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STATE CIVIL POWER OVER RESERVATION INDIANS

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INTRODUCTION

Defining the legal relationship of a state to reservation Indians within a state's boundaries is a problem with which this nation's courts have struggled from the earliest days of the Republic. The problem has not submitted to solution by way of principles uniformly understood and consistently applied. Confusion and inconsistency is more the rule than the exception. This will continue, with the undesirable effects which confusion and inconsistency inevitably breed, until those responsible for defining the extent of state power over reservation Indians analyze carefully what has already been authoritatevly said about the nature of the state/reservation Indian relationship.

It is the purpose of this note to discover: 1) the power of a state to exercise court jurisdiction over civil actions which are based on events that occur within Indian country,[1] and to which one of the parties is an Indian (hereinafter, this set of limitations will be referred to simply as "state court jurisdiction"); and 2) the power of a state to impose its civil laws on Indians within Indian country (hereinafter, these limitations will be referred to as "imposition of state laws").[2] In both cases, analysis is limited to instances where state court jurisdiction and imposition of state laws is attempted without Congressional authorization, or without compliance with conditions precedent for obtaining Congressional authorization.

State court jurisdiction and imposition of state laws can be analyzed as historical and legal problems by focusing primary attention on: 1) state constitutional provisions for retention by the federal government of absolute jurisdiction and control over Indian lands; 2) the landmark United States Supreme Court decision in *Williams v. Lee;*[3] and 3) the recent United States Supreme Court decision in *Kennerly v. District Court of the Ninth Judicial District of Montana.*[4]

COURT INTERPRETATIONS OF STATE CONSTITUTIONAL PROVISIONS FOR ABSOLUTE FEDERAL JURISDICTION AND CONTROL OVER INDIAN LANDS

A number of states were admitted into the Union with disclaimer

[1]Indian country may be most simply defined as that land located within the exterior boundaries of an Indian reservation. This, in essence, is the definition that Congress gave to the term in 1948. *See,* 62 Stat. 757 (1948), 18 U.S.C. §1151 (1970).

[2]Though state court jurisdiction and imposition of state laws may be conceptually distinguished, there may in application be little practical difference between the two. For example, if it is found that a state has no court jurisdiction, then, of course, an imposition of state laws would be of no practical consequence, for the imposition would be unenforceable. *E.g., Commissioner of Taxation v. Brun,* 286 Minn 43, 174 N.W.2d 120, 126 (1970).

[3]358 U.S. 217 (1959).

[4]400 U.S. 423 (1971).

provisions in their statehood acts to the effect that the federal government retains absolute jurisdiction and control over the Indian lands within the states' borders.[5] Moreover, many states included this disclaimer provision in their constitutions.[6] These states constitutional disclaimers are substantially indentical. Montana's provision reads, in pertinent part:

> Second. That the people inhabiting the said proposed state of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; . . .

The key phrase with respect to state jurisdiction and imposition of state laws is, ". . . Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." That phrase, inexplicably, means different things to different courts.

Arizona is presently the least restrictive (from the state's point of view) in the interpretation of its disclaimer provision. In *McClanahan v. State Tax Commission,*[7] an Arizona Court of Appeals said that its disclaimer ". . . deals with disclaimers of *title to land owned or held by an Indian or an Indian tribe.*"[8] (Emphasis supplied). Therefore, whether the disclaimer prevents a particular exercise of state court jurisdiction or imposition of state laws depends on whether, by means of the exercise or imposition, ". . . the State of Arizona is . . . asserting any ownership or proprietary interest in Indian lands."[9]

New Mexico's interpretation of its disclaimer is only slightly, if at all, more restrictive than that of Arizona. In *Ghahate v. Bureau of Revenue,*[10] the New Mexico Court of Appeals held its disclaimer to be

[5] *E.g.,* 25 Stat. 676, 677 (1889), which applies to the admission of Montana, North Dakota, South Dakota and Washington; 28 Stat. 107, 108 (1894), which applies to the admission of Utah; 36 Stat. 557, 558-559 (1910), which applies to the admission of New Mexico; and 36 Stat. 557, 569 (1910), which applies to the admission of Arizona.

[6] *E.g.,* Arizona, ARIZ. CONST. art. XX, §4; Idaho, IDAHO CONST. art. XXI, §19 [ratified by Congress, 26 Stat. 215 (1890)], Montana, MONT. CONST. ord. No. 1, §2; North Dakota, N.D. CONST., §203; New Mexico, N.M. CONST. art. XXI, §2; South Dakota, S.D. CONST. art. XXII; Washington, WASH. CONST. art. XXVI; and Wyoming, WYO. CONST. art. XXI, §26 [ratified by Congress, 26 Stat. 222 (1890)].

[7] 14 Ariz.App. 452, 484 P.2d 221 (1971).

[8] *Id.* at 225.

[9] *Id.* In formulating this interpretation of its disclaimer provision, the Arizona Court relied heavily on *dicta* contained in *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962). In that case the United States Supreme Court made the following comments about the meaning of disclaimer provisions: at 69, 1) "The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest"; at 68, 2) ". . . 'absolute' federal jurisdiction is not invariably exclusive jurisdiction"; and at 71, 3) ". . . the words 'absolute jurisdiction and control' are not intended to oust the State completely from regulation of Indian 'property' . . .".

