Montana Law Review

Volume 52
Issue 2 *Summer 1991*

Article 4

July 1991

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ARTICLES

MONTANA TRIBAL COURTS: INFLUENCING THE DEVELOPMENT OF CONTEMPORARY INDIAN LAW*

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* This article is dedicated to the judges of the tribal courts in Montana, Wyoming and elsewhere who work ceaselessly, often at great personal cost and for very little compensation, to bring a fair and responsive justice system to those residing on Indian reservations.

We thank Joan Poston for her encouragement and research assistance; Cecelia Palmer for her typing and good humor; and all of the students of the Indian Law Clinic—those who assisted in the preparation of this article, and those whose hard work and enthusiasm through the years have been key to the endeavors of the clinic.

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I. INTRODUCTION

Tribal courts located on Indian reservations within Montana's borders play a central role in the development of contemporary Indian law. Two leading recent United States Supreme Court decisions concerning tribal court civil jurisdiction, *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*[1] and *Iowa Mutual Insurance Co. v. LaPlante*,[2] originated in tribal courts in Montana.[3] An important aspect of the United States Supreme Court's opinion in *LaPlante* was previewed in a Ninth Circuit case that arose on the Fort Belknap Indian Reservation, *R.J. Williams Co. v. Fort Belknap Housing Authority*.[4]

Applying federal Indian law, the Montana Supreme Court has ruled in recent years on numerous tribal court jurisdiction cases originating in tribal courts or affected by tribal court activity. Tribal courts themselves are actively working to meet the challenge of the increased responsibility they face as a result of their development, as well as judicial recognition of the breadth of their authority.

Largely due to tribes' increasing assumption of existing jurisdictional authority, lawyers in Montana who do not specialize in Indian law are more likely now than previously to represent clients in matters involving Indian law. The significant non-Indian presence on reservations, either through land ownership and leasing, or business and recreational activity, creates many contacts between Indians and non-Indians. Cases arising from these contacts are be-

1. 471 U.S. 845 (1985).

2. 480 U.S. 9 (1987).

3. Except for Williams v. Lee, 358 U.S. 217 (1959), the only other modern United States Supreme Court decisions pertaining to tribal court civil jurisdiction, Kennerly v. District Court, 400 U.S. 423 (1971), and Fisher v. District Court, 424 U.S. 382 (1976), also arose on Indian reservations in Montana, the Blackfeet and the Northern Cheyenne. In addition, a much-cited regulatory jurisdiction case, occasionally (and questionably) applied in adjudicatory determinations, arose from challenges to Crow governing authority over hunting and fishing activities on non-Indian reservation lands—Montana v. United States, 450 U.S. 544 (1981).

4. 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985).

ing litigated more often than ever before in tribal court.

II. Federal Common Law and Tribal Court Civil Jurisdiction

Jurisdiction is the bedrock for the "right and power to interpret and apply the law."[5] Judges, practitioners and students turn regularly to constitutional and statutory law to find firm jurisdictional rules for the various courts in the American federal system. Expectedly, the rules will be precise; plaintiffs, defendants, and judges at least share a common interest in knowing with certainty that a forum may rightfully entertain and decide a dispute between parties.

This article emphasizes the civil jurisdiction of tribal courts and the interrelated issues of state and federal jurisdiction over civil disputes arising in Indian Country. For this adjudicatory arena, the jurisdictional rules have been formulated by a complex amalgam of law, including treaties, statutes, and judicial decisions. The results to date have yielded certain firm rules, as in specific matters related to the Indian Civil Rights Act[6] and the Indian Child Welfare Act.[7] For other civil matters, jurisdictional rules have evolved and are evolving in more piecemeal fashion.

The United States Supreme Court in 1985, and again in 1987, addressed the question of the reach of the general civil adjudicatory jurisdiction of tribal courts.[8] In both instances, the underlying cases involved Indian plaintiffs and non-Indian defendants. The Court's opinions restated important protections for tribal court civil jurisdiction over reservation affairs. These decisions did not establish broad general rules, however, and the Court has required that jurisdictional determinations be based on particularized inquiries into federal law as it applies to specific tribal governments and tribal courts. Further, tribal courts must have full opportunity to rule on their jurisdiction before a federal district court can address the issue. All of the ramifications for tribal, federal and state adjudicatory jurisdiction cannot be predicted with certainty until many specific jurisdictional inquiries have run their course.

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5. The American Heritage Dictionary of the English Language 711 (1981).

6. *See infra* notes 53-60 and accompanying text.

7. *See infra* Part IX.

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

III. History and Structure of Tribal Courts[9]

A. *Origins and Growth of Tribal Courts*[10]

Tribal courts in Montana (and elsewhere) derive their authority from inherent tribal powers;[11] but to a great degree, they have not descended from traditional Indian dispute-settling institutions.[12] Rather, tribal courts find their origins in courts the Office of Indian Affairs (predecessor of the Bureau of Indian Affairs (BIA)) created in the 1880s called "Courts of Indian Offenses."[13] The courts were modeled on Anglo-American courts and functioned as assimilative devices, similar to other techniques of the time used to "foster civilization" among the Indian tribes.[14]

Because many non-Indian government officials and others did not see or understand the traditional mechanisms used by tribes to maintain law and order among their members, non-Indians tended to believe that tribal societies were lawless.[15] Although clearly erroneous, this widespread belief generated attempts by non-Indians to fill what was perceived as a void with Anglo-American law,[16] legal

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9. This Part and Part X reflect the authorities cited throughout as well as the authors' more than thirteen years of experience working with tribal courts in this region. Each tribal court in Montana is representative of the tribe or tribes it serves. Our general comments here are not meant to imply that tribal courts are all the same.

10. For more detailed history of tribal courts and their origins, see United States v. Clapox, 35 F. 575 (D. Or. 1888); American Indian Lawyer Training Program, Inc., Indian Self-Determination and the Role of Tribal Courts (1977); American Indian Lawyer Training Program, Inc., Justice in Indian Country (C. Small ed. 1980) [hereinafter Justice in Indian Country]; American Indian Policy Review Commission, Report on Federal, State and Tribal Jurisdiction 121-24 (1976); V. DeLoria & C. Lytle, American Indians, American Justice (1983); W. Hagan, Indian Police and Judges (1966); National American Indian Court Judges Association (NAICJA) Long Range Planning Project, Indian Courts and the Future (1978) [hereinafter Indian Courts and the Future]; 2 F. Prucha, The Great Father: the United States Government and the American Indians 646-48 (1984); Collins, Johnson, and Perkins, *American Indian Courts and Tribal Self-Government*, 63 A.B.A. J. 808 (1977); Coulter, *Federal Law and Indian Tribal Law: The Right to Counsel and the 1968 Indian Bill of Rights*, 3 Columbia Survey of Human Rights Law 49 (1970-71); Zion, *Harmony Among the People: Torts and Indian Courts*, 45 Mont. L. Rev. 265 (1984).

11. United States v. Wheeler, 435 U.S. 313 (1978); Fisher v. District Court, 424 U.S. 382 (1976).

12. Contemporary traditional legal institutions remaining are primarily those of the Pueblos of the southwestern United States.

13. 2 F. Prucha, *supra* note 10, at 646-48.

14. W. Hagan, *supra* note 10, at 107-10. For a brief discussion of the negative impact of the Court of Indian Offenses on customary practices among the Crow Indians, see C. Bradley, After the Buffalo Days (1977).

15. For revealing studies to the contrary, see, *e.g.*, K. Llewellyn & E. Hoebel, The Cheyenne Way (1941); R. Strickland, Fire and the Spirits: Cherokee Law from Clan to Court (1975).

16. Perhaps the first federal comprehensive interference with tribal self-government

structures, and to some extent, decisionmakers.[17]

The Secretary of the Interior authorized Courts of Indian Offenses[18] in 1883 and directed the Commissioner of Indian Affairs to adopt both substantive and procedural regulations to be applied in the courts.[19] Early rules promulgated by the BIA prohibited such customary practices as "giveaways"[20] and traditional dances.[21] The

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was the creation of an Indian police force in 1878 by the Office of Indian Affairs. *See* W. HAGAN, *supra* note 10, at 42.

17. Before the creation of the Courts of Indian Offenses, at the onset of the Reservation era, Indian agents stationed on reservations exercised some judicial power. Even in 1928, on ten reservations the Superintendent still assumed the role of judge. INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 772 (L. Meriam ed. 1928) [hereinafter MERIAM REPORT].

18. The Courts of Indian Offenses are often called CFR courts because the *Code of Federal Regulations* contains their governing rules and procedures. *See* 25 C.F.R §§ 11.1-11.98 (1991).

19. Congress never explicitly authorized the Courts of Indian Offenses, although some find Congressional authorization in the 1921 Snyder Act ["the employment of . . . Indian police, Indian judges . . . ."] and in the continuing appropriations Congress made for the courts. *See* Snyder Act, ch. 115, 42 Stat. 208 (1921) (codified at 25 U.S.C. § 13 (1988)). *See also* Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).

20. Giveaways are:

> a traditional custom of all Montana Indian tribes [as well as many other tribes outside of Montana]. They are derived from the Indian belief that people should share with relatives and friends who have done good deeds for them or whom they respect. It is also customary for surviving family members to give away the material possessions of the deceased to his or her friends. [This is the type of giveaway specifically addressed by the 1883 rules.]
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> Usually the items given away [were] greatly prized by the owner and the ones receiving them [were] greatly honored. Even today, giveaways frequently involve cattle and horses, although it is more common to give blankets, beadwork and quilts.

Bryan, *Montana's Indians Yesterday and Today*, in 11 MONTANA MAGAZINE, MONTANA GEOGRAPHIC SERIES 113 (1985).

21. The 1883 regulations were reissued with some modifications in 1892 when the offenses were set forth in part:

> 4. *Offenses.*—For the purpose of these regulations the following shall be deemed to constitute *offenses*, and the judges of the Indian court shall severally have jurisdiction to try and punish for the same when committed within their respective districts.
>
> (a) Dances, etc.—Any Indian who shall engage in the sun dance, scalp dance, or war dance, or any other similar feast, so called, shall be deemed guilty of an offense, and upon conviction thereof shall be punished for the first offense by the withholding of his rations for not exceeding ten days or by imprisonment for not exceeding ten days; . . . .
>
> (b) Plural or polygamous marriages.—Any Indian under the supervision of a United States Indian agent who shall hereafter contract or enter into any plural or polygamous marriage shall be deemed guilty of an offense, . . . and so long as the person shall continue in such unlawful relation he shall forfeit all right to receive rations from the Government.
>
> (c) Practices of medicine men.—Any Indian who shall engage in the practices of so-called medicine men, or who shall resort to any artifice or device to keep the Indians of the reservation from adopting and following civilized habits and pur-

rules authorized the reservation Indian agent (forerunner of today's BIA Superintendent) to choose the tribal judges.[22] The judges generally were tribal members. In some instances, appeal of a decision of a Court of Indian Offenses could be made to the Indian agent. Despite their Anglo-American character, and even though many Indian people refused to accord legitimacy to them, Courts of Indian Offenses did play an influential role in reservation government until the middle of the twentieth century.[23]

The Indian Reorganization Act of 1934 (IRA),[24] legislation intended to revitalize tribal governments,[25] recognized as an existing power of Indian tribes the power to provide for tribal law and or-

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suits, or shall adopt any means to prevent the attendance of children at school, or shall use any arts of a conjurer to prevent Indians from abandoning their barbarous rites and customs, shall be deemed to be guilty of an offense, ...

(d) Destroying property of other Indians.—Any Indian who shall willfully or wantonly destroy or injure, . . . or appropriate . . . any property of any other Indian or Indians, shall . . . be deemed guilty of an offense, and upon conviction shall be compelled to return the property to the owner or owners, . . . and in addition he shall be imprisoned for not exceeding thirty days; and the plea that the person convicted or the owner of the property in question was at the time a "mourner," and that thereby the taking . . . of the property was justified by the customs or rites of the tribe, shall not be accepted as a sufficient defense.

F. PRUCHA, AMERICANIZING THE AMERICAN INDIANS 301-02 (1973).

22. The rules provided:

Appointment of judges.—There shall be appointed by the Commissioner of Indian Affairs for each district a person from among the Indians of the reservation who shall be styled "judge of the Indian court." The judges must be men of intelligence, integrity, and good moral character, and preference shall be given to Indians who read and write English readily, wear citizens' dress, and engage in civilized pursuits, and no person shall be eligible to such appointment who is a polygamist.

Each judge shall be appointed for the term of one year, subject, however, to earlier removal from office for cause by the Commissioner of Indian Affairs . . . .

Id. at 301.

23. *See* MERIAM REPORT, *supra* note 17, at 769-73. Coulter states: "Formal tribal courts with written codes, though products of the Indian subjugation during the nineteenth century, have become part and parcel of Indian self-government today." Coulter, *supra* note 10, at 64.

24. Ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1988)) (also known as the Wheeler-Howard Act for its sponsors, Senator Burton K. Wheeler of Montana and Representative Edgar Howard of Nebraska).

25. The extent to which tribal governments needed revitalization in 1934 as well as the extent to which the Indian Reorganization Act contributed to, rather than prevented, assimilation of Indian people remain issues of controversy today. According to the late D'Arcy McNickle, noted historian, anthropologist, author, and a member of the Confederated Salish & Kootenai Tribes, "Perhaps what can best be said about the Indian Reorganization Act is that it encouraged tribes to reassert the inherent rights which the courts had affirmed in them as domestic dependent nations down through the years." McNickle, *Tribal Government and the Indian Reorganization Act: Government by Consent*, in TRIBAL CONSTITUTIONS: THEIR PAST—THEIR FUTURE 12 (1978).

der.[26] The IRA encouraged tribes to adopt constitutions and codes of law.[27] Thus, tribes could adopt their own codes of laws and substitute the new codes for those imposed upon them by the Office of Indian Affairs. When a tribe took this course, the court changed from a Court of Indian Offenses, or CFR court[28] (a federal instrumentality),[29] to a tribal court, an institution of tribal self-government.[30] Most tribes have implemented this transition from CFR courts to tribal courts.[31] By 1976 all of the tribes in Montana had accomplished this change,[32] although some of the tribal codes remained largely derivative of the CFR code. By 1986 each of the tribes in Montana had completed at least one major tribal code revision.[33]

The recognition of tribal judicial authority in the IRA did not lead tribes to return to customary law. In the years since Indians

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26. Powers of Indian Tribes, 55 Interior Dec. 14 (1934); 25 U.S.C. § 476 (1988).

27. Some tribes had already adopted constitutions before enactment of the IRA. *See, e.g.*, CONSTITUTION OF THE ASSINIBOINE & SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION (1927). *See* Clow, *The Indian Reorganization Act and the Loss of Tribal Sovereignty: Tribal Constitutions on the Rosebud and Pine Ridge Reservations*, 7 GREAT PLAINS QUARTERLY 125-34 (1987). *See also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 129 (U.N.M. ed. 1942) (Cohen's *Handbook of Federal Indian Law* continues as the foremost treatise in the field. First published by the Department of the Interior in 1942, the *Handbook* built upon a 46 volume collection of federal laws and treaties compiled by Cohen and Theodore H. Haas, a colleague in the Department of the Interior. Although reprinted in the 1940s, the *Handbook* was out of print a decade later. A 1958 edition, first published by the Department of the Interior, evidenced revisions born of the termination period in federal Indian policy. Cohen's original work was republished in a facsimile reprint in 1971 by the American Indian Law Center and the University of New Mexico. The *Handbook* was substantially reorganized, rewritten and republished in 1982 by the collaborative efforts of leading Indian law scholars and practitioners, with Rennard Strickland of the University of Tulsa College of Law as Editor-in-Chief.).

28. *See supra* note 18.

29. United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380 (8th Cir. 1987).

30. The relevant regulation provides:

> The regulations in this part shall continue to apply to tribes organized under the act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), until a law and order code has been adopted by the tribe in accordance with its constitution and bylaws and has become effective; and thereafter §§ 11.3, 11.4, 11.301, 11.302, 11.303, 11.304, 11.305 and 11.306 shall continue in effect as long as the Indian judges and Indian police are paid from appropriations made by the United States or until otherwise directed.

25 C.F.R. § 11.1(d) (1991).

31. Only 21 CFR courts now exist in the United States. *Hearings on H.R. 972 Before the House Comm. on Interior and Insular Affairs*, 102d Cong., 1st Sess. (April 11, 1991) (statement of Ronald Eden, Director, Office of Tribal Services, Bureau of Indian Affairs). Approximately 200 tribal courts, including CFR and Alaska Native courts, are presently operating in the United States. 4 THE TRIBAL COURT RECORD 2 (Fall 1991).

32. In 1976 the Crow Tribal Court ceased operating as a CFR court.

33. See discussion on tribal code revision at *infra* Part X.

had been forced onto reservations some had lost touch with traditional law. Further, Interior Department personnel in Washington, D.C., drafted a model tribal constitution that many tribes adopted with minimal alterations, primarily because they lacked resources to design individualized constitutions. Furthermore, many tribes, rather than adopting tribally specific laws grounded in tribal tradition, modeled their written laws on the 1935 BIA revision of the 1883 Courts of Indian Offenses regulations.[34] Thus, many post-IRA tribal courts and CFR courts did not differ significantly from pre-IRA courts.

Some tribal court experts view the post-IRA model tribal constitutions and the CFR code as factors that limited and slowed tribal court development because of their narrow approach to tribal court jurisdiction.[35] For example, the 1935 CFR code (which has been changed very little) authorized criminal jurisdiction only over members of federally recognized tribes. The code excluded from tribal court jurisdiction crimes covered by the Major Crimes Act,[36] even though the federal act does not provide that federal jurisdiction is exclusive. The code also limited criminal penalties and provided for civil jurisdiction over non-Indian defendants only with their consent.

Although the CFR civil provisions are sparse, the code did provide CFR courts with broad choice of law authority.[37] The CFR directed Courts of Indian Offenses to apply state law in the absence of applicable federal or tribal law. Most contemporary tribal codes continue to include similarly broad choice of law provisions.[38]

With federal governmental encouragement, Indian tribes began to make more significant changes in their court systems in the 1960s; this work continues today. In recent years, the federal and tribal governments have directly increased the responsibilities and jurisdiction of tribal courts significantly by enacting and amending federal and tribal jurisdictional statutes and ordinances. Moreover,

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34. An updated version of these regulations can be found in 25 C.F.R. Part 11 (1991). *See also* Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).

35. JUSTICE IN INDIAN COUNTRY, *supra* note 10, at 53.

36. Originally enacted in 1885, the Major Crimes Act is codified at 18 U.S.C. § 1153 (1988).

37. The regulation entitled "*Law applicable to civil actions*" provides in part:

> Any matters that are not covered by the traditional customs and usages of the tribe, or by applicable Federal laws and regulations, shall be decided by the Court of Indian Offenses according to the laws of the state in which the matter in dispute may lie.

25 C.F.R. § 11.23(c) (1991).

38. *See infra* note 488.

Congress has expanded tribal exercise of tribal regulatory authority.[39] In 1978 Congress affirmed broad tribal court authority over child welfare matters involving Indian children both on and off the reservation.[40] In 1982 Congress authorized tribes to issue municipal development bonds with the same favorable tax treatment as that enjoyed by state and local governments.[41] In 1986 Congress increased the maximum allowable criminal sentences tribal courts can impose.[42] In the environmental area, Congress, in several instances, has permitted tribes to assume the same authority as states in the federal environmental regulatory scheme.[43]

Tribal governments have responded to this federal action, and to the complexities of modern life, by enacting tribal law in areas that previously had received little attention, such as environmental regulation, taxation, land use, health, and natural resources. Disputes related to the implementation of these codes are regularly brought to tribal courts. Tribal governments have also amended tribal laws to remove limitations upon the exercise of tribal inherent authority over the reservations and their people.[44]

Federal courts have also thrust more responsibility on tribal justice systems. Following a 1978 United States Supreme Court ruling, most challenges to tribal government activity based on the Indian Civil Rights Act must be determined by tribal courts.[45] The Court has also upheld broad tribal authority to tax,[46] to regulate on-reservation activities of non-Indians engaged in agreements with tribes or otherwise affecting tribal health, welfare and safety,[47] and to regulate Indian and non-Indian hunting and fish-

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39. *See Tribal Court Systems and Indian Civil Rights Act: Hearing Before the Senate Select Committee on Indian Affairs*, 100th Cong., 2d Sess. 70 (1988) (statement of Professor David K. Getches).

40. *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1988)). *See also infra* Part IX.

41. Indian Tribal Government Tax Status Act of 1982, Pub. L. 97-473, 96 Stat. 2607 (codified in scattered sections of 26 U.S.C. (1988)).

42. Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (codified as amended at 25 U.S.C. § 1302 (1988)).

43. *See* 7 U.S.C. § 136(u) (1988); 33 U.S.C. § 1377(e) (1988); 42 U.S.C. §§ 300(j)-11, 6948(a), 9604(d), 9626 (1988).

44. *See infra* Part X.

45. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (limiting relief in federal courts under the ICRA to habeas corpus proceedings). *See infra* notes 59-60 and accompanying text. For discussion of the ICRA in general, see *infra* notes 53-60 and accompanying text.

46. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). *See infra* notes 149-54 and accompanying text.

47. Montana v. United States, 450 U.S. 544 (1981). *See infra* note 164 and accompanying text. *But see* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

ing on reservations.[48] Of primary importance to tribal courts are the Supreme Court's holdings that tribal court jurisdiction is presumptive over disputes arising from the on-reservation activities of Indians and non-Indians alike,[49] and that when that jurisdiction is challenged, tribal courts must make the initial jurisdictional determination.[50] Thus, tribal courts now adjudicate cases covering a broad spectrum of issues, ranging from customary law to environmental and land-use regulation.[51]

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48. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). *But see* Montana v. United States, 450 U.S. 544 (1981).

49. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987). *See* discussion at *infra* Part VII.

50. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985). *See* discussion at *infra* Part VI.

51. A review of recent tribal court cases in the American Indian Lawyer Training Programs's Indian Law Reporter illustrates the complexity of cases determined in today's tribal court systems. *See, e.g.*, Southern Ute Tribe v. Roote, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6031 (S. Ute Trib. Ct. 1991) (criminal statute held not impermissibly vague and therefore not a violation of defendants' rights under the Indian Civil Rights Act); Cavenham Forest Indus., Inc. v. Colville Confederated Tribes, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6037 (Colville Ct. App. 1991) (appellate court affirmed trial court's issuance of temporary injunction against timber company's landfill until company complied with tribal land use ordinance); Navajo Communications Co. v. Navajo Tax Comm'n, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6068 (Navajo 1991) (upholding imposition of tribal business activity tax on telephone company doing business on the reservation); Mustang Fuel Corp. v. Cheyenne Arapaho Tax Comm'n, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6095 (Dist. Ct. for the Cheyenne-Arapaho Tribes of Okla. 1991) (action challenging authority of tribal tax commission to levy gross production taxes on hydrocarbons produced on allotted lands owned by individual Indians); Indian Credit Corp. v. Gillette, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6001 (N. Plains Intertrib. Ct. App. 1990) (appeal of an action for the collection of agricultural loans in which intertribal appellate court directed that laws of District of Columbia govern validity of terms and interest rate of loan contracts); MacDonald v. Navajo Nation *ex rel.* Rothstein, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6003 (Navajo 1990) (issues included scope of investigatory subpoena and whether testimonial privilege applied to former tribal chairman); Davis v. Turtle Mountain Hous. Auth., 17 Indian L. Rep. (Am. Indian Law. Training Program) 6035 (Turtle Mountain Trib. Ct. 1990) (trial court denied motion to dismiss case against tribal housing authority on sovereign immunity grounds); Davis v. Superpumper, Inc., 17 Indian L. Rep. (Am. Indian Law. Training Program) 6063 (Turtle Mountain Trib. Ct. 1990) (trial court granted a preliminary injunction against defendant's gasoline pricing); *In re* Estate of Jumbo, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6042 (Navajo 1990) (appellate court reversed tribal trial court holding that Navajo courts are not bound by the distribution section of the Federal Employees' Group Life Insurance Act (FEGLI) and that while a constructive trust can be ordered to prevent payment of FEGLI proceeds to a beneficiary, the facts of the case did not warrant imposition of a constructive trust); Estate of Bighorse v. Confederated Salish & Kootenai Tribes, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6003 (App. Ct. of the Confederated Salish & Kootenai Tribes 1989) (affirming trial court's finding of jurisdiction over action for damages arising from an automobile accident on the Flathead Reservation, but reversing the trial court's allocation of the parties' liability for damages, and holding $3 million damage award not excessive); DeRoche v. Blackfeet Indian Hous. Auth., 17 Indian L. Rep. (Am. Indian Law. Training Program) 6036 (Blackfeet Trib. Ct. App. 1989) (appellate court affirmed trial court's $1.18 million jury verdict against tribal housing authority in favor of general con-

B. Contemporary Tribal Court Structure

Tribal court structure[52] retains its Anglo-American character, in part because of the 1968 enactment of the Indian Civil Rights Act (ICRA).[53] In the ICRA, Congress addressed the fact that the federal Bill of Rights does not apply to tribal governments,[54] although Indians, as citizens of the United States, are protected by the Bill of Rights with respect to actions by the state and federal governments. The ICRA imposes most of the provisions of the federal Bill of Rights on tribal governments.[55]

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struction contractor); Defender v. Bear King, 17 Indian L. Rep. (Am. Indian Law. Training Program) 6078 (Standing Rock Sioux Trib. Ct. 1989) (denial of motion for summary judgment in wrongful discharge case).

52. Several excellent articles on tribal court practice have been written recently. *See, e.g.*, Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M.L. REV. 49 (1988); Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987); Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989).

53. Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. §§ 1301-1341 (1988)). This pattern may be changing. For example, in 1982 the Navajos established the Navajo Peacemaker Court, a court system that blends Navajo tradition and procedure with the established Navajo tribal court system, a system that had its origins in Anglo-American law. For an interesting article describing the origins of the Peacemaker Court, see Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983). In 1991 the Blackfeet Tribal Court convened a similar traditional dispute resolution body for a matter involving internal relations of the tribe.

54. Talton v. Mayes, 163 U.S. 376 (1896). *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-57 (1978).

55. The ICRA provides:

INDIAN RIGHTS

SEC. 202. No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one

By judicial decision interpreting its legislative history, the ICRA has been held to require that tribal governments must comply with its provisions in their dealings with non-Indians as well as with Indians.[56] For a decade federal district courts heard many civil claims under the Act[57] and generally interpreted the ICRA in light of the tribal context and not necessarily in the same way as courts interpret similar provisions in the Bill of Rights.[58] Then in 1978, the United States Supreme Court ruled in *Santa Clara Pueblo v. Martinez*[59] that in the ICRA Congress had neither provided a private civil cause of action nor waived the sovereign immunity of Indian tribes. The Court found that Congress had limited federal remedies under the Act to habeas corpus petitions. The Court reasoned that "[t]ribal forums are available to vindicate rights created by the ICRA . . . [which had] the substantial and intended effect of changing the law which these forums are obliged to apply."[60]

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offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

HABEAS CORPUS

SEC. 203. The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 77, 77-78 (1968) (codified as amended at 25 U.S.C. §§ 1302-1303 (1988)).

Before passage of the ICRA, some tribal constitutions included provisions guaranteeing individual rights. *See, e.g.*, CONSTITUTION & BYLAWS OF THE CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION art. VII, Bill of Rights.

56. Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969).

