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Civil Rights

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CIVIL RIGHTS

OVERVIEW

Section 1983 of the Civil Rights Act of 1871 is undeniably a very powerful weapon in protecting constitutional rights. Perhaps it is too powerful. The success that section 1983 plaintiffs have met in recent years has encouraged an increasingly large number of section 1983 claims, including many of questionable merit. Of the more than thirty-five civil rights cases considered by the Tenth Circuit Court of Appeals in the past year, over four-fifths were brought pursuant to section 1983. Prisoners, employees, political parties, an architect denied his license to practice, and a dismissed judge were among the many Tenth Circuit plaintiffs seeking recovery under section 1983 for alleged violations of their constitutional rights. Yet less than half of these plaintiffs were successful. The increase in section 1983 claims is certainly a major contributor to the steadily growing number of civil rights claims crowding federal dockets across the country.[1]

In accordance with the growing reliance upon section 1983, the most significant developments of civil rights law in the Tenth Circuit during the past survey period involved the section 1983 cause of action. Notable progress was made on the issue of the applicability of state statutes of limitation to section 1983 claims. Also, an exhaustive but necessary opinion describing the "reasonable fee" to be awarded under the Civil Rights Attorney's Fees Award Act made the Tenth Circuit law the most understandable and useful on the issue.

I. SECTION 1983 OF THE CIVIL RIGHTS ACT OF 1871

Section 1983 places personal liability upon any individual who, acting under color of state law, violates constitutional or other federally protected rights of another person.[2] As the Tenth Circuit assessed the validity of the section 1983 claims before it during the survey period, it was compelled to consider the limits of several constitutional rights and further define the boundaries of state action.

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1. In 1960, the number of civil rights suits totalled 280. 1960 ANN. REP. OF DIRECTOR OF ADMIN. OFFICE OF U.S. CT., at 232. Over 19,700 civil rights cases were filed in federal courts during the twelve month period ending June 30, 1983. 1983 ANN. REP. OF DIRECTOR OF ADMIN. OFFICE OF U.S. CTS., at 135.

2. Section 1983 of the Civil Rights Act of 1871 is codified at 42 U.S.C. § 1983 (1982) and provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

A. *Liability: A Deprivation of Rights*

1. First Amendment Rights

The tension created between the state's interest in regulating the speech of its employees and the employees' first amendment speech rights has been the focus of recent judicial attention. A Tenth Circuit interpretation of a significant change in the law governing public employees' free speech rights made by the Supreme Court in *Connick v. Myers*[3] further restricted the rights of employees.

In *Wilson v. City of Littleton*,[4] Glen Wilson had been fired from his position as a police officer for refusing to remove a black shroud that he had placed over his badge in mourning the death of a fellow officer. The Tenth Circuit held that the termination was not a deprivation of his first amendment rights. The court rejected the lower court's application of symbolic speech principles to Wilson's section 1983 claim, and turned to the recent *Connick* decision for guidance on the issue of public employees' speech rights.[5]

Connick is significant because it established a threshold requirement that the employee's speech be a matter of "public concern" before a court may proceed into the traditional balancing test of weighing public and private speech interests.[6] The Supreme Court defined "public concern" as a matter of "political, social, or other concern to the community."[7] The *Connick* case involved a questionnaire which Sheila Myers, an assistant district attorney, had prepared and distributed among her fellow staff members. The questionnaire generally pertained to internal working conditions and employee transfer policy, although one question concerned employer-created pressure to work in political campaigns.[8] Myers' superiors considered the distribution of the questionnaire to be an act of insurbordination and forced her to resign.

In ruling upon Myers' section 1983 claim against her employers for violation of her first amendment rights, the Supreme Court said that, with the exception of the political campaign question, the questionnaire amounted to an attempt by Myers to turn her dissatisfaction with a proposed transfer into an office insurrection.[9] The Court subsequently dismissed Myers' claim, holding that the content of the questionnaire was not a matter of public concern entitling her to protection.

The Tenth Circuit interpreted *Connick* in a curious manner. The

3. 461 U.S. 138 (1983).

4. 732 F.2d 765 (10th Cir. 1984).

5. *Id.* at 767.

6. 461 U.S. at 142, 146. *See also* Pickering v. Board of Educ., 391 U.S. 563 (1968), the landmark case on the balancing of state and individual interests when a public employee's speech rights are involved. The Supreme Court upheld a teacher's right to comment upon the issue of school funding without losing her teaching position.

7. 461 U.S. at 146.

8. *Id.* at 149.

9. *Id.* at 148-49. Because the political campaign question had touched upon an issue of public concern, the Court proceeded with the *Pickering* balancing analysis to determine if Myers' discharge had been constitutional.

Supreme Court obviously felt that matters such as office morale, the need for an internal grievance committee, and the amount of trust and confidence officeworkers have in their superiors are not of public concern.[10] But the Tenth Circuit borrowed from the dissenting opinion in *Connick* and found that the Supreme Court had rejected Myers' questionnaire because it "did not *sufficiently inform the issue* as to be helpful in evaluating the performance of a district attorney."[11] The Tenth Circuit added that the public concern issue turned not on the topic itself, but rather on what was being said about the topic.[12]

By making this deduction from the Supreme Court decision, the Tenth Circuit dealt a severe blow to Officer Wilson's first amendment rights. The message or meaning of Wilson's symbolic interest, rather than the subject of the protest, became the issue. The court, in a very brief analysis, said that although the death of a policeman could be the subject of public concern, the statement Wilson was making upon the subject by covering his badge was not.[13] The court assumed that Wilson was merely expressing a feeling of personal grief. The opinion only briefly mentioned the fact that Wilson did not know the victim personally,[14] and did not address the likelihood that Wilson may have been making a symbolic statement on the broader issue of police deaths in general, which is certainly a public concern.

The Tenth Circuit, in *Wilson*, has undermined symbolic speech rights because it has exposed a form of speech which is inherently ambiguous and capable of carrying several meanings to a narrow, restricted method of analysis.[15] Rather then eliminate a public employee's symbolic speech rights at the threshold by deciding that the content of the speech does not relate to a matter of public concern, a legal reasoning more protective of first amendment rights should be based on a presumption that the employee's speech is constitutionally protected. This presumption of protection could then be overcome only by a clear and convincing showing that the speech is not a matter of public concern, in which case courts would proceed to the traditional balancing of public and private interests.[16]

The Tenth Circuit considered another first amendment issue in *Baer*

10. *See id.* at 147-49. The Court, tentatively assuming that the public would be interested in an evaluation of the performance of the district attorney, expressly said "we do not believe these questions are of public import." *Id.* at 148.