[10] 80 N.M. 98, 451 P.2d 1002 (1969).

". . . not applicable where there is no *issue concerning Indian lands*"[11] (Emphasis supplied). Apparently, there will be no "issue concerning Indian lands" unless title, right of possession or control of Indian lands is drawn in question by a particular imposition of state laws or exercise of state court jurisdiction.[12] Also, the New Mexico Supreme Court has said that the disclaimer provision is a disclaimer of proprietary rather than governmental interest.[13]

The most restrictive interpretation of a disclaimer provision is that of South Dakota. In *Smith v. Temple*,[14] the South Dakota Supreme Court said:[15]

> 1. The disclaimer of jurisdiction contained in our Enabling Act and Constitution deprives our state of criminal jurisdiction over Indians and Indian territory; . . .
>
> 3. Criminal jurisdiction over Indians for crimes committed within Indian territory in South Dakota is exclusively vested in the Federal and Tribal courts.
>
> The same principles govern and the same conclusion applies to state civil jurisdiction over an enrolled tribal Indian defendant in a cause of action arising within Indian country.

In accordance with these principles, the South Dakota Court held specifically that its courts had no jurisdiction in a tort action by one Indian against other Indians for injuries received in an automobile accident which occurred within the exterior boundaries of an Indian reservation. Broadly read, *Smith* means that the disclaimer provision prohibits exercise of state court jurisdiction and imposition of state laws, unless expressly authorized by Congress or by decisions of the United States Supreme Court.

It is not presently clear how Montana interprets its disclaimer provision, though the strongest indications are that it is in a manner similar to that of South Dakota. In *United States v. Partello*,[16] Montana's Federal Court said:[17]

> It was agreed by the ordinance [Section 2 of Ordinance No. 1, Montana Constitution] . . . that congress was to retain the absolute jurisdiction and control over these Indian lands within the Indian reservations in Montana. The word "jurisdiction," as used in the above clause, when applied to congress, means the power of governing such lands; to legislate for them; the power or right of exercising authority over them. These are the definitions of this word which will be found in Webster's Dictionary. When we speak of the right

[11] *Id.* at 1005.

[12] *Id.*

[13] Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51, 53 (1966).

[14] 82 S.D. 650, 152 N.W.2d 547 (1967). It is significant that this decision was rendered five years *after* that in *Organized Village of Kake v. Egan*, *supra* note 9. Apparently, the South Dakota Supreme Court does not consider *Kake* as authoritatively controlling on questions of interpretation of state constitutional disclaimer provisions, since the South Dakota Court does not cite nor discuss the less restrictive *Kake* language quoted *supra* in note 9.

[15] *Id.* at 548.

[16] 48 F. 670 (C.C. D.Mont. 1891).

[17] *Id.* at 676.

> **to govern certain lands, we not only mean the right to do some thing with the land itself, but to legislate for and control the people upon said lands, as well as to legislate concerning the land itself. When we say congress has the right to legislate for a place within its exclusive jurisdiction, we mean for the people who are there, as well as concerning the land itself. (Emphasis supplied.)**

This *Partello* language was quoted with approval by the Montana Supreme Court in *State ex rel. Irvine v. District Court.*[18] Very recently, in *Crow Tribe of Indians v. Deernose,*[19] the Montana Supreme Court held that the disclaimer provision prevented our state courts from having subject matter jurisdiction over a foreclosure suit involving Indian trust lands, unless such jurisdiction has been granted state courts by an act of Congress.[20]

Of course, *Crow Tribe* only applies, at its broadest, to suits involving Indian lands. Also, the restrictive language in *Partello* and *Irvine,* regarding Indian persons, pre-dates the United States Supreme Court decision in *Organized Village of Kake v. Egan,* which, as pointed out in note 9 *supra,* contains dicta that would sanction a much less restrictive interpretation of our disclaimer provision. Thus, a clear and definitive statement of Montana's interpretation of its disclaimer provision cannot, with certainty, be presently made.

Though an extended discussion about the accuracy of the different interpretation of disclaimers might be interesting, the problem of how a disclaimer provision ought properly to be read is today in large part academic. There are limitations on the exercise of court jurisdiction and the imposition of state laws other (and, except in the case of South Dakota, more stringent) than those that may or may not be contained in disclaimer provisions. These other limitations have been expressed by the United States Supreme Court in *Williams v. Lee* and *Kennerly v. District Court of the Ninth Judicial District of Montana.*

[18]125 Mont. 398, 239 P.2d 272, 276 (1951).

[19].....Mont. ....., 487 P.2d 1133 (1971).

