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SURVEY OF CIVIL JURISDICTION IN INDIAN COUNTRY 1990

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I. The Origins of Tribal Sovereignty

A. Introduction¹

Long before their contact with European nations, most Indian

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This survey was prepared by the Institute for Court Management of the National Center for State Courts, in conjunction with the Civil Jurisdiction of Tribal Courts and State Courts: Research and Leadership Consensus Building Project, which is administered by the National Center for State Courts, sponsored by the Conference of Chief Justices of State Supreme Courts, and funded by the State Justice Institute. The Project's goals are to clarify civil jurisdictional concerns between tribal and state courts and to develop strategies for resolving jurisdictional disputes between these two sovereigns.

This survey of literature, caselaw, and statutes is intended to summarize the existing law governing jurisdiction over civil actions that arise in Indian Country. The survey should assist tribal and state court judges in determining the extent and limits of their jurisdiction over civil actions arising in Indian Country.

The law governing civil jurisdiction in Alaska and Oklahoma differs somewhat from the law in other states. Persons in those states are encouraged to refer to the 1982 edition of Felix Cohen's *Handbook of Federal Indian Law* for a detailed study of the unique law applicable in Alaska and in Oklahoma. The *Handbook* is the leading treatise in the field of Indian law and other researchers should consult the work for a more complete discussion of the concepts presented in this survey. Other valuable sources include W. Canby's *American Indian Law* (West Nutshell Series 1989) and C. Wilkinson's *American Indians, Time & the Law* (Yale University Press 1987).

The Coordinating Council that guides this Project requested that citations to tribal authority be included to support the propositions included in the survey. Unfortunately, time and financial resources prohibited the authors from implementing the suggestion to the extent desired. Many tribal codes are not annotated. There are even fewer digests. The Navajo nation is one exception: the tribal code is annotated and a digest is available from DNA People's Legal Services in Window Rock, Arizona. For that reason, most citations to tribal laws in this survey are to Navajo law. A *caveat*: laws differ from tribe to tribe, just as they do from state to state. When a question of tribal/state jurisdiction arises, reference should always be made to the law of the particular tribe concerned.

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tribes were independent, self-governing societies.² The degree of organization varied from the League of the Iroquois, a confederation of tribes with a population between 10,000 and 17,000,³ to the entities of the Pacific Northwest, where the basic political unit consisted of family groups or clans.⁴ Typically, tribal policy on major issues such as war and foreign affairs was developed by consensus,⁵ often at general council meetings which were open to all adult members in many tribes.⁶

While historically most tribes had no written laws,⁷ individual behavior was guided by norms of conduct that evolved as custom. These precepts were normally enforced through peer pressure in the form of mockery, ostracism, ridicule, and religious sanctions.⁸ The Indians' system of justice also demanded restitution from wrongdoers;⁹ thus, many tribes required that a wrongdoer compensate the injured party's family.¹⁰ Some tribes imposed additional sanctions, including corporal punishment such as whipping or even death for serious crimes such as murder, theft, and rape.¹¹

1. Much of this section is taken from F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 229-32 (1982 ed.).

2. See generally H. DRIVER, *INDIANS OF NORTH AMERICA* 287-308 (1969); K. LLEWELLYN & E. HOWBBEL, *THE CHEYENNE WAY* (1941).

3. See, e.g., H. DRIVER, *supra* note 2, at 302; A. DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 9, 13 (1970); L. MORGAN, *LEAGUE OF THE HO-DE'-NO-SAU-NEE OR IROQUOIS* (1954). The League of the Iroquois is one federal system that served as a model in the development of the United States' constitutional framework. See, e.g., Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 183 (1940); Russell, *The Influence of Indian Confederations on the Union of the American Colonies*, 22 J. AM. HIST. 53 (1928).

4. See, e.g., H. DRIVER, *supra* note 2, at 298-302.

5. Tso, *The Tribal Court Survives in America*, JUDGES' J., Spring 1986, at 22, 24.

6. See H. DRIVER, *supra* note 2, at 302; W. WASHBURN, *THE INDIAN IN AMERICA* 40-51 (1975).

7. A few tribes did develop formal court systems without direct influence from the European nations. See J. NOON, *LAW AND GOVERNMENT OF THE GRAND RIVER IROQUOIS* (1949); R. STRICKLAND, *FIRE AND THE SPIRIT* (1975).

8. See J. REID, *A BETTER KIND OF HATCHET* 10-12 (1976); W. WASHBURN, *supra* note 6, at 42-51.

9. Tso, *supra* note 5, at 24.

10. See, e.g., G. HYDE, *SPOTTED TAIL'S FOLK: A HISTORY OF THE BRULE SIOUX* 152, 307 (1961); D. McNICKLE, *THEY CAME HERE FIRST* 52-65 (1975); W. WASHBURN, *supra* note 6, at 40-51.

11. See, e.g., D. McNICKLE, *supra* note 10, at 52-65; W. WASHBURN, *supra* note 6, at 40-42.

*B. Retained Tribal Sovereignty*¹²

When the tribes began their relationship with the federal government, they possessed all of the sovereign powers of independent nations. After the tribes came under the authority of the United States, certain limitations upon the external powers of tribal self-government necessarily followed.¹³ From the beginning the United States permitted, then protected, the tribes in their continued self-government.¹⁴ In three opinions written between 1823 and 1832,¹⁵ Chief Justice John Marshall articulated the concepts and principles that have defined the legal status of Indian tribes to this day.

First, the Marshall Court established that the Constitution delegated paramount authority over Indian matters to the federal government.¹⁶ Thus, federal treaties with Indian tribes and statutes regulating Indian matters prevail over state laws.¹⁷ This rule on allocation of power has been consistently followed.¹⁸

Second, the Marshall Court described the tribes' status in relation to the United States as a dependent one, based on the

12. Much of this section is taken from F. COHEN, *supra* note 1, at 122-50, and Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 480-84 (1979).

13. In *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), Chief Justice Marshall concluded that "discovery" by the European nations prohibited the tribes from selling their land without the approval of the new sovereign. *Id.* at 574. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Chief Justice noted that tribes may not make treaties or establish political connections with nations other than the United States. *Id.* at 17. Other early decisions alluded to the inability of tribes to enter into direct commercial relations with foreign nations. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring).

14. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). See also *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-74 (1973); *Quiver v. United States*, 241 U.S. 602, 603-06 (1916); *Talton v. Mayes*, 163 U.S. 376, 384 (1896); *Ex parte Crow Dog*, 109 U.S. 556, 558-70 (1883); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1869); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556, 560-62 (1832).

15. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

16. *Worcester*, 31 U.S. (6 Pet.) at 561. As the Court stated, the previous allocation of authority had been uncertain because of ambiguous wording in the Articles of Confederation.

17. The Supreme Court has never held a federal Indian statute or treaty to be an invasion of state authority, and on several occasions the Court reversed contrary holdings of lower courts. See, e.g., *United States v. Sandoval*, 231 U.S. 28 (1913).