11. 732 F.2d at 768 (emphasis by Tenth Circuit).

12. *Id.* at 769.

13. *Id.*

14. *Id.* at 766.

15. The Tenth Circuit's opportunity to consider the relationship between symbolic speech and public employees' speech rights as defined in *Connick* has not been duplicated in the other federal appellate circuits. Most cases applying *Connick* have involved speech in spoken or written form, where the question of whether the speech relates to a matter of public concern is more easily decided. *See, e.g.*, Rowland v. Mad River Local School Dist., 730 F.2d 444 (6th Cir. 1984); Renfroe v. Kirkpatrick, 722 F.2d 714 (11th Cir. 1984); McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983).

16. *See supra* note 6 and accompanying text.

v. Meyer,[17] a section 1983 action brought by members of the Citizens Party of Colorado and the Libertarian Party of Colorado. The political parties claimed that the State of Colorado had unconstitutionally burdened their right to political opportunity by denying the parties the ability to place a party designation other than "unaffiliated" on the voter registration form, while allowing Democrats and Republicans to do so.[18] The Tenth Circuit agreed. The court noted a recent Supreme Court decision which held that a burden which falls unequally on political parties violates the associational choices guaranteed by the first amendment.[19] The court then rejected the state's argument that it could not grant the party's request for registration designation because it was not possible to ascertain whether the request was valid or merely a frivolous act by an unorganized group.[20] The court observed that existing Colorado law contains a workable set of criteria indicating when a political organization merits the Secretary of State's permission to receive party designation in registering.[21] These criteria would allow the state to discern the legitimate requests from the insubstantial requests. Furthermore, because there was minimal difficulty involved in altering the registration forms to accomodate the plaintiffs, the court upheld the section 1983 claim and ordered the Secretary of State to provide the name designation.[22]

2. Due Process Rights

In *McKay v. Hammock*,[23] the Tenth Circuit considered whether a law enforcement officer's conduct in arresting and detaining an individual constituted a deprivation of due process rights. McKay brought a section 1983 claim for deprivation of his liberty without due process, claiming wrongful arrest against DeLuca and Hammock, Colorado county police officers, Pfeffer, a city policeman in New Mexico, and against the respective police departments directly.[24] Officer Hammock had ar-

17. 728 F.2d 471 (10th Cir. 1984).

18. *Id.* at 472-73. The political parties emphasized that placement of the full party names on the registration forms was needed to be able to later use the computerized record of all registered voters, which the Republican and Democratic parties had found to be an invaluable tool. The plaintiffs also brought a related claim on the matter of name description of political parties. This issue was decided by applying Colorado law, not reaching the merits of the constitutional claim. *Id.* at 473-74.

19. *Id.* at 475 (citing Anderson v. Celebrezze, 460 U.S. 780 (1983)).

20. 728 F.2d at 475.

21. *Id.* (referring to McBroom v. Brown, 53 Colo. 412, 127 P. 957, 958 (1912)). The plaintiff in *McBroom* was a political organization, with political officials, that had previously placed a candidate on the ballot by petition. Although *McBroom* did not specifically set forth criteria, the Tenth Circuit Court was referring to the facts of the case as the criteria. These three elements found in *McBroom* constitute the standard to be applied under Colorado law.

22. 728 F.2d at 476.

23. 730 F.2d 1367 (10th Cir. 1984). This decision also provides an excellent example of the court's application of the uniform characterization analysis for § 1983 claims, as recently set forth in Garcia v. Wilson. *See infra* notes 63-75 and accompanying text.

24. 730 F.2d at 1369. The constitutional basis for this claim is the fourteenth amendment, § 1, which provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

rested McKay in Routt County, Colorado, for being in possession of a stolen automobile. McKay was released on a bond which required him to appear in Routt county three weeks later for other charges filed against him by the New Mexico authorities. McKay was then twice improperly re-arrested in Colorado due to a misunderstanding created by Hammock concerning the limits of McKay's bond. The officers had arranged for the arrest and detention of McKay in Denver and again later in Buena Vista, erroneously thinking that the bond was only applicable in Routt County, when in fact the bond provided McKay with the right to travel freely throughout Colorado.[25] McKay was detained for a short time in both cities and then released.

The district court applied *Baker v. McCollan*,[26] a Supreme Court case in which the plaintiff had been incorrectly identified by policemen as another individual, arrested under a valid warrant, and held for four days despite his pleas of mistaken identity. In *Baker*, the Supreme Court ruled that the detention was not a deprivation of a constitutional right, thereby rendering invalid McCollan's section 1983 claim against the arresting officer.[27]

The Tenth Circuit quickly and correctly distinguished *Baker*, observing that the arrest of McKay had been in violation of his bond and was therefore significantly different than an arrest pursuant to a valid warrant.[28] In so reversing the district court, the issue of whether McKay's due process rights had been violated by the police officers was reopened.[29]

The Tenth Circuit then turned to the officers' defense that McKay had only alleged negligence, thereby failing to state a valid claim under section 1983. The issue of whether an allegation of official negligence may in itself be the basis of a cause of action under section 1983 has been a legal quagmire for many years.[30] The Tenth Circuit, by remanding most of McKay's claims,[31] pulled the district court into the swamp but offered no clear escape. The court noted the absence of a clear Supreme Court ruling on the significance of official intent or negligence

25. 730 F.2d at 1371-72.

26. 443 U.S. 137 (1979).

27. 730 F.2d at 1371 (referring to *Baker*, 443 U.S. at 144-45).

28. 730 F.2d at 1372. Several other circuits have also found the *Baker* decision inapplicable where the plaintiff was not arrested and detained under factual circumstances identical to those in *Baker*. *Id.* at 1371. *See also* Douthit v. Jones, 619 F.2d 527 (5th Cir. 1980) (*Baker* was considered inapposite where the prisoner was detained without a valid commitment order).

29. 730 F.2d at 1373.

30. The problem arises from the absence of clear language in § 1983 pertaining to a standard of conduct requirement. For a thorough discussion of the issue, and an attempt to discern when consideration of official negligence is sufficient in alleging § 1983 claims based upon eighth amendment violations, see Comment, *Actionability of Negligence Under Section 1983 and the Eighth Amendment*, 127 U. PA. L. REV. 533 (1979).

