 (West Supp. 2000).

79. *Id.* §§ 1302-1303 (West 1983 & Supp. 2000).

80. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT, A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 8-10 (1991) (describing opposition to the Indian Civil Rights Act by various Pueblo Tribes of New Mexico because the Act would violate their customs and traditions).

81. 25 U.S.C.A. § 1303 (West 1983); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66-70 (1978).

82. *Id.* §§ 1322, 1326 (West 1983).

83. *Id.* § 1323(a) (West Supp. 2000).

84. President Nixon rejected the termination policy in his message to Congress in 1970 and stated that the goal of the federal Indian policy must be "to strengthen the Indian sense of autonomy without threatening his sense of community." *See* PEVAR, *supra* note 42, at 8, 11 n.28 (quoting Message from the President of the United States, 1970, "Recommendations for Indian Policy" (Washington, DC: Government Printing Office)).

85. Myers, *supra* note 65, at 6.

that states lacked civil jurisdiction to: (1) hear a suit by a non-Indian against an Indian;[86] (2) tax the income of a tribal member earned on the reservation;[87] and (3) decide an adoption case in which all parties are Indian and live on the reservation.[88]

In 1978, the Supreme Court decided *Santa Clara Pueblo v. Martinez*.[89] The Court affirmed tribal court jurisdiction over a dispute in which a tribal member sued the tribe for ICRA violations. In this decision, the Supreme Court held that, except for habeas corpus petitions, the federal courts lack jurisdiction over civil actions alleging violations of the ICRA.[90]

Congress further demonstrated its commitment to the policy of tribal self-determination by enacting the Indian Child Welfare Act of 1978.[91] The Act established standards and procedures designed to safeguard the "best interests" of the Indian child and the security of Indian family units.[92] It provided for exclusive tribal jurisdiction over any child custody proceeding involving an Indian child domiciled or residing on the reservation or any ward of the tribal court, except where such jurisdiction is already vested in the state.[93] This important statute gives the tribes maximum control over their most valuable resource—their children.

In 1981, the Supreme Court acknowledged that tribal courts have inherent civil authority, even over actions of non-Indians when those actions affect "the political integrity, the economic security, or the health or welfare of the tribe."[94]

K. 1980-Present: Cutbacks in Federal Funding

Some observers of Indian affairs have labeled the current economic situation in Indian country as a form of "termination by funding cuts." While the present administration has acknowledged a government-to-government relationship with

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86. Kennerly v. District Court of Montana, 400 U.S. 423, 428-29 (1971) (holding that a non-Indian merchant could not bring suit in state court against a Blackfeet Indian for a transaction occurring on the reservation; tribal court was the proper forum for such a suit).

87. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 165 (1973).

88. Fisher v. District Court of Montana, 424 U.S. 382, 389 (1976) (ruling that Montana did not have jurisdiction over an adoption proceeding in which all parties were members of the Northern Cheyenne Tribe and residents on that reservation; again, tribal court was the appropriate forum).

89. 436 U.S. 49 (1978).

90. *Id.* at 51-52.

91. 25 U.S.C.A. §§ 1901-1963 (West 1983 & Supp. 2000).

92. 25 U.S.C.A. § 1902 (West 1983).

93. 25 U.S.C.A. § 1911 (West 1983). But note that there is a conflict among lower courts regarding whether jurisdiction is concurrent in P.L. 280 states. *Compare* Native Village of Nenana v. Alaska Dep't of Health and Soc. Servs., 722 P.2d 219 (Alaska 1986) (holding that Alaska Native Villages cannot exercise jurisdiction over child custody proceedings without a reassumption under § 1918 of the Act), *with* Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991) (stating that tribes have concurrent jurisdiction with the State over ICWA matters where the children are domiciled on the reservation in a P.L. 280 state).

94. Montana v. United States, 450 U.S. 544, 566 (1981). But note that the Supreme Court has severely limited this holding through its opinion in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), discussed in detail *infra* Part IX.B.

Indian tribes,[95] federal funding for Indian social programs has been cut dramatically,[96] and federal funds that support tribal government operations have either decreased or are grossly insufficient to support tribal programs.[97] Also, Congress passed the Indian Tribal Justice Act in 1993.[98] Under this Act, the tribes were to receive $58.4 million per year to create and expand their justice systems. However, to date, only $5 million has actually been appropriated pursuant to the Act,[99] and the Act expired on October 1, 1999. The long-range impact of these policies has yet to be determined.

In addition to cutbacks in federal funding, recent Supreme Court decisions demonstrate a shift away from acknowledging and expanding inherent tribal sovereignty.[100] The most disturbing aspect of these cases, aside from their holdings, is the fact that each of them was a unanimous decision. This means there is little hope of changing the trend via the judiciary, unless the current Justices come to understand more about the impact of their decisions in Indian country.

III. INTRODUCTION TO TRIBAL COURT JURISDICTION

In an effort to provide comprehensive and practical information for tribal, state and federal court personnel, advocates and others interested in improving the interaction among jurisdictions, the remainder of this Article will begin with an

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95. *See, e.g.*, Memorandum from President William J. Clinton to the Heads of Executive Departments and Agencies on the Government-to-Government Relations with Native American Tribal Governments (May 3, 1994) (on file with the *McGeorge Law Review*).

96. For example, the Department of the Interior recently closed the Albuquerque office of Indian Health Services, which had provided medical services to the large Indian population in the Albuquerque area.

97. *See, e.g.*, Theodore R. Quasula, *A Tribute to Jack Lee Spencer*, TRIBAL CT. REC., Winter 1999, at 20, 20-21 (noting that a BIA officer, who lost his life in the line of duty, might not have been killed had there been more federal law enforcement officers on duty); Joseph Myers, *Criminal Justice Issues in Indian Country Today*, TRIBAL CT. REC., Winter 1999, at 7, 8 (noting the dire need for improved detention facilities in Indian country).

98. Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified as amended at 25 U.S.C.A. § 3613 (West Supp. 2000)).

99. Myers, *supra* note 65, at 6.

100. *See* Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997) (holding that the tribal court lacked jurisdiction to hear a personal injury suit brought by a non-Indian spouse of a deceased tribal member against a contractor who was doing business with the Tribe). Despite the fact that the accident had occurred on a road running through the reservation, the Court in *Strate* found that the case did not impact the Tribe's "political integrity, economic security, health or welfare" simply because the Tribe had granted a right-of-way over the highway to the State. *Id.* at 457-58 (quoting Montana v. United States, 450 U.S. 544 (1981)); *see also* Alaska v. Native Village of Venetie, 522 U.S. 520 (1998) (stating that land owned by a Native Alaskan corporation pursuant to the Alaska Native Claims Settlement Act was not "Indian country" and therefore was not subject to the Village's taxes); Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) (explaining that state and local governments may impose ad valorem taxes on Indian lands that have been sold to non-Indians under the authority of a federal statute rendering such lands alienable and later re-acquired by the Tribe); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) (holding that federal environmental laws did not apply to land within the Tribe's original reservation, despite language in the agreement between the Tribe and federal government stating that all provisions of a prior treaty were to remain in effect. This decision resulted not only in lack of tribal or federal environmental control over the land but also in a diminishment of the reservation boundaries).

explanation of key concepts and terms used in the following discussion of jurisdiction in Indian country.[101]

Two distinct types of civil jurisdiction exist. Regulatory jurisdiction is the authority of a tribe to tax, license and create laws. Adjudicatory jurisdiction is the power of the tribal court to hear a given case. Often, regulatory jurisdiction implies adjudicatory jurisdiction over the same matters; however, there may be instances in which the tribe has the power to regulate a matter but lacks the authority to adjudicate it.[102] The adjudicative authority may lie with the federal government or the state.[103] Determining which powers the tribe and state have can be particularly challenging where the Supreme Court has failed to distinguish whether its holding in a given case applies to either or both types of jurisdiction. The source of both regulatory and adjudicatory powers is the tribe's retained inherent authority.[104] In addition, the U.S. Supreme Court in *Strate v. A-1 Contractors*[105] suggested that tribal adjudicatory authority is limited to the scope of its power to regulate.[106] Thus, the prior presumption that tribes could adjudicate any matter that they had the power to regulate has recently been called into question.

Generally, the jurisdiction of a tribal court is the power of the court to hear particular cases. For that authority to exist, the tribal court must demonstrate the three vital elements of jurisdiction.

First, the court must possess personal jurisdiction, which is the court's power over the parties to the case. Usually, this authority is set forth in the constitution or the law and order code of each tribe. Without the authority to demand the presence of a party, the court would be without the ability to effectively decide the case.

Secondly, there must be a specific territory in which the court is authorized to assert its power to hear particular cases: territorial jurisdiction. That geographical area is usually referred to as Indian country and is defined as such at 18 U.S.C.A. § 1151. The definition includes (1) all lands within the exterior boundaries of a reservation, including patented lands and rights-of-way (for example, roads and

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101. Although the explanatory sections of this Article may seem basic to practitioners, this author has included them for two reasons. First, many judges, prosecutors and advocates in Indian country do not have formal legal training because knowledge of the tribal customs is often at least as important in effectively adjudicating issues in tribal courts. Second, even if the reader has extensive legal training, these basic concepts often have different applications in the context of Indian law and tribal courts. Therefore, even seasoned attorneys and judges are urged to read these sections if they anticipate practicing in tribal courts.

102. *See Strate*, 520 U.S. at 459 (noting that tribal adjudicatory jurisdiction will never exceed its regulatory jurisdiction).

103. *See* Major Crimes Act, 18 U.S.C.A. § 1153 (West Supp. 1999) (giving the federal government jurisdiction over enumerated crimes); *Id.* § 1162 (West 1984) (allowing certain states to exert criminal jurisdiction over crimes in Indian country).

104. *See* CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 131 (Nicholas J. Spaeth ed., 1993) [hereinafter AMERICAN INDIAN LAW DESKBOOK].

105. 520 U.S. 438 (1997).

106. *Id.* at 453 (stating that "[a]s to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction").

highways); (2) "all dependent Indian communities" (which may include lands off-reservation); and (3) all Indian-owned allotments outside the reservation, including rights-of-way running through them.[107] The territorial jurisdiction must also be determined by examining the tribe's governing documents, including its constitution and codes.

The third element is subject matter jurisdiction, which is the authority of the court to hear particular types of cases. This authority is set forth in the tribe's constitution or the law and order code. Some tribal courts exercise broad subject matter jurisdiction; others are very narrow. For example, some courts may hear disputes involving contracts, domestic affairs, and torts, while other courts may be limited to hearing only fishing controversies.

In addition to the three key elements of jurisdiction (personal, territorial and subject matter), there are three basic types of judicial proceedings: administrative, criminal and civil. When a case is brought before a hearing officer or review board of a governmental agency, it is called an administrative proceeding. These proceedings are not as formal as court proceedings; however, basic due process protections are required. The parties must receive sufficient notice of the hearing, and the hearing must be conducted fairly.

A criminal proceeding is one in which the government prosecutes an individual or firm for an act or omission which the community, through its government, has deemed to be unlawful. A conviction in a criminal proceeding carries with it the possibility of imprisonment and/or a fine. Because of restrictions set forth in the ICRA,[108] the maximum punishment a tribal court may impose is imprisonment of up to one year and a maximum fine of $5,000.[109]

Usually, any legal action initiated by a private party to enforce a private right or to seek compensation for a civil wrong is heard in a civil proceeding. Judgments in civil proceedings are not limited by ICRA; any limitations on the scope of a civil proceeding will be described in the tribe's law and order code.

To provide an operable framework for civil proceedings, the law and order code defines basic terms. First, the code will define the parties to a civil proceeding. The party who complains of a wrongdoing and brings a civil action seeking relief is called a plaintiff or petitioner. The party against whom the action is brought is called the defendant or respondent.

107. 18 U.S.C.A. § 1151 (West 1984). But note that the definition may differ depending on the situation. For example, certain statutes such as the Indian Gaming Regulatory Act define Indian country broadly. 25 U.S.C.A. § 2703(4) (West Supp. 2000). Also, certain states, such as California, Oklahoma and Alaska, have unique histories and have been subject to legislation that affects the definition of Indian country in those states. *See, e.g.*, Rancheria Act of 1958, Pub. L. No. 85-671, 72 Stat. 619 (1958) (eliminating the legal status of many California tribes and limiting the land base of others); Curtis Act of 1898, ch. 517, 30 Stat. 495, 504 (forcing the allotment of Indian territory in Oklahoma); and Alaska v. Native Village of Venetie, 522 U.S. 520, 523 (1998) (holding that lands held pursuant to the Alaska Native Claims Settlement Act are not Indian country).

108. 25 U.S.C.A. §§ 1301-1341 (West 1983 & Supp. 2000).

109. 25 U.S.C.A. § 1302(7) (West Supp. 2000).

The legal theories which determine whether an injury or civil wrong has occurred and who is responsible provide the basis for civil substantive law. The rules which govern the conduct of a civil proceeding are called civil procedural law. Examples include the form of complaints, filing deadlines and the trial process. The methods by which a civil right is enforced or for which a civil harm is compensated are called civil remedies. They include money damages, specific performance, custody orders and others.

In order for a civil case to be adjudicated in tribal court, complete civil jurisdiction must exist, and the authority must be bestowed in the tribal governing documents. Additionally, the basic framework for civil proceedings must be enumerated in the code. In a sense, civil jurisdiction follows the principles of criminal jurisdiction. Like criminal jurisdiction, civil jurisdiction starts from a presumption that tribes have power over their internal affairs. Congress and the federal courts have not intruded upon tribal civil jurisdiction as much as they have in criminal matters, so the scope of tribal civil jurisdiction remains broad. State jurisdiction in both areas is confined to matters not involving Indians and not affecting Indian interests,[110] although this line is not always clear and sometimes is crossed.

In 1978, the Supreme Court held in *Oliphant v. Suquamish Indian Tribe*[111] that Indian tribes lacked authority to assert criminal jurisdiction over non-Indians.[112] In response to the *Oliphant* decision, several tribes decriminalized certain tribal statutes in order to fill the void created by that decision. As a result of this response, the distinction between criminal and civil is often blurred in tribal jurisdictions.

Oliphant was decided against a backdrop of 150 years of federal criminal legislation that assumed an absence of tribal governmental authority to punish non-Indians who violated tribal laws. In contrast, no such pattern of federal legislation exists in the civil area. Instead, the federal government has made little attempt to undertake the adjudication of private civil disputes in Indian country.

The Supreme Court in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*[113] held that the *Oliphant* criminal jurisdictional presumption did not apply to civil disputes arising in Indian country and involving non-Indians.[114] However, more recently in *Strate v. A-1 Contractors*,[115] the Supreme Court held that tribes have no inherent authority to adjudicate civil disputes involving only nontribal members absent express congressional authority to the contrary. While the

110. This is true except in states to which Public Law 280, 28 U.S.C.A. § 1360 (West 1993), or other such federal legislation, applies.

111. 435 U.S. 191 (1978).

112. *Id.* at 195.

113. 471 U.S. 845 (1985).

114. *Id.* at 854.

115. 520 U.S. 438 (1997).

Strate Court reiterated certain "exceptions"[116] to this presumption enumerated in the case *Montana v. United States*,[117] the decision in *Strate* potentially limits tribal court civil jurisdiction and adds to the tension between tribal and state courts. The case and its possible ramifications for tribal court jurisdiction are discussed below.[118]

IV. INTRODUCTION TO CRIMINAL JURISDICTION

The mid 1800's brought extensive settlement and development to regions which had been inhabited only by tribes. The resulting proximity between Indian and non-Indian communities amplified the differences in the value systems of the communities, especially in the area of criminal penalties. Indian communities fought and won the right to apply tribal laws to their community members. In 1883, the U.S. Supreme Court decided the case of *Ex parte Crow Dog*,[119] which recognized that Indian tribes possessed exclusive jurisdiction over crimes committed by one tribal member against another tribal member in Indian country.[120]

The *Crow Dog* case involved a murder of one member of the Sioux Tribe by another. Responding in the traditional way that focused on restitution rather than revenge, the victim's family agreed to take $600, eight horses and a blanket as payment for the murder.[121] Outraged by what it perceived as an insufficient response to the murder, and based on pressure by the Bureau of Indian Affairs (BIA), Congress enacted the Major Crimes Act[122] in 1885, just two years after the *Crow Dog* decision. This statute gave the federal government jurisdiction over several "major" crimes committed within Indian country, including murder.[123]

The next significant U.S. Supreme Court decision was *Talton v. Mayes*,[124] in which the Court held that tribal criminal jurisdiction derived from inherent tribal sovereignty.[125] As a result, certain constitutional limitations, such as the Bill of Rights, did not apply to tribal governments. The Court later held that the constitutional prohibition against double jeopardy did not apply to prosecutions of offenses by tribal governments and federal or state governments.[126] But the Supreme Court severely limited tribal court jurisdiction in the case of *Oliphant v.*

116. *Id.* at 1409-10.
117. 450 U.S. 544 (1981).
118. *Infra* Part IX.B.
119. 109 U.S. 556 (1883).
120. *Id.* at 571-72.
121. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 157 (4th ed. 1998).
122. 18 U.S.C.A. § 1153 (West Supp. 1999).
123. *Id.*
124. 163 U.S. 376 (1896); *see also* GETCHES ET AL., *supra* note 121, at 470.
125. 163 U.S. at 383-84.
126. *See* United States v. Wheeler, 435 U.S. 313, 317-18 (1978); GETCHES ET AL., *supra* note 121, at 470.

