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# NOTE

# Indians: Modern Tribal Jurisdiction over Non-Indian Parties: The Supreme Court Takes Another Bite Out of Tribal Sovereignty in *Strate v. A-1 Contractors*

## *I. Introduction*

Indian tribes occupy a unique status in American law. Before European immigration to America, Indian tribes were self-governing sovereign political communities.[1] They exercised unlimited power over all people within their communities.[2] Indian tribes, however, no longer possess "the full attributes of sovereignty."[3] Recent court decisions often describe Indian tribes as "quasi-sovereigns."[4] By incorporating within the United States' territory and accepting its

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1. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973). However, during the late nineteenth and early twentieth centuries, the Supreme Court seemed to have differing opinions on the extent Indian nations are independent sovereigns. The Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) stated:

> From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed [sic] by the United States.

*Id.* at 556. Still other cases held that tribal sovereignty was inferior to the sovereignty of both the federal and state governments. For example, the Court in *Montoya v. United States*, 180 U.S. 261 (1901), stated that:

> North American Indians do not and never have constituted 'nations'. . . . The word 'nation' as ordinarily used presupposes or implies . . . sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries and the power to enter into negotiations with other nations. These characteristics the Indians have possessed only in a limited degree. . . . Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a temporary submission to an intellectual or physical superior, who in some cases ruled with absolute authority, and in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership.

*Id.* at 265.

2. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985).
3. United States v. Kagama, 118 U.S. 375, 381 (1886).
4. *See* BLACK'S LAW DICTIONARY 1245 (6th ed. 1990) (defining the term "quasi" as "[a]s if; almost



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protection,[5] Indian tribes have been divested of some aspects of sovereignty that they previously enjoyed. Treaties and statutes, which fall under the exercise of Congress' plenary control,[6] have divested Indian tribes of other aspects of sovereignty.[7]

One of the first United States Supreme Court holdings limiting Indian sovereignty was based on the Discovery Doctrine.[8] This Doctrine stated that any European nation discovering lands, unclaimed by another European nation, possessed the "sole right of acquiring the soil from the natives."[9] In other words, the Doctrine gave the government making "discovery" full rights of title over the lands against all other European governments.[10] Indian tribes were allowed to retain possession and use of the land. However, "their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[11]

A stream of Supreme Court decisions involving jurisdictional disputes between an Indian tribe and nonmembers of the tribe represents one of the largest limitations placed on modern tribal sovereignty.[12] Tribal sovereignty no longer stretches beyond what is necessary to protect tribal self-government or to control tribes' inter-

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as it were; analogous to. This term is used in legal phraseology to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that there are intrinsic and material differences between them").

5. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 568-69, 574 (1823) (describing some of the inherent limitations on tribal powers that stem from their incorporation into the United States).

6. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978); *see also* BLACK'S LAW DICTIONARY 1154 (6th ed. 1990) (defining "plenary" as "[f]ull, entire, complete, absolute, perfect, unqualified").

7. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (holding that Indian "tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. . . . Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status'" (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (1976))).

8. *See Johnson*, 21 U.S. at 573 (holding that an Indian tribe could not pass legal title in land it held by a federal grant to a non-Indian); *see also* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955). The Court stated in *Tee-Hit-Ton Indians* that

> [e]very American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale by the conquerors' will that deprived them of their land.

*Id.*

9. *Johnson*, 21 U.S. at 573.

10. *See id.*

11. *Id.* at 574.

12. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852-53 (1985) (holding that the issue of whether a tribal court has civil jurisdiction over non-members is a "federal question" and falls under the jurisdiction of federal courts); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211-12 (1978) (holding Indian tribes cannot try nonmembers in tribal courts); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-668 (1974); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (holding Indian tribes cannot enter into direct commercial or governmental relations with foreign nations); *Johnson*, 21 U.S. at 574 (holding that Indian tribes can no longer freely alienate the land they occupy to non-Indians).

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nal relations.[13] The inherent powers tribes still possess include: (1) the power to decide their form of government; (2) the power to set the conditions for membership in the tribe; (3) the power to lay and collect taxes; (4) the power to regulate domestic relations among their members; (5) the power to regulate property use within their borders; and (6) the power to prescribe laws for their members and to punish infractions of those laws.[14]

This note will first discuss civil jurisdiction in tribal courts. Because a discussion of criminal jurisdiction in tribal courts is also necessary to understand fully the reasoning behind recent decisions regarding civil jurisdiction, Part II of this note discusses cases involving criminal jurisdiction in tribal courts. Part II is divided into subparts discussing the law as it exists when the criminal defendant is: (1) an Indian who is a member of the prosecuting tribe; (2) an Indian who is a member of a different tribe than the prosecutor; and (3) a non-Indian. Part III examines the cases regarding civil jurisdiction in tribal courts. Part III is also divided into subparts discussing tribal adjudicatory and regulatory authority. The distinction between these two facets of tribal authority is important in understanding tribal civil jurisdiction. Part IV discusses the Supreme Court's most recent decision regarding tribal civil jurisdiction, *Strate v. A-1 Contractors*.[15] Part V deals with the problems associated with this decision and argues that the Supreme Court committed a grave error.

## *II. Tribal Criminal Jurisdiction*

### *A. Criminal Jurisdiction over Tribal Members*

In *United States v. Wheeler*,[16] the Supreme Court addressed the issue of whether a tribal court has criminal jurisdiction over members of its own tribe. The Court held that "the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."[17]

The respondent in *Wheeler* was a member of the Navajo Tribe. He pled guilty in the tribal court to contributing to the delinquency of a minor. A federal grand jury indicted him for statutory rape arising out of the same incident. The respondent moved to dismiss the federal indictment because the tribal offense of contributing to the delinquency of a minor was a lesser included offense of statutory rape. Therefore, he claimed that the tribal court proceeding barred subsequent federal prosecution. The district court granted the motion and the Ninth Circuit affirmed,

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13. *See* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1415 (1997) (citing Montana v. United States, 450 U.S. 544, 566 (1981)).
14. *See id.* at 1416 (citing Montana v. United States, 450 U.S. 544, 566 (1981)).
15. 117 S. Ct. 1404 (1997).
16. 435 U.S. 313 (1978).
17. *Id.* at 326.