18. Modern decisions of the Court hold that the federal power over commerce with the Indian tribes, U.S. CONST. art. I, § 8, cl. 3, and the treaty power, U.S. CONST. art. II, § 2, cl. 2, are the most important sources of federal authority over Indian affairs. See *United States v. Mazurie*, 419 U.S. 544, 554 (1975); *McClanahan*, 411 U.S. at 172 n.7.

common treaty provision that the tribe placed itself under United States protection "and of no other sovereign whatsoever."¹⁹ This dependency has several important consequences. The Court held that the general practice of European sovereigns to exercise dominion over land acquired from the Indian tribes had been absorbed into federal law.²⁰ Under this rule, the tribes' use and occupancy of their lands is respected, but they may not sell their lands to anyone except those acting under authority of the federal government.²¹ The same dependent relationship authorized Congress to legislate broadly concerning the Indians.²² However, Congress' broad authority over Indian affairs was described as imposing on the federal government the duty of protecting the Indians and their property.²³

Third, the Marshall Court concluded that the parties to the early Indian treaties intended that the tribes would retain self-government within the territory reserved to them, subject only to federal authority.²⁴ In reaching this conclusion, Marshall relied on the express terms of treaties, the general course of federal legislation and Indian treaties, and the principle of international law that the internal law of conquered or protectorate territory remains in force until affirmatively superseded by the new sovereign.²⁵ This doctrine has subsequently been applied to tribal lands set aside by unilateral federal action as well.²⁶

Fourth, the Marshall Court construed Indian treaties and federal statutes in favor of federal protection for and self-govern-

19. *Worcester*, 31 U.S. (6 Pet.) at 551-52, 555 (quoting one of the Cherokee treaties). Later treaties included language acknowledging the tribe's "dependence on the government of the United States." See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 207 (1978) (quoting from a treaty with the Suquamish Tribe). In other treaties, the tribes acknowledge the "supremacy" of the United States. See, e.g., Treaty with the Cheyenne Tribe, July 6, 1825, art. 1, 7 Stat. 255. Some treaties included no such terms. See Treaty with the Wyandot and Other Indian Tribes, Aug. 3, 1795, 7 Stat. 49 (Treaty of Greenville).

20. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 584-88 (1823).

21. Since 1790, this principle has been codified in successive statutes commonly known as the Nonintercourse Acts. The present version is codified at 25 U.S.C. § 177 (1988).

22. This principle is implicit in much of Marshall's language, particularly in *Worcester*, 31 U.S. (6 Pet.) at 561, and later decisions depended on it directly. See *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *United States v. Kagama*, 118 U.S. 375, 384-85 (1886).

23. *Worcester*, 31 U.S. (6 Pet.) at 551-52, 556.

24. *Id.* at 560-61.

25. *Id.*

26. Both Congress and the executive have treated tribal self-government in Indian Country without any distinctions based on the manner in which lands were set aside. See 18 U.S.C. §§ 1151, 1162 (1988); 25 U.S.C. §§ 450-450n, 461-479, 1301-1326 (1988); 28 U.S.C. § 1360 (1988).

ment by the tribes.²⁷ From this principle several closely related canons of construction have evolved governing the interpretation of federal laws and treaties respecting Indian matters. Treaties and other bilateral agreements are to be interpreted as the Indians would have understood them.²⁸ Ambiguities or doubts about the meaning of statutory or treaty provisions are to be resolved in the Indians' favor.²⁹ Treaties and federal Indian statutes are to be interpreted in favor of retained tribal self-government as opposed to competing federal or state authority.³⁰ Federal Indian laws are to be interpreted liberally so as to effectuate their protective purpose.³¹

A fifth principle, not specifically articulated by Marshall, was developed in later cases: the reservation to tribes of federally protected territory is intended for the Indians' economic self-support as well as their continued self-government. The fish, game, timber, minerals, waters, and other resources are implicitly reserved with the land itself to provide a productive economic base for the Indians.³²

From the Cherokee Cases evolved perhaps the most basic principle of federal Indian law: those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers

27. *Worcester*, 31 U.S. (6 Pet.) at 551-52, 555-56, 560-62, 582.

28. *Id.* at 515, 551-54. See also *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970); *United States v. Winans*, 198 U.S. 371, 380 (1905); *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

29. See *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174-76 (1973); *Squire v. Capoean*, 351 U.S. 1, 6-7 (1956); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Winters v. United States*, 207 U.S. 564, 576-77 (1908).

30. *Washington v. Confederated Bands and Tribes of the Yakima Nation*, 439 U.S. 463, 484 (1979); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-72 (1978); *Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1976); *McClanahan*, 411 U.S. at 174-75; *United States v. Quiver*, 241 U.S. 602, 604-06 (1916); *Ex parte Crow Dog*, 109 U.S. 556, 571-72 (1883).

31. *Antoine*, 420 U.S. at 200; *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930); *Smith v. McCullough*, 270 U.S. 456, 463-65 (1926).

32. The Court in *Worcester* emphasized the Indians have "full right" to their lands. *Worcester*, 31 U.S. (6 Pet.) at 560-61. In *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835), the Court stated that the Indians' "right of occupancy is considered as sacred as the fee simple of the whites." *Id.* at 746. Later cases of importance include *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *United States v. Shoshone Tribe*, 304 U.S. 111 (1938); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918); *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Winans*, 198 U.S. 371 (1905).

of a limited sovereignty which has never been extinguished.³³ The Supreme Court has held that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."³⁴ This principle guides determinations of the scope of tribal authority. Today, the tradition of tribal sovereignty furnishes the backdrop against which all federal Indian laws are to be read.³⁵

II. Indian Country

The Supreme Court has repeatedly emphasized that there is a significant geographic component to tribal sovereignty.³⁶ Indian tribes have long been held to have "attributes of sovereignty over both their members and their territory."³⁷ Conversely, "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state laws otherwise applicable to all citizens of the State."³⁸

While most people are familiar with the term "Indian reservation," for most jurisdictional purposes, the operative legal term is "Indian Country." "Indian Country" is defined in 18 U.S.C. § 1151 as

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (b) all dependent Indian communities within the borders [sic] of the United States whether within or without the limits of a State, and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.³⁹

Although the definition of "Indian Country" appears in the section of the United States Code governing federal criminal laws

33. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); 55 Interior Dec. 14, 20-30 (and cases cited therein) (1934).

34. *Wheeler*, 435 U.S. at 323; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-09 (1978). See also 55 Interior Dec. 14, 20-30 (and cases cited therein) (1934).

35. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172-73 (1973).

36. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-45 (1980).

37. *Bracker*, 448 U.S. at 142; *United States v. Mazurie*, 419 U.S. 544, 557 (1975). See also *Wheeler*, 435 U.S. at 323; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978).

38. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

39. 18 U.S.C. § 1151 (1988).

applicable to Indian Country, the Supreme Court has stated that the statute's definition generally applies also to questions of civil jurisdiction.⁴⁰

While the "Indian Country" statute appears to be straightforward, there have been numerous actions focusing on whether specific conduct occurred on land subject to federal, state, or tribal jurisdiction.⁴¹

III. Tribal Sovereign Immunity

A. In State or Federal Court

The doctrine of sovereign immunity provides that neither the United States nor any state may be sued without its consent.⁴² The Supreme Court has held that Indian tribes enjoy sovereign immunity from suit in state or federal court, in much the same manner as the United States.⁴³

Tribal sovereign immunity can be waived by Congress,⁴⁴ but such waivers must be clearly expressed⁴⁵ and are to be strictly construed.⁴⁶ Congress has not enacted a broad-based waiver of tribal sovereign immunity like that passed by the United States

40. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). *See also* *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 837-38 (1982); *Bracker*, 448 U.S. at 142-45.

41. *See* *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *United States v. Chavez*, 290 U.S. 357 (1933).

42. *See* *United States v. McLemore*, 45 U.S. (4 How.) 286, 288 (1846) (immunity of the federal government) (finding that a federal circuit court had no jurisdiction to hear an equity action against the United States because "government is not liable to be sued, except with its own consent, given by law."); *Black v. Republic*, 1 Yeates 139 (Pa. 1792) (immunity of the states) (finding that the court lacked jurisdiction over an action against the commonwealth without its consent). The rules established by these, and similar, early cases developed as a tacit assumption rather than as a reasoned doctrine. For a summary of the development of the doctrine of sovereign immunity, see Johnson & Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153 (1987).

43. *E.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172 (1977); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940).

44. *Martinez*, 436 U.S. at 58; *Hamilton v. Nakai*, 453 F.2d 152, 158-59 (9th Cir. 1971), *cert. denied*, 406 U.S. 945 (1972).

45. *Martinez*, 436 U.S. at 58. *See also* *Turner v. United States*, 248 U.S. 354 (1919). *Cf.* *United States v. Testan*, 424 U.S. 392 (1976) (congressional waivers of the United States' immunity may not be broadened by implication); *United States v. King*, 395 U.S. 1 (1969) (same).

