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Dale Beck Furnish
Arizona State University

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SORTING OUT CIVIL JURISDICTION IN INDIAN COUNTRY AFTER *PLAINS COMMERCE BANK*: STATE COURTS AND THE JUDICIAL SOVEREIGNTY OF THE NAVAJO NATION

*Dale Beck Furnish**

People need to be aware of the rightful place of Indian Nations.
— Chief Justice Herb Yazzie, Navajo Nation Supreme Court¹

Introduction

On June 25, 2008, the Supreme Court of the United States decided *Plains Commerce Bank v. Long Family Land & Cattle Co.*,² applying *Strate v. A-1 Contractors*,³ decided eleven years before.⁴ Whereas the high court decided *Strate* by unanimous vote, with the opinion written by Justice Ruth Bader Ginsburg, *Plains Commerce* created a 5-4 split, with Justice Ginsburg writing the dissent. The *Plains Commerce* decision provides a convenient benchmark for measuring the ongoing development of the civil jurisdiction of tribal courts in the United States.

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* Professor Emeritus, Sandra Day O'Connor College of Law, Arizona State University. While I harbor no special pretensions as an Indian law scholar, for parts of four decades I have taught at a law school where Indian law students are a significant part of the student body and the faculty has included leading Indian law scholars like Rebecca Tsosie, Judge William C. Canby, Jr., Robert N. Clinton, and Kevin Gover, among others. I long ago incorporated a section on Indian Country in my Creditor-Debtor teaching materials. See DALE BECK FURNISH, CREDITOR/DEBTOR RELATIONS: CASES & MATERIALS 354-416 (14th ed. 2003).

I owe a special debt to two research assistants who aided me in Spring 2007, Deborah Ann Begay and Cherie Espinosa, both members of the Navajo Nation and of the class of 2007 at the Sandra Day O'Connor College of Law at Arizona State University. Their sure sense of their traditions and their Navajo inheritance, combined with their increasing knowledge of the law, have guided me to many revelations and insights.

1. Quoted in Gale Courey Toensing, *Navajo Supreme Court Hears Controversial Long-Arm Case*, INDIAN COUNTRY TODAY, Feb. 26, 2007, at 1, available at <http://www.indiancountry.com/archive/28207199.html>.

2. 128 S. Ct. 2709 (2008).

3. 520 U.S. 438 (1997).

4. Since *Strate*, three changes have occurred in Supreme Court personnel. Chief Justice John Roberts replaced Chief Justice William Rehnquist, Justice Samuel Alito replaced Justice Sandra Day O'Connor, and Justice Sonia Sotomayor replaced Justice David Souter.

Over the course of almost two centuries, Congress has steadily consigned more and more felony criminal jurisdiction over Indians and Indian Country to the federal courts, until for all practical purposes, tribal courts now exercise none.⁵ Civil jurisdiction is quite different. The last generation or two has seen a steady development of tribal courts' capacity and exercise of civil jurisdiction, encouraged by the Congress and the Executive. Those two branches pursue policies that support tribal autonomy, including active tribal courts. At the same time, a series of decisions by the Supreme Court of the United States might appear to limit the power of tribal courts to exercise civil jurisdiction over parties and events that have significant contacts outside Indian Country, regardless of significant contacts within Indian Country.⁶

Does *Plains Commerce Bank* further pare back tribal courts' civil jurisdiction, just as more tribes have strengthened their legal systems and their courts have begun increasingly to exercise jurisdiction over civil parties and controversies? This article views *Plains Commerce Bank* as a misadventure by our country's highest court, an inapposite precedent constricted by the single, narrow issue it decided, hardly worthy of the ponderous process of consideration by the Supreme Court of the United States. Further, it demonstrates the relative permissiveness of the existing Supreme Court precedents in the face of an assertive, artful tribal court.

This analysis has chosen the Navajo Nation tribal court system and its emerging case law of civil jurisdiction to illustrate how tribal courts can derive cogent doctrine in favor of expansive civil jurisdiction by faithfully applying the Supreme Court's federal Indian law precedents of the last generation, up to and including *Plains Commerce Bank*.⁷ The Navajo Nation Supreme Court, beginning in 2003, has decided a series of cases dealing with the civil jurisdiction of the Navajo Nation tribal courts.⁸ These cases invoke federal Indian law to define an assertive judicial sovereignty over civil parties and controversies that have contacts with the Navajo Nation.

The emerging Navajo Nation case doctrine looms as important not only to the Navajo Nation, but also to other tribes that may seek to establish vigorous court systems. The Navajo opinions apply federal Indian law in ways other

5. See *infra* note 21 and accompanying text.

6. See discussion *infra* notes 58-75, 157-76 and accompanying text.

7. The Navajo Supreme Court, in considering *Todecheene v. Ford Motor Co.*, No. SC-CV-33-07 (Navajo 2008), asked the parties to brief the effects of the *Plains Commerce Bank* opinion on the case before it. *Id.* at 4, available at <http://www.navajocourts.org/NNCourtOpinions2008/Ford%20v.%20Kayenta.pdf>.

8. See discussion *infra* notes 234-312 and accompanying text.

tribal courts might adopt, and the Navajo case law could work a revolution in tribal civil jurisdiction throughout the United States if they are fully understood and widely applied. They provide a framework for understanding the negligible immediate impact of *Plains Commerce Bank* on tribal courts' administration of civil justice, while at the same time providing a basis from which to assess whether *Plains Commerce Bank* might portend future change in Supreme Court doctrine.

The Navajo Context

The Navajo Reservation lies within the boundaries of the states of Arizona, New Mexico, and Utah. Because of the Navajo Nation's status as a "domestic dependent nation,"⁹ that geography creates two overlapping judicial systems within portions of each state. Rather than jurisdictional neighbors separated by state lines, such as Arizona and New Mexico, Indian Country creates jurisdictional competitors, such as Arizona and the Navajo Reservation, on ground reserved to the tribe but within the state.¹⁰ In any given case or controversy, one or more of the three state court systems may compete with the Navajo courts for jurisdiction over the resulting civil lawsuit. Due to Indians tribes' particular status in the federal system, a special set of considerations are applied to resolve that competition. The competition for civil jurisdiction takes on immediacy because sometimes the substantive law rules for the resolution of a given case or controversy may vary depending on which courthouse—state or tribal—issues the final judgment.

Until recently, there was no competition for civil jurisdiction between Navajo courts and state courts. Before 1958, the Navajo Nation had no courts to speak of, and thus had neither reason, nor means to have exercised civil jurisdiction. In the fifty years since, the Navajo Nation has developed a strong legal system and a vigorous, effective judiciary.¹¹ Not surprisingly, that

9. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

10. Most maps do not show the boundaries of the Navajo Reservation. See, e.g., NAT'L GEOGRAPHIC, ATLAS OF THE WORLD 32 (8th ed. 2004).

11. The advent of Navajo judicial independence coincides closely with adoption of tribal autonomy as the durable Indian policy of the federal government. See *Development of the Navajo Courts*, 8 Navajo Rptr. xxi (2009). This occurred after almost two centuries of inconsistent, abusive, and ineffective Indian policy, vestiges of which still exist in the federal system and memories of which create lasting distrust on the part of many Indians. Nonetheless, today, federal Indian law does provide a stable framework for tribal government, and the Navajo Nation has prospered within that framework.

Curiously, while the judicial branch of the federal government has chipped away at tribal judicial autonomy, and still manifests apparent suspicion regarding tribal courts' due process

development—and similar growth in other tribes' judicial systems—has given rise to a series of judicial precedents from the Supreme Court of the United States addressing the issue of tribal civil jurisdiction. The Supreme Court of the Navajo Nation has had to assimilate that emerging case law as a necessary part of working out its own judicial system. In turn, the advent of Navajo

and other guaranties, the Executive and the Congress have steadfastly supported tribal autonomy in an unusually consistent manner for about half a century. While many benchmarks might be cited, in 1970 President Richard Nixon appeared before Congress decrying the "historic and legal relationship between the federal government and Indian communities [that] has oscillated between two equally harsh and unacceptable extremes," assimilation and excessive dependence, and calling on Congress for new laws that would "strengthen the Indian's sense of autonomy without threatening his sense of community." President Richard Nixon, Special Message on Indian Affairs, 1970 PUB. PAPERS 564, 564, 567 (July 8, 1970), reprinted in 116 CONG. REC. 22,355 (1970). By 1975, Congress promulgated a "statement of findings [and] Congressional declaration policy" that "the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities." 25 U.S.C. §§ 450-450a(1)-(2) (2006). By 1977, the American Policy Review Commission, established the year before, Pub. L. No 93-580, 88 Stat. 1910 (1976), had reported to Congress and called for a "firm rejection of assimilationist [sic] policies, reaffirmation of the status of tribes as permanent, self-governing institutions, and increased financial aid to the tribes." WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 31 (4th ed. 2004). Perhaps amazingly, considering history, federal policy has unswervingly supported tribal autonomy since. In 1994, President William Clinton issued a Memorandum for the heads of all Executive Departments and Agencies instructing them to operate "within a government-to-government relationship with federally registered Native American tribal governments . . . reflecting respect for the rights of self-government due the sovereign tribal governments." 59 Fed. Reg. 22,951 (May 4, 1994). President Clinton issued further still-valid Executive Orders, including an especially important one, toward the end of his time in the White House. Exec. Order No. 13,175, Fed. Reg. 67,249 (Nov. 9, 2000). President George W. Bush continued the policy. See 67 Fed. Reg. 67,773 (Nov. 6, 2002).

Today, then, most American Indian tribes retain a broad opportunity to pass their own laws and apply them through their courts. As we shall see with the Navajo, the effectiveness of a given tribe in taking advantage of that opportunity will vary with its degree of self-sufficiency, which in turn depends on its economic resources and viability, in addition to the constituent will of its people to take control of their own destiny. Today, the Navajo Nation enjoys its own unique form of government and a highly developed legal system notable for its vigor and self-definition.

Federal Indian law has not, however, gone out of its way to support the Navajo Nation's—or any other tribe's—emergence as an independent legal system. The Navajo Nation has achieved success in forging an indigenous legal system not because it always was encouraged to do so by the federal government, but because it has remained committed to its tribal identity and has been astute in exploiting the opportunities presented by federal Indian law. See Tom Tso, *The Tribal Court Survives in America*, JUDGESJ., Spring 1986, at 22, 53 [hereinafter Tso, *The Tribal Court Survives*].

tribal courts has pressured state courts to apply the same Supreme Court precedents to sort out their civil jurisdiction over events and parties within Indian Country. The placement of the Navajo Reservation on the Nation's traditional home grounds thus gives rise to case law from four different "state" court systems: Arizona, New Mexico, Utah, and the Navajo Nation, a broad base for analysis.

The boundaries of the Navajo Reservation encompass territory about the size of West Virginia.¹² There is a membership of about 300,000 tribal members,¹³ who call themselves *Diné*.¹⁴ Perhaps because of its size in land and people, or perhaps because of its will to survive as a people, the Navajo Nation has forged a notably successful autonomous government structure, including a strong judicial branch.¹⁵

Navajo law finds its sources in extensive legislation and case precedent. It includes much of the same substantive legislation, most of the same rules of courtroom and pleading procedures, and many of the other ingredients that characterize state legal systems throughout the United States, making up what might be called "American law."¹⁶ Navajo judges write their case opinions in

12. The reservation's total area comprises over 27,000 square miles, equal to just under a fourth the size of Arizona. The Navajo Nation—History Page, <http://www.navajo.org/history.htm> (last visited Aug. 28, 2009).

13. The Navajo Nation is the second largest Indian tribe in the United States in number of members, after the Cherokee. *Encyclopedia—Navajo Indians*, HISTORY.COM, <http://www.history.com/encyclopedia.do?vendorId=FWNE.fw..na018700.a#FWNE.fw..na018700.a> (last visited Aug. 28, 2009).

14. *Diné* means simply the "Navajo People." *Glossary of Navajo Terms*, 8 Navajo Rptr. xxiii (2009). *Diné* does not mean the Navajo government any more than "the public" means "the government." Further, while the Navajo people constitute a tribe, their own term for their collective membership is the "Navajo Nation." Research by assistants Deborah Ann Begay and Cherie Espinosa (Spring 2007).

15. I have had the good fortune to teach at a law school with one of the largest contingents of Native American law students in the United States. The special aspects of the Navajo system have come home to me in the light of remarks by law students from other tribes, and the respect—in some cases approaching awe—in which they hold the Navajo Nation. For example, once I was advising a law student clerking for a tribal court and urging him that the court should exercise jurisdiction regarding a commercial matter that had contacts both on and off the reservation, noting that the Navajo Nation courts had done so in similar situations. He responded, "Sure, the Navajos would, but nobody else can be like the Navajos."

16. The basis for the term "American law" is the homogeneity of the fifty states' legal systems, consummated in the first half of the twentieth century by such events as the advent of the American Law Institute and its Restatements of American Law. See generally LAWRENCE FRIEDMAN, *HISTORY OF AMERICAN LAW* (3d ed. 2005); LAWRENCE FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* (2002); see also Willis L. M. Reese, *Unification of Common Law Rules:*

English, making them accessible to *biligaana*¹⁷ jurists. The Navajo judicial style resembles the "American" standard; indeed, most of the Navajo judiciary graduated from "American" law schools.

Just as an "American" lawyer begins to feel comfortable in the Navajo legal system, however, he or she runs into a series of distinguishing characteristics that make it seem quite foreign. The Navajo Nation does not have a constitution, nor is it subject to the United States Constitution.¹⁸ Even more notably, pre-Columbian principles provide the system with its Fundamental Law, the source of its most basic, overriding rules and attitudes.¹⁹ This special

The Role of the American Law Institute, in LEGAL THOUGHT IN THE UNITED STATES OF AMERICA UNDER CONTEMPORARY PRESSURES 171 (John Hazard & Wenceslas Wagner eds., 1970); *Erie v. Tompkins*, 304 U.S. 64, 78 (1938) (abolishing "federal general common law" in favor of that of the states); Act of June 19, 1934, Pub. L. No. 73-651, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2072-2075 (2006)) (adopting uniform rules of procedure and evidence in federal courts); Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387 (1935). The state courts then adopted the federal rules, creating uniformity in procedure. Today, United States jurists routinely approach a legal topic by analyzing case law and statutes from all states as if they were one body of law. Additionally a series of authoritative Restatements drafted by the American Law Institute sets out the "American Law" of Contracts, Property, Torts, Trusts, Conflicts and most other major fields of the law.

17. Anglo. *Glossary of Navajo Terms*, *supra* note 14.

18. On three different occasions, the Navajo Nation rejected proposed constitutions, in 1937, in 1953, and in 1968. See DAVID E. WILKINS, *DINÉ BIBEEHAZ'AANII: A HANDBOOK OF NAVAJO GOVERNMENT* 51-52, 58-59 (1987). Despite the past efforts to create a constitution, it appears that the *Diné* have grown comfortable with a form of government in which "since [its] powers are *not defined*, they are also *not limited*." *Id.* at 57.

The Navajo Nation Code (NNC) does include, as Chapter 1 of its first Title, a Navajo Nation Bill of Rights that tracks—but does not duplicate exactly—that of the first ten amendments to the U.S. Constitution. See NAVAJO NATION CODE tit. 1, §§ 1-9 (2005). These provisions complied with the Indian Civil Rights Act (ICRA), Pub. L. No. 90-284, §§ 201-202, 82 Stat. 73, 77-78 (1968), which provided "constitutional rights" (consisting of most of the U.S. Constitution's Bill of Rights guaranties) that no Indian tribe might abrogate in its exercise of self government. See ICRA, 25 U.S.C. § 1302(1)-(10) (2006).

19. The Navajo Nation and its legal system tend to perceive individual interests, where the American legal culture perceives individual rights. The individual's interests, then, exist as defined within group interests. Navajo law assumes as part of its fundamental task the necessity to mediate between the individual and the tribe in ways that maintain harmony within the group, vindicating valid individual interests by resolving them within group consensus. One set of interests (individual) cannot exist without the other (communal). Tension tends to exist between the individual and the community, but it is the law's task to reconcile the individual's interests and concerns to those of the community, and vice versa, so as to maintain harmony between them. See Robert Yazzie, "*Life Comes from It*": *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 187 (1994); Tom Tso, *Moral Principles, Traditions and Fairness in the Navajo Nation*

characteristic of Navajo justice means the resolution of a given case or controversy may be different in a Navajo court than it would be in a state court. The Navajo system—however much it may resemble the state systems around it—is distinctly its own.

How did the Navajo legal system achieve the vigor it enjoys at the beginning of the twenty-first century? For most of the time since they took up permanent residence on the Navajo Reservation in 1868, the *Diné* had no viable court system, with civil cases falling by default to the state courts.²⁰ Federal legislation long ago placed Navajo felony criminal cases under the exclusive jurisdiction of the federal courts, with the United States Attorney's office acting as prosecutor, beginning early in the nineteenth century.²¹ In 1958, about twenty-five years after its modern government began to take shape,²² the Navajo Nation created its first tentative court system, which began

Code of Judicial Conduct, 76 JUDICATURE 15 (1992); Tso, *The Tribal Court Survives*, *supra* note 11, at 22. Former Chief Justice of the Navajo Supreme Court Raymond D. Austin has completed a new book that promises to be an invaluable contribution, *Navajo Courts and Navajo Common Law*, scheduled for publication by the University of Minnesota Press in November 2009.

For further study of Navajo Fundamental Law, see NAVAJO COMMON LAW PROJECT (Navajo Nation Council 2002), *available at* <http://www.navajocourts.org/NCLP/commlawproj.pdf>. Curtis Heeter also has compiled an extensive collection of all references to Navajo Common Law by the Navajo Supreme Court, organized by topic. The document, a work in progress, is available from the author at curtisheeter@navajo.org.

20. Territorial courts provided this function until Utah was admitted to the Union in 1896, followed by Arizona and New Mexico in 1912.

21. Criminal law is a special case. Congress has never been shy about expanding the jurisdiction of federal courts over criminal matters involving Indians, in or out of Indian Country. See 18 U.S.C. §§ 1151-1170 (2006). In 1825, Congress passed the forerunner of what today is known as the Assimilative Crimes Act, making any act within United States territory (including Indian Country) "a like offense and subject to a like punishment" in federal court whenever the act is defined as a crime by the laws of the state within which the territory is located. 18 U.S.C. § 13 (2006). Finally, Indian law drastically limits tribal courts in the criminal sentences they may impose. See 25 U.S.C. § 1302(7) (2006) (limiting the maximum sentences that a tribal court may impose to a \$5000 fine and one year in prison). Taken all together, the federal statutes provide virtually unlimited federal criminal jurisdiction over events in Indian Country, involving Indians or non-Indians, leaving only misdemeanors to the tribal courts. Misdemeanor jurisdiction does entail an extensive criminal trial calendar in tribal court, running into tens of thousands of cases each year. For example, in fiscal 1998 the Navajo courts handled well over 27,000 criminal misdemeanor cases. *Means v. District Court of Chinle*, 7 Navajo Rptr. 382, 386 (1999).

22. The Navajo Nation has developed its governmental structure within the last half century, beginning with the creation of a Tribal Council in 1923 to approve oil and gas leases on the Reservation. Thereafter, when the Indian Reorganization Act of 1934, ch. 576, 48 Stat.

to hear and decide civil lawsuits.²³ With no opportunity to hear felony criminal matters,²⁴ the tribal courts' civil jurisdiction represented an unexplored landscape, open to development. In 1985, after an initial period of growth, substantial reforms confirmed the Navajo court system in its current form and status, with a permanent Supreme Court and an increasingly active civil calendar.²⁵

The Conundrum of Jurisdictional Overlap

Because tribal reservations overlap the same territory as states, but have different rather than equal status within our federal Union, tribal courts cannot always utilize the same minimum-contacts and long-arm analyses that define state court jurisdiction. Those standards tend to permit concurrent jurisdiction in multiple states for civil suits based on contacts in more than one. But in the Indian context, significant contacts may occur in only one physical location, which is both on the reservation and in the state.

When two or more states might properly take jurisdiction of a case, where the plaintiff chooses to file the complaint likely determines which state's court ultimately hears and decides the lawsuit, but usually the outcome would be substantially the same in either state.²⁶ In general, the same rule applies when one of the courts is a tribal court. Results in tribal and state courts tend to approximate each other.²⁷ Still, things are more complicated when the civil suit arises from contacts within Indian Country, specifically the Navajo

1984-88 (also known as the Wheeler-Howard Act), presented the Navajo Nation with an opportunity to organize tribal government under a constitution, the Nation by referendum vote rejected that possibility. The incident gave impetus to the development of modern Navajo Nation government from that date forward. The Navajo Tribal Council became a de facto governing body, slowly wresting control of Navajo internal affairs from the federal government and steadily adding sophistication to its own structure and rules. See WILKINS, *supra* note 18, at xvi-xvii, 48-54.

23. See Tso, *The Tribal Court Survives*, *supra* note 11, at 53.

24. Into the 1950s, the only "Navajo Courts" were the Courts of Indian Offenses established in 1883 by the Bureau of Indian Affairs to apply criminal law on Indian reservations; they were known as "CFR Courts" because they operated under the Code of Federal Regulations. See 25 C.F.R. §§ 11.100-11.104 (2005).

