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INTRODUCTION

The Tenth Circuit recently decided several cases on the issue of tribal court jurisdiction over non-Indians. Following a brief general discussion of the history of federal Indian policy, this Survey will explore the Tenth Circuit's latest decisions regarding the tribal abstention doctrine and the Indian Child Welfare Act (ICWA).[1]

In *Worcester v. Georgia*,[2] the Supreme Court recognized that Indian tribes exist "as distinct political communities, having territorial boundaries, within which their authority is exclusive."[3] The decision in *Worcester*, however, did not stop the federal government from attempting to assimilate Indians into white society.[4] Such attempts blurred the territorial boundaries between state and tribal authority.[5]

Congress gradually has abandoned its assimilation policies in favor of self-determination.[6] In the past, the laws, policies, and treaties of the United States have compelled the integration of Indians and non-Indians. The policy of self-determination represents a departure from tradition: an attempt to recognize the rights of Indians, and in some instances, to redress the wrongs inflicted on Indians over the centuries. As a result of self-determination, federal Indian laws, policies, and treaties often separate Indians from non-Indians.

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1. 25 U.S.C. §§ 1901-1963 (1994).
2. 31 U.S. (6 Pet.) 515 (1832).
3. *Worcester*, 31 U.S. (6 Pet.) at 557.
4. *See* Indian General Allotment (Dawes) Act, ch. 119, §§ 1-11, 24 Stat. 388 (1887) (current version at 25 U.S.C. §§ 331-358 (1994)). "The ultimate purpose of the Dawes Act was to break up tribal governments, abolish Indian reservations, and force Indians to assimilate into white society." STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 5 (Norman Dorsen ed., 2d ed. 1992). The Dawes Act created a checkerboard effect with respect to land within a reservation, and non-Indians were allowed to purchase reservation land. *Id.* The changes that occurred as a result of the Dawes Act continue to affect questions of tribal authority.

In 1934, Congress shifted gears and passed the Indian Reorganization Act (IRA), ch. 576, §§ 1-19, 48 Stat. 984 (1934) (current version at 25 U.S.C. §§ 461-479 (1994)). The IRA prohibited further allotment of Indian land, added lands to existing reservations, created new reservations, and restored tribal ownership to unoccupied "surplus" land. The act encouraged tribes to self-govern. *See* PEVAR, *supra*, at 6-7. In 1953, Congress again changed Indian policy. In an effort to reduce federal spending and responsibility, Congress adopted a policy of "termination" with respect to Indian tribes. Termination effectively abolished both tribal government and landholdings. Because of the ensuing drastic effects on Indian culture, some scholars compare termination to "genocide." *Id.* at 57. During termination, Congress granted jurisdiction over Indians tribes to several designated states and provided an option for the rest of the states to assume jurisdiction at a later time. Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588 (1953) (current version at 18 U.S.C. § 1162 (1994)); *see also* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 49 (1987) (discussing case law limitations on congressional jurisdiction under the act). During the 1960s and early 1970s, the Kennedy, Johnson, and Nixon administrations worked with Congress to end the "termination era" to promote Indian self-determination. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 252 (3d ed. 1993).
5. *See supra* note 4.
6. *See* GETCHES ET AL., *supra* note 4, at 252.

Separation does not equal isolation, however, and controversies continue to arise between Indians and non-Indians as well as between federal and local governments.[7]

I. JURISDICTION

A. *Tribal Abstention Doctrine*[8]

1. Background

In *National Farmers Union Insurance Co. v. Crow Tribe of Indians*,[9] the Supreme Court required a federal court to "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made."[10] Tribal courts have the first opportunity to determine jurisdiction before federal courts may examine the issue.[11] The Court articulated exceptions to this abstention doctrine where: (1) tribal jurisdiction is motivated by bad faith; (2) the action patently violates express jurisdictional prohibitions; or (3) exhaustion would be futile.[12] Although federal

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7. Nowhere is this fact more evident than in the recent Supreme Court decision, Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996). *Seminole Tribe* resolved a circuit split between a Tenth Circuit case, Ponca Tribe v. Oklahoma, 37 F.3d 142 (10th Cir. 1994), an Eleventh Circuit case, Seminole Tribe v. Florida, 11 F.3d 1016 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996), and a congressional interpretation of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (1994).

Congress had enacted IGRA in reaction to California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), in which the Court concluded that, so long as a state allowed any gambling, it could not regulate tribal gaming. *See* Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Indian Gaming Compacts*, 47 WASH. U. J. URB. & CONTEMP. L. 51, 56 (1995). IGRA attempts to promote cooperation between tribal and state governments by providing a regulatory framework for gaming activities on Indian lands while balancing tribal, state, and federal interests. *See id.* In *Ponca Tribe*, the Tenth Circuit upheld the IGRA, reasoning that the U.S. Constitution's Indian Commerce Clause empowers Congress to bring states into court. *Ponca Tribe*, 37 F.3d at 1427. In *Seminole Tribe*, however, the Eleventh Circuit held that Congress lacked the authority to abrogate Eleventh Amendment state immunity. *Seminole Tribe*, 11 F.3d at 1028. The United States Supreme Court sided with the Eleventh Circuit, holding that Congress may not force a state governor to enter into good faith negotiations with a tribe. Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996) (referring to the doctrine announced in *Ex Parte* Young, 209 U.S. 123 (1908), which allowed a federal court to enjoin the state Attorney General from performing an unconstitutional discretionary act, regardless of whether the state consented to the suit).