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holding that the Double Jeopardy Clause of the Fifth Amendment barred respondent's federal trial.[18]

The Supreme Court reversed. In an opinion by Justice Stewart, the Court held that tribes act as independent sovereigns, and not as arms of the government, in criminally punishing a tribal member. Therefore, the Double Jeopardy Clause does not bar a subsequent federal indictment arising out of the same crime.[19] The Court reasoned:

> [T]he dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But, the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. "[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self government, by associating with a stronger, and taking its protection."[20]

In other words, the power to punish tribal members for the violation of tribal crimes is a part of tribal sovereignty that has never been taken away. It is in no way attributable to a delegation of federal authority. Therefore, when tribes exercise criminal jurisdiction over tribal offenders, they do so "as part of [their] retained sovereignty and not as an arm of the Federal Government."[21]

However, the Court noticed that this notion of dual sovereignty could frustrate the federal interest in prosecuting major crimes. 25 U.S.C. § 1302(7) provides that tribal courts cannot impose criminal punishment greater than six months imprisonment or a $500 fine.[22] Therefore, "when both a federal prosecution for a major crime and a tribal prosecution for a lesser included offense are possible, the defendant will often face the potential of a mild tribal punishment and a federal punishment of substantial severity."[23] The differences in potential punishment would surely persuade the tribal members to seek prosecution in tribal courts to avoid the more severe federal punishment.[24] Therefore, the court held that federal courts retain jurisdiction over most major crimes committed by Indians.[25] "Since tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offence,' and the Double Jeopardy Clause thus does not bar one when the other has occurred."[26]

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18. *See* United States v. Wheeler, 545 F.2d 1255, 1258 (9th Cir. 1976).
19. *See Wheeler*, 435 U.S. at 326-29.
20. *Id.* (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832).
21. *Id.* at 328.
22. *See* 25 U.S.C. § 1302(7) (1994).
23. *Wheeler*, 435 U.S. at 330.
24. *See id.* at 330-31.
25. *See id.* at 329-30.
26. *Id.*

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*B. Criminal Jurisdiction over Nonmember Indians*

In *Duro v. Reina*,[27] the Court addressed the issue of whether one tribe's court has criminal jurisdiction over an Indian of a different tribe. In *Duro*, the petitioner allegedly shot and killed an Indian youth within a reservation. Although the petitioner lived on the reservation, he was a member of another tribe. The tribal court charged him with the illegal firing of a weapon on the reservation, a misdemeanor under the tribal criminal code.[28]

The petitioner filed in the tribal court a motion to dismiss for lack of jurisdiction. After the tribal court denied the motion, he filed a habeas corpus petition in the federal district court. The court granted the writ, holding that allowing the tribe to assert jurisdiction over a nonmember Indian is racial discrimination in violation of the equal protection guarantees of the Indian Civil Rights Act of 1968.[29] The district court reasoned that subjecting a nonmember Indian to tribal jurisdiction is discrimination based on race when a non-Indian, under the same circumstances, would not be subject to tribal jurisdiction.[30]

A divided panel of the Ninth Circuit reversed.[31] Relying on *Wheeler*,[32] the court held that tribal courts retain jurisdiction over minor crimes committed by Indians against Indians, regardless of tribal membership.[33] In reaching its decision, the court examined federal criminal statutes that were applicable to Indian country.[34] The court reasoned that references to "Indians" in those statutes and the cases construing them applied to all Indians. The court stated that "if Congress had intended to divest tribal courts of criminal jurisdiction over nonmember Indians they would have done so."[35] The court also rejected the petitioner's equal protection claim. It reasoned that because the petitioner resided with a tribal member on the reservation, he had significant contacts with the prosecuting tribe. These contacts justified tribal jurisdiction.[36]

The Supreme Court reversed. In an opinion by Justice Kennedy, the Court held that Indian tribes may not assert criminal jurisdiction over a nonmember Indian.[37] The court noted that a basic attribute of territorial sovereignty is the sovereign's power to enforce its laws against its own citizens or aliens.[38] The court recognized that Indian tribes no longer possess the full attributes of a full territorial sovereign. Tribes only retain the sovereignty needed to "control their own internal relations,

27. 495 U.S. 676 (1990).

28. *See id.* at 681.

29. *See id.* at 682.

30. *See id.*

31. *See* Duro v. Reina, 821 F.2d 1358 (9th Cir. 1987). Both the panel opinion and the dissent were later revised in *Duro v. Reina*, 851 F.2d 1136 (9th Cir. 1988).

32. *See* United Sates v. Wheeler, 435 U.S. 313 (1977).

33. *See* Duro, 851 F.2d, at 1143.

34. *See* 18 U.S.C. §§ 1151-1153 (1994).

35. *Duro*, 851 F.2d, at 1143.

36. *See id.* at 1143-44.

37. *See* Duro v. Reina, 495 U.S. 676, 697 (1989).

38. *See id.* at 685.