25. In 1985, the Court of Appeals became the Navajo Supreme Court, with three permanent justices. Tso, *The Tribal Court Survives*, *supra* note 11, at 53.

26. One practical manifestation of this is that parties often avoid possible conflicts of law by stipulating that the law of the local jurisdiction shall apply, thus making finding and arguing the law eminently simpler for local attorneys and judges.

27. See Bethany Berger, *Justice and the Outsider: Jurisdiction over Non-Members in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005).

Reservation, since the competing jurisdictions now include at least one state court and one tribal court and events may arise within the territory of a single state rather than from contacts with different state territories.

The imperatives of federal Indian law can foreclose the possibility of concurrent jurisdiction in both the state and the tribal court; one or the other often takes exclusive jurisdiction. Special concern for tribal sovereignty—either inherent or defined by federal preemption of state interests—dictates that some civil controversies must be limited to tribal jurisdiction. Other controversies, where tribal interests fail to achieve sufficient weight, may be foreclosed to the tribe and reserved to the exclusive jurisdiction of the state court even though they arose wholly within the boundaries of the tribal reservation.

Between the two exclusive jurisdictions, however, there lies ample possibility for concurrent jurisdiction. When a state court or a tribal court finds it has exclusive jurisdiction, the other may not abide by that finding; it might simply find that it has concurrent jurisdiction, should the occasion present itself.²⁸ In the extreme case, the second court might decide that it is the one with exclusive jurisdiction, creating an awkward standoff in which both systems claim exclusivity and purport to exercise it. Only the federal courts can resolve the issue.

The Supreme Court of the United States has established—in a relatively small number of opinions resolving a limited set of circumstances—the rules and doctrines that delineate between tribal and state civil jurisdiction. In our context here, it falls to the state and Navajo courts, in turn, to apply those rules and doctrines to the heavier workaday traffic in civil lawsuits that find their way onto their respective calendars. Perhaps because for so long the Navajo Nation provided no tribal forum for the resolution of civil lawsuits, or perhaps because the advent of a tribal alternative applying Navajo law offers the prospect of a departure from the “American Law” that prevails throughout the states, non-Indian civil defendants hailed into Navajo tribal court frequently react by objecting to the court’s jurisdiction. To a lesser degree, defendants in actions filed in state courts also may respond by objecting to the court’s jurisdiction when they feel that Navajo interests are at stake.²⁹

28. See *Astorga v. Wing*, 118 P.3d 1103 (Ariz. Ct. App. 2005).

29. Apparently, there are simply fewer cases filed in state court that raise the issue. Perhaps defendants are less inclined to object to jurisdiction in state court, even when they could do so. Perhaps it is more common for plaintiffs to be Navajos in Navajo courts, suing on grounds that a generation before they might never have pressed against non-Indian defendants. In any event, the combined appellate courts of the three states have generated fewer opinions

A body of case law has begun to emerge in the state and tribal courts dealing with the issues that determine when the Navajo Nation's courts may exercise their civil jurisdiction and when they may not. Interesting discrepancies exist among the three state courts' case law. The Navajo Supreme Court's case law adds a further dimension. While they need not necessarily be congruent, one would hope the issue of civil jurisdiction in the Navajo courts—while still a relatively new question of law—might have developed to the point that some conclusions may be drawn and some judgments made as to which among the state and tribal court judicial precedents deserve endorsement as the better rules.³⁰

We begin by tracing the case law of the Supreme Court of the United States, since the case law of Arizona, New Mexico, Utah, and the Navajo Nation must be judged against that standard, to which they all are bound to adhere. As already stated, this article concludes that the new opinion in *Plains Commerce Bank* adds virtually nothing to the discussion. The *Plains Commerce Bank* decision should not jeopardize any of the existing case law in the three state courts or in the Navajo tribal courts.

The Federal Indian Law of Tribal Courts' Jurisdiction: The Trust Relationship, Infringement, and Preemption Analysis

Our analysis begins with the early established view—dating from the first Non-Intercourse Acts in 1790³¹ and carrying past the *Worcester v. Georgia* decision³²—that relations with Indian tribes exclusively belong to the federal

on civil jurisdiction than the Navajo Supreme Court.

30. Perhaps we search here for what Judge Posner would call the "Implicit Economic Logic of the Common Law." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 251-55 (4th ed. 1992); see also BENJAMIN NATHAN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 25-32, 44-50, 99-100, 178-79 (1921). When new issues come up in the law, they often generate a stream of cases until the "best rule" begins to emerge by consensus and then achieves general acceptance. Fewer and fewer cases raise the issue, and it eventually becomes settled law. In sum, the common law method works to the best rule, over and over again.

31. Between 1790 and 1834, Congress passed a series of laws known as the Non-Intercourse Acts setting the boundaries of Indian Country, prohibiting entry to non-Indians for purposes of purchasing land or settlement, and reserving all trade with Indians to federal regulation, among other measures consistent with Indian sovereignty. See Indian Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790). The original Act was temporary and subsequently extended in 1793, 1796, and 1799, until succeeded by two permanent acts in 1802 and 1834. See Indian Trade and Intercourse Act, ch. 13, 2 Stat. 139 (1802); Indian Trade and Intercourse Act, ch. 161, 4 Stat. 729 (1834).

32. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

government and that states possess no unilateral authority over Indians or Indian Country.³³ Any state jurisdiction over Indian Country must be derivative, delegated by federal dispensation, either legislative or judicial. Congress may intervene whenever and to whatever extent it finds warranted, mindful of the trust relationship it serves through its legislation, to set tribal courts' jurisdiction, but state courts and legislatures have no independent authority to affect that jurisdiction.³⁴ Likewise, the Supreme Court of the United States may decide cases and create precedents that partition state and tribal courts' jurisdiction within Indian Country, subject always to post hoc preemption by Congress.³⁵

Until 1871, the Executive could execute treaties with tribes.³⁶ Those treaties, subject to ratification by the Senate,³⁷ also could bestow a tribe with jurisdiction and other aspects of tribal sovereignty. The Navajo Nation has such a treaty, the Treaty of Fort Sumner, ratified in 1868 and still in force.³⁸ The Treaty of Fort Sumner plays an important role in defining Navajo sovereignty and the civil jurisdiction based on it.

We know that the constitutional guaranties that limit state courts' choice of applicable law do not apply to Indian tribes.³⁹ We further know that Indian tribes are domestic dependent sovereigns, subject to the federal government's trust relationship with them.⁴⁰

How does an Indian tribe relate to a state of the federal union and its laws? Criminal law falls out of the equation, due to acts of Congress,⁴¹ but that still leaves tribal courts extensive jurisdiction over civil matters not arrogated to the

33. See *supra* notes 31-32.

34. Congress has since delegated such authority to the states. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-42 (1980) ("Long ago the Court departed from Mr. Chief Justice Marshall's view that 'that the laws of [a state] can have no force' within reservation boundaries.") (quoting *Worcester*, 31 U.S. at 561).

35. E.g., *Duro v. Reina*, 495 U.S. 676 (1990). The *Duro* case held that a tribal court did not have criminal jurisdiction over a nonmember Indian, but Congress reacted immediately by passing a statute to reverse that result. See 25 U.S.C. § 1301(2) (2006).

36. U.S. CONST. art. II, § 2. Congress repealed the President's treaty power to negotiate treaties with Indian tribes by the Act of Mar. 3, 1871, ch. 120, 16 Stat. 544 (codified at 25 U.S.C. § 71). The law did not pretend to affect existing treaties, except those with tribes "in actual hostility to the United States," whose treaties the President might abrogate by proclamation. See 25 U.S.C. § 72.

37. U.S. CONST. art. II, § 2.

38. Treaty of Fort Sumner with the Navajo Tribe, June 1, 1868, 15 Stat. 667.

39. See *supra* note 18 and accompanying text.

40. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

41. See *supra* note 21.

federal government by Indian law: domestic relations, contracts, commercial law, property, probate, execution of judgments, torts, and most of the rest of private law normally handled by state legal systems.⁴² The Navajo Nation has the legal system to handle those issues and the inclination to do so.

When a case or controversy involving private law issues arises because of significant relationships with both a state and the Navajo Nation, which law should apply? Put another way, when must or may state laws apply to cases or controversies involving Navajo Nation members and Navajo Indian Country, and vice versa?

These gateway questions establish the parameters of tribal courts' civil jurisdiction. In the absence of direct legislation by Congress, the Indian law propounded by the Supreme Court of the United States provides the answer, or at least the guidelines by which the answer must be reached. In general, federal Indian law prohibits state courts from taking jurisdiction over tribal members and events whenever they are preempted from doing so by congressional legislation or a treaty or whenever to do so would infringe on Indian sovereignty. The development of the preemption and infringement doctrines—a process begun relatively recently—is still a work in progress. It promises to generate decisions in the Supreme Court of the United States for the foreseeable future, with significant input from lower federal courts as well.

The growing body of state and tribal case law based on the Supreme Court precedents lacks cohesion, as this article should demonstrate. To date, no jurisdictional rule has emerged that would curtail parties' racing to the state or to the tribal courthouse,⁴³ where they think they might find more favorable law. So far, the jurisdictional question has been treated generally as one and the same with the question of the applicable law; tribal courts apply tribal law, and state courts apply state law.⁴⁴

42. Tribes in Public Law 280 states are excepted. See 18 U.S.C. § 1162 (2006); 28 U.S.C. § 1360 (2006).

43. *Erie v. Tompkins*, 304 U.S. 64 (1938), ended a similar disparity between state and federal courts. Before the decision in *Erie*, courthouses on opposite sides of the street might predictably reach different resolutions, applying different law (federal common law often was different from state common law) and giving rise to races to file in one court or the other, since the place of filing determined the outcome. This sort of jurisdictional determinism may exist today between state and tribal courts, and it does affect parties' conduct.

44. *But see infra* note 198 and accompanying text for a New Mexico case that might have applied tribal law in state court.

The Infringement Test

Formation of modern doctrine on tribal courts' civil jurisdiction began at about the same time as the Navajo Nation's modern court system. The seminal decision for defining jurisdiction over claims by non-Indians against Indians, when the claim grows out of events on the reservation, is *Williams v. Lee*.⁴⁵ The case involved a non-Indian merchant operating a general store on the Navajo Indian Reservation.⁴⁶ The merchant followed a long-established practice of filing suit in the Arizona state court to collect a debt for goods he had sold to Navajo tribal members, husband and wife, who lived on the Reservation.⁴⁷ The state court entered judgment, and the Arizona Supreme Court affirmed its jurisdiction.⁴⁸ The Supreme Court of the United States reversed, casting the question as "one of state power over Indian affairs," and stating:

[T]he basic policy of *Worcester* has remained. . . . 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*. . . . Today the Navajo [tribal courts] exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants. No Federal Act has given state courts jurisdiction over such controversies.

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

45. 358 U.S. 217 (1959). The relatively late date for *Williams* may be explained by the fact that only in the mid-twentieth century, after the Indian Reorganization Act of 1934 and especially with the advent of Indian self-determination in the 1960s, did tribal courts applying tribal laws become a viable factor. There were jurisdictional decisions before *Williams*, but the 1959 case sets the benchmark for modern analysis of the issue.

46. *Id.* at 217.

47. *Id.* at 218.

48. This sequence of events would have done no more than follow standard law and practice in place for over a century. However, at the time *Williams* was decided, the Navajo Nation had already initiated its court system, beginning in 1952.

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, then it is for Congress to do it.⁴⁹

The "infringement test" established by *Williams* describes a situation in which the parties cannot consent to state court jurisdiction; i.e., it vests subject matter jurisdiction exclusively in the tribal court regardless of whether the state court has personal jurisdiction over the Indian defendant. The state court could not take the lawsuit even if the Indian defendant appeared without contesting jurisdiction. Is the key to the *Williams* decision the fact that the claim arose in Indian Country, so that the tribal court also would have exclusive jurisdiction where the Indian was the plaintiff and the non-Indian the defendant? The Supreme Court has since answered that question in the negative, permitting the proper (although perhaps not exclusive) exercise of jurisdiction over such cases by state courts, their traditional venue.⁵⁰ Why a jurisdictional distinction might turn on tribal membership, rather than residence or significant contacts⁵¹, may not be immediately apparent,⁵² but bear with the issue and it may become clearer.

Does exclusive tribal jurisdiction under the *Williams* doctrine turn on the presence of an Indian defendant? It might seem so. Indeed, consistent with that proposition, where both parties were Indians, the Supreme Court held that state courts could not entertain a lawsuit between two tribal members.⁵³ On the other hand, one can readily contemplate circumstances in which the activities of a non-Indian defendant, or events surrounding a non-Indian defendant, might infringe on a tribe's right to govern itself. Generally, persons

49. *Id.* at 219-20, 222, 223 (citations omitted).

50. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 148 (1984). Presumably, federal courts might also exercise jurisdiction where diversity and the requisite amount were present, but thus far no decision has established whether diversity exists, for example, between an Arizona resident and a Navajo member resident on the reservation in Arizona. See ROBERT N. CLINTON, CAROLE E. GOLDBERG & REBECCA TSOSIE, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 809-10 (4th ed. 2003).

51. For example, had the merchant in *Williams* been an Arizona resident who went to live in New Mexico and set up his business there, the New Mexico courts clearly would have jurisdiction over a civil suit naming him as the defendant.

52. See *Williams*, 358 U.S. at 223 ("It is immaterial that [plaintiff]-respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.").

53. *Fisher v. Dist. Court*, 424 U.S. 382, 386 (1976). There may be a question regarding nonmember Indians from another tribe or reservation, however. See *Duro v. Reina*, 495 U.S. 676, 693 (1990). The *Duro* case held that a tribal court did not have criminal jurisdiction over a nonmember Indian, but Congress reversed that result by a statute that did not pertain to civil jurisdiction. 25 U.S.C. § 1301(2) (2006).

and conduct within a sovereign's territory fall within that sovereign's governmental authority.⁵⁴ If the merchant in *Williams* had set up his trading post in-state, but outside the Reservation, he would have submitted to the jurisdiction of that state.

Note again that *Williams*' infringement test cannot determine concurrent jurisdiction; it functions only to determine exclusive subject matter jurisdiction. If infringement occurs, the state must stand aside, even though the case might appear to present circumstances in which concurrent jurisdiction would exist were two states involved. *Williams*' rejection of all possibility of concurrent jurisdiction renders its rule inappropriate for a case in which an Indian plaintiff were to sue a non-Indian defendant, even if it arose in Indian County. That set of facts might give rise to concurrent jurisdiction in the tribal court as well as the state court.⁵⁵ One might ponder the validity of using the defendant's lack of tribal membership as the determining factor, but more recent cases have increasingly turned to that factor to whittle away at tribal courts' subject matter jurisdiction.⁵⁶ The nub of *Plains Commerce Bank* may lie in that reasoning,⁵⁷ although the majority opinion was not willing to make it a categorical disqualifier.

Curbing Tribal Court Jurisdiction over Non-Indians: Neo-Infringement Rules that Equate Tribal Adjudicatory Jurisdiction and Tribal Legislative Jurisdiction

In 1997, after generating substantial intervening case law on other types of tribal jurisdiction, the Supreme Court returned to the question of civil jurisdiction in *Strate v. A-1 Contractors*,⁵⁸ pulling together strands from various cases, in a way that appeared to nip at budding expansion of civil jurisdiction for tribal courts. *Plains Commerce Bank* has not changed the rules established by *Strate*, although it may have muddied their application. In the

54. RESTATEMENT OF THE FOREIGN RELATIONS LAW §§ 183-186 (1965).

55. Some tribal courts would hesitate to exercise such jurisdiction by their own tribal laws. Judge Canby notes that "a number of tribal codes provide for civil jurisdiction over non-Indian defendants only when they stipulate to it." CANBY, *supra* note 11, at 189. But the fact that they could exercise such jurisdiction upon a defendant's consent indicates that the subject matter is appropriate to the tribal court.

56. Indeed, the first words of Paul A. Banker, the attorney for Plains Commerce Bank, at oral argument before the Supreme Court of the United States were, "Tribes lack inherent sovereign power over nonmembers." Transcript of Oral Argument at 3, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008) (No. 07-411).

57. See *Plains Commerce Bank*, 128 S. Ct. at 2715.

58. 520 U.S. 438 (1997).

more recent decision, no member of the Supreme Court disavowed *Strate* in any way; the Court split 5-4 over whether its first (of two) tribal-jurisdiction-granting exceptions applied in a specific set of circumstances.

Strate involved an automobile accident between non-Indians⁵⁹ on a state highway through a reservation. When the plaintiff filed in tribal court, the defendants made a special appearance to contest jurisdiction and lost before the trial court and on appeal. Without waiting to litigate the merits, the defendants then commenced an action in federal district court, again attacking the tribal court's jurisdiction. The question made its way to the Supreme Court on certiorari, and the United States' highest tribunal held that tribal courts had no jurisdiction over a dispute between nonmembers growing out of events on a right-of-way (lands ceded to the state for a highway) through the reservation.⁶⁰

Strate walks an interesting line. It relied on *Montana v. United States*,⁶¹ a case the Supreme Court had decided sixteen years earlier and which dealt with a tribe's legislative jurisdiction. *Strate* found in *Montana* an analysis of "forms of [tribes'] civil jurisdiction" that applied to judicial power over civil matters and held that a tribe's "adjudicative jurisdiction" could not surpass its legislative jurisdiction. The Court stated:

While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of "inherent sovereignty." [M]ontana delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise "forms of civil jurisdiction over non-Indians." As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding. . . . [T]he civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally "do[es] not extend to the activities of nonmembers of the tribe."⁶²

59. *Id.* at 443. The Court actually characterized the parties as "nonmembers," apparently making the decision valid as to cases including Indians of a tribe different than the tribal court. *See id.*

60. *See id.* at 459 (creating a special category of Indian Country less subject to Indian jurisdiction). Compare with 18 U.S.C. § 1151 (2006).

61. 450 U.S. 544 (1981) (6-3 vote). In the sixteen years between *Montana* and *Strate*, the makeup of the Supreme Court changed greatly. Of the nine judges who decided *Montana*, only two—Rehnquist and Stevens—were still on the Court when it decided *Strate*.

62. *Strate*, 520 U.S. at 453 (citations omitted).

Finally, the *Strate* opinion recognized the “continued viability” of *Williams v. Lee*’s infringement test, but saw “[n]either regulatory nor adjudicatory authority over the state highway accident [as] needed to preserve ‘the right of reservation Indians to make their own laws and be ruled by them.’”⁶³ Perhaps it should not have surprised anyone that the *Williams* infringement test—drawn to define subject matter jurisdiction exclusive to tribal courts—might not deprive state courts of the power to hear a dispute between non-Indians arising on fee (non-Indian) land. The language of the decision in *Strate* probably ended any lingering doubt that the sole determining factor for infringement would be the site of the event on the reservation. The Supreme Court’s concern fixed on the status of the parties. Justice Ginsburg wrote for the unanimous *Strate* Court, “As to nonmembers, we hold, a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.”⁶⁴

The Infringement Test Restated for Legislative Jurisdiction

The *Strate* decision found its touchstone for measuring tribal courts’ civil jurisdiction in the case of *Montana v. United States*, which had defined the boundaries of a tribe’s power to legislate.⁶⁵ The Crow Tribe of Montana prohibited hunting and fishing by nonmembers on reservation lands, but Montana asserted its authority to regulate fishing by non-Indians on the Big Horn River. While the river flowed through the reservation, its riverbed had passed into state ownership when Montana entered the Union.⁶⁶ The Supreme Court held that the Crow Tribe had no authority to regulate hunting and fishing by non-Indians on land owned by non-Indians, even though that land was within the reservation.⁶⁷

The *Montana* court restated the proper measure of the tribal interest that might be infringed: “exercise of tribal power beyond that which 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.”⁶⁸ There is an echo of *Williams* in *Montana*, but the

63. *Id.* at 459 (quoting *Williams*, 358 U.S. at 220).

64. *Id.* at 453.

65. 450 U.S. 544 (1981) (6-3 vote).

66. *Id.* at 556-57. This holding ignored the canons of construction, which normally would have construed all treaties liberally in favor of the tribe and generally would have read treaties as grants from, rather than to, the tribe. Justice Blackmun, joined by two others, pointed this out in his dissent. See *id.* at 569 (Blackmun, J., dissenting).

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

68. *Id.* at 564 (1981), quoted in *Nevada v. Hicks*, 533 U.S. 353, 359 (2001) and *Strate v.*

later opinion expressed the field of a tribe's exclusive subject matter jurisdiction for legislative purposes more specifically and more narrowly.

The *Montana* court—with Justice Stewart writing for the majority—began by stating a sweeping proposition: “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers.”⁶⁹ That proposition clashed with the general rule of vestigial sovereignty that, absent a treaty or statute to the contrary, a tribe has authority over its territory. Taking that consideration into account, the *Montana* decision recognized two exceptions that would allow a tribe to regulate nonmembers' activities: 1) where the nonmembers had entered into “consensual relationships with the tribe or its members,” or 2) “the conduct of non-Indians on fee lands within [a] reservation . . . threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁷⁰

Thus, *Montana* set out a rule: activities of nonmembers are not subject to tribal regulation.⁷¹ Then *Montana* set out two exceptions to its rule. The two exceptions borrowed (though not overtly) the criteria from *Williams*, expressing them descriptively in the first exception and doctrinally in the second. The first exception describes the fact situation in *Williams*. The second exception provides a doctrine by which to measure whether certain

A-1 Contractors, 520 U.S. 438, 446, 456-59 (1997).