46. *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 521 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966).

concerning monetary claims⁴⁷ and the actions of administrative officials.⁴⁸ Those states which have enacted similar laws abandoning their own sovereign immunity must nevertheless honor the tribes' immunity.⁴⁹ Sovereign immunity seems to run with the tribes, not with tribal land, so sovereign immunity may apply even though an incident, such as an alleged tort or contract breach, occurs off-reservation.⁵⁰

Tribal sovereign immunity may not prevent a federal court from hearing a case when the plaintiff requests injunctive or declaratory relief against individual tribal officials who allegedly acted outside the scope of their authority. The rule, an outgrowth of *Ex Parte Young*,⁵¹ which involved federal sovereign immunity, is based upon the concept that a suit against officers engaging in illegal conduct is not a suit against the tribe itself. Thus, in *Puyallup Tribe, Inc. v. Department of Game of Washington*,⁵² the Supreme Court upheld orders against tribal officials in a fishing rights case, holding that "whether or not the tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible."⁵³ However, in the special case of enforcing the provisions of the Indian Civil Rights Act (ICRA),⁵⁴ which imposed some of the restrictions of the Bill of Rights upon the tribes,⁵⁵ the Supreme Court has found that Congress did not intend to create a federal cause of action against tribal

47. See Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1988); Tucker Act, 28 U.S.C. §§ 1346, 1491 (1988).

48. See Administrative Procedure Act, 5 U.S.C. §§ 702, 703 (1988).

49. See *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 428, 443 P.2d 421, 424 (1968).

50. *Id.*

51. 209 U.S. 123 (1908).

52. 433 U.S. 165 (1977).

53. *Id.* at 171.

54. 25 U.S.C. §§ 1301-1303 (1988).

55. The ICRA differs from the Bill of Rights because it does not include a provision comparable to the establishment clause of the first amendment. See 25 U.S.C. § 1302(1) (1988). Nor does it provide a right to a grand jury indictment or counsel except at the defendant's own expense. See *id.* § 1302(6). Only a six-person grand jury is required. See *id.* § 1302(10). Criminal penalties imposed by tribal courts are limited to confinement for one year and a five thousand dollar fine. See *id.* § 1302(7).

Even where the "Indian bill of rights" contains language similar to that of the Bill of Rights, the protections afforded by the ICRA are not necessarily coextensive with the rights guaranteed by the latter. See *Stands Over Bull v. Bureau of Indian Affairs*, 442 F. Supp. 360, 367 (D. Mont. 1977), *appeal dismissed*, 578 F.2d 799, 799-800 (9th Cir. 1978); *Janis v. Wilson*, 385 F. Supp. 1143, 1150 (D.S.D. 1974), *remanded on other grounds*, 521 F.2d 724, 729-30 (8th Cir. 1975).

officials. An exception to that principle is the writ of habeas corpus testing the validity of the detention of any person in a tribe's custody.⁵⁶

One question that has not been directly addressed by the Supreme Court is whether congressional approval is required to support a tribe's waiver of its sovereign immunity in federal or state court. In *United States v. United States Fidelity & Guaranty Co.*,⁵⁷ the Court wrote only in terms of congressional action. In *Puyallup Tribe*⁵⁸ the Court referred loosely to either tribal or congressional consent. In *Santa Clara Pueblo v. Martinez*,⁵⁹ the Court seemed to require an "unequivocal expression" by Congress. Later, in holding that North Dakota could not condition a tribe's right to sue on the tribe's waiver of all sovereign immunity, the Court did not question the fact that the tribe had the power to waive its immunity.⁶⁰ Lower courts have now accepted the view that a tribe can waive its immunity if the tribe does so unequivocally.⁶¹

The Supreme Court has recognized the general right of tribes to sue in state and federal courts without the presence of the United States as a party.⁶² By bringing an action in court, a tribe necessarily consents to a full adjudication of the claim sued upon⁶³ and to claims of recoupment or set-off that arise from the transaction in controversy and do not exceed the tribe's claim.⁶⁴ However, by bringing an action, the tribe does not waive its immunity from counterclaims, even "compulsory" ones.⁶⁵

Tribes cannot waive their sovereign immunity in matters affecting trust property without secretarial or congressional approval.⁶⁶ Similarly, restricted property cannot be taken to satisfy a judgment without congressional authority.⁶⁷

56. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 67 (1978).

57. 309 U.S. 506 (1940).

58. 433 U.S. 165 (1977).

59. 436 U.S. 459 (1978).

60. *Three Affiliated Tribes of the Fort Berthold Indian Reservation v. Wold Eng'g*, 476 U.S. 877 (1986).

61. See *Weeks Constr. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd on other grounds*, 455 U.S. 130 (1982); *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977).

62. See *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370-71 (1968); *Creek Nation v. United States*, 318 U.S. 629, 640 (1943).

63. See *United States v. Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981).

64. See *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1343-46 (10th Cir. 1982).

65. See *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 773-74 (D.C. Cir. 1986); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1343-46 (10th Cir. 1982).

66. 25 U.S.C. § 81 (1988).

67. See *Heckman v. United States*, 224 U.S. 413, 440-42 (1912).

B. In Tribal Court

Congress limited the power of tribal governments in 1968 when Congress enacted the ICRA.⁶⁸ The ICRA applies some of the provisions of the Bill of Rights to Indian tribes, including the equal protection and due process clauses.⁶⁹ The Supreme Court has held that the ICRA does not waive a tribe's immunity as to federal civil actions for injunctive or declaratory relief to redress violations of the Act, except in habeas corpus actions.⁷⁰ After *Martinez*, the principal forum available to a party aggrieved by tribal government action is tribal court.

As sovereign governments, tribes may adopt or reject sovereign immunity or may create waivers to immunity as to actions filed in tribal court. No federal law requires a particular result. The choice is up to each tribe.

Some tribes have chosen to address sovereign immunity in tribal constitutions,⁷¹ while others have dealt with sovereign immunity in legislation.⁷² Still other tribes have left the immunity issue to their courts. Tribal courts tend to apply the doctrine of sovereign immunity as provided by the tribal code⁷³ or as an

68. Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (codified at 25 U.S.C. §§ 1301-1341 (1988)).

69. See *supra* note 55 and accompanying text.

70. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 61 (1978).

71. E.g., MENOMINEE CONST. art. XVIII, § 1 ("[t]he Tribal Legislature shall not waive or limit the right of the Menominee Indian Tribe to be immune from suit except as authorized by this Article and by Article XII of this Constitution").

72. E.g., NAVAJO TRIB. CODE tit. 7, § 257 (Supp. 1984-1985) (prohibiting the district courts of the Navajo Nation from exercising jurisdiction over any action against the Navajo Nation without its express consent); NAVAJO TRIB. CODE tit. 1, §§ 354-355 (Supp. 1984-1985) (waiving the sovereign immunity of the Navajo Nation under certain circumstances). See also *Cudmore v. Cheyenne River Sioux Tribal Council*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6004, 6005 (Cheyenne River Sioux Tribal Ct. 1981) (finding a waiver of immunity in a code section providing that "no security shall be required of . . . [the] Tribe, or of its officers or agency" when a restraining order is issued against it. The court said this language waived immunity in injunction actions because such a clause would otherwise be unnecessary.).