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and to preserve their own unique customs and social order."[39] Limited sovereignty includes the power to prescribe and enforce internal criminal laws, when the laws involve the relations among members of a tribe.[40]

However, the Court noted that if the jurisdictional scheme laid out in its decision "proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs."[41] Shortly after the *Duro* decision, Congress gave tribal courts the power "to exercise criminal jurisdiction over all Indians."[42]

*C. Criminal Jurisdiction over Non-Indians*

In *Oliphant v. Suquamish Indian Tribe*,[43] the Supreme Court dealt with the issue of tribal criminal jurisdiction over non-Indians. The two petitioners in *Oliphant* were non-Indian residents of the Port Madison Reservation. The tribal police arrested and charged Petitioner Oliphant with assaulting a tribal officer and resisting arrest. After arraignment before the tribal court, Oliphant was released on his own recognizance. Petitioner Belgarde was arrested by the tribal police after an alleged high-speed chase through reservation highways. Tribal police apprehended Belgarde when his car collided with a tribal police vehicle. Belgarde was charged under the Tribal Code with injuring tribal property and "recklessly endangering another person."[44]

Both petitioners applied for a writ of habeas corpus to the United States district court, arguing that the tribal court did not have criminal jurisdiction over non-Indians. In separate proceedings, the district court denied both petitions. The Supreme Court, in an opinion by Justice Rehnquist, held that tribal courts do not have criminal jurisdiction over non-Indians, unless specifically authorized by Congress.[45] The Court noted Justice Johnson's concurrence in *Fletcher v. Peck*,[46] the first Indian case to reach the Supreme Court, which stated that the Indian tribes have lost any "right of governing every person within their limits except themselves."[47]

Together, *Oliphant*, *Wheeler*, and *Duro* define tribal criminal jurisdiction as extending only over Indians. However, these cases also carry a "parallel analysis and statement of reasons applicable to jurisdiction or power by the Indians over all

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39. *Id.* at 685-86.

40. *See id.*

41. *Id.* at 698.

42. 25 U.S.C. § 1301(2) (1994). See 25 U.S.C. § 1301(4) (1994) (defining an "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies").

43. 435 U.S. 191 (1978). *But see* United States v. Wheeler, 435 U.S. 313, 316 (1977) (limiting the tribe's powers to set the final punishment for non-Indian criminals); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 550 (10th Cir. 1980) (McKay, J., concurring), *aff'd*, 455 U.S. 130 (1982) (en banc).

44. *Oliphant*, 435 U.S. at 194.

45. *See id.* at 194-96.

46. 10 U.S. (6 Cranch) 87 (1810).

47. *Oliphant*, 435 U.S. at 209 (quoting *Fletcher*, 10 U.S. (6 Cranch) at 147).

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matters relating to nonmembers."[48] This case law establishes that unless there is express congressional authorization, "tribal jurisdiction over the conduct of nonmembers exists in only limited circumstances."[49] The Supreme Court has used these decisions as a basis for a line of cases denying tribal civil regulatory jurisdiction over non-Indians.

## *III. Tribal Civil Jurisdiction*

### *A. Tribal Regulatory Authority / "The Montana Rule"*

Relying on *Oliphant*'s general proposition that tribal sovereignty does not extend to the activities of nonmembers,[50] the United States Supreme Court in *Montana v. United States* took a huge bite out of tribal sovereignty.[51] The *Montana* Court held that the Crow Tribe did not have the authority to regulate hunting and fishing activities of non-Indians on reservation lands, when the land is owned in fee simple by a nonmember of the tribe.[52]

The Court established the "*Montana* Rule,"[53] which states that unless Congress gives express authorization, Indian tribes do not have civil jurisdiction over a nonmember for disputes arising on land within the reservation that is non-Indian-owned.[54] However, two exceptions exist. First, the tribes retain civil jurisdiction over a nonmember who enters a consensual relationship with the tribe or its members. Second, the tribes retain civil jurisdiction over a nonmember for activity that affects the tribes' political integrity, economic security, health or welfare.[55]

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48. *Merrion*, 617 F.2d at 555.

49. *Strate*, 117 S. Ct. at 1409.

50. *See* Montana v. United States, 450 U.S. 544 (1981). However, the Court in *Williams v. Lee*, 358 U.S. 217, 220 (1959), held that tribal courts have exclusive civil and criminal jurisdiction over claims that arise on tribal lands, even if one of the parties is not an Indian. The *Williams* Court dealt with a civil dispute between an Indian and a non-Indian, arising from a transaction that took place in Indian country. The Court held the tribal court retains jurisdiction, unless: (1) there is clear congressional authorization for the state to exercise jurisdiction; or (2) there is no significant Indian interest in maintaining jurisdiction. The Court stated that giving jurisdiction to the state

> would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. If this power is to be taken away from them, it is for Congress to do it.

*Id.* at 223 (citations omitted).

51. *See Montana*, 450 U.S. at 565.

52. *See id.* at 566.

53. *See Strate*, 117 S. Ct. at 1409-10.

54. *See Montana*, 450 U.S. at 564-67.

55. *See id.* at 564-66. The Court stated that

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise

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In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,[56] the Court took yet another bite out of tribal sovereignty. In determining whether a tribe had the authority to issue zoning ordinances on fee lands within the reservation, the Court drastically limited a tribe's ability to rely on the second exception to the *Montana* Rule. The Court held that it is not enough that the non-Indian's activity merely affects the tribe. The Court stated that "the impact [on the tribe] must be *demonstrably serious* and must *imperil* the political integrity, the economic security, or the health and welfare of the tribe."[57]

The decisions in *Montana* and *Brendale* established a presumption that absent congressional authority, jurisdiction over non-Indians does not lie in tribal courts. This presumption can be rebutted if the party claiming tribal jurisdiction satisfies one of the two *Montana* exceptions. These exceptions are satisfied when the non-Indian enters a consensual relationship with the tribe or its members, or when the non-Indian's activity affects the tribes' political integrity, economic security, health or welfare. In other words, a tribe may only exercise jurisdiction over a non-Indian if his conduct is directly related to the internal affairs of the tribe. However, *Montana* and *Oliphant* do not govern cases involving conduct by tribal members for conduct occurring on tribal lands. In these cases, there still exists a presumption in favor of tribal authority.[58]

*B. Tribal Adjudicatory Authority / "The Tribal Exhaustion Doctrine"*

Three years after *Montana* drastically limited tribal regulatory authority, the Supreme Court decided *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*.[59] The plaintiff in *National Farmers* was the guardian of a Crow Indian minor. The minor was injured when a motorcycle struck him in a school parking lot, which was within the Crow Indian Reservation. However, the land on which the school was built belonged to the State of Montana.