57. The federal courts had held that they had jurisdiction to hear the cases under the federal question jurisdiction statute (28 U.S.C. § 1331) or the civil rights jurisdiction statute (28 U.S.C. § 1343 (1) and (4)), or both. *See* D. GETCHES & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW, 369-70 (2d ed. 1986).

58. Tom v. Sutton, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976). *But see* United States v. Strong, 778 F.2d 1393, 1397 (9th Cir. 1985).

59. 436 U.S. 49 (1978).

60. *Id.* at 65. An exception to the *Santa Clara* rule has been found when a non-Indian corporation claiming an Indian Civil Rights Act violation was denied a tribal forum. Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981). *See also* Little Horn State Bank v. Crow Tribal Court, 690 F. Supp. 919 (D. Mont. 1988) (applying *Dry Creek Lodge* when a debtor attempted to have a state court enforce an *ex parte* order of the Crow Tribal Court issued against the creditor more than two years after the creditor had secured a judgment in state court). The federal court's judgment and memorandum were subsequently vacated and the action dismissed

The justice meted out by tribal courts does not always replicate that found in their state and federal counterparts.[61] Tribal court judges and other court personnel most often are tribal members whose cultural values infuse their actions.[62] Tribal courts generally render swifter decisions and often in a manner less formal than state and federal courts.[63] For example, in criminal proceedings tribal judges may require restitution for damages rather than the imposition of a fine or imprisonment.[64]

C. *Montana Tribal Courts*

Each of the seven tribal governments located in Montana has a tribal justice system.[65] Each justice system has a trial court and an appellate court. The appellate court formerly was most often composed of judges who did not preside at the trial,[66] but the cur-

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with prejudice after the parties apparently settled the matter. Little Horn State Bank v. Crow Tribal Court, 16 Indian L. Rep. (Am. Indian Law. Training Program) 3075 (D. Mont. 1989).

61. The fact that tribal courts were patterned after Anglo-American institutions does not entirely dictate their character. According to a report of the National American Indian Court Judges Association,

> If Indian courts have not been terribly destructive of Indian culture, it can be attributed to two facts: (1) most judges historically have been Indians, and (2) federal funding has been so lean that courts have had little influence, destructive or otherwise. Factors such as removal, war, and confinement on reservations were far more powerful.

INDIAN COURTS AND THE FUTURE, *supra* note 10, at 7. The authors note, as indicated in this article, that tribal court influence has expanded greatly since the publication of this 1978 report. *See generally* Tso, *supra* note 52.

62. Chief Judge Tom Tso of the Supreme Court of the Navajo Nation has said:

> Navajos have survived since before the time of Columbus as a separate and distinct people. What holds us together is a strong set of values and customs, not words on paper. I am speaking of a sense of community so strong that, before the federal government imposed its system on us, we had no need to lock up wrongdoers. If a person injured another or disrupted the peace of the community, he was talked to, and often ceremonies were performed to restore him to harmony with his world. There were usually no repeat offenders.

Tso, *supra* note 52, at 231.

63. *See generally* Coulter, *supra* note 10; Taylor, *supra* note 52; Zion, *supra* note 53.

64. *See, e.g.*, TRIB. CODE OF THE N. CHEYENNE RESERVATION, R. CRIM. P. 35 (1987).

65. The courts are: Blackfeet Tribal Court, Browning; Chippewa-Cree Tribal Court, Rocky Boy's Agency; Confederated Salish & Kootenai Tribal Court, Pablo; Crow Tribal Court, Crow Agency; Fort Belknap Community Court, Fort Belknap Agency; Fort Peck Tribal Court, Poplar and Wolf Point; Northern Cheyenne Tribal Court, Lame Deer. *See* INDIAN LAW CLINIC, TRIBAL COURTS IN MONTANA AND WYOMING (1991) [hereinafter TRIBAL COURTS IN MONTANA AND WYOMING] (Published annually by the Indian Law Clinic of the University of Montana School of Law, this booklet contains an entry for each tribal court, listing tribal court personnel, conditions of practice, filing fees and procedures, a basic guide to tribal civil, criminal and Indian Child Welfare Act jurisdiction, and other similar items of interest to tribal court practitioners.).

66. *See, e.g.*, CROW TRIB. CODE § 3-3-331 (1978).

rent trend is toward a free-standing court composed of judges, usually serving on a part-time basis, who hear only appeals.[67]

Tribal judges generally are tribal members who may have a background in law or law enforcement, but to date most tribal judges are not lawyers. Increasingly, as their dockets become more complex, tribal courts are served by lawyers in the capacity of law clerks. Tribal court judges participate in regional and national training programs.[68] A national certification program has recently been established for tribal court judges.[69] Most tribal judges are appointed by the tribal council, but tribal law on some reservations provides for the election of judges.[70]

In most courts many parties are not represented by legal advisers. Those who are, are often represented by advocates (paralegals) rather than licensed attorneys. Some tribal courts in Mon-

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67. *See, e.g.*, BLACKFEET TRIB. CODE ch. 11, pt. 1, § 1 (1967); FORT PECK ASSINIBOINE & SIOUX TRIBES COMPREHENSIVE CODE OF JUSTICE tit. 1, § 203 (1989).

68. Since 1983 the National Indian Justice Center (NIJC) of Petaluma, California has presented comprehensive national training sessions on a variety of topics for tribal court judges and other tribal court personnel. Most of the instructors have tribal court experience. Participants receive extensive written training manuals on the course subject matter which can be invaluable to courts with limited libraries.

> The American Indian Lawyer Training Program (AILTP) was founded in 1973 to strengthen and enhance the development of tribal constitutions by providing programs and services which:
>
> * improve access to the increasingly vast and complex legal developments that affect Indian tribes and their members;
>
> * promote communication and cooperation among and between members of the Indian legal community and others who participate in making decisions and policies affecting Indian people; and
>
> * develop the skills of members of the Indian legal community.

18 Indian L. Rep. (Am. Indian Law. Training Program) 9 (1991). Since 1974 AILTP has published the Indian Law Reporter, a monthly compilation of federal, state and tribal Indian law cases and administrative material.

Training and technical assistance have long been available from the American Indian Law Center (AILC) of Albuquerque, New Mexico, the oldest national Indian controlled and operated legal and governmental advocacy organization. AILC's principal interest from its inception has been the development of tribal governmental institutions and tribal relationships with federal, state and local governments. AILC's services include legal research, policy analysis, technical assistance and professional organizational development. AILC has worked with tribal courts directly with code and system development and indirectly with training and the development of model codes and systems.

Other, smaller organizations also provide training opportunities. The Montana-Wyoming Tribal Court Judges Association complements national training programs by directing regional sessions in cooperation with the Indian Law Clinic of the University of Montana School of Law.

69. The National Indian Justice Center established the program. The Justice Center and New College of California have also created a two-year degree program for tribal court personnel leading to an Associate of Arts degree in Indian Justice Systems.

70. *See, e.g.*, CHIPPEWA-CREE CONST. art. XII (1935); CROW TRIB. CODE §§ 3-3-202, 3-3-305 (1978).

tana employ tribal advocates who provide legal services paid for by the tribe in criminal cases[71] and in civil cases.[72] Partly for these reasons, tribal court proceedings are generally less formal than proceedings in state and federal court.

Tribal courts have full dockets. Historically, the majority of the cases heard were criminal matters. Increased recognition of tribal court civil adjudicatory authority and replacement of the CFR code with comprehensive tribal codes have resulted in a steadily increasing number of civil cases. In the Montana tribal court with the greatest number of case filings, the Blackfeet Tribal Court, approximately 8500 cases are filed annually; of these, about 5000 are criminal cases.[73] Even the smallest tribal court, the Chippewa-Cree Tribal Court of the Rocky Boy's Reservation, processed over 700 cases in 1989.[74]

Nationally, tribal court budgets are small, and Montana tribal court budgets are no exception.[75] Generally the basic operating costs are provided through contracts with the BIA under the Indian Self-Determination and Education Assistance Act of 1975.[76] Additional funds may be provided by the tribal government, but often tribes lack the resources to make an appreciable contribution.[77]

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71. *E.g.*, the Blackfeet Tribe and the Fort Belknap Indian Community.

72. *E.g.*, the Confederated Salish & Kootenai Tribes.

73. *See* JUDICIAL SYSTEM OF THE BLACKFEET TRIBE (Aug. 1990) (report to Bureau of Indian Affairs).

74. *See* JUDICIAL SYSTEM OF THE CHIPPEWA CREE INDIANS (Aug. 1990) (report to Bureau of Indian Affairs).

75. *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 37-44 (1991). Senator Daniel K. Inouye, Chairman of the Senate Select Committee on Indian Affairs, says that "[t]he reality is that the quality of justice that tribal courts are able to render is most often a factor of the amount of funding and resources available to the courts." Senator Daniel Inouye, Remarks at Meeting of the National American Indian Court Judges Association (Apr. 2, 1991).

76. Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. § 450(f) (1988)). The contracts are commonly referred to as "638 contracts" because the Act is found in Public Law 93-638. In September of 1991 Senators Daniel Inouye (Haw.) and John McCain (Ariz.) introduced a bill that would dramatically increase the amount and change the method of funding tribal courts. The Indian Tribal Courts Act of 1991 would fund tribal courts at a level equivalent to state courts. The Act would also establish a national tribal judicial conference composed of tribal court judges whose work would include working with tribal governments, developing a formula for distribution of tribal court funding, surveying tribal court development, and providing technical assistance and direction to tribal courts. The bill would also establish a Tribal Justice Institute to administer tribal court grant programs for education, research and planning. S. 1752, 102d Cong., 1st Sess. (1991).

77. The tribes in Montana with substantial income provide a great deal of financial support to their court systems. The Fort Peck and Flathead Tribes make significant contributions to support their court systems. According to tribal officials, the total fiscal year 1992 budget of the Fort Peck Tribal Court is $447,271. Of this total, the tribe provided $362,771

In the last twenty years a number of federal and tribal entities have issued reports on tribal justice systems. A common thread running through the reports has been the pressing need for additional funding for the courts.[78] Most recently, in 1991, the United States Commission on Civil Rights expressed its support for "the pending and proposed congressional initiatives to authorize funding of tribal courts in an amount equal to that of an equivalent state court."[79] The United States Supreme Court has recognized tribal courts as essential components of tribal self-government. Their breadth of jurisdiction necessitates adequate funding to enable tribal courts to perform their responsibilities.

IV. The Centrality of Tribal Courts to Tribal Self-Government

A. Williams v. Lee—*Judicial Support of Tribal Autonomy*

Notably in a field of law in which constants are threatened, federal courts have repeatedly emphasized the importance of tribal court civil jurisdiction to tribal self-government. Their decisions have increasingly protected tribal courts from the competing jurisdiction of both state and federal courts. Slightly more than three decades ago, in *Williams v. Lee*,[80] the United States Supreme Court held that a tribal court had exclusive jurisdiction over a suit stemming from a transaction involving Indians within a reservation. The case began with a non-Indian merchant filing an action in an Arizona state court to collect for goods sold on credit to Navajo Indians on the Navajo reservation. The Arizona Supreme Court upheld state jurisdiction on the grounds that no Act of Congress expressly prohibited Arizona courts from exercising jurisdiction over civil suits by non-Indians against Indians when such suits arise on an Indian reservation.[81] The Supreme Court granted certiorari because it found the Arizona decision to be a "doubtful determination of the important question of state power over Indian

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and the federal government provided $84,500. The Fort Peck Court of Appeals' separate budget, provided entirely by the tribe, is $30,000. The fiscal year 1992 total budget of the Confederated Salish & Kootenai Tribal Court is $433,711; the tribal contribution is $283,711 and the federal contribution is $150,000.

78. The need for additional funding is also addressed in *Tribal Court Systems and Indian Civil Rights Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. (Jan. 22, 1988).

79. United States Commission on Civil Rights, The Indian Civil Rights Act 72-73 (June 1991). This report refers to proposed legislation such as Senate Bill 1752. *See supra* note 76.

80. 358 U.S. 217 (1959).

81. *Id.* at 218.

affairs . . . ."[82] In reversing the Arizona court, the Supreme Court reviewed the long course of its treatment of state power in Indian Country, beginning with Chief Justice John Marshall's seminal 1832 opinion, *Worcester v. Georgia*.[83] Justice Marshall had drawn sharp lines in barring state authority from Indian Country, and the *Williams v. Lee* Court recounted the modifications of the *Worcester* principles that the Court had made over the years in decisions when it concluded that tribal relations and rights of Indians would not be jeopardized. These modifications included the Court's decisions approving suits by Indians against outsiders in state courts[84] and state criminal jurisdiction over reservation crimes committed by non-Indians against one another.[85]

As is its routine practice, the Court noted the primacy of Congress in Indian affairs; it acknowledged that Congress could either grant states the jurisdiction in Indian affairs that *Worcester* had denied or, alternatively, take authority away from the Navajos.[86] The Court found no grant of state jurisdiction or diminishment of tribal governing power in either express statute or congressional policy. On the contrary, the Court concluded that Congress had "acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."[87] Congress had encouraged the strengthening of tribal governments and courts in the Indian Reorganization Act of 1934 and subsequent BIA policies had sought to carry out this congressional mandate.[88] In recent years the Navajo court system had developed more fully and was capable of exercising broad criminal and civil jurisdiction, including suits by outsiders against Indian defendants.[89]

In delivering the opinion, Justice Black also scrutinized the particular relations between the United States and the Navajos to determine if they revealed any departure from policies applied to other Indians. Not finding any distinction, Justice Black concluded that implied in the 1868 Navajo Treaty with the United States "was the understanding that the internal affairs of the Indians re-

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82. *Id.*

83. 31 U.S. (6 Pet.) 515 (1832).

84. *Williams*, 358 U.S. at 219-20 (citing Felix v. Patrick, 145 U.S. 317 (1892) and United States v. Candelaria, 271 U.S. 432 (1926)). *See also* McCrea v. Busch, 164 Mont. 442, 524 P.2d 781 (1974).

85. *Williams*, 358 U.S. at 220 (citing New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946)). *See also* Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1882).

86. *Williams*, 358 U.S. at 221.

87. *Id.* at 220.

88. *Id.*

89. *Id.* at 222.

mained exclusively within the jurisdiction of whatever tribal government existed."[90] *Williams v. Lee* is perhaps best known for the Court's succinct inquiry: "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."[91] The opinion's concluding passage provided the answer to this inquiry:

> 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. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.[92]

In years following, the *Williams v. Lee* decision came to stand for the deceptively simplified rule that tribal courts have exclusive jurisdiction over suits by non-Indians against Indians arising out of reservation transactions.[93] It came as no surprise, therefore, when

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90. *Id.* at 221-22.

91. *Id.* at 220.

92. *Id.* at 223 (citations omitted).

93. Passages in United States Supreme Court opinions in the 1970s suggest that the alignment of civil cases (non-Indian v. Indian or Indian v. non-Indian) was not determinative of tribal court jurisdiction. In Kennerly v. District Court, 400 U.S. 423, 427 (1971), the Court referred to "civil causes of action by or against Indians arising in Indian country" in discussing the state jurisdiction to which tribes could acquiesce (and implicitly retain without acquiescence) under Public Law 280. *See infra* notes 107-13 and accompanying text. In Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978), the Court observed that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."

For an early discussion of the rightfulness of tribal court civil jurisdiction over non-Indian as well as Indian defendants, see Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 221, 224-25 (Since writing this article and moving from his position as Professor of Law at Arizona State University to the bench of the Ninth Circuit Court of Appeals, Judge William C. Canby, Jr., has authored two editions of the highly respected *American Indian Law in a Nutshell* (West 1981, 1988).).

In his 1973 article, Judge Canby argued persuasively that there was no federal law requiring the limitation, generally included in tribal codes of that time, that civil suits could only be brought in tribal courts when defendants were tribal members or when both parties stipulated to the jurisdiction of the tribal court. Because a basic principle of law provides that personal consent cannot confer subject matter jurisdiction upon a court, the provisions of tribal codes and federal regulations permitting tribal courts to assert jurisdiction over non-Indian defendants with consent of the parties indicated there were "no legal restraints, aside from tribal ordinances, barring [tribal courts] from asserting jurisdiction over non-

the United States Supreme Court held in *Fisher v. District Court*,[94] that the Northern Cheyenne Tribal Court had exclusive jurisdiction over an adoption proceeding in which all parties were members of the Tribe and residents of the Northern Cheyenne Reservation.

Rejecting the Montana Supreme Court's reasoning that denying access to state courts violated equal protection rights, the Supreme Court noted an 1877 federal statute ratifying an agreement between the Northern Cheyenne Tribe and the United States which provided that Congress would "secure to [the Indians] an orderly government."[95] The Court recounted that the Northern Cheyenne Tribe had adopted a constitution under the Indian Reorganization Act, "a statute specifically intended to encourage Indian tribes to revitalize their self-government."[96] Thereafter, the tribal council had established the tribal court and granted it jurisdiction over adoptions " 'among members of the Northern Cheyenne Tribe.' "[97]

After reiterating the *Williams v. Lee* test ("whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them"), the Court reversed the Montana Supreme Court's ruling with the observation that "[s]ince this litigation involves *only* Indians, at least the same [test] must be met before the state courts may exercise jurisdiction."[98] In the adoption proceeding at issue, "[s]tate-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court."[99]

The Court found no impermissible racial discrimination in the denial of access to the state courts to the Indian couple seeking a custody determination. As it has characterized the nation's unique treatment of Indians in other circumstances,[100] the Court stated

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Indian defendants." Canby, *Civil Jurisdiction and the Indian Reservation*, *supra*, at 225.

94. 424 U.S. 382 (1976) (per curiam) (a pre-Indian Child Welfare Act decision reversing a decision of the Montana Supreme Court that had permitted state district court jurisdiction based upon plaintiff's right to access to state court).

95. *Id.* at 386 (citing Act of Feb. 28, 1877, ch. 72, 19 Stat. 256).

96. *Id.* at 387. *See supra* notes 24-33 and accompanying text.

97. *Fisher*, 424 U.S. at 387 (citation omitted).

98. *Id.* at 386 (emphasis added).

99. *Id.* at 387.

100. *See, e.g.*, Morton v. Mancari, 417 U.S. 535 (1974) (upholding an employment and promotion preference for qualified Indians in the Bureau of Indian Affairs). The Court stated that the preference was "granted to Indians not as a discrete racial group, but, rather as members of quasi-sovereign tribal entities." *Id.* at 554.

See also United States v. Antelope, 430 U.S. 641 (1977), which upheld the constitutionality against equal protection challenge of federal criminal statutes applicable to Indians in Indian Country. Such federal legislation was not an impermissible racial classification, but

that the tribal court's exclusive jurisdiction derived not from the race of the plaintiff, but "rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law."[101]

B. *Congressional Authorization of State Jurisdiction*

In both *Williams* and *Fisher*, the Supreme Court observed that Congress had authorized states to assume civil jurisdiction over reservation Indians within their boundaries, but that neither Arizona nor Montana had taken the steps essential to exercise the civil jurisdiction granted by Congress. The Court's reference in each case was to Public Law 280.[102] This 1953 legislation provided for outright grants of criminal and civil jurisdiction in Indian Country to first five, and then, six states.[103] It also provided an option for other states. Until 1968 states could have unilaterally assumed similar jurisdiction by affirmative legislative action.[104] In

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was "rooted in the unique status of Indians as 'a separate people' with their own political institutions." *Id.* at 646.

101. *Fisher*, 424 U.S. at 390.

102. Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, and 28 U.S.C. § 1360 (1988)).

103. As enacted, 18 U.S.C. § 1162(a) extended state *criminal* jurisdiction to all Indian Country within the States of California and Nebraska; to all Indian Country within Minnesota except the Red Lake Reservation; to all Indian Country within Oregon except the Warm Springs Reservation; and to all Indian Country within Wisconsin except the Menominee Reservation. The legislation was amended in 1958 to include Indian Country in Alaska.

Twenty-eight U.S.C. § 1360(a) extended state *civil* jurisdiction, including exceptions, to the same five states named in 18 U.S.C. § 1162. It was amended in 1958 to include all Indian Country within Alaska effective upon that state's admission to the Union, January 3, 1959.

The Menominee Reservation was brought under Public Law 280 jurisdiction in 1954. Following termination and restoration, Wisconsin retroceded its jurisdiction over the Menominee Reservation to the federal government in 1976. Similarly, acting under 25 U.S.C. § 1323, Nebraska has retroceded jurisdiction over the Winnebago and Omaha reservations.

Eighteen U.S.C. § 1162(a) and (c) provides that upon assuming jurisdiction under the Act, a state will have jurisdiction over offenses committed by or against Indians in Indian Country to the same extent that a state has jurisdiction over offenses committed elsewhere in the state. State criminal laws are to have the same force and effect in Indian Country as elsewhere in the state, and federal authority for law enforcement under 18 U.S.C. §§ 1152 and 1153 is displaced by state authority.

Twenty-eight U.S.C. § 1360(a) provides that upon assuming jurisdiction under the Act, a state will have jurisdiction over causes of action between Indians and to which Indians are parties. Linked to that jurisdiction is the provision that the "civil laws of [a] State that are of general application to private persons or private property shall have the same force and effect within . . . Indian Country as they have elsewhere in the State." 28 U.S.C. § 1360(a) (1988).

104. 18 U.S.C. § 1162 (1988); 28 U.S.C. § 1360 (1988). Section 6 of the original act gave the consent of the United States to any state to amend its constitution or statutes to remove any legal impediment to the assumption of Public Law 280 jurisdiction notwithstanding the disclaimer of jurisdiction over Indian lands in any Enabling Act for the admission of a state to the Union. Act of Aug. 15, 1953, Pub. L. No. 280, § 6, 67 Stat. 588, 590. Section 7 of the

1968, as part of the omnibus Indian Civil Rights Act, Congress required that *tribes* must also consent to subsequent assumptions of Public Law 280 jurisdiction.[105] This legislation also permitted states to retrocede to the federal government all or part of the jurisdiction they had previously assumed under Public Law 280.[106]

1. *Public Law 280 Procedures Initially Are Strictly Construed*

At the first opportunity, the United States Supreme Court strictly construed the procedural provisions of Public Law 280 in *Kennerly v. District Court*.[107] The case, clearly similar to *Williams*

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original act gave the consent of the United States to any state not having Public Law 280 criminal or civil jurisdiction "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." Act of Aug. 15, 1953, Pub. L. No. 280, § 7, 67 Stat. 588, 590. Several states, including Montana, assumed a measure of Public Law 280 jurisdiction without amending their constitutions. (Montana's disclaimer of jurisdiction over Indian lands, part of Ordinance I of the state's 1889 Constitution, was reaffirmed in the 1972 Constitution, confirming the "agreement and declaration" that Indian lands "remain under the absolute jurisdiction and control of the congress of the United States, . . . until revoked by the consent of the United States *and the people of Montana*." MONT. CONST. art. I (emphasis added).)

When Montana's Public Law 280 criminal jurisdiction on the Flathead Reservation was challenged because it was accomplished statutorily without constitutional amendment, the Montana Supreme Court upheld the state's procedure. The court reasoned that Congress had enacted Public Law 280 as an aspect of its "absolute jurisdiction and control over Indian lands." State *ex rel.* McDonald v. District Court, 159 Mont. 156, 163, 496 P.2d 78, 81 (1972). Further, because Congress could at any time repeal Public Law 280 and terminate state jurisdiction under the Act, in the court's view, Indian lands continued to be under congressional jurisdiction and control.

Similar developments occurred in Washington state, and the Washington Supreme Court also ruled that state legislative enactment, not constitutional amendment, fulfilled the procedural requirements of Public Law 280. State v. Paul, 53 Wash. 2d 789, 337 P.2d 33 (1959).

The United States Supreme Court addressed this and other Public Law 280 issues in Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979). The Court ruled that the necessity for state constitutional amendment for the assumption of Public Law 280 jurisdiction was a matter for a state's own determination. The Court also ruled that even before the Act's amendments in 1968, it was permissible for a state to assume partial Public Law 280 jurisdiction and not the full range of state jurisdiction authorized by the Act. (The 1968 congressional amendments specifically provided for the assumption by a state—with the consent of the affected tribe—of partial criminal and civil jurisdiction over all or part of a reservation. Act of Apr. 11, 1968, Pub. L. 90-284, 82 Stat. 78 (codified at 25 U.S.C. §§ 1321-1322 (1988)).) For a comprehensive treatment of the background of Public Law 280 and developments under the legislation for the first two decades after its enactment, see Goldberg, *Public Law 280: the Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

105. Act of Apr. 11, 1968, tit. IV, Pub. L. 90-284, 82 Stat. 78 (codified at 25 U.S.C. § 1326 (1988)) (State assumption of jurisdiction over Indian Country requires a "majority vote of the adult Indians voting at a special election held for that purpose.").

106. 25 U.S.C. § 1323 (1988).

107. 400 U.S. 423 (1971) (reversing the Montana Supreme Court).

v. Lee,[108] involved a suit brought in Montana state court by a non-Indian to collect money for groceries purchased on credit at a store on the Blackfeet Reservation.[109] Distinct in the situation was a 1967 Blackfeet Tribal Council Resolution providing that " '[t]he Tribal Court and the State shall have *concurrent* and not exclusive jurisdiction of all suits wherein the defendant is a member of the Tribe.' "[110]

The Montana Supreme Court had viewed the Blackfeet Tribal Council's action as sufficient consent to state jurisdiction. Consequently, in the Montana court's view, state jurisdiction would not infringe on the self-government rights of the Blackfeet, as prohibited by *Williams v. Lee*.[111]

In reversing the Montana court, the Supreme Court found shortcomings in both tribal and state procedures. The tribal council's 1967 resolution could not operate to give Montana jurisdiction over litigation involving Indians arising in Indian Country because it did not meet the requirements of a special tribal election specified by Congress in its 1968 amendments to the Indian Civil Rights Act.[112] Nor, in the view of the Court, had Montana complied with the "affirmative legislative action" requirements of Public Law 280, under which the so-called optional states could have extended "jurisdiction over civil causes of action by or against Indians arising in Indian country."[113]

2. *The Montana-Confederated Salish and Kootenai Tribes Agreement*

The Montana implementation of Public Law 280 has been limited to a single extension of state jurisdiction to Indian Country resulting from an agreement worked out between the State and the Confederated Salish and Kootenai Tribes of the Flathead Reservation in the years 1963 to 1965.[114] The terms of the agreement,

108. 358 U.S. 217 (1959). *See supra* notes 80-92 and accompanying text.

109. *Kennerly*, 400 U.S. at 424.

110. *Id.* at 425 (emphasis added).

111. *Id.* at 426.

112. *Id.* at 429.

113. *Id.* at 427. Montana enacted legislation in 1963 under the authority of Public Law 280. Although ostensibly opening the way for other tribes to request state criminal and/or civil jurisdiction, the legislation was directed to the Confederated Salish & Kootenai Indian Tribes of the Flathead Reservation. Ch. 81, 1963 Mont. Laws 170 (codified at MONT. CODE ANN. § 2-1-301 (1991)).

114. Montana conditioned its extension of state criminal and/or civil jurisdiction to the people and lands of the Confederated Salish & Kootenai Indian Tribes on action by the governing body of the Tribes. Once Montana's Governor received a resolution requesting state jurisdiction from the Tribes (and the consent of county commissioners in affected

found in state and tribal codes,[115] provide for concurrent state and tribal jurisdiction in criminal matters, as well as in eight areas of civil law.[116]

Five years after *Kennerly*, and in the same year in which it issued its opinion in *Fisher*, the United States Supreme Court drew principally from congressional legislative history in confining the scope of Public Law 280 civil jurisdiction to "jurisdiction over private civil litigation involving reservation Indians in state court."[117] As interpreted by the Court in *Bryan v. Itasca County*, the effect of Public Law 280 was to authorize state courts to apply

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counties), he was to issue a proclamation within 60 days that the agreed upon jurisdiction was in effect. MONT. CODE ANN. § 2-1-302 (1991). The Montana legislation also provided that the Confederated Salish & Kootenai Tribes could withdraw their consent to state jurisdiction *within two years* after the Governor's proclamation. MONT. CODE ANN. § 2-1-306 (1991) (emphasis added).