Suquamish Tribe,[127] in which it held that the tribes lacked criminal jurisdiction over offenses committed by non-Indians in Indian country.[128] The question of whether tribes may apply tribal law to non-Indians or nonmember Indians has shaped the issue of criminal jurisdiction in Indian country.

Jurisdiction over criminal activity in Indian country requires consideration of a complex mixture of federal, state and tribal law. Proper criminal jurisdiction may be asserted by federal, state and/or tribal courts, depending on the circumstances. Finding a path through this jurisdictional maze requires an examination of several factors, such as which federal statutes apply; whether the state has jurisdiction pursuant to P.L. 280;[129] what the nature of the offense is (e.g., whether it is a "major crime");[130] the location of the criminal activity (e.g., whether it occurred in Indian country); and whether the offender and/or the victim is a tribal member, nonmember Indian or non-Indian. This inquiry is further complicated by conflicting appellate court opinions. The following Parts will examine each of these factors.

V. FEDERAL STATUTES

Congressional legislation often applies generally to "Indians" and "Indian country," rather than to specific tribes or reservation territories. To determine the scope and purpose of federal legislation concerning Indians and Indian country, tribal, state and federal judiciaries must have a thorough understanding of these terms of art.

A. *"Indian" Defined*

The term "Indian" has long been obsolete with respect to the culture of members of tribes in the United States; however, it is a term that Congress has adopted to refer to tribes as a single political body as well as a cultural entity. The question of who is an Indian has been repeatedly asked in the history of the United States. The answer differs depending on the circumstances,[131] but generally speaking, the legal definition of an Indian includes anyone who is a member of a federally recognized tribe.[132]

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127. 435 U.S. 191 (1978).

128. *Id.* at 195.

129. 18 U.S.C.A. § 1162 (West 1984).

130. Major Crimes Act, 18 U.S.C.A. § 1153 (West Supp. 1999).

131. For a thorough discussion of the various legal definitions of the term "Indian," see PEVAR, *supra* note 42, at 12, 13.

132. 25 U.S.C.A. § 479 (West 1983). This is just one statutory definition. As stated in the text, the definition varies depending on the circumstances. For example, a person is an Indian eligible for federal health benefits even if she is a member of a tribe that was terminated. Ultimately, tribes have the inherent authority to determine their own membership, see Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), but note that these legal definitions of "Indian" have no cultural significance for the tribes.

B. Indian Country as Defined in 18 U.S.C.A. § 1151

Congress defines Indian country in 18 U.S.C.A. § 1151 as including:

> (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.[133]

This definition encompasses all lands within the exterior boundaries of a reservation, even if the land is held in fee simple by a non-Indian entity or person.[134] It also includes lands deemed to be "dependent Indian communities" which may be located on trust land outside the reservation boundaries.[135] For lands to be considered Indian country, the federal government must have set the land aside for the use of the tribes, and the lands must be under federal superintendence.[136]

C. Indian Country Crimes Act (General Crimes Act): 18 U.S.C.A. § 1152

The Indian Country Crimes Act,[137] also known as and hereinafter referred to as the General Crimes Act, states that:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[138]

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133. 18 U.S.C.A. § 1151 (West 1984).
134. *See* Solem v. Bartlett, 465 U.S. 463 (1984).
135. 18 U.S.C.A. § 1151(b) (West 1984).
136. Alaska v. Native Village of Venetie, 522 U.S. 520, 530-31 (1998).
137. 18 U.S.C.A. § 1152 (West 1984).
138. *Id.*

The General Crimes Act provides for the application of federal criminal statutes to activities in Indian country with the exceptions of "Indian v. Indian offenses"[139] or activities performed pursuant to treaty stipulations.[140] Such federal laws include the same statutes applicable to federal enclaves such as military installations and national parks.[141] The Act's reference to "punish[ment] by the local law of the tribe"[142] has been interpreted to allow concurrent jurisdiction by tribal courts.[143]

Cases involving "victimless" crimes, such as adultery, in which all parties are Indians, have been construed to come within the "Indian v. Indian" exception.[144] Although the issue arose in a case heard by the U.S. Supreme Court, the Court refrained from resolving whether the "Indian v. Indian" exception applies to crimes by nonmember Indians.[145] Nonetheless, a literal reading of the exception indicates that federal prosecution is barred.[146]

Prior to 1881, the General Crimes Act, which has no explicit provisions for "non-Indian v. non-Indian" crimes in Indian country, was applied so that federal jurisdiction over such crimes preempted state jurisdiction.[147] In 1881, the U.S. Supreme Court held in *United States v. McBratney*[148] that the State of Colorado could assert jurisdiction in "non-Indian v. non-Indian" crimes.[149] The Court reasoned that, because Colorado was not required to disclaim jurisdiction over Indian country upon its entry into the Union, the State could rightfully assert jurisdiction on the basis of the equal footing doctrine.[150] The equal footing doctrine was later supplanted by the reasoning that neither the tribes nor the federal government had any interest in matters affecting only non-Indians in Indian country, except prior to there being a state government to handle such matters.[151]

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139. Note that certain "Indian v. Indian" crimes may be governed by the Major Crimes Act, discussed *infra* Part IV.

140. 18 U.S.C.A. § 1152.

141. GETCHES ET AL., *supra* note 121, at 472.

142. 18 U.S.C.A. § 1152.

143. *See* Tim Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387, 391-92 (1974) (asserting that the exclusion in the Act of federal jurisdiction over Indian v. Indian crimes and crimes that have been punished by the tribes implies that tribes retain jurisdiction over crimes committed by Indians against non-Indians).

144. *See* United States v. Blue, 722 F.2d 383, 386 n.4 (8th Cir. 1983).

145. Duro v. Reina, 495 U.S. 676, 697 (1990).

146. AMERICAN INDIAN LAW DESKBOOK, *supra* note 104, at 89 n.22.

147. GETCHES ET AL., *supra* note 121, at 472.

148. 104 U.S. 621 (1881).

149. *Id.* at 624.

150. *Id.* The equal footing doctrine allowed states that were admitted into the Union after the original 13 states to enjoy the same sovereign interests. The doctrine is most often used in Indian law today with respect to title rights involving navigable waterways.

151. New York *ex rel.* Ray v. Martin, 326 U.S. 496, 500-01 (1946); GETCHES ET AL., *supra* note 121, at 799 n.*; *see also* Draper v. United States, 164 U.S. 240, 244, 247 (1896) (holding that Montana, a state which had disclaimed jurisdiction as a condition of statehood, may assert jurisdiction over a murder of one non-Indian by another on the Crow Reservation).

D. Assimilative Crimes Act: 18 U.S.C.A. § 13

The Assimilative Crimes Act[152] incorporates into federal law any state penal statutes where a federal enclave is located. Because it is a "general law," the Assimilative Crimes Act is made applicable to Indian country pursuant to the General Crimes Act,[153] discussed above. Federal appellate courts have been divided on the extent of its application. For example, one area of dispute is whether the Assimilative Crimes Act incorporates into federal law state penal statutes that have a civil regulatory objective but impose criminal sanctions for noncompliance.[154] Some courts focus on whether the underlying purpose of the state statute is to prohibit certain conduct or to regulate it, while other courts reject this distinction.[155] The division among the lower courts stems from the difficulty in characterizing those statutes that involve "victimless" crimes or consensual behavior. In addition, certain statutes, such as fireworks statutes, fall into a "gray" area that is neither clearly regulatory nor prohibitory.[156]

E. Major Crimes Act: 18 U.S.C.A. § 1153

In 1885, two years after the U.S. Supreme Court decision in *Ex parte Crow Dog*[157] recognized exclusive tribal criminal jurisdiction over a murder case involving an Indian victim and defendant, Congress adopted the Major Crimes Act.[158] The Major Crimes Act provides for exclusive federal jurisdiction over

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152. 18 U.S.C.A. § 13 (West Supp. 1999). The Assimilative Crimes Act provides:

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title . . . is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment[;]

(b) [F]or purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, territory, possession, or district for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States.

Id.

153. 18 U.S.C.A. § 1152 (West 1984).

154. *See* AMERICAN INDIAN LAW DESKBOOK, *supra* note 104, at 87 n.13 (giving examples of the jurisdictional splits among various circuit courts).

155. *Id.*

156. *Id.* For a further discussion of the jurisdictional issues raised by the Assimilative Crimes Act, see GETCHES ET AL., *supra* note 121, at 483.

157. 109 U.S. 556 (1883).

158. 18 U.S.C.A. § 1153 (West Supp. 1999).

specifically enumerated crimes occurring on the reservation, regardless of whether the victim and defendant are Indian.[159]

The Major Crimes Act states:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, 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 the 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 offense 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.[160]

Although the U.S. Supreme Court has not resolved the question,[161] several federal courts have concluded that tribes may still exercise concurrent jurisdiction over cases which are subject to federal jurisdiction pursuant to the Act.[162]

Another controversial issue concerns a U.S. Supreme Court finding that a defendant has the right to request a lesser included offense instruction in a Major Crimes Act prosecution, even though the offense was not one of those specified under the statute.[163] The Court reasoned that, in such situations, tribal self-government interests were unaffected, because the ability of a defendant to request the lesser included offense instruction "neither expands the reach of the Major Crimes Act nor permits the Government to infringe the residual jurisdiction of a

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159. *Id.*

160. *Id.*

161. *See* AMERICAN INDIAN LAW DESKBOOK, *supra* note 104, at 90 n.29 (noting the unresolved question of whether § 1153 abrogates retained tribal jurisdiction to prosecute members for major crimes (citing United States v. Wheeler, 435 U.S. 313, 325 n.22 (1978), and Duro v. Reina, 495 U.S. 676, 679 n.1 (1990))).

162. *See* AMERICAN INDIAN LAW DESKBOOK, *supra* note 104, at 90 n.29 (concluding that a tribe has concurrent criminal jurisdiction over conduct constituting a major crime) (citing People v. Morgan, 785 P.2d 1294, 1298-99 (Colo. 1990); Wetsit v. Stafne, 44 F.3d 823 (9th Cir. 1995) (concluding that tribal court has concurrent criminal jurisdiction over a tribal member with respect to conduct for which the member has been prosecuted under the Major Crimes Act). But note that the Indian Civil Rights Act, 25 U.S.C.A. §§ 1301-1341 (West 1983 & Supp. 2000), limits the criminal penalties a tribe may impose to one year imprisonment and a $5,000 fine.

163. Keeble v. United States, 412 U.S. 205, 214 (1973).

tribe by bringing prosecutions in federal court that are not authorized by statute."[164] The Supreme Court failed to address the issue of whether lesser included offense instructions could be requested absent the defendant's consent. Lower courts are divided on this issue.[165]

F. State Criminal Jurisdiction Pursuant to Public Law 280

In 1953, Congress enacted Public Law 83-280 (P.L. 280),[166] which requires California, Minnesota, Nebraska, Oregon and Wisconsin to exercise limited civil and extensive criminal jurisdiction over Indian country within their borders. In 1958, Alaska was also made a mandatory P.L. 280 state.[167] The General Crimes Act and the Major Crimes Act are inapplicable to Indian country crimes in these six mandatory states.[168]

Codified at 18 U.S.C.A. §1162(a), the statute provides:

> (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.

164. *Id.*; *see also* AMERICAN INDIAN LAW DESKBOOK, *supra* note 104, at 90 n.29 (citing *Keeble*, 412 U.S. at 214).

165. *Compare* United States v. Demarrias, 876 F.2d 674 (8th Cir. 1989) (allowing such instructions over defendant's objections), *with* United States v. Narcia, 776 F. Supp. 491 (D. Ariz. 1991) (denying prosecutor's attempt to charge the defendant under 18 U.S.C.A. § 1153 with a lesser included offense over the defendant's objections).

166. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C.A. § 1162 (West 1984), 25 U.S.C.A. §§ 1321-1326 (West 1983 & Supp. 2000), 28 U.S.C.A. § 1360 (West 1993)).

167. 18 U.S.C.A. § 1162(a).

168. *Id.* § 1162(c).

California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

While sweeping in nature, P.L. 280 was not novel legislation. Kansas, Iowa, New York and North Dakota at different times had been granted varying levels of jurisdiction over crimes committed in Indian country located within their state borders.[169]

Originally, P.L. 280 allowed for states to voluntarily assume P.L. 280 civil and criminal jurisdiction over Indian country located within their borders without consultation with the tribes. However, in 1968, an amendment to the Indian Civil Rights Act of 1968[170] required an affirmative vote by affected tribal members at a special election authorizing state assumption of criminal or civil jurisdiction.[171] The amendments also allow states to retrocede any jurisdiction they had voluntarily assumed prior to the effective date of those amendments or of any jurisdiction mandatorily imposed under 18 U.S.C.A. §1162(a).[172] Unfortunately, this process must be initiated by the states and cannot be initiated by the affected tribes.

The extent of P.L. 280 jurisdiction has been an issue of significant contention. The U.S. Supreme Court has held that P.L. 280 authorizes criminal jurisdiction only

169. *See* AMERICAN INDIAN LAW DESKBOOK, *supra* note 104, at 94 n.42 (noting that (1) 18 U.S.C.A. § 3243 (West 1985) grants Kansas jurisdiction over offenses committed in Indian country but does not deprive federal jurisdiction pursuant to the General Crimes Act and the Major Crimes Act; (2) Public Law 80-846 (1948) grants Iowa similar jurisdiction over the Sac and Fox Indian Reservation; (3) 25 U.S.C.A. § 232 (West 1983), which grants New York criminal jurisdiction over offenses by Indians, has been construed as concurrent in nature; and (4) that 60 Stat. 229 (1946) grants North Dakota jurisdiction over nonmajor criminal offenses committed by or against Indians on the Devils Lake Indian Reservation).

170. 25 U.S.C.A. §§ 1301-1341 (West 1983 & Supp. 2000).

171. 25 U.S.C.A. §§ 1321(a), 1322(a) (West 1983).

172. 25 U.S.C.A. § 1323 (West Supp. 2000).

with respect to criminal-prohibitory, and not civil-regulatory, laws.[173] The Court in *California v. Cabazon Band of Mission Indians*[174] reasoned that:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within [P.L. 280]'s grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and [P.L. 280] does not authorize its enforcement on Indian reservations. The shorthand test is whether the conduct at issue violates the State's public policy.[175]

In essence, the *Cabazon* ruling prevents P.L. 280 states from applying state laws to interfere with activities in Indian country that the state does not outright prohibit. Unfortunately, this distinction is not always clear, as in the case of fireworks discussed above.[176]

VI. CASE PRECEDENT

The federal legislation discussed above is the starting point for the analysis of criminal jurisdiction over cases that arise in Indian country. But there are aspects of criminal jurisdiction that these statutes do not address. For example, the Major Crimes Act[177] only pertains to crimes committed by one Indian against another Indian. The statute is further limited to the enumerated crimes. Therefore, many of the parameters of criminal jurisdiction in Indian country have been developed over the years by the courts.