[20]*Id.* at 1134-1135. It should be noted that the Montana Court in *Crow Tribe* also held that 25 U.S.C. §483a (70 Stat. 62), enacted by Congress in 1956, is not an express grant of state jurisdiction over foreclosure suits concerning reservation trust lands. This act provides that:

> The individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the State or Territory in which the land is located. For the purpose of any foreclosure or sale proceeding the Indian owner shall be regarded as vested with an unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, and any conveyance of the land pursuant to proceedings shall divest the United States of title to the land.
>
> All mortgages and deeds of trust to such land heretofore approved by the Secretary of the Interior are ratified and confirmed.

In construing this Act, the Montana Court said at 1136:

> This statute by its language simply authorizes individual Indians to mortgage lands held in trust by the United States for their use and benefit, with the consent of the Secretary of the Interior, and permits such mortgages

PRE-WILLIAMS AND KENNERLY: A BRIEF HISTORICAL PERSPECTIVE

In order to properly understand *Williams* and *Kennerly* it is essential to have some historical perspective as to the nature of Indian tribes, their reservations, and the relationship of the inhabitants of these reservations to the states in which the reservations are located.

In the beginning Indian tribes were separate nations within what has come to be the United States.[21] As separate nations, they possessed all the powers of any sovereign nation. Through conquest and treaties they were induced to give up their total sovereignty in exchange, principally, for grants of land from the federal government. Conquest and treaties effectively terminated the external powers of sovereignty of the tribes. For example, the tribes no longer had power to make war or enter into treaties with foreign nations. Moreover, the internal powers of sovereignty of the tribes, the power to regulate the internal affairs of land set aside for them by the federal government, was made subject to the legislative power of the federal government.[22] Was the tribal power to regulate internal reservation affairs also made subject to the legislative powers of the states within which the reservation lay? This question was early answered by the United States Supreme Court in the landmark case of *Worcester v. Georgia*.[23]

About 1830 the Georgia Legislature enacted laws which, in effect, forbade Indians on the Cherokee Reservation from enacting their own laws or holding court.[24] *Worcester* was the case in which the validity of the Georgia action was tested. In the course of Chief Justice Marshall's exhaustive opinion for the Court it was held that: 1) Georgia's assertion of power was invalid; 2) Indian tribes are distinct political entities, with the right of self-government, having exclusive authority of all matters which occur within their territorial boundaries; and 3) Indian reservations are not subject to the laws or courts of the state or

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to be foreclosed in accordance with state law. It has nothing to do with granting jurisdiction to state courts in such mortgage foreclosure actions, and pointedly avoids the use of the term "jurisdiction".

The Court's conclusion seems to be based on the proposition that when Congress intends to allow state courts to assume jurisdiction in a particular instance, the term "jurisdiction" is specifically used. This proposition is not invariably true. For example, 25 U.S.C. §231 (1929, 45 Stat. 1185; amended 1946, 60 Stat. 962), which authorizes states to enforce some of their health and education laws against reservation Indians, does not use the term "jurisdiction"; nevertheless, this act has been held an express Congressional grant of jurisdiction to state courts, for the purpose of enforcing state health and education laws. *See*, In re Colwash, 57 Wash.2d 196, 356 P.2d 994 (1960). Without expressing an opinion as to the correctness of the Montana Court's ultimate conclusion, it is the author's belief that had the Court engaged in more thorough analysis than is indicated by the opinion it could have found better reasons than it gave to support its holding.

[21]Williams v. Lee, *supra* note 3 at 218.

[22]*See*, COHEN, HANDBOOK OF FEDERAL INDIAN LAWS, 122 (1942); and Native American Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959).

[23]31 U.S. (6 Pet.) 515 (1832).

[24]The Georgia laws are set forth *Id.* at 487-489.

states in which they are located, nor even to federal laws or courts, unless subjugation to state or federal laws and courts is expressly authorized by federal legislation.

For the sake of clarity in later analysis, the broad principle of *Worcester*, that an Indian reservation is, as to states, a distinct nation within whose boundaries state laws and courts cannot of their own force penetrate, may be stated in two principles: 1) states have no power unilaterally to impose their laws and courts with respect to matters within an Indian reservation *that involve or affect Indians* (hereinafter this will be referred to simply as "the first *Worcester* principle"); and 2) states have no power unilaterally to impose their laws and courts with respect to matters within an Indian reservation *that do not involve or affect Indians* (hereinafter referred to as "the second *Worcester* principle").

The relationship between Indian reservations and states, as defined in *Worcester*, has not remained constant. The second *Worcester* principle has been substantially modified over the years by the United States Supreme Court. Thus, in *Langford v. Monteith*[25] it was held that process may be served within a reservation for a suit in territorial court between two *non-Indians*. In *United States v. McBrantney*[26] and *Draper v. United States*[27] the Supreme Court held that the murder of one *non-Indian* by another *non-Indian* on a reservation was a matter for state law. In *Thomas v. Gay*[28] a state tax on cattle of *non-Indian* lessees of reservation land was upheld.[29] Finally, in *Utah and Northern Railway v. Fisher*[30] a territorial tax on a *non-Indian* railroad that ran through a reservation was held valid.