8. The tribal abstention doctrine requires federal courts to abstain from hearing a matter until a tribal court has first had the opportunity to consider the matter. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985). Challengers must exhaust all tribal remedies before a federal court may review a challenge to a tribal court ruling. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16-17 (1987).

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

10. *National Farmers*, 471 U.S. at 857 (footnotes omitted).

11. *Id.* at 856-57; *see* Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 336-44 (1989) (discussing the factors that a tribal court must consider in determining its jurisdiction). Two years after *National Farmers*, the Court in *LaPlante* decided that "[r]egardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *LaPlante*, 480 U.S. at 16 (quoting *National Farmers*, 471 U.S. at 857).

12. *National Farmers*, 471 U.S. at 856 n.21.

courts may hear a challenge to tribal jurisdiction,[13] a challenger must generally exhaust tribal remedies before raising the issue in federal court.[14]

A tribe's authority to exercise jurisdiction within its territory is subject to any limitations that Congress may seek to impose.[15] For example, tribes cannot exert criminal jurisdiction over non-Indians.[16] Federal jurisdictional limitations, however, do not extend to civil matters where the conduct in question involves Indians, reservation land, or trust land that was once within the boundaries of a reservation.[17] A non-Indian who challenges the authority of a tribe to exert jurisdiction usually claims either that the action did not occur in Indian country,[18] or that the tribe lacks sufficient interest in the matter to exert jurisdiction.[19] The term "Indian country" encompasses not only the formal reservation, but Indian allotments and dependent Indian communities as well.[20] A tribe may exercise civil authority over Indian country as defined by 18 U.S.C. § 1151.[21] The boundaries of Indian Country determine the extent

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13. *Id.* at 855-57.

14. *Id.* at 856-57. The tribal abstention doctrine is based on the congressional policy of "supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* at 856 (footnotes omitted).

15. United States v. Wheeler, 435 U.S. 313, 323 (1978) (stating that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance"); *see* PEVAR, *supra* note 4, at 154; Pommersheim, *supra* note 11, at 335-36 (discussing the extent of tribal legislative and regulatory authority over non-Indians). *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47-206 (Rennard Strickland et al. eds., 1982 ed.) (discussing the history of United States policy toward Indians).

16. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978). The exercise of tribal jurisdiction in criminal matters does not extend to non-Indians unless Congress gives that power to the tribe. *Id.* at 208. *But see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832) (holding that acts passed by Congress "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive").

17. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-53 (1980); PEVAR, *supra* note 4, at 155-56; Pommersheim, *supra* note 11, at 343-44 ("Does a tribal court have civil jurisdiction over a civil transaction that took place outside the boundaries of the diminished reservation but on trust land within the original borders of the reservation? The apparent answer is yes.").

18. "Indian country" refers to:

> (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.

18 U.S.C. § 1151 (1994). Section 1151 on its face defines "Indian country" solely for the purpose of criminal jurisdiction. The Court, however, has held that § 1151 applies to questions of civil jurisdiction as well. *See* DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). Difficulties arise in determination of what constitutes "Indian country," due in part to the inconsistent treatment of Indians by Congress. *See supra* note 4.

19. *See* Montana v. United States, 450 U.S. 544, 565-66 (1981). "[A] tribe may assert its authority if the non-Indian activity threatens or has a direct effect on the political integrity, economic security, or health and welfare of the tribe or if the activity is the result of a consensual agreement, such as a business contract, with the tribe." PEVAR, *supra* note 4, at 156.

20. *See supra* note 18.

21. *DeCoteau*, 420 U.S. at 427 n.2.

of tribal court jurisdiction, tribal legislative and regulatory authority, and the applicability of the tribal abstention doctrine.

2. *Pittsburg & Midway Coal Mining Co. v. Watchman*[22]

a. *Facts*

The South McKinley Mine lies outside the Navajo Reservation (Reservation) and adjacent to a companion mine located within the Reservation boundary. Five interests hold shares in the surface title to the mine shaft.[23] Three interests have an ownership interest in the subsurface coal estate.[24] The Pittsburg & Midway Coal Mining Company (P&M) leased the right to conduct mining operations from these titleholders.[25]

The Navajo Nation imposed a 5% levy on source gains[26] in the form of a Business Activities Tax.[27] Under protest, P&M paid this tax, and, in 1986, filed an action seeking an injunction and a declaratory judgment that the Navajo Nation (the Nation) lacked jurisdiction to impose this tax.[28] The Nation argued that the federal court should abstain from exercising its jurisdiction due to the tribal abstention doctrine and should allow the tribal court to hear the matter first.[29] Finding that the mine was not on the Reservation, the district court refused to defer to the tribal court.[30]

The Nation offered two theories in support of its claim for federal court abstention. It claimed that the mine was located on part of the Reservation, and, in the alternative, that the area in question included Indian Country as defined by 18 U.S.C. § 1151.[31] The Tenth Circuit affirmed the district court's finding that the mine did not lie on the Reservation.[32] Since the district court failed to determine if the mine's location involved Indian Country, however, the Tenth Circuit remanded the case to address this issue.[33]

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22. 52 F.3d 1531 (10th Cir. 1995).