Until fairly recently, those tribes that had the resources to assert criminal jurisdiction within their territory did so to the fullest extent possible under the federal statutes. Then the U.S. Supreme Court decided the case of *Oliphant v. Suquamish Indian Tribe*,[178] in which it held that tribes may not assert criminal jurisdiction over non-Indians in disputes that arise in Indian country.[179] This holding has severely hampered the tribes' ability to maintain law and order within the reservation boundaries. It also undermined tribal sovereignty, not only because of the direct holding, but because the Supreme Court and other courts have taken the reasoning of *Oliphant* and applied it to other fact situations. For example, the Supreme Court in *Duro v. Reina*[180] held that a tribe may not assert criminal

173. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209-10 (1987).
174. 480 U.S. 202 (1987).
175. *Id.* at 209.
176. *See supra* note 156 and accompanying text (discussing this murky area of the law).
177. 18 U.S.C.A. § 1153 (West Supp. 1999).
178. 435 U.S. 191 (1978).
179. *Id.* at 195.
180. 495 U.S. 676 (1990).

jurisdiction over a nonmember Indian, reasoning that the nonmember was a non-Indian for purposes of tribal court criminal jurisdiction.[181]

The *Duro* decision resulted in a critical jurisdictional gap in Indian country because states lack criminal jurisdiction in Indian country (except in P.L. 280 states), and the federal government usually only prosecutes crimes under the Major Crimes Act due to funding constraints. Congress responded to the *Duro* decision by amending the Indian Civil Rights Act[182] to (1) recognize and affirm the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians, and (2) explicitly expand the definition to include any person defined as an Indian under 18 U.S.C.A. §1153 (the Major Crimes Act) to be within the criminal jurisdiction of tribal courts.[183]

However, one lower court refused to follow the legislation. In *United States v. Weaselhead*,[184] the Eighth Circuit held that it was for the Supreme Court to decide a tribe's inherent sovereignty and that it was "beyond Congress's power to declare existent a sovereignty-based jurisdiction that the Court has declared to be nonexistent."[185] But, as the dissent in *Weaselhead* pointed out, neither caselaw nor the Constitution supports the majority's opinion.[186] In fact, the Supreme Court has consistently recognized Congress' plenary power over Indian affairs.[187]

Although the Eighth Circuit vacated its earlier decision in *Weaselhead* and affirmed the district court's ruling in favor of tribal court jurisdiction,[188] it is worth discussing the court's reasoning since it demonstrates the lengths to which courts can go to undermine tribal sovereignty. Basically, the majority in *Weaselhead* attempted to turn the plenary power doctrine on its head. The concept of plenary power is based on federal case law; nowhere in the Constitution does it actually say that Congress has plenary power over Indians. The Constitution merely says that Congress has the right to regulate commerce with the Indian tribes.[189] The doctrine is based instead on two hundred years of U.S. Supreme Court decisions interpreting the "Indian Commerce Clause" as giving Congress such power.

But the *Weaselhead* court directly challenged this authority and all of the prior case law by declaring that Congress had acted beyond its scope when it enacted the post-*Duro* legislation. Such an assertion implies that all Supreme Court cases involving Indian law issues that invoke or mention the plenary power doctrine

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181. *Id.* at 679.

182. 25 U.S.C.A. §§ 1301-1303 (West 1983 & Supp. 2000).

183. *Id.* § 1301 (West Supp. 2000).

184. United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998), *rev'd en banc*, 165 F.3d 1209 (8th Cir. 1999).

185. *Id.* at 824.

186. *Id.* at 824-25.

187. Talton v. Mayes, 163 U.S. 376, 384 (1896); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

188. United States v. Weaselhead, 165 F.3d 1209 (8th Cir. 1999).

189. U.S. CONST. art. I, § 8, cl. 3.

(which is most, if not all, such cases) are "constitutional" cases. This would mean that Congress cannot enact legislation that contradicts any of these cases.[190] Furthermore, this interpretation would render the plenary power doctrine meaningless. But the Supreme Court has never challenged such authority. In fact, the Supreme Court in *Talton v. Mayes*,[191] a case dating back to 1896, specifically held that the sovereign powers exercised by the tribes did *not* spring from the Constitution.[192] The *Mayes* Court further held that, because the tribes' powers of self-government pre-dated the Constitution, the tribes are not bound by the provisions of the Constitution unless Congress specifically states otherwise.[193] Thus, the Eighth Circuit's reason for not following the post-*Duro* legislation contradicts Supreme Court precedent.[194] Possibly realizing that its reasoning was erroneous, the Eighth Circuit later vacated its holding and affirmed the trial court's ruling that the tribal court did have jurisdiction.[195]

In non-P.L. 280 states, the issue arises as to what to do when a fugitive crosses the border from the jurisdiction that seeks to arrest him. Neither jurisdiction has the legal authority to make such an arrest absent an extradition agreement or federal statute conferring that right.[196] However, many state courts have upheld such arrests, especially when they involved a "hot pursuit" chase of a suspect onto a reservation.[197]

VII. THE SCOPE OF CIVIL JURISDICTION

As noted above, the criminal jurisdiction of tribal courts has been extremely limited by federal courts and federal legislation. However, the civil jurisdiction of tribal courts over disputes that arise in Indian country is more broad and is subject

190. *See* James W. Zion, *New Attacks on Indian Nation Criminal Jurisdiction: Is Congress' "Plenary Power" Really Plenary?*, TRIBAL CT. REC., Winter 1999, at 12.

191. 163 U.S. 376 (1896).

192. *Id.* at 384. In fact, the Court held that:

> [A]lthough [the tribes are] possessed of these attributes of local self government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States. But the existence of the right in Congress to regulate the manner in which the local powers of the [Indian tribes] shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States.

Id. (citation omitted).

193. *Id.*

194. It should also be noted that the U.S. Supreme Court, in its recent decision in *Strate v. A-1 Contractors*, acknowledged approvingly this post-*Duro* legislation. *See* Strate v. A-1 Contractors, 520 U.S. 438, 444-45 n.5 (1997). Obviously, the Court knew its *Duro* decision was not a constitutional decision.

195. United States v. Weaselhead, 165 F.3d 1209 (8th Cir. 1999).

196. *See* GETCHES ET AL., *supra* note 121, at 421.

197. *Id.*; *see also* Judith V. Royster & Rory SnowArrow Fausett, *Fresh Pursuit onto Native American Reservations: State Rights "To Pursue Hostile Indian Marauders Across the Border"* 59 U. COLO. L. REV. 191, 195, 238 (1988) (stating that the reservation boundary should act as an "unassailable bar" to any state arrests in Indian country).

to fewer of the federal limitations imposed on tribal courts' criminal jurisdiction. Tribal courts are limited in civil cases involving tribal members only by the tribal code. Absent restrictions in the tribal code in cases involving a non-Indian petitioner and an Indian respondent, the tribal courts are able to hear any case in which they can obtain service of process for the Indian defendant. In cases that do not involve tribal members, the extent of the tribal courts' jurisdiction is more limited.

VIII. PERSONAL JURISDICTION IN CIVIL CASES

There are three types of jurisdiction that any court, including a tribal court, must establish before it can properly hear a matter. They include personal jurisdiction, territorial jurisdiction and subject matter jurisdiction. The discussion of territorial jurisdiction based on the site of the dispute is included in both the personal jurisdiction and subject matter jurisdiction sections, as the considerations are slightly different for each of these areas.[198]

Personal jurisdiction is the power of the court to require a party to an action to appear.[199] Tribal courts, like other civil courts, acquire jurisdiction over defendants by service of process within their territory, by residence and constructive service, or by long-arm service for suits arising from activity within the court's geographical jurisdiction. There are no inherent limits on dollar amounts or the exercise of equitable remedies in tribal court civil jurisdiction. Those limits have been made by certain tribes but have not been imposed by the federal government and cannot be imposed by state authorities.[200]

A. *Parties*

The parties can include any combination of tribal members, nonmember Indians and non-Indians. The tribal governing documents, including the constitution and codes, specify the parties over which it can have personal jurisdiction. The jurisdiction may be restricted to tribal members living on the reservation, or it may be very broad and include anyone who comes onto the reservation or conducts any

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198. *See infra* Part VIII (discussing territorial jurisdiction with respect to personal jurisdiction); *infra* Part IX (reviewing territorial jurisdiction in the context of subject matter jurisdiction).

199. While this discussion may seem simplistic to some practitioners, it is included because the concepts discussed here may have slightly different applications in Indian country. It is also included for the benefit of tribal court personnel who may not have formal legal training.

200. For example, a tribe might limit the amount a plaintiff can recover in a civil case. These limits balance the rights of plaintiffs to receive compensation and the reality that tribal member defendants may not have the financial resources to pay large judgments.

business with the tribe. Thus, the starting point for any inquiry of personal jurisdiction is the tribal constitution and codes.[201]

B. Methods of Obtaining Personal Jurisdiction

1. Service of Process

The first requirement for personal jurisdiction is service of process on the party. This is the act of giving notice to the party that a lawsuit has been filed against him. Usually, service of process is accomplished by having a tribal police officer or a private process server physically hand a copy of the complaint to the party. This ensures that the party has notice and the ability to respond to the suit within the time set out in the tribal code, usually thirty days from the date the party receives the papers.

As long as the party comes on to the reservation, service of process is not a complicated issue. However, if the person being sued does not come on to the reservation after the dispute arises, as in the case of a nonresident involved in a car accident, then service of process can become a more difficult issue. Again, the starting point is the tribal constitution and codes. These documents should authorize service of process off the reservation. In addition, there must be some agreement between the state and the tribe to allow for service of process off the reservation when the party cannot be served on the reservation. Absent both of these elements, the tribal court cannot obtain personal jurisdiction over nonresidents not present on the reservation.

It is also worth noting that the service of process issue is similar when a party to an action filed in state court is attempting to serve a tribal member who is domiciled on the reservation. Unless the tribe and state have an agreement or the state is a P.L. 280 state, a state official or process server cannot serve a tribal member within the boundaries of the reservation.

2. Domicile and Residence

While the terms "domicile" and "residence" are generally interchangeable, the difference can be crucial if the tribal code makes such a distinction. Domicile, in legal terms, is the place in which a person lives and intends to stay for the indefinite future—in other words, the person's permanent residence.[202] A person has only one

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201. This point cannot be over-emphasized. Many litigators in state and federal courts fail to look to the tribal constitution and codes prior to filing lawsuits, forcing the tribal court to untangle the mess the lawyers have created. For instance, a county sheriff may *think* he has the right to serve process on a tribal member within the reservation, but unless such authority is expressly granted in the tribal code or in a written agreement between the tribe and the county, such service will be improper, and the court will lack personal jurisdiction to hear the case.

202. BLACK'S LAW DICTIONARY 501 (7th ed. 1999).

domicile. In contrast, a residence is the place in which a person is staying at a given point in time.[203] A student, traveler, or military personnel can have a residence different from her domicile. Or someone may have several residences, as in a summer home and a winter home. The distinction between domicile and residence is only relevant when the tribal code permits service of process or personal jurisdiction only for domiciliaries of the reservation and not for residents. In most cases, however, the words are interchangeable, and the tribe may serve process on anyone domiciled or residing on the reservation. In addition, the tribal court will have personal jurisdiction over them as well.

3. *Tribal Long-Arm Statute Plus Minimum Contacts and Fairness*

The more complicated issue arises when the defendant is neither domiciled nor residing on the reservation. The starting point is the tribal code's "long-arm statute." A long-arm statute is a law that allows the forum (i.e., the tribal court) to obtain personal jurisdiction over a nonresident in an action involving tribal members and/or tribal interests. The tribe's long-arm statute will specify exactly who is within the court's personal jurisdiction. The statute may be very broad, allowing the tribal court to hear matters involving any nonresident who can be properly served, or it may be very narrow, allowing jurisdiction over tribal members only.

In addition to the tribe's long-arm statute, any exercise of tribal court jurisdiction should pass the United States Supreme Court's test in *International Shoe Co. v Washington.*[204] In short, this test requires that the party should have certain minimum contacts[205] with the tribe such that the exercise of personal jurisdiction would be fair.[206] Generally, if the cause of action arises out of[207] or is "substantially" related to[208] such contacts, then the assertion of jurisdiction is fair. For example, if a car accident occurred within the reservation, and there is a lawsuit in tribal court based on that accident, then the cause of action is said to arise out of the contacts. But for the parties driving on the reservation roads, the accident would not have occurred. Or where there is a contract between the tribe and a corporation run by nontribal members, and a dispute arises as to the terms or performance of the contract, that transaction relates to the contact with the tribe.[209]

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203. *Id.* at 1310.
204. 326 U.S. 310 (1945).
205. *Id.* at 316.
206. *Id.*; *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).
207. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).
208. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).
209. But note that several lower courts have held that the level of minimum contacts with the tribal forum must be higher for a tribe to assert personal jurisdiction than if the tribe were a state. *See, e.g.*, Babbitt Ford, Inc. v. Navajo Indian Tribe, 519 F. Supp. 418, 431 (D. Ariz. 1981), *aff'd in part, rev'd in part*, 710 F.2d 587 (9th Cir. 1983); Red Fox v. Hettich, 494 N.W.2d 638, 645 (1993); *see also* Laurie Reynolds, *Adjudication in Indian*

IX. SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is the power of a court to hear the type of matter before it. For example, if a lawsuit involves personal injuries from an accident that occurred outside the reservation boundaries between two non-Indians, the tribal court would not have the subject matter jurisdiction to adjudicate the case. This is because the tribe would lack an interest in the outcome and the authority to properly apply its laws to the situation. But if the matter involved the divorce of two tribal members domiciled on the reservation, the tribal court would have subject matter jurisdiction over the case, as long as the tribal code allows the court to hear the matter. It is important to note that one of the main differences between personal jurisdiction and subject matter jurisdiction is that personal jurisdiction can be waived by the parties while subject matter jurisdiction cannot.[210] This means that a party that otherwise would not be reachable by the court, either because it could not be properly served or the jurisdiction's long-arm statute does not allow for personal jurisdiction over the party, can agree to appear before the court anyway, thus waiving the court's lack of personal jurisdiction. In contrast, the parties cannot waive subject matter jurisdiction because this involves the *forum's* interest in hearing the matter before it, not the parties' interests.

If the tribal court has subject matter jurisdiction to hear the case, such jurisdiction can either be exclusive or concurrent with the state or the federal courts (or another tribal court). Exclusive jurisdiction means that only one court—tribal, state or federal—has the adjudicatory authority to hear the case. For example, under the Indian Child Welfare Act (ICWA),[211] tribes in non-P.L. 280 states have exclusive jurisdiction to hear child custody matters involving Indian children domiciled or residing on the reservation.[212] Concurrent jurisdiction means that more than one court can hear the matter. An example of tribal-state concurrent jurisdiction is a divorce proceeding in which one spouse is a tribal member domiciled on the reservation and the other spouse is domiciled off the reservation. Either the state or the tribal court could hear such a matter. As discussed more fully below, where more than one court has jurisdiction over a case, there is a potential for conflicting judgments if both courts hear the matter to its completion. Most of the disputes regarding subject matter jurisdiction are between the tribes and the state.

Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction, 38 WM. & MARY L. REV. 539, 574 (1997) (stating that "[b]oth state and federal courts have asserted, without clear doctrinal justification, that establishing the personal jurisdiction of the tribal courts 'requires more in the way of minium contacts than would be sufficient for the citizen of one state to assert personal jurisdiction over the citizen of another state.'") (quoting from *Babbitt Ford, supra.*)

210. Sosna v. Iowa, 419 U.S. 393, 398 (1975); Mitchell v. Maurer, 293 U.S. 237, 244 (1934).

211. 25 U.S.C.A. §§ 1901-1963 (West 1983 & Supp. 2000).

212. *Id.* § 1911 (West 1983).

There are certain matters over which tribes have exclusive jurisdiction, either due to treaties, federal legislation or Supreme Court decisions. For example, some tribes have exclusive jurisdiction over hunting and fishing on the reservation pursuant to treaties; all non-P.L. 280 state tribes have exclusive jurisdiction over child custody proceedings of Indian children who are domiciled on the reservation pursuant to the Indian Child Welfare Act;[213] and tribes have the exclusive jurisdiction to tax the income of tribal members derived solely from on-reservation activities.[214]

A. *Parties*

1. *Civil Jurisdiction over Tribal Members*

Assuming that the tribal code allows for personal jurisdiction over all tribal members, the tribal court has jurisdiction to hear any dispute authorized under the code where the parties are all tribal members. There is no federal legislation that limits the civil authority of a tribe to regulate and adjudicate matters involving tribal members when the dispute arises on the reservation. The only limitation on such jurisdiction is the tribal code. If the tribe is in a non-P.L. 280 state, then such jurisdiction is exclusive;[215] if it is located in a P.L. 280 state, then the tribal jurisdiction is concurrent with that of the state court.[216]

2. *Civil Jurisdiction over Nonmember Indians*

Although it was traditionally assumed that tribes had civil subject matter jurisdiction over disputes involving any Indians when the dispute arose on the reservation, this assumption has been called into question by various recent court cases. The U.S. Supreme Court in *Duro v. Reina*[217] first distinguished between member Indians and nonmember Indians in the criminal context, and held that the tribal court lacked criminal jurisdiction over nonmember Indians.[218] Although Congress legislatively overruled *Duro*,[219] the holding indicates a growing trend by courts from the Supreme Court down toward confining tribal court jurisdiction to matters involving tribal members. By focusing on the membership status of the

213. *Id.* § 1911(a) (West 1983).

214. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 181 (1973).

215. *See, e.g.*, Williams v. Lee, 358 U.S. 217 (1959); Fisher v. District Court, 424 U.S. 382 (1976); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

216. *See* Walker v. Rushing, 898 F.2d 672, 674 (8th Cir. 1990); Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 561 (9th Cir. 1991).

217. 495 U.S. 676 (1990).

218. *Id.*

219. *See* 25 U.S.C.A. § 1301(2) (West Supp. 2000) (affirming the tribe's inherent authority to exercise criminal jurisdiction over all Indians within the tribe's borders).

parties, rather than the geographic boundaries of the reservation, the Supreme Court and lower courts continue to make it more difficult for the tribes to preserve the integrity of their political and social units.

In addition, the U.S. Supreme Court's language in its recent decision of *Strate v. A-1 Contractors*[220] suggests that nonmember Indians may hold the same status as non-Indians even in civil disputes. *Strate* uses the term "nonmember" throughout the decision, instead of using the word "non-Indian." Whether this was intentional is not clear from the decision, but it does call into question the civil adjudicatory authority of a tribal court in matters involving nonmember Indians if the dispute arises on fee land.

3. *Civil Jurisdiction over Non-Indians*

Williams v. Lee[221] was the first modern case to address whether the state or tribal court had subject matter jurisdiction in civil cases involving an Indian and non-Indian in a dispute that arose in Indian country. The Supreme Court in *Williams* held that state courts lack subject matter jurisdiction over a claim by a non-Indian against an Indian when the claim arose in Indian country.[222] The assertion of state jurisdiction in those circumstances would infringe "on the right of reservation Indians to make their own laws and be ruled by them."[223] This has become known as the *Williams* "infringement" test.

When the activity occurs on the reservation, the court must determine the extent of its jurisdiction by examining whether the Indian party is the plaintiff or the defendant in the action. If the Indian party is the defendant and the suit is filed in state court, then the *Williams* infringement test definitely applies, and the tribe has exclusive jurisdiction. If, however, the Indian party is the plaintiff, then the state court has concurrent jurisdiction with the tribe, despite the fact that the dispute arose in Indian country.[224]

In order for a court to decide whether it has civil jurisdiction, it must determine the site of the dispute. In *Merrion v. Jicarilla Apache Tribe*,[225] the U.S. Supreme Court noted that tribes can exercise civil jurisdiction over non-Indians on Indian lands.[226] Indian tribes also retain some inherent sovereign power to exercise some

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220. 520 U.S. 438 (1997); *see also infra* Part IX.B.

221. 358 U.S. 217 (1959).

222. *Id.*

223. *Id.* at 220.

224. *See* Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 148 (1984) (stating that the Supreme Court "repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country. . . . The interests implicated in such cases are very different from those present in *Williams v. Lee*, where a non-Indian sued an Indian in state court for debts incurred in Indian country").

225. 455 U.S. 130 (1982).

226. *Id.*

forms of civil jurisdiction over non-Indians on the reservations, even on non-Indian fee lands.[227] In 1981, the Supreme Court decided *Montana v. United States*.[228] The Court devised a new test to determine the civil regulatory jurisdiction of a tribe over a non-Indian on non-Indian-owned lands within the exterior boundaries of the reservation. The test set out in *Montana* to determine whether a tribe has civil jurisdiction contains four elements:

> (1) Whether the non-Indian entered into any consensual relationship with the tribe or its members. For example, whether there have been any commercial dealings, contracts, leases or other arrangements;
> (2) Whether the non-Indian's activity threatens or has some direct effect on the political integrity of the tribe;
> (3) Whether the non-Indian's activity threatens or has some direct effect on the economic security of the tribe; and
> (4) Whether the non-Indian's activity threatens or has some direct effect on the health or welfare of the tribe.[229]

B. Strate v. A-1 Contractors

1. Montana *Test After* Strate

The Court in *Strate v. A-1 Contractors*[230] extended the *Montana* test to apply to determinations of civil adjudicatory jurisdiction over non-Indians. This case involved a car accident on a highway that ran through the Fort Berthold Reservation in North Dakota. The land on which the highway was constructed was part of the trust land of the Tribe, but a right-of-way had been granted to the state for the highway. The accident was between a driver of a truck, which was owned by a non-Indian company doing business with the Tribe, and the non-Indian wife of a deceased tribal member. Her children were tribal members, and she claimed to be residing on the reservation, facts which the Supreme Court found to be irrelevant to its decision.[231]

In its analysis of whether the tribal court had jurisdiction to hear the personal injury suit brought by the wife of the tribal member and her children, the *Strate* Court modified the way in which the *Montana* test was applied. Instead of using the

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227. Jurisdiction over fee parcels within the exterior boundaries of a reservation is one of the most often litigated jurisdictional issues. Due to the allotment of Indian lands under the General Allotment Act, 25 U.S.C.A. §§ 331-358 (West 1983 & Supp. 2000), most reservations contain both fee land (usually owned by nonmembers as a result of allotment) and trust land owned by the tribe and tribal members.

228. 450 U.S. 544 (1981).

229. *Id.* at 565-66.

230. 520 U.S. 438 (1997).

231. *Id.* at 457.

four-part test outlined above, the Court in *Strate* held that the *Montana* test starts with the presumption that "tribes lack civil [adjudicatory] authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions."[232] Those two exceptions are: (1) where the individual has entered into a consensual agreement with the tribe or its members; and (2) where the conduct of the nonmember threatens or has some direct effect on the political integrity, economic security, health or welfare of the tribe.[233] In addition, the Court stated that the tribe's adjudicative authority does not exceed its legislative authority unless Congress has specifically enlarged the tribal court's jurisdiction.[234]

This decision diluted the strength of the *Montana* holding in several respects. First, it requires that the inquiry regarding tribal court jurisdiction begin with the presumption that the tribal court does *not* have jurisdiction in civil matters involving non-Indians on non-Indian land.[235] The tribal court may only hear such a case if one of the "exceptions" applies. This analysis is the exact opposite of the *Montana* holding, which began with the presumption that there was tribal court jurisdiction if any element of the four-part test outlined in the holding had been met.[236] While this distinction may seem subtle, it is crucial because the starting point after *Strate* is that there is no tribal court jurisdiction over matters involving non-Indians on fee land. Thus, the burden is on the tribal court to rebut this presumption by demonstrating that the matter falls within one of the two exceptions.

The Court also dismissed the first part of the *Montana* test as being inapplicable in *Strate*.[237] That is, the Court concluded that A-1's connection with the Tribe was irrelevant to the discussion because the plaintiff was not a party to the contract between A-1 and the Tribe.[238] However, A-1's connection was very relevant: but for A-1's business relationship with the Tribe, it is unlikely that their driver would have been on the highway running through the reservation. Thus, without the contract between the parties, there would have been no accident. But, because the Court dismissed this prong of the *Montana* test, there was no discussion of whether the driver of the A-1 truck was on company business at the time of the accident.

The court should also have considered A-1's business relationship with the tribe in its analysis of the second prong of the test. In analyzing any court's subject matter jurisdiction, the health and safety of the forum's residents gives any state subject matter jurisdiction over accidents within its borders. But the *Strate* Court

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232. *Id.* at 446.
233. *Id.*
234. *Id.* at 453.
235. *Id.* at 446.
236. *See* Montana v. United States, 450 U.S. 544, 565 (1981) (stating that "tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands").
237. *Strate*, 520 U.S. at 457.
238. *Id.*

dismissed this concern as trivial. The Court stated, "Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana's* second exception requires no more, the exception would severely shrink the rule."[239] What "more" the Court could possibly require besides protecting the safety of tribal members is unclear, especially when safety of tribal members is defined as one of the elements of both the *Montana* test and the *Strate* Court's "exceptions."

The Court then went on to say that requiring A-1 to "defend against this commonplace state highway accident claim in an unfamiliar court"[240] is not necessary to protect the Tribe's interests.[241] This statement is shocking in several respects. First, although it is a State right-of-way, the State does not own the underlying land. The fact remains that the highway ran through the boundaries of the reservation. The State had no legal ownership interest in the land.[242]

Second, it is a complete mischaracterization to call the tribal court an "unfamiliar court."[243] The fact that A-1 was doing business with the Tribe, owned the truck and employed the driver that was involved in the accident while driving on the reservation makes this statement absurd. If A-1 had been engaged in construction for South Dakota while being a business entity from North Dakota, there would have been no discussion whatsoever as to unfamiliar forums if the accident had occurred in South Dakota, regardless of whether the driver was engaged in official company business at the time of the accident. Merely by virtue of driving on a road running through the State of South Dakota, both the driver and A-1 would be subject to its personal jurisdiction, and the State would have subject matter jurisdiction over the lawsuit. It is an accepted norm of modern life that being involved in an automobile accident in a foreign state automatically gives that forum subject matter jurisdiction over the case. This is because courts recognize that the forum has a very strong interest in protecting the safety of its residents and of the roadways in general. The only distinction between such cases and the situation in *Strate* was that the State of North Dakota built the highway that ran through the reservation pursuant to a right-of-way. As the Court itself pointed out, the Tribe still certainly has an interest in protecting its tribal members from the reckless driving of those driving on the roads running through the reservation.[244]

The Court also dismissed as having little relevance the fact that the tribal police retained the jurisdiction to patrol the road.[245] This is basically an acknowledgment

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239. *Id.* at 457-58.
240. *Id.* at 459.
241. *Id.*
242. *See* BLACK'S LAW DICTIONARY 527 (7th ed. 1999) (defining an easement as a right to *use* land, not an ownership interest in it).
243. *Strate*, 520 U.S. at 459.
244. *Id.*
245. *Id.* at 455 n.11.

that the Tribe had a significant interest in protecting the safety of those who used the highway running through the reservation. But, as with the other facts that ran contrary to its conclusion, the Court dismissed the significance of this fact by placing it in a footnote and stating that it was irrelevant without explaining why.[246]

In addition, a right-of-way is a form of an easement, which is a right to use land; it is specifically *not* an ownership interest in the land. The federal government still held title to the underlying land in trust for the Tribe. In order to reach its conclusion that the tribal court had no subject matter jurisdiction in this case, the Court focused on the fact that the State paid the Tribe compensation for the right-of-way, and the Tribe retained only the right to erect crossings on the highway.[247] But both of these issues are irrelevant when considered in light of basic property law. In negotiating easements, it is almost always the case that the owner of land will collect compensation for an easement. In addition, the owner will often require the easement holder to maintain the easement and will retain for itself very few rights for the duration of the easement. Thus, the elements that the Court used to justify its statement that the highway should have been treated as fee land owned by a non-Indian make no logical or legal sense.

2. *Member v. Nonmember Indians After* Strate

The decision in *Strate* also used the term "nonmember" rather than "non-Indian" in its discussion of tribal court jurisdiction.[248] This would suggest that the Court might have intended the holding to apply equally to non-Indians and nonmember Indians. But such a holding is in direct conflict with a recent congressional modification of the Indian Civil Rights Act[249] in which Congress specifically overruled a Supreme Court holding that treated nonmember Indians the same as non-Indians in a criminal context.[250] Based on this legislation, it is more likely Congress' intent to have member and nonmember Indians residing on a reservation treated the same for civil purposes.[251] In addition, treating nonmember Indians the same as tribal members makes more sense given both the historical and modern realities of tribal life. Members of one tribe often marry members of other tribes and live their lives on their spouse's reservation. The children are raised in that tribe; the nonmember spouse obtains services from Indian Health Services on the member spouse's reservation. Thus, the line between nonmember Indians and

246. *Id.*
247. *Id.* at 455.
248. *Id.* at 446, 447, 454.
249. 25 U.S.C.A. §§ 1301-1341 (West 1983 & Supp. 2000).
250. *Id.* § 1301(2) (West Supp. 2000).
251. *See supra* Part IV regarding criminal jurisdiction and the statutory and case law restrictions on tribal criminal jurisdiction. Few federal statutes and cases restrict tribal civil jurisdiction, leading to the conclusion that Congress would probably not acknowledge tribal criminal jurisdiction that was broader than tribal civil jurisdiction.

member Indians residing on the same reservation is much less distinct than is the line between nonmembers and non-Indians. Logic dictates that nonmember Indians residing on the reservation should be treated the same as tribal members for adjudicative purposes.[252]

3. The Court's Definition of "Indian Country" in Strate

One of the most significant grounds on which the Court based its holding involved the Court's definition of the term "Indian country." Because the accident occurred on a right-of-way held by the State, the Court concluded that the highway was the same for nonmember regulatory purposes as alienated non-Indian land.[253] The Court discussed rights-of-way in a footnote,[254] merely saying,

> [f]or contextual treatment of rights-of-way over Indian land, compare 18 U.S.C.[A.] § 1151 [the Major Crimes Act] (defining "Indian country" in criminal law chapter generally to include "rights-of-way running through [a] reservation") with [18 U.S.C.A.] §§ 1154(c) and 1156 (term "Indian country," as used in sections on dispensation and possession of intoxicants, "does not include . . . rights-of-way through Indian reservations."[255]

The Court appears to have cited these two inconsistent definitions of Indian country to justify its conclusion that the State's right-of-way in *Strate* was analogous to alienated non-Indian land. However, this conclusion ignores the fact that the definition in the Major Crimes Act[256] is the default definition of Indian country in both the civil and criminal context.[257] The definition of Indian country relied on by the Court in *Strate* is an obscure statute that only applies to the sale and possession of liquor in Indian country.[258] By relying on the statute to justify its conclusion that the State highway in *Strate* was not Indian country, the Court contradicted its prior case law. All other cases decided by the U.S. Supreme Court have used the definition of Indian country in the Major Crimes Act unless there was

252. One of the rationalizations for treating nonmember Indians and non-Indians the same is that nonmembers generally have no voice in the tribal government. But this rationalization fails when analogized with anyone who has two or more residences. Because they can only be registered to vote in one of their states of residence, they necessarily have no voice in the government of the other state. But this inability to participate in both state governments has no impact whatsoever on either state's ability to exercise its full sovereignty.

253. Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997).

254. *Id.* at 454 n.9.

255. *Id.*

256. 18 U.S.C.A. § 1151 (West 1984).

257. *See, e.g.*, DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975) (stating that although § 1151 is a criminal statute, it "generally applies as well to questions of civil jurisdiction"); *see also* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) (using § 1151 in the Court's analysis of whether a landfill constructed on non-Indian fee land was Indian country).

258. 18 U.S.C.A. §§ 1154(c), 1156 (West 1984 & Supp. 1999).

a specific statutory definition that applied to the issue.[259] Therefore, by focusing on the intended result rather than the potential impact of the decision, the Court left open the possibility for other courts to "pick and choose" which definition of Indian country suits their purpose in any given case.

4. *Exhaustion of Tribal Remedies After* Strate

While the Court in *Strate* specifically held that neither *National Farmers*[260] nor *Iowa Mutual*[261] applied to the case, in a footnote, the Court stated that there was no need to exhaust tribal remedies on the issue of tribal court jurisdiction.[262] In a sweeping generalization, the Court says that "it is plain" that there is no tribal jurisdiction in this case and that exhausting tribal remedies would merely serve to delay the proceedings.[263] But the district court upheld tribal jurisdiction, the appellate court affirmed tribal jurisdiction, the appellate court, *en banc*, reversed, and the Supreme Court affirmed that the tribe lacked jurisdiction. In other words, two courts held that the tribal court had jurisdiction, and two courts held that it did not. This judicial history defies the assertion that it was "plain" that the tribal court lacked jurisdiction.

Additionally, the Court potentially undermined any tribal court proceeding to determine its subject matter jurisdiction as delaying the proceedings.[264] But such an inquiry is a critical part of the court's judicial process. If a tribal court is subject to having its inquiry trivialized as "plain" and a means of delaying the process, the concept of exhaustion of tribal remedies will become a tool by which district court judges can make the holdings in *National Farmers* and *Iowa Mutual* meaningless.

C. *Potential Ramifications of* Strate

The Supreme Court clearly meant the holding in *Strate* to apply only when a tribal member was not a party to the action. For example, prior to analyzing the *Montana* "exceptions," the Court noted that the accident occurred between two non-Indians.[265] The Court went on to discuss whether such an accident jeopardizes the

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259. For example, the Indian Child Welfare Act, 25 U.S.C.A. § 1903(10) (West 1983), includes its own definition of Indian country that is slightly different from the Major Crimes Act, 18 U.S.C.A. § 1151 (West 1984). But this definition applies only to ICWA cases, and the Supreme Court has never attempted to use this definition in any other context.