In effect, what the United States Supreme Court has said is that in at least some matters concerning non-Indians, Indian reservations are not to be considered "distinct political entities." On the contrary, in some matters that effect or involve only non-Indians a reservation is a part of the surrounding state, subject to its court jurisdiction and laws; and this is the case in spite of the previously discussed disclaimer provisions.[31]

The first *Worcester* principle, on the other hand, has been fairly consistently adhered to by the United States Supreme Court. For ex-

[25]102 U.S. 145 (1880). *See also*, Stiff v. McLaughlin, 19 Mont. 300, 48 P. 232 (1897).
[26]104 U.S. 621 (1882).
[27]164 U.S. 240 (1896). *See also*, State *ex rel.* Nepstad v. Danielson, 149 Mont. 438, 427 P.2d 689 (1967).
[28]169 U.S. 264 (1898). *See also* Casier v. McMillan, 22 Mont. 484, 56 P. 965 (1899).
[29]The Court in *Thomas v. Gay*, *supra* note 28, did note that because the lands on which the taxed cattle grazed were Indian lands, the tax might have some effect on Indians. However, the Court found the effect too remote to compel a holding that the state tax was invalid.
[30]116 U.S. 28 (1885).
[31]*See*, Draper v. United States, *supra* note 27 at 245, 247.

ample, in *The Kansas Indians*[32] it was held that a state has no power to tax Indian lands. The Court said:[33]

> If the tribal organization of the [Indians] is preserved intact, and recognized by the political department of the government as existing, then they are a "people distinct from others," . . . separated from the jurisdiction of [the State], and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority. . . . As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws.

In *United States v. Kagama*[34] the following comment appears:[35]

> [The Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws . . . of the State within whose limits they resided.

However, in *Felix v. Patrick*[36] and *United States v. Candelaria*[37] the United States Supreme Court authorized state court jurisdiction over suits by Indians against non-Indians to enforce title to Indian land. The holdings of these cases represent a slight erosion of the first *Worcester* principle, which, stated in light of these decisions, would provide that states have no power unilaterally to impose their laws and courts with respect to matters within an Indian reservation that involve or effect Indians, except that an Indian may bring a civil action in state court to redress wrongs against his person and property, allegedly committed by a non-Indian.[38] The principle, as thus modified, has been termed an "anomalous jurisdictional anachronism"[39], and the label is appropriate, for *Felix* and *Candelaria* do not appear to be products of the Supreme Court's concern with problems of state power over reservation Indians and modifications of *Worcester* principles, but rather with the fact that state courts are, by their state constitutions, open to all *persons* for the redress of grievances, and Indians are persons.[40]

This was the state of the law when, in 1959, the Supreme Court decided *Williams v. Lee*. It must now be considered whether the opinion in *Williams* was intended to provide for a further erosion, or perhaps restatement, of the *Worcester* principles.

WILLIAMS V. LEE: A CHANGE IN DIRECTION?

In *Williams* the Arizona Supreme Court had held[41] that Arizona

[32]72 U.S. (5 Wall.) 737 (1866).
[33]*Id.* at 755, 757.
[34]118 U.S. 375 (1886).
[35]*Id.* at 381-382.
[36]145 U.S. 317 (1892).
[37]271 U.S. 432 (1926).
[38]This, also, is the case in spite of the previously discussed disclaimer provisions. *See*, Smith v. Temple, *supra* note 14 at 548.
[39]Smith v. Temple, *supra* note 14 at 548.
[40]Felix v. Patrick, *supra* note 36 at 332.
[41]83 Ariz. 241, 319 P.2d 998 (1958).

courts have jurisdiction over a civil suit against reservation Indians for goods sold them on credit on the reservation by a non-Indian who operated a general store within the exterior boundaries of the Navajo Indian Reservation and the State of Arizona. The judgment was reversed by the United States Supreme Court, on certiorari. The opinion of the unaminous court stated,[42] with respect to *Worcester:*

> **Over the years this Court has modified . . . [the Worcester] principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained.**

After reviewing the Supreme Court decisions that had modified *Worcester's* principles, the Court went on to say:[43]

> **Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.**

After a brief discussion of the history of the Navajo Tribe, noting that tribal courts would have had jurisdiction over the suit, the Court concluded:[44]

> **There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. . . . If this power [of self-government] is to be taken away from them, it is for Congress to do it.**

The Court did not clearly say why "there can be no doubt that to allow the exercise of state jurisdiction here . . . would infringe on the right of the Indians to govern themselves." There are two possibilities. First, it was merely a conclusion drawn from the particular facts and circumstances of the case (as indicated, the Court noted that tribal courts had jurisdiction over the controversy), with the implication that given other facts and circumstances (perhaps lack of tribal court jurisdiction) the Court would approve a unilateral imposition of state laws or an exercise of state court jurisdiction with respect to matters within an Indian reservation that involve or effect Indians. Under this interpretation, the *Williams* "question" as to "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" is viewed as a substantive test that restates and modifies both the first and second *Worcester* principles. The second way to interpret *Williams,* however, is to say that the mere fact that the state dealt with matters within an Indian reservation that involved or effected Indians makes the state action one that "infringed on the right of reservation Indians to make their own laws and be ruled by them." Under this interpretation, the *Williams* "question" is a substantive test with respect to the second *Worcester* principle, but a conclusion with respect to the first *Worcester* principle.