69. *Montana*, 450 U.S. at 565.

70. *Id.* at 565-66.

71. The *Montana* rule might be seen, in its own right, as an exception to the broader traditional rule that tribes have authority to regulate activity within their territory, i.e., within Indian Country. By 1997, however, the Supreme Court stated in *Strate v. A-1 Contractors*, 520 U.S. 438, 450 (1997), “*Montana* thus described a general rule that, absent different congressional direction, Indian tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation . . .” The Supreme Court expressed a concern that the exceptions to the “*Montana* rule” should not be applied in a way that “would severely shrink” it. *See id.* at 458. With that formulation, *Montana* should best be seen as a new rule, replacing the old rule in favor of general tribal authority over their territory. *But see* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (“Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. . . . Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by specific treaty provisions or federal statute.”). Judge Canby notes,

Although *Montana* announced an exception to the general rule that a tribe has governmental power over its territory unless some statute or treaty takes it away, subsequent Supreme Court opinions have tended to refer to the “*Montana* rule,” not the “*Montana* exception.” As a “rule” limiting inherent tribal sovereignty, it continues to gain strength; indeed, it appears to have become the foundation case for contemporary Indian law in the Supreme Court.

CANBY, *supra* note 11, at 78.

conduct by a nonmember reaches a level of impact on the tribe that justifies tribal regulation. Under the *Montana* doctrinal exception, it is hard to conceive of a situation in which any common transaction between two nonmembers might engage “the political integrity, the economic security, or the health or welfare of the tribe.”⁷²

The *Montana* Court confronted a fact situation that made its rejection of the first exception, for a consensual relationship, relatively easy. The Court then turned to the second exception and summarily found that hunting and fishing by nonmembers bore “no clear relationship to tribal self-government or internal relations” and therefore retained inherent sovereignty did not authorize the Crow Tribe to exercise authority over that activity.⁷³

Despite Mr. Justice Stewart’s sweeping statement, which might be read to deny tribes all regulatory jurisdiction over nonmembers wherever they were, the facts of *Montana*—nonmembers’ conduct on non-Indian fee lands (specifically, the state’s river running through the reservation)—left open the possibility that where nonmembers’ conduct occurred in Indian Country (whether Indian or non-Indian land), and engendered significant contacts with a tribe, that tribe might still enjoy general sovereignty over such activities. In 2001, *Atkinson Trading Co. v. Shirley*⁷⁴ at least restricted that possibility, making it clear that it would not be an easy loophole.

In *Atkinson*, the Supreme Court denied the Navajo Nation the right to tax non-Indians for hotel occupancy within the reservation. Although the hotel occupied an island of non-Indian land, it relied on tribal services and security and employed almost 100 tribal members. In the eyes of the *Atkinson* Court, *Montana*’s sweeping statement had an application as broad as its language, at least for regulatory authority, and neither of its exceptions were present. The Supreme Court seemed to require a clear and heightened “threa[t] or . . . direct effect on the political integrity, the economic security, or the health or welfare of the tribe,” even in the event of a consensual relationship with the tribe or its members, before it would find an exception creating tribal jurisdiction.⁷⁵ Still, *Atkinson* did not extend *Montana* to Indian lands proper.

72. See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (permitting (by 5-4 vote) tribal zoning of nonmember fee lands in a portion of the reservation closed to the public, thus permitting regulation of nonmember activities).

In *Brendale*, Justice Blackmun argued in his dissent that *Montana* had created a relatively narrow exception to the general authority of tribes’ power to govern. See *id.* at 450-53. However, no Supreme Court justice has made that argument since.

73. *Montana*, 450 U.S. at 564-65.

74. 532 U.S. 645 (2001).

75. *Id.* at 657 (quoting *Montana*, 450 U.S. at 566).

After *Montana* and *Atkinson*, the possibility of a tribe invoking the *Montana* infringement exceptions to exercise legislative jurisdiction over a nonmember involved in conduct on non-Indian fee land seems quite remote. And, since *Strate* makes tribal judicial jurisdiction over civil controversies the same as legislative jurisdiction, tribal courts might contemplate greatly restricted civil jurisdiction growing out of nonmembers' conduct on non-tribal lands, even when those non-tribal lands lay wholly within the reservation and even when tribal members are involved.

In fact, the majority in *Plains Commerce Bank* found that exactly those circumstances—a transaction between nonmembers involving non-tribal lands within the reservation—existed in that case. It does appear that the majority ignores significant involvement of tribal members, or at least finds that any such involvement was irrelevant without saying so.

Has Plains Commerce Bank Instigated a Limited Per Se Rule with Virtually No Precedential Value?

If *Strate*, *Montana*, and *Atkinson* left doubts as to how far the Supreme Court might have left the door open for tribal jurisdiction over nonmember conduct on non-tribal lands, *Plains Commerce Bank*⁷⁶ seems to have labored mightily and identified one limited situation in which tribal courts cannot exercise jurisdiction, at least in the minds of five of the nine justices then sitting on the Supreme Court of the United States. Specifically, under the new case, when a nonmember sells fee land to a nonmember, then any possibility that the sale may have discriminated against a tribal member escapes the competence of the tribal court.⁷⁷

Plains Commerce Bank involved troubled Indian debtors attempting through workouts with the lender bank to salvage a ranching operation, the Long Family Land & Cattle Company, on 2230 acres of fee land within the boundaries of the Cheyenne River Sioux Reservation in South Dakota. Beginning in 1988, the Company and the owners of the land, Kenneth and Maxine Long, and subsequently their son Ronnie and his wife, Lila, became debtors of the bank.⁷⁸ Incorporated in South Dakota, the Company's articles

76. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008).

77. *Id.* at 2714.

78. *See Id.* at 2714-16. *Plains Commerce Bank* is successor to the Bank of Hoven, which initiated the loans to the Longs in 1988. The town of Hoven, South Dakota, lies about twenty-five miles from the reservation. While the loans were to the Company, the bank required personal guaranties from Kenneth, Maxine, Ronnie, and Lila Long, including a mortgage on their 2230 acres of land and security interests in their personal property including hay, cattle,

of incorporation required that “at least 51% of [its] outstanding shares must be Indian owned at all times, ensuring the company’s eligibility for Bureau of Indian Affairs (BIA) loan guarantees.”⁷⁹ Maxine, a tribal member, took 51% of the shares and Kenneth, a nonmember, 49%. When Maxine died, Ronnie and Lila, both tribal members, inherited her 51%. Kenneth’s will provided that his interests in the land and the Company were to go to his four children, all tribal members.⁸⁰

The ranching operation had debts. When Kenneth died in 1995, he owed the bank over \$750,000, more than the value of his estate. Negotiations ensued in the Cheyenne River Sioux Tribe’s offices, with direct participation by “tribal officers and BIA employees.”⁸¹ The parties agreed to a workout deal by which the estate would deed the 2230 acres, and Kenneth’s off-reservation house, to the bank in lieu of foreclosure, reducing the debt by \$478,000. In return, the bank initially offered to sell the land back to the Longs for the same amount under a twenty-year “contract for deed,”⁸² while at the same time extending operating loans to the Company. However, the bank changed its mind and withdrew the offer by a letter “citing ‘possible jurisdictional problems’ posed by the Long Company’s status as an ‘Indian owned entity on the reservation.’”⁸³ In December 1996, the Longs—with little bargaining power—signed a two-year lease with an option to purchase for \$478,000 and an agreement for attendant operating loans to be guaranteed by the BIA.

The Longs’ bad luck continued when the “horrific winter of 1996-1997” ensued.⁸⁴ While the winter raged, for two months the BIA did not respond to the bank’s initial applications for guaranties on the operating loans.⁸⁵ The BIA finally requested that the bank redraft the applications and submit them again. The bank then chose not to pursue the BIA guaranties further and did not make

machinery, and their shares in the Company. *See id.*

The BIA also guaranteed the loans and ultimately paid the bank “almost \$400,000, more than 80% of the net losses resulting from its loans to the Longs.” *Id.* at 2729 (Ginsburg, J., dissenting) (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 440 F. Supp. 2d 1070, 1078 (D.S.D. 2006)).

79. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 491 F.3d 878, 881 (8th Cir. 2007).

80. Apparently Ronnie Long’s three siblings assigned him their interest in their father’s estate. *Id.* at 881 n.2.

81. *Id.*

82. *Plains Commerce Bank*, 128 S. Ct. at 2715.

83. *Plains Commerce Bank*, 491 F.3d at 882.

84. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, No. R-120-99, at 3 (Cheyenne River Sioux Tribe Ct. App. Nov. 30, 2004).

85. *See Plains Commerce Bank*, 440 F. Supp. 2d at 1074.

the operating loans to the Company,⁸⁶ which in the interim lost all of its cattle—over 500 head—to blizzards.⁸⁷ The Longs claimed the bank's failure to provide operating loans sealed their loss of the land.⁸⁸

Although they could not meet their obligations, the Longs refused to vacate the land when their lease expired in 1998. In early 1999, the bank began eviction proceedings in state court and tribal court,⁸⁹ after first selling a 320-acre parcel of the land to a non-Indian couple. Subsequently, after the Longs received the eviction notices, the bank sold the remaining 1910 acres, again to a non-Indian couple.

The Longs⁹⁰ responded with a multi-claim suit in tribal court alleging among other things the bank's breach of the loan agreement and other contracts, its bad faith in its dealings with the Longs, and its discrimination against the Longs when it gave more favorable terms to non-Indian buyers, of what had been the Longs' land. After a two-day trial in December 2002, the jury returned a general verdict for the Longs on the three claims and awarded them \$750,000 plus \$123,131 in prejudgment interest and an option to purchase 960 acres under title to the bank for \$201,600.⁹¹

The bank appealed to the tribal Court of Appeals, raising—somewhat incredibly—only the issue of tribal jurisdiction over the discrimination claim.⁹²

86. *Id.*

87. *Plains Commerce Bank*, 128 S. Ct. at 2715.

88. *Plains Commerce Bank*, 440 F. Supp. 2d at 1074.

89. Although it ultimately served the Longs with a notice to quit through the Cheyenne River Sioux Tribal Court. See *Plains Commerce Bank*, 128 S. Ct. at 2715; *id.* at 2729 (Ginsburg, J., dissenting).

90. There is some confusion as to precisely who the plaintiffs in the case were and on what claims. The contract claims pertained to the Long Family Land & Cattle Co., but individual plaintiffs brought the discrimination claim.

91. See *Plains Commerce Bank*, 128 S. Ct. at 2715-16; *Plains Commerce Bank*, 440 F. Supp. 2d at 1075.

92. The limited basis for the bank's objection to jurisdiction is hard to track through the various levels and opinions. Could the Longs still claim their judgment for \$880,000, based on the bank's bad faith and breach of contract? None of the opinions confronts and clarifies this point. The four opinions prior to the Supreme Court of the United States did not have to since they affirmed the trial court. The Supreme Court states that the appellant bank seeks a ruling that the tribal judgment is "null and void because, as relevant here, the Tribal Court lacked jurisdiction over the Long's discrimination claim." *Plains Commerce Bank*, 128 S. Ct. at 2716. The Longs raise this argument as one against the bank's standing, but the majority says that "the jury could have based its damages award, in whole or in part, on the finding of discrimination." *Id.* at 2717. The majority finally states that "the ultimate collateral consequence of such a determination, whatever it may be, . . . does not alter the fact that the Bank has shown injury traceable to the challenged action and likely to be redressed by a favorable ruling." *Id.* at 2717-

It lost before the tribal Court of Appeals and then before the U.S. District Court for the District of South Dakota and before the United States Court of Appeals for the Eighth Circuit. The Supreme Court of the United States granted certiorari.

Mr. Chief Justice Roberts' opinion for the five-member majority begins,

This case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals. Following the sale, an Indian couple, customers of the bank who had defaulted on their loans, claimed the bank discriminated against them by offering the land to non-Indians on terms more favorable than those the bank offered to them.⁹³

To thus characterize the case, is to decide against tribal jurisdiction at the outset. It casts the case ineluctably into *Strate*'s most basic formulation, "[T]he civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'do[es] not extend to the activities of nonmembers of the tribe.'"⁹⁴

Of course, *Plains Commerce Bank*'s facts would seem to compel a more accurate formulation of the case as one which involved Indian-owned fee land mortgaged by its Indian owners to a non-Indian bank, which of its own volition, had remained continuously involved with those tribal-member owners, their tribe, and the BIA on their reservation. The bank's conduct at issue before the Cheyenne River Sioux trial court in *Plains Commerce Bank* occurred toward the end of its longstanding commercial relationship with certain tribal members, the Longs. The bank had come onto the reservation to work out agreements, mediated by tribal and BIA officials, with the Longs when the debts secured by the Longs' fee land placed their continued ownership of that fee land in peril. Finally, the bank had sought procedures before the tribal court to evict the debtors from their land after they had defaulted.

Does the singular fact of status, as fee lands trafficked at some point between a non-Indian bank and non-Indian buyers, somehow scrape off all possibility of tribal jurisdiction over that particular transaction, regardless of whatever prior relationship existed between the bank, tribal members, and the land? *Plains Commerce Bank* can support no such sweeping rule; it treats only jurisdiction over the issue of discrimination in such a sale and might seem to

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93. *Id.* at 2714.

94. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

leave other matters—specifically, bad faith and breach of contract—properly before the tribal court. That would preserve the essence of *Strate-Montana*'s first exception, that consensual relationships with Indians submit the party entering into them to the jurisdiction of tribal courts.

The four dissenters would not even deny tribal jurisdiction over the discrimination issue. Justice Ginsburg—also author of the unanimous *Strate* decision eleven years before—begins the dissent with a categorical rejection of Justice Roberts' characterization of the case. She instead embraces the Eighth Circuit's view that it is a case "[a]bout the power of the Tribe to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members."⁹⁵ Not surprisingly, the broader characterization led her to conclude, "In my view, this is a clear case for application of *Montana*'s first or 'consensual relationships' exception."⁹⁶ The dissent goes on to argue that precisely the kind of bank conduct at issue here supports the consensual-relationships exception, noting that *Montana* itself listed "commercial dealing, contracts and leases" as the sort of activities that it contemplated tribes properly regulating.⁹⁷

The Facts and Single Issue on Appeal Make Plains Commerce Bank a Very Narrow Holding, of Little Precedential Value

One must read *Plains Commerce Bank* as a child of its peculiar pleading. The appellant bank attacked the tribal jurisdiction over only the discrimination claim, although the jury found for the plaintiffs on their claims of bad faith, breach of contract, and discrimination and awarded a "general verdict" for \$750,000. This curious self-limitation⁹⁸ by the successful appellant leaves open not only the question of precisely what it has won, if anything, but what precedent its case may have set. If the Supreme Court of the United States' proper role is to create law rather than decide individual cases, and it should use certiorari judiciously for that purpose, then *Plains Commerce Bank* is a bad day's work.

95. *Plains Commerce Bank*, 128 S. Ct. at 2727 (Ginsburg, J., dissenting) (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 491 F.3d 878, 887 (8th Cir. 2007)).

96. *Id.*

97. *Id.* (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)).

98. In a similarly strange oversight, or odd strategic decision, the appellees did not plead the Treaty of Fort Laramie with the Sioux Nation, Apr. 29, 1868, 15 Stat. 635 (ratified Feb. 16, 1869). Both the federal district court and the Eighth Circuit took note of the omission. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 440 F. Supp. 2d 1070, 1076 n.2 (D.S.D. 2006); *Plains Commerce Bank*, 491 F.3d at 885 n.5.

The bare majority may have granted certiorari in the expectation that it could use the *Plains Commerce Bank* as an agenda case to derogate or emasculate the first exception in *Montana*. The facts might have supported a ruling denying a tribal court all possible jurisdiction over the legal consequences of a non-Indian bank's continued consensual commercial relationship with its erstwhile Indian debtors.

But for whatever reason, the five justices missed the opportunity. The majority could have agreed with the four dissenters (and all of the lower court judges that considered the case) that the discrimination claim grew out of a consensual relationship. Then the majority could have ruled that even where the facts qualified the case for *Montana*'s first exception, no tribal court jurisdiction obtained, either derogating the exception altogether or emasculating it by identifying mitigating factors that made it inapplicable in the case. Such a decision could have left tribal courts with virtually no civil jurisdiction over nonmembers, regardless of their consensual relationships with tribes and tribal members.

It could have taken us back to Justice Stewart's statement in *Montana* that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers"⁹⁹ and stripped away the major exception to that rule. Perhaps the bare majority could not muster all of its five votes to that extreme, or it lacked resolve when the time came to write the opinion, feeling that the *Plains Commerce Bank* case did not provide a suitable vehicle for such a sweeping change.

Note carefully what the majority backed away from in *Plains Commerce Bank*. As the majority stated the case, however much it may have twisted the facts to do so, *Plains Commerce Bank* deals with a transaction between two nonmembers, the same as in *Strate*. That formulation does not confront the first *Montana* exception, it avoids it. To truly confront the first exception, the Supreme Court—or at least a majority of the Supreme Court—must first identify a case whose facts deal with only one nonmember who has created a consensual relationship with tribal members in Indian Country. *Plains Commerce Bank* had such facts, if the majority had only recognized them. Given such a case, then the bare majority—if it has the will to do so—would have the occasion to overrule the first exception.¹⁰⁰

As it stands, *Plains Commerce Bank* represents no disagreement over the *Strate-Montana* doctrine. The two exceptions continue untouched. The five-justice majority excluded the first *Montana* exception by finding that the case

99. *Montana*, 450 U.S. at 565.

100. See *supra* notes 96-97 and accompanying text.

involved a sale of fee land between nonmembers. Four justices thought it was more and saw facts that would have triggered the first exception.¹⁰¹

Lower courts should apply the *Strate-Montana* doctrine as before, mindful that the Supreme Court of the United States has passed on a chance to overrule that doctrine. Our highest court has defined a sale of non-tribal land between nonmembers as insufficient to give rise to a member's discrimination claim. By definition, no claim of discrimination against tribal members can arise from those facts. Consequently, no tribal court hereafter should exercise civil jurisdiction over that singular factual situation.

The *Plains Commerce Bank* decision, however, does not appear to foreclose the propriety of tribal jurisdiction based on the implications—including bad faith and breach of contract—of such a sale in the context of related circumstances involving tribal members.¹⁰² Indeed, the tribal court granted judgment on those causes of action,¹⁰³ and the judgment debtor neglected to appeal that exercise of jurisdiction.¹⁰⁴ It remains quite likely that the Long family will have its judgment against the bank—now over a million dollars in principal and interest—and wind up back on its land, when the trial court considers the issues on remand.¹⁰⁵

The Supreme Court reversed, by narrowing the consensual relationship out of the facts, by the narrowest of margins.¹⁰⁶

101. All lower courts (totaling eight judges, with no dissents) found jurisdiction in the Cheyenne River Sioux Tribal Court because of the first exception in *Montana*: nonmembers' consensual relationship with the tribe or its members. See *Plains Commerce Bank*, 491 F.3d at 881; *Plains Commerce Bank*, 440 F. Supp. 2d at 1078; *Plains Commerce Bank v. Long Family Land & Cattle Co.*, No. R-120-99 (Cheyenne River Sioux Tribe Ct. App. Nov. 30, 2004).

¹⁰². See *Plains Commerce Bank*, 128 S. Ct. at 2715-16.

¹⁰³. *Id.*

¹⁰⁴. *Id.* at 2725.

¹⁰⁵. The Supreme Court shied away from any indication that its holding would upset the Longs' judgement against the bank. While it muddles through to a reference that hints that the appellant bank might gain relief from the judgment in tribal court, the bare majority's disposition of the issue is anything but dispositive. See *id.* at 2725 n.2. At oral argument, the Court seemed equally unable to pin down the ultimate consequences of its reversal and remand, as it might generally effect the Longs' judgment against the bank. See generally Transcript of Oral Argument at 18-21, 26-32, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008) (No. 07-411).

¹⁰⁶. Both *Montana* and *Strate* were unanimous decisions. See generally *Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Since then, it appears nine justices have never agreed on a case involving the civil jurisdiction of tribal courts.

The *Strate-Montana* parlay, essentially unaffected by *Plains Commerce Bank*, leaves some promising possibilities still open to tribes interested in exercising civil jurisdiction. First, *Montana*'s subjective exceptions provide viable bases for tribal courts' civil jurisdiction; exceptions which appear to echo in concept the *Williams v. Lee* infringement test. Courts below the Supreme Court have shown themselves willing to find circumstances that fit the exceptions. Second, *Williams*' statement of the infringement test contained the seed of another doctrine, when it said, apropos of "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, it is for Congress to do it."¹⁰⁷ In other words, *Williams* recognized that Congress might preempt limitations on a tribe's civil jurisdiction by granting the tribe broader jurisdictional powers. No subsequent case or congressional act has diminished that possibility, to which we now turn.