Also, the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (West Supp. 2000), has a very expansive definition of "Indian lands" that applies only for purposes of Indian gaming. *See* 25 U.S.C.A. § 2703(4) (West Supp. 2000).

260. 471 U.S. 845 (1985).

261. 480 U.S. 9 (1987).

262. Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997).

263. *Id.*

264. *Id.*

265. *Id.* at 456.

"political integrity, the economic security, or the health or welfare" of the Tribe[266] (that is, whether *Montana's* second "exception" had been met). In concluding that the accident had not affected the Tribe's interests enough to allow it to have jurisdiction over the case, the Court specifically distinguished between the potential of injury to a tribal member and the actual injury of a tribal member.[267] The Court states, "if *Montana's* second exception requires no more [than a potential for injury to a tribal member], the exception would severely shrink the rule."[268]

But the Court's holding in *Strate* rested mainly on the characterization of the land on which the accident occurred. Instead of focusing on the threat that negligent drivers pose to the safety of tribal members, the Court based its reasoning on a strained definition of Indian country. The Court concluded that the right-of-way where the accident had occurred should be treated as alienated fee land.[269] Thus, because the accident had involved only nonmembers, and, for analytical purposes, the land was non-Indian-owned fee land, the Court concluded that the Tribe had no interest in the accident.

The Court's analysis in *Strate* left the door open for other courts to deny the tribes jurisdiction even in cases involving tribal members. In fact, two cases out of the Ninth Circuit recently used the Supreme Court's reasoning to circumvent tribal court jurisdiction in tort actions involving injuries to tribal members. The appellate court in *Wilson v. Marchington*[270] concluded, despite the fact that the accident involved a tribal member, "this case mirrors the facts of *Strate* almost precisely."[271] Focusing solely on the characterization of the highway as alienated fee land, the *Wilson* court held that the tribal court lacked subject matter jurisdiction over the case.[272] The Tribe's interest in the safety of its members, which in the *Wilson* case is no longer theoretical, was summarily dismissed by the Ninth Circuit. The *Wilson* court stated that "[i]f the possibility of injuring multiple tribal members does not satisfy the second *Montana* exception under *Strate*, then, perforce, Wilson's status as a tribal member alone cannot."[273] The Ninth Circuit took the Supreme Court's conclusion that the *possibility* of injury to tribal members was insufficient to implicate tribal interests and applied it to a situation in which there had been *actual* injury to a tribal member.

But there are several flaws in the court's logic in *Wilson*. First, the facts of this case did not mirror those in *Strate*. As noted above, the Supreme Court began its analysis by observing that no tribal members had been involved in the accident.[274]

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266. *Id.* at 457.
267. *Id.* at 458.
268. *Id.*
269. *Id.* at 454.
270. 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).
271. *Id.* at 814.
272. *Id.* at 814-15.
273. *Id.* at 815.
274. Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997).

It is upon this fact that the Court in *Strate* based its conclusion that the tribe had no interest in the case. Second, the *Wilson* court failed to recognize the obvious difference between the possibility of injury and the fact of injury to a tribal member. If actual physical injury to a tribal member does not constitute a threat to "health or safety," then nothing can, and this portion of the *Montana* "exception" is meaningless. Furthermore, the *Wilson* court focused on the application of *Montana* and *Strate* to the tribe, not to the members.[275] But linguistics and logic dictate that the "health or safety" elements of the *Montana* test apply to the individual tribal members, and not to the tribe as an entity.

Following the precedent set by the Ninth Circuit, a district court in the State of Montana held that the Crow Tribal Court lacked subject matter jurisdiction over a lawsuit filed by a tribal member against a non-Indian.[276] As in *Wilson*, the *Austin's Express, Inc. v. Arneson*[277] case involved a car accident that occurred within the reservation boundaries but on an interstate highway right-of-way held by the state. Noting that the "key" to the *Strate* holding was the Court's characterization of the highway as alienated fee land,[278] the *Austin's Express* court found it insignificant to the analysis of tribal interests that the victim was a tribal member.[279]

But, despite the fact that the holdings in *Wilson* and *Austin's Express* fail to recognize the significant interests of the tribes in protecting the health and safety of their members, neither decision is surprising given the reasoning in *Strate*. The *Strate* Court's characterization of the right-of-way through trust land as falling outside the definition of Indian country almost makes these holdings inevitable.

D. Nature/Subject Matter of the Dispute

Certain types of civil cases have withstood challenges to tribal court jurisdiction based upon the infringement test set out in *Williams*.[280] Those include divorce, adoption and child custody, probate and execution of judgments against Indian property.

1. Divorces

The tribal courts have exclusive jurisdiction over divorces between Indians domiciled in Indian country.[281] Tribal courts have concurrent jurisdiction with the

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275. *Wilson*, 127 F.3d at 815.
276. Austin's Express, Inc. v. Arneson, 25 Indian L. Rptr. 3187 (D. Mt. 1998).
277. 25 Indian L. Rptr. 3187 (D. Mt. 1998).
278. *Id.* at 3188.
279. *Id.*
280. Williams v. Lee, 358 U.S. 217, 220 (1959).
281. State *ex rel.* Stewart v. District Court, 609 P.2d 290, 292 (Mt. 1980); Whyte v. District Court, 346 P.2d 1012, 1014 (Colo. 1989).

state to grant divorces when at least one party is an Indian domiciled within the territorial jurisdiction of the tribal court.[282] Tribal codes vary in the manner in which they assert such jurisdiction, sometimes basing jurisdiction on the domicile and Indian status of the plaintiff, sometimes on service of process and the Indian status of the defendant. In some cases, this results in the tribe exercising less power than it could (for instance, a court may refuse to take jurisdiction over a divorce sought by a resident Indian plaintiff against an absent Indian or non-Indian defendant). It can also lead to conflicting judgments between state and tribal courts if one of the parties files the suit in tribal court and the other files in state court. Currently, there are no requirements for full faith and credit between tribal and state courts. Therefore, unless the tribe and state have an agreement based on comity, there is a potential for conflicting judgments.[283]

2. *Adoption and Child Custody*

The Indian Child Welfare Act of 1978[284] provides that tribal courts shall have exclusive jurisdiction over custody matters involving Indian children residing or domiciled on the tribe's reservation, and nonexclusive but preferential jurisdiction over such matters involving Indian children living off the reservation.[285]

3. *Probate Cases*

Tribal courts have exclusive jurisdiction to probate non-trust assets of Indians who die domiciled within the tribal court's territorial jurisdiction.[286] A tribal court probably has exclusive jurisdiction to probate non-trust assets located within the court's jurisdiction, even if the deceased Indian had been domiciled outside of Indian country.[287] The principal authority for this is the specific language in *Williams v. Lee*[288] because inheritance is one of the most customary and traditional aspects of tribal law. The probate of trust assets must be accomplished through the Bureau of Indian Affairs and is within the exclusive jurisdiction of the federal courts.[289]

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282. Sanders v. Robinson, 864 F.2d 630, 633 (9th Cir. 1988); Hunt v. Hunt, 16 Indian L. Rptr. 6039 (Ft. McDermitt Tribal Ct. 1988).

283. *See infra* Part XI (regarding "Conflict of Laws").

284. 25 U.S.C.A. §§ 1901-1963 (West 1983 & Supp. 2000).

285. *See* Fisher v. District Court, 424 U.S. 382 (1976). ICWA is a complicated statute, and a full discussion of its jurisdictional implications is beyond the scope of this Article.

286. Montana v. United States, 450 U.S. 544, 563 (1981). The Bureau of Indian Affairs has exclusive jurisdiction to probate trust assets of tribal members because it is the administrative agency under the Department of the Interior responsible for administering Indian trust assets.

287. This analysis is based on the concept of in rem jurisdiction.

288. 358 U.S. 217 (1959).

289. This is because the federal government is the legal title holder of all tribal trust property.

4. Execution of Judgments on Indian Property

Tribal courts have exclusive jurisdiction to enforce judgments by execution on Indian property located within Indian country.[290] Even in P.L. 280 states, only the tribe or the federal government can do any act that would result in the encumbrance, alienation or taxation of Indian property.[291]

5. Land Issues

The first fact that a court must ascertain is the exact status of the land. The court must determine whether the land is within the reservation boundaries or outside; whether the land is "open" or "closed";[292] whether the land is held in fee or trust; and whether the land is owned by a tribal member, nonmember Indian or non-Indian. The answer to each of these inquiries influences the tribe's subject matter jurisdiction over the property.

If the land is held in trust by the federal government for a tribal member or the tribe itself, then the tribal court and federal court have concurrent jurisdiction. This is because disputes involving Indian land held by the federal government in trust is by definition a federal question conferring subject matter jurisdiction on federal district courts.[293] This is true in both P.L. 280[294] and non-P.L. 280 states.

If the land is within the exterior boundaries of the reservation, the only clear jurisdictional rules are: (1) the tribe has exclusive jurisdiction to zone "closed" areas, whether fee or trust, and whether held by an Indian or non-Indian owner; and (2) the tribe has no jurisdiction to zone "open-area" fee land owned by a non-Indian.[295] These rules come from *Brendale v. Confederated Tribes and Bands of the Yakima Nation*,[296] in which the only portions of the decision that garnered a majority are those listed above. A "closed" area is a portion of the reservation that is closed to all but tribal members; an "open" area includes any part of the reservation to which the tribe allows nonmembers access. Because *Brendale* involved a tribe's regulatory authority (e.g., its right to regulate land use through zoning ordinances), it demarcates the outside limits of a tribe's adjudicatory

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290. Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980).
291. 28 U.S.C.A. § 1360(b) (West 1993).
292. *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 411-12 (1989) (defining "open" as areas within the reservation owned by a large number of nonmembers and "closed" as the areas in which the Tribe has retained the right to exclude nonmembers).
293. 28 U.S.C.A. § 1331 (West 1993); *see also* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) (holding that land claimed pursuant to a treaty is also a federal question).
294. 28 U.S.C.A. § 1360(b) (West 1993).
295. *Brendale*, 492 U.S. at 411-12.
296. *Id.* at 408.

authority as well.[297] If the land is trust land held by the tribe or a tribal member, it would likely fall within both the *Montana*[298] and *Strate*[299] tests described above. That is, any disputes involving the land would almost certainly be considered crucial to the tribe's economic security and political integrity.

The tougher questions involve land held in fee by a tribe, a tribal member or a nonmember Indian. The jurisdictional resolution would depend on what affect the outcome of the litigation might have on the tribe.[300] A dispute involving land held by the tribe itself would be the most likely to implicate the political integrity or economic security of the tribe.[301] In contrast, land held in fee by a non-Indian has been held to be subject to local non-tribal zoning ordinances.[302] Whether tribes have regulatory or adjudicatory jurisdiction over land held in fee by a nonmember Indian would require a close analysis of the *Montana* and *Strate* factors.

6. *Commercial Transactions*

The initial inquiries for determining which court has adjudicatory authority over commercial transactions (e.g., contract disputes) include who the parties to the transaction are;[303] whether an Indian party is the plaintiff or defendant;[304] where the contract was negotiated;[305] where the contract was executed (signed);[306] where the majority of the terms of the contract were to be performed;[307] whether there were any forum selection provisions in the contract;[308] and where the parties to the contract were domiciled, or state of incorporation and principal place of business for corporations.[309]

Once the court ascertains these facts, it would begin its analysis based on the status of the parties and the tribal code. If both parties are tribal members, the tribal court would have the fullest jurisdiction allowed by the tribal code. If the plaintiff is a tribal member and the defendant is a non-Indian, the court would apply the

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297. *See* Strate v. A-1 Contractors, 520 U.S. 438 (1997) (holding that a tribe's adjudicatory authority cannot exceed its regulatory authority).

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

299. Strate v. A-1 Contractors, 520 U.S. 438 (1997).

300. *Id.*

301. *See* 28 U.S.C.A. § 1362 (West 1993) (conferring on the federal district courts original jurisdiction over civil actions brought by tribes where the matter "arises under the Constitution, laws, or treaties of the United States").

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

303. *See supra* Part IX.A (discussing the tests to determine tribal civil adjudicatory jurisdiction, depending on whether the parties are tribal members, nonmember Indians or non-Indians).

304. Williams v. Lee, 358 U.S. 217 (1959).

305. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 186-88 (1971) (hereinafter RESTATEMENT).

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

Williams[310] test. The court would apply the *Williams* or *Montana/Strate*[311] analysis if both parties are nonmembers, depending on whether the contract was negotiated, performed or executed in Indian country.

7. *Personal Injury*

The relevant inquiries for resolving jurisdictional disputes for personal injury cases (e.g., auto accidents) include where the injury occurred;[312] where the conduct causing the injury occurred (if different from where the injury occurred, as in a products liability case);[313] whether the party is a tribal member, nonmember Indian or non-Indian;[314] whether the Indian party is the plaintiff or defendant;[315] and where the parties are domiciled, or place of incorporation and principal place of business of corporation.[316] The analysis would be the same as in a commercial transaction, which is discussed above.[317]

8. *Gaming*

Because Indian lands are held in trust by the federal government, they are not subject to the regulatory laws of the states in which they sit,[318] even in P.L. 280[319] states. The tribes have attempted to use this unique status to develop their reservation economies. Until recently, most of these efforts have been thwarted by the states, which resent the fact that they lack the authority to tax reservation income earned by tribal members.[320] But the United States Supreme Court upheld the tribes' right to run gaming facilities on the reservation in *California v. Cabazon Band of Mission Indians*.[321] The issue in *Cabazon* was whether the Cabazon Band of Mission Indians could conduct certain games that were regulated in the State of California. The Court held that, because the State merely regulated the type of gaming at issue, but did not outlaw it completely, it was not against the State's

310. *See supra* text accompanying notes 221-24 (setting forth the *Williams* test).
311. Montana v. United States, 450 U.S. 544 (1981); Strate v. A-1 Contractors, 520 U.S. 438 (1997).
312. RESTATEMENT, *supra* note 305, §§ 145(2)(a), 146. The court would also apply the *Williams* (Williams v. Lee, 358 U.S. 217 (1959)) infringement test or the *Strate* (Strate v. A-1 Contractors, 520 U.S. 438 (1997)) holding to determine the tribe's interest in the action.
313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*
317. *See supra* Part IX.D.6.
318. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).
319. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C.A. § 1162 (West 1984), 25 U.S.C.A. §§ 1321-1326 (West 1983 & Supp. 2000), 28 U.S.C.A. § 1360 (West 1993)).
320. *See* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973).
321. *Cabazon*, 480 U.S. 202 (1987).

public policy to allow those games.[322] Because the State could not enforce its regulatory laws within the reservation, the Tribe could legally conduct the gaming operations without being subject to the State's control, even in California, which is a P.L. 280 state.[323]

In response to the *Cabazon* decision, Congress enacted the Indian Gaming Regulatory Act (IGRA)[324] in 1988. Congress adopted much of *Cabazon's* language in the Act, which states: "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity."[325] The state's public policy seems to be the main focus when determining whether the tribal gaming will be allowed.

IGRA also divides gaming into three classes. Class I is defined as the "social gaming," including traditional games and games with nominal prizes.[326] Class II basically consists of non-electronic games that are not played against the "house."[327] If the state permits "such gaming" and it is not prohibited by federal law, then the tribe can conduct Class II gaming. Class III gaming includes games played against the house when the games are permitted by the state and are not prohibited by federal law.[328] It also consists of all electronic games.[329] This is the category that requires a compact between the tribes and the states.

The language of IGRA is far from clear. One of the most contested issues is what is meant by the language "such gaming"[330] in the provision that says the states must negotiate with the tribes if the state "permits *such gaming*."[331] The question is how specifically to interpret the phrase "such gaming." In the case of *Rumsey Indian Rancheria v. Wilson*,[332] the Ninth Circuit interpreted this language very narrowly, holding that the tribal games must be identical to the ones allowed by the state. But the dissent to the denial of rehearing articulated the other side of the argument, which is the broad interpretation of the term.[333] According to the dissent, the better interpretation is to allow any games that fall within any class not prohibited by the state.[334]

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322. *Id.* at 206.
323. *Id.* at 221-22.
324. 25 U.S.C.A. §§ 2701-2721 (West Supp. 2000).
325. *Id.* § 2701(5) (West Supp. 2000).
326. *Id.* § 2703(6) (West Supp. 2000).
327. *Id.* §§ 2703(7)(A)(I), 2703(8) (West Supp. 2000).
328. *Id.* § 2703(8).
329. *Id.*
330. *Id.* § 2710(d)(1)(B) (West Supp. 2000).
331. *Id.* (emphasis added).
332. 64 F.3d 1250 (9th Cir. 1995), *reh'g denied, amended by* 99 F.3d 321 (9th Cir. 1996), *cert. denied*, 521 U.S. 1118 (1997).
333. *Id.*
334. *Id.*

Another problem with IGRA is the inability to enforce the provision that requires the states to negotiate compacts with the tribes "in good faith."[335] The Supreme Court held that the tribes could not sue the states in federal court for failure to negotiate in good faith because such suits violate the Eleventh Amendment to the Constitution.[336] According to the Court, the states have sovereign immunity from such suits unless they consent.[337] Although IGRA is still valid, the tribes have no way to enforce the "good faith" negotiation provision.