31. The Tenth Circuit did dispose of McKay's claim against the New Mexico city police department by ruling that the allegations were insufficient. 730 F.2d at 1375. Additionally, the court held that negligence was not at issue. McKay had alleged knowledge on the part of Officer Hammock that the arrests were improper. The court therefore ruled that McKay had sufficiently stated a § 1983 claim against Hammock. *Id.* at 1374.

in section 1983 claims for due process violations.[32] The Tenth Circuit also made reference to an indication by the Supreme Court that official negligence may, in certain circumstances, result in a deprivation of due process rights.[33] But as to what those circumstances are, the Tenth Circuit gave no instruction. The district court was provided with no firm standard with which to determine whether Officers Pfeffer and DeLuca had acted in a manner sufficient to support McKay's claim. The Tenth Circuit merely referred to "various standards of proof" under which different government officials may be liable.[34]

The court further confused the matter by suggesting that perhaps the entire unsettled negligence issue could be avoided by approaching the problem through immunity defense analysis.[35] But the immunity defense to section 1983 actions and the issue of official negligence are not conterminous. Until the Supreme Court rules that an assessment of the possible negligence of public officials subjected to a section 1983 claim is no longer necessary,[36] the Tenth Circuit would better serve the development of the law by ruling directly upon the factual circumstances as they occur, rather than force the lower courts to do so without guidance.[37]

In *Dock v. Latimer*,[38] the Tenth Circuit considered a section 1983 claim by a Utah state prisoner that the chairman of the state prison board had violated his fourteenth amendment right to due process by failing to comply with Utah regulations that address parole eligibility. The prisoner's argument received treatment consistent with similar claims brought before the Tenth Circuit in the past several years. In rejecting the claim, the court said that even assuming the regulations had not been followed, the plaintiff had not suffered a due process violation because he did not have an entitlement interest in the parole-release consideration process.[39] The court ruled that Utah parole decisions were a matter of state discretion, not of constitutional right, as it has similarly ruled upon the Oklahoma and Colorado parole decision

32. *Id.* at 1373.

33. *Id.* (referring to Parrat v. Taylor, 451 U.S. 527, 536-37 (1981)).

34. 730 F.2d at 1373-74 (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982); Owen v. City of Independence, 445 U.S. 622 (1980); Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976)).

35. 730 F.2d at 1373 n.5. It is not clear why the court has now turned to the immunity defense criteria as a possible solution to the negligence question. Two of the three Supreme Court cases cited by the Tenth Circuit for immunity analysis were handed down over four years ago.

36. Justice Stevens has most recently made reference to official negligence in the § 1983 context, indicating that the issue is still alive, if unsettled. Castorr v. Brundage, 459 U.S. 928 (1982) (opinion of Stevens, J., explaining the *denial* of the petition for writ of certiorari).

37. *See generally* Murray v. City of Chicago, 634 F.2d 365 (7th Cir. 1980). The Seventh Circuit decided the negligence question for the lower court, ruling that where plaintiff had been arrested and detained pursuant to an invalid arrest warrant the section 1983 claim was valid. The case was then remanded for a determination of which of the several named defendants had acted negligently. *Id.*

38. 729 F.2d 1287 (10th Cir.), *cert. denied*, 105 S. Ct. 256 (1984).

39. *Id.* at 1289-92 (citing Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1 (1979)).

processes.[40]

B. *Liability: Under Color of State Law*

The second element essential to a successful section 1983 action is that the individual or entity acting to deprive another of his rights has done so under color of state law. In *Loh-Seng Yo v. Cibola General Hospital*,[41] the court erased any doubt that an exception may exist to the general rule that receipt of government aid does not in itself make the actions of a private institution the acts of the state. Yo, a physician, sued the hospital claiming that probationary actions imposed upon him by the hospital had violated his civil rights. He pointed to government funds and government regulation of the hospital as the basis of his state action allegation.[42] The Tenth Circuit referred to a recent Supreme Court case in which the defendant school district, primarily supported by public funds, was not held liable for a section 1983 claim because the deprivation of rights at issue had no connection with the public funding.[43] The Tenth Circuit emphasized that the state action must be related to the specific action involved in the section 1983 action to be valid and affirmed the lower court's dismissal of the case.[44]

C. *Governmental Immunity*

1. The Good Faith Defense

In *Harlow v. Fitzgerald*,[45] decided in 1982, the Supreme Court redefined the qualified or "good faith" immunity defense that shields governmental officials from personal liability in section 1983 claims. The court broadened the immunity by eliminating the subjective element of the "good faith" defense, which had removed the official's immunity in circumstances where he "reasonably should have known" that his conduct would violate the constitutional rights of another.[46] The Tenth Circuit court, in *Fairchild v. Valentine*,[47] recently demonstrated the potentially dramatic reduction in a plaintiff's access to public officials that *Harlow* has effected. The defendants, drug enforcement officials, placed an electronic "beeper" in a large drum of ether in a chemical supply store, correctly suspecting that Fairchild would purchase the ether for use in manufacturing cocaine.[48] After tracing Fairchild to his home by using the "beeper," the officials installed a camera on an electric utility pole near his house to monitor his activities. Fairchild discovered the camera when it malfunctioned, causing images of his home to appear on

40. *See* Shirley v. Chestnut, 603 F.2d 805 (10th Cir. 1979); Schuemann v. Colorado State Bd. of Adult Parole, 624 F.2d 172 (10th Cir. 1980).
41. 706 F.2d 306 (10th Cir. 1983).
42. *Id.* at 307.
43. Rendell-Baker v. Kohn, 457 U.S. 83 (1982).
44. 706 F.2d at 308.
45. 457 U.S. 800 (1982).
46. *Id.* at 815-19 (quoting Wood v. Strickland, 420 U.S. 308, 321-22 (1975)).
47. No. 82-1702 (10th Cir. Nov. 4, 1983) (not selected for publication).
48. *Id.* slip op. at 2.

his neighbors' television sets. Because no search warrant had been obtained by the defendants for any of these activities, Fairchild brought a section 1983 action against them for violation of his fourth amendment rights.[49]

The Tenth Circuit, citing *Harlow*, held that the officials were immune from the section 1983 prosecution because their actions "did not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known."[50] Although the court had cited, in dicta, a case for the proposition that the warrantless placement of a "beeper" in a private residence was probably illegal,[51] there was no firm law so holding at the time of the official's action.[52] Therefore, although the officials might have reasonably suspected that a warrant was required before engaging in this invasive conduct, qualified immunity remained available to them as an adequate defense. The "good faith" defense, in accordance with *Harlow*, is now assessed by answering the simple objective question of what the law explicitly requires of the officials at the time of their conduct.