The Preemption Doctrine

Preemption begins from the proposition that Congress may intervene to define tribal jurisdiction however it wishes; the power is plenary. It is at this juncture, perhaps, that the nature of the trust relationship between federal government and tribe becomes most obvious. The *res* of the trust figuratively settled on the federal government is tribal sovereignty itself.¹⁰⁸ In addition, it must be thought of as an equitable or constructive trust—growing out of circumstance, neither willingly nor intentionally rendered up by the tribes¹⁰⁹—imposed by doctrine worked out in the chambers of the Supreme Court of the United States, and exercised by the Congress with the aid of the Executive.

The trust doctrine may leave open the question of how much inherent tribal sovereignty remains. Even if there be some portion neither given up nor expropriated to the federal government, enough is gone that it becomes simpler to just presume that there is no inherent sovereignty and come at the equation from the other side. One asks not whether the tribe retained sovereignty, but

107. See *Williams v. Lee*, 358 U.S. 217, 223 (1959).

108. This reference probably is best taken in a figurative sense because a *res* normally requires a type of property, existing and assignable. See ROBERT L. MENNELL, *WILLS AND TRUSTS IN A NUTSHELL* 195-96 (2d ed. 1994).

109. Again, the analogy is not perfect, since the constructive trust normally requires the trustee to transfer specific property to the beneficiary, rather than to administer it over time. See DAN B. DOBBS, *REMEDIES* §§ 4.3, 10.2, 10.3 (1993).

whether Congress has given it back. The United States Congress may clearly define how much sovereignty the tribes—or a given tribe—may use and how they may use it. Until 1871, Congress did so by ratifying the treaties the Executive negotiated with tribes that defined tribal sovereignty.

The case that most cleanly exposes the nature of the trust relationship in the context of the preemption doctrine may be *McClanahan v. Arizona State Tax Commission*,¹¹⁰ in an opinion written by Justice Thurgood Marshall.

In *McClanahan*, the analysis moved away from—but did not completely abandon—inherent Indian sovereignty as a bar to state jurisdiction over Indians and Indian Country. In that case the Supreme Court of the United States read the applicable treaties and statutes with the “tradition of sovereignty in mind” to decide that the State of Arizona was preempted from taxing the income earned by an Indian on the reservation.¹¹¹ In the process, the Supreme Court defined a new perspective on the nature of domestic dependent sovereignty.

McClanahan held that virtually all of the tribes’ sovereignty had been delivered up in trust to the federal government implicitly by the events of the nineteenth century. *McClanahan* shifted the focus to the concept of federal preemption, turning to treaties and statutes to determine areas foreclosed to state exercise.¹¹² In Judge Canby’s phrase,

By reducing sovereignty to a backdrop and relying on the preemptive effect of federal law to exclude state power, *McClanahan*’s analysis appears to alter the presumption that the tribe has governmental power over all matters affecting the tribe on the reservation, and that the state does not. It seems instead to assume that the state has power unless federal law (including federal Indian policy) has preempted it.¹¹³

In effect, preemption analysis places tribal sovereignty into a federal preserve, for which treaties or congressional laws set rules protecting the tribes’ domestic sovereignty and thereby preempt the states’ jurisdiction.¹¹⁴

110. 411 U.S. 164 (1973).

111. *Id.* at 173.

112. *Id.* at 172.

113. CANBY, *supra* note 11, at 89.

114. The Navajo Supreme Court does not see treaties in this light, however. See *Means v. District Court of Chinle*, 7 Navajo Rptr. 382 (1999), available at <http://www.tribal-institute.org/cases/navajo/means.htm>. The *Means* opinion states, “A treaty is not a grant of rights to Indian nations but a grant of rights from them, with reservations of all rights which are not granted.” *Id.* at 389.

That analysis avoids reference to inherent sovereignty as the basis for tribal jurisdiction, although it does not abolish the reference. Identifying what activities are preempted based on treaties and statutes that define tribal sovereignty often becomes an exercise in long-after-the-fact adaptation.

The Navajo Treaty of Fort Sumner of 1868 set apart a reservation for the use and occupation of the Navajo tribe of Indians,¹¹⁵ thereby retaining civil jurisdiction by inherent sovereignty.¹¹⁶ In contemplation of such treaties, the acts by which states were admitted to the Union typically contained provisions by which the new states disclaimed all right and title to jurisdiction over land and property held by Indians.¹¹⁷ Such laws provide a durable “inherent” sovereignty that persists in the face of case law that would otherwise curtail it.¹¹⁸

Perhaps the preemption doctrine had always been there, latent in the nature of the trust relationship. Where *Worcester* might have implied that the tribes retained sovereignty that had never passed from them, unless and until a treaty or a law of Congress took it from them, *McClanahan* seems to embrace the idea that virtually all tribal sovereignty passed to the federal government for its fiduciary administration. Any inherent sovereignty is of residual character, a tradition to be born in mind. Meanwhile, the federal trustee may preempt state interest by permitting the tribal beneficiary to take possession of all or portions of the trust sovereignty. The federal fiduciary also, however, may permit the states to exercise all or portions of the tribal sovereignty held in federal trust. The proper exercise of tribal and state jurisdiction then turns on determining the preemptive effect of the federal laws and treaties.

A federal grant of tribal sovereignty preempts state jurisdiction. No state may violate that preemption by “interfer[ing] with or [acting] incompatibl[y] with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.”¹¹⁹ That formulation of the preemption doctrine seems to admit the possibility that state interests might overcome apparent preemption when the state interest attains sufficient weight to overcome a tradition of tribal sovereignty, be that inherent or by federal grant. Or perhaps it admits the possibility that a state’s

115. Treaty of Fort Sumner with the Navajo Tribe, *supra* note 38, at art. 2.

116. *Williams v. Lee*, 358 U.S. 217, 221-23 (1959).

117. See Act of June 20, 1910, ch. 310, 36 Stat. 557 (1910); ARIZ. CONST. art. 20; N.M. CONST. art. XXI, § 2.

118. *E.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195-97 (1978); *Duro v. Reina*, 495 U.S. 676, 684 (1990).

119. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

interest may ascend to such elevated importance that it must override tribal sovereignty, else it be preempted even when Indian sovereignty is not overtly expressed, simply because the fiduciary administration favors the beneficiary's use, always bearing in mind the tradition of sovereignty.¹²⁰ This formulation departs a bit from that of Judge Canby quoted above, shading its assumption away from the states and in favor of the tribes. Let us test it against the rest of the body of law defining tribal jurisdiction and when a state may act.

At the end of the day, laws and treaties provide a rich trove of Indian sovereignty—be it residual inherent sovereignty or sovereignty created anew by federal grant—that persists under the preemption doctrine.¹²¹ The infringement doctrine preserves that sovereignty from incursion by state courts or legislatures. Preemption defines sovereignty; freedom from infringement preserves it. There may be deeper, more venerable sources of Indian sovereignty, inherent in the history and status of the tribes, but at the end of the day it does not matter. Federal Indian policy today supports tribal autonomy, having laid a sturdy preemptive basis for such autonomy in nineteenth century treaties and a more recent series of late twentieth century laws. Preemptive sovereignty provides a sufficient base, even if there were no other, for tribal courts' civil jurisdiction. Paired with the infringement doctrine as developed to this point in time, preemption establishes ample—if not unlimited—opportunity to vindicate tribal court jurisdiction in the face of a state court's claim.

The Exhaustion Requirement: Tribal Courts' First Crack at Determining Their Own Jurisdiction

The Supreme Court gave tribal courts succor in 1985, in *National Farmers Union Insurance Co. v. Crow Tribe*,¹²² which dealt with the question of a Crow Tribe court's jurisdiction over a case involving members and activities at a school on the Crow reservation run by the state school district, giving rise to a claim for indemnity against an out-of-state insurer. The insurer and the school district—which somehow did not find out about the case until after the tribal court had entered a judgment¹²³ and plaintiffs had begun execution against school property—resisted by filing a lawsuit before the federal district

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

121. E.g., *Oliphant*, 435 U.S. at 195-97; *Duro*, 495 U.S. at 684.

122. 471 U.S. 845 (1985).

123. *Id.* at 847-48. The plaintiffs served the complaint and summons on the chairman of the school board, but he neglected to notify either the school board or the insurer. See *id.*

court based on “federal question” jurisdiction,¹²⁴ seeking to enjoin enforcement for lack of jurisdiction in the tribal court. They argued that an earlier case, *Oliphant v. Suquamish Indian Tribe*, holding that tribal courts “did not have criminal jurisdiction to try and punish non-Indians for offenses committed on the reservation,” applied to cutoff tribal jurisdiction over civil actions as well.¹²⁵ The Supreme Court found a federal question, but concluded,

[T]he 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. Rather, the 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.

We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.¹²⁶

In other words, the *National Farmers* court identified a situation in which the tribal court might properly exercise adjudicative jurisdiction, not necessarily exclusive to the tribe, but conceivably appropriate to the tribe. The Supreme Court wanted the tribal court to take the first look at its own civil jurisdiction before any federal court did.

Two years later, in *Iowa Mutual Insurance Co. v. LaPlante*,¹²⁷ the Supreme Court dealt with a similar question when Blackfoot members and activities on the Blackfoot reservation gave rise to a claim for indemnity against an out-of-state insurer. The insurer resisted, this time invoking federal diversity jurisdiction as a bar to any obligation it might have had to defend and indemnify the defendants named in the tribal court lawsuit. The Supreme Court’s opinion noted that

124. See 28 U.S.C. § 1331 (2006).

125. *Nat’l Farmers Union*, 471 U.S. at 853; see also *Oliphant*, 435 U.S. at 212.

126. *Nat’l Farmers Union*, 471 U.S. at 855-56.

127. 480 U.S. 9 (1987).

[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development. . . . Tribal authority over activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.¹²⁸ [T]he 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.'¹²⁹

The rule requiring exhaustion of tribal remedies set out in *National Farmers* and *Iowa Mutual* departs from normal practice in jurisdictional matters in state courts, which could either bind a defendant to a determination of jurisdiction where s/he made an appearance in the lawsuit¹³⁰ or permit a defendant to choose not to appear, suffer a default judgment, and then attack the jurisdictional question—but not the merits—in a different court.¹³¹ Note carefully, however, that the question of tribal courts' civil jurisdiction does not derive from the usual situation in a civil suit, since the court with ultimate responsibility for resolving the jurisdictional question (the federal court) is *not* the court that might hear the merits (state or tribal), unless there is diversity jurisdiction. The federal question jurisdiction to determine tribal jurisdiction never depends on diversity.

The language of *National Farmers* and *Iowa Mutual* seems to reject the categorical statements of *Montana* and *Oliphant* and create special consideration for tribal courts' civil jurisdiction. Particularly, for example, *Iowa Mutual*'s statement that "tribal authority over activities of non-Indians on reservation lands is an important part of tribal sovereignty, [with] [c]ivil jurisdiction over such activities presumptively [lying] in the tribal courts"¹³²

128. *Id.* at 14-15, 18 (citations omitted).

129. *Id.* at 16. However, the tribal court's full opportunity to determine its own jurisdiction is ultimately subject to review in federal district court. *Id.* at 19.

130. See RESTATEMENT (SECOND) OF CONFLICTS §§ 24, 81 (1971). A defendant might make a special appearance, as provided for in section 81, solely for the purpose of contesting jurisdiction. If defendant wins on that question, he or she may then leave without having consented to jurisdiction over the merits; but if defendant loses, he or she is then subject to jurisdiction over the merits. See *id.*

131. See *id.* §§ 24, 110. Parallel proceedings need not dictate that one should cease. The first judgment in time should prevail. See *id.* § 86.

132. *Iowa Mutual*, 480 U.S. at 18.

seems to reject or at least confront *Montana*'s earlier statement that "the inherent sovereign [legislative] powers of an Indian tribe do not extend to the activities of nonmembers."¹³³ If the exhaustion-requirement cases apparently encouraged broader possibilities for tribal civil jurisdiction for a time, *Strate*, however, may have nipped those possibilities in the bud by reading the *Iowa Mutual* language as simply a reiteration of the *Montana* exceptions.¹³⁴

After the *Strate* decision (1997) and the categorical holdings in *Montana* (1986) and *Atkinson* (2001), the exhaustion requirement does not hand over as much jurisdictional discretion as might have appeared at the time *National Farmers* (1985) and *Iowa Mutual* (1987) were first decided. The exhaustion requirement never rested easy in the system, however. The *Iowa Mutual* decision contains a footnote that clearly states that the requirement "did not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite."¹³⁵ In other words, after the tribal court has made its ruling on jurisdiction, a party may still dispute that ruling in federal court. Parties have done so, frequently and successfully,¹³⁶ more so after *Strate* discarded any possibility that *National Farmers* and *Iowa Mutual* might have moved away from applying *Montana*'s limitations on legislative jurisdiction to the recognition of tribal courts' civil adjudicative jurisdiction.

The exhaustion requirement does have an effect, however. It gives tribal courts an initial strike in defining and asserting their own jurisdiction and puts pressure on those who must undertake the time and cost to resist it whenever it is asserted. Proceedings in the tribal court should create a record supporting any finding of jurisdiction. When that record goes to the federal court for review, that review should presumably begin in a light favorable to affirmation, even as it considers the question de novo. The United States

133. *Montana v. United States*, 450 U.S. 544, 565 (1981).

134. See *Strate v. A-1 Contractors*, 520 U.S. 438, 451-53 (1997) ("In keeping with the precedent to which *Iowa Mutual* refers, the statement stands for nothing more than the unremarkable proposition that, where tribes possess authority to regulate activities of non-members, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts."). This, of course, construes the *Iowa Mutual* statement as a mere tautology, that tribal courts presumptively have jurisdiction whenever they have jurisdiction.

135. *Iowa Mutual*, 480 U.S. at 16 n.8; see *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997); see also *Strate*, 520 U.S. at 453 (characterizing exhaustion as a "prudential rule").

136. See CLINTON, GOLDBERG & TSOSIE, *supra* note 50, at 810-15. Unlike the constitutional obligation between the states to render full faith and credit to the judgment of a sister state, comity permits review of a prior holding—including jurisdiction—to make sure that it comports with the standards of the receiving court.

Court of Appeals for the Ninth Circuit, an important circuit encompassing many Indian tribes, construes the exhaustion requirement in diversity cases brought in federal district court to force the plaintiff to withdraw and file in tribal court, even though he or she initially chose not to do so.¹³⁷

There exists enough ambiguity in the system still—with *Montana's* exceptions and *McClanahan's* preemption doctrine laid over *Williams's* infringement test—that an imaginative and insightful tribal court frequently may find good bases for its assertion of civil jurisdiction over non-Indians. Given contacts with the reservation and its member Indians, the circumstances of any civil suit open themselves to the “careful examination of tribal sovereignty . . . as well as a detailed study of relevant statutes . . . treaties . . . and administrative or judicial decisions”¹³⁸ commended by *National Farmers* and to the possibility that a tribal court may determine that it has the power to proceed to judgment.

The clear cases for and against jurisdiction out of the Supreme Court of the United States are relatively few, leaving a significant spectrum in which to assert a tribal court's power, if a tribal court is so disposed. Thus, the assertive tribal court enjoys an advantage in holding on to civil litigation filed before it. Facts like those in *Williams v. Lee*—a non-Indian plaintiff doing business on the reservation, suing an Indian defendant over events on the reservation—create clear and exclusive jurisdiction in the tribal court. Facts like those in *Strate* and *Plains Commerce Bank*—two non-Indian parties and events on non-Indian land within the reservation—create clear and exclusive jurisdiction in the state court. Every other set of facts creates at least a possibility of tribal court jurisdiction, and the tribal court gets the first opportunity to weigh that possibility whenever the plaintiff chooses to initiate the suit in tribal court or in some federal courts.

So Where Are We?

After the dust has settled, for our purposes here, it seems most important to repeat that the field of tribal courts' civil jurisdiction remains largely unsurveyed, although some benchmarks have been placed. The Supreme Court of the United States, while quite active in recent years in this area, scarcely has begun to deal with all the diverse civil cases and controversies that come before tribal courts, with their enormous disparity in attendant

137. *Crawford v. Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991); *Wellman v. Chevron, Inc.*, 815 F.2d 577 (9th Cir. 1987).

138. *Nat'l Farmers Union v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985).

circumstances, parties, and connections to Indian Country or to non-Indian lands. That simple fact leaves a great deal of jurisdictional definition to lower federal courts, but even more—perhaps the bulk of it—to state courts and especially to tribal courts, as they work out patterns in the lacunae left outside direct appeals to federal courts.

It should be noted again here—as at the beginning of this section—that the federal Indian law of tribal court jurisdiction imposes limits on tribal courts, in favor of state courts. Presumably, however, the state courts do not have to take everything that Indian law gives them, any more than the State of Montana had to regulate fishing on the Big Horn River in place of the Crow Tribe when the Supreme Court said it could. Nor do tribal courts have to take jurisdiction of every civil lawsuit that might properly fall within their power. Concurrent jurisdiction should become a more common option. Many rules exist in conflict of laws doctrine that permit a court to abstain from exercising its jurisdiction in favor of another court better situated to make a determination in a given case.¹³⁹ Likewise, then, there is leeway for what a given state's courts may wish to adjudicate and what they may wish to leave to tribal adjudication, or vice versa, regardless of the federal Indian law of tribal court jurisdiction. Given all of the above factors, that jurisdiction may vary from state to state, and—for the Navajo Nation's courts—within the same tribal court, depending on which of three states is involved on the other side of the jurisdictional issue.

State Court Applications of Federal Indian Law to the Question of Navajo Tribal Courts' Jurisdiction

The courts of the three states in which the Navajo Nation lies have an emerging body of reported case law dealing with when they should exercise jurisdiction over civil controversies involving matters with implications for the sovereignty of the Navajo Nation and Navajo Indian Country. Perhaps indicating the relative infancy of the issue, to date the three states' courts have not developed a consistent doctrine.

This study deals first with Arizona, partly because it is the author's home state and partly because it has generated recent cases of iconoclastic bent. It establishes an extreme position in favor of imposing Arizona state law on events affecting the Navajo Nation, through aggressive exercise of civil jurisdiction. While New Mexico courts also have decided a number of cases

139. See RESTATEMENT (SECOND) OF CONFLICTS §§ 84-85; NAVAJO NATION CODE tit. 7, § 253a(E) (2005).

on the issue, they have maintained a more measured approach. The New Mexico approach finds an echo in Utah, although Utah does not have the depth of case law that the other two do. Two of the New Mexico cases treated here to derive that state's approach deal with criminal jurisdiction—which would normally fall outside our consideration—for the insight they provide on New Mexico's attitude toward jurisdiction in general.

From the select group of cases discussed here—four from Arizona, three from New Mexico and one from Utah—we should adequately define the parameters and attitudes of each state regarding the issue of when its courts may exercise civil jurisdiction over matters involving Indians. All stem from circumstances involving the Navajo Nation.

Arizona: Begay v. Roberts, an Arizona State Court Opinion Protecting Navajo Sovereignty from Infringement by Denying State Jurisdiction to Garnish Wages on the Navajo Reservation

The first Arizona case is *Begay v. Roberts*,¹⁴⁰ a classic collections case turning on wage garnishment. The judgment debtor, Tony Begay, was a Navajo residing and working on the Navajo Indian Reservation in Arizona. He purchased an automobile off the reservation, on credit, and failed to make monthly payments. The creditor filed a complaint in Arizona state justice court and served Begay by registered mail delivered to his reservation address. Begay objected that the state court lacked jurisdiction and the matter belonged in tribal court, but the trial went ahead and he suffered a judgment. When Begay continued to miss payments, the creditor sued him again and obtained a second judgment. The judgment creditor then had writs of garnishment issued against Begay's employer, a political subdivision of the state providing utilities throughout Arizona and on the Navajo Reservation.

The writ of garnishment on the first judgment was served on the employer at an office on the reservation; the second at an office off the reservation. Begay answered, claiming his wages were not subject to garnishment under writs issued by the state court because he earned the wages on the reservation. On appeal, the Arizona Court of Appeals noted that the Arizona state court "clearly had jurisdiction to issue the writs of garnishment" against Begay's employer, but because Begay lived and worked on the reservation, "this case cannot be decided without considering the Indian law implications."¹⁴¹

140. 807 P.2d 1111 (Ariz. Ct. App. 1990).

141. *Id.* at 1114.