73. See *George v. Colville Tribes Business Council*, CV-84-402 (Colville Tribal Ct. 1984); *Stone v. Somday*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6039 (Colville Tribal Ct. 1983); *Miller v. Adams*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6034 (Intertribal Ct. App. 1982); *Cudmore v. Cheyenne River Sioux Tribal Council*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6004 (Cheyenne River Sioux Tribal Ct. 1981); *Chapoose v. Uintah & Ouray Tribal Business Comm.*, Civ. No. 133-177 (Ute Indian Tribes of Uintah & Ouray Reservation Tribal App. Ct., *opinion on reh'g* Nov. 23, 1981); *Burnette v. Rosebud Sioux Tribe*, 1 Tribal Ct. Rep. A-51 (Rosebud Sioux Tribal Ct. 1978).

interpretation of common law.⁷⁴ At least one tribal court has rejected the doctrine of sovereign immunity as a defense.⁷⁵ Most tribal courts have found that the ICRA waives the tribe's immunity from suit as to actions in tribal court alleging a violation of the Act.⁷⁶

Where a tribal code is silent as to the issue of sovereign immunity, a waiver may be found in other tribal documents. At least two tribal courts have found waivers of sovereign immunity in the tribes' personnel manuals.⁷⁷ Another tribal court found a waiver of sovereign immunity in an insurance policy.⁷⁸

As to suits against tribal officials, most tribal courts that rely on the common law, as opposed to a tribal code provision,

74. See *Garman v. Fort Belknap Community Council*, 11 Indian L. Rep. (Am. Indian Law. Training Program) 6017 (Ft. Belknap Tribal Ct. 1984); *Satiacum v. Sterud*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6013 (Puyallup Tribal Ct. 1982); *Holy Rock v. Tribal Election Bd.*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6009 (Oglala Sioux Tribal Ct. 1982); *Grant v. Grievance Comm. of Sac & Fox*, 2 Tribal Ct. Rep. A-39 (Sac & Fox Tribal Ct. 1981); *Kiowa Business Comm. v. Ware*, 2 Tribal Ct. Rep. A-45 (Kiowa Tribal Ct. of Indian Off. 1980); *Halona v. MacDonald*, 2 Tribal Ct. Rep. A-70 (Navajo Sup. Ct. 1978).

75. *O'Brien v. Fort Mojave Tribe*, 11 Indian L. Rep. (Am. Indian Law. Training Program) 6001, 6002 (Ft. Mojave Tribal Ct. 1983). Plaintiff sued the tribe and tribal chairperson for back pay allegedly due him because of wrongful discharge from tribal employment. The defendants' motions to dismiss on grounds of sovereign immunity were denied. After reviewing the early English and American history of the sovereign immunity doctrine, the court concluded that the doctrine was not appropriate for the Fort Mojave Tribe, saying "the court rejects the adoption of sovereign immunity as an affirmative defense and holds that the full range of court authority be available to afford relief against tribal officials whose actions contravene the legal rights of plaintiff." *Id.*

76. See generally *Gonzales v. Allen*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6048, 6049 (Shoshone-Bannock Tribal Ct. 1989) (tribal immunity is not a bar to equitable relief against the tribal government, although it is a bar to money damages in ICRA actions); *Butler v. Siletz Tribal Council*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6044, 6045 (Siletz Tribal Ct. 1989) (there is no tribal immunity for ICRA actions filed against the tribe in tribal court as a matter of traditional law embodied in the tribal constitution); *Dupree v. Cheyenne River Hous. Auth.*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6106, 6108 (Cheyenne River Sioux Ct. App. 1988) (finding language in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that "[t]ribal forums are available to vindicate rights created by the ICRA" requires tribal courts to entertain causes of action based upon the ICRA); *Oglala Sioux Tribal Personnel Bd. v. Red Shirt*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6052, 6052-53 (Oglala Sioux Tribal Ct. App. 1983) (the ICRA is an implied waiver of sovereign immunity). But see *TBI Contractors, Inc. v. Navajo Tribe*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6017, 6018-19 (Navajo 1988) (the ICRA does not waive the tribe's sovereign immunity).

77. See *Moses v. Joseph*, 2 Tribal Ct. Rep. A-51 (Sauk-Suiattle Tribal Ct. 1980); *Turtle Mountain Band of Chippewa Indians v. Parisien*, 1 Tribal Ct. Rep. A-95 (Turtle Mountain Ct. App. 1979).

78. *Mitchell v. Confederated Salish & Kootenai Tribes* (Flathead Tribal Ct. 1982).

follow the rule summarized by the United States Supreme Court in *Dugan v. Rank*.⁷⁹ In *Dugan* the Court permitted suits against government officials and, "even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void."⁸⁰ Thus, where the tribal court finds that tribal officials have acted within the scope of their constitutional and statutory authority when performing the acts in question, sovereign immunity will bar the suit.⁸¹ However, where injunctive relief is sought and the plaintiff can show, at least for the purpose of surviving a motion to dismiss, that the defendant has acted unconstitutionally, or in violation of the tribal code or the ICRA, tribal courts generally will not bar the suit.⁸² At least one tribal court has held that officials who act in disregard of clear law are accorded no immunity and are subject to monetary damages.⁸³

C. Immunity of Tribal Entities

Tribal immunity cases often center on the provisions of the Indian Reorganization Act of 1934 (IRA).⁸⁴ In passing the IRA, Congress intended to allow the tribes a certain amount of freedom to enter and compete in the private business world.⁸⁵ To resolve the problem that immunity would pose to tribes in obtaining credit, Congress authorized the tribes to organize two separate entities: a political governing body to exercise preexisting powers of self-government pursuant to section 16 of the Act⁸⁶

79. 372 U.S. 609 (1963).

80. *Id.* at 621-22.

81. See *Garman v. Fort Belknap Community Council*, 11 Indian L. Rep. (Am. Indian Law. Training Program) 6017 (Ft. Belknap Tribal Ct. 1984); *Stone v. Somday*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6039 (Colville Tribal Ct. 1983); *Satiacum v. Sterud*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6013 (Puyallup Tribal Ct. 1982).

82. See *Gonzales v. Allen*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6048 (Shoshone-Bannock Tribal Ct. 1989); *Miller v. Adams*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6034 (Intertrib. App. Ct. 1982); *Cudmore v. Cheyenne River Sioux Tribal Council*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6004 (Cheyenne River Sioux Trib. Ct. 1981); *Moses v. Joseph*, 2 Tribal Ct. Rep. A-51 (Sauk-Suiattle Tribal Ct. 1980); *Kiowa Business Comm. v. Ware*, 2 Tribal Ct. Rep. A-45 (Kiowa Tribal Ct. of Indian Off. 1980); *Turtle Mountain Band of Chippewa Indians v. Pairsien*, 1 Tribal Ct. Rep. A-95 (Turtle Mountain Ct. App. 1979); *Halona v. MacDonald*, 1 Tribal Ct. Rep. A-70 (Navajo Ct. App. 1978); *Burnette v. Rosebud Sioux Tribe*, 1 Tribal Ct. Rep. A-51 (Rosebud Sioux Tribal Ct. 1978).

83. *Gonzales v. Allen*, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6048 (Shoshone-Bannock Tribal Ct. 1989).

84. 25 U.S.C. §§ 461-479 (1988).

85. 65 Interior Dec. 483 (1958); see also 25 U.S.C. § 477 (1988); 61 Interior Dec. 8 (1952).

86. 25 U.S.C. § 476 (1988).

and a new tribal corporation to engage in business transactions pursuant to section 17.⁸⁷

Those tribes electing to form section 17 business corporations received charters drafted by the Bureau of Indian Affairs (BIA). These charters often contain a clause authorizing the corporation to sue and be sued.⁸⁸ Some courts have held this language to be a waiver of the immunity of the tribal corporation.⁸⁹ However the waiver is limited to actions involving the business activities of the section 17 corporation.⁹⁰ Complications in determining whether the waiver applies can arise from the fact that many tribes have not clearly separated the activities of their section 16 tribal governments from the section 17 business corporations.⁹¹ Any action against the tribe acting in a governmental capacity is beyond the scope of the section 17 corporation's waiver and should be barred.⁹²

Another issue regarding tribal immunity concerns which entities of the tribe may claim immunity. Corporations created pursuant to section 17 of the IRA are tribal in character — they must be wholly owned by the tribe and are essentially alter egos of the tribal government. However, the immunity of other tribal corporations or authorities is less clear. Like other governments, tribes may also charter corporations not owned or only partially owned by them.⁹³ If the corporation is an arm of the tribal government or a wholly owned corporation chartered by the tribe, the tribe should be able to confer its immunity on the corporation.⁹⁴ When private ownership enters the picture, the

87. *Id.* § 477.