That provision became the focus of deliberations in the Montana legislature in the spring of 1991. The Confederated Salish & Kootenai Tribes sought to remove the two-year limitation on the withdrawal of their consent in order to facilitate retrocession of the state's Public Law 280 jurisdiction on the Flathead Reservation to the United States. Although the amendment passed the House of Representatives, it was defeated in the Senate. Arguments against this necessary step toward retrocession under 25 U.S.C. § 1323 called for further study and emphasized doubts about the availability of federal resources should the United States reassume criminal jurisdiction under 18 U.S.C. §§ 1152-1153. The Department of the Interior supported the request of the Confederated Salish & Kootenai Tribes to remove the restriction on their withdrawal and to obtain formal retrocession of Montana's Public Law 280 jurisdiction. Testimony in support of the Tribes' request recounted the growth and development of the Tribes' general government and judicial system in the quarter century since the state-tribal agreement took effect. The Tribes' operations budget increased from $250,000 in 1963 to $70 million in 1990; the number of tribal employees increased from 11 to 1200 during the same period.

115. MONT. CODE ANN. §§ 2-1-301 to -307 (1991); CONFEDERATED SALISH & KOOTENAI TRIBES LAW & ORDER CODE ch. I, § 2.

116. The eight areas of civil law include: compulsory school attendance; public welfare; domestic relations (except adoptions); mental health, insanity, care of the infirm, aged and afflicted; juvenile delinquency and youth rehabilitation; adoption proceedings (with consent of the Tribal Court); abandoned, dependent, neglected, orphaned or abused children; and operation of motor vehicles upon public streets, alleys, roads and highways. CONFEDERATED SALISH & KOOTENAI TRIBES LAW & ORDER CODE ch. I, § 2(3).

This list of subject areas for the state's concurrent civil jurisdiction over Indian activities on the Flathead Reservation suggests the understanding that the civil jurisdiction of the state would be broader than that determined by the United States Supreme Court in Bryan v. Itasca County, 426 U.S. 373 (1976). Notably absent from the list are contract and tort actions. The Montana Supreme Court has ruled, however, that tort actions arising from the operation of motor vehicles on public roads on the reservation and involving Indian parties are subject to the agreement on concurrent civil jurisdiction. Larrivee v. Morigeau, 184 Mont. 187, 602 P.2d 563 (1979), *cert. denied*, 445 U.S. 964 (1980). *See infra* notes 326-27 and accompanying text.

117. Bryan v. Itasca County, 426 U.S. 373, 385 (1976). *Bryan* is one of several leading cases analyzed in Philip P. Frickey's insightful article, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1166-68 (1990).

their rules of decision in adjudicating such disputes.[118] *Bryan* arose in Minnesota, and the Court's decision invalidated a county personal property tax on a mobile home owned by a member of the Minnesota Chippewa Tribe and situated on trust land within the Leech Lake Reservation.[119] Before being reversed, the Minnesota Supreme Court had upheld the tax as within the scope of Public Law 280 civil jurisdiction.[120]

C. *Criminal Jurisdiction Over Non-Indians: Judicial Severance From the Authority of Tribal Courts*

Two years after *Fisher* and *Bryan*, the United States Supreme Court again addressed the scope of tribal court jurisdiction, but this time the court focused on criminal—not civil—jurisdiction. Abandoning its earlier particularized scrutiny of tribal jurisdiction based on specific treaties and statutes, the majority ruled in *Oliphant v. Suquamish Indian Tribe*[121] that tribal courts do not have criminal jurisdiction over non-Indians. Both the Court's broad ruling and its reasoning were to be of importance in the following years when tribal court civil jurisdiction would again be before the justices.

Oliphant resulted from disturbances on the Port Madison Reservation in western Washington during the Suquamish annual celebration, Chief Seattle Days. Tribal law enforcement officers arrested two non-Indians, both residents of the reservation, for violations of the tribal law and order code. They were charged with assaulting a tribal officer, resisting arrest, injuring tribal property, and recklessly endangering another person.[122] After arraignment, they unsuccessfully challenged the tribe's criminal authority in federal district court; and the Ninth Circuit Court of Appeals subsequently also upheld tribal jurisdiction.[123]

Applying a traditional analysis of retained tribal governing powers,[124] the Ninth Circuit Court reasoned that the authority to preserve order on the reservation and to punish those who violate tribal law was part of the original sovereignty of the Suquamish. The court drew from Chief Justice Marshall's opinions of the 1830s the premise that Indian tribes, "though conquered and dependent,

118. *Bryan*, 426 U.S. at 384.
119. *Id.* at 375.
120. *Id.* at 378-79.
121. 435 U.S. 191 (1978).
122. *Id.* at 194.
123. Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976).
124. *Id.* at 1009.

retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress."[125] In the context of those early opinions,[126] the Marshall Court had identified two external sovereign powers lost to Indian nations as a result of their incorporation into the United States: the authority to sell lands to any buyer except the United States and the power to enter into any intercourse with other nations.[127] The Ninth Circuit Court could find no further limitation of the Suquamish Tribe's sovereign powers in the treaty creating the Port Madison reservation or in federal statutes.[128] Additionally, the court determined that in the circumstances, the exercise of tribal criminal jurisdiction did not interfere with or frustrate the policies of the United States.[129]

The Ninth Circuit Court's opinion in *Oliphant* reflected a split decision by a three-judge panel. Dissenting was then Circuit Court Judge and now United States Supreme Court Justice Anthony Kennedy. Applying an analysis ostensibly countering well-established federal Indian law principles that tribal governing powers are inherent, not delegated,[130] Judge Kennedy initially observed that the exercise of tribal criminal jurisdiction over non-Indians was "novel and unusual, and certainly inconsistent with prior practice."[131] Then, acknowledging that these factors did not make the procedure improper, he called for "careful examination of the purpose and history of tribal courts to determine whether an assertion of jurisdiction over non-Indians is consistent with *the powers granted by Congress to tribal governments during the last 100 years.*"[132]

Judge Kennedy declined to read the silence of the Treaty of Point Elliott regarding tribal court jurisdiction as an assent to jurisdiction over all persons. Instead, for him, the silence "must be understood in light of then prevailing policies."[133] He placed particular emphasis upon the federal statutory scheme for dealing with offenses in Indian Country as evidence that Congress, without being explicit, had acted in accord with the premise that "Indian

125. *Id.* (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832)).

126. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

127. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17; *Johnson*, 21 U.S. (8 Wheat.) at 574.

128. *Oliphant v. Schlie*, 544 F.2d at 1010-12.

129. *Id.* at 1012-13.

130. *See generally* W. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 68-69 (2d ed. 1988); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 229-35 (1982).

131. *Oliphant v. Schlie*, 544 F.2d at 1014 (Kennedy, J., dissenting).

132. *Id.* (emphasis added)(Kennedy, J., dissenting).

133. *Id.* at 1016 (Kennedy, J., dissenting).

tribal courts were not intended to have jurisdiction over non-Indians."[134] It was an easy step to conclude that a "presumption in favor of any inherent, general jurisdiction for tribal courts is wholly inconsistent with the juridical relations between the federal government and the Indian tribes . . . for the past 100 years."[135]

Judge Kennedy's dissent foreshadowed the reasoning underlying a major portion of the Supreme Court's opinion in *Oliphant v. Suquamish Indian Tribe*,[136] authored by then Associate Justice Rehnquist. Justice Rehnquist elaborated upon "the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians."[137] He traced the shared presumption to 1834 and 1855 Attorneys' General opinions, an 1878 federal district court opinion, and nineteenth century congressional acts dealing with federal jurisdiction over reservation crime.[138] This inquiry was not carried out in the abstract, as clearly the Court was mindful of its own case-by-case scrutiny of treaties and statutes to evaluate whether, in given circumstances, tribal governments retained challenged aspects of their inherent sovereign powers.[139] There is a forthright acknowledgment in Justice Rehnquist's opinion that no statute or treaty term expressly limited the Suquamish Tribe's criminal jurisdiction over non-Indians. Silence on the point in the Treaty of Point Elliott was not determinative, however, as it was overshadowed by what the Court perceived to be the combined effect of the beliefs and assumptions of the three branches of the federal government.[140]

In a passage, the conclusion of which contradicted many earlier Court pronouncements on Indian treaty and statutory construction,[141] Justice Rehnquist stated:

"Indian law" draws principally upon the treaties drawn and exe-

134. *Id.* at 1019 (Kennedy, J., dissenting).

135. *Id.* (Kennedy, J., dissenting).

136. 435 U.S. 191 (1978). *See supra* notes 121-22.

137. *Id.* at 206.

138. *See id.* at 199-204.

139. *Id.* at 209.

140. *Id.* at 206.

141. The canons of construction of treaties with Indian tribes and of statutes affecting Indian tribes and individuals are derived from United States Supreme Court decisions dating back to Chief Justice Marshall's opinion in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Rooted in the federal trust relationship to the tribes, and a generally prevailing unequal negotiating position, the canons instruct that treaties are to be construed as the Indians would have understood them, and that both treaties and statutes are to be liberally construed to favor Indians, with ambiguities resolved in their favor. *See* F. COHEN, *supra* note 130, at 221-25.

> cuted by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation *but must be read in light of the common notions of the day and the assumptions of those who drafted them.*[142]

Despite its bow to treaty and statutory construction, the *Oliphant* opinion ultimately put treaties and statutes aside and held that the power to try non-Indians was simply not a retained inherent power of tribal sovereignty. For the first time since Chief Justice Marshall's day, the Court determined that a tribal sovereign power had been removed as an "inherent" and "intrinsic" limitation stemming from the incorporation of Indian tribes into the United States.[143] As a result of "submitting to the overriding sovereignty of the United States," the Court found that "Indian tribes . . . necessarily [gave] up their power to try non-Indian citizens of the United States . . . ."[144]

Justice Rehnquist acknowledged that the Indian Civil Rights Act had provided due process guarantees for "*anyone*" who was a defendant in a tribal court criminal proceeding.[145] He emphasized, however, that the ICRA guarantees were not identical with the constitutional protections accorded criminal defendants in state and federal courts, and observed that Suquamish Tribal Court juries excluded non-Indians.[146] Justice Rehnquist noted the increased sophistication of some tribal court systems and their resemblance "in many respects" to their "state counterparts."[147] The *Oliphant* opinion expressed also the Court's awareness of the prevalence of non-Indian crime on reservations, but concluded that these circumstances were not relevant to the question of inherent jurisdiction, but were instead "considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians."[148]

V. Tribal Civil Jurisdiction: Judicial Distinctions and Continued Protections

Predictably, a leading question in federal Indian law after *Oli-*

142. *Oliphant*, 435 U.S. at 206 (emphasis added).
143. *Id.* at 210.
144. *Id.*
145. *Id.* at 212 (emphasis in the original).
146. *Id.* at 194 n.4.
147. *Id.* at 211-12.
148. *Id.* at 212.

phant was whether the Court would extend its prohibition of tribal criminal authority over non-Indians to the exercise of civil jurisdiction. The Court's answer came directly in addressing tribal tax authority, and indirectly in addressing tribal regulatory authority.

A. Tribal Tax Authority: No Divestiture

Two years after *Oliphant*, in *Washington v. Confederated Tribes of the Colville Indian Reservation*,[149] Justice Rehnquist's reasoning in *Oliphant* led the Court to uphold tribal taxes imposed on sales of cigarettes by Indians to non-Indians. Applying *Oliphant's* analysis, the Court found a "widely held understanding within the Federal Government . . . that federal law . . . [had not brought about] a divestiture of Indian taxing power."[150] Writing for the majority, Justice White traced the historical viewpoints of the executive and judicial branches to nineteenth century opinions of the United States Attorney General and to federal court decisions from the early 1900s.[151] Congressional endorsement of tribal tax powers was found in the Indian Reorganization Act of 1934.[152] For the Court, the section of the IRA confirming tribal powers under existing law constituted congressional recognition of a tribal government's "authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter."[153] When the Court applied the principal test set forth in *Oliphant*, it failed to find an "overriding federal interest that would necessarily be frustrated by tribal taxation."[154]

B. Tribal Regulatory Authority: Land Ownership Patterns May Preclude Reservation-Wide Rules

The next occasion for the United States Supreme Court to address the reach of tribal civil jurisdiction occurred when the Court reviewed *United States v. Montana*,[155] which had upheld the right of the Crow Tribe to regulate all hunting and fishing within the

149. 447 U.S. 134 (1980).

150. *Id.* at 152.

151. *Id.* at 152-54.

152. *Id.* at 153.

153. *Id.*

154. *Id.* at 154. Two additional challenges to tribal tax authority soon reached the Supreme Court. In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), the Court upheld a tribal severance tax on oil and gas leases held by non-Indians. In Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985), the Court held that the Navajo could impose a possessory interest tax and business activity tax.

155. 604 F.2d 1162 (9th Cir. 1979).

Crow reservation in Montana. The Ninth Circuit's decision was based partly on its conclusion that Crow authority over Indians and non-Indians on both Indian and non-Indian land was an incident of the tribe's inherent sovereignty over the entire Crow reservation.[156]

Although in *Montana v. United States*[157] the Supreme Court did not disturb the holding of the Ninth Circuit that the Crow Tribe could prohibit hunting and fishing on Indian lands or condition entry by charging fees and imposing regulations, the Court disagreed markedly with the Ninth Circuit's conclusion about the reach of Crow tribal authority over non-Indian hunting and fishing on non-Indian lands within the Crow reservation.[158] To reach its decision, the Court engaged in a particularized scrutiny of the United States' treaties with the Crow Tribe and examined land developments including allotment and subsequent passage of Crow lands into non-Indian ownership.[159] As in *Oliphant*, the Court did not apply the traditional canons of Indian treaty and statutory construction.[160] As a result, the Crow Tribe lost both land and regulatory rights: title to the bed and banks of the Big Horn River within the reservation was declared to have passed to Montana with the state's admission to the Union in 1889,[161] and reservation lands owned by non-Indians were subtracted from treaty promises protecting Crow tribal interests in the lands " 'set apart for [their] absolute and undisturbed use and occupation.' "[162]

C. *The "*Montana *Exceptions" Become the Yardstick for Tribal Regulatory (and Occasionally, Adjudicatory) Jurisdiction*

Ironically, although Crow tribal rights were substantially reduced by the decision in *Montana*, the Court's full opinion provided general support in succeeding years for nationwide increased

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156. *Id.* at 1170.

157. 450 U.S. 544 (1981).

158. *Id.* at 565-67.

159. *Id.* at 557-61.

160. No mention is made in *Montana*, except in a partial dissent, of what surely must have been the Crow Tribe's understanding that their reservation homeland, recognized and established by treaty in 1868, included the portion of the Big Horn River flowing through the Crow lands. Instead, principles drawn from the field of public land law form the basis for the Court's holding that title to the bed and banks of the Big Horn River passed from the United States to the State of Montana upon Montana's admission to the Union in 1889. *See* Arnott, *In the Aftermath of the Bighorn River Decision: Montana Has Title, Indian Law Doctrines Are Clouded, and Trust Questions Remain*, 2 PUB. LAND L. REV. 1 (1981).

161. *Montana*, 450 U.S. at 556-57.

162. *Id.* at 553 (quoting the Second Treaty of Fort Laramie, May 7, 1868, art. II, 15 Stat. 649).

tribal regulation of activities undertaken by both Indians and non-Indians on reservation lands. At first, however, the late Justice Stewart in writing for the court appeared to extend the ruling of *Oliphant* to tribal civil jurisdiction. He drew from *Oliphant* "support [for] the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[163]

But after enunciating this apparent containment of tribal authority, Justice Stewart then set forth broad exceptions. As a result, the case has been cited often to support tribal governing authority over non-Indians. The following passage, buttressed by citations to earlier Supreme Court opinions, has provided the yardstick for tribal regulatory authority:

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

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163. *Id.* at 565. Justice Stewart set forth a narrow view of retained tribal inherent sovereignty. With reasoning tracing to *Oliphant*, he stated that "[the] exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 564. For the Court, Crow tribal regulation of hunting and fishing by nonmembers on lands no longer owned by the tribe, but located within reservation boundaries, bore no relationship to tribal self-government.

Justice Stewart's opinion in *Montana* drew also from his own earlier opinion in United States v. Wheeler, 435 U.S. 313 (1978) (double jeopardy protections do not bar successive prosecutions in tribal and federal courts for offenses arising out of the same incident because tribes exercise inherent sovereign powers to enforce their criminal laws against tribal members). In *Wheeler*, Justice Stewart had emphasized the distinction between a tribe's external and internal relations and observed that the "areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian and nonmembers of the tribe." *Id.* at 326. He placed foreign relations and land alienation to non-Indians within that category, and then added (misquoting *Oliphant*) "try[ing] *nonmembers* in tribal courts." *Id.* (emphasis added).

This discussion became an important basis for the Court's holding in Duro v. Reina, 110 S. Ct. 2053 (1990), that the retained sovereignty of an Indian tribe does not include the authority to impose criminal sanctions on an Indian defendant who is not a tribal member. Congress in turn reacted to *Duro* by amending the Indian Civil Rights Act definition sections to include acknowledgement and affirmation of "the inherent power of Indian Tribes . . . to exercise criminal jurisdiction over *all* Indians." Defense Appropriation Act for FY 91, Pub. L. No. 101-511, § 8077(b)-(d) (1990) (emphasis added) (amending 25 U.S.C. § 1301(2) (1983)). To gain time for fuller consideration, the amendments initially were to expire September 30, 1991. The temporary nature of Congress' response was removed by the enactment of House Bill 972 on October 15, 1991. On October 28, 1991, President Bush signed H.R. 972, Act of Oct. 15, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified at 25 U.S.C. § 1301(2), (4)), making permanent the legislative overturning of *Duro*.

> civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.[164]

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164. *Montana*, 450 U.S. at 565-66 (citations omitted). Based on these exceptions, tribal *regulatory* authority over non-Indian activity on non-Indian lands or property within reservations has been upheld as an inherent power under the second *Montana* exception when "conduct . . . threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. *See, e.g.*, Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 902, 903 (10th Cir. 1982) (tribal zoning ordinance); Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 964 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982) (tribal ordinance regulating docks and breakwaters on the south half of Flathead Lake); Cardin v. De La Cruz, 671 F.2d 363, 366 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982) (tribal health regulation of grocery store on non-Indian land).

The intention of the Yakima Indian Nation to apply its land-use regulations throughout its reservation in Washington state, the intention of Yakima county to zone reservation lands held by non-Indians, and the resistance of two non-Indian landowners to tribal regulations led to litigation in the mid-1980s. The Ninth Circuit Court of Appeals applied the second *Montana* exception, the "tribal interest" test, and held that the Yakima Nation had inherent authority to zone non-Indian fee lands on the reservation, within both a so-called closed area, long protected for natural and cultural resources, in which only a small portion of the land was privately owned, and an open, checkerboarded area with a significant percentage of land in private ownership. Tribes & Bands of Yakima Indian Nation v. Whiteside, 828 F.2d 529, 534-35 (9th Cir. 1987) (The Ninth Circuit Court remanded the case so the federal district court could weigh the interests of Yakima County and the Yakima Nation in zoning non-Indian lands in the open area, and successful petitions for Supreme Court review followed.).

The outcome of the litigation is more readily described than either its broad implications or a splintered Court's reasoning. The Yakima Nation now has exclusive zoning authority in the closed area; Yakima county, not the Yakima Nation, may zone non-Indian lands in the open area.

A plurality opinion authored by Justice White, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, found precedent in *Montana* to hold that the Yakima Nation's treaty rights had been diminished by post-allotment alienation of lands to non-Indians. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 423-25 (1989). Justice White found no basis in the "*Montana* exceptions" for the Yakima Nation's zoning authority over *any* non-Indian lands within the reservation. *Id.* at 428. Instead, *Montana* suggested that the tribe had a "protectable interest" in activities on those lands which could be asserted by an injunctive suit in federal court if the impact was "demonstrably serious and imperil[ed] the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at 431. His plurality opinion has thus clouded but not erased the vitality of the second *Montana* exception.

Justice Stevens, joined by Justice O'Connor, ignored the *Montana* analysis. With reasoning based on a tribe's right to exclude (not tribal self-governing authority), they upheld the Yakima Nation's zoning authority in the closed area, and the county's zoning authority in the open area. *Id.* at 444, 447 (Stevens, J., concurring). These two justices thus were counted in separate majorities, concurring with Justice White's opinion as to the open area, and announcing the Court's decision for the closed area.

Justice Blackmun, joined by Justices Brennan and Marshall, concurred in the result but not the reasoning of Justice Stevens' opinion on zoning in the closed area. *Id.* at 449 (Blackmun, J., concurring and dissenting). In a strongly worded dissent, Justice Blackmun reasoned from both treaty rights and *Montana* to conclude that the Yakima Nation's zoning authority was exclusive throughout the reservation. *Id.* at 468 (Blackmun, J., concurring and dissenting).

VI. INDIAN V. NON-INDIAN LITIGATION IN TRIBAL COURT: *NATIONAL FARMERS UNION* AND THE CROW TRIBAL COURT

When the United States Supreme Court in 1985 again addressed the civil jurisdiction of the Crow Tribe, the subject was adjudicatory jurisdiction, and the circumstances posed a question similar to that decided by the Court in *Williams v. Lee* twenty-six years earlier. This time, however, the configuration of the litigation was reversed: a tribal member had sued a non-Indian defendant, the Lodge Grass school district, in the Crow Tribal Court. The tribal court had asserted jurisdiction over the case and issued a default judgment.[165]

Events that followed would later be characterized as a "procedural nightmare."[166] Although the complaint had been served on the School Board chairman, he did not notify others, nor did he file an answer. In accordance with its rules, the Crow Tribal Court entered a default judgment and issued findings of fact, conclusions of law and a judgment of $153,000 against the school district.[167] This action attracted wider attention and, with some haste, the School District and its insurer sought a temporary restraining order in federal district court. They succeeded in obtaining first a restraining order and, then, a permanent injunction against the enforcement of the Crow Tribal Court judgment on the grounds that the tribal court did not have subject matter jurisdiction over the civil suit.[168]

A. *Crow Tribal Court Jurisdiction: Not Within the "Montana Exceptions" to the Federal District Court*

More than tribal court jurisdiction was at issue when National Farmers Union Insurance Companies sought relief in federal district court. Federal district and circuit courts had only recently delineated the grounds for their own authority to hear challenges to tribal court jurisdiction.[169] Their review of tribal court actions had

165. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 847 (1988) (The litigation arose from injuries sustained by a Crow Indian child who was struck by a motorcycle in the parking lot of the Lodge Grass elementary school on the reservation. The school was located on land in which the State of Montana held surface ownership; its student body was overwhelmingly made up of Crow tribal members. The boy's guardian filed suit in Crow Tribal Court against the school district, seeking damages of $153,000.).

166. *Id.* at 853.

167. *Id.* at 847-48.

168. *Id.* at 848.

169. *See, e.g.*, Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982) (the federal district court had jurisdiction under federal common law over a suit in which a non-Indian contested the authority of the Quinault Indian Tribe to require compliance with tribal building,

been sharply curtailed in 1978 when the Supreme Court in *Santa Clara Pueblo v. Martinez*[170] ended a decade-long series of federal court cases involving a wide range of civil claims against tribal governments arising under the Indian Civil Rights Act of 1968.[171]

Without acknowledging that the barriers against entertaining ICRA civil claims were absolutely insurmountable, the Montana federal district court avoided ruling on the insurance companies' claim that the Crow Tribal Court's notice procedures violated the ICRA. Terming the jurisdictional analysis "not a novel one," United States District Court Judge James Battin ruled that his court could determine whether the tribal court had exceeded the lawful limits of its authority under the court's federal question jurisdiction.[172] Both the Ninth Circuit and the United States Supreme Court would in turn address this issue, and the long-range results of the litigation were to include the Supreme Court's expanded explanation of the nature of the federal law that provides the pathway to federal district courts in similar litigation.

Montana v. United States, not *Williams v. Lee*, became the federal common law applied in *National Farmers Union*.[173] Judge Battin, focusing upon the *Montana* exceptions set forth by Justice Stewart, declined to bring the school-yard accident within the cloak of those exceptions: in the court's reasoning, a personal injury did not involve a contract, lease, or commercial arrangement; nor did an individual's personal injury affect the health and welfare of the Crow Tribe.[174] Having found that "neither prong of the exceptions to the general rule in *Montana* analysis [was] satisfied, [Judge Battin] concluded that the tribal court [was] without jurisdiction to pass judgment on the alleged tort."[175] His opinion proclaimed that "[t]ribal interests [were] not threatened by eliminating tribal jurisdiction to try a single tort."[176] Furthermore, "civil

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health and safety regulations). The plaintiff claimed that the tribe's jurisdiction was barred by the principles of *Oliphant*. The court observed that the *Oliphant* principles "are not drawn from any specific statute or treaty, but rather form a part of federal common law." *Id.* at 365. Under Illinois v. City of Milwaukee, 406 U.S. 91 (1972), the action came within the general federal-question jurisdiction of 28 U.S.C. § 1331. *Cardin*, 671 F.2d at 365. For an extensive treatment of the emergence of similar claims against tribal authority, see Gover & Laurence, *Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 HAMLINE L. REV. 497 (1985).

170. 436 U.S. 49 (1978).

171. *See supra* notes 53-60 and accompanying text.

172. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 560 F. Supp. 213, 214-15 (1983) (citing 28 U.S.C. § 1331).

173. *Id.* at 216-18.

174. *Id.* at 216-17.

175. *Id.* at 217.

jurisdiction over torts committed by non-Indians [was] not necessary to protect Tribal self-government, economic security or the health and welfare of the Tribe and, hence, cannot survive without express Congressional approval."[177]

Judge Battin's ruling and permanent injunction against enforcing the Crow Tribal Court's default judgment did not relegate the litigation to a jurisdictional limbo; the final passage of his opinion explained that the state courts of Montana were the proper courts for the Crow plaintiff's claim against the school district.[178] Acknowledging that the tort claim presented no grounds for federal court jurisdiction, the opinion cited both United States Supreme Court and Montana Supreme Court precedents upholding the propriety of suits by Indians against non-Indians in state court.[179]

B. Crow Tribal Court Jurisdiction: Not Reviewable to the Ninth Circuit Court of Appeals

Judge Battin's ruling was reversed by the Ninth Circuit Court of Appeals on jurisdictional grounds. The Ninth Circuit drew a line between tribal regulatory and adjudicatory jurisdiction and pronounced that, while a claim challenging tribal regulatory jurisdiction could create federal question jurisdiction under 28 U.S.C. § 1331, a tribe's assumption of adjudicatory jurisdiction should not do so.[180] In support of this conclusion, Judge Fletcher emphasized that Congress intended "to limit the intrusion of federal courts upon tribal adjudication."[181] As is often the pattern in federal Indian law, the Ninth Circuit Court found congressional intent illuminated by a decision of the United States Supreme Court, specifically *Santa Clara Pueblo*.[182] The limitation of federal court review of a claimed violation of the ICRA to the single remedy of the writ of habeas corpus persuaded the Ninth Circuit to "decline to recognize a common law cause of action in addition to the limited remedies available under the ICRA."[183] The Ninth Circuit observed that the proper forum for determining tribal court jurisdiction, "at

177. *Id.*

178. *Id.* at 219.