2. Absolute Immunity

The Tenth Circuit court's resolve to protect public officials from civil rights claims was most evident in the strained reasoning put forth to deny a forceful attack on absolute immunity in *Lerwill v. Joslin*.[53] Joslin, a part-time city attorney for Santaquin, Utah, charged and arrested Lynn and Penny Lerwill for violation of state felony statutes. Joslin, however, was only authorized to file criminal charges based upon city misdemeanor ordinances.[54] The Lerwills therefore brought a section 1983 suit against Joslin, claiming, inter alia, a violation of their due process rights. Joslin asserted the affirmative defense of absolute immunity from section 1983 suits as a prosecuting attorney engaged in his prosecutorial duties, citing *Imbler v. Pachtman*.[55] The Tenth Circuit accepted the defense and reversed the district court.[56] But in so doing, the court ex-

49. *Id.*

50. *Id.* at 4 (emphasis by Tenth Circuit).

51. *Id.* (referring to United States v. Clayborne, 584 F.2d 346, 351 n.3 (10th Cir. 1978)).

52. In a subsequent case, the Tenth Circuit explicitly ruled that the warrantless use of a "beeper" to monitor contraband inside a private residence was unconstitutional. United States v. Karo, 710 F.2d 1433 (10th Cir. 1983); *cert. denied*, 104 S. Ct. 1918 (1984). Section I of the criminal procedure article in this issue contains an extensive discussion of the *Karo* decision.

53. 712 F.2d 435 (10th Cir. 1983). Although not stated in any opinion handed down this term, perhaps the Tenth Circuit is tiring of § 1983 claims of questionable merit against public officials. At least seven decisions during the term dealt with the immunity issue, either qualified or absolute, and in each the plaintiff's argument for an exception to the official's immunity was rejected. *See* Benavidez v. Gunnell, 722 F.2d 615 (10th Cir. 1983); Tuttle v. City of Oklahoma City, 728 F.2d 456 (10th Cir. 1984); A.E. v. Mitchell, 724 F.2d 864 (10th Cir. 1983); Wilhelm v. Continental Title Co., 720 F.2d 1173 (10th Cir.), *cert. denied*, 104 S. Ct. 1601 (1984); Hill v. Bogans, 735 F.2d 391 (10th Cir. 1984).

54. 712 F.2d at 436.

55. 424 U.S. 409 (1976).

56. 712 F.2d at 438.

tended the *Imbler* immunity.

The issue in *Imbler* was "whether a state prosecuting attorney who acted *within* the scope of his duties" as a criminal prosecutor was immune from section 1983 suits.[57] As the Lerwills argued, Joslin clearly acted beyond his authority, rendering *Imbler* inapplicable as precedent.[58] However the Tenth Circuit reasoned that just as a prosecutor who acts unconstitutionally, and therefore beyond his authority, nonetheless does not automatically lose absolute immunity, neither should a prosecutor acting beyond the boundaries of local law immediately lose immunity.[59]

The Lerwills had put forth the strong argument that the extension of the prosecutor's immunity to include constitutional violations was not justification for the extension of the immunity to obvious violations of local law, such as Joslin had committed. Allegations of unconstitutional actions are often not clearly and easily substantiated, whereas a breach of a local ordinance is more readily recognized. The Lerwills pointed to the law governing judicial immunity, which does not protect a judge where he has acted beyond his jurisdiction.[60] The court side-stepped this analogy by emphasizing that only in the "clear absence of all jurisdiction" does a judge cease to be protected by absolute immunity.[61] The court then observed that Joslin's illegal prosecution had been a "mistake that many honest prosecutors could make,"[62] as if to suggest that the ease with which Joslin illegally acted made that action less clearly improper.

D. *Statute of Limitations*: Garcia v. Wilson

1. A Uniform Characterization for Section 1983 Claims

Choosing the appropriate state statute of limitations for federal section 1983 claims has been the source of inconsistency both within the Tenth Circuit and among the several circuits. In *Garcia v. Wilson*,[63] the court set the matter to rest for the Tenth Circuit. The case involved a section 1983 claim for a violation of constitutional rights against a New Mexico state police officer for viciously beating the plaintiff. An additional claim was brought against the officer's superior for negligently hiring and failing to train, supervise, and discipline the officer while having knowledge of his history of violence and convictions for several seri-

57. 424 U.S. at 410 (1976) (emphasis added).
58. 712 F.2d at 438.
59. *Id.*
60. *Id.*
61. *Id.* at 439 (citing Stump v. Sparkman, 435 U.S. 349, 356 (1978) (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 351, 355 (1872)).
62. 712 F.2d at 439-40. The Fifth Circuit came to the same result through less troubled and considerably shorter reasoning in Henzel v. Gerstein, 608 F.2d 654, 657 (5th Cir. 1979). While admitting that the prosecutors had acted beyond their jurisdiction, the court simply held, without reference to any authority, that those actions "unquestionably fall within the band of prosecutorial immunity" as a "necessary and integral part of a prosecutor's role in the judicial system." 608 F.2d at 657.
63. 731 F.2d 640 (10th Cir.), *cert. granted*, 105 S. Ct. 79 (1984).

ous crimes.[64] The defendants moved for a motion to dismiss, claiming that the suit was barred by the New Mexico two-year tort claims statute of limitations.[65] The district court denied the motion and sent the limitations issue to the court of appeals as an interlocutory appeal.[66]

After an examination of the law on the issue in each of the federal circuits,[67] the court held that it was imperative that a uniform characterization of all section 1983 claims be adopted in the interest of settled expectations and equal treatment of the claims within each Tenth Circuit state.[68] The court then chose to characterize section 1983 claims as actions for injury to personal rights.[69]