335. 25 U.S.C.A. § 2710(d).
336. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (1996); *see* U.S. CONST. amend. XI.
337. *Id.*

X. PUBLIC LAW 280

Public Law 83-280 (P.L. 280)[338] is a federal statute that transferred jurisdiction over all criminal matters "committed by or against Indians in Indian country" from the federal government to six states.[339] These states are known as the "mandatory states" because they had no choice but to take the jurisdiction pursuant to the statute; P.L. 280 also provided for other states to assume jurisdiction if certain requirements were met. The Act was later amended to require tribal consent to the assumption of jurisdiction by the states,[340] but did not allow tribes to initiate the

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338. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C.A., § 1162 (West 1984), 25 U.S.C.A. §§ 1321-1326 (West 1983 & Supp. 2000), 28 U.S.C.A. § 1360 (West 1993)). The civil portion reads:

State civil jurisdiction in actions to which Indians are parties.

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	*Indian country affected*
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

28 U.S.C.A. § 1360 (West 1993).

For an excellent discussion of the legislative history of Public Law 280, see Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975). For a detailed analysis of the statute, see CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (1997).

339. 18 U.S.C.A. § 1162 (West 1984).

340. 25 U.S.C.A. §§ 1321-1322 (West 1983).

retrocession process.[341] The "criminal" portion of P.L. 280 was enacted to fill the jurisdictional gap that existed at the time.[342] When P.L. 280 was enacted, the federal government would only come on to a reservation to investigate one of the "major" crimes, that is, crimes enumerated in the Major Crimes Act.[343] The tribes had exclusive jurisdiction over crimes committed by Indians in Indian country that were not one of the "major crimes."[344] But many smaller tribes lacked dispute resolution systems, usually because the traditional system had been abolished by the federal government and the tribe did not have the resources to have a BIA-approved court. Thus, if a crime such as assault, battery, any attempt crime (i.e., attempted rape), trespass or disturbing the peace occurred on the reservation, there was no legal recourse for the victim in the federal system.

Although the congressional intent with respect to this criminal portion of P.L. 280 was based on a legitimate concern that many victims lacked legal recourse under the federal system,[345] the enactment of P.L. 280 increased the tension between the tribes and the states; the tribes resented the state's exercise of jurisdiction in their territories, and the "mandatory" states received no money to pay for the enforcement expenses.[346] The "real world" result of the statute was often to increase the jurisdictional gap that existed on the smaller reservations. Because the states were only given enforcement power without the corresponding regulatory or taxing authority, for anything short of murder, the response time of local law enforcement officials in California was at least three days.[347]

In addition to transferring most of the criminal jurisdiction, P.L. 280 also transferred jurisdiction from the federal government to the specified states over some civil matters.[348] The "civil" section of P.L. 280 was added at the last minute and was more related to the federal government's attempt to assimilate Indians at the time than with serving any legitimate purpose.[349] It allowed the state to assert civil jurisdiction, but just how much is very unclear from either the language or

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341. *See* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1409 (1997) (stating that "[b]rute force rather than negotiations among governments was the model for Public Law 280").

342. 18 U.S.C.A. § 1162; *see also* Goldberg, *supra* note 338.

343. 18 U.S.C.A. § 1153 (West Supp. 1999).

344. *See supra* Part IV.

345. For a criticism of the argument of "lawlessness" that existed in Indian country, see generally GOLDBERG-AMBROSE, *supra* note 338. "Since the earliest years of European contact, non-Indian commentaries on tribal life have abounded in misconceptions about the existence and nature of tribal legal systems. Because tribal systems look and function so differently from non-Indian systems, the outsiders often concluded there was no law at all." *Id.* at 1410-11.

346. *See id.* at 1416 (noting that states historically resented the special rights and status of the tribes, and P.L. 280 "empowered an often hostile force"—e.g., the states).

347. *Id.* at 1426. Sheriffs cite remoteness of reservation, cultural differences and uncertainties regarding jurisdiction as the reasons for the delays. *Id.*

348. 28 U.S.C.A. § 1360 (West 1993).

349. Goldberg, *supra* note 338, at 543.

legislative history of the statute.[350] In addition, the language of the statute itself created jurisdictional gaps. For example, if there is a dispute that affects title to Indian land, then the federal government and tribes have concurrent jurisdiction. Thus, state courts cannot hear disputes in such cases.[351] In a situation where a tribe lacks a tribal code, constitution and formal justice system, then the only forum for resolving the dispute is federal district court.[352] But to say the federal officials are slow to act in such disputes is an understatement. Carole Goldberg-Ambrose cites a typical situation in her recent law review article.[353] In her article, she recounts a dispute that arose when an Indian allottee at Torres-Martinez Reservation in Southern California leased land for use as a dumping facility.[354] The tribal council passed a resolution opposing the facility, but the Tribe lacked the enforcement capability to stop the project. The Tribe eventually obtained two cease and desist orders from the Bureau of Indian Affairs. However, the Bureau made no effort to enforce either order because of it's belief that the Tribe was divided on the issue.[355]

To best understand P.L. 280, it is helpful to break the statute down and examine each of its major parts. Briefly, the civil provision of P.L. 280 is divided into three sections, 28 U.S.C.A. § 1360 (a), (b) and (c). Section 1360(a) grants jurisdiction over civil causes of action "to which Indians are parties"[356] that arise in Indian country within the state "to the same extent that such State . . . has jurisdiction over other civil causes of action."[357] This section also provides that state laws of "general application" will apply to Indian reservations in the state in the same manner that those statutes apply to the rest of the state.[358] Courts have interpreted this latter provision to exclude Indian lands from local regulations, such as zoning, rent control and gambling.[359]

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350. Bryan v. Itasca County, 426 U.S. 373, 381 (1976) (stating that, in "marked contrast" to the extensive legislative history of the criminal provision of P.L. 280, there was a "virtual absence" of congressional intent in enacting the civil provision).

351. Owens Valley Indian Housing Auth. v. Turner, 185 F.3d 1029 (9th Cir. 1999). In this case, the court held that the federal district court lacked subject matter jurisdiction to hear the case because there was no federal question and the state court lacked jurisdiction to hear it because of the federal statute, P.L. 280 (28 U.S.C.A. § 1360(c) (West 1993)). Since the tribe had no court, there was no forum for the Tribal Housing Authority's unlawful detainer action. It should be noted that this opinion was withdrawn by 192 F.3d 1330 due to mootness because the defendant, Gifford Turner, died while the action was pending. The reasoning, however, is still a valid reflection of how the Ninth Circuit will decide such a case when it comes before them in the future.

352. *Id.*

353. Goldberg-Ambrose, *supra* note 341, at 1421-23.

354. *Id.*

355. *Id.*

356. *See* 28 U.S.C.A. § 1360(a) (West 1993).

357. *Id.*

358. *Id.*

359. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (holding that state gambling laws did not apply to reservations where the games at issue did not violate the state's public policy); Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1393 (9th Cir. 1987) (holding that P.L. 280 does not subject Indian country to local rent control ordinances because, "[u]nlike the field of taxation, where the laws of both the State and Tribe may be enforced simultaneously, the cities' rent control ordinances would necessarily preclude enforcement of

Section 1360(b) of the civil provision of P.L. 280 specifically exempts from state regulatory jurisdiction the sale, encumbrance or taxation of tribal lands held in trust by the federal government.[360] In *Bryan v. Itasca County*,[361] the U.S. Supreme Court held that the language in this section means that states cannot even apply their laws or enforce state court judgments in a way that would result in the alienation, encumbrance or taxation of trust property.[362] The statute also prohibits the state from regulating the use of such trust land if the regulation is inconsistent with any federal treaty, agreement or statute with respect to the land.[363]

Section 1360(c) states that any tribal ordinances or customs of the tribe "will be given full force and effect in the determination of civil causes of action"[364] as long as it is not inconsistent with any state civil law. Although this provision has rarely been invoked, as tribes in P.L. 280 states continue developing their infrastructures, subsection (c) will likely become more significant.

The exact scope of civil jurisdiction that P.L. 280 grants to the states has been the subject of extensive debate and judicial consideration since the statute was enacted in 1953. There are two separate debates that arose as a result of the ambiguous language and sparse legislative history of the civil provision of P.L. 280.[365] The first issue involves the type of jurisdiction that P.L. 280 confers. The U.S. Supreme Court in *Bryan* held that the statute granted states only the right to adjudicate private civil disputes between Indians on the reservation, not the right to regulate reservation activities.[366] The second area of contention revolves around the question of which state laws apply to tribes and tribal members; that is, what is the exact meaning of the term "laws of general application"[367] described in the statute. The only guidance the Supreme Court has given on this issue was in *California v. Cabazon Band of Mission Indians*.[368] The Court held that P.L. 280 states have "criminal/prohibitory" jurisdiction, while the tribes maintain "civil/regulatory" authority over Indians in Indian country.[369] Since the *Cabazon* decision, the P.L. 280 states and the tribes within those states have litigated

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a conflicting ordinance enacted by the Tribe, and would 'effectively nullify' the Tribe's authority to regulate the use of its lands" (citation omitted)); Zachary v. Wilk, 173 Cal. App. 3d 754 (Cal. Ct. App. 1985) (concluding that a rent control ordinance could not be enforced on the reservation regardless of whether the tenants were non-Indian); *see also* Goldberg, *supra* note 338, at 582-83 (stating that the likely interpretation of the phrase "laws of general application" is statewide laws).

360. 28 U.S.C.A. § 1360(b) (West 1993).

361. 426 U.S. 373 (1976).

362. *Id.* at 391.

363. 28 U.S.C.A. § 1360(b).

364. *Id.* § 1360(c) (West 1993).

365. *Bryan*, 426 U.S. at 383.

366. *Id.* at 384-85.

367. 28 U.S.C.A. § 1360(a) (West 1993).

368. 480 U.S. 202 (1987).

369. *Id.* at 213-14.

extensively over the issue of what constitutes "civil/regulatory" versus "criminal/prohibitory."

The ambiguity in the language of P.L. 280 has also created choice of law issues with which the tribes and states continue to struggle. Section 1360(c) of the statute states:

> Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.[370]

Potentially this means that, if a tribal law on point exists and that law is not inconsistent with the state law, then tribal law must be applied in a civil dispute. In addition, the Ninth Circuit has held that P.L. 280 did not divest tribes of jurisdiction; it merely granted the state and tribal governments concurrent jurisdiction.[371] The *Venetie* court also held that P.L. 280 did not prevent tribes from exercising concurrent jurisdiction with the State of Alaska, as all jurisdictional ambiguities are to be resolved in favor of the tribes.[372] Because the statute says that state courts shall apply tribal laws that are not inconsistent, the question is: in what circumstances must tribal law be applied? The focus of the inquiry, then, is on which tribal laws are inconsistent with state laws. The statute gives no guidance on the proper interpretation of the meaning of "inconsistent laws." Is it enough that a tribal law is inconsistent with the public policy behind the state's law? Or if the law

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370. 28 U.S.C.A. § 1360(c) (West 1993).

371. Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 560-62 (9th Cir. 1991); *see id.* at 561 (stating that the Supreme Court has not interpreted P.L. 280 as a divestiture statute and has "rejected all interpretations of Public Law 280 which would result in an undermining or destruction of tribal governments").

372. *Id.*; *see also* AMERICAN INDIAN LAW DESKBOOK, *supra* note 104, at 144 n.120 (stating *Compare Becker County Welfare Dept. v. Bellcourt*, 453 N.W.2d 543, 544 (Minn. Ct. App. 1990) (rejecting defendant's claim that state agency could not bring action to determine paternity and stating that, "[w]hile chapter 256 of Minnesota Statutes regarding AFDC does contain some regulatory aspects, in a paternity action, the county is only acting on behalf of a private party who has assigned her rights to establish paternity and recover child support"), *with State ex rel. Dept. of Human Services v. Whitebreast*, 409 N.W.2d 460, 463 (Iowa 1987) (concluding that Public Law 280 jurisdiction did not authorize action by state agency to recover aid to dependent family payments, since "the public character of the Child Support Recovery Unit . . . seems to us unescapable"); *see also United States v. County of Humboldt*, 615 F.2d 1260 (9th Cir. 1980) (ruling that P.L. 280 did not authorize application of county zoning and building codes against Indian construction projects on tribal trust lands); *State v. Lemieux*, 317 N.W.2d 166, 169 (Wis. Ct. App. 1982) (Public Law 280 grant of civil jurisdiction insufficient to allow enforcement of statutory prohibition against possession of uncased or loaded firearms in vehicles against on-reservation activity of tribal members); *see generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. Rev. 535, 576-80 (1976) (discussing the difficulty in determining the precise scope of state substantive civil law authorized to be applied under Public Law 280).

of the two sovereigns are only partially inconsistent, must the court apply the portion of tribal law that is not inconsistent? And it is not clear whether the state court has an affirmative duty to discover the tribal law or whether the burden is on the parties to inform the court of the tribal law.

Another area of ambiguity that exists regarding the interpretation of P.L. 280 involves whether the tribes retain concurrent jurisdiction over all matters covered by the statute. One argument is that the statute merely transfers the federal jurisdiction to the state without divesting the tribes of any criminal or civil jurisdiction. According to David Getches, one of the foremost Indian law scholars, nothing in P.L. 280 divests the tribes of concurrent jurisdiction with the state; the tribal criminal jurisdiction survived such that the tribes can punish tribal members for violations of tribal law.[373] According to Getches, tribes also retained their full civil jurisdiction.[374] This is because P.L. 280 addresses the shift between the state and federal jurisdiction, not tribal jurisdiction. The only additional restriction on tribal authority that P.L. 280 imposes involves the choice of law when the tribal law is inconsistent with the state law in civil matters.[375] Otherwise, the tribes in P.L. 280 states retain their full jurisdiction, subject only to the same restrictions over non-Indians or non-Indian land,[376] discussed above.

But not all courts agree with Professor Getches' interpretation of the statute.[377] These courts, most notably Alaska state courts, view P.L. 280 as completely divesting tribal courts of jurisdiction, even in Indian Child Welfare Act[378] cases.

As tribal courts continue to develop, theses ambiguities will increasingly be an area of tension between the tribes and the states. Court rules should be developed by the tribes and states in order to address these jurisdictional issues.[379]

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373. GETCHES ET AL., *supra* note 121, at 504 n.2.

374. *Id.*; *see also* Goldberg-Ambrose, *supra* note 341, at 1416 (noting that "no mention was made [in P.L. 280] of tribal authority").

375. 28 U.S.C.A. § 1360(c) (West 1993).

376. GETCHES ET AL., *supra* note 121, at 504 n.2.

377. For example, despite the clear intent of Congress in the Indian Child Welfare Act (ICWA) to expand tribal court jurisdiction over matters involving the custody of Indian children, the Supreme Court of Alaska has consistently held that the Native Villages lack any jurisdiction, concurrent or otherwise, over ICWA matters unless the Village has specifically petitioned for and been granted jurisdiction under the Act. *See, e.g.*, Native Village of Nenana v. Alaska, 722 P.2d 219 (Alaska 1986); *In re* K.E., 744 P.2d 1173 (Alaska 1987); *In re* F.P., 843 P.2d 1214 (Alaska 1992). Other courts and commentators have read the reassumption provision to mean that a tribe is required to reassume jurisdiction only where a tribe in a P.L. 280 state wants *exclusive* jurisdiction, which is the correct interpretation in light of the Supreme Court's decision in *Bryan v. Itasca County*, 426 U.S. 373 (1976) (holding that the purpose of the civil section of P.L. 280 was to provide a forum for the resolution of civil disputes arising in Indian country where such a forum was lacking). *Id.* at 383. Therefore, where the tribe has the ability to adjudicate the matter, there is no basis in law or policy to prevent concurrent jurisdiction between the tribe and state.

378. 25 U.S.C.A. §§ 1901-1963 (West 1983 & Supp. 2000).