179. *Id.* at 218 (citing, among others, Williams v. Lee, 358 U.S. 217 (1959), as federal authority for Indians to bring claims in state courts and State *ex rel.* Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), as state authority).

180. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1323 (9th Cir. 1984).

181. *Id.*

182. *Id. See supra* notes 59-60 and accompanying text.

183. *National Farmers Union*, 736 F.2d at 1323.

least in the first instance, is not a federal court but a tribal court."[184]

Judge Wright, in his separate opinion, expressed the firm belief that plaintiffs must exhaust their remedies in tribal court before seeking federal court intervention.[185] He observed that the Crow Tribal Court had not had the opportunity to rule on the challenge to its jurisdiction. The Crow Tribal Code provided for procedures to challenge the tribal court's jurisdiction and set aside default judgments. Neither avenue had been pursued in tribal court; instead, "[t]he plaintiffs ignored that system and . . . attempted to circumvent it by suing immediately in federal court."[186]

The United States Supreme Court granted certiorari in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*[187] to determine "whether the District Court properly entertained petitioners' request for an injunction under 28 U.S.C. § 1331."[188] In the context of ruling on the federal district court's injunctive jurisdiction, the Supreme Court addressed two questions: (1) Whether the National Farmers Union claim could be entertained under 28 U.S.C. § 1331, providing for the "original jurisdiction [in federal district courts] of all civil actions arising under the Constitution, laws, or treaties of the United States,"[189] and (2) if federal district court jurisdiction was proper, whether it was essential that petitioners first "exhaust their remedies in the tribal judicial system."[190]

C. *Crow Tribal Court Jurisdiction: A Federal Law Question to the United States Supreme Court*

A unanimous Supreme Court answered both questions affirmatively. In its first full treatment of the specific subject in the context of federal Indian law,[191] the Court summarized its frequent

184. *Id.* at 1324.

185. *Id.* (Wright, J., concurring and dissenting). Judge Wright did not agree that there was a distinction between challenges to tribal regulatory and adjudicatory jurisdiction in providing grounds for a federal common law cause of action.

186. *Id.* at 1326.

187. 471 U.S. 845 (1985).

188. *Id.* at 847.

189. *Id.* at 850 (citing 28 U.S.C. § 1331).

190. *Id.* at 853.

191. During the same term in which *National Farmers Union* was decided, the Court had relied upon federal common law as the jurisdictional basis for the Oneida Indian Nation to assert its possessory interests in lands in New York State. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). The Court referred to a long line of decisions, reaching back to Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), and Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), defining a federal right of Montana, through suits brought under federal

experience in deciding "questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians."[192] The rule of decision in the cases had been provided by federal law, and the complexity of the law is underscored by the Court's statement:

> Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes. The tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America.[193]

The Court proceeded from the assumption that the power to resolve disputes arising within their territory was once an attribute of inherent tribal sovereignty. The Court styled the petitioners' contention to be that the Crow Tribe had been to some extent divested of this aspect of sovereignty, and that federal law had curtailed the power of the tribe. Having initially noted that federal common law by itself supports claims under 28 U.S.C. § 1331, the Court found little difficulty in ruling that the petitioner's action was a claim " 'arising under' federal law within the meaning of § 1331."[194]

1. Oliphant *Distinguished: Tribal Court Civil Jurisdiction Over Non-Indians Is Not "Automatically Foreclosed"*

In its treatment of the necessity for National Farmers Union to exhaust tribal court remedies before invoking federal district court jurisdiction, the Supreme Court once again reviewed its broad 1978 ruling in *Oliphant* prohibiting tribal court criminal jurisdiction over non-Indians.[195] The Court's re-examination of *Oliphant* was in response to the argument that the decision had made "exhaustion as a matter of comity '. . . manifestly

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common law. *Oneida Indian Nation*, 470 U.S. at 235. The Court also cited United States v. Santa Fe Pac. R.R., 314 U.S. 339 (1941), for the principle that "the Indians' right of occupancy need not be based on treaty, statute, or other formal Government action," and that " 'absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.' " *Oneida Indian Nation*, 470 U.S. at 236 (citation omitted). For discussion of *Oneida Indian Nation* and the utilization of federal common law in protecting rights of American Indians, see Field, *Sources of Law: the Scope of Federal Common Law*, 99 HARV. L. REV. 881, 948-49 (1986).

192. *National Farmers Union*, 471 U.S. at 851.

193. *Id.*

194. *Id.* at 853.

195. *Id.* at 853-55.

inappropriate.' "[196]

Justice Stevens' opinion in *National Farmers Union* echoed the distinctions drawn earlier by the Court between tribal civil and criminal jurisdiction.[197] Once again, the reasoning of *Oliphant* yielded results distinguishing the exercise of tribal civil jurisdiction. The opinions of nineteenth century United States Attorneys General and the implications to be drawn from congressional criminal law enactments persuaded the Court "that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require."[198]

Having discerned no fixed rule governing tribal court civil jurisdiction over non-Indians, the Court set forth the procedure to be followed when a tribal court's civil jurisdiction is challenged:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.[199]

2. *The Tribal Court Exhaustion Requirement Explained*

The Court stated that, initially, such a particularized examination must be conducted in the tribal court itself until tribal remedies are exhausted. Until then, "it would be premature for a federal court to entertain a claim that a tribal court has exceeded the lawful limits of its jurisdiction, . . . or to consider any relief."[200]

Four reasons were given for the exhaustion requirement:

> [1] [Congressional commitment] to a policy of supporting tribal self-government and self determination . . . favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.
>
> [2] [T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question con-

196. *Id.* at 853 (citation omitted).

197. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

198. *National Farmers Union*, 471 U.S. at 855.

199. *Id.* at 855-56.

200. *Id.* at 857.

cerning appropriate relief is addressed.

[3] The risks of the kind of "procedural nightmare" that ha[d] allegedly developed in [*National Farmers Union*] will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made.

[4] Exhaustion will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.[201]

Exceptions to the exhaustion requirement were set forth by the Court in a footnote to the *National Farmers Union* opinion. Important to tribal courts as cautionary guidelines, the exceptions include situations in which the exercise of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith"; when a tribal court action is "patently violative of express jurisdictional prohibitions"; or when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."[202]

3. *The Tribal Court Exhaustion Requirement Implemented*

The exhaustion requirement explained in the Supreme Court's decision returned the litigation to the Crow tribal justice system. After hearing evidence and reviewing briefs on the jurisdictional issue, the Crow Tribal Court denied the defendant's motion to dismiss the action.[203] Adhering closely to the Supreme Court's prescription, the tribal court based its order on the Crow Treaty of 1868, statutes and patents related to the allotment and sale of Crow lands, federal support for the Lodge Grass School, and tribal interests reflected in the student body, governing board, and public services provided to the school. No aspect of its scrutiny revealed any "alteration, divestment, or diminishment of tribal sovereignty over civil actions arising from the conduct of the Defendant committed inside the Crow reservation against a tribal member."[204]

Unlike the federal district court, the Crow Tribal Court reasoned that injury to one of the tribe's children *was* related to the tribe's "essential interest in [its] health, welfare and safety."[205] Ad-

201. *Id.* at 856-57.

202. *Id.* at 856 n.21.

203. Sage v. Lodge Grass School District No. 27, Civ. No. 82-287 (Crow Trib. Ct. Sept. 12, 1985).

204. *Id.* at 7.

205. *Id.* at 6.

ditionally, the court stated that the establishment of a court system to resolve civil disputes is "an inherent and an essential attribute of Indian sovereignty."[206] Disagreeing also with the federal district court that *Williams v. Lee* had become "old law,"[207] the Crow Tribal Court observed that the United States Supreme Court had continued to cite and follow *Williams*.[208] In the tribal court's view, that decision "recognized tribal court civil jurisdiction over the conduct of non-Indians committed inside the Navajo Indian Reservation."[209] The Crow Treaty of 1868 was "identical in every relevant particular" to the Navajo Treaty of 1868.[210] In the circumstances, the Crow Tribal Court would not infer that "the United States Supreme Court would hold that the Navajo treaty retained tribal sovereignty over civil actions against non-Indians, as it did in *Williams*, and hold that the same sovereignty was not retained for the Crow Tribe."[211]

Following the tribal court's refusal to dismiss, relief was sought in the Crow Court of Appeals, where attorneys for the Lodge Grass School District argued anew both jurisdictional and procedural aspects of the litigation. Subsequently, the tribal appellate court affirmed the ruling of the trial court and expanded upon that court's reasoning on the issues of territorial, subject matter, and personal jurisdiction.[212] Federal case law formed the basis for the appellate court's determination that the state school lands where the child's injury occurred had never been removed from reservation status.[213] The Crow Court of Appeals applied the *Montana* exceptions with full force.[214] To demonstrate compliance with the first *Montana* exception the court traced "four consensual transactions" between the Crow Tribe and the Lodge Grass School District.[215] Next the court explained that all subsections of the second *Montana* exception could be applied: in the court's reasoning,

206. *Id.*

207. *Id.* at 5.

208. *Id.* (citing Montana v. U.S., 450 U.S. 544 (1981), and Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 467 U.S. 138 (1984) (*Wold* discussed herein at *infra* notes 291-92 and accompanying text)).

209. *Id.* at 4.

210. *Id.*

211. *Id.*

212. Sage v. Lodge Grass School Dist. No. 27, 13 Indian L. Rep. (Am. Indian Law. Training Program) 6035 (Crow Ct. App. 1986).

213. *Id.* at 6037 (citing Solem v. Bartlett, 465 U.S. 463 (1984) (holding reservations not diminished by allotment and emphasizing strong continued tribal presence even after "opening" of reservation)).

214. *Id.* at 6038-39. *See supra* note 164 and accompanying text.

215. *Sage*, 13 Indian L. Rep. (Am. Indian Law. Training Program) at 6038-39.

the adjudication of a controversy between a tribal member and a non-Indian school district arising out of injuries sustained within the reservation *was* closely related to the Crow Tribe's interest in its health and welfare and economic security.[216] Assuming (without deciding) that the Crow Tribe could not impose safety regulations on Montana schools operating within the reservation, the court distinguished its adjudicatory jurisdiction, which it reasoned was not limited to areas in which governmental regulation was permissible. Cited in support of this conclusion was the statement of the United States Supreme Court that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."[217]

VII. The Jurisdiction of Federal and Tribal Courts Over Reservation-Based Diversity Cases

The requirement that a tribal court have the opportunity to rule on its jurisdiction before a case can be considered by a federal district court was not novel in the development of federal Indian law. Two years before the Supreme Court's *National Farmers Union* decision, the Ninth Circuit Court of Appeals held that, before non-Indian litigants in a dispute arising on the Fort Belknap reservation could invoke the diversity jurisdiction of a federal district court in Montana, they first had to give the tribal court an opportunity to determine its jurisdiction in the matter.[218]

A. *Prelude in* R.J. Williams Company v. Fort Belknap Housing Authority

In *R.J. Williams Co. v. Fort Belknap Housing Authority*, the Ninth Circuit Court restated and enlarged upon its earlier analysis of federal court diversity jurisdiction in reservation-based cases involving Indians. In cases dating back to 1965,[219] the court had

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216. *Id.* at 6039.

217. *Id.* at 6040 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978), *quoted in* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1322 n.3 (9th Cir. 1984)).

218. R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985).

219. *See* Hot Oil Serv., Inc. v. Hall, 366 F.2d 295, 297 (9th Cir. 1966); Littell v. Nakai, 344 F.2d 486, 489 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966).

A year before its decision in *R.J. Williams*, the Ninth Circuit court had again addressed federal diversity jurisdiction over reservation-based cases in Begay v. Kerr-McGee Corp., 682 F.2d 1311 (9th Cir. 1982) (affirming the dismissal by a federal court in Arizona of a complaint brought by Navajo miners, their wives and widows, against Kerr-McGee and

found barriers to a federal court's exercise of its diversity jurisdiction for two reasons, each linked to the tribal self-government infringement principles set forth in *Williams v. Lee*.[220] First, if a tribal court had exclusive jurisdiction over a controversy, the exercise of federal court diversity jurisdiction would create the same interference with tribal self-government as the state court jurisdiction barred by *Williams*. Second, the court drew from general principles of federal diversity jurisdiction the rule that, in diversity cases, a federal court operates as an adjunct to the state court and that, "where . . . one is barred from recovery in the state court, he should likewise be barred in the federal court."[221]

In *R.J. Williams*, a Washington state construction firm sued in

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other mining corporations seeking damages for deaths and injuries allegedly stemming from radon radiation in uranium mines on the Navajo reservation). The court concluded that the plaintiffs' claims should be brought under Arizona workers' compensation law before the Industrial Commission of Arizona. Although it found no state intrusion into tribal self-governance, the court re-emphasized the effect of *Williams v. Lee* upon the exercise of federal diversity jurisdiction: if a matter was within the exclusive jurisdiction of a tribal court, then there could not be federal judicial resolution of a dispute. The court said "[i]t would be inappropriate to permit a federal court to exercise its diversity jurisdiction over a state-law controversy which *Williams v. Lee* prohibits the state courts from entertaining." *Id.* at 1317. Although the practical result for the Navajo plaintiffs was unchanged, the court stated that their complaint should have been dismissed because it failed to state a claim upon which relief could be granted, not because the federal district court lacked subject matter jurisdiction under 28 U.S.C. § 1332(a). *Id.* at 1320.

The Eighth Circuit Court of Appeals addressed the issue of federal diversity jurisdiction in a case with many similarities to *R.J. Williams*. In Weeks Constr. Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668 (8th Cir. 1986), a Montana contractor sued the Oglala Sioux Housing Authority for breach of contract in federal district court in South Dakota, invoking both federal question and diversity jurisdiction. After succinctly concluding that the district court lacked subject matter jurisdiction over the dispute based on a federal question, the Eighth Circuit court expanded upon its reasoning for also affirming the district court's dismissal of the case for lack of diversity jurisdiction.

Underlying the reasoning was the premise that "[t]he power to hear and adjudicate disputes arising on Indian land is an essential attribute of [tribal] sovereignty," and that the need to protect tribal governments and avoid undermining the authority of tribal courts affects federal courts as well as state courts. *Id.* at 673. As in *R.J. Williams*, an ambiguity existed in the Oglala Sioux Tribal Code because it provided (in part) for jurisdiction over civil suits in which the defendant was a member of the tribe. The Eighth Circuit court held that the Oglala Sioux Tribal Court had to make the initial determination of whether the Housing Authority was a member of the tribe for jurisdictional purposes. The door was left open for the possible exercise of federal diversity jurisdiction over the matter if the tribal court "determine[d] that the Housing Authority [was] not a member of the tribe." *Id.* at 674.

In a footnote to the decision in *Weeks*, the Eighth Circuit court distinguished its 1975 decision in Poitra v. Demarrias, 502 F.2d 23 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975) (finding federal diversity jurisdiction applicable when asserting a "state-created" right). *Weeks*, 797 F.2d at 674 n.7.

220. *See supra* notes 80-92 and accompanying text.

221. *Littell*, 344 F.2d at 489 (referring to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and quoting Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949)).

federal district court in Montana seeking return of property and damages arising out of the seizure of company equipment and materials under an order of the Fort Belknap Community Court. The federal district court asserted both diversity and federal question jurisdiction over the case and awarded damages to the contractor.[222]

In reversing the district court, the Ninth Circuit initially emphasized the twofold requirement for the proper exercise of federal court diversity jurisdiction under 28 U.S.C. § 1332: that the parties be of diverse citizenship and that "the courts of the state in which the federal court sits must be able to entertain the action."[223]

Again for the Ninth Circuit, the principles of *Williams v. Lee* also had a direct impact on diversity actions brought in federal court. A federal, as well as a state court, "would impinge upon [a] tribe's right to adjudicate controversies arising within it" if it resolved a dispute "which was within the province of the tribal courts or of other nonjudicial law-applying tribal institutions."[224]

The Ninth Circuit recognized the jurisdictional uncertainties present in *R. J. Williams*,[225] but asserted that the issues had to be decided initially by the Fort Belknap Community Court:

> if the dispute itself does not implicate the tribal government and the tribe has decided not to exercise its exclusive jurisdiction, it does not follow that the state courts are without power to resolve a controversy occurring within [a] state but on a reservation. By the same token, the federal courts sitting in diversity are not divested of jurisdiction when the tribe has not itself manifested an interest in adjudicating the dispute.[226]

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222. R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 981 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985).

223. *Id.* at 982.

224. *Id.* at 983. The Ninth Circuit stated that it had "recognized that the tribal court is generally the exclusive forum for the adjudication of disputes affecting the interests of both Indians and non-Indians which arise on the reservation." *Id.* In addition to that protectable exercise of tribal self-government, the court also pointed out that tribal self-government could be implicated "if [a] dispute itself calls into question the validity or propriety of an act fairly attributable to the tribe as a governmental body." *Id.*

225. The Ninth Circuit court observed that a tribe might not exercise its right to assume its exclusive jurisdiction over such disputes as the *R.J. Williams* case. The court noted that the 1970 Fort Belknap Law and Order Code stated that the tribal court had jurisdiction over suits in which the " 'defendant is a member of the Fort Belknap Indian Community,' " but that the word " 'member' " was "not precisely defined." *Id.* The court acknowledged the arguments of the Housing Authority that the code had been subsequently amended, but held that the question of whether the Housing Authority was "contemplated within the jurisdictional statute" had to be addressed by the tribal court as part of the tribal court's determination of whether it had jurisdiction in the matter. *Id.* at 983 & n.4.

226. *Id.* at 984 (citations omitted).

The Ninth Circuit court referred specifically to the decisions of the Montana Supreme Court holding that Montana state courts could exercise jurisdiction "over controversies which the tribal courts decline to decide themselves."[227]

B. *The United States Supreme Court Addresses the Diversity Issue in* Iowa Mutual Insurance Company v. LaPlante

Four years after *R. J. Williams*, the federal diversity jurisdiction issue came squarely before the Supreme Court when the justices granted certiorari to *Iowa Mutual Insurance Co. v. LaPlante*,[228] another case initiated in a tribal court on a Montana reservation. As in *National Farmers Union*,[229] the litigation stemmed from challenges to tribal court jurisdiction by non-Indian defendants.[230]

In *LaPlante*, the defendant insurance companies moved in tribal court to dismiss the complaint for failure to allege tribal court jurisdiction and for lack of subject matter jurisdiction.[231] The Blackfeet tribal court initially dismissed the complaint "for failure to allege the factual basis of the court's jurisdiction";[232] however, the LaPlantes were permitted to amend their complaint. Thereafter, the tribal court ruled against the defendants' renewed motions to dismiss for lack of subject matter jurisdiction.[233]

Filing an action in federal district court that alleged diversity of citizenship under 28 U.S.C. § 1332, Iowa Mutual sought a declaratory ruling that it had no duty to defend or indemnify the insured parties because LaPlante's injuries were not covered by the applicable insurance policies.[234] In the federal forum the district court granted the LaPlantes' motion to dismiss for lack of subject matter jurisdiction.[235] The Ninth Circuit Court of Appeals affirmed

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227. *Id.* For discussion of the Montana Supreme Court's decisions, see *infra* Part VIII.

228. 480 U.S. 9 (1987).

229. 471 U.S. 845 (1985). *See supra* notes 191-202 and accompanying text.

230. *LaPlante*, 480 U.S. at 11. The case arose from injuries sustained by a Blackfeet tribal member while he was operating a cattle truck in the course of his employment on the Blackfeet reservation by the Wellman Ranch Company, a Montana corporation owned by members of the Blackfeet tribe. Attempts to settle the claim against the ranch company's insurer were unsuccessful, and the truck driver and his wife then sued Wellman, Iowa Mutual, and Midland Claims Service, Inc. in the Blackfeet Tribal Court.

231. *Id.* at 12.

232. *Id.*

233. *Id.* at 12 n.1.

234. *Id.* at 13.

235. The federal district court, relying on *R.J. Williams*, "held that the Blackfeet Tribal Court must first be given an opportunity to determine its own jurisdiction." *Id.* Because Montana state courts did not have jurisdiction over comparable reservation suits filed by Montana insurance companies, the federal district court indicated that its diversity jurisdic-

the federal district court's order,[236] setting the stage for the United States Supreme Court to hand down a definitive opinion delineating federal court diversity jurisdiction over reservation-based claims.

1. The Tribal Court Exhaustion Requirement Is Applied and Further Defined

Justice Thurgood Marshall's opinion in *LaPlante* garnered near-unanimous agreement,[237] an increasingly rare circumstance in the Supreme Court's enunciations of federal Indian law.[238] Four general rules derive from *LaPlante*:

1) The tribal court exhaustion requirement of *National Farmers Union* applies in diversity as well as federal-question cases.[239]

2) The "full opportunity" mandated by *National Farmers Union* for a tribal court to rule initially on its jurisdiction requires that a tribal appellate court have the opportunity to review decisions of lower tribal courts.[240]

3) If a tribal appellate court upholds a lower tribal court's ruling that the tribal court has jurisdiction, that jurisdictional deter-

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tion would be precluded. Based on Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949), the court observed that in diversity cases federal courts "operate solely as adjuncts to the state court system." Therefore, it could hear Iowa Mutual's case " '[o]nly if the Blackfeet Tribe decides not to exercise its exclusive jurisdiction.' " *LaPlante*, 480 U.S. at 13 (citation omitted).

236. Iowa Mut. Ins. Co. v. LaPlante, 774 F.2d 1174 (9th Cir. 1985) (mem.).

237. Justice Marshall's opinion for the Court was joined by Chief Justice Rehnquist and Justices Brennan, White, Blackmun, Powell, O'Connor, and Scalia. Justice Stevens filed an opinion concurring in part and dissenting in part. *LaPlante*, 480 U.S. at 10.

238. Some of the Court's divisions in recent Indian law decisions trace basically to differing views of an issue similar to that which Chief Justice Marshall encountered: the powers lost to Indian tribes as a result of their incorporation into the United States. A dwindling number of justices strictly construe implicit divestitures and insist on the presence of express withdrawal of tribal authority in treaties or statutes.

Philip Frickey traces the basic divisions among the justices to their willingness or unwillingness to find a legally protected interest in the unique political community rights of Indian tribes and their members. Before his retirement, Justice Brennan joined Justices Marshall and Blackmun in "approach[ing] Indian cases with a strong presumption in favor of Indian uniqueness." Conversely, the typical position of Chief Justice Rehnquist and Justices White and Stevens is to view Indian political community interests narrowly. *See* Frickey, *supra* note 117, at 1201-02 (noting also that other factors in particular cases—statutory language, legislative history, specific context—determine the Court's divisions). In contrast to the divisions of the Court on other tribal civil jurisdiction issues (reaching implausible heights in *Brendale*), the Court's decisions on tribal adjudicatory authority are remarkably broad based. Significantly, both *Williams v. Lee* and *National Farmers Union* were decided unanimously by the Court, and important aspects of *LaPlante* drew similar agreement.

239. *LaPlante*, 480 U.S. at 16.

240. *Id.* at 16-17.

mination (as in *National Farmers Union*) subsequently can be challenged in a federal district court.[241]

4) As a matter of comity, a federal district court's diversity jurisdiction should be exercised only in the event the court determines the tribal court lacks jurisdiction.[242]

After noting that "[t]ribal courts play a vital role in tribal self-government," and that the "Federal Government has consistently encouraged their development,"[243] the Court again differentiated between the criminal and civil jurisdiction of tribal courts—the former subject to "substantial federal limitation"; the latter, "not similarly restricted."[244] Observing that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty,"[245] the Court stated: "Civil jurisdiction over such activities *presumptively* lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[246]

Although an assertion of state-court jurisdiction was not directly implicated in *LaPlante*, the Court restated the principles drawn from *Williams v. Lee*[247] and *Fisher*[248] that state judicial authority is barred as a matter of federal law when a state court's "jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government."[249] The Court then expanded upon the reasoning from *National Farmers Union*[250] that a federal court's exercise of jurisdiction can also intrude upon the authority of tribal courts:

> Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction." In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. Adjudication of such matters by any nontribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.[251]

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241. *Id.* at 19.
242. *Id.* at 18-19.
243. *Id.* at 14-15.
244. *Id.* at 15.
245. *Id.* at 18.
246. *Id.* (emphasis added).
247. *See supra* notes 80-92 and accompanying text.
248. *See supra* notes 94-101 and accompanying text.
249. *LaPlante*, 480 U.S. at 15.
250. *See supra* note 201 and accompanying text.
251. *LaPlante*, 480 U.S. at 16 (citations omitted).

When the LaPlante-Iowa Mutual dispute was before the Blackfeet Tribal Court, Iowa Mutual's jurisdictional challenge had been ruled upon only by the Blackfeet trial court. The Blackfeet Code did not permit interlocutory appeals from jurisdictional rulings, and Iowa Mutual had filed its complaint in federal district court before any decision was made by the Blackfeet Tribal Court on the merits of the LaPlantes' claims.[252] These circumstances resulted in the United States Supreme Court's further explanation of its holding in *National Farmers Union*:

> The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. In this case, the Tribal Court has made an initial determination that it has jurisdiction over the insurance dispute, but Iowa Mutual has not yet obtained appellate review, as provided by the Tribal Code, ch. 1, § 5. Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.[253]

A key segment of the *LaPlante* opinion discusses the relationship between the statutory grant of diversity jurisdiction to federal courts and the federal policy of deference to tribal courts. Justice Marshall emphasized that the diversity statute, 28 U.S.C. § 1332, makes no reference to Indians. Furthermore, nothing in the statute's legislative history at the time of its first enactment in 1789 (nor in the course of its subsequent amendments) demonstrates Congress' intent "to limit the civil jurisdiction of the tribal courts."[254]

At its simplest and most straightforward level, *LaPlante* restates the holding of *National Farmers Union*.[255] Repeated is the rule that a federal district court has subject matter jurisdiction, under 28 U.S.C. § 1331, to hear challenges to tribal court jurisdiction as a federal question, after there has been a full opportunity (now defined as including tribal appellate review) for tribal court determination of the jurisdictional question.[256]

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252. *Id.* at 12.

253. *Id.* at 16-17.

254. *Id.* at 18.

255. *See supra* notes 191-202 and accompanying text.

256. *LaPlante*, 480 U.S. at 19.

2. Federal Diversity Jurisdiction Exists, but Deference to Tribal Courts Poses Restraints

More complex, and less well defined (indeed, still subject to question)[257] is the Court's treatment of federal diversity jurisdiction. A disconcertingly brief passage at the conclusion of the opinion observes that "[u]nless a federal court determines that the Tribal Court lacked jurisdiction, . . . proper deference to the tribal court system precludes relitigation of issues raised by the LaPlantes' bad-faith claim and resolved in the Tribal Courts."[258]

By implication, if not more, the passage confirms diversity jurisdiction over the subject matter of the merits of the suit in federal district court should there be a federal court ruling that the tribal court lacked jurisdiction. Justice Stevens' separate opinion in *LaPlante* expands upon the concept of concurrent jurisdiction of a federal district court and a tribal court in a civil case arising on the reservation and involving parties of diverse citizenship. While agreeing with the majority that the federal district court had subject matter jurisdiction in *LaPlante* (and should not have dismissed the suit on that basis), he expressed strong disagreement with the conclusion that the federal district court should defer to the tribal court and avoid adjudicating the merits of the LaPlantes' federal suit.[259]

Relegated to a dismissive footnote in *LaPlante*[260] is the Court's treatment of one part of the diversity jurisdiction analysis emphasized by the Ninth Circuit Court of Appeals (and many commentators): the inability of a federal court to hear a case in diversity if the case could not be brought in a state court.[261] For tribal courts, the Court's treatment of the analysis should make

257. *See, e.g.*, Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 350-51 (1989) (drawing from the Court's observations in *LaPlante* that the federal diversity statute makes no specific reference to Indians and noting potential discriminatory results when access to federal courts is dependent on whether plaintiffs are residents or nonresidents of the state in which the reservation is located). *See also* R. CLINTON, N. NEWTON & M. PRICE, AMERICAN INDIAN LAW, CASES AND MATERIALS 515 (3d ed. 1991) (noting that the Court has not definitively resolved the earlier split in the Eighth and Ninth Circuits over the issue of the existence of federal diversity jurisdiction when a state lacks subject matter jurisdiction over the litigation).