In holding that a uniform characterization is required to effectuate a consistent approach to the issue, the court attacked the alternative case-by-case approach. This approach entails identifying the state cause of action most analogous to the specific facts of the section 1983 claim at hand, and then applying the state statute of limitations that governs that cause of section.[70] The Tenth Circuit court rejected this approach, and its own past practice, by observing that a strong focus on the individual facts of each section 1983 case, as the case-by-case approach requires, is often prevented because section 1983 facts are frequently complex and known only to the defendant.[71] Furthermore, because the disputed factual issues in section 1983 claims are typically quite different from the issues involved in the analogous state cause of action, the application of the corresponding state limitation period to the federal claim may be inappropriate.[72] The court cited as further justification for abandoning the case-by-case approach the difficulty of achieving consistency when analogizing section 1983 claims to state claims, and the potential conflict between the state policies underlying the various statutes of limitations and the broad remedial purpose of section 1983.[73]

In deciding to characterize all future section 1983 claims as actions for injury to personal rights, the Tenth Circuit likened the statutory claim, which entails a deprivation of an individual's constitutional rights, to a personal injury. "In the broad sense, every cause of action under

64. *Id.* at 642.
65. *Id.* at 651.
66. *Id.* at 642.
67. *Id.* at 643-48. In the absence of clear guidance from the Supreme Court, the circuits have chosen to apply, either uniformly for all § 1983 cases or varying with the facts of each case, state statutes of limitations for causes of action including torts, liability created by statute, personal injury, wrongful arrest, and assault and battery. In Tenth Circuit decisions prior to this case, § 1983 actions have been characterized in three separate ways: as liability created by statute, as contractual in nature, and as a non-contractual injury to the rights of another. *See id.* at 648-49.
68. *Id.* at 650.
69. *Id.* at 651.
70. *See* McClam v. Barry, 697 F.2d 366, 371-73 (D.C. Cir. 1983), for an example of the case-by-case approach to the statute of limitation question for § 1983 claims. In this case, the D.C. Circuit found that a constitutional assault claim was most analogous to common-law assault, for which the District of Columbia provides a limitations period of one year.
71. 731 F.2d at 649.
72. *Id.*
73. *Id.* at 649, 650.

section 1983 which is well-founded results from a 'personal injury' ".[74] Turning to the facts of *Garcia*, the court applied the New Mexico three-year "injury to personal rights" limitation period, under which the plaintiffs' claim remained timely, and remanded to the district court for further proceeding.[75]

2. *Garcia* Applies Prospectively Only

In *Jackson v. City of Bloomfield*,[76] the court limited the applicability of the *Garcia* statute of limitations ruling to cases commenced after the *Garcia* date of decision. The plaintiffs had brought a section 1983 claim against the city and various city officials for wrongful termination of their employment in retaliation for exercising their first amendment rights. The termination had occurred more than three years but less than four years before the suit was filed. The district court denied the defendant's motion for a judgment on the pleadings and certified the limitations issue for immediate appeal to the Tenth Circuit court.[77]

On appeal, the defense argued that either the New Mexico two-year torts claims limitation period or the three-year personal injury limitation period should apply. The plaintiffs agreed that either of these limitations periods could be applicable, but asserted that two four-year statutes of limitation governing statutory claims and unwritten contracts were also applicable. The plaintiffs then claimed that the longest statute of limitations should govern in a civil rights case where more than one statute is arguably applicable, citing *Shah v. Halliburton Co.*[78]

In response to these arguments, Tenth Circuit first ruled that the *Garcia* uniform characterization of section 1983 claims directly overruled *Shah* insofar as the latter case required the application of the longer of two arguably applicable limitations periods.[79] The court then ruled that retroactive application of *Garcia* would not be appropriate in this case because of the plaintiff's reliance upon the *Shah* rule[80] and clear Tenth Circuit precedent that held that a New Mexico four-year limitations period governed section 1983 based upon employment discrimination.[81] The court reasoned that because both of these cases were overruled by *Garcia* after the plaintiff's case had been filed, to apply the New Mexico

74. *Id.* at 651 (quoting Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972)).

75. 731 F.2d at 651-52. Where state law did not include a statute of limitations expressly applicable to actions for injury to personal rights, the Tenth Circuit twice applied that state's residuary statute. *See* McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984) (Colorado); Mismash v. Murray City, 730 F.2d 1366 (10th Cir. 1984) (Utah).

76. 731 F.2d 652 (10th Cir. 1984).

77. *Id.* at 653.

78. 627 F.2d 1055, 1059 (10th Cir. 1980). The plaintiff in *Shah* brought, inter alia, a § 1981 claim against his employer for wrongful termination of employment. The Tenth Circuit reasoned that the rule calling for the application of the longer of two potentially applicable limitations periods was particularly apposite in the statutory civil rights context because it would assist more individuals in achieving the equal rights and opportunities for which the civil rights statutes were enacted.

79. 731 F.2d at 653-54.

80. *Id.* at 655.

81. *Id.*

three-year injury to personal rights limitations periods that *Garcia* required would result in a substantial inequity.[82] Therefore, the Tenth Circuit affirmed the district court's denial of the defendant's motion and remanded for further consideration of the section 1983 claim.[83]

3. Fraudulent Concealment of Section 1983 Violations

In *Pike v. City of Mission, Kansas*,[84] the Tenth Circuit court rejected the plaintiff's argument that a section 1983 claim should not be defeated by a statute of limitations defense because the defendants had fraudulently concealed their violations of his constitutional rights. Pike alleged, in a suit brought nearly six years after his termination as city police chief, that various city officials had wrongfully discharged him, failed to give him a constitutionally fair post-termination hearing and defamed him. Pike further claimed that the officials had subsequently conspired to refuse to reinstate him.[85] The court said that although Pike may not have known of all of the individuals responsible for his termination, there were sufficient facts known to him, including the defective nature of the hearing and the lack of cause given for termination, to inform him at the time of the termination that his rights may have been violated.[86]

Pike alternatively argued that the constitutional violations were continuing in nature because the city officials refused to reinstate him or provide him a hearing, and therefore his case was timely under the limitations period.[87] Citing the Supreme Court decision of *United Airlines Inc. v. Evans*,[88] the Tenth Circuit held that although the impact of the defendants' acts may have continued to be felt by Pike during the statutory limitations period, the discrete actions comprising the violation occurred outside the period. The court therefore affirmed the district court's application of the Kansas two-year injury to personal rights limi-

82. *Id.* The Tenth Circuit Court referred to Chevron Oil Co. v. Hudson, 404 U.S. 97, 106-07 (1971), for a three part analysis of the appropriateness of applying federal decisions retroactively: (1) whether the decision to be applied directly overruled past precedent upon which the parties may have relied, (2) whether retroactive application would be in keeping with the purpose and effect of the decision, and (3) whether retroactive application would impose a substantial inequity on one of the parties. The court found that the first and third factors required prospective application on *Garcia*, leaving the second factor unresolved.