23. *Pittsburg & Midway Coal*, 52 F.3d at 1534. The United States holds 47% in trust for individual Navajo allotees, non-Indian private parties hold 40%, the Navajo Nation holds 7%, the United States holds 5% as public lands, and New Mexico holds title to less than 0.5%. *Id.*

24. *Id.* The United States holds title to 52%, Cerillos Land Company holds title to 47%, and New Mexico holds title to less than 0.5%. *Id.*

25. *Id.*

26. "Source gains of a Branch are the gross receipts of that Branch from the sale, either within or without the Navajo Nation, of Navajo goods or services . . . ." Navajo Tribal Code, 24 § 404 (2). "Branch" means any person engaged in trade, commerce, manufacture, power production, or any other productive activity whether for profit or not, wholly or in part within the Navajo Nation." Navajo Tribal Code, 24 § 404 (1).

27. *Pittsburg & Midway Coal*, 52 F.3d at 1535. A Business Activity Tax is a tax "imposed on the source-gains of a Branch at the rate established . . . . The tax due for a period is computed by multiplying the source-gains of the Branch for the period by the tax rate." Navajo Tribal Code, 24 § 401; *see also supra* note 26 (defining source-gains).

28. *Pittsburg & Midway Coal*, 52 F.3d at 1534. *See generally* Pommersheim, *supra* note 11, at 347 (discussing tribal taxation of non-Indians).

29. *Pittsburg & Midway Coal*, 52 F.3d at 1534.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

On remand, the district court held that the area in question did not include Indian Country,[34] and refused to dismiss P&M's complaint.[35] The Nation appealed again, raising three arguments: (1) the district court should abstain from hearing the matter until P&M exhausts its tribal remedies because the three exceptions to the tribal abstention doctrine are inapplicable; (2) the district court erred in concluding that no part of the mine site was within a trust allotment; and (3) the district court chose the wrong "community of reference" for its dependent Indian community analysis.[36]

b. *Decision*

The Tenth Circuit found that at least a portion of the mine existed in Indian Country due to the state's trust holdings of individual Navajo allotments.[37] The court held, however, that the record was insufficiently developed to determine whether the mine's location included a dependent Indian community.[38] This determination was crucial: the Navajo's interests would not be sufficient to invoke the abstention doctrine unless a dependent Indian community existed in addition to individual allotments. Therefore, the court reversed and remanded the matter again with new criteria for the district court to consider as to whether the mine and surrounding area constituted a dependent Indian community.[39]

P&M argued that the Nation's attempt to tax the mining company violated express jurisdictional prohibitions because 18 U.S.C § 1151 did not confer civil jurisdiction over Indian country to the Nation.[40] The Tenth Circuit disagreed, holding that § 1151 is "an express Congressional delegation of civil

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34. *Id.*

35. *Id.*

36. *Id.* at 1535-36. Community of reference refers to the fact that in order to determine if a dependent community exists, the court must first ascertain what community to include in its analysis.

37. *Id.* at 1541. "[T]he United States holds 47% of the mine site area in trust for individual Navajo allotees. These Navajo trust allotments are Indian country by definition under 18 U.S.C. § 1151(c)." *Id.*

38. *Id.*

39. *Id.* The court expanded the "community of reference" from that which the district court had used in its initial determination. The Tenth Circuit also adopted the Eighth Circuit's four-prong test for determining what constitutes a dependent Indian community:

> (1) whether the United States has retained "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting this territory"; (2) "the nature of the area in question, the relationship of the inhabitants in the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area"; (3) whether there is "an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality"; and (4) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples."

Id. at 1545 (quoting United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982) (citations omitted)).

40. *Id.* at 1536. P&M dismissed as dicta the Supreme Court precedent set forth in DeCoteau v. District County Court, 420 U.S. 425, 428 n.2 (1975), which recognized that § 1151 generally applies to civil jurisdiction as well as criminal jurisdiction. *Pittsburg & Midway Coal*, 52 F.3d at 1540 n.10.

authority over Indian country to the tribes,"[41] which includes the authority to tax.[42]

3. Analysis

Pittsburg & Midway Coal presents a question of first impression for the Tenth Circuit regarding the appropriate "community of reference" for the purpose of defining a dependent Indian community within Indian Country.[43] Jurisdiction turns on whether or not the mine is located within a dependent Indian community. The question then becomes who determines the "community of reference" for the purpose of jurisdiction.

As discussed above, the statutory definition of "Indian country" includes Indian allotments.[44] Here, both parties agreed that a portion of the mine lies on Indian allotments.[45] Because the court held that the Nation has authority to tax mining activities in Indian country, the Business Activities Tax did not violate any express jurisdictional prohibitions.[46] Thus, the Tenth Circuit decided that the tax did not fit the "express jurisdictional prohibitions" exception to the abstention doctrine articulated in *National Farmers*. P&M, therefore, had no grounds for escaping tribal court jurisdiction. The court, however, upheld the district court finding that the Indian allotments alone provided an insufficient basis for removal.[47] In order for the tribal court to exercise jurisdiction, the mine site and surrounding community must be considered Indian country: a dependent Indian community.[48] An initial determination that a dependent Indian community exists is a prerequisite to the exercise of tribal court jurisdiction.