On behalf of the minor, the plaintiff filed an action in the Crow Tribal Court seeking damages against the school district. After the plaintiff obtained a default judgment, the school district filed an action in the United States district court for an injunction invalidating the default judgment. The school district claimed that 28 U.S.C. § 1331 gave the district court "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[60] The district court held that tribal courts do not have civil jurisdiction over an action against a non-

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> civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

*Id.*

56. 492 U.S. 408 (1989).

57. *Id.* at 431 (emphasis added).

58. *See* Nell Jessup Newton, *In the U.S. Supreme Court: Tribal Court Jurisdiction Over Personal Injury Actions Between Non-Indians*, WEST'S LEGAL NEWS, Dec. 30, 1996, *available in* 1996 WL 738536, at 5.0.

59. 471 U.S. 845 (1985).

60. 28 U.S.C. § 1331 (1994).

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Indian and granted the district's motion for an injunction prohibiting execution of the tribal court's judgment.[61] The Ninth Circuit reversed, holding that the district court did not have jurisdiction.[62]

The Supreme Court reversed. In an opinion by Justice Stevens, the Court held that the district court has the authority to determine whether a tribal court has exceeded the lawful limits of its jurisdiction.[63] However, the district court must wait until the party challenging tribal jurisdiction has exhausted all available remedies in the tribal court.[64] The Court also held that the district court should decide whether it should dismiss or suspend the federal action, pending tribal court proceedings.[65] In reaching this decision, the Court introduced the "Tribal Exhaustion Doctrine." However, the Court did not address the issue of tribal civil adjudicatory authority over non-Indians and remanded the case to the tribal courts.[66]

In *National Farmers*, the Supreme Court distinguished its holding in *Oliphant*, which involved criminal jurisdiction, from cases involving disputes of civil jurisdiction. The Court stated that:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.[67]

The Court, recognizing Congress' commitment "to a policy of supporting tribal self-government and self-determination," held that this examination should first be made by a tribal court.[68] This decision encourages the tribal courts to provide a full record of the case's development in the tribal court, explaining the court's precise basis for accepting or denying jurisdiction. Therefore, the tribal court would give the district court the benefit of the tribe's expertise in making this determination of tribal sovereignty.[69]

More than thirty years later, in *Iowa Mutual Insurance Co. v. LaPlante*,[70] the Supreme Court had another chance to address the issue of adjudicatory authority over non-Indians. However, as in *National Farmers*, the Court evaded the issue. The plaintiff in *Iowa Mutual* was a Blackfeet Indian. He filed a civil action against

61. *See National Farmers*, 560 F. Supp. 213, 218 (D. Mont. 1983).
62. *See National Farmers*, 736 F.2d 1320, 1324 (9th Cir. 1984).
63. *See National Farmers*, 471 U.S. at 852-53.
64. *See id.* at 857.
65. *See id.*
66. *See id.*
67. *Id.* at 855-56.
68. *Id.* at 856.
69. *See id.*
70. 480 U.S. 9 (1987).

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a non-Indian company in the Blackfeet Tribal Court, alleging injuries sustained on the Indian lands.[71]

Using the Tribal Exhaustion Doctrine, the Court held that federal courts cannot exercise diversity jurisdiction[72] until the party challenging tribal jurisdiction has exhausted all of his remedies within the tribal courts. The Court reasoned that tribal jurisdiction over non-Indians for activities occurring on reservation lands is an important part of tribal sovereignty. Therefore, civil jurisdiction over such activities presumptively lies in the tribal courts, unless Congress has expressly limited it.[73]

Both *National Farmers* and *Iowa Mutual* involved defendants who tried to circumvent the tribal courts and to proceed directly to the district court. These cases declined to extend *Oliphant* to civil cases arising on reservations and involving non-Indian defendants. They held that civil jurisdiction over such activities presumptively lies in the tribal courts. Unless a specific treaty provision or federal statute affirmatively limits jurisdiction, the district courts put litigation on hold until the tribal court has decided its own jurisdiction.[74]

## *IV. Strate v. A-1 Contractors*

### *A. Facts*

In *Strate v. A-1 Contractors*,[75] the Supreme Court was faced with its first case after the tribal court remedies had been exhausted. *Strate* directly addresses the issue of whether tribal courts have civil jurisdiction over a dispute among non-Indians. The case stemmed from personal injuries sustained by Gisela Fredericks when her vehicle collided with a vehicle driven by Lyle Stokert, A-1 Contractors' employee. A-1 Contractors also owned the vehicle Stokert was driving. The accident occurred on a North Dakota state highway which runs through the Fort Berthold Indian Reservation, home to the Three Affiliated Tribes. This stretch of highway is open to the public and is maintained by North Dakota under a federally granted right-of-way. The United States holds the land underlying the highway in trust for the Three Affiliated Tribes and its members.[76]

Neither party was a tribal member. Fredericks was the widow of a deceased tribal member. She had five adult children[77] who were members of one of the Three Affiliated Tribes, and she owned property on the reservation. A-1 Contractors was a non-Indian-owned business, which principally operated outside the reservation. However, at the time of the accident, it was under a subcontract with a tribal owned corporation to perform landscaping within the reservation.[78] The issue facing the

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71. *See id.* at 11.

72. *See* 28 U.S.C. § 1332 (1994).

73. *See Iowa Mutual*, 480 U.S. at 18.

74. *See* Newton, *supra* note 58, at 4.0.

75. 117 S. Ct. 1404 (1997).

76. *See id.* at 1408.

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

78. *See Strate*, 117 S. Ct. at 1408. It is important to note that the record did not reveal whether or

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Supreme Court in *Strate* was whether, absent a statute or treaty authorizing the Tribes to govern the conduct of non-Indians on the highway in question, the tribal court had civil jurisdiction over this dispute.