[42]Williams v. Lee, *supra* note 3 at 219.
[43]*Id.* at 220.
[44]*Id.* at 223.
[45]*Id.* at 220-221.

Admittedly, elementary analysis of the above quoted language from *Williams* would incline one to the view that the first interpretation is more plausible. Nevertheless, there is just enough other language in the decision to lend a reasonable doubt as to its true meaning. Immediately following what appears to be the substantive test language the Court remarked:[45]

> Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. . . . Significantly, when Congress has wished the States to exercise this power [civil and criminal jurisdiction over Indians] it has expressly granted them the jurisdiction which **Worcester v. Georgia** had denied.

This language, especially the first sentence, gives cause to wonder whether, except for the *Felix v. Patrick* exception, discussed *infra,* the first principle of *Worcester* was intended by the court in *Williams* to remain unmodified.

The element of reasonable doubt about the correct interpretation of *Williams* led the Supreme Court of Washington to opt for the second interpretation of *Williams,* remarking, in 1960, that:[46]

> . . . [T]he jurisdiction of the federal government over Indian tribes and enrolled members of such tribes, while they are on Indian reservations, is exclusive. . . .
>
> In a long line of cases beginning with **Worcester v. State of Georgia** . . . and continuing to the recent decision of Williams v. Lee . . . the United States supreme court has recognized the exclusive jurisdiction of Congress over the affairs of enrolled Indians on Indian reservations. . . . [T]he courts of this state . . . have no jurisdiction [over reservation Indians] beyond that expressly granted by Congress.

Fortunately, the United States Supreme Court rendered assistance as to what it meant in *Williams* by way of a dictum contained in the 1962 decision of *Organized Village of Kake v. Egan.*[47] In *Kake* the Court said:[48]

> These decisions [Williams v. Lee, notably] indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.

Though the language used is somewhat different than that of *Williams,* it is concluding language, and in the preceeding paragraph[49] the *Kake* Court set forth the *Williams* substantive test language verbatim. Thus, it is, after *Kake,* almost certain that *Williams* was intended to mean that states can unilaterally exercise court jurisdiction over or impose their

[46]State *ex rel.* Adams v. Superior Court, 57 Wash.2d 181, 356 P.2d 985, 987-988 (1960). *Adams* specifically held that Washington Courts do not have jurisdiction to unilaterally declare reservation Indian children deprived and dependent, thereby permanently depriving their parents of custody of their children, and making the children wards of the state, subject to adoption.

[47]Organized Village of Kake v. Egan, *supra* note 9.

[48]*Id.* at 75.

[49]*Id.* at 74-75.

laws on all persons (Indian or non-Indian) in Indian country, so long as it can be said that such state action does not infringe on the right of reservation Indians to make their own laws and be ruled by them; and this is apparently the test in spite of state constitutional disclaimer provisions.[50]

Yet, though the Supreme Court has apparently authorized states to impose their laws and courts on reservation Indians, the state and lower federal courts have shown varying degrees of willingness to approve such impositions. The most marked area of conflict has been over whether reservation Indians could be required to pay state personal income taxes. A review of the state court decisions on this issue provides a good (and for purposes of this note, sufficient) example of courts' attempts to apply the amorphous *Williams* test.[51]

[50] *Id.* at 67-68. It should also be noted that in 1964, in *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1964), the United States Supreme Court placed a further limitation on the exercise of state power over persons within an Indian reservation. The Court held invalid a state tax imposed on a reservation Indian trader, saying, at 690: "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on traders." In other words, if Congress has broadly legislated in (i.e., preempted) a particular field, state power must yield. Of course, it hardly needs to be said that if Congress expressly forbids a particular exercise of state court jurisdiction or imposition of state laws on reservation inhabitants, then, again, the state would be without power. *See,* Organized Village of Kake v. Egan, *supra* note 9 at 72.

[51] In addition to the disputes over the application of personal income tax, which the author merely uses as exemplary of the potential problems of application of the *Williams* test, the reader might also wish to examine: 1) *Whyte v. District Court of Montezuma County*, 140 Colo. 334, 346 P.2d 1012 (1959), where the Colorado Supreme Court held that its state courts had no jurisdiction over a divorce action where both parties were reservation Indians who had been married on the reservation. At 1014 the Court said:

> Surely, if a non-Indian's rights under a contract made with an Indian on an Indian reservation are subject to the exclusive jurisdiction of the tribal court [referring to *Williams*], it must follow that a contract of marriage entered into on an Indian reservation between two enrolled members of the tribe must be governed by tribal law.