The Court of Appeals opinion in *Begay* relied on *Williams v. Lee* and *McClanahan*, and on lower federal court and state court decisions¹⁴² applying those opinions, for the proposition that “tribal courts have inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians which are based upon events occurring on the reservation.”¹⁴³ The Court of Appeals framed the ultimate question as “whether the exercise of state court jurisdiction in a given case will ‘frustrate federal policy or violate traditional notions of tribal sovereignty.’”¹⁴⁴

It then upheld the justice court’s jurisdiction over the actions underlying the judgments, since *Begay* had gone off the reservation to conduct consensual commercial activity with a merchant who had sought no presence within the confines of the reservation.¹⁴⁵ It also approved the use of registered mail to serve process¹⁴⁶ and acquire personal jurisdiction over *Begay*, lest he “retreat back to the reservation to escape service of process.”¹⁴⁷ Different considerations, however, applied to the garnishment of wages earned on the Navajo Reservation by a Navajo living there and working for a company doing business there. The court held that wage garnishments against *Begay*’s employer were preempted since they would infringe upon Navajo tribal sovereignty, and the state court had no jurisdiction to issue them.¹⁴⁸

The fact that Navajo law did not provide for collections through wage garnishment¹⁴⁹ was an important consideration. When the judgment creditor

142. The court especially relied on *Smith Plumbing Co. v. Aetna Casualty & Surety Co.*, 720 P.2d 499 (Ariz. 1986) (3-2 vote) (holding that state court had jurisdiction over a non-Indian surety in a suit by a supplier against the Navajo Housing Authority where the supplier and surety were non-Indians located off-reservation). The *Smith Plumbing* opinion stated, “Although preemption analysis begins with whether specific congressional acts govern a given state action, it ultimately amounts to whether Indian self-government is implicated.” *Id.* at 504.

143. *Begay*, 807 P.2d at 1114 (quoting *Smith Plumbing*, 720 P.2d at 504).

144. *Id.* at 1115.

145. Had there been no jurisdiction, the writs of garnishment would have been invalid, since jurisdiction may always be raised as a bar. Note that a holding that the state court had jurisdiction does not exclude the possibility that the Navajo tribal court might also have exercised proper jurisdiction over the dispute between *Begay* and his creditor. It simply approves the jurisdiction of the state court, since it offends no sovereign interest that might make Navajo jurisdiction exclusive.

146. This was provided for in ARIZ. R. CIV. P. 4.

147. *Begay*, 807 P.2d at 1118 (quoting *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1112 (Ariz. 1989)).

148. *Id.*

149. The same is true of the laws of several states, notably Texas and Pennsylvania. 42 PA. CON. STAT. ANN. § 8127; TEX. CONST. art. 16, § 28.

argued the garnishment took place off the reservation, since the employer was located there, too, the court held that "the effect of the garnishment will be felt by Begay on the reservation" and that would thwart the Navajo policy against wage garnishment.¹⁵⁰ The Court of Appeals relied on a federal decision making the same distinction where a New Mexico state court had attempted wage garnishment of a reservation Navajo,¹⁵¹ a federal decision preventing an attempt by an off-reservation seller to repossess a reservation Navajo's automobile on the reservation,¹⁵² and *McClanahan*.

The Arizona Court of Appeals decided *Begay* at a time when both the infringement test from *Williams*¹⁵³ and the preemption doctrine of *McClanahan*,¹⁵⁴ augmented by the exhaustion cases of *National Farmers*¹⁵⁵ and *Iowa Mutual*,¹⁵⁶ had not yet run afoul of *Strate-Montana*. Thus, *Begay* prohibited the exercise of state court jurisdiction to carry out collections through means prohibited by Navajo law, where such means impacted the reservation domicile and livelihood of a Navajo member, but it did not prevent service of process and the exercise of personal jurisdiction over the same member by means provided for in the Arizona Rules of Civil Procedure, whose long arm reached onto the reservation to exercise personal jurisdiction over a defendant growing out of an obligation that he sought out and consented to off the reservation.

The Arizona Supreme Court—having denied certiorari in *Begay*—soon took up the issues of personal and subject matter jurisdiction and service of process, drawing new guidelines after the U.S. Supreme Court decided *Strate*.

150. *Begay*, 807 P.2d at 1116.

151. *Joe v. Marcum*, 621 F.2d 358 (10th Cir. 1980).

152. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983). Navajo law prohibits both garnishment and self-help repossession of a vehicle. Perhaps the seller in *Begay* was aware of the *Babbitt Ford* decision and for that reason did not pursue the possibility of repossessing the automobile from Tony Begay, so long as he kept it on the reservation. Repossession would be the normal response by the creditor in case of non-payment, especially where an automobile is at issue, and all states permit it under their adoptions of the Uniform Commercial Code.

153. *See Begay*, 807 P.2d at 1115, 1117.

154. *See id.* at 1114-15, 1117.

155. *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

156. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

Zaman I and Zaman II: Two Arizona Supreme Court Decisions that Demonstrate Aggressive State Exercise

Akhtar Zaman, a non-Indian living on the Navajo Reservation, had a five-year relationship with Barbara Wilson, a member of the Navajo Nation. During that time Sahira Zaman, allegedly the child of Akhtar, was born to Barbara. The mother, who received aid for Sahira from the State of Arizona, assigned her rights to the state, which proceeded to file suit against Akhtar in state court for purposes of determining paternity, custody, and child support obligations. The two *Zaman* cases dealt with whether the state had jurisdiction over the paternity suit (*Zaman I*¹⁵⁷) and whether service of process was properly carried out by a sheriff's deputy who went on the reservation to find and serve the defendant (*Zaman II*¹⁵⁸). The Arizona Court of Appeals found that the state lacked jurisdiction, but the Arizona Supreme Court overruled the lower court and then found service of process was proper.

In *Zaman I*, the defendant argued that the infringement test should have prevented jurisdiction over the paternity suit in the state court, even though the plaintiff was an Indian and he was not, because "the infringement test seeks to protect the collective interests of the tribe, not the interests of individual tribal members."¹⁵⁹ The court categorically rejected the argument, stating that no Supreme Court case had considered the issue from the perspective of the collective interests of the tribe and reasoning that where the rights and interests of an individual Indian were at issue "the relevant inquiry is the infringement of individual rights."¹⁶⁰ It also rejected an argument based on the federal exhaustion requirement that the Arizona court should exercise "judicial restraint" and not take the case even if it had the power to do so until the Navajo tribal court had determined whether it had jurisdiction.¹⁶¹

To this observer, the Arizona Supreme Court failed to engage the arguments presented against jurisdiction, imposing formalistic—virtually *ad hominem*—reasoning to reach its result. This impression increases to conviction upon consideration of the thorough and thoroughly reasoned Court of Appeals opinion¹⁶² the Arizona Supreme Court overruled. The intermediate appellate court opinion sorted through the relevant Navajo law and

157. State v. Zaman, 946 P.2d 459 (Ariz. 1997).

158. State v. Zaman, 984 P.2d 528 (Ariz. 1999).

159. *Zaman*, 946 P.2d at 462.

160. *Id.*

161. *Id.* at 463.

162. State v. Zaman, 927 P.2d 347 (Ariz. Ct. App. 1996).

demonstrated that the issues in *Zaman* mattered to the Navajo Nation, based on Navajo case law,¹⁶³ and that tribal courts would have had and asserted jurisdiction.¹⁶⁴ The Court of Appeals discussed relevant case law from other jurisdictions on the question, found the better rule favors rejection of jurisdiction in the state court,¹⁶⁵ and held that “the [state trial court] lacked subject-matter jurisdiction over this paternity proceeding.”¹⁶⁶

The Arizona Supreme Court’s opinion deals with none of the Court of Appeals’ reasoning or sources, acting as if they simply did not exist. The Arizona Supreme Court asserted without citation that where an Indian files suit in state court against a non-Indian “[t]he Indian interests which the infringement test seeks to protect are not present.”¹⁶⁷ The naked result—especially in light of the excellent substantive discussion in the Court of Appeals opinion that it overruled—leaves one decidedly unsatisfied and harboring the sort of feelings of professional embarrassment that arise upon encountering a bad piece of judicial workmanship. Perhaps, however, the Arizona Supreme Court felt a jurisdictional imperative and asserted its hierarchical advantage¹⁶⁸ to head off the Court of Appeals’ inclination to restraint.¹⁶⁹ In any event, it created a categorical Arizona precedent that should encourage its state courts to exercise jurisdiction over Indian cases whenever a non-Indian is a party, plaintiff or defendant.¹⁷⁰

163. *Id.* at 350-51.

164. *Id.* at 352. The Arizona Supreme Court majority opinion ignored this analysis and found that Navajo court jurisdiction was “an uncertain proposition at best.” See *Zaman*, 946 P.2d at 461.

165. *Zaman*, 927 P.2d at 352-54.

166. *Id.* at 355.

167. *Zaman*, 946 P.2d at 461. The same opinion found that the appellant had not argued preemption, so it was not necessary to address that issue. *Id.* The Court of Appeals opinion finds the preemption question at issue and discusses it at length. See *Zaman*, 927 P.2d at 349-50.

168. After the Supreme Court’s resolution and reasoning become the law of Arizona, the Court of Appeals opinion ceases to have any effect.

169. Note that the Arizona Court of Appeals resolved the case by invoking the collective interests of the tribe over the interests of an individual. At the oral argument in *Plains Commerce Bank*, the Supreme Court of the United States, or at least Justice Kennedy, showed a concern for the due process and other constitutional rights of a nonmember before a tribal court. See Transcript of Oral Argument at 56-57, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008) (No. 07-411).

170. *Zaman* did appeal to the Supreme Court of the United States, which denied certiorari. 522 U.S. 1148 (1998). By that default test, the Arizona Supreme Court’s decision stands affirmed.

The Arizona Supreme Court's assertion of state court power did not abate in *Zaman II*, although the unanimity of *Zaman I* was replaced by a 3-2 vote, generating a careful dissent and a hesitant concurrence by a judge who counseled against the practice his deciding vote approved. *Zaman II* approved service of process by an Arizona sheriff's deputy who personally served Zaman on the reservation. Unhindered by a Court of Appeals decision on the issue, the majority's decision turned on the fact that Zaman was a non-Indian, stating that "the status of the defendant as an Indian or a non-Indian is the *sine qua non* of federal Indian law."¹⁷¹ The majority opinion worked through the arguments of the dissent but did not meet its reasoning, simply reiterating that nothing in the dissent overcame the determinative effect of Zaman's non-Indian status.

Like *Zaman I*, the majority opinion in *Zaman II* was formalistic in its analysis, spare in its authority, and careful to avoid any consideration of the Navajo Nation's collective interests in the case. This is curious. Service of process and other procedural matters create some of the most sensitive issues in private international law. Many countries have declared the United States' procedural rules and practices against public policy and even specified criminal charges for their exercise,¹⁷² a fact not likely lost on judges in a border state with significant cross-border litigation.

The concurrence (and deciding third vote) in *Zaman II* seems aware that the tribe does have interests when it states,

In the interest of the state's relationship with the tribes, litigants are encouraged to use . . . alternative methods [of service] whenever and wherever reasonably feasible in order to avoid the unnecessary presence of county law enforcement officers in Indian Country and the potential for conflict which may arise from such presence.¹⁷³

What the concurrence would recommend, the dissent would have imposed as the Arizona rule.

It is the dissent that engages the issue of tribal concerns and finds that the rationale for not permitting state officials to enter the reservation to serve process "extends to non-Indians located on the reservation."¹⁷⁴ The dissent would have held that the Navajo Reservation should be treated like a sister

171. *Zaman*, 946 P.2d at 461.

172. See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 774-94 (1996).

173. *Zaman*, 946 P.2d at 531.

174. *Id.*

state such as California or New Mexico, where long-arm service by mail or private process server would be appropriate but personal service by an Arizona law officer would not. "Arizona rules provide ample means for long-arm service without invading the territorial integrity of another sovereign" by the person of a law officer "with process in hand and gun on hip."¹⁷⁵ The Navajo Rules of Civil Procedure also provide for several means of service that could have been used, including appointment of a state officer by the Navajo court as a temporary tribal officer for purposes of service.

The dissent based its argument in comity,

Recognition of state official personal service in Navajo territory does not turn only on the state's relationship with the litigant or even its power, but also on its relationship with the Navajo Nation. . . . [G]ood judgment and respect dictate an easier and better resolution. . . . Even if, as the majority contends, the constitution permits us this power, it does not require us to exercise it. As a matter of state law we could and should show our respect for Navajo sovereignty.¹⁷⁶

Astorga v. Wing: Concurrent Jurisdiction Does Not Require a State Court to Stand Aside When the Case Might Go Forward in Tribal Court

In general terms, we have seen tribal courts normally have jurisdiction over non-Indians who come on the reservation seeking to do business with Indians,¹⁷⁷ but, as *Zaman I* indicates, Indian plaintiffs may choose to bring suit in Arizona state court and there may be some confusion as to how far tribal jurisdiction may extend over non-Indians.¹⁷⁸ In *Astorga v. Wing*,¹⁷⁹ a Court of

175. *Id.* at 532.

176. *Id.* at 533.

177. See *Williams v. Lee*, 358 U.S. 217 (1959); *Montana v. United States*, 450 U.S. 544, 565-66 (1981); CANBY, *supra* note 11, at 201-11, 225. Regarding the "typical reservation-based claim brought by an Indian plaintiff against a non-member," Canby first noted that when a tribal member is the defendant in a standard civil suit, "tribal jurisdiction is *exclusive* under *Williams v. Lee*," and then remarked, "[W]hen the subject of the litigation is exactly the same, but the tribal member is the plaintiff instead of the defendant, the tribal interest is very nearly as strong." *Id.* at 207.

178. To some degree, the issue of tribal courts' civil jurisdiction over non-Indians has come on only in recent years because for many years, tribal courts did not attempt to exercise such jurisdiction, preferring to either solicit non-Indians' stipulations or not attempt to compel them to appear. With the growth of tribal courts and their more aggressive use of jurisdictional power over non-Indians, the universe of civil cases and non-Indian defendants in tribal courts has

Appeals decision, Indian plaintiffs against a non-Indian defendant attempted to hedge against the possibility that the tribal court might feel that it either lacked jurisdiction or chose not to exercise it.

The defendant was a mortuary in Winslow, Arizona, that had a contract with Navajo Social Services to provide funerals for Navajo indigents. Plaintiffs were seven Navajo siblings who filed suit against the defendant for “wrongful burial and infliction of emotional distress” because defendant allegedly had botched the burial of their Navajo mother. Eleven days after filing the original lawsuit in Navajo District Court, and shortly before the two-year statute of limitations ran, the plaintiffs filed virtually the same complaint in state Superior Court, seeking a “jurisdictional backstop” in case for any reason the tribal lawsuit did not proceed. They asked the state court to accept the suit and then immediately stay proceedings until and unless the plaintiffs came back to it. The state court refused to play along, denying the request for a stay and instead proceeding with the case. The Court of Appeals affirmed the decision.

Astorga provides insight into the different parlays between state and tribal courts and those where federal and tribal courts are involved. The federal court would have waited for the tribal court to exhaust determination of its own jurisdiction under *Iowa Mutual* and *National Farmers Union*, reserving the right to review that exercise.¹⁸⁰ Indeed, the plaintiffs in *Astorga* argued the state had the same exhaustion requirement the federal courts did, alleging that “comity and respect for Indian courts require that tribal courts be allowed to determine their own jurisdiction and exhaust it, prior to a matter being brought in either federal or state courts.”¹⁸¹ The plaintiffs also pointed to an Arizona case that held a stay was correct when the same action was pending in “two courts of separate sovereigns.”¹⁸²

increased. See CANBY, *supra* note 11, at 201.

179. 118 P.3d 1103 (Ariz. Ct. App. 2005).

180. None of the *Strate* exceptions should have applied to a case so straightforward as to defendant’s presence on the reservation. Perhaps the case most illustrative of the federal deferral to tribal courts is *Wellman v. Chevron*, 815 F.2d 577 (9th Cir. 1987), which held that an Indian contractor could not bring a civil suit in federal court against a non-tribal entity when a tribal court had apparent concurrent jurisdiction.

181. *Astorga*, 118 P.3d at 1106. Perhaps the plaintiffs took their argument from Judge Canby’s book, for it states, “If the federal courts must defer to tribal courts to avoid undue interference with tribal adjudication of claims by tribal members against nonmembers, it is difficult to see why state courts should not be required to do the same.” CANBY, *supra* note 11, at 210.

182. *Tonnemacher v. Touche Ross & Co.*, 920 P.2d 5, 10 (Ariz. Ct. App. 1996). The two courts in *Tonnemacher* were state and federal, and Arizona stayed the suit in state court while

The state Court of Appeals distinguished the relationship between federal and tribal courts, characterizing it as "vertical (at least in part)," from that between state courts and tribal courts, "because whether the Indian court has jurisdiction over the matter is not at issue in the state court proceeding."¹⁸³ Given jurisdiction in the state court, the Court of Appeals then reasoned that the state trial court had discretion whether to grant a stay or not and noted it might properly proceed simultaneously, taking into account the defendant's "right to have the case decided in a reasonably timely manner."¹⁸⁴ Since two years had gone by since the case had been filed there and the Navajo court still had not decided whether it had jurisdiction, the state court had good reason to deny the stay.

Arizona's General Approach: Aggressive Assertion of State Jurisdiction to the Exclusion of Tribal Courts

Astorga seems a reasonable exercise of state court discretion where Indian plaintiffs had chosen to seek relief (even if only as a backstop) in the state court. *Begay* likewise seems a reasonable application of United States Supreme Court doctrine by the state court, which found jurisdiction where an Indian buyer-debtor left the reservation to seek out a non-Indian seller-creditor, but eschewed any power to collect the resulting judgment by wage garnishment on the reservation. The *Zaman* decisions, however, demonstrate that the Arizona Supreme Court is inclined to find state court jurisdiction at the expense of Navajo sovereignty. Neither opinion deigned to even consider the possibility that Navajo interests might be implicated. They simply rejected the possibility *a priori*. *Zaman I* is quite striking in this respect, and one wonders how such an approach garnered a unanimous vote, the more so for its imperious treatment of the Court of Appeals opinion.¹⁸⁵ The dissent in *Zaman II* carefully detailed obvious tribal sensitivity as the appropriate basis for self-

it proceeded in federal court.

183. *Astorga*, 118 P.3d at 1106-07.

184. *Id.* at 1109.

185. The salient example is the Arizona Court of Appeals' careful conclusion that the Navajo tribal court would probably take jurisdiction of the case, based on its analysis of tribal case law and United States Supreme Court doctrine. See *State v. Zaman*, 927 P.2d 347, 352 (Ariz. Ct. App. 1996). The Arizona Supreme Court opinion simply states, without referring to the Court of Appeals opinion or attempting to provide contrary supporting citation or authority, "the Navajo court has no jurisdiction" and "tribal jurisdiction is uncertain at best." See *State v. Zaman*, 946 P.2d 459, 461, 464 (Ariz. 1997).

restraint on the part of the state, but the two-vote majority opinion summarily rejected that approach as irrelevant.

As things stand now in Arizona, to judge by its most recent Supreme Court precedents, whenever litigation involves a non-Indian party—even if resident on the reservation—the state’s lower courts should feel little reason to find the levels of infringement or preemption that would trigger exclusive tribal civil jurisdiction.

New Mexico

The State of New Mexico has generated a lot of case law on the civil jurisdiction of tribal courts. Its high court recognized and applied the *Williams v. Lee* infringement test within three years after that decision¹⁸⁶ and appears thoroughly familiar with *McClanahan* and the preemption doctrine.¹⁸⁷

Tempest Recovery Services v. Belone, the Latest in a Long Line of Common Sense Accommodations of Tribal Interests by the New Mexico Supreme Court

New Mexico’s most recent case on infringement and the possibility of exclusive jurisdiction in the tribal court, *Tempest Recovery Services, Inc. v. Belone*,¹⁸⁸ raised the perennial issue of an off-reservation creditor’s repossession of a tribal member’s vehicle on tribal land¹⁸⁹ in violation of Navajo law.¹⁹⁰ In *Tempest Recovery* a Navajo tribal member purchased a car in Arizona. Seller gave him credit under a retail installment contract, taking a security interest in the car, and buyer thereafter stopped making payments. Pursuing collection under assignment of the contract, Tempest Recovery Services repossessed the car at Belone’s residence, not on the reservation proper but within Indian Country.¹⁹¹ Tempest Recovery then brought suit in

186. See *Chino v. Chino*, 561 P.2d 476, 478 (N.M. 1977); *Foundation Reserve Ins. Co. v. García*, 734 P.2d 754, 755 (N.M. 1987).

187. See *Chino*, 561 P.2d at 478-79; *Hartley v. Baca*, 640 P.2d 941, 943 (N.M. App. Ct. 1981).

188. 74 P.3d 67 (N.M. 2003).

189. The Navajo Nation courts and all the neighboring states’ courts have dealt with the issue at various times. *Babbitt Ford v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983); *Peterson v. Ford Motor Credit Co.*, 2 Navajo Rptr. 36 (1979).

190. NAVAJO NATION CODE tit. 7, § 621(A) (2005). At the time of *Tempest Recovery*, the provision was NAVAJO NATION CODE tit. 7, § 607.

191. At the time of the repossession, there was New Mexico case authority for the proposition that Belone did not live in Indian Country because he lived on allotted Indian land outside the reservation boundaries, in the Rock Springs Navajo community. *Tempest Recovery*

New Mexico state court for a deficiency judgment, and Belone filed a counterclaim for wrongful repossession. Belone also objected to the state court jurisdiction, arguing that exclusive jurisdiction lay in the tribal court.