*B. Procedural History*

Fredericks filed a personal injury action in the Tribal Court of the Three Affiliated Tribes against A-1 Contractors and Stockert (respondents). Fredericks' five adult children joined as plaintiffs and filed an action for loss of consortium. Fredericks and her children (petitioners) claimed damages in excess of $13 million.[79] The respondents filed a motion to dismiss in the tribal court for lack of subject matter and personal jurisdiction. The tribal court denied the motion, stating that: (1) the petitioners were residents of the Fort Berthold Indian Reservation and had the right to seek relief in the tribal courts; (2) the respondents entered a consensual business relationship with the Tribe; and (3) the court's exercise of jurisdiction was not barred by treaty, federal law, or constitutional provision. The respondents then appealed, and the Northern Plains Intertribal Court of Appeals affirmed.[80]

The respondents then filed an action in the federal district court seeking a declaratory judgment that the tribal court lacked jurisdiction and an injunction against further proceedings in the tribal court. The district court dismissed the action by granting petitioners' motion for summary judgment. The district court decided that the tribal court had both personal jurisdiction and subject matter jurisdiction. The court distinguished *Oliphant*, noting that the principles governing civil jurisdiction are different from those governing criminal jurisdiction.[81] The court held that Indian tribes have retained the inherent sovereignty to exercise jurisdiction over civil cases involving non-Indians, unless treaties or federal statutes have specifically limited jurisdiction. The court concluded that no treaty or statute limiting jurisdiction existed.[82]

*C. Decision of the Eighth Circuit Court of Appeals*

On appeal to the Eighth Circuit, the respondents only addressed the issue of whether the tribal court had subject matter jurisdiction over the dispute.[83] A three-judge panel affirmed the district court's ruling.[84] However, the court agreed to rehear the decision en banc. It then reversed the district court in an 8-4 decision.[85] The court relied on *Montana* as the controlling precedent, holding that the conduct giving rise to this dispute did not satisfy the two exceptions stated in the *Montana*

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not Stockert was actually doing work for the tribal contract at the time of the accident.

79. *See* A-1 Contractors v. Strate, No. A1-92-94, 1992 WL 696330, at *1 (D.N.D Sept. 16, 1992).

80. *See Strate*, 117 S. Ct. at 1408.

81. *See National Farmers*, 471 U.S. at 855.

82. *See Strate*, 1992 WL 696330, at *9-10.

83. *See Strate*, 1994 WL 666051, at *2.

84. *See id.* at *1-2.

85. *See* A-1 Contractors v. Strate, 76 F.3d 930, 941 (8th Cir. 1996).

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Rule. Therefore, the court concluded that the tribal court did not have subject matter jurisdiction over the dispute.[86]

The petitioners contended that they satisfied the first *Montana* exception because the respondents entered a "consensual relationship" with the Tribe and because Stockert was on the reservation pursuant to this relationship when the accident occurred. However, the Eighth Circuit held that there was no consensual relationship between the respondents and the Tribe. The court reasoned that the dispute arose out of a "simple personal injury tort claim . . . from an automobile accident."[87] It did not arise under the terms of the respondents' subcontract with the Tribe.[88]

The petitioners also contended that they satisfied the second exception. They claimed that the respondents' conduct affected the Tribe's political integrity because it occurred on the reservation.[89] However, the court decided that this "case has nothing to do with the Indian tribe's ability to govern its own affairs."[90] It merely involves the conduct of a non-Indian and the Tribe's power to exercise judicial authority over him.[91] Therefore, the court determined that the Tribe's interest in asserting civil jurisdiction over a non-Indian in a tort claim does not satisfy the second *Montana* exception.[92]

*D. The Supreme Court's Holding*

The Supreme Court affirmed.[93] In an opinion written by Justice Ginsburg, the Court held that unless there is express congressional authorization, a tribal court's adjudicative jurisdiction does not exceed its regulatory jurisdiction over non-Indians.[94] Therefore, "[s]ubject to controlling provisions in treaties and statutes, and the two exceptions identified in Montana, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'does not extend to the nonmembers of the tribe.'"[95]

*E. Decision*

The petitioners' first contention was that *National Farmers* and *Iowa Mutual* establish a presumption in favor of tribal jurisdiction, even if the case involves non-Indians.[96] However, the Court held that *Montana* was the controlling precedent.[97] The Court reasoned that *National Farmers* and *Iowa Mutual* merely describe the

86. *See id.* at 940-41.
87. *Id.* at 940.
88. *See id.* at 941.
89. *See id.*
90. *Id.* at 940.
91. *See id.*
92. *See id.*
93. *See* Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997).
94. *See id.* at 1413.
95. *Id.*
96. *See id.* at 1410.
97. *See id.*

exhaustion rule that allows tribal courts to decide the extent of their own jurisdiction. The exhaustion rule does not establish tribal adjudicatory authority over non-Indians.[98] The Court stated that these decisions "enunciate only an exhaustion requirement, a 'prudential rule,' based on comity. . . . [and] do not expand or stand apart from *Montana*'s instruction."[99]

Therefore, the Court adopted *Montana*'s general rule that absent express authorization, Indian tribes do not have civil jurisdiction over non-Indians, unless: (1) the tribes retain civil jurisdiction over a nonmember who enters a consensual relationship with the tribe or its members; or (2) the tribes retain civil jurisdiction over a nonmember for activity that affects the tribes' political integrity, economic security, health or welfare.[100]

However, the *Montana* Rule requires "a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."[101] Only after the *Montana* Court examined the treaties and legislation relied on by the Tribe, did the Court establish the *Montana* Rule and its exceptions. The *Montana* Court clearly stated that its exceptions only apply when there is not a specific treaty or federal statute directing otherwise.[102]

The petitioners' second contention was that *Montana* did not govern because the Tribe held the land underlying the scene of the accident in trust for the Tribe. However, the Court decided that *Montana* applied to this issue because the accident "related to nonmember activity on alienated, non-Indian reservation land."[103] The accident occurred on a right-of-way which was granted from the United States to the state of North Dakota.[104]

Therefore, the Court required the petitioners to show that this case fell under one of *Montana*'s two exceptions. The first exception covers "'activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'"[105] The Court held that the respondent was engaged in subcontract work with the Tribe, not with the petitioners. "Gisela Fredericks was not a party to the subcontract, and the tribes

98. *See id.*
99. *See id.* at 1413; Montana v. United States, 450 U.S. 544, 564-65 (1980).
100. *See* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1413 (1997); *Montana*, 450 U.S. at 564-65.
101. *Strate*, 117 S. Ct. at 1411 (quoting *National Farmers*, 471 U.S. at 855-56).
102. *See id.*
103. *Id.* at 1413.
104. *See id.*; *see also* 25 U.S.C. §§ 323-328 (1994) (governing federal grants of right-of-way over Indian lands).
105. *Strate*, 117 S. Ct. at 1415 (quoting *Montana*, 450 U.S. at 565).