379. For further discussion, see *infra* Part XIII.D.

XI. CONFLICT OF LAWS ISSUES

A. *Subject Matter Jurisdiction: Who Can Hear the Case v. Who Should Hear the Case*

The court in which a lawsuit is filed is called the forum court. The forum court must determine whether it has personal, subject matter and territorial jurisdiction over each case that comes before it. If the forum court determines that it has all of these elements, but another jurisdiction does as well, then the court must decide which jurisdiction is most appropriate for the resolution of the dispute and what law it should apply.[380] A modern conflict of laws analysis focuses on two basic factors: which jurisdiction "has the most significant relationship to the occurrence and the parties,"[381] and which jurisdiction has the most significant interest in the outcome of the dispute.[382] Detailed below are factors set out by the Restatement (Second) of Conflict of Laws[383] that are helpful in determining which jurisdiction should hear the case.

The discussion focuses on three of the most common types of suits that create conflict issues between tribal and state courts: land disputes, personal injury cases, and commercial transaction suits. However, the basic analysis can be applied to any conflict of laws situation. While most courts have not yet applied this conflicts analysis when there is a situation in which the state and a tribe have concurrent jurisdiction, it is included here because it provides a logical and fair way to determine which court should hear a case when more than one court can hear the case. In addition, the Restatement analysis is one of the most widely accepted procedure for dealing with conflicts issues that arise when any two forums can hear a case. This includes state/state, state/federal, or United States/foreign country conflicts.

1. *Land Issues*

Pursuant to the Restatement (Second) of Conflict of Laws,[384] the single determinative factor for deciding which forum should hear a case involving real property is the location of the land.[385] Thus, if the Restatement were applied to

380. In the context of Indian law, the issue of choice of law rarely arises. The common issue that arises is which court—tribal or state (or which of two tribal courts)—should or can hear a case where there is concurrent jurisdiction over the matter. Although the factors used in this section generally determine "choice of law," they are also useful in analyzing "choice of forum."

381. RESTATEMENT, *supra* note 305, § 145.

382. MAURICE ROSENBERG ET AL., CONFLICT OF LAWS, CASES AND MATERIALS 513 (10th ed. 1996) (citing Professor Brainerd Currie's theory).

383. RESTATEMENT, *supra* note 305, § 145.

384. *Id.* §§ 222-231.

385. *See id.* (stating that the law of the court where the land is located should be applied).

resolve issues involving land disputes within the reservation boundaries, the tribal court would always be the appropriate forum. Who owned the property or how title was held would be irrelevant under the Restatement view. This view makes the most sense because the tribe has the most significant interest in the outcome of any disputes involving land within the reservation boundaries. For example, it is universally recognized in this country that a state has the exclusive right to determine matters involving any real property located within its borders. This is true regardless of where the underlying case arose, as in a divorce action or probate matter. In either of these cases, the couple or decedent might own land located in a state other than the one in which the underlying case was filed.[386]

Unfortunately, Indian law has not developed in such a neat fashion, and the tribe's adjudicatory authority rests on the inquiries mentioned above, such as whether the land is held in fee or trust and whether the owner is a tribal member.[387]

2. *Personal Injury Cases*

Pursuant to the Restatement (Second) of Conflict of Laws,[388] the most important factor in determining the best forum for adjudicating personal injury lawsuits is the site of the injury.[389] Other factors to consider include the domicile and residence of the parties;[390] where the injury-causing conduct occurred,[391] if different from the site of the injury; and the place in which the relationship between the parties, if any, is centered.[392] In the case of a products liability action, where the item was purchased[393] and where the retailer advertised[394] are also relevant factors to the inquiry. As with all discussions of tribal jurisdiction, the legal status of the parties is crucial as well. The court must determine if the parties are tribal members, nonmember Indians or non-Indians. In addition, whether the tribe can exercise jurisdiction over these cases should be detailed in the tribe's law and order code.

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386. The practical reason for this development is that enforcement of a judgment against land in a different jurisdiction is difficult.

387. *See supra* Part VII (discussing civil jurisdiction in Indian Country).

388. RESTATEMENT, *supra* note 305, §§ 145-146.

389. *Id.* § 145(2)(a).

390. *Id.* § 145(2)(c).

391. *Id.* § 145(2)(b).

392. *Id.* § 145(2)(d).

393. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). This case involves a personal jurisdiction analysis, but because it comes down to looking at the contacts with the forum and fairness to the parties, the basic policies underlying the analysis are similar to the Restatement analysis (which examines the extent of the relationship with the forum and the forum's interest in the outcome).

394. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235 (1958) (including in its analysis of what constitutes "minimum contacts" solicitation of business in the forum).

Once this is determined, the court looks at the tests in *Williams*[395] (the right of tribes to make their own laws and be governed by them), and in *Montana*[396] and *Strate*[397] (whether there is a consensual relationship between the tribe or tribal member and the other party, and whether the resolution of the suit affects the political integrity, economic security, health or welfare of the tribe).[398] The Restatement factors described above are particularly helpful in determining the tribe's interest.

3. Commercial Transaction Cases

If there is no provision in the contract for the selection of the forum, then the Restatement sets out the following factors for deciding which jurisdiction has the greatest interest in the transaction. These factors include the place of contracting,[399] the place of negotiating the contract,[400] the place of performance of the contract,[401] the location of the subject matter of the contract[402] and the domicile, residence, place of incorporation and principal place of business of the parties.[403] The specific application to Indian law must also include the determination of whether the parties are tribal members, nonmember Indians or non-Indians. Again, the *Williams*[404] test (the right of tribes to make their own laws and be governed by them) and the *Montana*[405] and *Strate*[406] tests (whether there is a consensual relationship between the tribe or tribal member and the other party; whether the resolution of the suit affects the political integrity, economic security, health or welfare of the tribe)[407] must then be applied to the analysis. The use of the Restatement factors can be helpful in the court's analysis.

4. Considerations of Forum Non Conveniens

The doctrine of forum non conveniens basically applies to cases where the court has personal, territorial and subject matter jurisdiction, but the forum is so inconvenient that the court declines to exercise its jurisdiction. This analysis

395. Williams v. Lee, 358 U.S. 217 (1959).
396. Montana v. United States, 450 U.S. 544 (1981).
397. Strate v. A-1 Contractors, 520 U.S. 438 (1997).
398. *Id.*
399. RESTATEMENT, *supra* note 305, § 188(2)(a).
400. *Id.* § 188(2)(b).
401. *Id.* § 188(2)(c).
402. *Id.* § 188(2)(d).
403. *Id.* § 188(2)(e).
404. Williams v. Lee, 358 U.S. 217 (1959).
405. Montana v. United States, 450 U.S. 544 (1981).
406. Strate v. A-1 Contractors, 520 U.S. 438 (1997).
407. *Id.*

depends on the availability of an alternate forum.[408] For example, a car accident may occur inside the boundaries of the reservation, and the driver of one car sues the other driver for his injuries. The plaintiff is a non-Indian and lives off the reservation, so he files the suit in state court. However, the defendant, who is also a non-Indian, and all of the witnesses live on the reservation, and the accident occurred there. It would be time-consuming and expensive to require all of the parties to go to the state court to litigate the dispute, so, providing there is a tribal forum available, the state court should dismiss the case on the basis of forum non conveniens.

Under a traditional conflict of laws analysis, the factors to consider in a forum non conveniens discussion are divided into two categories: private and public. The private factors are those factors that only affect the particular parties or jurisdictions. They include access to proof, ability to serve process on the parties and witnesses, cost of getting witnesses to the litigation, access to the site if that is necessary, and the ability to enforce the judgment that the forum renders.[409] The public factors include administrative difficulties, such as congestion of the courts, the local interest in having a local controversy resolved there, the financial burden on the forum if it hears the case, and the application of foreign law if the forum's law does not apply.[410]

B. Choice of Law: Whose Law Should Apply

It should be noted at the outset that there are two types of law that a forum must apply: procedural and substantive. Procedural law refers to the rules governing how a case will proceed. For example, procedural laws determine the size of paper to be used, the time for filing and serving papers, how discovery is to be conducted, just to name a few. In contrast, substantive law refers to the law that governs the dispute itself. For instance, if it is a car accident, the substantive law applied by the court determines if there are any caps on damages. The distinction between these two types of law is important because the forum always applies its own procedural laws, but it can decide to apply another jurisdiction's substantive law if it determines that the other jurisdiction has a stronger relationship to the parties or interest in the outcome.

Under the Restatement (Second) of Conflict of Laws,[411] the factors a court should consider when deciding which substantive law to apply are as follows: the

408. RESTATEMENT, *supra* note 305, § 84.

409. *Id.* § 84 cmt. c; Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

410. *Gulf Oil*, 330 U.S. at 508-09. Note that the term "foreign" simply means a jurisdiction other than the forum; it does not mean foreign in the international sense.

411. RESTATEMENT, *supra* note 305, § 6.

needs of the system (need for uniformity in the area of law);[412] the relevant policies of each forum;[413] the protection of justified expectations of the parties;[414] the basic policies underlying the particular field of law;[415] "certainty, predictability and uniformity of result";[416] and the ease in determining and applying the appropriate law.[417]

1. *Need for Uniformity in Indian Law*

Any commentator on Indian law will agree that this area of law is one of the most inconsistent in our judicial system. Application of tribal, state and federal law in a haphazard manner only adds to this confusion. As the Supreme Court recognized in *National Farmers*[418] and *Iowa Mutual*,[419] tribal forums should be utilized whenever possible in disputes arising in Indian country. And applying tribal law to disputes that arise in Indian country will prevent parties from avoiding tribal law by "forum shopping" in state courts.

2. *Polices of Each Potential Forum*

In deciding whose law should apply, the court should consider the policies of each jurisdiction. For example, if an auto accident occurs between a tribal member and non-Indian, and the action is filed in tribal court, the tribe may have certain caps on damages. This is one of the greatest areas of dispute in policy between tribal courts and state courts. The tribe has a significant interest in protecting the limited financial resources of the tribe and its members while the state has a significant interest in allowing its residents to obtain the greatest compensation possible for injuries they sustain. Tribes also have a strong interest in exercising their sovereignty because the state and federal governments have often taken a "use it or lose it" attitude with respect to the tribes.[420] In addition, tribes have a significant interest in maintaining their culture and traditions. Applying state laws

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412. *See id.* § 6 cmt. d ("Probably the most important function of choice-of-law rules is to make the interstate and international systems work well.").

413. *Id.* § 6(2)(b).

414. *Id.* § 6(2)(d).

415. *Id.* § 6(2)(e).

416. *Id.* § 6(2)(f).

417. *Id.* § 6(2)(g).

418. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

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

420. States often have asserted jurisdiction even when they clearly lack it if they perceive that the tribe is not exercising its jurisdiction. The federal government has followed the same path, as evidenced by the enactment of P.L. 280 due to a perceived "lawlessness" in Indian country.

to disputes in Indian country would seriously undermine these efforts.[421] And any judgment obtained in state court would be unenforceable against property owned by a tribal member that is located on the reservation, rendering the state court judgment moot.[422] In contrast, if the accident were to occur outside the reservation boundaries or involved a contract dispute where all parties had equal connections to both jurisdictions, application of state law may be more appropriate.

3. *Protection of Justified Expectations*

One goal of any justice system is to protect the justified expectations of those who live and transact business in the forum. For instance, in a contract case involving a tribe or tribal member and non-Indian entity where the terms of the contract were to be performed in Indian country, the Indian parties would have a justified expectation that tribal law would be applied to the resolution of the dispute, unless the contract specifically stated otherwise.[423] It might still be appropriate to apply tribal law even when the contract states otherwise if the contract is a "form" contract, rather than one negotiated specifically by the parties.[424] Application of state law might be more appropriate where the parties entered into the contract off the reservation, even if the suit were filed in tribal court.

4. *Policies Underlying the Law*

The policies underlying federal Indian law in general are to encourage self-determination and financial independence from federal funds.[425] In order to accomplish these objectives, it is important to give effect to tribal law whenever possible. This will give non-Indians a chance to understand that their interests can be protected by tribal law, which will in turn encourage more business relationships between the tribes and non-Indians. The court should balance these policies of Indian law generally with the policies underlying the specific type of case before

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421. *See* Goldberg-Ambrose, *supra* note 341, at 1411-12 (noting that the structure of traditional Indian dispute resolution systems was usually very unfamiliar to non-Indians, or, that the tribes "went underground" with their systems after white contact. As a result, the American government often concluded that no such system was in place and that the Indians lived in a state of "lawlessness").

422. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (holding that citizens of the State of Georgia could not enter the Cherokee Nation without the consent of the Tribe); Babbit Ford, Inc. v. Navajo Tribe, 710 F.2d 587 (9th Cir. 1983).

423. RESTATEMENT, *supra* note 305, § 187(1).

424. *Id.* § 187(2). For example, if the form contained a paragraph stating that New York law would apply, and a tribal member signed the contract in South Dakota, either on or off the reservation, the State of New York arguably would have no interest in the dispute.

425. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 (1983); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

it—e.g., real property, tort, contract, etc. In other words, tribal sovereignty should be the "backdrop" against which courts make choice of law decisions.[426]

5. Certainty, Predictability and Uniformity of Results

Because federal Indian law has developed within a framework of inconsistent federal policies toward the tribes in the past 200 years, courts should make aggressive efforts to bring certainty, predictability and uniformity of results to this area of law. Where a dispute arises in Indian country, application of tribal law is one of the surest ways to promote consistency. For example, if a state court has decided to hear a case that involves an accident within the reservation between two non-Indian parties, applying state law creates the exact type of inconsistency that the Restatement would seek to avoid. A state applying its own laws to such a dispute would create an outcome very different from a dispute on the same road involving a tribal member where that dispute was resolved using tribal law.

6. Ease in Determining and Applying the Law

This factor is the most likely to cause concern for state courts attempting to apply tribal law. If the tribal laws are not clearly written in a tribal code, this concern might be justifiable. But most tribes with judicial systems do have a tribal code that is written in a form similar to the codes of any state or local government. Also, if there is difficulty determining and applying the tribal law, this would be a reason for the state court to defer to tribal jurisdiction if it is available. If there is no tribal forum available and no written code, the tribe could qualify a tribal member recognized by the tribal community as an expert to testify regarding traditional tribal law.

XII. APPEALS

A. Exhaustion of Tribal Remedies

The U.S. Supreme Court has held that, in both federal question[427] and diversity[428] cases filed in federal district court, the district court should, as a matter of comity, allow the tribal court to determine whether it has subject matter jurisdiction over the case. In addition, the Court has held that the litigants should exhaust their tribal remedies in resolving this issue before filing for review of the

426. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).
427. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).
428. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

tribal court decision in federal district court.[429] The holdings stated that the exhaustion requirement was also a matter of comity.[430]

In contrast, where a suit has been filed in both state and tribal court, there are no requirements that either stay its hand during the pendency of the litigation in the other forum. This situation continues to result in conflicting judgments being rendered by state and tribal courts where they have concurrent jurisdiction. Some potential solutions to this problem are proposed below in the section entitled "Enforceability of Judgments."[431]

B. *Lack of a Tribal Forum*

One issue that continues to plague those involved in Indian law is what to do when a case *should* be heard by the tribal court, either because the matter particularly affects the tribal interests or because the tribe has exclusive jurisdiction as a matter of law—for instance, pursuant to the Indian Child Welfare Act[432]—but the tribe lacks a forum in which to adjudicate the matter. Some states have simply taken it upon themselves to hear the cases, while others refuse to do so. The former solution solves the immediate problem of a lack of a forum. Unfortunately, it also sets up the likelihood of future conflicts between the tribes and state if the tribe later develops a dispute resolution system. Although refusing to adjudicate certain cases may leave the litigants without relief, the court should consider the interests of tribal sovereignty when deciding to hear cases over which it would otherwise lack jurisdiction.[433]

XIII. ENFORCEABILITY OF JUDGMENTS

Another complicated issue facing tribal and state courts today is the ability of a party to enforce a judgment rendered by one jurisdiction in the other jurisdiction.[434] This is an issue because the Full Faith and Credit Clause of the

429. *National Farmers Union*, 471 U.S. at 857; *Iowa Mutual*, 480 U.S. at 19.

430. *National Farmers Union*, 471 U.S. at 857; *Iowa Mutual*, 480 U.S. at 19.

431. *Infra* Part XIII.

432. 25 U.S.C.A. §§ 1901-1963 (West 1983 & Supp. 2000).

433. *See* Owens Valley Indian Housing Auth. v. Turner, 185 F.3d 1029, 1034 (9th Cir. 1999) (holding that an unlawful detainer action brought by a tribal housing authority against a tribal member did not present a federal question for purposes of federal court jurisdiction and the state lacked jurisdiction because of 28 U.S.C.A. § 1360(b) (West 1993)). As a result, the tribe had exclusive jurisdiction, despite the fact that the tribe had no tribal court. *Id.* It should be noted that this opinion was withdrawn by 192 F.3d 1330 due to mootness because the defendant, Gifford Turner, died while the action was pending. The reasoning, however, is still a valid reflection of how the Ninth Circuit will decide such a case when it comes before them in the future.