National Farmers indicates that the tribal court should have the first opportunity to make initial jurisdiction determinations.[49] The Tenth Circuit, in *Pittsburg & Midway Coal*, acknowledged that a federal court should not rule on tribal court jurisdiction until tribal remedies are exhausted.[50] In *Pittsburg & Midway Coal*, the Tenth Circuit could have directed the district court to abstain until the tribal court determined jurisdiction. Applying the Tenth Circuit's test for a dependent Indian community,[51] the tribal court could have made the initial determination regarding its jurisdiction. Had P&M challenged the tribal court's decision, it would have had the benefit of the federal district court's review,[52] as *National Farmers* provides federal review of tribal court

41. *Pittsburg & Midway Coal*, 52 F.3d at 1541.
42. *Id.*
43. *Id.* at 1543; *see supra* note 18.
44. *See supra* note 18.
45. *Pittsburg & Midway Coal*, 52 F.3d at 1542.
46. *Id.* at 1538.
47. *Id.* at 1542. The Tenth Circuit noted that if the mine were located entirely on Navajo trust allotments, or if only the 47% of the mine within the allotments were in controversy, the abstention doctrine would apply without question. *Id.* at 1542 n.11.
48. *Id.* at 1542.
49. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).
50. *Pittsburg & Midway Coal*, 52 F.3d at 1537.
51. *See supra* note 39.
52. *National Farmers*, 471 U.S. at 857 (concluding "that § 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction, and that exhaus-

jurisdiction after exhaustion in tribal court.[53] The Tenth Circuit, however, did not direct the district court to abstain. Instead, the Tenth Circuit directed the district court to decide whether the mine lies in Indian Country.[54] The court maintains that the remand to the district court is consistent with *National Farmers* and its analysis of the tribal abstention doctrine.[55] This is not the case. The remand is inconsistent with *National Farmers* and contradicts the Tenth Circuit's stance on initial questions of tribal court jurisdiction.

If the district court finds a dependent Indian community, the tribal court may exercise jurisdiction. The Tenth Circuit allows the federal court to review tribal court jurisdiction before the tribal court has exercised jurisdiction.[56] By contrast, *National Farmers* provides for federal court review after the tribal court has exercised jurisdiction. In this case, if the tribal court should acquire jurisdiction, then P&M's right to subsequent federal court review of the tribal court's exercise of jurisdiction[57] should be precluded by the doctrine of *res judicata*.[58]

When the Supreme Court set forth the tribal abstention doctrine in *National Farmers*, the Court failed to direct the lower courts as to its proper scope. Thus, federal courts apply the tribal abstention doctrine inconsistently.[59] In *Pittsburg & Midway Coal*, the court failed to explain why the tribal court should *not* be allowed to determine the existence of Indian country for jurisdictional purposes. Absent such an explanation, the Tenth Circuit's approach either: (1) calls into question the ability of tribal courts to examine questions of jurisdiction without bias or prejudice; or (2) suggests that tribal courts lack the competence to follow directions. A more definitive line between federal and tribal court jurisdiction would resolve the inconsistency in application of *National Farmers*.[60]

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tion is required before such a claim may be entertained by a federal court"). In *National Farmers*, the Court implied that exhaustion of tribal remedies would "legitimize" the tribal courts. *See id.* at 856-57. This, in turn, would allow tribal courts to explain the reasoning behind their actions. *Id.* Subsequently, on review, federal courts would have the benefit of the tribal court's expertise as well as a comprehensive record. *Id.*; *see also* Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1105 (1995) (analyzing the development of the tribal abstention doctrine).

53. *National Farmers*, 471 U.S. at 856-57.

54. *Pittsburg & Midway Coal*, 52 F.3d at 1541.

55. *Id.* at 1539 n.8. "We do not believe our final disposition of this appeal contradicts this analysis. Our remand to the district court on the dependent Indian community issue is essentially limited to the resolution of factual issues and their application to the legal framework outlined in this opinion." *Id.*

56. It appears to follow that if the mine is located in Indian country, and the tribal court has jurisdiction to hear the matter, then the tribe probably has authority to tax. If this is true, then the federal district court has, in effect, resolved the controversy in its entirety. *See id.* at 1541 (holding that § 1151 "represents an express Congressional delegation of civil authority over Indian country to the tribes. As a result, the Navajo Nation has authority to tax any mining activities taking place in Indian country without violating any express jurisdictional prohibitions").

57. *National Farmers*, 471 U.S. at 856-57.

58. "A matter decided or passed upon by a court of competent jurisdiction is received as evidence of the truth." BLACK'S LAW DICTIONARY 1310 (6th ed. 1990).

59. Reynolds, *supra* note 52, at 1114-19; *see also* Phillip W. Lear & Blake D. Miller, *Exhaustion of Tribal Court Remedies: Rejecting Bright-Line Rules and Affirmative Action*, 71 N.D. L. REV. 277, 285-92 (1995) (pointing out the inconsistent application of the exhaustion rule by federal circuit courts).