258. *LaPlante*, 480 U.S. at 19.

259. *Id.* at 22 (Stevens, J., concurring and dissenting).

260. The Court appeared to limit a state law bar to federal diversity jurisdiction to situations in which substantive *state* policy would be contravened. For the Court, the *federal* substantive policy of noninfringement seems to have precluded Montana jurisdiction over similar cases (citing Milbank Mut. Ins. Co. v. Eagleman, 218 Mont. 58, 705 P.2d 1117 (1985)). *LaPlante*, 480 U.S. at 20 n.13.

261. *See supra* notes 219-21 and accompanying text.

little difference. Under *LaPlante*, litigants "must exhaust available tribal remedies before instituting suit in federal court."[262] Thus, if tribal court jurisdiction is proper (and the presumption for that jurisdiction is weighty), tribal courts will be insulated from competing federal court jurisdiction when parties to an action have diverse citizenship.

If *Williams v. Lee*[263] is regarded as the foundation for the modern era of the United States Supreme Court's treatment of tribal court jurisdiction and the importance of tribal justice systems to tribal self-government, *LaPlante* is now the capstone. An interval of twenty-eight years separates the decisions, and there are clear distinctions in the cases. The issue of diversity jurisdiction is dominant in *LaPlante* and absent from *Williams*. No tribal court proceedings had commenced in *Williams*, but they were underway in *LaPlante*. Assertion of state jurisdiction brought *Williams* to the Court; the rightfulness of federal diversity jurisdiction was before the Court in *LaPlante*. The decisions provided opportunities for the Court to consider two issues: the propriety of state civil jurisdiction over cases involving Indians arising within a reservation (in *Williams*) and the propriety of a federal court exercising similar jurisdiction when the parties are diverse (in *LaPlante*). In each instance, the Court applied an analysis for tribal adjudicatory jurisdiction and for competing state (and federal) jurisdiction distinct from its treatment of tribal jurisdiction and state jurisdiction in other civil contexts.

The infringement test of *Williams* asks this question: Will the exercise of state civil court jurisdiction infringe on tribal self-government rights? A weighing of state interests is *not* included in the analysis, in contrast to the weighing of both state and federal interests required by the Court when addressing the permissible exercise of state tax or regulatory authority on Indian reservations. In *LaPlante* (determined by application of the infringement test to federal jurisdiction), the Court stated that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" and "[c]ivil jurisdiction over such activities *presumptively* lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[264] Absent from the presumption and the strict analysis are suggestions of either implicit divestiture of tribal powers based on conflicting fed-

262. *LaPlante*, 480 U.S. at 19.

263. *See supra* notes 80-92 and accompanying text.

264. *LaPlante*, 480 U.S. at 15 (emphasis added).

eral interests (from *Oliphant*)[265] or *Montana*'s much narrower characterization of retained tribal civil jurisdiction (coupled with two sets of explicit exceptions).[266]

National Farmers Union and *LaPlante* have determined procedures and results when tribal court civil jurisdiction has been addressed by federal district and circuit courts in the past four years. These decisions have similarly provided guidelines for tribal court jurisdictional rulings. Federal courts have routinely required that tribal courts be given the first opportunity to rule on their jurisdiction,[267] while reserving the right thereafter to hear claims that a tribal court lacks jurisdiction as a matter of federal law. These decisions have addressed challenges to tribal court proceedings[268] and claims brought initially in federal court.[269]

Similar federal court responses have occurred when post-*LaPlante* diversity actions have been filed.[270] *LaPlante's* principle

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265. *See supra* notes 121-22 and accompanying text.

266. *See supra* note 163 and accompanying text.

267. Departures from the requirement that tribal courts be given full opportunity to rule on their jurisdiction have occurred when federal courts have found barriers in federal law to tribal court jurisdiction. *See, e.g.*, United States v. Yakima Tribal Court, 806 F.2d 853, 860-61 (9th Cir. 1986) (tribal court action was an unconsented suit against the United States barred by sovereign immunity); Lower Brule Constr. v. Sheesley's Plumbing & Heat., 84 B.R. 638 (D.S.D. 1988) (tribal court jurisdiction does not extend to bankruptcy proceedings).

268. A complete survey of post-*National Farmers Union* and *LaPlante* federal and tribal cases addressing tribal court jurisdiction is beyond the scope of this article. Cases arising on Montana reservations include Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989), in which a non-Indian challenged Northern Cheyenne Tribal Court jurisdiction over a divorce action encompassing child custody and child support payment issues. Tribal court jurisdiction was examined (and upheld) by the tribal appellate court and, later, by both federal district and circuit courts. *See also* FMC v. Shoshone Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1404 (1991) (affirming the decision of the Shoshone-Bannock Tribal Appellate Court that the tribes could require a non-Indian contractor to comply with their Tribal Employment Rights Ordinance).

269. *See, e.g.*, Burlington N. R.R. v. Crow Tribal Council, 940 F.2d 1239 (9th Cir. 1991) (vacating the federal district court's judgment for Burlington Northern Railroad (BN) and remanding for dismissal or stay of BN's suit challenging the Crow Tribe's Common Carrier Ordinance until BN exhausts Crow Tribal remedies—both administrative and judicial); Northwest S.D. Prod. Cred. Ass'n v. Smith, 784 F.2d 323 (8th Cir. 1986) (the Cheyenne River Sioux Tribe should decide in the first instance whether it has jurisdiction over an action to foreclose a mortgage on individually owned Indian trust lands). *But see* Stock West v. Taylor, 942 F.2d 655 (9th Cir. 1991), *reh'g en banc granted*, 1992 U.S. App. LEXIS 1500 (9th Cir. 1992) (*Stock West II*) (reversing district court's dismissal of case for failure to exhaust tribal remedies on principle of comity or because of tribal officer's immunity from suit).

270. *See, e.g.*, Brown Constr. Co. v. Washoe Hous. Auth., 835 F.2d 1327 (10th Cir. 1988) (tribal court remedies must be exhausted before a federal court can review the tribal court's jurisdictional determination); United States *ex rel.* Kishell v. Turtle Mountain Hous. Auth., 816 F.2d 1273 (8th Cir. 1987) (exhaustion of tribal remedies required before tribal

of federal court deference to tribal court proceedings as a matter of comity has dictated the outcome of litigation in which a tribal appellate court's ruling on tribal jurisdiction has been affirmed by federal court review.[271]

The particularized jurisdictional inquiries made by tribal courts applying *National Farmers Union* guidelines generally have not resulted in decisions adverse to tribal jurisdiction. Tribal courts have not found civil adjudicatory authority divested or altered by federal statutes, administrative regulations, or judicial decisions. Nor have reviews of specific treaty provisions resulted in findings of restraints on tribal court civil jurisdiction. Because most tribal codes now include broad statements of civil adjudicatory jurisdiction, code provisions seldom constitute barriers to tribal jurisdiction over non-Indians.[272] When tribal interests are remote, however, tribal courts have declined jurisdiction when judges have reasoned that a state court forum was more appropriate.[273]

Against this review of the development of federal law concern-

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court jurisdiction could be challenged in a trespass suit brought by tribal member's executor against tribal housing authority); Wellman v. Chevron, U.S.A., Inc., 815 F.2d 577 (9th Cir. 1987) (A Blackfeet tribal member must exhaust remedies in tribal court before a federal court can exercise either federal question or diversity jurisdiction over a contract claim against a Pennsylvania non-Indian corporation.). *See also* Crawford v. Genuine Parts Co., Inc., 947 F.2d 1405 (9th Cir. 1991), *cert. denied*, 1992 U.S. LEXIS 1303 (1992) (terming a case brought in state court and removed to federal court on diversity grounds a "reservation affair," the Ninth Circuit held that the district court must defer to tribal court proceedings unless one of the *National Farmers Union* exceptions is asserted); American States Ins. Co. v. McDougall, No. CV90-115-M-CCL (D. Mont. 1991) (litigants in declaratory judgment action to determine the coverage of an automobile liability insurance policy—in which the Confederated Salish & Kootenai Tribes intervened—must exhaust tribal remedies before entering the federal system).

271. *See* Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221 (9th Cir. 1989)(*Stock West I*) (upholding the jurisdiction of the Colville Tribal Court over a dispute concerning the management of tribal timber resources and ruling that it was proper for the federal district court to defer to tribal court jurisdiction on the grounds of comity).

272. *See, e.g.*, Smallsalmon v. Allen, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6054 (Confederated Salish & Kootenai Trib. Ct. 1989) (holding the Confederated Salish and Kootenai Tribal Court had subject matter and personal jurisdiction over a contract suit filed against a non-Indian operating a flatbed trailer business within the Flathead Reservation); Fort Peck Hous. Auth. v. Home Sav. & Loan Ass'n, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6083 (Fort Peck Trib. Ct. 1989). *See also* Twin City Constr. v. Turtle Mountain Band of Chippewa Indians, 911 F.2d 137 (8th Cir. 1990) (recapitulating a long course of litigation during which the Turtle Mountain Tribal Code was amended to remove restrictions on suits brought against non-Indians performing contracts on the reservation).

273. *See, e.g.*, Johnson v. Patterson & United Pac. Ins. Co., CV-179-90 (Confederated Salish & Kootenai Trib. Ct. 1990) (dismissing a case stemming from an automobile accident on private property within the reservation involving individuals who were not tribal members although their families included tribal members). The court determined that because of the particular issues involved, the parties' interests would be served better in state court.

ing tribal court civil jurisdiction, this article now turns to state-tribal jurisdictional relationships in Montana.

The recent course of these relationships spans the decades of the 1970s and 1980s, and they reflect developments in federal Indian law broader than the law of adjudicatory jurisdiction. Conflicts over the collection of state taxes within reservations led to the United States Supreme Court's distinctive Indian law preemption analysis in *McClanahan v. Arizona State Tax Commission*[274] in 1973, an analysis further discussed in *Washington v. Confederated Tribes of the Colville Reservation*[275] in 1980, and most fully articulated in *White Mountain Apache Tribe v. Bracker*[276] later in 1980. Federal and tribal interests are generally intertwined in the judicial weighing of interests when courts apply the Indian law preemption analysis, but state interests are by no means disregarded. They are a mandatory component of the particularized inquiry made of state, federal, and tribal interests when courts address questions of whether the on-reservation exercise of state tax

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274. 411 U.S. 164 (1973) (barring state taxation of income earned on her reservation by a Navajo tribal member). The Court said:

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.
>
> The Indian sovereignty doctrine is relevant then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.

Id. at 172 (citations omitted).

275. 447 U.S. 134 (1980) (permitting the imposition of state taxation on the purchase of cigarettes from tribal outlets by both non-Indians and nonmember Indians). The Court said, "The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Id.* at 156.

276. 448 U.S. 136 (1980) (barring the imposition of state motor carrier and fuel taxes on non-Indian logging companies performing on-reservation work for tribal timber enterprises). The Court said:

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Id. at 144-45 (citations omitted).

or regulatory authority will violate federal law.[277]

VIII. The Montana Supreme Court—Balancing Tribal Sovereignty Against an Individual's Right of Access to a Forum

The Montana Supreme Court, out of a well-intentioned spirit and a conventional judicial outlook, has been persistent in its efforts to assure a forum for the reservation-based claims of its Indian citizens. As an ever-increasing number of cases are brought to tribal justice systems, however, the supreme court's focus on individual interests can be seen as increasingly in conflict with tribal sovereignty.

Even before the recent United States Supreme Court decisions in *National Farmers Union*[278] and *LaPlante*,[279] the Montana Supreme Court, (relying primarily on the earlier cases of *Williams v. Lee*[280] and *Kennerly v. District Court*[281]), attempted to adhere to federal jurisdictional principles, while at the same time upholding another principle important to the court—parties' access to a forum. In the most significant of these cases, *State ex rel. Iron Bear v. District Court*,[282] the Montana Supreme Court enunciated a test that it followed for eighteen years before departing from it, at least nominally, in *First v. State ex rel. LaRoche*.[283] Central to the origin of the *Iron Bear* test is the Montana Supreme Court's belief that Indians' right of access to state courts is fundamental even though it may be in conflict with tribal sovereignty.

The Montana court did not move away from the *Iron Bear* test in *First* because of *National Farmers Union* and *LaPlante*. In fact, in the three cases it has decided since these Supreme Court decisions, the Montana court has referred only once to *LaPlante* and never to *National Farmers Union*. In *First*, the court relied on a United States Supreme Court taxation case that set forth an analysis for state taxation and regulatory authority and dealt not

277. For distinctive analyses of the implications of the Court's shift from emphasizing the inherent sovereignty of tribes to the preemption analysis, balancing state, federal, and tribal interests, see D. Getches & C. Wilkinson, *supra* note 57, at 332-36; Canby, *The Status of Indian Tribes in American Law Today*, 62 Wash. L. Rev. 1 (1987).

278. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985). *See supra* notes 191-202 and accompanying text.

279. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987). *See supra* notes 228-66 and accompanying text.

280. 358 U.S. 217 (1959). *See supra* notes 80-92 and accompanying text.

281. 400 U.S. 423 (1971). *See supra* notes 107-13 and accompanying text.

282. 162 Mont. 335, 512 P.2d 1292 (1973). *See infra* notes 304-21 and accompanying text.

283. 247 Mont. 465, 808 P.2d 467 (1991).

at all with adjudicatory jurisdiction.

A. *Access to State Courts for Indian Plaintiffs: From* Bonnet v. Seekins *to* Three Affiliated Tribes v. Wold Engineering

In contrast to the rule applicable to lawsuits brought by non-Indians against Indians in reservation-based claims,[284] the rules applicable to reservation-based claims brought by Indians permit the filing of those claims in either state or tribal court. In *Bonnet v. Seekins*,[285] the Montana Supreme Court in 1952 showed its concern for the availability of a state forum in which to resolve reservation-based disputes by holding that a state district court had jurisdiction over a claim by an Indian for lease payments and damages to trust land located on the Blackfeet Indian Reservation.[286] The court referred to Montana's constitutional guarantee that " '[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character.' "[287] The court also cited case law from other states affirming the right of Indians to sue in state court.

Similarly, on the grounds of full access and equal protection, the court held in *McCrea v. Busch*[288] that a member of the Confederated Salish and Kootenai Tribe could bring a reservation-based wrongful death action against a non-Indian in state district court.[289] By the time of *McCrea*, the principles of *Williams v. Lee* were well-established, and the Montana court observed that in *Williams* the United States Supreme Court had also recognized and approved state court jurisdiction over reservation-based claims brought by Indians.[290]

The Supreme Court restated that position in *Three Affiliated Tribes v. Wold Engineering*,[291] a decision upholding state court ju-

284. *I.e.*, under *Williams*, tribal court jurisdiction over the matter is exclusive.

285. 126 Mont. 24, 243 P.2d 317 (1952).

286. The court did not directly address the jurisdictional implications of the fact that the land involved was trust land. Under federal statutory law, federal jurisdiction over disputes concerning trust property generally is exclusive. 25 U.S.C. §§ 345-346 (1988); 28 U.S.C. § 1353 (1988).

287. *Seekins*, 126 Mont. at 27, 243 P.2d at 319 (quoting MONT. CONST. art. I, § 8 (1889)).

288. 164 Mont. 442, 524 P.2d 781 (1974).

289. The cause of action was not included in any of the eight areas of civil law over which the state and tribe have concurrent jurisdiction under Public Law 280. *See supra* note 116 and accompanying text.

290. *McCrea*, 164 Mont. at 444, 524 P.2d at 782.

291. 467 U.S. 138 (1984)(*Wold I*); 476 U.S. 877 (1986)(*Wold II*). The procedural background of the *Wold* case is complex. In 1974 the Three Affiliated Tribes of the Fort Berthold Reservation engaged the services of Wold Engineering, P.C., a North Dakota corporation, to design and build a water-supply system on the reservation. Wold completed the

risdiction over a reservation-based claim filed by a tribe against a non-Indian defendant. In ruling that such exercise of jurisdiction violated neither the preemption nor the infringement test, the Court stated that it "repeatedly [had] approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country."[292] The Court distinguished this situation from those involving all Indian parties or Indian defendants and cited *McCrea v. Busch* as an example of state judicial approval of Indian access to state courts.[293]

B. Access to State Courts for Reservation-Based Claims Involving Significant Off-Reservation Contacts: Crawford v. Roy

As indicated above, under *Williams v. Lee*,[294] a state court may not exercise jurisdiction over a reservation-based claim by a non-Indian against an Indian because that would infringe on tribal

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system in 1977. The tribes found the system unsatisfactory and in 1980 sued Wold in North Dakota state court for negligence and breach of contract. At the time the case was filed, the Three Affiliated Tribes' tribal code provided that the tribal court had jurisdiction over non-Indian defendants only when the defendants consented. (The tribal code was later amended.)

Wold moved to dismiss the state court action on the grounds that the state courts lacked subject matter jurisdiction over reservation-based claims. The trial court dismissed the case and the North Dakota Supreme Court affirmed the dismissal. The North Dakota Supreme Court held that under North Dakota constitutional and statutory law, the state courts had no jurisdiction of reservation-based claims unless the tribal members of the reservation involved had voted to accept jurisdiction under Public Law 280. The court further held that any pre-1953 residuary jurisdiction (*i.e.*, state jurisdiction over reservation-based claims obtained prior to enactment of Public Law 280 in 1953) was disclaimed in 1963 when North Dakota enacted legislation providing for state exercise of Public Law 280 jurisdiction over reservation-based claims "upon acceptance by Indian citizens." *Wold I*, 467 U.S. at 144.

In *Wold I*, the United States Supreme Court vacated the North Dakota Supreme Court's decision and remanded the case for reconsideration under the holding that "the assumption that P.L. 280 and the Civil Rights Act of 1968 either authorized North Dakota to disclaim jurisdiction or affirmatively forbade the exercise of jurisdiction absent tribal consent is incorrect." *Id.* at 154. On remand, the North Dakota Supreme Court held that the 1963 law had ended any residuary jurisdiction that may have existed over reservation-based claims brought by Indians against non-Indians. *Wold II*, 476 U.S. at 882.

In *Wold II*, the United States Supreme Court reversed, ruling that the North Dakota law was "preempted insofar as it is applied to disclaim pre-existing jurisdiction over suits by tribal plaintiffs against non-Indians for which there is no other forum, absent the Tribe's waiver of its sovereign immunity and consent to the application of state civil law in all cases to which it is a party." *Wold II*, 476 U.S. at 883. One wonders how closely the United States Supreme Court's affirmance of state court jurisdiction over reservation-based claims by Indians against non-Indians was linked to the absence of a tribal forum in *Wold*.

292. *Wold I*, 467 U.S. at 148.

293. *Id.* at 148 n.7.

294. 358 U.S. 217 (1959). *See supra* notes 80-92 and accompanying text.

self-government. However, in *Crawford v. Roy*,[295] the Montana Supreme Court found state jurisdiction over a reservation-based claim by a non-Indian against an Indian proper when the claim arose from a transaction involving significant off-reservation contacts.[296] The district court, relying on *Williams v. Lee*, had dismissed the case.[297] The Montana Supreme Court reversed, finding that the off-reservation activities were "sufficient to give a state court jurisdiction"[298] and that under these circumstances there could be no infringement upon tribal self-government.[299]

Similarly, in an earlier case, *Little Horn State Bank v. Stops*,[300] the Montana court had found proper enforcement on the reservation of a writ of execution issued by a state court against reservation Indians. The Little Horn State Bank in Hardin, near the Crow Reservation, had sued the Stops, a husband and wife, for failure to repay a loan that had been negotiated off the reservation. At the time of the litigation the Crow Tribal Code did not provide for enforcement in tribal court of off-reservation judgments.[301] The court pointed out that the parties had transacted the loan off the reservation. In applying *Williams v. Lee*,[302] the court found that prohibited infringement exists only when the transaction occurs on the reservation and the tribal court affords a forum for resolving the dispute.[303]

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295. 176 Mont. 227, 577 P.2d 392 (1978) (investigators sued an on-reservation Indian attorney for failure to pay for their services under a contract negotiated on and off the reservation, entered into on the reservation, to be performed both on and off the reservation, and with payment to be made to a post office off the reservation).

296. Off-reservation contacts also had significance in Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, *cert. denied*, 419 U.S. 847 (1974), when the court ruled state jurisdiction proper over a divorce action involving reservation Indians because the tribal court did not—at that time—adjudicate divorces. It is notable for this discussion that the court pointed out that the marriage took place off the reservation. *See also* State *ex rel.* Old Elk v. District Court, 170 Mont. 208, 552 P.2d 1394, *appeal dismissed*, 429 U.S. 1030 (1976).

297. *Crawford*, 176 Mont. at 229, 577 P.2d at 393.

298. *Id.* at 230, 577 P.2d at 394.

299. *Id.* The Ninth Circuit later applied *Crawford* in R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979 (9th Cir. 1983), finding that case did *not* meet the significant (off-reservation) contacts test. *Id.* at 984-85.

300. 170 Mont. 510, 555 P.2d 211 (1976), *cert. denied*, 431 U.S. 924 (1977).

301. The Crow Tribal Code now provides a mechanism for enforcement of foreign judgments. *See* CROW TRIB. CODE R. CIV. P. 20 (1978).

302. 358 U.S. 217 (1959). *See supra* notes 80-92 and accompanying text.

303. *Stops*, 170 Mont. at 515, 555 P.2d at 213.

C. General Civil Adjudicatory Jurisdiction: When the Individual's Right of Access Conflicts with Tribal Sovereignty

1. Iron Bear

a. Jurisdiction

In 1973, in *State ex rel. Iron Bear v. District Court*,[304] the Montana Supreme Court decided that federal Indian law permitted a state court to adjudicate the divorce of reservation Indians because the tribe had enacted an ordinance in 1938 purporting to cede jurisdiction over divorces to the state.[305] The court was influenced by the fact that the tribal court (the Assiniboine and Sioux Tribal Court of the Fort Peck Reservation) was not at that time asserting jurisdiction over divorces. Thus, the state court was the only forum available to the parties.[306]

Relying on *Kennerly v. District Court*[307] and two subsequent Montana Supreme Court decisions,[308] the district court ruled ineffective—as a transfer of jurisdiction—the 1938 tribal ordinance which stated in part: "[N]o marriage or divorce of any member of this Reservation shall be valid or have any force or effect unless entered into or granted or decreed in accordance with the laws of the State of Montana."[309] The ordinance had been interpreted by tribal authorities as a cession to the state of tribal court jurisdiction over marriage and divorce.[310]

The Montana Supreme Court granted Mary Iron Bear's petition for a writ of mandamus and directed the district court to take jurisdiction of the case.[311] The state supreme court, adding to preemption and infringement (the criteria derived from *Worcester*,[312]

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304. 162 Mont. 335, 512 P.2d 1292 (1973).

305. The court relied on Bonnet v. Seekins, 126 Mont. 24, 243 P.2d 317 (1952). *See supra* notes 285-87 and accompanying text.

306. *Iron Bear*, 162 Mont. at 338, 512 P.2d at 1294 (Mary and Harry Iron Bear, enrolled members of the Assiniboine and Sioux Tribe, were married under a state marriage license in 1954. During their marriage, the Iron Bears lived within the boundaries of the Fort Peck Indian Reservation in northeast Montana. In 1971, Mary Iron Bear filed a divorce action against her husband in state district court. Harry Iron Bear did not respond and the district court clerk entered his default in the case. When Mary Iron Bear applied for judgment by default, the district court, on its own motion, dismissed the divorce action for lack of jurisdiction over the subject matter.).

307. 400 U.S. 423 (1971). *See supra* notes 107-13 and accompanying text.

308. Blackwolf v. District Court, 158 Mont. 523, 493 P.2d 1293 (1972); Crow Tribe v. Deernose, 158 Mont. 25, 487 P.2d 1133 (1971).

309. *Iron Bear*, 162 Mont. at 337-38, 512 P.2d at 1294.

310. *Id.* at 338, 512 P.2d at 1294.

311. *Id.* at 346, 512 P.2d at 1299.

312. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *See supra* notes 83-85 and accompanying text.

Williams,[313] and *McClanahan*[314]), stated the governing rule to be the following:

> Before a district court can assume jurisdiction in any matter submitted to it, it must find subject matter jurisdiction by determining: (1) whether the federal treaties and statutes applicable have preempted state jurisdiction; (2) whether the exercise of state jurisdiction would interfere with reservation self-government; and (3) whether the Tribal Court is currently exercising jurisdiction or has exercised jurisdiction in such a manner as to preempt state jurisdiction.[315]

In applying part one of the test, the court found inapplicable both the state constitutional disclaimer of jurisdiction required by the 1889 Montana Enabling Act and Public Law 280.[316] Further, the court ruled there were "no federal limitations on the state's jurisdiction over divorce."[317] When applying part two of the test, the court further found that because the intent of the 1938 ordinance was to do away with tribal court jurisdiction, assertion of state court jurisdiction did not interfere with tribal self-government.[318] The court stated,

> The state thus has residual jurisdiction in areas where the federal law has not preempted state activity and the tribes have determined not to exercise jurisdiction. . . .
>
> . . . .
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> Based on the holding in *McClanahan*,[319] that the determi-

313. Williams v. Lee, 358 U.S. 217 (1959). *See supra* notes 80-92 and accompanying text.

314. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). *See supra* note 274 and accompanying text.

315. *Iron Bear*, 162 Mont. at 346, 512 P.2d at 1299.

316. *Id.* at 341, 512 P.2d at 1296. Ordinance 1, adopted in accordance with the Montana Enabling Act, ch. 180, 25 Stat. 676 (1889), states:

> 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 . . . .

MONT. CONST. ordinance 1, § 2 (1889). Despite the ordinance's specific reference to jurisdiction over Indian lands, the court stated: "This disclaimer of a right and title to Indian lands is a disclaimer of a proprietary interest therein and control thereof, and not a disclaimer of governmental control." *Iron Bear*, 162 Mont. at 341, 512 P.2d at 1296.

317. *Iron Bear*, 162 Mont. at 343, 512 P.2d at 1297.

318. *Id.*

319. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). *See supra* note 274 and accompanying text.

> nation of jurisdiction is made by examining federal statutes for preemption and federal treaties and statutes for the sovereignty of the tribe, the residual jurisdiction of the state over divorces on the Fort Peck Indian Reservation remains valid.[320]

As for part three, the court noted that the tribal court had granted no divorces since 1938 and that the state court had dissolved the marriages of "hundreds" of tribal reservation residents.[321]

Before 1991 the Montana Supreme Court had applied the *Iron Bear* test in ten cases, upholding state court jurisdiction three times[322] and finding a lack of state court jurisdiction seven times.[323] In each case in which the court ruled that state jurisdiction existed, the court found that the parties did not have a remedy in tribal court. In the cases in which the court ruled that the state courts lacked jurisdiction, the court found that the parties did have a remedy in tribal court.