434. *See, e.g.*, Hon. Richard E. Ransom, Hon. Christine Zuni, P.S. Deloria, Robert N. Clinton, Robert Laurence, Nell Jessup Newton, M.E. Occhialino, Jr., *Recognizing and Enforcing State and Tribal Judgments: A Roundtable Discussion of Law, Policy, and Practice*, 18 AM. INDIAN L. REV. 239 (1992); Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian*

Constitution[435] does not apply between tribes and states (or tribes and the federal government). Thus, any recognition of the other's judgments is based on one of several grounds: (1) the concept of comity; (2) full faith and credit based on state and/or tribal legislation or case law; (3) a written agreement between the state and tribe to enforce each other's judgments; or (4) adoption of court rules providing for recognition of each other's decisions. The benefits and drawbacks of each of these solutions is discussed below.

A. Comity

Comity is the deference shown by one sovereign to the jurisdiction of another sovereign out of respect, rather than any legal requirement to do so. Arizona and Oregon both recognize tribal judgments as a matter of comity.[436] The disadvantage of this doctrine is that it is completely voluntary. The expectation of reciprocity is not binding on either jurisdiction, so one sovereign may recognize the judgments of another and find that its judgments are not reciprocally recognized.

B. Full Faith and Credit

Some states and tribes have given full faith and credit to each other's judgments even though they are not constitutionally mandated to do so. For example, the New Mexico Supreme Court held that the Navajo Nation's decisions were entitled to full faith and credit in New Mexico courts because the Nation was a "territory" within the meaning of 28 U.S.C.A. § 1738.[437] In addition, Oklahoma and Wisconsin have enacted statutes that require their courts to give full faith and credit to tribal court decisions where the tribe grants reciprocity to that state's judgments.[438] Certain federal laws require full faith and credit between jurisdictions. For example, the Violence Against Women Act,[439] Full Faith and Credit for Child Support Act[440] and the Indian Child Welfare Act[441] require full faith and credit be given to orders issued by any tribal court of competent jurisdiction.

Civil Rights Act, 69 OR. L. REV. 589 (1990); Gorden K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397 (1985); James M. Jannetta, *Reciprocity Between State and Tribal Legal Systems*, 71 MICH. B.J. 400 (1992); Robert Laurence, *Service of Process and Execution of Judgments on Indian Reservations*, 10 AM. INDIAN L. REV. 257 (1982).

435. U.S. CONST. art. IV, § 1.

436. The states of Arizona and Oregon recognize tribal court judgments as a matter of comity only. *See, e.g.*, Leon v. Numkena, 689 P.2d 566 (Ariz. 1984); *In re* Marriage of Red Fox, 542 P.2d 918 (Or. 1975).

437. Jim v. CIT Fin. Servs. Corp., 533 P.2d 751 (N.M. 1975).

438. OKLA. STAT. ANN. tit. 12, § 728 (West Supp. 1999); WIS. STAT. ANN. § 806.245 (West Supp. 1999).

439. 18 U.S.C.A. § 2265 (West Supp. 2000).

440. 28 U.S.C.A. § 1738B (West Supp. 2000).

441. 25 U.S.C.A. § 1911(d) (West 1983).

C. Written Agreements

Another way in which tribal and state courts have recognized each other's judgments is through written agreements between the tribe(s) and state. This solution presents some difficult issues to make it workable. For instance, the parties to the agreement could be difficult to identify (for example, should the attorney general or the governor sign on behalf of the state?). Also, the cost of negotiating separate agreements for each tribe in a state such as California that has over 100 federally recognized tribes would be prohibitive.

D. Court Rules

One of the most plausible and most often recommended solutions is the adoption of court rules by both the tribes and the states that would provide for the recognition of judgments based on mandatory (full faith and credit) principles. For example, the rules could clarify over what types of matters the state and tribal courts had concurrent jurisdiction; in what instances one jurisdiction should defer to the jurisdiction of the other; and in which instances the state court should apply tribal law, or vice versa. This solution has two advantages. First, because the rules of court have the force of law, judges and practitioners would have no choice but to follow and apply the rules. In addition, adopting court rules would put the control in the hands of those who must confront the complexities of working with the jurisdictional issues on a daily basis. If the states and tribes worked together to develop the rules, this would increase the workability and consistency among the courts.[442] It would also increase the respect between the tribes and the states.

The California Judicial Council has taken the lead on implementing this solution by developing forms that take into account the possibility of a tribal forum. For example, in their domestic violence forms, there is a box to check in case the tribe has jurisdiction over the matter. By including the tribal courts as a possible forum, the Judicial Council has both recognized that the tribe may have exclusive or at least concurrent jurisdiction with the state and made it easier for a party or court to invoke the tribe's jurisdiction. It is worth noting, however, that some tribes may reject this notion of mandatory full faith and credit due to historical antagonism and prejudice between the tribes and nearby tribal, state or federal governments.

442. In fact, Joseph Myers, Executive Director of the National Indian Justice Center, is on the Access and Fairness Committee for the California Judicial Council, which is the organization that is responsible for the creation of standard forms used by California state courts.

XIV. FEDERAL/TRIBAL COURT JURISDICTIONAL ISSUES

For a federal district court to have jurisdiction over a civil matter, the matter must involve a "federal question"[443] or the parties must be from different states.[444] Federal question jurisdiction means that the issues concern federal law or policy. If the matter is brought by a federally recognized tribe, pursuant to 28 U.S.C.A. § 1362, federal district courts have original jurisdiction over the action. If the matter consists of interpreting a federal statute involving Indians, such as P.L. 280,[445] then the district court would have jurisdiction pursuant to 28 U.S.C.A. § 1331 (federal question). But note that the federal courts do not have jurisdiction to hear claims for violations under the Indian Civil Rights Act (ICRA), except for habeas corpus petitions.[446] Even though this would appear to be a federal question, the Supreme Court has held that allowing federal courts to hear claims of ICRA violations would infringe too significantly on tribal sovereignty.[447]

In addition, it is not always clear when a matter constitutes a federal question. For example, lower district courts in California were divided over whether unlawful detainer actions on tribal land administered by a tribal housing authority were a federal question; a state issue, given that California is subject to Public Law 280; or purely a tribal matter.[448] The Ninth Circuit resolved the split by holding that such actions are like landlord/tenant disputes.[449] The court reasoned that, because it does not involve the federal right of possession, an unlawful detainer action is not a federal question.[450] In addition, the court held that the State lacked jurisdiction because of the land exclusion in P.L. 280.[451] The tribe, therefore, had exclusive jurisdiction to hear the matter.[452]

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443. 28 U.S.C.A. § 1331 (West 1993).

444. *Id.* § 1332 (West 1993 & Supp. 2000).

445. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953 (codified as amended at 18 U.S.C.A § 1162 (West 1983), 25 U.S.C.A. §§ 1321-1326 (West 1983 & Supp. 2000), and 28 U.S.C.A. § 1360 (West 1993)).

446. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 67-72 (1978).

447. *Id.* at 71.

448. *See* All Mission Indian Housing Auth. v. Silvas, 680 F. Supp. 330, 332 (C.D. Cal. 1987) (holding that the district court had subject matter jurisdiction over an unlawful detainer action because it presented a federal question); Round Valley Indian Housing Auth. v. Hunter, 907 F. Supp. 1343, 1348-49 (N.D. Cal. 1995) (holding that the district court lacked subject matter jurisdiction to hear an unlawful detainer action because it was an "eviction" case, which is a landlord/tenant matter and, therefore, a matter of state law).

449. Owens Valley Indian Housing Auth. v. Turner, 185 F.3d 1029 (9th Cir. 1999). It should be noted that this opinion was withdrawn by 192 F.3d 1330 due to mootness because the defendant, Gifford Turner, died while the action was pending. The reasoning, however, is still a valid reflection of how the Ninth Circuit will decide such a case when it comes before them in the future.

450. *Id.* at 1032.

451. *Id.* at 1034; *see also* 28 U.S.C.A. § 1360(b) (West 1993).

452. *Owens Valley*, 185 F.3d at 1034.

The determination of whether a federal court has jurisdiction is a more difficult question when jurisdiction is based on diversity of citizenship.[453] In such cases, the plaintiff(s) and defendant(s) must be from different states to create diversity. In addition, the district court only has jurisdiction if the courts of the state in which the district court sits would also have subject matter jurisdiction to resolve the dispute.[454] The reason for this requirement in a diversity case is that, unlike a federal question case, the cause of action in a diversity case is based on state law. As such, a federal court sitting in diversity acts in the place of the state court.[455] Therefore, when the cause of action is based on tribal law or where all parties are tribal members and the dispute arose on the reservation, then the tribe's right to self-government is implicated, and the tribe has exclusive jurisdiction over such a matter.[456] For instance, an accident could occur between two tribal members on a reservation that straddles a state border. If the plaintiff is a tribal member residing on one side of the state border and the defendant lives on the other side of the border, then there would be diversity of citizenship for purposes of federal jurisdiction.[457] But both states lack the jurisdiction to hear the matter because to do so would infringe on the tribe's sovereignty.[458] And since the states cannot adjudicate the case, neither can the federal court, when the asserted jurisdiction is based solely on diversity of citizenship.

Another example of where neither the state nor the federal courts have jurisdiction would be where the plaintiff, who is a tribal member, sues the defendant, a non-Indian, pursuant to a provision of the tribal code. If the defendant challenges the validity of the tribal ordinance by filing an action in federal district court based on diversity, the federal court presumably would not be able to hear the case. Since there is no federal question in the interpretation of the tribal ordinance, jurisdiction must be based on diversity. But if the district court's jurisdiction is based on diversity, then the federal court would lack jurisdiction because the state could not have heard the underlying case due to the *Williams* infringement test.[459]

It should be noted, however, that federal courts clearly have the authority to hear a defendant's challenge to tribal court jurisdiction because the scope of tribal jurisdiction is a federal question.[460] But the Supreme Court has not yet decided the

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453. Note that, in addition to being tribal members, Indians are citizens of the state in which they reside. U.S. CONST. amend. XIV (providing that anyone born in the United States is a citizen of the state in which he resides). The Fourteenth Amendment applies to Indians. *See* Goodluck v. Apache County, 417 F. Supp.13 (D. Ariz. 1975), *aff'd sub nom.* Apache County v. United States, 429 U.S. 876 (1976).

454. Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949).

455. Guaranty Trust Co. v. New York, 326 U.S. 99, 108-09 (1945).

456. Williams v. Lee, 358 U.S. 217, 222-23 (1959).

457. 28 U.S.C.A. § 1332 (West 1993 & Supp. 2000).

458. *Williams*, 358 U.S. at 217, 222-23.

459. *Id.*

460. *But see* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16-17 (1987) (holding that federal courts should refrain from hearing the matter until all tribal remedies have been exhausted).

issue of what the federal court should do if there is a challenge to the tribal court's decision on the merits of a case, rather than a jurisdictional challenge. If the losing party challenges the tribal court's decision on the merits, and the state would not have had jurisdiction to hear the underlying case, then the federal district court presumably would not have jurisdiction to re-litigate the underlying dispute.

What makes the diversity of citizenship analysis so crucial is that a plaintiff may be left without a forum in which to seek relief if the analysis is conducted properly. As discussed above, this could occur if a federal court determines that the tribal court lacks jurisdiction to hear the case, and the state and federal courts also lack subject matter jurisdiction. It can also occur if the tribe lacks a dispute resolution system that can adjudicate the matter. This creates a very uncomfortable situation for most courts. The usual response is to find a way to twist the analysis so that either the state or the federal court can assert jurisdiction. Unfortunately, while this makes the plaintiff happy, it also creates bad precedent. More than one district court has completely contorted the jurisdictional discussion in a diversity situation to avoid leaving the plaintiff with no hope of relief.[461]

Finally, an issue exists regarding whether a party who challenges the jurisdiction of a tribal court must exhaust tribal remedies prior to filing the challenge in federal district court. While the Supreme Court has held that federal district courts *should* require the challenging party to exhaust all tribal remedies as a matter of comity,[462] it has not stated that the parties *must* exhaust the tribal remedies.

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461. *See, e.g.*, R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979, 984 (9th Cir. 1983). Although the *Fort Belknap* court held that the federal district court lacked jurisdiction to hear a case involving the interpretation of a tribal ordinance because it would violate the *Williams* "infringement test," the court's holding was based on the fact that the tribe was exercising its exclusive jurisdiction over the matter. The court stated, "the federal courts sitting in diversity are not divested of jurisdiction when the tribe has not itself manifested an interest in adjudicating the dispute." *Id.* at 984; *see also* Poitra v. Demarrias, 502 F.2d 23, 24 (8th Cir. 1974). *Poitra v. Demarrias* involved a wrongful death action filed by one tribal member against another based on an accident that occurred on the Standing Rock Sioux Reservation, which straddles the border of North Dakota and South Dakota. The plaintiff lived on the North Dakota side of the border, and the defendant lived on the South Dakota side. The court of appeals held that the district court had jurisdiction to hear the case because the plaintiff's wrongful death action was based on a North Dakota statute. Despite the fact that the North Dakota state courts had explicitly ruled that they lacked subject matter jurisdiction over such actions occurring on the Standing Rock Reservation, the court of appeals nonetheless held that the federal courts had jurisdiction for two reasons. First, the court held that, by not agreeing to state assumption of jurisdiction under P.L. 280, the tribe itself created the jurisdictional gap. *Id.* at 27. Second, there was no significant state interest implicated in the case. *Id.* Thus, instead of examining the tribal interests under the *Williams* test, the appellate court looked only at the federal and state interests and blamed the tribe for not ceding its authority to the State.

462. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (federal question); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (diversity).

XV. FEDERAL PREEMPTION DOCTRINE

Federal preemption refers to the doctrine holding that federal law displaces state law where state law conflicts either with the achievement of a federal scheme in an area of law or where Congress has occupied an entire field of law. The purpose of the inquiry, then, is to determine whether the tribe, state or federal government has jurisdiction. If the area of law is "traditionally federal," or if Congress has a comprehensive regulatory scheme with respect to that area of law, then federal law will preempt state law. Indian law is clearly "traditionally federal" because the Constitution reserves to Congress the right to regulate commerce with the tribes under the "Indian Commerce Clause,"[463] and the Supreme Court has consistently recognized Congress' plenary power over Indian affairs.[464] While the presumption is usually in favor of states in a preemption analysis in other areas of law, this is exactly the opposite in federal Indian law. As far back as the 1832 Supreme Court decision in *Worcester v. Georgia*,[465] the Supreme Court recognized the federal policy of protecting tribal sovereignty against state incursion.

Generally speaking, federal law will displace state law where the issues involve Indians on Indian land. Where the dispute involves non-Indians and/or non-Indian land, the presumption of federal preemption is weaker. However, even then, the analysis must be conducted against the "backdrop" of tribal sovereignty.[466] Some areas that Congress and the Supreme Court have recognized as being preempted by federal law include wildlife protection laws,[467] environmental statutes[468] and taxation involving reservation Indians[469] and Indian lands.[470] In setting out the preemption analysis, the U.S. Supreme Court stated:

> The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. . . . Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. We have thus rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required. . . .

463. U.S. CONST. art. I, § 8, cl. 3.

464. *See, e.g.*, Talton v. Mayes, 163 U.S. 376 (1896); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

465. 31 U.S. (6 Pet.) 515 (1832).

466. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973).

467. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 324 (1983).

468. *Id.*

469. *McClanahan*, 411 U.S. at 172.

470. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175 (1989).

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable.... [But where] a State asserts authority over the conduct of non-Indians engaging in activity on the reservation,... we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.[471]

The focus of the inquiry when non-Indians or non-Indian land is involved, then, is on congressional intent as expressed in the treaties and statutes and on whether the state law would conflict with or undermine such intent.

XVI. CONCLUSION

As tribes continue to work for economic and political self-sufficiency, tribal, state and federal courts will face more complex jurisdictional issues. These issues will best be resolved with a realization by both the state and federal governments that the tribes are continuing to evolve and change as sovereign entities. In turn, the tribes must exercise their sovereign powers fully informed and educated as to the ramifications of their laws and practices. Tribes should also pay close attention to the impact that economic development strategies may have on their sovereignty as a whole. All tribes need to further realize the impact that the lawsuits in which they are involved may have on tribes throughout the country. With these principles as a basis, all parties can work toward consistency, predictability and fairness to litigants while respecting tribal sovereignty.

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471. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-45 (1980) (citations omitted).