83. 731 F.2d at 655. A very similar analysis to the retroactivity issue was taken by the court in Abbit v. Franklin, 731 F.2d 661 (10th Cir. 1984), involving Oklahoma statutes of limitation. The decision indicates that the non-retroactivity ruling set forth in *Jackson* was not limited to the specific facts of *Jackson* and will be applicable to any Tenth Circuit case in which a § 1983 claimant, prior to the *Garcia* ruling, justly relied upon an appropriate limitations period.

84. 731 F.2d 655 (10th Cir. 1984).

85. *Id.* at 659.

86. *Id.* at 659-60. The court also observed that Pike's request for a tolling of the statute of limitations was inadequate under governing Kansas law, which provides such relief only for claims specifically grounded on fraud, not simply a § 1983 claim for violation of constitutional rights, as Pike had presented. *Id.* at 658.

87. *Id.* at 660.

88. 431 U.S. 553, 558 (1977).

tations period, in accordance with *Garcia*,[89] and dismissed the case.

II. Attorney's Fees In Civil Rights Litigation

A. *A Reasonable Fee:* Ramos v. Lamm

The Civil Rights Attorneys' Fee Award Act of 1976 provides that the court may award a "reasonable" attorney's fee to the prevailing party in federal statutory civil rights actions.[90] The question of what facts are to be considered in assessing the "reasonableness" of a claim for fees has been the source of debate since the inception of the Act.[91] In order to provide some consistency in this area of legal uncertainty,[92] and relying upon the recent *Hensley v. Eckerhart* Supreme Court decision,[93] the Tenth Circuit court explicitly took the opportunity to establish more specific standards in *Ramos v. Lamm*.[94]

The appeal arose from a successful claim for attorney's fees following a class action suit by prisoners in the Colorado State Penitentiary at Canon City.[95] The court began its analysis by questioning the applicability and usefulness of the frequently cited twelve factors of *Johnson v. Georgia Highway Express, Inc.*[96] Borrowing a "formula" from the *Hensley*

89. *See supra* notes 63-75 and accompanying text.

90. 42 U.S.C. § 1988 (1982) provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs.

42 U.S.C. § 1988 (1982).

91. Justice Brennan has observed: "section 1988's straight-forward command [has been] replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion in its wake." Hensley v. Eckerhart, 461 U.S. 424, 455 (1983) (Brennan, J., dissenting). *See also* Berger, *Court Awarded Attorney's Fee: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281 (1977).

92. *See, e.g.*, Ramos v. Lamm, 539 F. Supp. 730 (D. Colo. 1982).

93. 461 U.S. 424 (1983).

94. 713 F.2d 546 (10th Cir. 1983).

95. *See* Ramos v. Lamm, 539 F. Supp. 730 (D. Colo. 1982). In the initial action, the district court, per Judge Kane, held that the inadequate physical conditions of the Canon City prison violated the prisoners' eighth and fourteenth amendment rights and ordered that the facility be closed. Ramos v. Lamm, 485 F. Supp. 122 (D. Colo. 1979). On appeal, the Tenth Circuit court affirmed in part and remanded in part, instructing the district court to take into consideration state plans for the construction of a new facility. Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980). On reconsideration, the district court affirmed its order for closure. 520 F. Supp. 1059. No further appeal was taken by the state.

96. 488 F.2d 714 (5th Cir. 1974). This case has been consistently relied upon by federal courts at all levels in the determination of reasonable attorney's fees. It was referred to favorably in the legislative history of the Civil Rights Attorney's Fees Award Act of 1976 as providing appropriate factors for fee determination. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976), and S. Rep. No. 1101, 94th Cong., 2d Sess. 2 (1976). The extent to which *Ramos* has discredited *Johnson* is uncertain. Subsequent to the *Ramos* decision, the Tenth Circuit cited *Johnson* with favor in *Cooper v. Singer*. *See* 719 F.2d 1496, 1498-1500 (1983) and *infra* notes 118-23 and accompanying text. Furthermore, the Supreme Court's *Hensley* decision did not directly overrule *Johnson*.

The twelve *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by

decision, the Tenth Circuit said that by multiplying the hours reasonably expended on the litigation by a "reasonable hourly rate," a reasonable fee would be obtained.[97]

1. Time Reasonably Expended

The Tenth Circuit held that district courts in the Tenth Circuit should "carefully scrutinize" all of the hours claimed by the prevailing attorney to determine the number of hours reasonably spent on the litigation.[98] To facilitate this thorough review, attorneys intending to seek fees under section 1988 are required to keep precise time records.[99] In the instant case, and in future cases in which thorough records are not kept, reconstructed records are to be tolerated but subjected to a special scrutiny.[100] The reviewing court is to distinguish between "raw" time spent on the case, and "billable" time, being particularly suspicious of billable hours reported in excess of the "norm" of "six to seven billable hours per day for a five day week."[101]

The complexity of the case, the number of reasonable strategies pursued by the attorney, the work required due to the strategies of the opposing counsel, and the extent that legal work was unnecessarily duplicated by a second or third attorney are additional factors to be considered in determining the reasonableness of the number of hours expended.[102]

2. Reasonable Hourly Rate

The court stated that the second element of the "formula," a reasonable hourly rate, is to be based upon the rate received by lawyers of comparable skill and experience practicing civil rights law in the locality in which the litigation takes place.[103] A downward adjustment of the fee should be made when the attorney is inexperienced in the civil rights field. Additionally, the rate should reflect the prevailing rate at the time the award is made, not at the time the litigation took place.[104]

However, the court rejected the state's arguments that a reasonable fee for a public interest lawyer is lower than that for a lawyer in private practice,[105] and that a fee award to be paid from public funds should also be reduced.[106] The court noted that allowing these arguments to

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the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d 714, 717-19.