The *Tempest Recovery* opinion brings federal Indian law and that of New Mexico's own court¹⁹² up to 2003, providing the doctrinal context for resolving the fresh case before it. It reaffirms its reliance on the 1959 *Williams v. Lee* infringement test, which it applies by considering three factors:

- (1) whether the parties are Indians or non-Indians;
- (2) whether the cause of action arose within the Indian reservation; and
- (3) what is the nature of the interest to be protected.¹⁹³

It also notes that its case law has identified three circumstances in which exclusive tribal court jurisdiction is appropriate

- (1) where an action involves a proprietary interest in Indian land;
- (2) when an Indian sues another Indian on a claim for relief recognized only by tribal custom and law; or
- (3) when an Indian is being sued by a non-Indian over an occurrence or transaction arising in Indian country.¹⁹⁴

Thus oriented within the law, the court notes this is not a case that meets one of the categories for exclusive tribal jurisdiction and proceeds to test the circumstances for infringement. As in the Arizona case of *Begay v. Roberts*, the court distinguished between the basic contract claim and the collection activities. It found the contract claim had not arisen in Indian Country, and the state court shared concurrent jurisdiction with the tribal court over that matter.¹⁹⁵ With respect to the wrongful repossession counterclaim, the court held that it "clearly" arose in Indian Country and might have given rise to exclusive jurisdiction in the tribal court,¹⁹⁶ but "Belone chose to raise his counterclaim in state court."¹⁹⁷ Since that was his election, the court found

relied on subsequent Supreme Court decisions to specifically overrule the New Mexico precedent. See *Tempest*, 74 P.3d at 70-71.

192. Specifically, it cites to *Foundation Reserve Insurance Co. v. Garcia*, 734 P.2d 754 (N.M. 1987), and *Chino v. Chino*, 561 P.2d 476 (N.M. 1977).

193. *Tempest*, 74 P.3d at 71.

194. *Id.* (numbered paragraphs supplied).

195. I.e., *Tempest Recovery* alternatively could have sued the Navajo tribal member debtor, a resident of Navajo Indian Country, in Navajo tribal court.

196. *Tempest*, 74 P.3d at 71.

197. *Id.* at 72. The court does note that debtor-defendant did not initiate the lawsuit in state court and that his counterclaim likely was compulsory.

concurrent jurisdiction on the counterclaim, also. It did, however, remand to the state trial court to determine whether it should apply Navajo law to the counterclaim.¹⁹⁸

The *Tempest Recovery* opinion did a good job of parsing out the interests that determine jurisdiction for a single case involving both a claim that the state may take and a second claim that normally might have been denied to the state in favor of exclusive tribal jurisdiction. It approved state court jurisdiction for both claims, but mitigated any imposition on debtor-plaintiff because of the state court's incidental jurisdiction over the counterclaim by intimating that the trial court might best apply Navajo law to that issue on remand.¹⁹⁹

Unlike the defendant in *Zaman I*, the debtor in *Tempest Recovery* had little occasion to invoke tribal interests, since he had gone off the reservation to buy his car and the repossession—which the court might have prevented before the fact²⁰⁰—had already occurred. He asked simple compensation after the fact. The opinion is well-versed in United States Supreme Court precedent and other case law and projects the New Mexico Supreme Court's comfort with recognizing tribal court jurisdiction, exclusive or concurrent, depending on the circumstances. Based on this and its other decisions, the New Mexico court appears amenable to giving over exclusive jurisdiction to the tribe in civil matters where circumstances might so dictate,²⁰¹ it simply did not feel the particulars of *Tempest Recovery* made tribal jurisdiction exclusive in that case.

198. *Id.* at 68, 71.

199. *Id.*

200. Not only did the court note that the repossession fell into a class of activities giving rise to claims exclusive to tribal court jurisdiction, it also noted that the installment contract provided that Arizona law should apply, except for collections. In the latter case, the contract provided that the law of the "state" where the repossession was carried out should apply. Whether the Navajo Nation qualified as a "state" for purposes of that clause is a nice question, but the New Mexico court seemed disposed to find that it did. *Id.* at 67.

201. The three-point test for exclusive jurisdiction first appeared in *Chino v. Chino*, 561 P.2d 476, 479 (N.M. 1977). Before *Tempest Recovery*, the test was faithfully repeated in *Foundation Reserve Insurance Co. v. Garcia*, 734 P.2d 754, 755 (N.M. 1987), and *Wacondo v. Concha*, 873 P.2d 276 (N.M. App. Ct. 1994), two cases that found concurrent jurisdiction. Another case that, like *Chino*, used the test to find no state jurisdiction was *Hartley v. Baca*, 640 P.2d 941, 943 (N.M. App. Ct. 1981).

*The Law of Criminal Procedure and the Basis of New Mexico State Court
Deference to Tribal Sovereignty*

Perhaps the New Mexico judiciary's attitude of concern for and sensitivity to tribal sovereignty may best be demonstrated by its sure touch with criminal jurisdiction. In two cases, decided in 1976 and 1995, the New Mexico Supreme Court invalidated arrests and denied state criminal jurisdiction where state officers continued hot pursuit of criminal suspects into Indian Country rather than utilize cooperative mechanisms—specifically extradition—available through the tribal judiciary.²⁰² In light of *Nevada v. Hicks*²⁰³ and other United States Supreme Court decisions, the New Mexico court might have permitted such intrusions consistent with the Supreme Court of the United States' constricted vision of Indian criminal jurisdiction. Perhaps, however, states consider—or should consider—factors other than the absolute extent of their power under federal Indian law when they decide to defer to exclusive tribal jurisdiction, in civil as in criminal matters.

Over thirty years ago, the New Mexico Supreme Court decided *Benally v. Marcum*.²⁰⁴ Police officers had chased a suspect through the City of Farmington and, in hot pursuit, into the adjacent Navajo Reservation, where they made an arrest on suspicion of driving under the influence of alcohol. The state high court held that the arrest was illegal because it violated tribal sovereignty and infringed upon “the orderly procedure for extradition from the Navajo Reservation” provided for in Navajo legislation.²⁰⁵ The New Mexico Supreme Court added a precatory note, “It does not behoove any court to declare that the government may disregard the law in order to secure the conviction of a law violator.”²⁰⁶

The City of Farmington, bounded by two immediately adjacent reservations, apparently was not impressed. About twenty years later, it was still pursuing suspects onto the Navajo Reservation and arresting them there. When one of the suspects (no immediate relation to the original Benally) again objected after his arrest, *City of Farmington v. Benally*²⁰⁷ gave the city the opportunity to challenge *Benally v. Marcum*. There was some basis for the challenge in

202. The Navajo Nation Code provides for extradition. NAVAJO NATION CODE tit. 17, §§ 1001-1002 (2005).

203. 533 U.S. 353 (2001).

204. 553 P.2d 1270 (N.M. 1976).

205. NAVAJO NATION CODE tit. 17, §§ 1001-1002.

206. *Benally*, 553 P.2d at 1274.

207. 892 P.2d 629 (N.M. Ct. App. 1995).

emerging law. The United States Supreme Court had decided *Oliphant v. Suquamish Indian Tribe*²⁰⁸ just two years after the first New Mexico case. *Oliphant* held that Indian tribes' status as domestic dependent sovereigns dictated that they could not exercise criminal jurisdiction over nonmembers and opened an era of apparent judicial whittling at tribal jurisdiction, discussed above in the civil context.

Montana followed *Oliphant* by three years, and soon the highest court had held that—also by dint of their domestic dependent sovereignty—tribes could not regulate liquor sales on their reservations.²⁰⁹ Other jurisdiction-reducing opinions followed,²¹⁰ and in 1990 the United States Supreme Court again addressed the issue of criminal jurisdiction, this time to hold that no Indian tribe could exercise criminal jurisdiction over a nonmember Indian for a crime committed on their reservation.²¹¹ Although the court handed down the *Strate* decision in 1997,²¹² that case was working its way to the United States Supreme Court at the same time that *City of Farmington v. Benally* was coming through the New Mexico judicial system.

Despite any tendencies that it may have perceived in the Supreme Court of the United States, the Supreme Court of New Mexico held firm. The court found the city had “challenge[d] the tribe’s right to make and enforce laws for Navajo citizens on Navajo land,”²¹³ the very essence of sovereignty and more than sufficient reason to invalidate the arrest. The *City of Farmington* opinion turned on the “unique status” of Indian tribes in the United States system and a special “respect for the sovereignty of an Indian government and the special status of its citizens.”²¹⁴ Those considerations made the jurisdictional issue different from what it would have been had the arrest occurred in another state or even another country. The *City of Farmington* opinion noted that case precedent generally allowed the prosecuting state to go ahead with a criminal trial, even where the accused had been arrested illegally outside its state borders, but stated “those cases do not account for the special factors . . . that are unique to considering a state’s unlawful arrest of an Indian on Indian

208. 435 U.S. 191 (1978).

209. *Rice v. Rehner*, 463 U.S. 713 (1983).

210. See *supra* notes 58-75 and accompanying text.

211. *Duro v. Reina*, 495 U.S. 676 (1990). Congress immediately passed a statute overturning the *Duro* result. 18 U.S.C. § 1301(2) (2006).

212. See *supra* notes 58-64 and accompanying text.

213. *City of Farmington v. Benally*, 892 P.2d 629, 630 (N.M. Ct. App. 1995).

214. *Id.* at 632.

land.”²¹⁵ It then reaffirmed the decision of twenty years before and invalidated the arrest and the prosecution.

Even though it is a criminal case, *City of Farmington* sheds interesting light on the role of state law in mediating questions of tribal civil jurisdiction. Five years after it was decided, the United States high court decided *Nevada v. Hicks*,²¹⁶ which at first impression might be read to overrule *City of Farmington*. *Hicks* involved tort claims in tribal court against state officers, growing out of a search for criminal evidence that allegedly damaged plaintiff's property in the process. The officers who conducted the search had gotten a search warrant²¹⁷ from a state court judge and then served it on a tribal member at his residence on Indian reservation land before they conducted a fruitless search. The United States Supreme Court held that the tribe had no jurisdiction over non-Indian officers and their conduct in carrying out a search of an Indian residence on trust land while seeking evidence related to an alleged crime committed off the reservation. The *Strate-Montana* rule that tribal judicial jurisdiction may not exceed tribal legislative jurisdiction carried the day.

One might feel that the *City of Farmington* advocates who argued to overturn *Benally v. Marcum* in 1995 were prescient, but six years before their time, and should now—armed with *Hicks*—again try their luck before the Supreme Court of New Mexico. In fact, that view would be wrong, for the following reasons. Cooperative agreements between state and tribal authorities had been the standard before *Hicks* and have continued to be the standard since²¹⁸ for all the reasons discussed by the dissent in *Zaman II*.²¹⁹ There exist palpable reasons for avoiding official presence of the state or other foreign authorities on Indian land. Moreover, *Hicks* may be classified as a special case, involving a state criminal statute.²²⁰

The power to exercise jurisdiction does not dictate that the jurisdiction must be exercised. As Judge Feldman, referring to service of civil process, pointed

215. *Id.*

216. 533 U.S. 353 (2001).

217. An earlier search warrant issued by the same state court had required approval by the tribal court before it was valid. The second warrant did not include that contingency, but in both cases the officers obtained tribal court warrants before conducting their search. *Id.* at 356.

218. CANBY, *supra* note 11, at 84-85 (also pointing out that some states have decided to abandon the cooperative tradition, however); see *Inyo County v. Paiute-Shosone Indians of the Bishop Cmty.*, 538 U.S. 701 (2003).

219. See *supra* notes 174-76 and accompanying text.

220. The statute is a Nevada law prohibiting the killing or possession of certain protected animals. NEV. REV. STAT. ANN. § 501.376 (West 2000).

out in his dissent in *Zaman II*, “Even if . . . the constitution permits us this power, it does not require us to exercise it. As a matter of state law we could and should show our respect for Navajo sovereignty.”²²¹ The New Mexico Supreme Court appears to adopt as its unanimous holding the approach that Feldman’s dissent advocates. The advent of *Strate-Montana* and *Hicks* should not change that approach in New Mexico or in other states that embrace it.

New Mexico: A Venue that Practices Kinder, Gentler Ways Towards Tribal Jurisdiction

Overall, the Supreme Court of New Mexico has demonstrated the kind of balanced approach to Indian civil jurisdiction that resolves cases in a workmanlike manner, applying the Supreme Court of the United States’ case law in good faith but feeling no particular need to deny tribal jurisdiction in every instance case law might permit. Likewise, the New Mexico court has shown a good nose for the subjective nature of preemption-infringement analysis in the *Strate-Montana* era. It uses circumstantial analysis and seems to keep in mind the backdrop of Indian sovereignty and its purposes in the federal system.

Utah: Distinguishing Between Preemption-Infringement Factors

Utah does not have the exposure to the Navajos or to other Indians that Arizona and New Mexico do. Nonetheless, some of the Navajo Reservation lays in Utah, as do other tribal reservations, and questions of tribal jurisdiction do arise in that state. One leading Utah case, *Maryboy v. Utah State Tax Commission*,²²² sheds perspective on the issue. A Navajo married couple resident on reservation land in Montezuma Creek, Utah, considered themselves exempt from Utah state income taxes since they were both employed exclusively on the reservation. The state assessed back taxes and penalties for three prior years’ income. Mrs. Maryboy worked as a therapist for a mental health clinic maintained for Navajos by the Utah Department of Human Services. Mr. Maryboy was elected to the paid position of San Juan County Commissioner and also worked as the Division Director of the Utah Navajo Development Counsel.

The Maryboys invoked *McClanahan* for the proposition that the state “had no power to tax income they earned from on-Reservation activities.”²²³ The

221. *State v. Zaman*, 984 P.2d 528, 533 (Ariz. 1999) (Feldman, J., dissenting).

222. 904 P.2d 662 (Utah 1995).

223. *Id.* at 665, 667 (phrasing the argument as a “per se rule against taxing Native Americans

state argued in turn that nothing had preempted the state's taxing power. The Utah court disagreed with the Maryboys categorical argument and turned to a "flexible and particularized analysis"²²⁴ of preemption and infringement.

The *Maryboy* opinion provides a well-reasoned example of a state court's efforts to apply the case law of the Supreme Court of the United States on civil jurisdiction for matters involving Indians and Indian Country. The Supreme Court of Utah conducted a painstaking review of the Supreme Court of the United States' case law to derive the appropriate doctrine for the case at hand. At the end of its labors, the court found that

[w]hile protection of the interests of tribal self-government alone can be a sufficient bar to a state's exercise of authority on the reservation, it is related to the preemption analysis because the "right of tribal self-government is ultimately dependent on and subject to the broad power of Congress." Thus, when assessing the validity of a state tax, the Supreme Court has generally focused on a preemption analysis with the principles of tribal self-government acting as a backdrop.²²⁵

Thus oriented, the Utah court weighed the state interests to see if they overcame "the *McClanahan* presumption against state taxing jurisdiction."²²⁶ In the case of Mrs. Maryboy, although she worked as a mental therapist for a service provided by the state, her work involved only tribal members and occurred only on the reservation; functionally, her services were more like those normally found in the private sector.²²⁷ The state did have an interest, but it was not sufficient to overcome the presumption against its authority to tax Mrs. Maryboy's income.

Mr. Maryboy, however, presented a different set of facts and a different result. In his job as a county commissioner for San Juan County he worked for the state, carrying out state functions even when he was on the reservation. The court found the state's interest "could not be more compelling"²²⁸ and allowed state taxation of Mr. Maryboy's income as a county commissioner.

who reside on the reservation and derive their income from activities that take place on the reservation").

224. *Id.*

225. *Id.* at 666-67 (internal citation omitted).

226. *Maryboy*, 904 P.2d at 668.

227. Mrs. Maryboy did have "administrative and training activities" that took her off the reservation at times, but the court classified these as "merely incidental" to her basic duties. *Id.* at 669.

228. *Id.*

While *Maryboy* is not a case that directly involved the question of tribal civil adjudicatory jurisdiction, it is instructive for that purpose. It demonstrates in the context of a married couple that the question of preemption, measured against the backdrop of infringement,²²⁹ is indeed a flexible and particularized analysis. Relatively small distinctions in circumstances can—and should—create different resolutions of the same issue.

The Navajo Nation's Case Law on Civil Jurisdiction

While the state courts go about defining when they may take subject matter or personal jurisdiction of events and persons implicating Indian Country, the Supreme Court of the Navajo Nation has had repeated opportunities to exercise its own independent judgment in defining its tribal courts' civil jurisdiction. Any non-Indian defendant who finds himself in tribal court typically objects to its jurisdiction as a first defense, so there are a great many Navajo court decisions discussing the issue and the tribal judges have become adept at the craft of resolving it, perhaps to a greater degree than most state courts. The Navajo courts apply the same United States Supreme Court precedents the state courts do and weigh the same federal statutes, but the Navajo case law has reached different conclusions than the states.

The Navajo Tribal Council has set down a solid statutory base from which to derive jurisdiction. The NNC provides for the broadest possible civil jurisdiction, modeling its statute on state long-arm statutes.²³⁰ In 2001, the Tribal Council added a provision specifically titled "Long-Arm Civil Jurisdiction and Service of Process Act."²³¹ Finally, the tribal code defines the territorial reach of the tribal courts as broadly as possible.²³² In other words,

229. Perhaps the Utah court read *CANBY*, *supra* note 11, at 89, as quoted at *supra* note 113.

230. NAVAJO NATION CODE tit. 7, § 253(A)(2) (2005). The section states,

A. The District Courts of the Navajo Nation shall have original jurisdiction over: . . .

2. Civil Causes of Action. All civil actions in which the defendant: (1) is a resident of Navajo Indian Country; or (2) has caused an action or injury to occur within the territorial jurisdiction of the Navajo Nation.

Id.

231. NAVAJO NATION CODE tit. 7, § 253a(C), (E), (F). Section 253a(C) adds a provision detailing the circumstances that may create personal jurisdiction based on conduct, section 253a(E) provides for forum non conveniens practice by Navajo courts, and section 253a(F) provides that "[a] Court of the Navajo Nation may exercise jurisdiction on any other basis authorized by law, including the inherent and treaty jurisdiction of the Navajo Nation." *Id.*

232. NAVAJO NATION CODE tit. 7, § 254. The section extends territorial jurisdiction to "Navajo Indian Country," which the same provision defines in the broadest possible terms,

the legislative purpose of the Navajo Nation—in common with most states—is to push its civil jurisdiction to the furthest extension permissible, relying on federal Indian law—rather than constitutional due process—to place outer limits on its expansive language.

The rules for determining civil jurisdiction contain plenty of room for subjective judgments, tied as they are in almost every case to fact questions of whether Indian sovereignty may be infringed, either through the *Williams v. Lee* direct infringement test or through the *Strate-Montana* exceptions test or whether the *McClanahan* preemption test applies. For a few fact situations, the Supreme Court precedents seem to have resolved the jurisdictional question, but there are constant variations in circumstances and elements that call into issue the degree of infringement and/or the possibility of preemption, which always—explicitly or implicitly—provide the determining factors.

One must also bear in mind the important differences in judicial perspective when a tribal court looks at jurisdiction. Plaintiff has already filed the case in tribal court when the defendant objects to tribal jurisdiction.²³³ The question is not whether the connections to the tribe are so powerful as to create exclusive jurisdiction in its court, but rather whether there are enough contacts to sustain jurisdiction in that court, regardless of concurrent jurisdiction in a state court. There is at play no concept of infringement on state sovereignty. The only sovereignty in the balance is that of the tribe.

Not surprisingly, Navajo Nation courts show a tendency to find proper subject matter jurisdiction and retain cases, rather than to consign them to exclusive state court jurisdiction. Such a holding would necessitate a finding that the tribal court has no connection that would allow it to keep the case. In its opinions, the Navajo Nation Supreme Court has identified multiple connections. It has based its jurisdiction on simple inherent tribal sovereignty, without a need to seek out the higher levels of exclusionary interest that infringement or preemption provide, let alone *Strate-Montana*'s highest standard. It also has applied the preemption doctrine, based on the 1868

making no exception for non-Indian fee lands or rights-of-way so long as they fall within the exterior boundaries of the reservation or the Eastern Navajo Agency, largely composed of allotment and fee lands. *Id.*

233. The NNC allows no special appearance to contest jurisdiction; any appearance is a general appearance and submission to the tribal court's jurisdiction. In any case, the effect is the same. The party that makes a special appearance to contest jurisdiction and loses is thereafter bound by the substantive proceedings in the case. The party who wins an objection to jurisdiction before a court that does not permit special appearances achieves the goal: the case terminates at that point.

Treaty of Fort Sumner, in a way that provides a broad, durable source of civil jurisdiction to the Navajo courts.

A body of recent cases decided by the Supreme Court of the Navajo Nation deals with the jurisdiction question. They total more than all of those decided by neighboring state courts combined, and they constitute a regular flow. Winnowing through the Navajo case law presents a formidable task, but a definitive body of law began to emerge in 2003. Several cases decided after that date seem to form a complete doctrine of civil jurisdiction from the Navajo perspective. Already, the Navajo Supreme Court has begun to cite those cases as constituting settled doctrine and analysis.