60. *See* Reynolds, *supra* note 52, at 1113-56 (discussing uncertainties related to the exhaus-

B. *Indian Child Welfare Act of 1978*[61]

1. Background

Congress passed the Indian Child Welfare Act (ICWA) in an effort to remedy past wrongs against the Indian community.[62] Prior to ICWA's enactment, presumably well-intentioned, but misguided, state agencies and courts engaged in the systematic removal of reservation Indian children from their parents.[63] In passing ICWA, Congress recognized that as a sovereign entity, an Indian tribe has a vital interest in its children. ICWA, therefore, gives exclusive jurisdiction to tribal courts when a child resides on a reservation, and concurrent jurisdiction with state courts when an Indian child is domiciled or residing off a reservation.[64] Since state laws defining domicile vary among the states, the Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*[65] defined "domicile" for the purpose of jurisdiction under ICWA.[66] In *Holyfield*, the Court held that the domicile of a child is that of the child's parents.[67]

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tion doctrine and possible clarifications); *see also* Lynn H. Slade, *Dispute Resolution in Indian Country: Harmonizing* National Farmers Union, Iowa Mutual, *and the Abstention Doctrine in the Federal Courts*, 71 N.D. L. REV. 519, 521-34 (1995) (comparing other federal abstention doctrines to that set forth in *National Farmers* and suggesting that tribal abstention should be limited in application as it is in the federal/state context).

61. 25 U.S.C. §§ 1901-1963 (1994).

62. *See* 25 U.S.C. §§ 1901(4), 1902.

63. Manuel P. Guerrero, *Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture Caused by Foster and Adoptive Placements of Indian Children*, 7 AM. INDIAN L. REV. 51, 57, 66-73 (1979); *see also* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32-37 (1989) (discussing the history and purpose of the Indian Child Welfare Act).

64. Section 1911 reads in relevant part:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.
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> . . . In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, that such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1911(3).

65. 490 U.S. 30 (1989).

66. *Holyfield*, 490 U.S. at 44-48. In *Holyfield*, the Supreme Court addressed the meaning of the word "domicile" in its analysis of an adoption decree executed by the mother of twin babies. Although the parents lived on the reservation, the babies were born off-site. The Holyfields, both non-Indians, adopted the twins. The Choctaw Tribe moved to vacate the adoption decree based on the ICWA. The lower court denied the motion, finding that the Tribe did not have exclusive jurisdiction because the children had never resided on the reservation and were not domiciled on the reservation. *Id.* at 37-40. The Mississippi Supreme Court affirmed. *Id.* at 38-40. The Supreme Court reversed and remanded the proceeding, reasoning that "domicile" is not synonymous with residence. Because a child cannot form the intent to establish domicile, their domicile is determined by the domicile of its parents (i.e., the parents' physical presence in a place with the intent to remain there). *Id.* at 53.

67. *Id.* at 48-49.

2. *Comanche Indian Tribe v. Hovis*[68]

a. *Facts*

Rhonda Wahnee (Rhonda), a non-Indian, filed for divorce from Stuart Wahnee (Stuart), a member of the Comanche Indian Tribe of Oklahoma (Tribe).[69] Rhonda and Stuart signed a power of attorney giving custody of their daughter to Stuart's sister, Blanche Wahnee, another member of the Tribe.[70] The state court granted a divorce decree but stayed determination of custody and child support pending another proceeding on Rhonda's parental rights.[71] In accordance with ICWA, the tribal court informed the state court at a hearing of its wish to assume jurisdiction over the termination of parental rights proceeding.[72] Rhonda objected to the transfer.[73] Consequently, the tribal court filed a formal motion with the state court for the transfer of jurisdiction over the termination of parental rights proceeding pursuant to ICWA. The state court granted the motion.[74]

Rhonda then filed a motion in state court to vacate the order of transfer on the grounds that her oral objection made the transfer to the tribal court improper.[75] The state court vacated its order, and the tribal court filed two additional motions to transfer under ICWA.[76] The first claimed that the tribal court had exclusive jurisdiction to determine child custody proceedings pursuant to ICWA. The second requested that the state court rescind its order vacating the transfer to the tribal court, or in the alternative, transfer the matter back to tribal court.[77] The tribal court claimed that the state court had lost jurisdiction to vacate its transfer order when jurisdiction was transferred to the tribal court.[78]

The state court entered summary judgment in favor of Rhonda.[79] The court found that at the time of the filing of the juvenile proceeding, Rhonda and Stuart were not residing on tribal land.[80] Therefore, ICWA did not apply. Rather than appeal to the Oklahoma Supreme Court, the Tribe filed an action in federal court seeking a declaratory judgment as to which court had exclusive jurisdiction to adjudicate the parental termination proceedings.[81] The