88. *But see* *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421, 424 (1968).

89. *See* *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir.), cert. denied, 385 U.S. 918 (1966); *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127 (D. Alaska 1978); *Martinez v. Southern Ute Tribe*, 150 Colo. 504, 374 P.2d 691 (1962).

90. *See* *Boe v. Fort Belknap Indian Community*, 455 F. Supp. 462 (D. Mont. 1978); *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127 (D. Alaska 1978); *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977). In *Brunette v. Dann*, 571 F. Supp. 1382 (D. Idaho 1976), an action against a tribal court judge, the court refused, without analysis, to dismiss relying on a section 17 "sue and be sued" clause dated 1885. The court did not consider the matters discussed here, and the refusal to dismiss was clearly erroneous.

91. *See* *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 n.13 (1973).

92. F. COHEN, *supra* note 1, at 326.

93. *See* *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 517 F.2d 508 (8th Cir. 1975); *Hickey v. Crow Creek Hous. Auth.*, 379 F. Supp. 1002 (D.S.D. 1973).

94. *See* *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975).

issue is less certain. Immunity may be relevant whether or not the tribe has a majority ownership in the entity or if it serves a particular tribal governmental purpose.⁹⁵

IV. Preemption of State Laws in Indian Country

A. Supremacy Clause Analysis in General

The supremacy clause of the Constitution declares treaties and federal statutes to be "the supreme law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding."⁹⁶ Preemption problems arise under the supremacy clause whenever a state law is asserted to be unenforceable because it is contrary to a federal law. This problem occurs when the state commands conduct which federal law forbids, or when the federal government forbids state regulation of a field of activity subject to federal supervision. The Supreme Court has heard a number of cases in diverse fields⁹⁷ wherein a state law has been challenged as being in conflict with federal law and, therefore, invalid under the supremacy clause.

The Supreme Court's approach to supremacy clause problems differs by subject matter. Nevertheless, in all areas, the Court pays particular respect to the judicial and legislative traditions and precedents of the field under review.⁹⁸

B. Supremacy Clause Analysis in Indian Law Cases

Early in our nation's history, the effect of state laws in Indian Country was addressed by the Supreme Court in *Worcester v. Georgia*.⁹⁹ Under Georgia law any non-Indian who wished to reside in the Cherokee territory was required to obtain a license from the governor of Georgia. Non-Indian missionaries were convicted by Georgia courts for failure to obtain a state license.

95. Cf. *Department of Employment v. United States*, 385 U.S. 355 (1966) (holding the Red Cross to be a federal instrumentality not subject to state unemployment taxation).

96. U.S. CONST. art. VI, cl. 2.

97. See *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971) (labor law); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (maritime law); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (agricultural marketing); *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285 (1963) (government procurement); *United States v. Boyd*, 378 U.S. 39 (1964) (state taxation of federal contractors).

98. See Hirsch, *Toward a View of Federal Preemption*, 1972 U. ILL. L.F. 515. See also F. COHEN, *supra* note 1, at 271-72 (and sources cited therein).

99. 31 U.S. (6 Pet.) 515 (1832).

The Supreme Court reversed the missionaries' convictions under state law.¹⁰⁰ In an opinion written by Chief Justice John Marshall, the Court held that Indian reservations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed [sic] by the United States."¹⁰¹ It follows from this concept of Indian tribes as separate, although dependent, nations that "the laws of [a state] can have no force" within reservation boundaries.¹⁰²

For more than a century the Court relied upon tribes' sovereignty to invalidate attempts by the states to encroach upon tribal prerogatives.¹⁰³ However, in the early 1970s, the Court departed from the conceptual clarity of the *Worcester* decision and began to acknowledge certain limitations on tribal jurisdiction, even within Indian Country. In *McClanahan v. Arizona State Tax Commission*,¹⁰⁴ an enrolled member and domiciliary of the Navajo Nation sued for a refund of state income taxes withheld on income she earned on the reservation. The Court did not solely rely on the Indian sovereignty doctrine to resolve the case. Rather, the Court found the tribal sovereignty doctrine relevant

not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that "[t]he relation of the Indian tribes

100. *Id.* at 562-63.

101. *Id.* at 557.

102. *Id.* at 561, quoted in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973).

103. See *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866) (rejecting state efforts to impose a land tax on reservation Indians on the ground that Tribes are a "people distinct from others" . . . separated from the jurisdiction of Kansas"). The Court relied upon the non-repudiated "federal instrumentality" doctrine to invalidate the application of some state taxes to Indians at the turn of the century. *Id.* at 755. See also *Leahy v. State Treasurer of Okla.*, 297 U.S. 420 (1936); *United States v. Rickert*, 188 U.S. 432 (1903). Cf. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943) (limiting the doctrine sharply with respect to Indians).

104. 411 U.S. 164 (1973).

living within the borders of the United States . . . [is] an anomalous one and of a complex character They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."¹⁰⁵

With those principles to guide it, the Court concluded that the treaty provision setting certain lands apart for the exclusive use and occupancy of Navajos, together with the Tribe's right to exclude non-Indians from the reservation, as well as provisions of the Arizona Enabling Act disclaiming jurisdiction, precluded the extension of state law, including state tax law, to reservation Indians.¹⁰⁶

The most significant factor setting federal Indian law apart from supremacy clause law in other fields is the role of tribes as distinct political sovereigns in our federal system.¹⁰⁷ Treaties and executive orders establishing reservations and federal statutes affecting tribes have been construed consistently as reserving the right of self-government to the tribes.¹⁰⁸ The Supreme Court has held that this "tradition of sovereignty" is the "backdrop" against which state incursions into Indian Country must be judged.¹⁰⁹ As a result, the standards of preemption¹¹⁰ applied in other areas are not applicable to federal laws affecting tribes or reservations.¹¹¹

105. *Id.* at 172-73 (citations omitted).

106. *Id.* at 174-75.

107. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

108. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206-07 (1978); *Cherokee Nation*, 30 U.S. (5 Pet.) at 17-18.

109. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172-73 (1973). See also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

110. In *Worcester*, the Court held that Georgia's laws were "repugnant" to the Cherokee treaties and federal Indian statutes then in force. *Worcester*, 31 U.S. (6 Pet.) at 561. Modern supremacy clause terminology describes state laws as "preempted" by federal laws or treaties, and the Court now uses this term in Indian cases. See *McClanahan*, 411 U.S. at 172 (the first opinion in which the term "preemption" was used concerning Indians, although the Court did so in describing several prior decisions).

111. See *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982); *Bracker*, 448 U.S. at 143. For a discussion of the development of the preemption doctrine in the field of Indian law, see C. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 87-119 (1987).

Federal preemption of state laws affecting Indian Country is not limited to those situations where Congress has expressly announced an intention to preempt state activity.¹¹² Instead, there are “two independent, but related barriers” to state jurisdiction in Indian Country.¹¹³ First, federal law may preempt state jurisdiction if the state’s law interferes or is incompatible with federal and tribal interests as reflected in federal law. The state’s interest must be sufficient enough to justify assertion of its authority.¹¹⁴ Second, the exercise of state authority may also be barred by inherent tribal sovereignty; that is, if the state law “unlawfully infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.”¹¹⁵

V. *Public Law 280*

A. *Introduction*

Since it is the supremacy clause which defeats the application of state laws to matters to Indian Country,¹¹⁶ Congress can authorize state jurisdiction by superseding, repealing, or amending a preemptive treaty or statute. On occasion, treaties or statutes have terminated federal protection over a tribe and its territory.¹¹⁷ Many treaties and laws have also provided for cession of tribal lands, which may then cease to be Indian Country.¹¹⁸ Congress has also passed a number of specific statutes in particular circumstances. Some statutes apply state legislative standards only, such as the provision that incorporates the applicable state

112. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); *Ramah*, 458 U.S. at 838; *Bracker*, 448 U.S. at 144.