*First Consideration: Nelson v. Pfizer, Inc., and the Responsibility to
Protect Tribal Sovereignty against Infringement*

The Supreme Court of the Navajo Nation began its calculated consideration of its own civil jurisdiction in *Nelson v. Pfizer, Inc.*,²³⁴ handed down in 2003. That date gave the tribal high court the opportunity to take into account all the relevant decisions by the Supreme Court of the United States through *Strate* and include them in its analysis. *Pfizer* was a products liability case brought by a group of Navajo Reservation residents²³⁵ against the manufacturer of Redulin, a medication used to treat diabetes, “a disease prevalent among Native Americans.”²³⁶ The Navajo trial court applied the *Strate-Montana* test, found neither of the exceptions present, and dismissed for lack of jurisdiction. On appeal, the Navajo Supreme Court reversed, in an opinion that seems calculated to serve as a seminal discussion of the question.

The *Pfizer* opinion, written by then Acting Chief Justice Lorene Ferguson, begins by setting the *Strate-Montana* rule in its Navajo context and rejects its application to civil matters arising on tribal lands.

The implications of *Montana* for the Navajo Nation’s power over its territory are clear. . . . There are many non-Indian actors who impact the Navajo Nation in various and significant ways that may escape the authority of the Navajo Nation if our courts are required to apply the *Montana* exceptions to every civil case involving non-Indians. . . . Further, application of *Montana* to every civil case with a non-Indian defendant undermines the federal

234. *Nelson v. Pfizer, Inc.*, 8 Navajo Rptr. 369 (2003).

235. The plaintiffs included only one person who was not an enrolled member of the Navajo Nation.

236. *Pfizer*, 8 Navajo Rptr. at 373.

policy encouraging the development of tribal courts. See *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) ("Tribal courts play a vital role in tribal self-government . . . and the federal government has consistently encouraged their development.") . . . Finally, our responsibility to protect the sovereignty of the Navajo Nation counsels that we not surrender authority unnecessarily. . . .

Based on these considerations, and the explicit restrictions in *Montana* and later cases, including *Hicks*, we decline to extend *Montana* to activity on tribal land . . . *Hicks* applies *Montana* in the unique situation where the sovereign interests of a state government enforcing state criminal law are at issue, and no further. We decline to extend *Hicks* beyond the United States Supreme Court's own limitation.²³⁷

In its *Pfizer* decision, the Navajo Supreme Court rejected the proposition that *Montana* applied to a case in which non-Indian activities occurred on tribal land.²³⁸ The opinion sets out a checklist of "several sources" for tribal court jurisdiction over non-Indians: 1) "its broad inherent sovereignty over non-Indian conduct anywhere within its territory;" 2) "federal and state statutes, regulations and intergovernmental agreements" delegating such authority; 3) treaties that recognize such authority; and 4) "a tribe's authority as landowner."²³⁹

Pfizer held that the tribal court had jurisdiction because of inherent sovereignty, thereby finding it unnecessary to consider the alternative proposition argued by the plaintiff, delegation by treaty.²⁴⁰

The opinion lists any number of aspects of the case that have significance for the Navajo Nation, but never identifies precisely what specific factors ultimately may have triggered inherent sovereignty.²⁴¹ Instead, oracle-like, the court states, "our subject matter jurisdiction over matters occurring on tribal

237. *Id.* at 376-77 (citations omitted). *Pfizer* took careful note of *Hicks*' statement that the "existence of tribal ownership is not alone enough to support . . . jurisdiction over nonmembers," but also noted that *Hicks* had "left open the issue of general civil authority" when it specifically limited its holding to the "question of tribal-court jurisdiction over state officers enforcing state law," preserving "the question of tribal-court jurisdiction over nonmember defendants in general." *Id.* at 375-76 (citations omitted).

238. The *Pfizer* opinion barely cites *Strate* and does not discuss it, presumably because that case applied *Montana* to events that did not occur on tribal lands.

239. *Pfizer*, 8 Navajo Rptr. at 374 (citations omitted).

240. *Id.*

241. *Id.* at 376.

land is broad.”²⁴² It is not a finding of exclusive jurisdiction, excluding all possibility that a state might have heard the case, but of sufficient jurisdiction.

Further insight into *Pfizer* may be gained from its disposition regarding tribal trial courts’ use of the *Strate-Montana* rule. It “does not want to discourage” tribal trial courts from utilizing the *Strate-Montana* exceptions, since “fulfillment of either one will satisfy the lower threshold we hold applies today.”²⁴³ In other words, if one of the *Montana* exceptions were present in a given case, that would clearly justify tribal civil jurisdiction, but the jurisdictional threshold is lower than that. Failing the exceptions, the analysis must proceed to consider the lower threshold and the various sorts of factors indicated in *Pfizer*, or, one surmises, any other aspects of the case that might bear on the Navajo Nation’s interest.

Pfizer seems to counsel Navajo trial courts, “Go ahead and use *Strate-Montana* if you want to clear a higher bar and establish jurisdiction impeccable beyond all doubt (and perhaps prepare for federal court review), but that analysis is neither necessary nor dispositive. *Strate-Montana* is limited by its particular facts and is subservient to much broader general criteria for determining Navajo civil jurisdiction, depending on the facts of each case.”

*The Benchmark Established: Dale Nicholson Trust v. Chavez, and the
Extent of Preemption by Treaty*

Within a year after the decision in *Pfizer*, the Navajo Supreme Court produced another jurisdiction opinion, *Dale Nicholson Trust v. Chavez*.²⁴⁴ The court seems to gather itself for a second, and more authoritative, visitation of the question. In that case—Justice Ferguson again writing the opinion—a trust involved “properties, assets and business operations within the Navajo Nation,” administered by a nonmember Indian trustee to benefit a member of the Navajo tribe. State tax agents (five from New Mexico, one from Arizona) issued Notices of Jeopardy Assessment against the assets of Rogers & Mercantile, a business run by the trustee’s son, alleging that its assets belonged to the trust. Many of those assets were on the reservation. Despite the trust’s protestations that its assets and operations were separate from those of the trustee’s son, the states persisted in their intent to satisfy the trust’s taxes against Rogers & Mercantile’s assets. The trust went before the Navajo District Court seeking a temporary restraining order, injunctions, and other

242. *Id.* at 377.

243. *Id.*

244. 8 Navajo Rptr. 417 (2004).

relief against the tax agents. The trial court found itself without jurisdiction, but the Navajo Supreme Court overruled it.

The issue was whether the tribal court could “restrain state officials from seizing property located within the Navajo Nation.”²⁴⁵ The Supreme Court of the Navajo Nation drew a careful distinction as to what facts might establish a basis for civil jurisdiction in the tribal court. “If the case concerns tribal land, the plaintiff needs only to allege specific facts showing that the cause of action arose on tribal land.”²⁴⁶ *I.e.*, in such a fact situation there is no need to seek a *Strate-Montana* exception, and tribal jurisdiction is clear. Justice Ferguson noted that her *Pfizer* opinion had not considered the treaty basis for tribal jurisdiction, since it based its result on inherent sovereignty. Nonetheless, the 1868 Treaty of Fort Sumner, interpreted “as our ancestors understood it,” specifically recognized the Navajo Nation’s “authority to regulate all non-members, including non-Indians, other than certain federal employees on its lands.”²⁴⁷ The treaty preempted the *Strate-Montana* test for jurisdiction, therefore, so long as the claim arose on tribal land.²⁴⁸

Dale Nicholson recognizes still another potential distinction, however, and then disposes of it as inapplicable to the Navajo Nation. The actions at issue were those of state agents. Under *Hicks*, the *Strate-Montana* test would have applied even on tribal lands where a plaintiff questioned state agents’ activities before the tribal court, *so long as* the civil jurisdiction of the tribal court rested on nothing more than inherent sovereignty.²⁴⁹ *Dale Nicholson* held, however,

245. *Id.* at 423.

246. *Id.* at 425 (citing *PacificCorp v. Mobil Oil Corp.*, 8 Navajo Rptr. 378, 385 (2003), and *Pfizer*, 8 Navajo Rptr. at 376, and using the definition of “tribal land” in NAVAJO NATION CODE tit. 7, § 254).

247. *Id.* at 428. The actual text of the Treaty of Fort Sumner with the Navajo Tribe, *supra* note 38, at art. 2, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 1015, 1016 (Charles Kappler ed., 1904), states that the reservation “shall be . . . set apart for the use and occupation of the Navajo tribe of Indians.” Perhaps one could dispute the claim that the text “specifically” recognized the Navajo Nation’s authority over all nonmembers on its lands. Apparently, however, the Navajo court could read it as its “ancestors understood it” to reach that specific conclusion, which is not implausible.

248. The court noted that *Montana* itself recognized such language in the 1868 Treaty of Fort Laramie with the Crow Tribe, and *Atkinson* reiterated that power from the same treaty. See *Montana v. United States*, 450 U.S. 544, 558 (1981); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650 (2001). Also in 1868, the Cheyenne River Sioux Tribe signed a treaty with the federal government containing a similar power, as recognized in *South Dakota v. Bourland*, 508 U.S. 679, 687-88 (1993). The Navajo Treaty of Fort Sumner of the same year “contains almost identical language.” *Dale Nicholson Trust*, 8 Navajo Rptr. at 429.

249. *Dale Nicholson Trust*, 8 Navajo Rptr. at 428.

that whenever the tribal court exercises preemptive treaty-based jurisdiction, it overrides any possible application of the *Strate-Montana* test.²⁵⁰

Thus, in Navajo Nation courts, neither *Strate-Montana* nor *Hicks* should ever apply to any claim that arises on Navajo tribal lands proper, since the Treaty of 1868 preserved tribal sovereignty by a specific grant of civil jurisdiction requiring only the territorial contact, regardless of who the parties might be. “If the cause of action arises on non-Indian owned fee land within the Navajo Nation, [however,] the plaintiff has a higher burden;”²⁵¹ viz., to demonstrate one of the two *Montana* exceptions, as required by *Strate* and *Hicks*.

When *Dale Nicholson* is read with *Pfizer*, the Supreme Court for the Navajo Nation has established that its courts will exercise civil jurisdiction over events occurring and/or parties acting on tribal land, without any need to demonstrate infringement or a *Strate-Montana* exception. Inherent sovereignty, or—more potently—the Treaty of 1868 that preempts any state exercise of civil jurisdiction by granting to the Navajo Nation the continued existence of its inherent sovereignty, provides the basis for such territorial jurisdiction.

A Further Bulwark to Navajo Jurisdiction: Allstate Indemnity Co. v. Blackgoat, and the Application of Strate-Montana Exemptions

By the doctrine set out in *Dale Nicholson*, the only time *Strate-Montana* exceptions become relevant is when events involving nonmember parties occur on non-Indian land. That question came before the Supreme Court of the Navajo Nation and Justice Ferguson in 2005 in *Allstate Indemnity Co. v. Blackgoat*.²⁵² Again, the opinion established guidelines for that situation. The case dealt with a claim by the estate of an insured couple deceased in a traffic accident on U.S. Highway 160 within the reservation. After some fruitless negotiation, the insurer filed an interpleader with the tribal court, tendering the maximum amount under the policy, \$30,000. The estate claimed pre-judgment interest beyond the cap amount, and the insurer objected that the court had no jurisdiction to award it.

Allstate argued *Strate-Montana* applied. The *Blackgoat* court initially accommodated the argument by assuming that “U.S. Highway 160 is the type of right-of-way that requires a *Montana* analysis.”²⁵³ Perhaps the Supreme

250. *Id.* at 428-29.

251. *Id.* at 425.

252. 8 Navajo Rptr. 660 (2005). Another aspect of the same case is decided at 8 Nav. Rep. 627 (2005).

253. *Blackgoat*, 8 Navajo Rptr. at 666. The court might have avoided the issue by holding

Court of the Navajo Nation did not have to assume the possibility that the *Strate-Montana* test applied. It could have ruled that the place of the accident had nothing to do with jurisdiction to distribute insurance proceeds paid into tribal court under interpleader instigated by the insurer.²⁵⁴ Conceding the assumption, however, allowed the court to cast its subsequent analysis against the strongest point in *Strate-Montana*.

The Navajo Supreme Court found the first *Strate-Montana* exception, a consensual relationship by Allstate in its contract with a Navajo tribal member. The opinion goes further, however, to address whether the court's jurisdiction might go beyond the simple distribution of the interpleaded funds, which Allstate urged should be the limit of its consensual relationship and the court's jurisdiction.²⁵⁵ The court felt that even if *Strate-Montana* defined its jurisdiction, the test was not so restrictive. It reasoned that "the actual U.S. Supreme Court test allows jurisdiction if the asserted jurisdiction has a 'nexus' to a consensual relationship," citing *Atkinson*,²⁵⁶ and held that "the question whether the cap provision precludes an award of pre-judgment interest clearly has a nexus to the contract itself."²⁵⁷ That nexus created jurisdiction in the

that the place of the contract, not the place of the accident, controlled. As it turned out, the court used a *Strate-Montana* exception (the insurer's consensual commercial contact) to find jurisdiction based on the highest requirement.

It might also have adopted an approach similar to that of the New Mexico court in *Tempest Recovery*, to the effect that the insurer chose the court and would have to abide by its law. See *supra* note 197 and accompanying text.

254. The court complains in a footnote that, under questions from the bench, [B]oth sides demonstrated a lack of understanding of [*Nicholson Trust*] and its identification of the exclusion provision of the Treaty of 1868 as the source of absolute jurisdiction over non-Indians on tribal lands within the Navajo Nation. . . . We state again that the *Montana* test is only relevant within the Navajo Nation on non-Indian owned fee land or on certain types of rights-of-way. It is only the fact that the accident occurred on a federal right-of-way that makes the *Montana* test relevant to our jurisdiction over this case.

Id. at 666 n.2. Perhaps the Supreme Court of the Navajo Nation extended itself with the assumption in order to make a point.

255. Allstate supported its argument by citing *Ford Motor Co. v. Todecheene*, 394 F.3d 1170 (9th Cir. 2005), *withdrawn upon reconsideration*, 488 F.3d 1215 (9th Cir. 2007), and *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), which had rejected tribal jurisdiction over a products liability claim against a vehicle manufacturer based on a finance agreement by the manufacturer's subsidiary and a simple car accident between a tribal member and a non-Indian driving through the reservation. The court distinguished the two cases on their "unique circumstances . . . under the fact-intensive *Montana* test." *Blackgoat*, 8 Navajo Rptr. at 667.

256. See *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001).

257. *Blackgoat*, 8 Navajo Rptr. at 666.

tribal court over the question of pre-judgment interest, even if the *Strate-Montana* test controlled.²⁵⁸ The court then applied the “strong public policy of the Navajo Nation” of *nályééh*, under which “injured parties should be compensated fully so that there are no hard feelings,”²⁵⁹ to support an award of pre-judgment interest against the insurer.

Final Touches: Application of the Doctrine in Subsequent Cases

Not much time has passed since the Navajo Supreme Court decided the *Dale Nicholson* case, but it already seems to have become a solid precedent. As frequently happens, when a court has occasion to address an issue repeatedly it soon identifies the analysis best suited to the task, sharpens its articulation of that analysis, and creates standing, formidable doctrine. Three opinions decided in 2007 and another in late 2008 have given the tribal high court the opportunity to confirm its body of jurisdictional doctrine and to indicate how it is likely to apply it for the foreseeable future.

Navajo Employees of Nonmember Employers on the Reservation

Two cases dealt with the Navajo Preference in Employment Act (NPEA).²⁶⁰ Both cases cite *Dale Nicholson* and its finding of preemption based on the 1868 Treaty of Fort Sumner,²⁶¹ turning to what appears to have become the Navajo Supreme Court’s touchstone of choice for the assertion of its civil jurisdiction free from *Strate-Montana* and other inhibiting rules.²⁶²

258. *Id.* at 666-67.

259. *Id.* at 668. Lest the award of pre-judgment interest be seen as unique to Navajo law, however, the court noted that “some [state] jurisdictions have awarded pre-judgment interest beyond contractual liability caps by ruling such contractual caps may be overridden by public policy considerations.” *Id.* (citations omitted).

260. *Thinn v. Navajo Generating Station*, No. SC-CV-25-06 (Navajo Oct. 19, 2007), available at <http://www.navajocourts.org/NNCourtOpinions2007/14Leonard%20Thinn%20v%20Navajo%20Generating%20Station.pdf>; *Cedar Unified Sch. Dist. v. Navajo Nation Labor Comm’n*, Nos. SC-CV-53-06, SC-CV-54-06 (Navajo Nov. 21, 2007), available at <http://www.navajocourts.org/suctopinions.htm> (follow “SC-CV-53-06 SC-CV-54-06” hyperlink).

261. Specifically, Article 2, which states that the lands designated for the Navajo Reservation “shall be . . . set apart for the use and occupation of the Navajo Tribe of Indians.” Treaty of Fort Sumner with the Navajo Tribe, *supra* note 38, at art. 2.

262. *Cedar Unified* states unequivocally, “Under its Treaty authority, the Nation does not have to fulfill the *Montana* test.” See *Cedar Unified*, Nos. SC-CV-53-06, SC-CV-54-06, at 5 n.5 (further discussing the effect of the treaty basis for tribal jurisdiction and the way in which it makes *Hicks*, 533 U.S. 353 (2001), in which the Fallon Paiute Tribe did not assert a treaty right to exclude or exercise jurisdiction over state officials on Indian trust land, inapplicable to

The two cases turned on whether the NPEA applied to non-Navajo entities operating on Navajo trust lands: in the first case the Navajo granted a lease for a power station to be built, maintained and operated by public utility companies licensed by the State of Arizona; the second case involved two school districts organized under Arizona state law operating schools under lease within the Navajo Nation. In both cases, former employees of the entities brought claims before the Navajo Nation Labor Commission, alleging wrongful termination without just cause. In both cases, the employers objected to the jurisdiction of the Commission, arguing a market basket of defenses. They availed nothing, principally because at the outset the Navajo high court cites *Dale Nicholson* for the proposition that, "Under the Treaty of 1868 the Nation has authority to regulate non-Indian activity on trust lands. This power is absolute"²⁶³ The opinions reveal *Dale Nicholson*'s application of the Treaty of 1868 as a stout precedent, equal to the defense of tribal civil jurisdiction whenever a controversy arises on tribal trust lands.

The two opinions nonetheless elaborate on the *Dale Nicholson* precedent, measuring it against whether a lease agreement may waive the Nation's authority to regulate employment;²⁶⁴ whether a federal court's application or interpretation of Navajo law is binding on the tribal court;²⁶⁵ whether employment contracts might waive the NPEA by a choice-of-law clause;²⁶⁶ whether state-certified or -licensed entities escape Navajo jurisdiction as political subdivisions of the state and as non-Indian entities;²⁶⁷ whether school districts enjoy special immunity, either as sovereign entities²⁶⁸ or by protection of federal law²⁶⁹ or because the state is a necessary party to a suit against them;²⁷⁰ and whether comity counsels deference to state law.²⁷¹

Working carefully through the various issues presented in *Thinn* and *Cedar Unified*, the Navajo Supreme Court takes the opportunity to dispel any thought that it might act as a servile tribunal overwhelmed by deeper legal

the Navajo Nation).

263. *Thinn*, No. SC-CV-25-06, at 4 (citation omitted); see *Cedar Unified*, Nos. SC-CV-53-06, SC-CV-54-06, at 5.

264. *Thinn*, No. SC-CV-25-06, at 3, 4, 5-10; *Cedar Unified*, Nos. SC-CV-53-06, SC-CV-54-06, at 6-7.

265. *Thinn*, No. SC-CV-25-06, at 4, 10-12.

266. *Cedar Unified*, Nos. SC-CV-53-06, SC-CV-54-06, at 2, 3, 9-10.

267. *Id.* at 3, 4-7.

268. *Id.* at 3, 7-8.

269. *Id.* at 3, 10-12.

270. *Id.* at 3, 8-9.

271. *Id.* at 3, 12.

complexities, inclined to turn civil jurisdiction over to state courts or to defer to federal and state law as appropriate limitations on its own exercise. While it would permit waiver of tribal authority, it will not find it lightly, requiring “clear, unmistakable words of the Council or its properly empowered designee [to] waive governmental authority.”²⁷² It further has no difficulty in finding that “the NPEA prohibits employees and employers from waiving the act by contract,”²⁷³ rendering choice-of-law clauses invalid as against public policy.²⁷⁴ In the same way a state court would not, the tribal court will not defer to a federal court’s reading of its laws.²⁷⁵ And, finally, while the Navajo Supreme Court has utilized comity to apply “another sovereign’s” law,²⁷⁶ “a strong Navajo policy justifies rejection.”²⁷⁷

The Navajo Long Arm and Dram Shop Liability

The third 2007 case, *Navajo Transport Services v. Schroeder*,²⁷⁸ raised the question of personal jurisdiction under the Navajo long-arm statute. Personal jurisdiction had merited a passing mention at the end of the *Pfizer* opinion, a simple acknowledgment that due process requirements applied without any effort to define how far the long arm of Navajo jurisdiction might reach.²⁷⁹ In *Navajo Transport* the issue came front and center. The Eagle Claw Trading Post and Liquor Store, located in Colorado off the reservation, sold alcohol to Navajo tribal members who then got into a car and hit a vehicle belonging to the plaintiff, who sued the trading post under the Navajo Nation’s dram shop statute.²⁸⁰

272. *Thinn*, No. SC-CV-25-06, at 5.

273. *Cedar Unified*, Nos. SC-CV-53-06, SC-CV-54-06, at 9.

274. *Id.* at 10.