97. 713 F.2d at 553-55.
98. *Id.* at 555.
99. *Id.* at 553.
100. *Id.* at 553 n.2.
101. *Id.* at 553.
102. *Id.* at 554.
103. *Id.* at 555.
104. *Id.*
105. *Id.* at 551.
106. *Id.* at 552.

prevail would defeat the legislative intent of section 1988: to encourage attorneys, public and private, to act as public attorneys general, pursuing civil rights action that might not otherwise be prosecuted due to the plaintiff's inability to pay.[107] Furthermore, inasmuch as many civil rights actions are brought pursuant to section 1983 under color of state law,[108] by enacting section 1988 Congress anticipated that governmental entities would be responsible for payment of many of the award fees.[109]

3. Additional Reduction or Enhancement of Fees Awarded

Borrowing directly from the *Hensley* Supreme Court decision,[110] the Tenth Circuit described circumstances in which a further modification of the reasonable hourly rate should be made, after having been derived as set forth above. Partial success, as when unrelated claims fail, is to be awarded only partially.[111] However, where a plaintiff has received "excellent results" overall, the attorney should not be penalized for failing to prevail on every claim made, and all hours reasonably expended should be included in the award.[112] The most critical factor is the degree of success obtained.[113]

While the court expressed reluctance to award fees in an amount greater than a reasonable hourly rate for hours reasonably expended, it did agree with the Supreme Court that such an enhancement may be justified for victory under "unusually difficult circumstances" or time constraints.[114] But the court cautioned that this "genius factor" diminishes as the amount of time spent on the suit increases. Also, the "undesirability" of the case is no longer a reason for fee enhancement because no real social stigma is attached to civil right cases today.[115]

4. Other Elements of the Fee Award

A reasonable fee includes the cost of law clerk and paralegal serv-

107. *Id.*
108. *See supra* notes 41-44 and accompanying text.
109. 713 F.2d at 552.
110. 461 U.S. at 434-37.
111. 713 F.2d at 556. The court leaves the method of reducing the fees for partial success to the discretion of the district court. The lower court can attempt to identify the precise hours spent by the attorney on the failed claims, or simply eliminate a portion of the award to recover for the failures. *E.g.*, Elmore v. Warne, Nos. 81-2076, 81-2144 (10th Cir. 1984) (not published), in which the Tenth Circuit upheld a district court decision to award only $2,000 in fees, while $12,997 had been requested. The plaintiff had sought $20,000 in damages in the underlying § 1983 action but recovered only $4,000.
112. 713 F.2d at 556.
113. *Id.* (quoting Hensley v. Eckerhart, 461 U.S. at 436).
114. 713 F.2d at 557 (quoting *Hensley*, 103 S. Ct. at 1940).
115. 713 F.2d at 557-58. In discussing whether a fee is worthy of enhancement, Judge Logan introduced what may come to be known as the "Peck Factor." Judge Logan stated: "Situations in which great courage is required to undertake a case, like that confronting the fictional lawyer in *To Kill a Mockingbird*, may still exist. But a bonus for the social stigma assumed by a lawyer participating in civil rights litigation should rarely be given." *Id.* at 558.

ices.[116] Other items normally billed to clients, such as reasonably necessary expert witnesses, telephone and copying costs, but not travel expenses, may also be includable in the fee.[117]

B. *The Effect of a Contingency Fee Upon a Section 1988 Award*

In *Cooper v. Singer*,[118] on rehearing en banc, the Tenth Circuit took the *Ramos* approach to the calculation of a reasonable fee one step further when it held that a previously arranged contingency fee agreement between the prevailing plaintiff and his attorney should not limit the court's reasonableness fee determination. Directly overruling the earlier Tenth Circuit decision which held that a contingency fee arrangement sets an upper limit to the award fee available pursuant to section 1988,[119] the court said that the "market standard" of *Hensley*, as set forth in *Ramos*, will automatically include an allowance for the contingent risks assumed by the attorney.[120] The court observed that the congressional intent of section 1988 was to allow the fee award to compensate fully the attorney for the cost of a successful statutory civil rights action.[121]

Because contingent fee arrangements based upon a percentage of the recovery money obtained in the underlying action will often differ from the section 1988 "reasonable fee",[122] the court suggested that, to avoid this conflict, attorneys take the availability of the statutory fee award into consideration when fee arrangements are established with clients. Disposing of the instant case, however, in which a percentage contingency fee arrangement had been informed, the court held that should the district court award a section 1988 fee to the attorney lower in the amount than the fee available under the contingency arrangement, the attorney will be expected to reduce his fee to the amount awarded by the courts.[123] Hence, in effect, the court concluded that the *Ramos* reasonable fee calculation principles should prevail regardless of the contingency arrangement.

C. *Limitations to the Applicability of Section 1988*

Following the authority of the other federal appellate courts, the Tenth Circuit court denied the availability of section 1988 attorney's fee awards to two types of litigants—parties prevailing in nonmandatory state administrative proceedings and pro se litigants.

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116. *Id.*
117. *Id.* at 559. The court indicated that employment of counsel from outside the area of litigation is generally unnecessary due to the large number of lawyers capable of handling civil rights cases in each major metropolitan area. *Id.* at 555.
118. 719 F.2d 1496 (10th Cir. 1983) (en banc).
119. Cooper v. Singer, 689 F.2d 929-31 (10th Cir. 1982).
120. 719 F.2d at 1502.
121. *Id.* at 1506.
122. *Id.*
123. *Id.* at 1506-07.

In *Garcia v. Ingram*,[124] the sole issue was whether a section 1988 attorney's fee should be awarded to a party who had prevailed in a state administrative proceeding. The plaintiff claimed that the reinstatement of her eligibility for social security benefits by an administrative hearing officer constituted a successful "proceeding" to enforce her rights under section 1983, entitling her to a fee award pursuant to section 1988.[125]

The court appeared sympathetic toward the plaintiff's argument that to disallow a fee award in an administrative context yet allow it in the more expensive and time-consuming civil court proceeding would only encourage further over-crowding of the federal court docket.[126] Nevertheless, the court took a narrow view of the term "proceeding" in section 1988, holding that the term does not include nonmandatory state administrative proceedings.[127]

Similarly, the Tenth Circuit denied a request for a section 1988 fee award by a pro se movant in *Turman v. Tuttle*.[128] The plaintiff, a prison inmate, had been successful in representing himself in a section 1983 claim against prison employees at the state correctional facility in Canon City, Colorado. The court upheld the district court's denial of the fee award, reasoning that the Congressional intent in enacting section 1988 was to allow worthy statutory civil rights litigants to bring their cases without bearing the legal costs, not to compensate pro se litigants.[129]

D. *Attorney's Fees for Prevailing Title VII Claimants*

Salone v. United States[130] demonstrated that an otherwise strong case for the recovery of legal fees for successful Title VII litigation may fail if counsel does not present clearly to the bench his case for fees. The attorney's fees issue in this case had been considered previously by the Tenth Circuit,[131] and remanded to the district court with instructions to consider the guidelines set forth in *Johnson v. Georgia Highway Express*.[132] Upon remand, however, the plaintiff's attorneys failed to appear in per-

124. 729 F.2d 691 (10th Cir. 1984).