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68. 53 F.3d 298 (10th Cir. 1995).
69. *Comanche Indian Tribe*, 53 F.3d at 299.
70. *Id.*
71. *Id.*
72. *Id.* at 300.
73. *Id.*
74. *Id.* The ICWA directs state courts to transfer proceedings to tribal court absent objection by either parent. *See supra* note 64.
75. *Comanche Indian Tribe*, 53 F.3d at 300. The motion to vacate was made almost four years after the state court ordered the transfer of the termination proceedings to the tribal court. Despite this extraordinary length of time, the court apparently regarded the motion as timely. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 301 n.5; *see* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989) (indicating that "[s]ince most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents").
81. *Comanche Indian Tribe*, 53 F.3d at 300-01.

federal district court ruled that the tribal court had exclusive jurisdiction because Kristy was a domiciled resident of the reservation, and a ward of the tribal court. In addition, the federal district court ruled that the state court had no jurisdiction to vacate its transfer order.[82]

b. *Decision*

Without addressing the Tribe's substantive arguments, the Tenth Circuit found that the ICWA did not provide independent grounds to litigate state court decisions in federal court and reversed the lower court decision. As a result, the tribe could not appeal the state court's judgment in federal court.[83] By statute, federal courts must give a state court judgment the same preclusive effect that the courts of that state would give to such judgments.[84] As such, the Tenth Circuit reviewed Oklahoma's rules of issue and claim preclusion.[85] Finding that Oklahoma's "estoppel by judgment" doctrine precluded the Tribe from re-litigating the matter in federal court under the guise of a motion for declaratory judgment,[86] the Tenth Circuit concluded that the federal court lacked jurisdiction to hear the matter.[87] Because the matter was litigated in state court, appellate review of that decision was limited to the state court system.[88]

3. Analysis

The Tenth Circuit's holding in *Comanche Indian Tribe* follows its earlier decision in *Kiowa Tribe v. Lewis*.[89] When a tribe disagrees with a state court's application of ICWA, the only available judicial review lies with the state appellate court and the United States Supreme Court.[90]

Comanche Indian Tribe and *Pittsburg & Midway Coal* demonstrate what some perceive as a general bias against tribal courts.[91] For example, when a tribal court assumes jurisdiction in a matter involving a non-Indian, the ensuing decision is subject to review by a federal district court.[92] In contrast,

82. *Id.* at 301.

83. *Id.* at 304-05. Rhonda appealed to the Tenth Circuit asserting that the Tribe was collaterally estopped from raising this issue in federal court. The Tribe argued that § 1914 of ICWA gave the Tribe the right to challenge in federal court the state court's ruling regarding the applicability of § 1911(a). The pertinent language in § 1914 authorizes certain individuals to "petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of" § 1911. *Id.* at 300-04 (quoting 25 U.S.C. § 1911 (1994)).

84. *Id.* at 302.

85. *Id.* at 302-03.

86. *Id.* at 303.

87. *See id.* at 302-04.

88. *Id.*

89. 777 F.2d 587 (10th Cir. 1985), *cert. denied*, 479 U.S. 872 (1986) (ruling on a tribe's attempt to secure federal review of a Kansas Supreme Court decision denying the tribe's motion to intervene under the ICWA). In *Kiowa Tribe*, the Tenth Circuit found that § 1914 was not an independent ground to relitigate the applicability of ICWA. *Id.* at 592.

90. *Comanche Indian Tribe*, 53 F.3d at 304-05.

91. *See generally* GETCHES ET AL., *supra* note 4, at 522-23 (discussing barriers to the improvement of and bias against tribal courts).

92. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 855-57 (1985).

when a state court assumes jurisdiction over a matter involving an Indian tribe, there is no similar option. The state court decision to exercise jurisdiction stands unless the United States Supreme Court determines otherwise.

In *Comanche Indian Tribe*, the question of jurisdiction arose under the ICWA, a statute purporting to favor tribal court jurisdiction. In application, however, the ICWA places a tribal court on unequal footing with state courts. For example, the ICWA gives state courts superior authority over tribal courts in deciding child custody proceedings. For example, a state court decides whether or not to grant a tribe's motion for transfer of jurisdiction,[93] despite congressional recognition that state courts in the past have often ordered unwarranted separation of Indian children from their parents.[94] Considering past and present conflicts existing between state and Indian governments,[95] the wisdom of giving states the authority to decide matters that are so vital to the survival of tribal government is questionable,[96] and at odds with the federal policy of self-determination.[97] Without federal review, a tribe remains at the mercy of state courts.

C. *Other Circuits*

During the Survey period, federal courts examined questions of tribal jurisdiction in a variety of contexts. In *United States* ex rel. *Morongo Band of Mission Indians v. Rose*,[98] the Morongo Band of Indians brought an action against a non-Indian and an Indian involving a contract and enforcement of a tribal ordinance regulating bingo on reservation land.[99] The Ninth Circuit ruled that the contract did not preclude enforcement of the tribal ordinance

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93. *See supra* note 55.

94. *See* 25 U.S.C. § 1901 (1994).