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were strangers to the accident."[106] Therefore, no "consensual relationship" existed between the petitioners and respondents.

*Montana*'s second exception concerns conduct that "'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'"[107] The Court noted that this exception can easily be misunderstood. Although Indian tribes retain considerable inherent control over non-Indian conduct on tribal land, a tribe's inherent power does not extend beyond "what is necessary to protect tribal self-government or to control internal relations."[108] The Court held that the tribe does not need to retain regulatory nor adjudicatory authority over accidents occurring on state highways to preserve its rights to make and enforce its own laws.

Upon reaching the decision that neither of the *Montana* Rule's two exceptions applies,[109] the Court held that the tribal court did not have jurisdiction over a civil tort claim against a non-Indian. Therefore, the Court stated that petitioners could pursue their case against A-1 Contractors and Stockert in state court.[110]

### *V. Analysis*

*Strate* is a prime example of a hard case making bad law. Arguably, the *Montana* Rule is not relevant to the issue of tribal adjudicatory authority over civil lawsuits. The Supreme Court simply failed to recognize the differences between civil adjudicatory authority and regulatory or legislative authority. Civil adjudicatory authority is the power of a tribal court to "hear the type of case that is then before it."[111] However, regulatory or legislative authority is the power to apply tribal laws to conduct occurring on tribal lands.[112]

In those cases in which the Supreme Court has refused to uphold the assertion of tribal civil jurisdiction over non-Indians, the Court has found congressional divestment of tribal sovereignty through the alienation of Indian land to non-Indians.[113] The decisions in *Montana* and *Brendale* involved express congressional divestment of tribal civil regulatory jurisdiction over non-Indian activities on non-Indian land. The *Montana* Court distinguished the issue of the Tribe's authority over

106. *Id.* at 1415 (citing Williams v. Lee, 358 U.S. 217, 223 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); Morris v. Hitchcock, 194 U.S. 384 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905) (upholding tribe's permit tax on nonmembers for the privilege of conducting business within tribe's borders; court characterized as "inherent" the tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders"). Measured against these cases, the Fredericks-Stockert highway accident presents no "consensual relationship" of the qualifying kind.

107. *Strate*, 117 S Ct. at 1415 (quoting *Montana*, 450 U.S. at 566).

108. *See id.* at 1416; *Montana*, 450 U.S. at 566.

109. *See Strate*, 117 S. Ct. at 1416.

110. *See id.* (quoting *Montana*, 450 U.S. at 566).

111. BLACK'S LAW DICTIONARY 854 (6th ed. 1990)

112. *See* Newton, *supra* note 58, at 4.0.

113. *See Montana* 450 U.S. at 561 (stating that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands" by Congress).

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the activities of non-Indians on Indian land from the issue of tribal authority over such activities on non-Indian owned lands.[114] The Court said the *Montana* Rule only applies to disputes arising on "lands no longer owned by the tribe."[115]

The Supreme Court's decisions in subsequent cases emphasize that application of the *Montana* Rule depends on whether the actions in dispute took place on Indian land or on non-Indian land. In *New Mexico v. Mescalero Apache Tribe*,[116] the state claimed jurisdiction, pursuant to *Montana*, over the regulation of non-Indian hunting and fishing on Indian land. The Court held that the *Montana* Rule does not automatically allow state jurisdiction over non-Indian conduct on Indian land. *Montana* stated that Indian tribes can prohibit hunting and fishing by non-Indians on Indian land.[117] The plurality opinion in *Brendale* went on to distinguish the *Iowa Mutual* rule cases by stating that these cases "did not involve the regulation of fee lands, as did *Montana*."[118]

However, the Supreme Court has repeatedly "emphasized that there is a significant geographic component to tribal sovereignty."[119] Tribal jurisdiction over conduct occurring on non-Indian owned lands places the tribe's regulatory authority into issue. If the tribe's regulatory authority were at issue, *Montana* and *Brendale* would be applicable. However, *Strate* involved tribal civil jurisdiction over the conduct of non-Indians on Indian land.

The accident in *Strate* occurred on Highway 8, which entered the reservation pursuant to right-of-way. The Bureau of Indian Affairs granted the easement to the North Dakota Highway Department on May 8, 1970, pursuant to 25 U.S.C. §§ 323-328. Highway 8 crosses 6.59 miles of land, which the federal government holds in trust for the Tribe and tribal members. The highway ends on the shores of Lake Sakakawea, a federal water resource project. Highway 8 does not cross any non-Indian owned land within the reservation.[120] It is not used as a major thoroughfare.

The Court held that the accident occurred on alienated non-Indian land. It reasoned that the right-of-way was made pursuant to a grant from the United States

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114. *See id.* at 557. The Court stated:

> The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.

*Id.*

115. *See id.* at 564.

116. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330-331 (1983).

117. *See id.*; *see also* U.S. *ex rel.* Morongo Band of Mission Indians v. Rose, 34 F.3d 901, 906 (9th Cir. 1994) ("Strictly speaking, the Montana exceptions are relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the land.").

118. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 427 (1989).

119. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980).

120. *See* Reply Brief of Petitioners at 3, *Strate*, 520 U.S. 438 (1997) (No. 95-1872), *available in* 1996 WL 739255, at *3.