275. *Id.* at 10-12. “Like interpretations of state law by the highest court of a state, federal courts must defer to this Court’s interpretation of Navajo law.” *Id.* at 11 (citations omitted).

276. *Bradley v. Lake Powell Medical Center*, No. SC-CV-55-05 (Navajo Feb. 16, 2007), available at <http://www.navajocourts.org/suctopinions.htm> (follow “SC-CV-55-05” hyperlink), (holding that the Navajo Nation Labor Commission should have granted comity to a decision by the Arizona Department of Economic Security Office of Appeals that an employee’s discharge was based on his willful conduct).

277. *Cedar Unified*, Nos. SC-CV-53-06, SC-CV-54-06, at 12.

278. No. SC-CV-44-06 (Navajo Apr. 30, 2007), available at <http://www.navajocourts.org/suctopinions.htm> (follow “SC-CV-44-06” hyperlink).

279. Earlier Navajo cases had discussed personal jurisdiction in detail, but not since more recent decisions by the Supreme Court of the United States. See *Sells v. Espil*, 6 Navajo Rptr. 195 (1990); *Billie v. Abbott*, 6 Navajo Rptr. 66 (1988).

280. NAVAJO NATION CODE tit. 7, § 207 (1995). This provision was amended and renumbered in 2003. See NAVAJO NATION CODE tit. 7, § 631 (2005) (but the accident at bar

The plaintiff invoked NNC's long-arm statute²⁸¹ to take personal jurisdiction over the defendant. The defendant resisted, filing a motion to dismiss for lack of personal jurisdiction. The trial court denied the motion, based on detailed allegations in the complaint that met the "minimum contacts" test. After discovery, however, defendants filed for summary judgment, again arguing lack of personal jurisdiction. This time the Kayenta trial court granted the motion, apparently following federal and state cases that had found a lack of minimum contacts where border town liquor stores had not advertised in the destination state.²⁸²

On appeal, the Supreme Court of the Navajo Nation first took to task the district court for failing to include the facts on which it relied, and might well have remanded on those grounds alone.²⁸³ Of greater interest for our analysis here, the court went on to address "a separate problem" on remand, the trial court's failure to make a careful analysis of Navajo Nation law, "because the bare application of federal interpretations of 'minimum contacts' ignores the clear policy of the Navajo Nation Council on alcohol." Not only does the NNC prohibit alcohol on the Nation,²⁸⁴ and include a dram shop act,²⁸⁵ but the NNC long-arm provision includes a specific section asserting personal jurisdiction over off-reservation merchants whose liquor causes accidents on the Navajo Nation.²⁸⁶ The court instructed, "Given the clear mandate of the long arm statute, the District Court would have to find the statute invalid as a violation of Appellee's due process rights under the Navajo Bill of Rights."²⁸⁷ Lest the implication be lost, the court's opinion made it clear that the U.S. Constitution's Due Process Clause did not provide a direct analogy.²⁸⁸ The operative question was

whether the [Navajo] long arm statute is consistent with Navajo concepts of fairness embedded in the Due Process Clause of the Navajo Bill of Rights. As stated previously by this Court, the Navajo concept of due process is unique, in that it applies concepts

occurred before the amendment).

281. NAVAJO NATION CODE tit. 7, § 253a (2005).

282. *Navajo Transport*, No. SC-CV-44-06, at 2.

283. *Id.* at 4-5.

284. NAVAJO NATION CODE tit. 17, §§ 410-412.

285. *See supra* note 223.

286. NAVAJO NATION CODE tit. 7, § 253a(C)(8).

287. *Navajo Transport*, No. SC-CV-44-06, at 6.

288. *Id.* at 6-7.

of fairness consistent with Navajo values . . . to be interpreted in light of Navajo Fundamental Law.²⁸⁹

The *Navajo Transport* case, according to the court's opinion, presented "a matter of first impression."²⁹⁰ It falls nicely into the jurisdictional construct emerging in recent years and complements the *Dale Nicholson* doctrine of preemptive sovereignty. While the Navajo Supreme Court's opinion does not dictate a finding of personal jurisdiction by the Kayenta District Court, it does instruct the lower court to contemplate the special Navajo concern against alcohol and its effects on the Nation's lands and to seek a concept responsive to special Navajo concepts of fairness. It does seem to reject the proposition that the matter is settled or even particularly illuminated by what might be a "universal view of modern state courts."²⁹¹

Post Plains Commerce Bank Application

Finally, on December 18, 2008, the Navajo Supreme Court released its opinion in *Ford Motor Co. v. Kayenta District Court*.²⁹² The decision demonstrates the hearty exercise of assertive jurisdiction by Navajo tribal courts continues unabated after *Plains Commerce Bank*, for which the tribal court specifically delayed its decision so that the parties could provide supplemental briefs. *Ford Motor* shows a Navajo Supreme Court well settled and secure in its jurisdictional doctrine, again applying it to find jurisdiction.

The case began when a tribal police officer died because of a defective seatbelt when her vehicle overturned while she was on duty on the reservation. Her parents brought a wrongful death claim in tribal court. The jurisdictional issue, on Ford's motion to dismiss, came before the tribal trial court, the federal District Court for the District of Arizona,²⁹³ the United States Court of Appeals for the Ninth Circuit once,²⁹⁴ and then again on a petition for

289. *Id.* at 7.

290. *Id.* at 6.

291. *Id.* at 4 n.5. The Navajo Supreme Court does not reject reference to state and federal court opinions. It distinguishes the cases that the district court relied on, noting that only one of four concerned an actual liquor store and that another state case had found personal jurisdiction in similar circumstances. *Id.* The court also notes that federal concepts of due process may be considered but are not controlling. *Id.* at 7-8.

292. No. SC-CV-33-07 (Navajo Dec. 18, 2008), available at <http://www.navajocourts.org/NNCourtOpinions2008/Ford%20v.%20Kayenta.pdf>.

293. *Ford Motor Co. v. Todecheene*, 221 F. Supp.2d 1070 (D. Ariz. 2002).

294. *Ford Motor Co. v. Todecheene*, 394 F.3d 1170 (9th Cir. 2005)

rehearing.²⁹⁵ On rehearing, the Ninth Circuit withdrew its earlier holding against jurisdiction and required Ford to seek review before the Navajo Supreme Court on the issue of whether the second *Montana* exception applied.²⁹⁶ When the tribal high court took the case, it applied its highly-developed jurisdictional analysis. *Ford Motor* thus provides the most recent benchmark on Navajo doctrine and how the tribal court handles the federal Indian law of jurisdiction up to and including *Plains Commerce Bank*.

The Navajo Supreme Court required the parties to address “an additional question[:] whether the Treaty of 1868 . . . provides an independent ground for the Nation’s courts to hear the case under the right of inherent sovereignty,”²⁹⁷ incorporating and overriding the second *Montana* exception. The court leaves no doubt that it relies on the 1868 Treaty of Fort Sumner “as the primary source of the Nation’s authority over non-Indians within the Nation,”²⁹⁸ citing *Dale Nicholson Trust* for the proposition that Article II of the Treaty “specifically recognizes the Navajo Nation’s authority to regulate all non-members other than certain federal employees on its lands.”²⁹⁹

The tentative recitation of diverse, undeveloped sources for tribal civil jurisdiction in *Pfizer*³⁰⁰ seems far behind. Within six years from that 2003 case, Navajo jurisdictional doctrine has focused on preemptive sovereignty based on the 1868 treaty. Unless and until the Supreme Court of the United States takes that jurisdictional reference away from the Nation,³⁰¹ it can trump

295. *Ford Motor Co. v. Todecheene*, 488 F.3d 1215 (9th Cir. 2007).

296. *Id.*

297. *Ford Motor*, No. SC-CV-33-07, at 3.

298. *Id.* at 4.

299. *Id.* at 6. As noted above, the specific language in the Navajo Treaty of Fort Sumner of 1868 states that the reservation shall be set apart for the “use and occupation of the Navajo tribe of Indians,” perhaps a less specific reference to jurisdiction than the court’s opinion might represent. See *supra* note 247.

300. See *supra* note 239 and accompanying text.

301. Such a decision might be difficult. See *Todecheene*, No. SC-CV-33-07, at 7-8. In 1868, the federal government executed several treaties with similar language. The court notes that *Montana* itself recognized the preemptive effect of language like that in the Navajo Treaty of 1868 in the 1868 Treaty of Fort Laramie with the Crow Tribe. *Montana v. United States*, 450 U.S. 544, 558 (1981), and *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650 (2001), reiterated that power from the same treaty. Also in 1868 the Cheyenne River Sioux Tribe signed a treaty with the federal government containing a similar power, as recognized in *South Dakota v. Bourland*, 508 U.S. 679, 687-88 (1993). As *Dale Nicholson Trust* noted, after citing the same cases, the Navajo Treaty of Fort Sumner of the same year “contains almost identical language.” *Dale Nicholson Trust v. Chavez*, 8 Navajo Rptr. 417, 429 (2004); see *supra* notes 247-50 and accompanying text.

almost any objection to its exercise of civil jurisdiction over parties on its tribal lands, even when contacts rather than physical presence create the connection.

Despite its confident articulation of “inherent sovereignty” (read preemptive sovereignty) doctrine in *Ford Motor*,³⁰² the Navajo Supreme Court also attends to the United States Supreme Court precedents in its opinion. It carefully notes that no Supreme Court case has dealt with facts like those in *Ford Motor* and dismisses *Plains Commerce Bank* on the Supreme Court’s own terms, as a “sale of non-tribal land between nonmembers.”³⁰³ It also adopts the venerated minimum contacts test to measure the tribal court’s assertion of jurisdiction over Ford.³⁰⁴ It engages in a careful, detailed analysis of Ford’s business activity and the reasonable expectation that claims arising from such activity would subject the company to jurisdiction before the tribal court.³⁰⁵ Ultimately, the *Ford Motor* opinion “finds that *Montana* does not apply in this case,” but nonetheless states that it “believes that both *Montana* exceptions are met,”³⁰⁶ and devotes several pages to that analysis.³⁰⁷

The Supreme Court of the Navajo Nation’s Clear Articulation of Well-Developed Doctrine Pertaining to Their Tribal Courts’ Civil Adjudicatory Jurisdiction: Focus on Preemptive Sovereignty Under the Treaty of 1868

Withal, the Navajo Supreme Court has defined a complete doctrine for approaching questions of tribal jurisdiction over civil matters and demonstrates an ever-surer grasp in disposing of the steady stream of jurisdictional cases that have come to it in the last few years. It initially set a broad base for such jurisdiction in *Pfizer*, noting multiple criteria while specifically finding inherent sovereignty, without explaining very well what it meant. By the time of *Dale Nicholson*, it had focused on the strongest among several factors: the preemptive grant of sovereignty in the Treaty of 1868, which it since has steadfastly referred to as “inherent sovereignty.” That grant enables all that follows. Beyond doubt, Congress has plenary power to invest any tribal court system with preemptive full sovereignty. The Navajo Supreme Court has held that Congress long ago gave the Navajo Nation courts preemptive full sovereignty when it ratified the Treaty of Fort Sumner in 1868.

302. *Todechenee*, No. SC-CV-33-07, at 4.

303. *Id.* at 7.

304. *Id.* at 8 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

305. *Id.* at 2, 9.

306. *Id.* at 10.

307. *Id.* at 10-13.

Preemptive sovereignty is a doctrine for all seasons and empowers the Navajo Nation as no other source of sovereignty could. It escapes the noisome *Strate-Montana* rule and nullifies *Hicks*. It permits the Navajo Supreme Court to implement a full-blown, autonomous legal system with courts of general civil jurisdiction whose judges in particular may assert the special nature and sources of Navajo law.

The Supreme Court of the Navajo Nation's recent jurisdictional cases (since 2003, culminating first in *Dale Nicholson Trust* and now in *Ford Motor*) set out a clear view of tribal doctrine with regard to civil jurisdiction, both subject matter and personal. The Navajo Nation's highest court has mastered United States Supreme Court case law and is not bashful about applying it in ways that take its own civil jurisdiction out to permissible limits. All of the elements are in place for expansive tribal jurisdiction: a legislative basis for long-arm jurisdiction in the NNC;³⁰⁸ a Treaty of 1868 whose language preserves civil jurisdiction to the Navajo Nation, preempting any exclusivity in state jurisdiction and overcoming any limiting presumptions in *Strate-Montana* or *Hicks*;³⁰⁹ recognition of a still vigorous inherent sovereignty,³¹⁰ alert against infringement; and judicial recognition of an overall "responsibility to protect the sovereignty of the Navajo Nation."³¹¹

When one traces the doctrine from *Pfizer* to *Dale Nicholson* to *Blackgoat* to *Navajo Transport* to *Ford Motor*, it becomes clear that the *Strate-Montana* test cannot—at least in the vision of the Supreme Court of the Navajo Nation—curtail the civil jurisdiction of Navajo tribal courts save in the limited circumstance of a non-Indian defendant for activities arising on non-Indian lands. Even then, when one of the two *Strate-Montana* exceptions must be present to create jurisdiction, the Navajo court seems prepared to read those exceptions expansively, asserting personal jurisdiction based on minimum contacts that correspond to Navajo, rather than federal, sensitivities.

At the further extension of developing Navajo doctrine, the *Blackgoat* and *Navajo Transport* cases are particularly suggestive of the possible special considerations within Navajo law that may control when Navajo civil jurisdiction does apply, and even provide the basis for that jurisdiction.³¹²

308. See *supra* notes 230-33 and accompanying text.

309. See *supra* notes 246-48 and accompanying text.

310. See *supra* notes 239-42 and accompanying text.

311. *Nelson v. Pfizer, Inc.*, 8 Navajo Rptr. 369, 376 (2003).

312. They are by no means the only such recent cases. In 2008, the Supreme Court of the Navajo Nation showed further implications of Navajo law for jurisdictional purposes when it decided a preliminary procedural matter in *Green Tree Servicing, L.L.C. v. Duncan*, No. SC-CV-46-05 (Navajo Aug. 18, 2008), available at <http://www.navajocourts.org/suctopinions.htm>

Both cases utilize concepts of public policy drawn from Navajo Common, or Fundamental, Law and raise the possibility that Navajo tribal courts in some cases might resolve a case involving the same parties and circumstances differently than might be expected in state court.

Points of Coincidence and Divergence Between Navajo and Arizona Case Law: Two Assertive Courts and the Possibilities of Concurrent Jurisdiction

Reading *Dale Nicholson* against *Zaman I* demonstrates the disparity between the Navajo Nation and Arizona case law. The Navajo Supreme Court recognizes multiple sources of jurisdictional authority over non-Indians and manifests a disposition to apply them assertively in favor of tribal civil jurisdiction. It focuses on finding positive bases for jurisdiction in the Navajo Nation, without attempting to formulate reasons for excluding the state. It is more thoughtful in its treatment of the United States Supreme Court cases; more substantive, and definitely concerned with the facts of each case. If *Dale Nicholson*'s preemption approach is not sufficient, *Pfizer* earlier provides a reference to several sources of tribal civil jurisdiction carefully gleaned from the United States Supreme Court cases, and commends a rigorous—but ultimately subjective—multi-factor analysis for inherent sovereignty.

The nature of the exercise dictates that the Arizona Supreme Court also focus on the bases for Navajo jurisdiction, rather than any concern for state interests per se, a perspective it has used in *Zaman I* to propound the formalistic rule that where a non-Indian defendant is involved in a state court suit brought by an Indian, there can be no tribal concerns, since only the individual rights of a single Indian are at issue and that Indian has chosen not

(follow “SC-CV-46-05” hyperlink). Plaintiff, a national lender specializing in mobile homes, asked for enforcement of an arbitration clause in its financing contract with defendant. State courts generally defer to arbitration clauses, but the tribal court required the parties to submit supplemental briefs to address the issue of whether the arbitration clause violated Navajo public policy, *id.* at 2, specifically in light of the test for validity of contract provisions applied in the *Blackgoat* decision, *id.* at 8. Apparently, the court referred to that part of the *Blackgoat* opinion that tested against Navajo public policy—specifically the Fundamental Law concept of *nalyééh*—the validity of an insurance policy provision to cap recovery by the insured. In *Green Tree*, the question would be whether any Navajo public policy or Fundamental Law might invalidate the arbitration clause, taking into account title 5A, section 2-203 of the Navajo Uniform Commercial Code’s provisions on unconscionable contracts, *id.* at 9-10; the Fundamental Law principles of *házhó’ógó*, requiring “meaningful notice and explanation of a right before a waiver of that right is effective,” *id.* at 10, *iishjáni ádooniil*, “making something clear or obvious,” *id.* at 11, and finally, “the context of the importance of a home in Navajo thinking,” *id.* at 12.

to assert them. As the majority in *Zaman II* would later state, “the status of the defendant as an Indian or a non-Indian is the *sine qua non* of federal Indian law.”³¹³ Nowhere do the United States Supreme Court cases make either statement, and its categorical assertion by the Arizona Supreme Court would seem ill-advised in an area fraught with subjective judgments as to when inherent tribal sovereignty may be infringed, or state court jurisdiction preempted, or when a non-Indian may have formed a consensual relationship with a tribe or its members, or when the conduct of non-Indians on fee lands within a reservation might threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of a tribe.³¹⁴

One characteristic seems common to both Arizona Supreme Court and Navajo Supreme Court criteria, however. They have both gravitated to doctrine—albeit opposing doctrine—that favors exercise of the broadest possible subject matter jurisdiction by their own civil courts. Of course, this may simply mean that concurrent jurisdiction is the most frequent result, a circumstance that mirrors jurisdiction between two states which both have contacts with the events and parties that give rise to a lawsuit. Since “American Law” will control in such situations and usually render the same or a similar resolution in either state court, the jurisdictional question often is not of great moment. When the concurrent jurisdiction includes the Navajo Nation, however, parties may find themselves in situations where the first question of which court will hear the case will also call in to question the outcome, since the applicable law comes with the jurisdiction and is not the same in both courts.

The disparity in analysis between tribal court and state court illustrates the effect of concurrent jurisdiction. In *Dale Nicholson* and in *Zaman I*, the deciding court needed only resolve the question of whether *it* had jurisdiction, not whether another court did concurrently. If either court had decided that it did not have jurisdiction, that decision would have constituted recognition of exclusive jurisdiction in the other court. Perhaps that insight provides a way to reconcile the Navajo and Arizona approaches: they both represent resolutions that protect jurisdiction over cases filed in their courts, without

313. *State v. Zaman*, 984 P.2d 528, 528 (Ariz. 1999).

314. Another recent Navajo case, dealing with the custody of an inscribed Navajo child, shows how the Navajo court approaches an issue similar to that in *Zaman I*. Although the father was not a Navajo and had taken the child off the Reservation to live in five different states in five years, when the mother instituted divorce proceedings in the tribal court, it took jurisdiction of the custody issue, too. *Miles v. Miles*, No. SC-CV-04-08 (Navajo Feb. 21, 2008), available at <http://www.navajocourts.org/suctopinions.htm> (follow “SC-CV-04-08” hyperlink).

taking away the jurisdictional possibility that the plaintiff could have filed in the other court. Neither court, at the end of the day, concedes exclusive jurisdiction to the other, but neither does their analysis foreclose the possibility of concurrent jurisdiction. The issue of concurrent jurisdiction simply is not before either court, nor is it necessary to either result.

Has a state or tribal court improperly taken jurisdiction where not concurrent, but exclusive, jurisdiction resides in the other? The truest test would be enforcement of judgments, since the enforcing court may refuse to enforce a judgment rendered without proper jurisdiction. In the *Zaman* cases, for example, should the defendant have continued to reside on the reservation, the judgment creditor probably would have had to come on tribal land to enforce the judgment. In such a case, the effort to enforce a judgment gives the enforcement jurisdiction a subsequent, and definitive, bite at the jurisdictional apple and the opportunity to say to the rendering court, "This case was ours. You never should have taken jurisdiction. You had none. You applied the Supreme Court doctrine improperly, but we will now remedy that mistake by denying enforcement of your judgment." Even that case, however, represents a unilateral resolution to overcome a unilateral resolution.

The Supreme Court of the United States and the Supreme Court of the Navajo Nation

The United States Supreme Court is the ultimate arbiter, but it cannot sort out every case. That leaves a large area of civil jurisdiction to development by state and tribal courts, and opens the possibility for significant variations in jurisdictional assertiveness from state to state to tribal court. The *Diné's* legal system is not a prototype, although other tribes might well consider it worthy of imitation. There is no archetypical tribal system. There may well be other tribes possessing similar elements to their legal systems. There may well be other tribes whose legal systems deserve analysis. We here focus on the Navajo Nation, because its still developing legal system lends itself especially well to showing how its judicial aspirations may be defined by the civil jurisdiction that its courts may exercise. The Navajo legal system may appear to an "American" lawyer as an unlikely mixed jurisdiction that blends pre-Columbian indigenous, consensual traditions with "American" Common Law, adversary traditions. The Navajo Nation has assimilated the old with the new. The Navajo legal system has become a successful, functioning, vital, developing legal system. It will exercise civil jurisdiction over controversies involving contacts with the Navajo Nation for a long time. Tribal case law has not yet established the precise limits of that jurisdiction, but it does

demonstrate a sure and expansive vision. That vision should light the path ahead.