The court upheld state court jurisdiction based *solely* on *Iron Bear* in only two cases, a divorce when all parties were reservation residents but the tribal court did not, at that time, exercise jurisdiction over divorce,[324] and an action to enforce a state court order in a claim and delivery action pertaining to a probate proceeding when the tribal court had disclaimed jurisdiction over the probate proceeding.[325] In a third case, *Larrivee v. Morigeau*,[326] an automo-

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320. *Iron Bear*, 162 Mont. at 345, 512 P.2d at 1298-99. For a discussion of residual state jurisdiction, see *supra* notes 291-93 and accompanying text pertaining to the *Wold* decision.

321. *Iron Bear*, 162 Mont. at 338, 512 P.2d at 1294.

322. Estate of Standing Bear v. Belcourt, ___ Mont. ___, 631 P.2d 285 (1981); Larrivee v. Morigeau, 184 Mont. 187, 602 P. 2d 563 (1979), *cert. denied*, 445 U.S. 964 (1980); Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, *cert. denied*, 419 U.S. 847 (1974).

323. Emerson v. Boyd, 247 Mont. 241, 805 P.2d 587 (1991); Geiger v. Pierce, 233 Mont. 18, 758 P.2d 279 (1988); Milbank Mut. Ins. Co. v. Eagleman, 218 Mont. 58, 705 P.2d 1117 (1985); *In re* Marriage of Limpy, 195 Mont. 314, 636 P.2d 266 (1981); State *ex rel.* Stewart v. District Court, 187 Mont. 209, 609 P.2d 290 (1980); State *ex rel.* Flammond v. Flammond, 190 Mont. 350, 621 P.2d 471 (1980); Security State Bank v. Pierre, 162 Mont. 298, 511 P.2d 325 (1973). The court applied the test implicitly in Little Horn State Bank v. Stops, 170 Mont. 510, 515, 555 P.2d 211, 214 (1976), *cert. denied*, 431 U.S. 924 (1977), when it stated, "Until the Crow Tribe has provided a means of such enforcement or acted in some manner within this area, we fail to see how tribal self government is interfered with by assuring that reservation Indians pay for their debts incurred off the reservation." The court did not explicitly apply *Iron Bear* in another case, State *ex rel.* Three Irons v. Three Irons, 190 Mont. 361, 621 P.2d 476 (1980), but rather applied *Flammond*, a case in which it had applied *Iron Bear*.

324. Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, *cert. denied*, 419 U.S. 847 (1974), *overruled by In re* Marriage of Limpy, 195 Mont. 314, 636 P.2d 266 (1980).

325. Estate of Standing Bear v. Belcourt, ___ Mont. ___, 631 P.2d 285 (1981) (claim and delivery action to restrain a personal representative from disposing of personal property owned by an Indian decedent and located on a reservation).

bile negligence case arising on the Flathead Indian Reservation, the court applied *Iron Bear* and found state court jurisdiction over the matter. The court did not reach parts two or three of the *Iron Bear* test, though, because it determined that under the governing federal law, *i.e.*, Public Law 280 and its implementation by the state and tribes, the state had concurrent jurisdiction over the operation of motor vehicles on the reservation.[327]

The Montana Supreme Court has held that state courts lack subject-matter jurisdiction in the following situations: An action on a consumer loan between a non-Indian lender and an Indian debtor arising on the Flathead reservation,[328] divorce when all parties were Indian and reservation residents and the tribal court was exercising jurisdiction over divorces,[329] a Uniform Reciprocal Enforcement of Support Act action against a reservation Indian,[330] an action by an insurance company against an Indian residing on the reservation for damages caused to an insured vehicle on the reservation,[331] a consumer credit action involving personal property purchased and used on the reservation by an Indian,[332] and a dispute arising out of a trucking contract entered into on the reservation.[333]

The Montana Supreme Court has sometimes expressed reluctance in following United States Supreme Court jurisdictional rulings because of the Montana court's concern that all state citizens should have access to state forums.[334] Because of its adherence to

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326. 184 Mont. 187, 602 P.2d 563 (1979), *cert. denied*, 445 U.S. 964 (1980).

327. *Id.* at 199-200, 602 P.2d at 570.

328. Security State Bank v. Pierre, 162 Mont. 298, 511 P.2d 325 (1973).

329. *In re* Marriage of Limpy, 195 Mont. 314, 636 P.2d 266 (1981); State *ex rel.* Stewart v. District Court, 187 Mont. 209, 609 P.2d 290 (1980). The Montana Supreme Court held otherwise in Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893 (1974), but reversed *Bad Horse* in *Limpy*. *See infra* notes 342-47 and accompanying text.

330. State *ex rel.* Flammond v. Flammond, 190 Mont. 350, 621 P.2d 471 (1980). *State ex rel. Three Irons v. Three Irons* involved similar facts arising on the Crow Reservation and the state court action was dismissed based on *Flammond*. *Three Irons*, 190 Mont. 361, 621 P.2d 476 (1980).

331. Milbank Mut. Ins. Co. v. Eagleman, 218 Mont. 58, 705 P.2d 1117 (1985).

332. Geiger v. Pierce, 233 Mont. 18, 758 P.2d 279 (1988).

333. Emerson v. Boyd, 247 Mont. 241, 805 P.2d 587 (1991).

334. Even before *Iron Bear*, in addition to *Bonnet v. Seekins*, the Montana Supreme Court showed a concern for parties' access to a forum in cases involving state court jurisdiction over reservation-based claims. In Crow Tribe of Indians v. Deernose, 158 Mont. 25, 487 P.2d 1133 (1971), the court found a state court lacked jurisdiction over a real estate foreclosure action concerning trust land located on the reservation. However in that case, another forum, federal district court, existed for the foreclosure action.

Similarly, six months after *Deernose*, the supreme court in Blackwolf v. District Court, 158 Mont. 523, 493 P.2d 1293 (1972), ruled a Northern Cheyenne tribal code provision that purported, under certain circumstances, to transfer jurisdiction of juvenile offender proceedings from tribal court to state district court ineffective because it conflicted with applicable

this belief, when no tribal forum is available for a reservation-based claim, the court will approve a state forum.

b. Access to the Courts

Important to the Montana Supreme Court's decision in *Iron Bear* was its holding that principles of equal protection require that Indians' right of access to the state courts parallels that of non-Indians. Referring to its decisions in *Bonnet v. Seekins*[335] and *State ex rel. Kennerly v. District Court*,[336] the court maintained that "this state and other states have long held that an Indian has the same rights as are accorded any other person to invoke the jurisdiction of the state courts to protect his rights in matters not affecting the federal government."[337] The court also noted that *Williams* recognizes and approves the "propriety of legal actions by Indians against non-Indians in the state courts."[338]

A statement in *Security State Bank v. Pierre*[339] indicates the court's belief that federal case law, specifically *Kennerly* and *Worcester*, may restrict the equal protection rights of litigants of reservation-based claims. The court said that "there is little state courts can do to afford the equal protection of our law to both its Indian and nonIndian [sic] citizens on civil matters arising within the exterior boundaries of an Indian reservation."[340] The court then held that state jurisdiction did not exist over a civil debt action by a non-Indian against an Indian for a transaction entered into on the reservation. Access to a forum was assured because, as the court noted, the Confederated Salish and Kootenai Tribes did exercise jurisdiction over this type of civil proceeding.[341]

By contrast, in *Bad Horse v. Bad Horse*, access to a tribal forum was not assured and the court once again ruled proper state court jurisdiction over a divorce of Indian reservation residents in part because the tribal court involved, the Northern Cheyenne,

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federal law. The court relied on *Deernose* and *Kennerly* in finding that the state and the tribe had not complied with Public Law 280 (either as originally enacted or as amended in 1968) to bring about a valid transfer of jurisdiction to the state court. The Northern Cheyenne Tribal Court did exercise jurisdiction over juvenile offender proceedings, thus providing the forum that the court sought to assure.

335. 126 Mont. 24, 243 P.2d 317. *See supra* notes 285-87 and accompanying text.

336. 154 Mont 488, 466 P.2d 85 (1970), *rev'd*, 400 U.S. 423 (1971).

337. State *ex rel.* Iron Bear v. District Court, 162 Mont. 335, 340, 512 P.2d 1292, 1295 (1973).

338. *Id.*

339. 162 Mont. 298, 511 P.2d 325 (1973).

340. *Id.* at 305, 511 P.2d at 329.

341. *Id.* at 300, 511 P.2d at 327.

was not exercising jurisdiction over divorces.[342] Repeating its interest in providing a forum for the resolution of disputes between Indians,[343] the court focused directly on the issue of equal access to courts:

> The cases cited by defendant deal with arguments concerning tribal self-government and assumption of jurisdiction by the state over the Northern Cheyenne Reservation. Here we are concerned with protecting the equal rights of a person under the Montana Constitution to maintain an action in the courts of this state.[344]

Citing the 1989 Montana Constitution[345] and *Bonnet v. Seekins*,[346] the court found that "[t]o deny plaintiff access to Montana courts here would leave him without a remedy as a practical matter and deny to him that which other persons of this state are entitled under Montana's Constitution."[347] Once again, the court had underscored its belief in the importance of affording access to the state courts for Indian citizens.

By the time the Montana Supreme Court faced the next *Iron Bear*-type case, six years after *Bad Horse*, tribal government developments had begun to influence Montana Supreme Court decisions. By 1980 more often than not a tribal forum did exist for a dispute. Thus, access to the courts was not discussed at length in *State ex rel. Stewart v. District Court*[348] when the Montana court held that the exercise of state jurisdiction over divorces of members of the Crow Tribe would impermissibly infringe on the right of the tribe to govern itself. The court simply pointed out that the

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342. Bad Horse v. Bad Horse, 163 Mont. 445, 451, 517 P.2d 893, 896, *cert. denied*, 419 U.S. 847 (1974), *overruled by In re* Marriage of Limpy, 195 Mont. 314, 636 P.2d 266 (1980). The Northern Cheyenne Tribe had enacted a domestic relations ordinance similar to the Fort Peck Tribal ordinance at issue in *Iron Bear*. The ordinance, originally adopted in 1937, stated in pertinent part [1966]: "All Indian marriages and divorces must be consummated in accordance with the laws of the State of Montana except that no common-law marriages shall be recognized within the bounds of the Northern Cheyenne reservation." The supreme court recognized that "[d]omestic relations may well be one of those concerns that are peculiar to Indian culture and tradition and best administered by tribal officials who understand Indian marriage and divorce customs." However, the court noted that the tribe had left governance of domestic relations to the state since 1937. *Bad Horse*, 163 Mont. at 451, 517 P.2d at 896.

343. *Id.* at 451-52, 517 P.2d at 896.

344. *Id.* at 449, 517 P.2d at 895.

345. MONT. CONST. art. III, § 6 (1889)("Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character; and that right and justice shall be administered without sale, denial or delay"). This provision, with little change, is currently found in MONT. CONST. art. II, § 16.

346. 126 Mont. 24, 243 P.2d 317 (1952). *See supra* notes 285-87 and accompanying text.

347. *Bad Horse*, 163 Mont. at 452, 517 P.2d at 896.

348. 187 Mont. 209, 609 P.2d 290 (1980).

Crow Tribe was exercising exclusive jurisdiction over divorces, so denial of a state court forum did not leave the parties without a remedy.

Similarly, a tribal forum was available when the Montana court deferred to legislative and judicial authority of the Blackfeet Tribe in holding that a district court lacked jurisdiction over a Uniform Reciprocal Enforcement of Support Act (URESA) action in *State ex rel. Flammond v. Flammond*.[349] The court indicated some reluctance in its decision, stating, "It is not our purpose here to deny Ms. Flammond a forum. We have no choice but to apply the law as it has been declared by the United States Supreme Court."[350] But the court stated that there was "every reason to hope that the Blackfeet Tribe will afford the petitioning wife a viable remedy in its courts."[351] Also,

> [a] state may simply not extend its jurisdiction by judicial fiat no matter how compelling the policy considerations for doing so may seem if there is no legal basis to support state jurisdiction. If a remedy other than tribal court is to exist, Congress must provide it.[352]

Even though tribal jurisdiction over the probate of nontrust property located on a reservation and owned by an Indian domiciled on the reservation is regarded as exclusive,[353] in *Estate of Standing Bear v. Belcourt*[354] the Montana Supreme Court ruled that a district court could exercise jurisdiction over a claim and delivery action to recover a road grader that was part of the estate of an Indian domiciled on the Rocky Boy's reservation when he died.[355] The court applied *Iron Bear* and held that the district court could exercise jurisdiction over the claim and delivery action as well as over the probate proceeding. Because the tribal court

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349. 190 Mont 350, 621 P.2d 471 (1980).

350. *Id.* at 354, 621 P.2d at 474.

351. *Id.* at 355, 621 P.2d at 474.

352. *Id.*

353. F. COHEN, *supra* note 130, at 632.

354. ___ Mont. ___, 631 P.2d 285 (1981).

355. The decedent was a member of the Wind River Arapaho Tribe of Wyoming. The grader was located on the Fort Peck Reservation at the time of the decedent's death and had been moved to the Rocky Boy's reservation when the action was filed. The district court had ruled "that it had jurisdiction over the probate proceeding but that it lacked jurisdiction over the claim and delivery action." The district court found that the sale of the grader occurred on the reservation, that most of the sale proceeds were deposited in a bank on another reservation, that the tribal court claimed jurisdiction of the case under tribal law, and that for the state court to exercise jurisdiction would be an interference with tribal government. *Id.* at ___, 631 P.2d at 287.

had disclaimed jurisdiction[356] over the matter, the Montana Supreme Court approved a state court forum. Had the court not done so, the personal representative would not have been able to probate the estate or pursue the road grader.

After Northern Cheyenne tribal law governing divorces was reinterpreted to provide a tribal forum for divorces, the Montana Supreme Court applied the doctrine of abstention and ruled that the state court lacked jurisdiction over a divorce of members of the Northern Cheyenne Tribe residing on the Northern Cheyenne Indian reservation. In *In re Marriage of Limpy*,[357] the court explicitly overruled *Bad Horse*[358] because, since that decision in 1974, the Northern Cheyenne Appellate Court had issued an advisory opinion in 1979 declaring that the Northern Cheyenne Tribal Court had exclusive jurisdiction over divorce actions between Northern Cheyenne Indians residing on the reservation.[359] The court noted that the tribal court afforded a remedy to the parties:

> This court has been assured by the attorney for Legal Services that the Tribal Court of the Northern Cheyenne Tribe is functioning in this area and thus providing a forum for tribal members to adjudicate domestic relations disputes so no vacuum exists in the jurisdiction of the tribal court in domestic relations cases. . . . If there were no tribal forum, it is difficult to see how the exercise of jurisdiction by a State court would infringe on tribal self-government.[360]

The court concluded that "sound public policy requires that the Tribal Courts should have the jurisdiction to interpret their Tribal Constitution and Tribal Law where the Indian tribe has established a functioning forum for themselves to adjudicate controversies affecting the custody of their children."[361]

Again, when a tribal forum was clearly available, four years after *Limpy*, in *Milbank Mutual Insurance Co. v. Eagleman*,[362]

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356. The tribal court stated, " 'This Court concedes that jurisdiction over the personal property owned by Douglas J. Standing Bear or in which he had an interest, which may have been or is located on the Rocky Boy's Reservation, *is in the District Court . . .*' " *Id.* at ___, 631 P.2d at 289 (quoting Chief Tribal Judge Mitchell) (emphasis in original).

357. 195 Mont. 314, 636 P.2d 266 (1981).

358. 163 Mont. 445, 517 P.2d 893, *cert denied*, 419 U.S. 847 (1974).

359. The Northern Cheyenne Appellate Court held "this section only provides for marriages to be consummated *in accordance* with the state law. *The section does not indicate in any way that the Tribe has ceded jurisdiction to the State.*" Wolfblack v. Wolfblack, No. 8824, slip op. at 2 (June 7, 1979), *quoted in Limpy*, 195 Mont. at 317, 636 P.2d at 268 (emphasis in original).

360. *Limpy*, 195 Mont. at 319, 636 P.2d at 269.

361. *Id.*

362. 218 Mont. 58, 705 P.2d 1117 (1985).

the court held that a district court could not exercise jurisdiction over a civil action by an insurance company against a Fort Peck tribal member for damages to an insured vehicle resulting from an accident on the reservation.[363] The court noted that the Fort Peck Assiniboine and Sioux Tribes Comprehensive Code of Justice provided for tribal court jurisdiction over the matter[364] and held that exercise of jurisdiction by the state court would interfere with tribal sovereignty and the right to self-government of the Fort Peck tribes.[365]

The Montana court did not dwell upon access to a forum in *Geiger v. Pierce*,[366] a case arising on the Flathead reservation, when it held that a state court lacked jurisdiction over a reservation-based debt action brought by a non-Indian creditor against an enrolled tribal reservation resident.[367] Applying *LaPlante* as well as *Iron Bear* to the issue of whether the state court had "primary subject matter jurisdiction" and referring to the tribe's Law and Order Code, the court stated that the subject matter of the case was "clearly within the preemptive jurisdiction assumed by the tribal court of the Confederated Salish and Kootenai Tribes."[368]

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363. *Id.* at 63, 705 P.2d at 1120. The court referred to the rules of *Iron Bear*, *Williams v. Lee*, and the statement in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (drawn from *McClanahan*), that the infringement and preemption tests are independent barriers to state jurisdiction over reservation activity or activity by tribal members. However, the court declined to determine the case on preemption. It pointed out that an argument for federal preemption existed because the State of Montana had not assumed jurisdiction over the Fort Peck Indian Reservation under Public Law 280 and the tribe was exercising jurisdiction in the area. But the court concluded that "[b]ecause recent federal cases are not clear, we choose not to rule on the preemption issue." *Eagleman*, 218 Mont. at 62, 705 P.2d at 1119.

364. *Eagleman*, 218 Mont. at 62-63, 705 P.2d at 1120. Subchapter 1, § 107 of the Fort Peck Assiniboine & Sioux Tribes Comprehensive Code of Justice (CCOJ) states that the tribal court has jurisdiction over "any action where one party to the action shall be an Indian, . . . and (a) the cause of action arises under the Constitution or laws of the Tribes; or (b) an Indian party to the action resides on the Fort Peck Reservation." The predecessor of the CCOJ also provided for jurisdiction in this situation.

365. *Eagleman*, 218 Mont. at 62, 705 P.2d at 1120.

366. 233 Mont. 18, 758 P.2d 279 (1988).

367. Although Public Law 280 applies to the Flathead Indian Reservation, that law had no bearing on the case because the subject matter of the case was not within the eight areas over which the state has been given concurrent jurisdiction. *Id.* at 20, 758 P.2d at 280. *See supra* note 116. The debt was incurred under an installment sales contract for purchase of a mobile home in Polson, Montana, located within reservation boundaries. The district court granted summary judgment against the debtor and denied the debtor's subsequent motion to dismiss for lack of subject matter jurisdiction. *Geiger*, 233 Mont. at 19, 758 P.2d at 279-80.

368. *Geiger*, 233 Mont. at 20, 758 P.2d at 280. Justice Weber specially concurred in the decision in order to explain his view that the decision was legally correct but not fair. Justice Weber was troubled by the fact that an Indian could sue a non-Indian in state court under circumstances that would prohibit a non-Indian from suing an Indian. *Id.* at 23, 758

With an affirmative reference to the existence of a tribal forum, in *Emerson v. Boyd*[369] the Montana Supreme Court held that a state district court lacked jurisdiction over a suit for breach of contract between two members of the Assiniboine and Sioux Tribes of the Fort Peck Reservation.[370] Based on the circumstances of the case, the court found the contract dispute arose on the reservation.[371] Because the tribal code specifically authorized jurisdiction over the case, state jurisdiction was precluded.

From the time of *Bonnet v. Seekins* in 1952, the Montana Supreme Court has exhibited a great concern about access to the state court system by Indian citizens for reservation-based claims. This led to the court's development of part three of the *Iron Bear* test. At times, this concern conflicted with tribal government authority or tribal sovereignty. However, as the tribal justice systems in this state developed and asserted their authority, the Montana Supreme Court routinely deferred to the tribal court activity, recognizing that the tribal justice systems themselves can serve their citizens well. This deference was not present in the *First* case.

2. First v. State *ex rel.* LaRoche: Iron Bear *Analysis Replaced by Civil Regulatory Analysis*

a. Montana Court Replaces Iron Bear *Test*

In 1991, in *First v. State ex rel. LaRoche*,[372] the Montana Supreme Court found that a Montana administrative tribunal had jurisdiction over a proceeding to withhold income from state unemployment benefits under a South Dakota child support order

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P.2d at 282 (Weber, J., concurring).

369. 247 Mont. 241, 805 P.2d 587 (1991).

370. The dispute arose from a trucking contract. The defendant resided on the reservation and the plaintiff resided off the reservation. Contract negotiations were conducted on the telephone by the defendant on the reservation and by the plaintiff off the reservation. The contract was signed on the reservation and the dispatching took place on the reservation. Payments were mailed to an off-reservation bank. Most of the truck loads were dropped off and picked up out-of-state or in the state of Montana and off the reservation. *Id.* at 243, 805 P.2d at 588.

371. Since aspects of the contract occurred both off and on the reservation, the court applied the following rule from *R.J. Williams*:

> "Generally courts look to (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the place of residence of the parties, evaluating each factor according to its relative importance with respect to the dispute."

Emerson, 247 Mont. at 242-43, 805 P.2d at 588 (quoting R.J. Williams v. Fort Belknap Hous. Auth., 719 F.2d 979, 985 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985)). The court did not apply *Crawford v. Roy*; see *supra* notes 295-99 and accompanying text.

372. 247 Mont. 465, 808 P.2d 467 (1991).

issued against a Montana Indian reservation resident.[373] The Montana court ruled in favor of the state agency despite the court's own recognition that the Fort Peck tribal court did have a remedy under the tribal code for collection of back child support.[374] The tribe's direct remedy differed, however, from that available in the state proceeding.[375] Having unsuccessfully challenged the withholding from his unemployment insurance benefits at an administrative hearing, Mr. First petitioned the district court for judicial review of the administrative order.[376] The district court reversed the administrative order, holding that under *Iron Bear* the State of Montana lacked subject matter and personal jurisdiction.[377]

The Montana Supreme Court reversed and held that the State had subject matter and quasi in rem jurisdiction.[378] The court discussed neither *Williams v. Lee*, *National Farmers Union* nor *LaPlante*, but looked instead to the United States Supreme Court's 1980 holding in a taxation case, *White Mountain Apache Tribe v. Bracker*.[379] In the court's view, the analysis of *White Mountain Apache* superseded the Montana court's own analysis in *Iron Bear* because federal law controls matters of state/tribal jurisdiction and *White Mountain Apache* was decided more recently than *Iron Bear*.[380] Stating that the United States Supreme Court is "the final authority" in determining jurisdictional questions involving Indians and Indian tribes,[381] the court noted the following from *White Mountain Apache* as the proper analysis to be applied

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373. In 1986, Jerome First, Jr.'s former wife, the custodial parent of the couple's three children, authorized the Office of Child Support Enforcement (OCSE) of the South Dakota Department of Social Services to enforce and collect child support owed by Mr. First. In April 1988, South Dakota's OCSE authorized the Montana Department of Social and Rehabilitation Services, Child Support Enforcement Division (CSED) to act on South Dakota's behalf to collect the child support. Montana's CSED issued a "notice of intent to withhold income" from unemployment insurance benefits payable to Mr. First under 42 U.S.C. § 666(b) (1983) and MONT. CODE ANN. § 40-5-401 (1987). *First*, 247 Mont. at 467-68, 808 P.2d at 468.

374. *First*, 247 Mont. at 475, 808 P.2d 473.

375. FORT PECK ASSINIBOINE & SIOUX TRIBES COMPREHENSIVE CODE OF JUSTICE (CCOJ) tit. IV, § 304 (1989). The tribal court cannot directly garnish state unemployment benefits. However, the tribal court can hear a child support matter and issue a child support order. That order can be enforced in state court under Wippert v. Blackfeet Tribe, 201 Mont. 299, 654 P.2d 512 (1982). Or the order could be directly enforced on wages earned on the reservation, CCOJ tit. IV, § 311 (1989), or on any funds "on deposit to the credit of the judgment debtor at the [Bureau of Indian Affairs] agency," CCOJ tit. IV, § 304 (1989).

376. *First*, 247 Mont. at 465, 808 P.2d at 469.

377. *Id.* at 468, 808 P.2d at 469.

378. *Id.* at 475, 808 P.2d at 473.

379. 448 U.S. 136 (1980). *See supra* note 276 and accompanying text.

380. *First*, 247 Mont. at 471, 808 P.2d at 470.

381. *Id.*

in cases of this nature:

> This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but unrelated barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them."[382]

Turning to the first barrier, federal preemption, and again quoting *White Mountain Apache*, the court observed that the issue " 'call[s] for a particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.' "[383] The court then held that exercise of state jurisdiction in this case was not in conflict with any federal law or treaty and in fact would promote federal law and policy in that it would carry out the federal government's plan for the enforcement of child support.[384] The court did not address the federal Indian law interest of promoting tribal self-government.

As for the second barrier, infringement on tribal government, the court held that exercise of state jurisdiction did not constitute infringement because it

> does not prevent the Fort Peck Tribe from continuing to provide a forum for tribal members with regard to actions including adoptions, paternity, child support obligations, and garnishments. Moreover, allowing Montana tribunals to assert subject matter jurisdiction in such instances would benefit Fort Peck's tribal members by assisting Indian parents owed child support by absent parents with off-reservation income.[385]

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382. *Id.* (quoting *White Mountain Apache*, 448 U.S. at 142).

383. *Id.* (quoting *White Mountain Apache*, 448 U.S. at 145).

384. The court found that exercise of subject matter jurisdiction by the CSED promoted federal law and policy because federal law requires the State of Montana to enforce child support obligations by withholding income, including unemployment benefits. The court also noted Montana's interest in maintaining a child support enforcement program in compliance with federal law. Further the court pointed out the possible losses to the state in failing to recover federal welfare assistance as well as to the children themselves when, like the First children, the family does not receive federal welfare assistance. *Id.* at 471-72, 808 P.2d at 470-71. Again, the court did not discuss the tribal remedies that could be used to bring about this collection.

The court also explained its view that federal child support enforcement statutes are statutes of general application and therefore apply to Indians on reservations. *See* Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).

385. *First*, 247 Mont. at 473, 808 P.2d at 472. The court did not precisely address the source of the wages for which Mr. First received unemployment benefits. Footnote 1 indi-

In response to the argument that the matter was under the exclusive jurisdiction of the Fort Peck Tribal Court as provided in the tribe's Comprehensive Code of Justice, the court found that although the code did provide for garnishment of wages for enforcement of child support, it did not provide for withholding from off-reservation income.[386] The court failed to acknowledge that a tribal court judgment may be enforced in state court under principles of comity.[387] The court also characterized the proceeding as a "collection action," not a "domestic affair, dominated by tribal tradition and custom."[388]

Concerning personal jurisdiction, the court held that income withholding was a quasi in rem proceeding that did not require personal jurisdiction over Mr. First.[389] Relying on a footnote to *Shaffer v. Heitner*,[390] the court held that because the proceeding was to enforce an already determined debt, Mr. First's "minimum contacts" with the state were not at issue.[391]

b. First *Dissent*

In a strong dissent, Justice Trieweiler challenged the majority's holding that no infringement on tribal government was created by the state proceeding,[392] and stated that under *Flammond v. Flammond*,[393] the *First* decision was incorrect. In *Flammond*, the Montana Supreme Court had held that a state district court lacked both personal and subject matter jurisdiction over a URESA action against a Blackfeet reservation resident.[394]

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cates the benefits were based on employment both off and on the reservation. The only other reference to the source of the wages is found in the transcript of the administrative hearing. In response to the hearings officer's question, "And were the wage credits used to determine his entitlement to unemployment on a reservation or was it otherwise?" the hearing examiner replied, "Well I believe some of them were off." *Id.* at 468 n.1, 808 P.2d at 468 n.1.