2) *Sigana v. Bailey*, 282 Minn. 367, 164 N.W.2d 886 (1969), in which the Supreme Court of Minnesota held that its state courts had no jurisdiction over an action in tort for injuries arising from an automobile collision which occurred within the exterior boundaries of an Indian reservation, in which all of the parties to the action were Indians, residents of the reservation (*contra, Paiz v. Hughes*, 76 N.M. 562, 417 P.2d 51 (1966), involving non-Indian defendants); 3) *Kain v. Wilson*, 83 S.D. 482, 161 N.W.2d 704 (1968), where the South Dakota Supreme Court held, at 706, that:

> . . . [T]he conclusion is inescapable that our state courts have no jurisdiction to hear and determine a civil action [by a non-Indian] for the alleged wrongful use and possession of land located in Indian Country by a tribal Indian defendant. To impose state law and state jurisdiction in this controversy would infringe upon the . . . Indians' right and power to make their own laws and be ruled by them.

4) *State of Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003 (1970), in which the Ninth Circuit Court of Appeals held that Arizona could not exercise extradition jurisdiction over Indian residents of the Navajo Reservation. (The decision is of particular interest because it is, in the author's opinion, the best reasoned application of the *Williams* test yet rendered.) 5) *Your Food Stores, Inc. (N.S.L.) v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 (1961), in which the New Mexico Court held that to allow a municipality to annex a portion of an Indian reservation and make the annexed land subject to the jurisdiction of the municipality would infringe on the right of the Indians to govern themselves. 6) *Commissioner of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120, 122 (1970), in which the Minnesota Court approved a ruling of the Minnesota Department of Employment Security that reservation Indians are not liable to make contributions to

In *McClanahan v. State Tax Commission* and *Ghahate v. Bureau of Revenue,* Arizona and New Mexico held that requiring Indians, who live and are employed on reservations, to pay state income taxes on their earnings does not interfere with the Indians' right to make their own laws and be ruled by them. In *Ghahate* the New Mexico Court was aided by the fact that both parties stipulated that the Indian tribe itself was not inconvenience nor in any way interfered with because its Indians were required to pay personal income taxes to the state.[52] This stipulation dictated the result. The court said: "The stipulated facts show that the tax does not interfere with reservation self-government."[53] In *McClanahan,* the Arizona Court was not blessed with a *Ghahate*-type stipulation, and so was forced to reason an application of the *Williams* test. The Court said:[54]

> . . . [W]e [do not] believe the fact that plaintiff as a Navajo Indian is required to pay the income tax on income derived soley from sources within the reservation results in an infringement on the Navajo tribe's right of self government. In determining whether such an infringement exists, we are aided by an examination of those early cases dealing with the federal-state dichotomy of income taxation. Thus, as was held in **Helvering v. Gerhardt,** 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938), when dealing with the problem of whether state employees were required to pay federal income taxes and the extent that such taxation infringed upon the sovereignty of the state:
>
> > Even though, to some unacertainable extent, the tax deprived the state of the advantage of paying less than the standard rate for the services which they engage, **it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence** as states. [Emphasis by the court.]
>
> [Since the federal income tax as applied to state employees does not interfere with the essential functions of state governments,] . . . how can it be seriously argued that an income tax by the State of Arizona upon a Navajo Indian, regardless of his employer, causes an impairment of the right of the Navajo tribe to be self governing? We believe it cannot.[55]

Directly contrary to *McClanahan* and *Ghahate* is the 1970 decision of the Supreme Court of Minnesota in *Commissioner of Taxation v. Brun.* In *Brun* it was held that:[56]

> It cannot be argued that siphoning off part of the earnings from [Indian] employees of a sawmill [located on the reservation and] operated for the benefit and welfare of enrolled members of the tribe [for payment of state personal income taxes] does not interfere with the tribal right of self-government.

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the Minnesota unemployment insurance fund. The decisions indicate that the amount of power a state may be allowed to exercise over reservation inhabitants under the *Williams* test is minimal.

[52]Ghahate v. Bureau of Revenue, *supra* note 10 at 1004.

[53]*Id.*

[54]McClanahan v. State Tax Commission, *supra* note 7 at 224.

[55]The author finds this reasoning highly questionable since it proceeds on the basis of a weak analogy between the federal/state relationship and the state/Indian reservation relationship.

[56]Commissioner of Taxation v. Brun, *supra* note 51 at 126.

The decisions in *Ghahate* and *McClanahan* are perhaps reconciliable on the ground that the Minnesota Court in *Brun* placed heavy emphasis on the fact that the Indians from whom Minnesota sought tax were "unique,"[57] that "few Indian tribes in the United States retain the sovereignty and the right to self government retained by the [Indians in question],"[58] and that, as a result, ". . . little help can be obtained from the decisions of other state courts. . . ."[59] Nevertheless, it seems from the decision in *Brun,* that the only reason the Indians in question were considered "unique" is that the Minnesota Court over the years has chosen to consider them "unique", and has consistently resisted attempts by the state to impose their laws or courts on these Indians.[60] If that is the case, then the result is simply that three state courts, all considering the same issue in light of the *Williams* test, have reached contrary results.