113. *Ramah*, 458 U.S. at 837; *Bracker*, 448 U.S. at 143. A thoughtful analysis of the two barriers, described as subject matter and geographical preemption, is found at C. WILKINSON, *supra* note 111, at 93-119.

114. *Mescalero Apache*, 462 U.S. at 334; *Bracker*, 448 U.S. at 145.

115. The Court has frequently mentioned this “second barrier” to state jurisdiction in Indian Country. *See, e.g., Williams v. Lee*, 358 U.S. 217, 220 (1959); *see also Mescalero Apache*, 462 U.S. at 332; *Bracker*, 448 U.S. at 142; *Washington v. Yakima Indian Nation*, 439 U.S. 463, 502 (1979); *Fisher v. District Court*, 424 U.S. 382, 386 (1976) (*per curiam*); *Kennerly v. District Court*, 400 U.S. 423, 426-27 (1971). However, tribal sovereignty has never been used as the basis for invalidating the application of state law in Indian Country. Instead, the Court has used the “first barrier” to strike down state law on the ground that it interferes or is incompatible with federal and tribal interests. *See Mescalero Apache*, 462 U.S. at 334; *Bracker*, 448 U.S. at 145.

116. *See supra* text accompanying notes 96-115.

117. *E.g., Klamath Termination Act*, 25 U.S.C. §§ 564-564x (1988), *construed in* *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974).

118. *See Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

law to determine heirship, descent, and partition of allotted lands.¹¹⁹ Other federal laws delegate to certain states law enforcement jurisdiction over Indian Country within the state. The most important of these is Public Law 83-280,¹²⁰ enacted in 1953.

Public Law 280 provided for the mandatory transfer to five,¹²¹ and later six,¹²² states of jurisdiction over most criminal and many civil matters arising in Indian Country within the states' borders. The Act also extended to all other states the option of accepting the same jurisdiction.¹²³ Ten of the optional states accepted some degree of jurisdiction over Indian Country.¹²⁴ In

119. 25 U.S.C. § 348 (1988).

120. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1988), 25 U.S.C. §§ 1321-1326 (1988), 28 U.S.C. § 1360 (1988)). For a detailed analysis of the statute, see Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

121. California, Minnesota (except for the Red Lake Reservation), Nebraska, Oregon (except for the Warm Springs Reservation), and Wisconsin (except for the Menominee Reservation).

122. Alaska Territory was added by Act of Aug. 8, 1958, Pub. L. No. 85-615, § 1, 72 Stat. 545 (codified at 18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a) (1988)). The Act was subsequently amended to authorize concurrent criminal jurisdiction over the Annette Islands Reservation by the Metlakatla Indian Community. Act of Nov. 25, 1970, Pub. L. No. 91-523, §§ 1, 2, 84 Stat. 1358 (codified at 18 U.S.C. § 1162(a) (1988)).

123. Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588, 590 (repealed and reenacted 1968) (codified as amended at 25 U.S.C. §§ 1321-1322 (1988)). States that disclaimed jurisdiction over Indian lands in their constitutions as a condition of their admission to statehood were authorized to amend the constitutions or statutes to remove any legal impediments to the assumption of jurisdiction over Indian Country. See 25 U.S.C. § 1324 (1988).

124. Arizona accepted jurisdiction over air and water pollution only. ARIZ. REV. STAT. ANN. § 36-1865 (1986). Florida assumed full Public Law 280 jurisdiction. FLA. STAT. ANN. § 285.16 (West 1975). Idaho accepted jurisdiction over seven subject areas and full Public Law 280 jurisdiction over tribal consent. IDAHO CODE §§ 67-5101 to -5103 (1989). Iowa assumed civil jurisdiction over the Sac and Fox Reservation. IOWA CODE ANN. §§ 1.12-1.14 (West 1989). Iowa had earlier been delegated criminal jurisdiction over the Reservation. See Act of June 30, 1948, ch. 759, 62 Stat. 1161. Montana assumed criminal jurisdiction over the Flathead Reservation. In addition, the governor was empowered to proclaim state criminal or civil jurisdiction at the request of any tribe and with the consent of affected counties. Tribal consent was made revocable within two years of the governor's proclamation. MONT. CODE ANN. §§ 83-801 to -806 (1966). Nevada originally accepted full Public Law 280 jurisdiction, but permitted individual counties to exclude themselves from acceptance of jurisdiction. This was amended in 1971 to require tribal consent. A 1975 amendment provided for retrocession except for those tribes already subject to the Act who consented to continue. NEV. REV. STAT. § 41.430 (1989). Jurisdiction now has been retroceded for most reservations. North Dakota accepted civil jurisdiction only, subject to tribal or individual consent. N.D. CENT. CODE §§ 27-19-01 to -13 (1974 & Supp. 1989). No tribe has consented and individual acceptance has been held invalid under the supremacy clause of the United States Constitution. See *Nelson v. DuBois*, 232 N.W.2d 54 (N.D. 1975). South Dakota assumed jurisdiction only

1968 Public Law 280 was amended to require a majority of a tribe's enrolled members to consent in a special election to a state's assumption of jurisdiction over Indian Country.¹²⁵

*B. Scope of State Civil Jurisdiction
Delegated Under Public Law 280*

Public Law 280 grants states "jurisdiction . . . over civil causes of action" and provides that the "civil laws of [the] State that are of general application" shall have the same force and effect in Indian Country as they have elsewhere in the state.¹²⁶ The Act precludes any state from alienating, encumbering, or taxing trust and restricted Indian property. The act also prohibits the states from applying their regulatory laws "in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto."¹²⁷

over criminal offenses and civil causes of action arising on highways, and conditioned acceptance of full Public Law 280 jurisdiction on federal government reimbursement to the state for the cost of the additional jurisdiction assumed. S.D. CODIFIED LAWS ANN. §§ 1-1-12 to -21 (1985). The state supreme court later held this assumption of jurisdiction invalid. See *In re Hankin's Petition*, 80 S.D. 435, 125 N.W.2d 839, 841-42 (1964). Utah has a post-1968 statute accepting jurisdiction when tribes consent. UTAH CODE ANN. §§ 63-36-9 to 63-36-21 (1989). No tribe has consented. Washington assumed full Public Law 280 jurisdiction over non-Indians and over Indians on nontrust land. Jurisdiction over Indians on trust land is limited to eight subject areas unless a tribe consents to full Public Law 280 jurisdiction. WASH. REV. CODE ANN. §§ 37.12.010 to .070 (1964).

125. 25 U.S.C. § 1326 (1988).

126. *Id.* §§ 1321(a), 1322(a); 28 U.S.C. § 1360(a) (1988). A discussion of the Act's grant of criminal jurisdiction is beyond the scope of this paper and, therefore, is not included.

127. 25 U.S.C. §§ 1321(b), 1322(b) (1988); 28 U.S.C. 1360(b) (1988). Public Law 280 also prohibits states from exercising jurisdiction that would "deprive any Indian or any Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." 25 U.S.C. § 1321(b) (1988). The exception has been held to apply to reservations set aside by executive order. See *Quechan Tribe v. Rowe*, 350 F. Supp. 106, 110-11 (S.D. Cal. 1972), *aff'd in part and remanded*, 531 F.2d 408 (9th Cir. 1976). The Supreme Court has declined an opportunity to provide a definitive identification of the rights protected by "treaty, agreement, or statute." See *Mattz v. Arnett*, 412 U.S. 481, 485 (1973). However, the Ninth Circuit has held that a tribe's exercise of powers under the Indian Reorganization Act, 25 U.S.C. § 476 (1988), is within the exception to Public Law 280. State regulation or control of Indian hunting or fishing would also be contrary to the purpose and language of Public Law 280's exceptions, which were designed to preserve the jurisdictional status quo with regard to those matters. *Rowe*, 531 F.2d at 410-11. But see *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977) (suggesting that in some circumstances states can regulate reservation fishing if necessary for conservation of a species).