386. *Id.* at 468, 808 P.2d at 468.

387. *See infra* notes 503-08 and accompanying text.

388. *First*, 247 Mont. at 473, 808 P.2d at 472.

389. *Id.* at 475, 808 P.2d at 473.

390. 433 U.S. 186, 210 n.36 (1977).

391. The court further explained that had Mr. First's "minimum contacts" been at issue, acceptance of state unemployment benefits would have provided the necessary "minimum contacts." *First*, 247 Mont. at 475, 808 P.2d at 473.

392. *Id.* at 479, 808 P.2d at 475 (Trieweiler, J., dissenting). Justice Trieweiler also argued that the case was moot. During the pendency of the state's appeal, Mr. First assigned to the Montana Department of Family Services fifty percent of his future right to unemployment insurance benefits for payment of his child support obligation. Also, he had obtained employment and was having income withheld in accordance with a South Dakota withholding order. *Id.* at 476, 808 P.2d at 473-74 (Trieweiler, J., dissenting).

393. 196 Mont. 350, 621 P.2d 471 (1980).

394. *Id.* at 355, 621 P.2d at 474.

Justice Trieweiler adopted the position the court had taken in *Flammond* that no "minimum contacts" between the father and the State of Montana existed that would vest the state court with jurisdiction over him.[395] In explaining why sufficient contacts did not exist, the *Flammond* court stated:

> Here the respondent father has injured neither persons nor property within the State of Montana. The cause of action to enforce support payments arises solely from his domestic relations. The controversy is the outgrowth of a separation that did not occur within Montana's territorial jurisdiction and that was not otherwise connected with this state.[396]

Because no obligation to support the child existed in Montana the state court lacked subject matter jurisdiction over the case.[397]

The jurisdictional facts of *First* and *Flammond* are very similar. The status of the parties in *First* supports the argument that the Montana Supreme Court should have followed its decision in *Flammond*. In fact, the parties in *First* were both enrolled members of Indian tribes, whereas Mrs. Flammond was not an Indian. In *Flammond*, only the husband lived on a reservation, while in *First*, all parties lived on reservations.

c. *The Implications of* First[398]

Although the Montana Supreme Court stated in *First* that it was replacing the *Iron Bear* test, the court implicitly applied part three of the test by addressing the issue of the existence of a remedy for child support in the tribal court. Then the court took *Iron Bear* one step further, by not only examining whether a remedy existed in tribal court but also evaluating the adequacy of that remedy.

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395. *First*, 247 Mont. at 478, 808 P.2d at 475 (Trieweiler, J., dissenting). In *Flammond*, the parties, a non-Indian and her husband, a member of the Blackfeet Tribe, had been married in California and then moved to the Blackfeet Indian Reservation, where they separated. The mother and child had returned to California. The nonsupporting parent, the father, remained on the Blackfeet Reservation. *Flammond*, 190 Mont. at 351, 621 P.2d at 472.

396. *Flammond*, 190 Mont. at 353, 621 P.2d at 473.

397. *Id.* at 354, 621 P.2d at 474. In *First*, Justice Trieweiler responded to the majority's concern for state loss of federal funding due to noncompliance with federal child support regulations by pointing out that "[c]ertainly the State of Montana cannot be punished for its failure to collect child support payments when it has no lawful authority for doing so." *First*, 247 Mont. at 477, 808 P.2d at 474 (Trieweiler, J., dissenting).

398. This passage is partly based on the thoughtful article by Thomas J. Lynaugh entitled *Developing Theories of State Jurisdiction Over Indians: the Dominance of the Preemption Analysis*, 38 MONT. L. REV. 63 (1977). D. Michael Eakin also contributed to the passage.

At first glance, the *Iron Bear* test appears to be a valid implementation of federal Indian law governing civil adjudicatory jurisdiction over reservation-based claims involving at least one Indian party.[399] Part one—whether applicable federal treaties and statutes have preempted state jurisdiction—and part two—whether the exercise of state jurisdiction would interfere with reservation self-government—derive from *Worcester*,[400] *Williams*,[401] *Kennerly*,[402] and *McClanahan*.[403] However, part three—whether the tribal court is currently exercising jurisdiction or has exercised jurisdiction in such a manner as to preempt state jurisdiction—can take the test one step beyond the infringement barrier and can result in a court finding valid what is actually an interference with tribal self-government.

In some circumstances, part three of the *Iron Bear* test may be viewed as merely an application of part two. Thus, in determining whether the exercise of state jurisdiction would interfere with reservation self-government, if a state court found that the tribal court was exercising or had exercised jurisdiction over a specific area, the state court might then correctly conclude that exercise of state jurisdiction would interfere with reservation self-government. So, for example, in *First*, because the Fort Peck Tribe did exercise jurisdiction over child support, the Montana Supreme Court should have held state jurisdiction invalid under part three of the *Iron Bear* test.[404]

One flaw in part three of the test is evident when the test is applied to a situation in which the tribal court does not exercise jurisdiction over a particular type of case. Under these circumstances, theoretically the state's exercise of jurisdiction would not interfere with tribal self-government. However, at least one important aspect of tribal self-government can be undermined by the test, and that is tribal legislative authority. A matter may be of great concern to a tribe, yet the tribe may have no written law in

399. Indeed, federal courts have looked to the *Iron Bear* analysis as a statement of Montana law seemingly compatible with federal Indian law. *See, e.g.*, Sanders v. Robinson, 864 F.2d 630, 630-34 (9th Cir. 1988); R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 984 n.6 (9th Cir. 1983).

400. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *See supra* note 83 and accompanying text.

401. Williams v. Lee, 358 U.S. 217 (1959). *See supra* notes 80-92 and accompanying text.

402. Kennerly v. District Court, 400 U.S. 423 (1971). *See supra* notes 107-13 and accompanying text.

403. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). *See supra* note 274 and accompanying text.

404. *See* State *ex rel.* Stewart v. District Court, 187 Mont. 209, 609 P.2d 290 (1980).

that area and the tribal court may not be adjudicating cases in that area. Tribal legislative authority certainly includes the decision not to legislate or, more significantly perhaps, the decision not to put unwritten customary law into writing. The danger created by part three of the *Iron Bear* test is that, in viewing self-governing powers too narrowly, application of this part of the test can interfere with the exercise of self-government by a tribe whose legislative activities do not closely parallel those of the state and federal governments.

Further, as expanded upon below,[405] tribal codes typically include broad choice of law provisions.[406] The tribal choice of law provision must be looked at together with the applicable jurisdictional provisions. When a matter could be brought to tribal court under those provisions, it must be brought there. Otherwise, the state court will not know—in the absence of a specific tribal provision—whether the tribe is exercising jurisdiction in the matter and, ultimately, whether part three of the test is satisfied.

Moreover, as in *First*, application of *Iron Bear* may cause a court to find state jurisdiction when a tribal court remedy exists but does not duplicate the state court remedy. A tribal court remedy existed in *First* for the South Dakota OCSE. The fact that off-reservation property is not directly reachable by a tribal court judgment is irrelevant. The South Dakota OCSE or the Montana CSED could have sued on the South Dakota judgment in the Fort Peck Tribal Court.[407]

To recognize tribal self-government in this context means to defer to the tribal law-making authority. In contemporary times, more and more this will mean that state courts must defer not only to a tribal decision not to act, but also as tribes enact more and more detailed written law codes,[408] to defer to a tribal decision to

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405. *See infra* note 488 and accompanying text.

406. *See, e.g.*, COMPREHENSIVE CODE OF JUSTICE OF THE FORT PECK ASSINIBOINE & SIOUX TRIBES tit. IV, § 501(d) (1989) ("*Applicable Laws* . . . [W]here appropriate the Court may in its discretion be guided by statutes, common law or rules of decision of the State in which the transaction or occurrence giving rise to the cause of action took place"); CHIPPEWA CREE TRIBE LAW & ORDER CODE tit. I, § 1.9 (1987) ("*Choice of Law* . . . In the absence of Tribal law in civil matters, the Court may apply laws and regulations of the United States or the State of Montana"); BLACKFEET TRIBAL LAW & ORDER CODE ch. 2, § 2 ("*Law Applicable* . . . Any matters that are not covered by traditional customs or by ordinances of the Tribal Court according to the laws of the State").

407. COMPREHENSIVE CODE OF JUSTICE OF THE ASSINIBOINE & SIOUX TRIBES OF THE FORT PECK RESERVATION tit. IV, § 312 (1989) ("*Enforcement of judgment of judicial records of other jurisdictions*"). Under Wippert v. Blackfeet Tribe, 201 Mont. 299, 654 P.2d 512 (1982), the tribal court judgment could be enforced in the state system. *See infra* Part X.

408. *See infra* Part X.

act in a manner that differs from the way similar situations are addressed by state law.[409]

d. The Lack of Authority on Adjudicatory Jurisdiction in First

More significant than the Montana Supreme Court's departure from *Flammond* and *Iron Bear* is its failure to apply and follow *Williams*,[410] *National Farmers Union*[411] and *LaPlante*,[412] the principal United States Supreme Court rulings on tribal court jurisdiction. All three decisions are instructive because they—unlike *White Mountain Apache Tribe v. Bracker*—concern adjudicatory jurisdiction. The governing law on adjudicatory jurisdiction over reservation-based claims does not parallel the law applicable to regulatory jurisdiction over reservation-based matters. The adjudicatory line of cases does not envision the balancing of *state* interests that is set forth in the regulatory cases; rather, a presumption exists that tribal courts will adjudicate reservation-based claims.[413] In *First*, the Montana Supreme Court looked at the federal and state interests involved as if in a regulatory context, rather than in the adjudicatory context as these interests were set forth most clearly in *LaPlante*.

In *LaPlante*, the Court restated the federal government's "longstanding policy of encouraging tribal self-government"[414] and referred to *Williams v. Lee*,[415] noting that this policy operates even in areas where federal law has not explicitly preempted state authority.[416] Describing the federal and tribal interests in very strong

409. A monograph recently published by the American Bar Association's Center for Children and the Law has as its purpose "to explore not only barriers to the establishment and enforcement of support orders for Indian children but also various methods for improving the reciprocal recognition of state and tribal court support orders." AMERICAN BAR ASSOCIATION CENTER FOR CHILDREN AND THE LAW CHILD SUPPORT PROJECT, TRIBAL AND STATE COURT RECIPROCITY IN THE ESTABLISHMENT AND ENFORCEMENT OF CHILD SUPPORT 1 (1991).

The report, which reviews tribal authority and tribal court jurisdiction, details the child support enforcement process, and describes interjurisdictional child support enforcement efforts, concludes with the hope that the reader will arrive at a commitment to "pursuing a mutual effort to ensure the necessary child support for Indian children." *Id.* at 48.

410. Williams v. Lee, 358 U.S. 217 (1959). *See supra* notes 80-92 and accompanying text.

411. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985). *See supra* notes 191-202 and accompanying text.

412. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987). *See supra* notes 228-56 and accompanying text.

413. *LaPlante*, 480 U.S. at 18. *See supra* note 246 and accompanying text.

414. *Id.* at 14.

415. 358 U.S. 217 (1959).

416. *LaPlante*, 480 U.S. at 14.

language, the Court stated that "tribal courts play a vital role in tribal self-government" and that the federal government had "consistently encouraged their development."[417] Further, "[i]f state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law."[418]

Even if *White Mountain Apache* were controlling, the result in *First* should be different. The Court stated in *White Mountain Apache* that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."[419] Thus, in *First*, where all parties were Indians, the state's interest was minimal. *First* involved only Indian parties and a reservation-based claim in an area long seen as tribally controlled. Thus, state interests could not outweigh the federal and tribal interests involved, principally the interests of tribal self-government.

What is included in tribal self-government? Felix S. Cohen, in his comprehensive treatise on Indian law published in 1942, stated that "property relations of husband and wife, or of parent and child, are likewise governed by tribal law and custom."[420] Responding to the enactment of the Indian Reorganization Act[421] in a much-cited opinion, Solicitor Nathan Margold of the Department of the Interior stated that "[t]he Indian tribes have been accorded the widest possible latitude in regulating the domestic relations of their members," and that "[i]n defining and punishing offenses against the marriage relationship, the Indian tribe has complete and exclusive authority in the absence of legislation upon the subject by Congress. No law of the State controls the domestic relations of Indians living in tribal relationship."[422] Certainly the Fort Peck Tribe had indicated its belief that self-government includes regulation of child support by its inclusion of child support obliga-

417. *Id.* at 14-15.

418. *Id.* at 15.

419. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980), *cited in* First v. State *ex rel.* LaRoche, 247 Mont. 465, 479, 808 P.2d 467, 475 (1991) (Trieweiler, J., dissenting).

420. F. COHEN, *supra* note 27, at 137.

421. *See supra* notes 24-27 and accompanying text.

422. Powers of Indian Tribes, 55 Interior Dec. 14, 40 (1934). The opinion addressed "what powers may be secured to an Indian tribe and incorporated in its constitution and bylaws by virtue of the following phrase, contained in Section 16 of the Wheeler-Howard Act . . . 'In addition to *all powers vested in any Indian tribe or tribal council by existing law*, the constitution adopted by said tribe shall also vest . . . .'" *Id.* at 17.

tions in the Fort Peck Comprehensive Code of Justice.[423]

In *LaPlante*, the Supreme Court stated that "civil jurisdiction over such activities [the activities of non-Indians on reservation lands] *presumptively* lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[424] In *LaPlante*, the defendant was a non-Indian insurance company, but in *First* all parties were Indians. All of these factors further support the conclusion that the Fort Peck Tribal Court was the proper forum for the *First* litigation.

IX. The Indian Child Welfare Act: Strengthening Tribal Justice Systems[425]

A. *Congressional Affirmation of Tribal Authority Over Child Welfare*

The congressional affirmation of tribal authority over child welfare matters embodied in the Indian Child Welfare Act of 1978 (ICWA)[426] fortified tribal justice systems. Congress enacted the ICWA following several years of study of the disproportionately high rate of removal of Indian children from Indian homes and the extent to which this breaking up of Indian families was caused by governmental action.[427]

Concluding that governmental action had contributed to the unwarranted fragmentation of Indian families, Congress focused its attention in the ICWA on state court proceedings rather than tribal court proceedings. Indeed, the ICWA generally limits and restricts *state* court, not tribal court, proceedings. Yet the effect of the Act on tribal courts has been dramatic.[428]

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423. Comprehensive Code of Justice of the Assiniboine & Sioux Tribes of the Fort Peck Reservation tit. VI, § 304 (1989) ("*Child custody*").

424. *LaPlante*, 480 U.S. at 18 (emphasis added).

425. This article chiefly addresses the Indian Child Welfare Act insofar as it affects tribal court jurisdiction. For fuller treatment of the Act, see Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 Hastings L.J. 1287 (1980).

426. Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1988)).

427. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. (1974); H.R. Rep. No. 1386, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 7530; Staff of American Indian Policy Review Commission, Task Force Four: Report on Federal, State, and Tribal Jurisdiction 78-88 (Comm. Print 1976); F. Prucha, *supra* note 10, at 1153-57.

428. Shortly after the ICWA was passed, the Department of the Interior held public hearings throughout the country and then issued *Guidelines for State Courts; Indian Child Custody Proceedings*. These *Guidelines* were not adopted as federal regulations. Their introduction contains a lengthy statement explaining why the Department, despite its statutory authority to adopt such "regulations as may be necessary to carry out the provisions of this chapter," adopted guidelines rather than regulations: "Nothing in the legislative history

Congress reaffirmed tribal authority over child welfare matters in three important ways.[429] First, Congress recognized inherent exclusive tribal authority over Indian children with the strongest tribal ties[430] and a type of concurrent tribal and state authority over

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indicates that Congress intended this Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (1979) [hereinafter Guidelines].

The Department did adopt regulations pertaining to administrative handling by the Bureau of Indian Affairs of notice of Indian Child Welfare Act actions, payment of attorney fees, grant awards, and tribal reassumption of jurisdiction over Indian child custody matters. 25 C.F.R. §§ 13 & 23 (1991).

429. Congress indicated its reasons for enacting the Indian Child Welfare Act as follows:

> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—
>
> (1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
>
> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
>
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901 (1988).

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902 (1988).

430. The ICWA provides:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal

Indian children whose tribal ties are presumed to be weaker.[431] Second, Congress authorized Indian tribes to intervene in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child.[432] Third, Congress mandated that the United States, its territories, the states, and Indian tribes must give full faith and credit to tribal child welfare proceedings.[433]

1. Exclusive Tribal Court Jurisdiction Over Indian Children Domiciled on the Reservation and Presumption of Tribal Court Jurisdiction Over All Other Indian Children

Central to implementation of the ICWA are subsections (a) and (b) of 25 U.S.C. § 1911. Subsection (a) provides that Indian tribes[434] have exclusive jurisdiction over child custody proceedings[435] involving an Indian child[436] residing or domiciled on a reser-

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court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

25 U.S.C. § 1911(a) (1988). The Act should be regarded as an affirmation of existing tribal authority. *See* Fisher v. District Court, 424 U.S. 382 (1976); Wisconsin Potowatomies of Hannahville Indian Community v. Houston, 393 F. Supp. 719 (W.D. Mich. 1973); Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975).

431. The ICWA provides:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, that such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1911(b) (1988).

432. The ICWA provides that "[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding." 25 U.S.C. § 1911(c) (1988).

433. The ICWA provides:

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C. § 1911(d) (1988).

434. The ICWA defines "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43." 25 U.S.C. § 1903(8) (1988).

435. The ICWA defines "child custody proceeding" as

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where paren-

vation, or an Indian child who is a ward of a tribal court. Subsection (b) of 25 U.S.C. § 1911 provides that "in the absence of good cause to the contrary" a state court must transfer any proceeding for the foster care placement of, or termination of parental rights to, an Indian child (not domiciled or residing on a reservation) to the "jurisdiction of the tribe, absent objection by either parent,[437] upon the petition of either parent or the Indian custodian[438] or the Indian child's tribe."[439]

Thus, under 25 U.S.C. § 1911(a), when a child custody proceeding involving an Indian child residing or domiciled on the reservation is erroneously filed in state court, the state court must dismiss the case because tribal court jurisdiction under these circumstances is exclusive. Even before enactment of the ICWA, it was well settled that Indian tribes possessed exclusive jurisdiction over their members' domestic relations.[440] Yet state courts often

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tal rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

25 U.S.C. § 1903(1) (1988).

436. The ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (1988).

437. The ICWA defines "parent" as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9) (1988).

438. The ICWA defines "Indian custodian" as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." 25 U.S.C. § 1903(6) (1988).

439. 25 U.S.C. § 1911(b) (1988). The ICWA defines "Indian child's tribe" as

(a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.

25 U.S.C. § 1903(5) (1988). The Indian tribe may decline the transfer. 25 U.S.C. § 1911 (1988).

440. *See* Fisher v. District Court, 424 U.S. 382 (1976); Wisconsin Potowatomies of Hannahville Indian Community v. Houston, 393 F. Supp. 719 (W.D. Mich. 1973); Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975).

determined Indian child welfare matters until the ICWA was passed.[441] State courts' clear lack of authority in this area has now been underscored.

State courts do have a type of concurrent jurisdiction over Indian children *not* domiciled or residing on a reservation under 25 U.S.C. § 1911(b), but even then, there is a presumption of tribal court jurisdiction. When a parent, Indian custodian, or the Indian child's tribe petitions for transfer of the case to tribal court,[442] the state court must transfer the proceeding unless one parent objects or there is "good cause to the contrary."[443] If the determination of the petition to transfer is made with the purposes of the ICWA in mind, most cases will be transferred to tribal court.[444]

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441. *See* Barsh, *supra* note 425, at 1293-94.

442. The ICWA defines "tribal court" as "a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings." 25 U.S.C. § 1903(12) (1988).

443. 25 U.S.C. § 1911(b) (1988). "Good cause to the contrary" is not defined in the Act. The *Guidelines* define it as follows:

> (a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.
>
> (b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:
>
> (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
>
> (ii) The Indian child is over twelve years of age and objects to the transfer.
>
> (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
>
> (iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.
>
> (c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.
>
> (d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

Guidelines, *supra* note 428, at 67591.

444. When state courts properly adjudicate Indian child welfare matters (as defined in the Act), the Act imposes significant restrictions on the state court activity. Before any involuntary child custody proceeding involving an Indian child is heard, strict statutory notice requirements must be met. The party filing the action must notify the child's parent, or Indian custodian, and the child's tribe of the pendency of the action. 25 U.S.C. § 1912(a) (1988).

Further, the state court must appoint counsel for indigent parents regardless of whether state law ordinarily provides for appointment of counsel in the proceeding involved. 25 U.S.C. § 1912(b) (1988).

The court may not order foster care placement or termination of parental rights over an

2. *Tribal Right of Intervention in State Court Proceedings*

State courts will properly adjudicate some Indian child welfare cases. In these cases, the tribe's right to intervene in the state court proceeding becomes significant. By granting the tribes the right of intervention, Congress emphasized that the best interests of the child must be viewed in the tribal context.

3. *Full Faith and Credit for Tribal Child Welfare Proceedings*

The United States constitutional requirement of full faith and credit does not literally apply to Indian tribes.[445] In the ICWA

Indian child without the testimony of "qualified expert witnesses." 25 U.S.C. § 1912(e) & (f) (1988).

The court must impose a heightened standard of proof—in foster care placement, clear and convincing evidence, and in termination of parental rights, proof beyond a reasonable doubt—that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e) & (f) (1988). Additionally, before ordering a foster care placement or termination of parental rights, the court must be satisfied that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d) (1988). Also, if the state court orders foster care placement, termination of parental rights, or adoption, statutory placement preferences must be followed:

> (a) . . . In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.
>
> (b) . . . Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—
>
> (i) a member of the Indian child's extended family;
>
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
>
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.
>
> (c) . . . In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

25 U.S.C. § 1915 (1988). *See also* 25 U.S.C. § 1916(b) (1988).

445. *See infra* Part X.

Congress mandated, with a narrow exception, that Indian tribal "acts, records, and judicial proceedings" involving Indian child welfare matters must be afforded full faith and credit by the United States, the states, United States territories and possessions, and other Indian tribes.[446]

B. ICWA Provisions Strengthen Tribal Justice Systems

In addition to the strengthening of tribal justice systems that resulted from the affirmation of tribal authority over child welfare matters, at least two other provisions of the Act have enhanced those systems. First, tribes who became subject to state jurisdiction under Public Law 280[447] may petition the Secretary of the Interior to reassume jurisdiction over Indian child custody proceedings.[448] Second, the Act authorizes the Secretary of the Interior to grant to Indian tribes and organizations funds for Indian child and family services programs.[449] Permitted purposes for those programs include funding for tribal court development.[450] Advocates for Indian children believe that insufficient funding has been made available under the Act;[451] yet tribal courts and their personnel have derived some benefit from the limited funds appropriated thus far.

C. Mississippi Band of Choctaw Indians v. Holyfield*: The United States Supreme Court Interprets the ICWA Broadly*

The United States Supreme Court's single decision to date under the ICWA, *Mississippi Band of Choctaw Indians v. Holyfield*,[452] endorses the policy of the Act and affirms tribal court authority over ICWA cases. Twin infants were born out of wedlock in 1985 to two enrolled members of the Mississippi Band of Choc-

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446. 25 U.S.C. § 1911(d) (1988). *See supra* note 433.

447. 18 U.S.C. § 1162 (1988); 28 U.S.C. § 1360 (1988). *See supra* notes 102-06 and accompanying text.

448. 25 U.S.C. § 1918(a) (1988).

449. 25 U.S.C. §§ 1931-1934 (1988); 25 C.F.R. §§ 23.21-23.71 (1991).

450. *E.g.*, funds may be provided for the following items for programs on or near reservations: "[T]he employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters," 25 U.S.C. § 1931(a)(5) (1988); "education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs," 25 U.S.C. § 1931(a)(6) (1988); "guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings," 25 U.S.C. § 1931(a)(8) (1988).

451. *See, e.g., Indian Child Welfare Act: Hearings on S. 1976 Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 1 (1988) (Statement of Senator Daniel K. Inouye, Chairman, Senate Select Comm. on Indian Affairs).

452. 490 U.S. 30 (1989).

taw Indians domiciled on the reservation. However, the children were born off the reservation and shortly thereafter both parents consented in Mississippi chancery court to their adoption. The chancery court issued a final decree of adoption several weeks later. Although the state chancellor who received the consents to adoption referred specifically to the Act in his certificate, the final decree did not refer to the Indian Child Welfare Act or to the infants' Indian ancestry.[453]

Two months later, the tribe moved to vacate the adoption decree claiming the tribal court had exclusive jurisdiction over the matter.[454] In denying the motion the state court held that the tribe had not obtained exclusive jurisdiction over the children, first, because the mother "went to some efforts to see that they were born outside the confines of the Choctaw Indian Reservation" and had immediately arranged for the adoption; and second, because the children had never resided or even been present on the reservation.[455] The Supreme Court of Mississippi affirmed and held that under state law the twins were not domiciled on the reservation.[456]

The United States Supreme Court reversed and held in a six-to-three decision that Congress intended a uniform federal law of domicile for the Act, and therefore, under applicable general state-law principles, the domicile of the twins would be that of their mother (*i.e.*, the reservation).[457]

Writing for the majority, Justice Brennan referred approvingly to a 1986 Utah decision, *Adoption of Halloway*,[458] a case with a central issue similar to that in *Holyfield*:

> "This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and

453. *Id.* at 38.
454. *Id.*
455. *Id.* at 38-39.
456. *Id.* at 39.
457. *Id.* at 47-48. The court also stated that no legal significance attached to the fact that the twins were voluntarily surrendered because "[t]ribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Id.* at 49.
458. 732 P.2d 962 (Utah 1986).

the preferred forum for nondomiciliary Indian children."[459]

Justice Brennan concluded by pointing out that because the twins were then three years old, "a separation at this point would doubtless cause considerable pain."[460] However, the Court stated that regardless of its views about where the twins should live, the question before it was not who should have custody, but rather who should *decide* who should have custody. Referring once again to *Halloway*, the Court closed by recognizing that the tribal court should make the determination:

> It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe—and perhaps the children themselves—in having them raised as part of the Choctaw Community. Rather "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy."[461]

D. Montana Supreme Court Decisions Interpreting the ICWA

The Montana Supreme Court has made several rulings under the ICWA.[462] Most are generally supportive of the Act but may not

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459. *Holyfield*, 490 U.S. at 52-53 (quoting *Halloway*, 732 P.2d at 969-70). Jeremiah Halloway lived with his mother until he was six months old on the Navajo reservation. Until he was almost three, he lived with his maternal grandmother, also on the reservation. Then, with his mother's consent, his maternal aunt took him to Utah, where he was placed for adoption with a non-Indian couple. Two years later, the Navajo Nation intervened in the adoption proceedings. The Utah Supreme Court determined that:

> To the extent Utah abandonment law operates to permit [a Navajo child's] mother to change his domicile as part of a scheme to facilitate his adoption by non-Indians while she remains a domiciliary of the reservation, it conflicts with and undermines the operative scheme established by [the Act] and weakens considerably the tribe's ability to assert its interest in its children.