One could argue with merit for either position, but today that would probably be wasted effort; for, about a year after *Brun* was decided, the United States Supreme Court rendered its decision in *Kennerly v. District Court of the Ninth Judicial District of Montana,* and, as will be seen, this decision should have a substantial impact on the current validity of the decisions in *McClanahan, Ghahate,* and *Brun.*

KENNERLY V. DISTRICT COURT: A SUPREME COURT DOUBLE REVERSE

In *Kennerly* the Montana Supreme Court had held[61] that its courts had jurisdiction over a civil action against reservation Indians for an unpaid debt arising from transactions that occurred within the exterior boundaries of the Blackfeet Indian Reservation. The principal ground[62] for assumption of state jurisdiction was the fact that the Blackfeet Tribal Council had adopted a statute which provided that:

> The Tribal Court and the State shall have concurrent and not exclusive jurisdiction of all suits wherein the defendant is a member of the Tribe which is brought before the Courts.[63]

The Montana Court logically reasoned that its assumption of jurisdiction would not, under the *Williams* test, infringe on the right of reservation Indians to make their own laws and be ruled by them, since

> Indian tribes have the power **absent some treaty provision or act of Congress to the contrary,** to enact their own laws for the government of their people. . . .[64] (Emphasis supplied.)

[57] *Id.* at 121.
[58] *Id.* at 126.
[59] *Id.* at 124.
[60] *Id.* at 121-122.
[61] 154 Mont. 488, 466 P.2d 85 (1970).
[62] Another ground was an attempted distinguishing of *Williams.* This was politely dismissed by the United States Supreme Court in a footnote. Kennerly, *supra* note 4, n. 3.
[63] BLACKFEET TRIBAL LAW AND ORDER CODE, Ch. 2, Civil Action, §1 (1967).
[64] Kennerly, *supra* note 61 at 90. *See also,* Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).

Since the Indians themselves enacted the law granting jurisdiction concurrent with the tribal courts to the state, an exercise of the power granted certainly could not be said to interfere with the right of the Indians to govern themselves. In other words, it seems perfectly logical that the Indians, with their right of self-government, could cede to a state the court jurisdiction which *Williams* had expressly denied.

The United States Supreme Court did not agree, and, on certiorari (without argument), the judgment of the Montana Court was vacated and remanded for further proceedings.[65]

The United States Supreme Court noted the *Williams* language that, "[e]ssentially, *absent governing Acts of Congress,* the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[66] (Emphasis supplied.) *But the Supreme Court dismissed any possible application of this Williams language to the entire problem of state court jurisdiction when it said:*[67]

> With regard to the particular question of the extension of state jurisdiction over civil causes of action by or against Indians arising . . . [within the exterior boundaries of an Indian reservation], there was, at the time of the tribal council resolution, a "governing Act of Congress"[68] . . . [which] conditioned the assumption of [such] state jurisdiction on "affirmative legislative action" by the State. . . . Here it is conceded that Montana . . . [did not take the required] affirmative legislative action with respect to the Blackfeet Reservation.[69] The unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction . . . [over civil causes of action by or against Indians arising within the exterior boundaries of an Indian reservation under the governing Act of Congress, since it was not the required "affirmative legislative action" by the state.][70]

[65]To the author's knowledge, no further proceedings were taken in the case.

[66]Kennerly, *supra* note 4 at 426-427.

[67]*Id.* at 427.

[68]The "governing Act" to which the Supreme Court made reference was the Act of August 15, 1953, 67 Stat. 590. The pertinent portion of the Act is Section 7, which provided:

> Section 7. The consent of the United States is hereby given to any . . . State not having jurisdiction with respect to . . . civil causes of action, . . . as provided for in this Act [jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian Country], to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

[69]Nor, it should be noted, did Montana take the required affirmative legislative action with respect to the extension of state civil jurisdiction over actions involving Indians which arise on any of the seven Indian reservations in Montana.

[70]The Court went on to hold that the unilateral action of the Blackfeet Tribal Council was also insufficient to vest Montana with jurisdiction under the provisions of the CIVIL RIGHTS ACT OF 1968, 82 Stat. 79. Title IV of this Act repealed Section 7 of the 1953 Act, and substituted a new scheme for the extension of state civil jurisdiction over actions involving Indians that arise within the exterior boundaries of an Indian reservation. Section 402(a) of this Act, 25 U.S.C. §1322(a), which deals with state court civil jurisdiction and imposition of state civil laws, provides:

> The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian Country situated within such State to assume, with the consent of the tribe occupying the particular In-

In *Williams,* the Court noted the existence of the Act of August 15, 1953, commonly referred to as P.L. 280.[71] However, the *Williams* Court, unlike the Court in *Kennerly,* did not call that act a "governing Act of Congress," so as to preclude any possible application of the *Williams* substantive test to the problem of state court jurisdiction. In *Kennerly,* on the other hand, the Court chose to label the act of 1953 a "governing Act of Congress," and in so doing effectively abolished the *Williams* test insofar as it was theretofore applicable to state court civil jurisdiction over actions which arise in Indian Country and involve Indians. The reason for the abolition is simple: by its own terms, the *Williams* test is only applicable "absent governing Acts of Congress."[72]

The rule of *Kennerly*—dictated not by prior court decisions, but by the fact that there presently exists a "governing Act of Congress"—is that state courts have no jurisdiction over civil actions by or against Indians which arise within the exterior boundaries of an Indian reservation, unless there is an express Congressional grant of such jurisdiction together with compliance with the conditions precedent, if any, of the express Congressional grant.[73] The rule is as absolute as it appears; that is, there are no exceptions to it.[74]

Manifestly, there are two limitations on the rule of *Kennerly.* First, the Court's opinion spoke only of the problem of state court jurisdiction, and did not consider the question of the imposition of state laws. Nevertheless, it must be noted that the present "governing Act of Congress"[75] makes provision not only for state court jurisdiction, but also for extension to Indians in Indian Country of "those civil laws of such State that are of general application to private persons or private property."