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to North Dakota. The Three Affiliated Tribes only retained the right to construct crossings of the right-of-way. The Tribes consented to and received payment for the grant. The Court decided that the Tribes cannot assert jurisdiction over the right-of-way as long as the state maintains it as part of North Dakota's highway.[121]

In reality, the Tribes merely gave the state a limited easement to pave and maintain the highway, granting only those rights that Congress has specifically provided.[122] The grant did not divest the Tribes of their authority to regulate tortious conduct on the road. Chapter 4-A of the Code of Laws of the Three Affiliated Tribes provides for tribal regulation over traffic offenses on the reservation.[123] The easement does not provide for any grants of jurisdictional authority to the state or federal government. The state merely acquired an easement, which is a property right less than fee simple. The Tribes granted the easement specifically for improving and maintaining Highway 8.

Congress and the Supreme Court have long distinguished between limited easements over Indian lands and complete divestment of Indian land.[124] The Tribe never completely divested itself of the land underlying the easement, which the federal government holds in trust. The Tribe retained ownership of the lands underlying the easement. The grant did not alienate to non-Indians the title to the land on which this case arose. Although the state maintains a highway over the land pursuant to an easement, the land remains Indian trust land.[125] The land underlying the easement is still "Indian land."[126] Therefore, this case involves the Tribes' civil adjudicatory authority.

Because the Tribes' civil adjudicatory authority is at issue, the precedent followed should have been *National Farmers* and *Iowa Mutual.* These two cases directly dealt with tribal adjudicatory authority over conduct on Indian land. In *Williams v. Lee*, the Court established the clear rule that tribes retain civil adjudicatory authority over the conduct of non-Indians on Indian land unless Congress has divested such jurisdiction. The Court recognized that Congress has not generally granted civil jurisdiction to the states over court cases involving non-Indians on Indian land.[127] Therefore, the Court held that inherent and exclusive jurisdiction lies in the tribal

121. *See* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1413 (1992); *see also* 25 U.S.C. §§ 323-328 (1994) (governing federal grants of right-of-way over Indian lands).

122. *See* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).

123. *See* Brief of Petitioners at 22, *Strate*, 520 U.S. 438 (1997) (No. 95-1872), *available in* 1996 WL 656356, at *22.

124. *See* Buttz v. Northern Pac. R.R. Co., 119 U.S. 55 (1886).

125. *See* Burlington Northern R.R. Co. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992) (holding that absent express congressional provision otherwise, tribe retains beneficial title to land underlying railroad right-of-way).

126. *See, e.g., Burlington Northern*, 924 F.2d at 902-04; Davis v. Director, North Dakota Dep't of Transp., 467 N.W.2d 420, 422 (N.D. 1991) (explaining that within Indian reservations, state highways are "Indian country" within the meaning of 18 U.S.C. § 1151).

127. *See* Williams v. Lee, 358 U.S. 217, 218-222 (1959).

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courts.[128] The decisions in *National Farmers* and *Iowa Mutual* have somewhat limited this holding.

These cases, however, establish that Congress has not generally divested tribal civil jurisdiction over the conduct of non-Indians on Indian land. In *National Farmers*, the Court stated that the "extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."[129]

However, the Court failed to make this "careful examination of tribal sovereignty." Tribal sovereignty is of a unique and limited character. "It exists only at the sufferance of Congress and is subject to complete defeasance. Yet until Congress acts, the tribes retain their existing sovereign powers."[130] Therefore, a fundamental principle of inherent tribal sovereignty is that it can only be limited when it has been expressly or implicitly divested by Congress.[131] The Supreme Court has held implicit divestment of tribal sovereignty exists only when tribal actions are in direct conflict with the interests of the national government. These conflicts exist when the tribes: (1) engage in foreign relations; (2) alienate Indian land to non-Indians without federal consent; or (3) exercise criminal jurisdiction over non-Indians.[132]

Tribal adjudicatory authority over non-Indians for conduct on Indian lands is an important part of tribal sovereignty. The Court in *Iowa Mutual* expressly noted that civil jurisdiction over such activities presumptively lies in tribal courts, unless Congress expressly limits it.[133] Because Indian tribes retain all of the inherent attributes of sovereignty, congressional silence allows tribal sovereignty to remain intact.[134]

However, such deference is not without its problems. Courts are forced to decide how exhaustion should continue without a tribal forum. This is known as the "no forum problem."[135] Although a state court can rely on general subject matter

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128. *See id.* at 223; *see also, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (holding that jurisdiction to regulate hunting and fishing by non-Indians on Indian land is exclusive with the tribe when state's authority to regulate the hunting and fishing of non-Indians on Indian land is challenged).

129. *See* National Farmers Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855-56 (1985).

130. Brief of Petitioners at 15, *Strate*, 520 U.S. 438 (1997) (No. 95-1872), *available in* 1996 WL 656356, at *15.

131. *See, e.g.*, Williams v. Lee, 358 U.S. 217, 223 (1959) ("If this power is to be taken away from them, it is for Congress to do it."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.").

132. *See* South Dakota v. Bourland, 508 U.S. 679, 699 (1993) (Blackmun, J., dissenting) (citing Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153-54 (1980)).

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

134. *See* Brief of Petitioners at 15, *Strate*, 520 U.S. 438 (1997) (No. 95-1872), *available in* 1996 WL 656356, at *15.