Halloway, 732 P.2d at 969. After the Utah Supreme Court ruled in the tribe's favor, the Navajo Tribal Court issued an order appointing Jeremiah's non-Indian custodians as his permanent guardians. Liberal visitation rights were ordered for the natural mother. Order Appointing Guardians and Stipulation and Order, No. WR-JU-CV-71-84 (Children's Ct. of the Navajo Nation Nov. 10, 1987).

460. *Holyfield*, 490 U.S. at 53.

461. *Id.* at 54 (quoting *Halloway*, 732 P.2d at 972). Justice Stevens, Chief Justice Rehnquist and Justice Kennedy dissented, finding the majority's interpretation of "domicile" both "not mandated by the language of the ICWA" and "contrary to its purposes." *Id.* at 65 (Stevens, J., dissenting). They also stated that "no interest in tribal self-governance is implicated." *Id.*

462. *In re* T.S., 245 Mont. 242, 801 P.2d 77 (1990), *cert. denied sub nom.* King Island Native Community v. Montana Dept. of Family Servs., 111 S. Ct. 2013 (1991); *In re* M.R.D.B., 241 Mont. 455, 787 P.2d 1219 (1990); *In re* M.J.D., 225 Mont. 200, 731 P.2d 937 (1987); *In re* M.E.M., Jr., 223 Mont. 234, 725 P.2d 212 (1986)(*M.E.M. II*); *In re* M.E.M., Jr., 209 Mont. 192, 679 P.2d 1241 (1984)(*M.E.M. I*); *In re* G.L.O.C., 205 Mont. 352, 668 P.2d 235

have a pronounced effect on tribal court jurisdiction. For example, the court has directed a district court to consider the *Guidelines* in determining whether or not to transfer an ICWA case.[463] The court has ruled that the statutorily created right to free assistance of counsel in a termination of parental rights proceeding governed by the ICWA is mandatory even when the parent does not request an attorney.[464] The paternal aunt of a child whose Indian parents had had their parental rights terminated has been held to have a right of intervention in the state court adoption proceeding.[465] The court has also held that alleged violations of the Act in temporary custody proceedings do not necessarily invalidate later permanent custody hearings that are in compliance with the Act.[466]

Two recent decisions more significantly impact tribal court jurisdiction. *In re M.R.D.B.*[467] ratified tribal court authority, and *In re T.S.*[468] may reduce the number of ICWA cases transferred to tribal courts in the future.

In *In re M.R.D.B.*, the Montana Supreme Court found exclusive tribal court jurisdiction over a member of the White Mountain Apache Tribe by upholding a tribal law definition of wardship[469] for purposes of applying the ICWA's exclusive tribal court jurisdic-

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(1983); *In re* M.E.M.[, Sr.], 195 Mont. 329, 635 P.2d 1313 (1981); *In re* T.J.D., 189 Mont. 147, 615 P.2d 212 (1980).

463. *In re* M.E.M.[, Sr.], 195 Mont. 329, 635 P.2d 1313 (1981). In what may be seen as a preview of *In re T.S.*, the court also stated, "although in addition thereto [to the *Guidelines*] the best interests of the child could prevent transfer of jurisdiction upon a 'clear and convincing' showing by the state." *Id.* at 336, 635 P.2d at 1317. For further discussion of the *Guidelines*, see *supra* note 428.

464. *M.E.M.[, Sr.]*, 195 Mont. at 335, 635 P.2d at 1317. The ICWA provides:

> In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child.

25 U.S.C. § 1912(b) (1988).

465. *In re* M.E.M., Jr., 223 Mont. 234, 725 P.2d 212 (1986) (*M.E.M. II*). The ICWA right of intervention applies only to the child's tribe and Indian custodian. The court analyzed the Montana Rules of Civil Procedure, which provide:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

MONT. R. CIV. P. 24(a).

466. *In re* M.E.M., Jr., 209 Mont. 192, 679 P.2d 1241 (1984) (*M.E.M. I*).

467. 241 Mont. 455, 787 P.2d 1219 (1990).

468. 245 Mont. 242, 801 P.2d 77 (1990).

469. *In re M.R.D.B.*, 241 Mont. 455, 460-63, 787 P.2d 1219, 1222-23 (1990).

tion provision.[470] Examining tribal court orders in the matter and the tribe's juvenile code, as well as the ICWA, the court found that the child remained a ward of the tribal court because the tribal court had never terminated the wardship even though that court had returned physical custody of the child to her Indian birth mother.[471] After examining applicable tribal code provisions,[472] the Montana Supreme Court concluded its analysis with the statement, "We are fully confident the Tribal Court will consider the best interest of all parties in making its adoption determination."[473]

Tribal court authority may be adversely affected by a more recent Montana Supreme Court decision. In *In re T.S.*,[474] the court held that, in determining whether or not good cause exists to deny a transfer to tribal court under 25 U.S.C. § 1911 (b), a state district court must apply the "best interests of the child" test in addition to the criteria in the *Guidelines* defining good cause.[475] The court

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470. The birth mother of M.R.D.B., a member of the White Mountain Apache Tribe, was brought up by a non-Indian couple and spent only four months of her life on the reservation before her daughter's birth. Shortly after the birth, the mother placed the child with a non-Indian family in Colorado and returned to the White Mountain Apache Reservation.

When the adoptive family filed a petition to adopt M.R.D.B. in Colorado state court, the mother withdrew her consent to the adoption. Subsequent proceedings and protracted jurisdictional disputes between the White Mountain Apache Tribal Court and the state district court spanned a period of four years, eventually culminating in the Montana Supreme Court's finding in favor of tribal court jurisdiction. *Id.* at 456-58, 787 P.2d at 1219-20.

471. *Id.* at 461-62, 787 P.2d at 1223.

472. *Id.* at 462, 787 P.2d at 1223.

473. *Id.* at 463, 787 P.2d at 1224. In later proceedings, the White Mountain Apache Tribal Court returned the child to members of her extended family with whom she had been placed earlier.

Justice Weber, specially concurring in the opinion, believed the decision was mandated by *Holyfield*, but expressed his concern about the tribe's failure to protect the birth mother's rights. Justice Weber was further concerned that the *Holyfield* case elevated tribal rights at the expense of parental rights. *Id.* at 464, 787 P.2d at 1224-25 (Weber, J., concurring). Justice Harrison also expressed concern that Congress, in enacting the ICWA "ha[d] put the welfare of the tribe over the best interest of a child." *Id.* at 465, 787 P.2d at 1225 (Harrison, J., dissenting).

474. 245 Mont. 242, 801 P.2d 77 (1990), *cert. denied*, 111 S. Ct. 2053 (1991). T.S., a young girl eligible for membership in the Eskimo King Island Native Community of Alaska, was born in Alaska but had never lived in the Native community. During her early life she and her mother lived in several places including Fergus County, Montana, where the Montana Department of Family Services (the Department) placed T.S. in protective custody without notifying the tribe. The mother did notify the tribe and requested the tribe to intervene. The Department filed a petition for permanent legal custody of T.S. and for termination of the mother's parental rights. The mother and the tribe petitioned for transfer of the case under 25 U.S.C. § 1911(b). After a hearing, the district court denied the transfer; the court relied on "good cause" guideline (a)(iii) in finding that appearing in tribal court in Alaska would be a hardship to the witnesses and parties involved. *T.S.*, 245 Mont. at 244-45, 801 P.2d at 78-79.

475. *T.S.*, 245 Mont. at 247, 801 P.2d at 80. For the guideline on "good cause" to deny

pointed out that "[i]n Indian child cases such as this, the first step is to determine the § 1911(b) jurisdiction issue by applying the 'best interests of the child' test and considering the BIA Guidelines to determine good cause."[476]

In affirming the district court's finding that transfer would not be in the best interests of the child, Justice Weber wrote:

> The uncontroverted evidence at the hearing in this case strongly indicates that any transfer of T.S. from her present environment would "devastate" the child and would have long-term harmful effects upon her. This is the longest, most stable and protected environment she has ever known. The District Court properly considered the only loving environment T.S. has ever known in its application of the best interests test. She resides in a home where the mother is Native American and fully capable and willing to teach T.S. about her Indian heritage. T.S. has adapted to her home and the family desires to adopt her as soon as possible.[477]

The tribe's primary argument in favor of the transfer was based upon the profound cultural difference between the child's Eskimo community and the foster mother's Plains Indian background.[478]

The tribe found support for this argument in the statutorily prescribed placement preferences for foster care or preadoptive placement, contending that the statute established a presumption that transfer was in the best interests of T.S. The Montana court, noting that the only available member of the child's extended family known to the court, her maternal grandmother, was unable to care for the child, also observed that the state authorities had made a good faith effort to comply with the ICWA placement preferences.[479] The court did not address the second preference, that of "a foster home licensed, approved, or specified by the Indian child's tribe."[480]

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transfer, see *supra* note 443.

476. *T.S.*, 245 Mont. at 247, 801 P.2d at 80.

477. *Id.* at 247, 801 P.2d at 80-81.

478. *Id.* at 247, 801 P.2d at 81. In his dissent Justice Sheehy agreed with the Tribe:

> It is improper and somewhat patronizing to assume that since the child is now placed with an Indian mother, though of a different tribe and territory, that the purpose of the Indian Child Welfare Act is fulfilled, and good cause shown for not assenting to the jurisdiction of the Eskimo tribe.

Id. at 251, 801 P.2d at 83 (Sheehy, J., dissenting).

479. *Id.* at 248, 801 P.2d at 80-81.

480. 25 U.S.C. § 1915(b)(ii) (1988). With respect to the requirement that a child be placed within reasonable proximity to his or her home, the supreme court found that the home of T.S. was in Fergus County, not in Alaska, because the child lived in Fergus County when the proceeding was begun and the mother did not move back to Alaska until after the

By adding to the *Guidelines'* criteria an additional test (*i.e.*, "best interests of the child"), the court expanded the scope of the transfer hearing into what may be seen as a dispositional hearing. The court also failed to recognize the *Holyfield*[481] Court's reminder that jurisdiction and placement under the ICWA are not synonymous. The *Holyfield* Court cautioned that "[w]hatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question of *who* should make the custody determination concerning these children—not what the outcome of that determination should be."[482]

The tribe was not permitted as a result of its intervention in the case to have an effective voice in the future planning for the child. Other options, such as convening a King Island Native Community tribal court hearing in Montana, were apparently not considered. If state courts refuse to transfer ICWA cases out of a fear that the tribal court will move the child to the child's detriment, then state courts will not be affording to tribal courts the deference mandated by the Act or the jurisdiction the Act intends.

X. Tribal Law and Tribal Court Practice in Montana

A. Ongoing Code Revision

In recent years in Montana tribal code revision has been extensive. Before 1960 most of the tribes were operating their courts either under the code originally written in the 1930s by federal officials and published in the *Code of Federal Regulations*,[483] or under a tribal code closely patterned after the CFR code. Both the CFR code and the tribal codes patterned after it were very limited in scope. Generally, most of the codes were devoted to a number of misdemeanor criminal offenses. The remainder of the codes usually included brief attention to adoption, guardianship and other family law matters, as well as civil jurisdictional provisions. After their enactment these codes were revised and amended in a piecemeal fashion.

During the 1960s, following the United States Supreme Court's affirmation of tribal court authority in *Williams v. Lee*,[484] it became obvious to tribal officials that contemporary tribal courts

child was removed from her home. *T.S.*, 245 Mont. at 248, 801 P.2d at 80-81.

481. Mississippi Choctaw Indian Band v. Holyfield, 490 U.S. 30 (1989).

482. *Id.* at 53 (emphasis in original). The Montana court had previously expressed similar sentiments. *See In re* M.R.D.B., 241 Mont. 455, 463, 787 P.2d 1219, 1224 (1990).

483. *See* 25 C.F.R. Part 11 (1991). *See supra* notes 13-38 and accompanying text.

484. 358 U.S. 217 (1959). *See supra* notes 80-92 and accompanying text.

needed modern and more comprehensive tribal codes to accomplish their increasingly complex work. Each of the tribes in Montana has completed at least one comprehensive tribal code revision since 1960.[485] Code revision, including the addition of subject areas, comprises an ongoing process for all of the tribal governments in the state.[486]

Tribal constitutions have also been revised and amended. An important part of these revisions has been attention to the provisions governing tribal court jurisdiction. Some IRA-era constitutions, as well as the model codes of the 1930s and the tribal codes patterned after them, typically took a rather narrow position on tribal court jurisdiction, particularly tribal court jurisdiction over non-Indians. The older codes, following the lead of the CFR code, generally asserted jurisdiction over non-Indian defendants only if they consented to the court's jurisdiction. Clearly, the trend of the United States Supreme Court is to recognize tribal court civil jurisdiction over non-Indians; consequently, some of the tribal codes and constitutions themselves can be impediments to tribes exercising their full inherent authority.[487] Expectedly, this constitution, code and ordinance revision will be continuous in the near future because, as tribes work with codes, like governments everywhere, they see what does and does not work and try new approaches to problems.[488]

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485. *See, e.g.*, COMPREHENSIVE CODE OF JUSTICE OF THE FORT PECK ASSINIBOINE & SIOUX TRIBES (1989); CHIPPEWA-CREE TRIBE LAW & ORDER CODE (1987).

486. For examples of very recent code additions, see COMPREHENSIVE CODE OF JUSTICE OF THE FORT PECK ASSINIBOINE & SIOUX TRIBES tit. XX (1989) ("*Licensing and Regulation of Bingo and Other Games of Chance*"); CONFEDERATED SALISH & KOOTENAI ADMINISTRATIVE PROCEDURES ORDINANCE.

487. *See* Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians, 911 F.2d 137 (8th Cir. 1990); Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians, 866 F.2d 971 (8th Cir. 1989).

488. One aspect of tribal law important for the practitioner is choice of law. Most tribal codes contain choice of law provisions to cover instances in which no tribal law exists on a particular subject. It is important to understand and use these choice of law provisions when practicing in tribal courts. For example, some provisions state that, in the absence of tribal or federal law on an issue the court *shall* apply state law. Others state that a tribal court *may* apply state law. Lawyers who are accustomed to practice in state court should realize that tribal governments have authority to enact legislation in all areas over which they have jurisdiction. Consequently, state law will generally not apply unless the tribe has chosen to make it apply. When addressing tribal courts, it is important to recognize this fact and not use arguments based on state laws that may not apply.

Further, it is important to understand the court rules and other procedures of the tribal court hearing the case. Information on rules and procedure can be obtained from tribal court clerks. *See* TRIBAL COURTS IN MONTANA AND WYOMING, *supra* note 65.

B. Conditions of Practice in Tribal Courts in Montana

Each of the tribal courts in Montana has established rules for admission to practice in the court. The common practice is to permit those authorized to practice law in the State of Montana to practice law in tribal courts. At present the Blackfeet Tribal Court and the Fort Peck Tribal Court require those practicing before the court to pass a bar examination.[489] A substantial portion of each of the tests is devoted to questions of tribal law. More tribal courts are likely to establish bar examinations in the near future.

C. The Future: The Montana-Wyoming Indian Supreme Court

In 1986 the tribal judges of Montana and Wyoming formed the Montana-Wyoming Tribal Court Judges Association to further the professional development of tribal court judges.[490] In 1988, working in cooperation with the Indian Law Clinic of the University of Montana School of Law, the Association began to study the concept of establishing an inter-tribal appellate court to hear appeals from tribal courts in this region.[491] In June 1991, the Associa-

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489. The Blackfeet Tribal Bar examination is given whenever someone applies for admission to practice in the court. The Fort Peck examination, which must be successfully completed by tribal judges also, is generally given twice a year.

490. Article II of the Association By-Laws states the following to be the objectives and purposes of the organization:

> A. To improve the Tribal court systems throughout the Montana-Wyoming region.
>
> B. To provide for the upgrading of Tribal court systems through professional advancement and continuing education.
>
> C. To, in any and all ways, further the public knowledge and understanding of the Tribal court systems and to establish one standard of conduct of these court systems as uniformly as is possible from the standpoint of providing equal protection to all persons before any Tribal court.
>
> D. To encourage and assist tribal officials to promote educational and welfare programs in an effort to serve the objectives and purposes of the Association.
>
> E. To conduct generally, research and educational activities to supplement other research and training programs for the purposes of promoting the affairs and achieving the purposes and objectives of the Association, and to secure financial assistance and support for the advancement of these purposes and objectives.

MONTANA-WYOMING TRIBAL COURT JUDGES ASS'N, BY-LAWS art.II (1986) (on file in the Indian Law Clinic at the University of Montana School of Law).

The University of Montana School of Law Indian Law Clinic provides administrative support and technical assistance to the Montana-Wyoming Tribal Court Judges Association. The clinic, established in 1980, arranges for three or four legal seminars each year for association members and provides drafting and legal research services to tribal governments and courts. For an overview of the early days of the Indian Law Program at the University of Montana, see McDermott, *The Indian Law Program at the University of Montana*, 33 MONT. L. REV. 187 (1972).

491. Similar regional tribal court systems exist in at least three other regions, *e.g.*, the Southwest Inter-Tribal Court of Appeals (SWITCA) of the Albuquerque American Indian

tion voted to establish the court and to work with individual tribal governments to bring about their participation in the court.[492]

As envisioned by the Association, the Montana-Wyoming Indian Supreme Court (MWISC) would be a part of each member tribe's existing court system.[493] Each participating tribe would determine, by legislation, how its participation would be structured and what matters would be appealable to the inter-tribal system. Thus, for one tribe, the MWISC would serve as a second level of appeal beyond an existing tribal appellate court. Another tribe might choose to substitute the MWISC for its existing appellate court. A third tribe might decide to make certain categories of cases, (*e.g.*, election cases), appealable beyond the existing tribal appellate system and make other categories of cases, (*e.g.*, cases involving customary law), nonappealable beyond the local appellate court.

The court, a panel of three judges chosen from a pool of twenty-four qualifying judges,[494] would apply the law of the tribal government on whose reservation the cause of action arose. Appellate hearings would be held on that reservation.[495]

The Association views the establishment of the Montana-Wyoming Indian Supreme Court as an important addition to existing tribal judicial systems.[496] Tribal judges anticipate that the MWISC will increase the respect given to tribal courts both on and off the reservation, partly because of more visible enforcement of the Indian Civil Rights Act. Furthermore, such a court would relieve some of the pressure now placed on tribal court judges and members of tribal governing bodies.

D. Recognition of Tribal Court Judgments by Other States[497]

The federal constitutional requirement that the states must

Law Center, the Northwest Inter-Tribal Court System of Everett, Washington and the Northern Plains Inter-Tribal Court of Appeals of Aberdeen, South Dakota. *See* Draft Report on Past Activities of the Montana-Wyoming Tribal Court Judges Association's Project to Establish the Montana-Wyoming Indian Supreme Court 1988-1991 (on file in the Indian Law Clinic, University of Montana School of Law) [hereinafter Report].

492. Because the tribal councils possess the tribal legislative authority, they must authorize tribal participation in the court.

493. Thus the court would be included in the "full appellate review" provided for in *LaPlante*.

494. *See* MONTANA-WYOMING INDIAN SUPREME COURT UNIFORM CODE ch. 2 (1991).

495. MONTANA-WYOMING INDIAN SUPREME COURT UNIFORM CODE § 3-1-101 (1991).

496. *See* Report, *supra* note 491, at 13-14.

497. For more detailed discussion of this complex topic, see Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 906 (1990); Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity*

give full faith and credit to the judgments of other states does not literally include tribal court judgments. Congress' implementation of the Full Faith and Credit Clause mandates the recognition of judgments "of any state, territory or possession of the United States."[498] Although this statute has been interpreted to mandate the extension of full faith and credit to tribal court judgments,[499] this is not the prevailing view.[500] The United States Supreme Court alluded to full faith and credit recognition of tribal court judgments in *Santa Clara Pueblo v. Martinez*[501] but made no holding on the issue.

States that recognize tribal court judgments do so either under full faith and credit principles[502] mandated either by legislation or judicial interpretation of 28 U.S.C. § 1738, or under principles of comity.[503] The State of Montana, for example, recognizes tribal court judgments under the latter theory.[504]

E. Recognition of Tribal Court Judgments in Montana

In *Wippert v. Blackfeet Tribe*[505] the state supreme court set forth the method used to enforce tribal court judgments in Montana. The court held that tribal court judgments are to be "treated with the same deference shown decisions of foreign nations as a

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and the Indian Civil Rights Act, 69 OR. L. REV. 589 (1990); Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M.L. REV. 133 (1977); Vetter, *Of Tribal Courts and "Territories": Is Full Faith and Credit Required?*, 23 CAL W.L. REV. 219 (1987); Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397 (1985) (authored by Gordon K. Wright).

498. 28 U.S.C. § 1738 (1988).

499. United States *ex rel.* Mackey v. Cox, 59 U.S. (18 How.) 100 (1856); Chischilly v. General Motors Acceptance Corp., 96 N.M. 264, 629 P.2d 340 (1980); Jim v. CIT Fin. Servs. Corp., 87 N.M. 362, 533 P.2d 751 (1975).

500. Neither the history of the clause nor its enabling legislation indicate any conscious intent to include Indian tribes within its scope. Ragsdale, *supra* note 497.

The Indian Child Welfare Act directs the United States, the States, United States territories and possessions, and other Indian tribes to give full faith and credit to Indian tribal "acts, records and judicial proceedings" involving Indian child welfare matters. 25 U.S.C. § 1911(d) (1988). *See supra* note 433.

501. 436 U.S. 49 (1978). The Court said, "Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts." *Id.* at 65-66 n.21.

502. Sheppard v. Sheppard, 104 Idaho 1, 655 P.2d 895 (1982); Jim v. CIT Fin. Servs. Corp., 87 N.M. 362, 533 P.2d 751 (1975); *In re* Buehl, 87 Wash. 2d 649, 555 P.2d 1334 (1976).

503. Allen v. Industrial Comm'n, 92 Ariz. 357, 377 P.2d 201 (1962); Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950); Fredericks v. Eide Kirschman Ford, 462 N.W.2d 164 (N.D. 1990); *In re* Red Fox, 23 Or. App. 393, 542 P.2d 918 (1975).

504. Wippert v. Blackfeet Tribe, 201 Mont. 299, 654 P.2d 512 (1982). *See also* 44 Op. Mont. Att'y Gen. 15 (1991).

505. 201 Mont 299, 654 P.2d 512 (1982).

matter of comity."[506] Parties can enforce tribal court judgments in state district court by bringing an action or special proceeding.[507] The court ruled that the district court should presume that the tribal court judgment " ' . . . is evidence of a right as between the parties . . . and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.' "[508]

XI. CONCLUSION

The focus of this article has been upon tribal court civil jurisdiction and the interrelationship between tribal, state, and federal courts. The geographic focus has been on Montana: initially upon litigation commenced in tribal courts within the state and concluded in the Supreme Court of the United States, with broad implications for tribal, state, and federal courts throughout the country. Although much emphasis has been placed upon judicial decisions, the article also demonstrates the role of Congress, especially in enacting the Indian Child Welfare Act, in drawing jurisdictional lines and establishing procedural rules.

Against this background, the article has described and analyzed Montana Supreme Court decisions in Indian law. The chronicle covers two decades, a period that commenced with many uncertainties in Indian law, and with the tribal justice system on the threshold of substantial growth and development. The article bears out that many of the uncertainties are now removed and that tribal courts routinely hear and decide cases of great number and range of complexity. These developments have not halted litigation contesting tribal court jurisdiction or exhaustion, however, and both state and federal courts continue their scrutinies of reservation-based civil juridiction issues.

It was no accident that over two hundred participants from the thirty-two states with federally recognized Indian Country convened last summer for a conference entitled *Civil Jurisdiction of Tribal and State Courts: From Conflict to Common Ground.*[509]

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506. *Id.* at 304, 654 P.2d at 515 (citing Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)).

507. MONT. CODE ANN. § 26-3-203 (1991).

508. *Wippert*, 201 Mont. at 305, 654 P.2d at 515 (quoting MONT. CODE ANN. § 26-3-205(2) (1981)).

509. The conference built upon a 30-month State Justice Institute project administered by the National Center for State Courts. It was sponsored by the National Center for State Courts, the Conference of Chief Justices, the National American Indian Court Judges Association, and the American Bar Association's National Conference of Special Court Judges. Conference funding was provided by the State Justice Institute with supplemental funding from the Otto Breumer Foundation of Minnesota.

The conference chairman was retired Appellate Justice Vernon R. Pearson of Washington state; the vice chairman was Chief Justice James G. Exum, Jr., of the North Carolina Supreme Court. The conference followed the work of forums in Arizona, Oklahoma, and Washington, and served as a prelude to similar forums in other states.

The fundamental goals of the state forums are expanded recognition of the correct authority of each judicial system and improvement of tribal-state court relations. Representatives from Montana participated in the Seattle conference, and they will work under the direction of Chief Justice Jean A. Turnage of the Montana Supreme Court and Judge Ed P. McLean of the Fourth Judicial District Court to carry on these endeavors in Montana. A related development is the establishment by the State Bar of Montana of a Committee on Judicial Relations.[510]

Speaking at the Seattle conference, Chief Justice Tom Tso of the Navajo Tribal Court characterized the first 500 years of Indian and non-Indian contact as years marked by conflict, and he expressed his hope that the next 500 years would be marked by cooperation. In presenting the conference summary and challenge at the final session, Judge William A. Thorne of the Utah Third Circuit Court, a former tribal court judge, expanded on Justice Tso's remarks:

> Cooperation is an investment that will pay big dividends in terms of a partnership. Partnership: the stronger your partner is, the better off your entire enterprise is. . . . A successful partnership of tribal and state courts, where each is strong and can help the other, where one is not a leader and one is a follower, where one is not subordinate to the other, but strong partners pulling in the same direction, can help to identify new ways to solve problems.
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> . . . .
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> The role of courts is to provide justice and fairness to all the people in the country, regardless of whether they are on or off the reservation. When we can do that, tribal and state judges can derive some mutual support from each other. . . . We all have crowded caseflow and none of us has a corner on wisdom or a

510. One of the five objectives of the Judicial Relations Committee is "[t]o investigate assistance to and/or the improvement of relations with regard to all aspects of the tribal courts with as much input as possible from the tribal courts." STATE BAR OF MONTANA, LAWYERS' DESKBOOK & DIRECTORY 1991-1992 at 20 (1991).

The committee is chaired by Charles Johnson of Great Falls. Other members are E. Eugene Atherton III, Gary Davis, Robert P. Gannon, the Hon. Leonard Lange, the Hon. C.B. McNeil, Mary Jo Mickelson, Paul Miller, the Hon. James E. Purcell, Cynthia Smith, and the Hon. Donald D. Dupuis, Chief Judge of the Confederated Salish & Kootenai Tribal Court.

> solution that will work, but if we are all pulling in the same direction, I think we can get there.[511]

Attorneys who practice in tribal, state, and federal courts have the opportunity through projects such as the state forums to direct their efforts toward strengthening the court systems individually and as complementary systems striving together to bring justice to all those who come before them.

511. Thorne, *Remarks*, in CIVIL JURISDICTION OF TRIBAL AND STATE COURTS: FROM CONFLICT TO COMMON GROUND 11-12 (1991).