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dian Country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian Country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian Country or part thereof as they have elsewhere within that State.

[71]The pertinent portion of this act is set forth in note 68, *supra. See,* Williams, *supra* note 3 at 222-223.

[72]Williams, *supra* note 3 at 220.

[73]The "governing Act of Congress", an express Congressional grant of general state court civil jurisdiction over actions that arise within Indian Country and involve Indians, is, today, Title IV, CIVIL RIGHTS ACT OF 1968 §402(a). There are, in addition, a number of specific express Congressional grants of state court jurisdiction. *E.g.,* 25 U.S.C. §231 (1929, 45 Stat. 1185; amended 1946, 60 Stat. 962), which authorizes states to enforce some of their health and education laws on Indian reservations with respect to Indians.

[74]The Montana Supreme Court has correctly recognized the absolute nature of the *Kennerly* rule. In a *dictum* in the recent case of *Crow Tribe of Indians v. Deernose, supra* note 19, the Court said at 1136, citing *Kennerly:*

> It is abundantly clear that state court jurisdiction in Indian affairs on reservations *does not exist* in the absence of an express statutory grant of such jurisdiction by Congress together with strict compliance with the provisions of such statutory grant. (Emphasis supplied.)

[75]Title IV, CIVIL RIGHTS ACT OF 1968, §402(a).

If this act is a "governing Act of Congress" for purposes of state court jurisdiction, there is absolutely no reason why it is not a "governing Act of Congress" for the purpose of the imposition of state civil laws. If that is the case, and it ought clearly to be so, then the *Williams* test, insofar as it may have been applicable to impositions by the states of their laws and courts on reservation Indians, is no longer the law.[76] And this will continue so long as the present "governing Act of Congress," or something that closely resembles it, remains unrepealed or held invalid. Second, the *Kennerly* rule and the present "governing Act of Congress" are not concerned with state court jurisdiction or imposition of state laws with respect to matters within an Indian reservation that involve or effect only non-Indians. To determine the validity of state action with respect to non-Indians on an Indian reservation one must still look, so far as federal law is concerned, to decisions of the United States Supreme Court and acts of Congress; that is, such state action ought to be held valid only if: 1) it does not infringe on the right of reservation Indians to make their own laws and be ruled by them—to govern the internal affairs of a reservation;[77] and 2) it is not contrary to federal law.[78]

CONCLUSION

With respect to state court jurisdiction, because of *Kennerly,* states have no power to exercise court jurisdiction over civil actions by or against Indians that arise within Indian country, absent an express Congressional grant of such jurisdiction together with compliance with the terms, if any, of the grant. Moreover, under *Kennerly,* courts should hold that states have no power to impose their civil laws on reservation Indians without an express Congressional grant of such power together with compliance with the terms, if any, of the grant. The same result could be achieved by a strict interpretation of a disclaimer provision, if the state has such a provision.

States may impose their laws and courts with respect to matters within an Indian reservation that do not involve or effect Indians so long as the imposition is not contrary to federal law, does not infringe

[76]An argument could be made that Title IV, CIVIL RIGHTS ACT OF 1968, § 402(a) was intended to speak exclusively to the problem of state court jurisdiction, and that the phrase "those civil laws of such state that are of general application to private persons or private property shall have the same force and effect within such Indian Country or part thereof as they shall have elsewhere within that State" means only that, in a civil action involving Indians which arises in Indian Country, state (not tribal) law is to be applied. The author woud object to such an interpretation on the ground that it seems contrary to the primary rule of statutory interpretation, the "plain-meaning" rule. Of course, the author does realize that one man's plain-meaning is another's ambiguity, and that one often sees plainly only that which he wants to see. As usual, legislative intent is unclear. *See,* 1968 U.S. CODE CONG. AND ADM. NEWS 1837, 1865-1866.

[77]*See,* Williams v. Lee, *supra* note 3 at 219-220.

[78]*See,* Organized Village of Kake v. Egan, *supra* note 9 at 75; and Warren Trading Post Co. v. Arizona Tax Commission, *supra* note 59 at 690.

on the rights of Indians to regulate the internal affairs of a reservation, and is not contrary to the manner in which the state interprets its disclaimer provision, if the state has such a disclaimer.

Whether these principles are "good" or "bad" for Indians is one of policy, which the author is woefully unqualified to answer.[79] This note is an attempt only to discover what the law is; not what the law ought to be. At present, the determination of what ought to be rests in the hands of state legislatures, Congress, and the Indians themselves.

[79] Considerations of legal and practical policy are dealt with *infra*.