95. The battle between the states and the tribes to determine who prevails has continued since, if not before, the Supreme Court's holding in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). In *Worcester*, the Court held that Georgia could not extend its laws within the boundaries of the Cherokee reservation. *Id.* at 557-61. Since this decision, the rule has eroded largely due to the enactment of the General Allotment Act, ch. 119, §§ 1-11, 24 Stat. 388 (1887) (current version at 25 U.S.C. §§ 331-358 (1995)). The General Allotment Act opened up reservation land to white settlement. As a result, some land within a reservation is owned in fee by non-Indians. States have authority to regulate these non-Indians, but state regulation often interferes with tribal regulation. These conflicts are readily apparent in more recent cases regarding hunting and fishing rights and regulations and zoning. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (noting that tribes cannot zone areas within reservations owned predominately by non-Indians); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (stating that tribes have the power to regulate land and resources including the taking of wildlife); Montana v. United States, 450 U.S. 544 (1981) (noting that tribes have authority to regulate hunting and fishing by non-members); Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977) (stating that tribes have power to regulate hunting and fishing by members). Most recently, the issue of regulating gaming on all reservation land has been the focus of legal battles between states and tribes. *See* Seminole Tribe v. Florida, 11 F.3d 1016 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996) (involving an Eleventh Amendment challenge to the Indian Gaming Regulatory Act); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (holding that a state which merely regulates, but does not prohibit, gambling may not regulate tribal gaming operations). For a further discussion of the regulation of gaming activities, see *supra* note 7.

96. Guerrero, *supra* note 63, at 51-54.

97. *See supra* note 4 and accompanying text.

98. 34 F.3d 901 (9th Cir. 1994).

99. *Morongo Band*, 34 F.3d at 903-04.

because the Secretary of Interior and the Commissioner of Indian Affairs had not approved the contract.[100] The Ninth Circuit concluded that the non-Indian party had subjected himself to the authority of the Morongo tribe by entering into a consensual commercial relationship with a tribal member.[101] The Ninth Circuit affirmed the district court judgment against the non-Indian.[102]

In another Ninth Circuit case, *Hinshaw v. Mahler*,[103] the court addressed subject matter and personal jurisdiction in a wrongful death and survivorship action.[104] The court found that pursuant to *Montana v. United States*[105] and *National Farmers*, the tribal court retained subject matter jurisdiction over both claims.[106] The Ninth Circuit conceded that the tribal court did not have concurrent probate jurisdiction over the survivorship claim, but held that this tort action did not relate to the administration of an estate.[107] The state court's probate action, therefore, did not initiate the plaintiff's tort action in state court.[108]

Addressing the defendant's claim that the tribal court lacked personal jurisdiction, the Ninth Circuit found that the defendant's contacts with the

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100. *Id.* at 904-05. The United States Code governs contracts made with Indians and tribes. It provides in relevant part:

> No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands . . . unless such contract or agreement be executed and approved as follows:
>
> . . . .
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.
>
> . . . .
>
> All contracts or agreement made in violation of this section shall be null and void . . . .

25 U.S.C. § 81 (1994).

101. *Morongo Band*, 34 F.3d at 906; *see also* Montana v. United States, 450 U.S. 544, 565 (1981) (explaining that "[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").

102. *Morongo Band*, 34 F.3d at 906. The court noted that *Montana* is relevant where a court determines that "there has been a general divestiture of tribal authority over non-Indians by alienation of the land." *Id.* According to the Ninth Circuit, "whether or not the Band generally has the authority to impose regulations such as its ordinance against non-Indians on Indians' trust allotments" remains an unanswered question. *Id.* Rose, a non-Indian, argued that the allotment of land to Miller, an Indian, should divest the tribe of authority over the activities carried on therein. *Id.* This argument appears to ignore precedent. First, tribes presumably retain civil jurisdiction over non-Indians in Indian country unless Congress expressly states otherwise. United States v. Wheeler, 435 U.S. 313, 323 (1978). Second, in *DeCoteau*, the Supreme Court recognized that 18 U.S.C. § 1151 defines "Indian country" for the purpose of civil as well as criminal jurisdiction. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). Third, § 1151(c) includes "all Indian allotments" in its definition of "Indian country." 18 U.S.C. § 1151(c) (1994).

103. 42 F.3d 1178 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 485 (1994).

104. *Hinshaw*, 42 F.3d at 1179.

105. 450 U.S. 544 (1981); *see supra* note 18.

106. *Hinshaw*, 42 F.3d at 1180-81. Tribal Ordinance 40-A provides for concurrent tribal and state jurisdiction over civil matters related to the operation of motor vehicles on public roads. Tribal Ordinance 36-B defines the circumstances under which such actions could be filed. *Id.*

107. *Id.* In Montana, a wrongful death claim and a survivorship claim must be brought in a separate nonprobate action. *Id.*

108. *Id.* at 1181.

forum met the personal jurisdiction requirements of both tribal law[109] and *International Shoe Co. v. Washington.*[110] The Ninth Circuit affirmed the district court's denial of summary judgment and affirmed the tribal court's jurisdiction over both the defendant and the subject matter.[111]

In *South Dakota v. Bourland*,[112] South Dakota filed an action to enjoin the Cheyenne River Sioux Tribe from excluding non-Indians from hunting and fishing on nontrust lands within the reservation.[113] The Eighth Circuit concluded that the conduct of the non-Indians did not fall within the exceptions set forth in *Montana* and affirmed the district court's decision to grant the injunction.[114] The dissenting opinion criticized the standard used by the district court.[115] The dissent concluded that under *Montana*, the conduct of the non-Indians was sufficient to constitute a direct effect on the tribe warranting tribal jurisdiction.[116]