Two major areas of controversy have arisen from the language that grants civil jurisdiction in Public Law 280. The first area concerns whether a county or city ordinance qualifies as one of the "civil laws of [the] State that are of general application" and that are to have the same force and effect in Indian Country as they have elsewhere in the state. In *Santa Rosa Band v. Kings County*,¹²⁸ the Ninth Circuit Court of Appeals held that the Act applied only the civil laws of the state itself and did not subject Indian Country to local regulation by a subdivision of the state.¹²⁹ According to the court:

Congress had in mind a distribution of jurisdiction which would make the tribal government over the reservation more or less the equivalent of a county or local government in other areas within the state, empowered, subject to the paramount provisions of state law, to regulate matters of local concern within the area of its jurisdiction.¹³⁰

The Ninth Circuit's decision enables tribal governments in Public Law 280 states to maintain a significant role in matters of local concern.¹³¹

The second area of controversy arising from the grant of civil jurisdiction concerns whether Public Law 280 delegated to the states all civil jurisdiction over "civil causes of action." This language implies that the state acquired only adjudicatory jurisdiction and not the broader power to legislate and regulate in Indian Country. However, the statutory grant also provides that the "civil laws of [the] State . . . shall have the same force and effect within such Indian country . . . as they have elsewhere within that State."¹³² This language suggests that Congress conferred full legislative jurisdiction on Public Law 280 states. The meaning of the statute was hotly contested until the Supreme Court resolved the matter adversely to the states in *Bryan v. Itasca County*.¹³³

Bryan involved an attempt by a Minnesota county to assess a state property tax on an Indian's unrestricted property located on trust land, within an Indian reservation over which the state

128. 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

129. *Id.* at 659-64.

130. *Id.* at 663.

131. F. COHEN, *supra* note 1, at 366.

132. 25 U.S.C. § 1322(a) (1988).

133. 426 U.S. 373 (1976).

had been granted jurisdiction by Public Law 280. The personal property involved was not trust property, and the state argued that it therefore became subject to the general "civil laws" of the state, including its tax laws. Relying upon the Act's legislative history and the canon of construction requiring ambiguities in federal laws to be construed in favor of the Indians,¹³⁴ the Court held that Public Law 280 only authorizes state courts to apply "their rules of decision to decide disputes between Indians and between Indians and other citizens."¹³⁵

The effect of the Court's decision is to confine the civil grant of Public Law 280 to adjudicatory jurisdiction only. The reasoning behind the Court's decision also precludes states from applying their regulatory laws to trust or restricted property in Indian Country—a matter that was presented to the Supreme Court eleven years after *Bryan* was decided.

In *California v. Cabazon Band of Mission Indians*,¹³⁶ two tribes were operating high-stakes bingo and poker games on their reservations under the authority of tribal ordinances. California, a mandatory Public Law 280 state, attempted to enforce its penal laws prohibiting bingo games unless they were conducted by charitable organizations and offered prizes not exceeding \$250 per game. Violations of the state law were punishable as a misdemeanor. Riverside County sought to apply its ordinance forbidding gambling on card games, with exceptions if municipalities licensed the card games. A major issue was whether state and county laws were "criminal laws" applicable to Indian Country under Public Law 280, or were "regulations" excepted from Public Law 280 by the *Bryan* rule.¹³⁷

In ruling for the tribes, the Court adopted the Fifth Circuit's analysis,¹³⁸ distinguishing between criminal/prohibitory and civil/regulatory laws. The Court reasoned:

[I]f the intent of a state law is generally to prohibit conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation.¹³⁹

134. *Id.* at 379.

135. *Id.* at 381.

136. 480 U.S. 202 (1987).

137. *Id.* at 208-10.

138. *See Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. Unit B Oct. 1981), *cert. denied*, 455 U.S. 1020 (1982).

139. *Cabazon*, 480 U.S. at 209.

Applying this analysis, the Court found that since California permitted charitable bingo, its gaming law was regulatory and could not be enforced on the reservations.¹⁴⁰ The Court also concluded that a regulatory law could not be converted into a criminal law subject to application in Indian Country, merely because a violation of the law is made a misdemeanor.¹⁴¹

C. *Assumption of Public Law 280 Jurisdiction*

The unilateral action of a tribal government to confer state jurisdiction over civil causes of action arising on the reservation and involving an Indian defendant is not sufficient to confer jurisdiction on the state.¹⁴² Before the 1967 amendment to the Act, a state must have taken some affirmative legislative act in order to assume jurisdiction over Indian Country.¹⁴³ After 1968 a state must obtain the consent, in a special election, of the Indians over whose reservation(s) the state intends to assume jurisdiction.¹⁴⁴

Additionally, eleven states¹⁴⁵ that were required to disclaim jurisdiction over Indian lands as a condition to their admission to the Union must amend "where necessary" their state constitutions or statutes to remove "any legal impediment" to the assumption of jurisdiction under Public Law 280.¹⁴⁶ Seven "disclaimer" states have enacted laws accepting jurisdiction under Public Law 280 without an amendment to the states' constitu-

140. *Id.* at 210-12.

141. *Id.* at 209.

142. *Kennerly v. District Court*, 400 U.S. 423, 427 (1971).

143. *Id.* In *Kennerly*, the Blackfeet Tribal Council enacted a law in 1967 providing that the tribal court and state court would have concurrent jurisdiction over all actions in which the defendant was a tribal member. However, the state took no affirmative legislative action to assume such jurisdiction. Nevertheless, the state court accepted jurisdiction over an action on a debt arising from the Indian defendants' purchase of food on credit from a grocery store located on the reservation. The Supreme Court held that the unilateral action of the tribal council in enacting the tribal law conferring concurrent jurisdiction on the state was insufficient to vest the state with civil jurisdiction. *Id.* at 429-30.

The 1968 amendment to the Act deleted section 7, which required "affirmative legislative action" by states assuming jurisdiction. See 28 U.S.C. § 1360(a) (1988). Under the present Act, the only federal procedural requirement appears to be for tribal consent by referendum. See 25 U.S.C. §§ 1321, 1322, 1326 (1988).

144. *Kennerly*, 400 U.S. at 429.

145. Alaska, Arizona, Idaho, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wyoming. See F. COHEN, *supra* note 1, at 368 n.175.

146. Act of Aug. 15, 1953, ch. 505, § 6, 67 Stat. 590 (codified as amended at 25 U.S.C. § 1324 (1988)).

tions.¹⁴⁷ In *Washington v. Confederated Bands of the Yakima Indian Nation*,¹⁴⁸ the Supreme Court concluded that federal law does not require amendment of a "disclaimer" state's constitution as a condition to a state's assumption of jurisdiction under Public Law 280. Rather, removal of any state's constitutional "impediment" to assumption of Public Law 280 jurisdiction is solely a question of state law.¹⁴⁹

VI. Tribal Governments in the Modern Era

A. Introduction

Most traditional tribal governing systems were altered as a result of contacts with the European settlers. Disruption of tribal economies, technology introduced by the settlers, and the influences of missionaries and trade contributed to the disappearance or alteration of tribal institutions.

Perhaps the most significant reason for the disruption of traditional tribal systems was that before European contact most tribes lacked centralized authority. Rather, many tribes consisted of small, largely independent bands or villages which united only for a specific purpose, such as war. After contact many tribes united permanently to confront the Europeans.¹⁵⁰ Others were "united" by federal government policy for convenience in treaty making and land cessions,¹⁵¹ and leaders were designated to represent tribes in negotiations. The later policy of leasing tribal land for the exploitation of timber and minerals necessitated a tribal authority to legitimize the leases.¹⁵²

147. These states are Arizona, Idaho, Montana, North Dakota, South Dakota, Utah, and Washington. See F. COHEN, *supra* note 1, at 368 n.177. In response to the North Dakota Supreme Court's decision in *State v. Lohnes*, 69 N.W.2d 508 (N.D. 1955), holding that an amendment was necessary, North Dakota amended its constitution. Act approved June 24, 1958, ch. 430, 1959 N.D. Laws 843-44.