135. *See* Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While*

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jurisdiction over civil actions arising on Indian lands within its borders, federal courts do not have such jurisdiction. Obviously, federal courts do not want to apply the Tribal Exhaustion Doctrine when the tribal courts do not provide a forum in which to resolve the dispute. Therefore, the courts must determine whether the absence of a tribal forum is sufficient to create federal jurisdiction. There is presently a split on this very issue. Some courts have held that state or federal courts automatically have jurisdiction when there is no tribal forum.[136] Still other have held that *Williams* has effectively precluded state jurisdiction, regardless of whether there is a forum available in the tribal courts.[137]

Although *National Farmers* succeeded in broadening tribal sovereignty, it failed to address directly the "no forum problem." However, *National Farmers* noted that the language of 28 U.S.C. § 1331 states that the federal district court "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. It is well settled that this statutory grant of 'jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.'"[138] The Court defined federal common law as "laws" under section 1331.[139]

Therefore, invoking section 1331 federal question jurisdiction in the federal courts is possible based on a common law jurisdictional dispute, without involving a federal statute or Constitutional provision. It is only necessary to base the claim on a dispute "arising under" federal law. Federal courts frequently decide issues relating to an Indian tribe's powers to regulate the actions of non-Indians. They have also decided the extent of the tribe's immunity from state action. Federal law has consistently been the judicial basis for these decisions. Therefore, in the absence

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*Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1130-31 (1995) ("The [no-forum] problem exists, for example, when a tribal ordinance fails to extend jurisdiction over the parties or over the cause of action that has come to federal court for relief, or, in more extreme cases, when no tribal court system exists.").

136. *See id.* at 1131 n.205; *see also* Native Village of Tyonek v. Puckett, 957 F.2d 631, 634 (9th Cir. 1992) (holding that the district court had subject matter jurisdiction to hear Alaska native village's complaint seeking to evict nonmembers from its territory); Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1077 n.3 (9th Cir. 1990) (holding the federal court had jurisdiction over a suit brought by an Indian tribe to enforce its ordinance against a non-Indian when the tribe has no tribal court); Richardson v. Malone, 762 F. Supp. 1463, 1467 (N.D. Okla. 1991) (holding that federal courts have jurisdiction over the dispute because there are no tribal courts and the state courts lack jurisdiction).

137. *See* Reynolds, *supra* note 135, at 1131-32 n.206; *see also* Enriquez v. Superior Court, 565 P.2d 522, 523 (Ariz. Ct. App. 1977) (holding that the fact of whether or not a tribal court provides a forum for the recovery for personal injuries has no significance in determining whether a state court has jurisdiction); Schantz v. White Lightning, 502 F.2d 67, 69 (8th Cir. 1974) (holding that the federal and state courts did not have jurisdiction in a matter where the plaintiff, a non-Indian, had no forum in which to bring a valid lawsuit because of a tribal jurisdictional statute that required plaintiffs to be a "resident or doing business on the Reservation for at least one year prior to the institution of the proceeding" and limiting the court's subject matter jurisdiction to suits in which the amount in controversy did not exceed $300).

138. *See National Farmers*, 471 U.S. at 850.

139. *See id.*

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of a tribal forum for the exhaustion of tribal remedies, the federal court may resolve the underlying dispute through federal question jurisdiction.

However, tribal exhaustion does not limit subsequent federal court consideration of jurisdictional questions. Although federal courts generally interpret *National Farmers* and *Iowa Mutual* as creating an expansive view of tribal sovereignty, the courts in essence create federal question jurisdiction in the federal courts over a variety of disputes that were previously outside federal jurisdiction. A rule that opens a decision from the tribe's highest judicial body to subsequent litigation in the lower federal courts will ultimately diminish tribal sovereignty.

In addition, before the establishment of the exhaustion rule, federal courts refused to hear cases involving contract disputes, lease disputes and personal injuries occurring on Indian land. Under *National Farmers'* expansive definition of federal question jurisdiction, these cases present issues that federal and state courts will decide. Therefore, the Tribal Exhaustion Doctrine would ultimately open the door for federal courts to entertain jurisdiction over tribal disputes, ultimately resulting in an even further limitation on tribal sovereignty, rather than allowing tribes to manage their own affairs.

### *VI. Conclusion*

The fundamental principle of inherent tribal sovereignty is that it remains intact unless it has been divested by Congress. Indian tribes have been divested of some aspects of tribal sovereignty by incorporating within the United States and accepting its protection. These divestments include the rights to: (1) engage in foreign relations; (2) alienate Indian land to non-Indians without federal consent; and (3) exercise criminal jurisdiction over non-Indians. Still, congressional action has divested other aspects of tribal sovereignty. The Supreme Court has even held that any divestment of tribal authority over the tribe's own affairs requires an express authorization by Congress.

However, some of the greatest divestments of tribal sovereignty have come from the Supreme Court. In fact, *Strate v. A-1 Contractors*, the Supreme Court's latest decision involving tribal sovereignty, has divested Indian tribes of a basic element of inherent sovereignty: a tribe's power to exercise adjudicatory jurisdiction and enforce its laws against all people within its borders. *Strate*'s unanimous decision established a hard rule that the Supreme Court will not tolerate an Indian tribe exercising jurisdiction over a non-Indian for conduct within Indian lands.

By applying *Montana* to issues involving the assertion of tribal jurisdiction over conduct arising on Indian lands, *Strate* has in essence destroyed any differences between tribal adjudicatory authority and tribal regulatory authority. In doing so, it has all but overruled *Iowa Mutual*'s clear preference for tribal jurisdiction, which has the effect of making the Tribal Exhaustion Doctrine a mere procedural step before removing a case from tribal courts and placing it in state or federal courts. The only authority a tribal court retains is the right to explain its basis for asserting or denying jurisdiction.

Therefore, *Strate* has established a new rule that a jurisdictional challenge in a tribal court is sufficient to allow state and federal courts to review a tribal court's

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initial decision to assert jurisdiction. This new rule thus basically gives these courts appellate review over the tribal courts. State and federal courts are no longer required to wait for the tribal court's final disposition. In other words, state and federal courts now have the power to preempt tribal courts and assert jurisdiction over any case involving a non-Indian.

The *Strate* decision represents yet another bite the Supreme Court has taken out of tribal sovereignty. In fact, *Strate* cuts to the very core of tribal self-government and self-determination. The Supreme Court has expressed such a limited view of tribal sovereignty that congressional intervention is necessary. Congress should step in and provide new legislation to further its policy of supporting tribal sovereignty. This legislation may be the only savior for the tribal judicial system from consistent attacks and limitations imposed by the United States Supreme Court.

*Aaron S. Duck*

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