During the survey period, the Eighth Circuit mirrored the Tenth Circuit's conservative approach to issues involving tribal jurisdiction and its preference for vesting jurisdiction in federal and state courts.[117] The Ninth Circuit, however, appears more comfortable with tribal authority and the exercise of such power. Unlike other circuits, the Ninth Circuit does not hesitate to rely on the general principles and precedents set forth by the Supreme Court that support

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109. *Id.* Tribal case law provides for personal jurisdiction where some relationship exists between the Tribes and the parties. By living on the reservation, Hinshaw "purposefully availed herself of the privilege of conducting activities in the forum." Her claim, therefore, arose out of her forum related activities. The Tribes' special interest in exercising jurisdiction in this matter makes such exercise of jurisdiction reasonable. *Id.*

110. 326 U.S. 310 (1945).

111. *Hinshaw*, 42 F.3d at 1179.

112. 39 F.3d 868 (8th Cir. 1994).

113. *Bourland*, 39 F.3d at 869.

114. The Tenth Circuit concluded that the district court's findings were not clearly erroneous in that the hunting and fishing of non-Indians on the taken land neither threatened nor directly affected the political integrity, economic security, or public health and welfare of the tribe. *Id.* at 870-71. The district court noted that harassment had occurred and that the deer population had been reduced. This reduction did not decrease subsistence hunting, however, and the court refused to find these actions sufficient to trigger the second exception in *Montana*. *Id.* Non-Indians "may have harassed cattle grazing on the taken area or on tribal lands, failed to close pasture gates, or let down wires on fences." *Id.* at 870 (citations omitted). The Eighth Circuit called such actions merely "vexatious." *Id.* Apparently, the district court and Eighth Circuit did not find cattle or the use and enjoyment of tribal property to be economic interests worth protecting. The court's unwillingness to categorize livestock as an economic interest is puzzling, especially given the cattle industry's reaction to the wolf reintroduction in some western states. *See Federal Efforts to Introduce Canadian Gray Wolves into Yellowstone National Park and the Central Idaho Wilderness, 1995: Oversight Hearing Before the House of Representatives, Committee on Resources*, 104th Cong. 1st Sess. 2 (1995) (arguing against reintroduction of wolves based in part on the fears of ranchers that wolves will kill cattle, and that states should have a say in whether or not to allow wolves to exist within their borders).

115. *Bourland*, 39 F.3d at 871-73 (Heaney, J., dissenting).

116. *Id.* Senior Circuit Judge Heaney pointed out that the Supreme Court quoted the language of *Montana*. *Id.* at 871-72. Judge Heaney concluded that the district court misapplied the *Montana* test because it only considered whether there was any "threat" or "peril" rather than addressing the "direct effect" to the Tribe's economic security, political integrity, health, or welfare. *Id.* at 873.

117. *But see* Lear & Miller, *supra* note 59, at 290-92 (noting that "[o]f all of the circuits, the Tenth Circuit most readily embraces a mandatory exhaustion requirement"); *cf.* Reynolds, *supra* note 52, at 1114 (referring to a Tenth Circuit opinion in which the court "avoided application of the exhaustion doctrine").

vesting substantial jurisdiction in tribal courts. The circuits, however, seem to share a common inconsistency in the application of Supreme Court precedent.

CONCLUSION

Jurisdiction questions cast a harsh light on the confusion and contradiction in federal courts with respect to Indian affairs, throwing these inconsistencies into sharp relief. For example, Congress removed criminal jurisdiction from tribes in several acts[118] that must be viewed together in order to determine (a) whether federal or state law has been violated, and (b) which court may exercise jurisdiction.[119] While the statutory structure is puzzling, some semblance of consistency appears in the exercise of criminal jurisdiction.

No such consistency exists, however, with respect to civil jurisdiction. In *Montana*[120] and *National Farmers*,[121] the Supreme Court sets forth tests which leave the scope of tribal jurisdiction to the discretion of lower federal courts. Since the Court gave no formal guidance, this precedent has proved of limited value. Perhaps this inconsistency and confusion could have been avoided by adhering to earlier precedent and leaving tribes with exclusive authority over their territory.[122]

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118. GETCHES ET AL., *supra* note 4, at 551-73 (detailing the Indian Country Crimes (General Crimes) Act, 18 U.S.C. § 1152 (1994); the Major Crimes Act, 18 U.S.C. § 1153 (1994); the Assimilative Crimes Act, 18 U.S.C. § 13 (1994); as well as other federal laws which vest "the United States with jurisdiction over crimes by and against Indians, in and out of Indian country"); PEVAR, *supra* note 4, at 130-33 (explaining that the General Crimes Act, the Major Crimes Act, and the Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588 (1953) (current version at 18 U.S.C. § 1162 (1994)), "are the three most important statutes regarding criminal jurisdiction in Indian country").

119. *See* PEVAR, *supra* note 4, at 116, 132 (providing tables showing the confusion surrounding criminal jurisdiction).

120. *See supra* note 19.

121. *See supra* text accompanying note 9-10.

122. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556-57 (1832). *Worcester* stated that:

> [C]ongress 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 guarantied [sic] by the United States.

Id.