125. *Id.* at 692.

126. *Id.*

127. *Id.* This Tenth Circuit holding is in agreement with the opinions of several other courts of appeal that have decided the issue. The Supreme Court has presently granted certiorari to a Sixth Circuit case, Webb v. County Brd. of Educ., 715 F.2d 254 (6th Cir. 1983), *cert. granted*, 104 S. Ct. 1906 (1984), which directly involves the Garcia v. Ingram issue.

128. 711 F.2d 148 (10th Cir. 1983).

129. *Id.* at 149 (citing Owen v. Lash, 682 F.2d 648 (7th Cir. 1982); Pitts v. Vaughn, 679 F.2d 311 (3d Cir. 1982); Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. 1981); Lovell v. Snow, 637 F.2d 170 (1st Cir. 1981); Davis v. Parratt, 608 F.2d 717 (8th Cir. 1979).

130. No. 81-1930 (10th Cir. June 2, 1983) (a prevailing attorney in a Title VII case is entitled to a reasonable fee in accordance with 42 U.S.C. § 1988 (1982)).

131. Salone v. United States, 645 F.2d 875 (10th Cir.), *cert. denied*, 454 U.S. 894 (1981). The attorneys for the plaintiff sought a reasonable fee for time spent both on the plaintiff's suit directly and in filing an amicus brief in a related case which arguably contributed to a favorable Supreme Court ruling and subsequent vacating of a Tenth Circuit decision against the plaintiff. *See* Salone v. United States, 511 F.2d 902 (10th Cir. 1975), *vacated*, 426 U.S. 917 (1976).

132. 488 F.2d 714 (5th Cir. 1978). *See supra* note 96 and accompanying text.

son before the lower court, relying instead upon affidavits to explain that the fees they requested were reasonable.[133] The lower court awarded only a portion of the fees sought.[134] While the Tenth Circuit agreed with attorneys that the requested fees may have been reasonable, the court held that the lower court's inability to follow the attorneys' arguments as presented in the affidavits and its displeasure with the attorneys' failure to appear in court was understandable.[135] Accordingly, the lower court decision was affirmed, with only a slight increase in the fee award.[136]

III. THE INDIAN CIVIL RIGHTS ACT

The Tenth Circuit clarified and restricted an exception to the traditional sovereign immunity defense which bars suits against Indian tribes in *White v. Pueblo of San Juan*.[137] The Whites, non-Indians, had brought suit in a federal court against the Pueblo of San Juan tribe alleging that the Indians had deprived them of their property without due process and had effected a taking of their property without just compensation in violation of the Indian Civil Rights Act (ICRA).[138] The Whites did not attempt to pursue a remedy in the tribal forum before bringing the federal suit.

Traditionally, there has been a firm rule that Indian tribes are exempt from suit under the doctrine of sovereign immunity.[139] Recently, the Supreme Court, in *Santa Clara Pueblo v. Martinez*,[140] specifically barred suits against Indian tribes brought pursuant to the ICRA. The Tenth Circuit, however, created an exception to that bar in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*.[141] Under this case, the Whites argued that their suit fell within the jurisdiction of the federal court.[142] The Whites claimed that *Dry Creek* stood for the proposition that federal court jurisdiction should be granted for suits against Indian tribes when three elements are satisfied: (1) the suit involves a non-Indian, (2) a deprivation of an individual's real property interests is alleged, and (3) there is an absence of an adequate tribal remedy.[143]

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133. No. 81-1930, slip op. at 6.
134. *Id.* at 2.
135. *Id.* at 5-6.
136. *Id.* at 6-7.
137. 728 F.2d 1307 (10th Cir. 1984).
138. 25 U.S.C. § 1301-03 (1982). The facts giving rise to the White's suit involved an alleged interference by the Indians with a sale of property located within the Indian reservation but owned by the Whites. The Whites were negotiating a sale of the land with a third party when the Indians obstructed an access road to it, causing the third party not to purchase the land. Eventually the plaintiff sold the property to the government in trust for the Pueblo at a considerably lower price. 728 F.2d at 1308-09.
139. *See, e.g.*, Turner v. United States, 248 U.S. 354 (1919); United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940); Puyallup Tribe, Inc. v. Washington Dept. of Game, 433 U.S. 165 (1977).
140. 436 U.S. 49 (1978).
141. 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).
142. 728 F.2d at 1310.
143. *Id.* The White's emphasis on the fact that they were a non-Indian party is understandable in view of the significance accorded to similar factual circumstances in *Dry Creek*.

The Tenth Circuit, in a rambling opinion per Judge Doyle, never rejected the plaintiff's *Dry Creek* argument, but distinguished *Dry Creek* from the case at bar by finding that the Whites, unlike the *Dry Creek* plaintiffs, had not attempted to pursue a remedy in the tribal forum.[144] While the *Dry Creek* plaintiffs had sought a remedy with the tribal court but had been refused,[145] the Whites proceeded directly to federal court, claiming, inter alia, that the Indians' failure to properly adopt and publish their Tribal Code of Law and Order excused them from exhausting the possible tribal remedies.[146] "Speculative futility is not enough to justify federal jurisdiction," wrote the Tenth Circuit as it ruled against the Whites.[147] A plaintiff must seek and be denied all tribal remedies before federal jurisdiction applies. Furthermore, where a tribal remedy exists, it is "exclusive."[148]

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"The reason for . . . the references to tribal immunity also disappear[s] when the issue relates to a matter outside of internal tribal affairs and when it concerns a non-Indian." 623 F.2d at 685. The Tenth Circuit, however, clearly emphasized in *White* that this fact alone will not be cause for conferral of federal jurisdiction and that the *Dry Creek* exception is to be construed narrowly. 728 F.2d at 1312.

144. 728 F.2d at 1312.

145. 623 F.2d at 684.

146. 728 F.2d at 1310.

147. *Id.* at 1313.

148. *Id.* at 1312 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978)).