148. 439 U.S. 463 (1979).

149. *Id.* at 478-93.

150. For example, the Cherokees formed a central government patterned after Anglo-American institutions. See R. STRICKLAND, *FIRE AND THE SPIRITS* 62-65 (1975).

151. A prominent example of this policy is the treaties made with the small tribes of the Puget Sound area, where legal designations remain unresolved to this day. See *United States v. Washington*, 384 F. Supp. 312, 354-82 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

152. For example, the Navajo Tribal Council was established by the federal government in 1923 after the discovery of oil within the Navajo Reservation. See D. PARMAN, *THE NAVAJOS AND THE NEW DEAL* 14-17 (1976). The Navajo Nation had previously been composed of many autonomous groups united only for war and in making treaties with the United States. Even the BIA previously had administered Navajo lands as several separate reservations. *Id.* at 6-12.

B. Origins of Modern Tribal Courts

In most cases the decline and suppression of traditional institutions left a vacuum in tribal governing authority. In 1882 the Bureau of Indian Affairs (BIA) initiated the practice of establishing Courts of Indian Offenses on Indian reservations to provide law and order and to undermine the authority of the traditional chiefs.¹⁵³ Because the BIA appointed and paid the judges and police, it exercised significant influence over the system.¹⁵⁴

The Courts of Indian Offenses functioned mostly as instruments of Bureau control until the reforms instituted by BIA Commissioner John Collier and the Indian Reorganization Act of 1934 (IRA).¹⁵⁵ The IRA marked a major turning point in federal Indian policy. It discontinued allotment of tribal lands and encouraged tribes to become self-governing. Largely as a result of the policies encouraged by the IRA, most tribes have now developed their own tribal courts and codes.

Tribes have inherent authority to establish their own dispute resolution systems, including the establishment of courts.¹⁵⁶ The constitutions of tribes organized under the IRA specifically provide authority for tribes to enact ordinances and to establish courts.¹⁵⁷ Most tribes have established their own codes and courts

153. W. HAGAN, *INDIAN POLICE AND JUDGES* 104-25 (1966); F. PRUCHA, *AMERICAN INDIAN POLICY IN CRISIS* 209-11 (1976). In 1900, two-thirds of the reservations had Courts of Indian Offenses. W. HAGAN, *supra*, at 109; F. PRUCHA, *supra*, at 210. By 1928, the number of such courts had dwindled to 30, serving less than half the reservations. See INSTITUTE FOR GOV'T RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* 769 (1928). By 1989, there were only 17 Courts of Indian Offenses. 25 C.F.R. § 11.1 (1989).

154. W. HAGAN, *supra* note 153, at 101-02, 154-57, 179.

155. 25 U.S.C. §§ 461-479 (1988). The IRA encourages tribes to form representative forms of government by authorizing tribal members to adopt a constitution. *Id.* § 476. The IRA requires a referendum to accept its provisions, *id.* § 478, to organize under a constitution, *id.* § 476, and to establish a corporate charter, *id.* § 477. The constitutions and charters that actually were issued uniformly provide for an elected tribal council. F. COHEN, *supra* note 1, at 332 n.7. In 1935, Commissioner Collier published a revised Code of Indian Tribal Offenses for the Courts of Indian Offenses. See 3 Fed. Reg. 952-59 (1938). With minor amendments, the revised code remains in force today. See 25 C.F.R. § 11 (1988).

156. The Five Civilized Tribes (Cherokee, Choctaw, Chickasaw, Creek, and Seminole Nations) established effective courts and codes during the nineteenth century. See R. STRICKLAND, *FIRE AND THE SPIRITS* 53-72 (1975); M. YOUNG, *REDSKINS, RUFFLESHIRTS & REDNECKS* ch. 1 (1961). More recently, non-IRA tribes have established sophisticated tribal courts as a matter of inherent tribal sovereignty. E.g., NAVAJO TRIB. CODE tit. 7, §§ 101-853 (1977 & Supp. 1984-1985).

157. The Code of Tribal Offenses also expressly authorizes tribes to establish tribal courts and codes to supplant the Bureau of Indian Affairs courts and code. See 25 C.F.R. § 11.1(e) (1988).

either pursuant to their inherent authority or their constitutional powers.¹⁵⁸

Most tribes that have tribal courts have developed tribal codes. These tribal codes cover basic civil and criminal matters; many are much more extensive, covering such areas as land use regulation, natural resource development and regulation, environmental regulation, taxation, and other issues. Where a tribal code does not address a particular issue, most tribal codes provide that the tribal court shall apply tribal traditional, common law, federal law, and then state law, in that order.¹⁵⁹

VII. *Personal Jurisdiction*

A. *Tribal Courts and Courts of Indian Offenses*

Many early tribal codes copied the civil jurisdiction provision of the Courts of Indian Offenses,¹⁶⁰ which limited jurisdiction to "suits wherein the defendant is a member of the tribe or tribes within [the courts'] jurisdiction, and of all other suits between members and nonmembers which are brought before the courts by stipulation of both parties."¹⁶¹ On most reservations tribal codes now contain long-arm statutes.¹⁶² In the few instances where a court operates under the jurisdictional limitation of the Courts of Indian Offenses, the only forum for most civil actions arising in Indian Country filed by Indians against non-Indians is state court.¹⁶³

State courts do not have jurisdiction over a civil action arising in Indian Country filed by a non-Indian against an Indian, because the state court's assumption of jurisdiction would interfere "with the right of reservation Indians to make their own laws and be ruled by them."¹⁶⁴ The Supreme Court has held that

158. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 n.7 (1978); NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, *INDIAN COURTS AND THE FUTURE* 42 (D. Getches ed. 1978). By 1989, there were approximately 120 tribal courts and only 17 Courts of Indian Offenses. See 25 C.F.R. § 11.1 (1988).

159. *E.g.*, LAW AND ORDER CODE OF THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION, MONTANA ch. 2, § 2.

160. *E.g.*, LAW AND ORDER CODE OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION (restricting jurisdiction over non-Indian defendants to those cases in which the non-Indian consents to tribal court jurisdiction).

161. 25 C.F.R. § 11.22 (1988).

162. See *infra* text accompanying notes 166-69.

163. Federal courts would provide an alternate forum to state courts in those cases where the parties were citizens of different states and the \$50,000 jurisdictional amount was satisfied. See 28 U.S.C. § 1332 (1988).

164. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

a state court may hear a civil action arising in Indian Country when the action is filed by an Indian against a non-Indian, at least when the tribal court does not have jurisdiction over the action.¹⁶⁵

B. Tribal Long Arm Statutes

Most tribes have departed from the jurisdictional model of the Code of Tribal Offenses and have adopted jurisdictional provisions similar to those of state "long-arm" statutes. These long-arm provisions authorize tribal courts to assert personal jurisdiction over:

1. any person residing, located or present within the reservation;
2. any person who transacts, conducts, or performs any business or activity within the reservation, either in person or by an agent or representative;
3. any person who owns, uses or possesses any property within the reservation; and
4. any person who commits a tortious act or engages in tortious conduct within the reservation.¹⁶⁶

Where tribal court has been empowered to assert jurisdiction over civil actions arising in Indian Country and involving an Indian defendant, a state court's assumption of jurisdiction over such an action is barred as an infringement upon tribal self-government.¹⁶⁷

There is no federal law which expressly limits the personal jurisdiction of tribal courts in civil actions. However, tribal long-arm statutes are subject to the same "minimum contacts" limitations¹⁶⁸ as state long-arm statutes. Any other limitation on the personal jurisdiction of a tribal court is prescribed by tribal law.¹⁶⁹

165. *Three Affiliated Tribes of the Fort Berthold Indian Reservation v. Wold Eng'g*, 467 U.S. 138 (1984). The Court reasoned that the state court's assumption of jurisdiction in a situation where the tribal code prohibited the tribal court from exercising jurisdiction over a non-consenting, non-Indian defendant would not undermine tribal self-government, and was not preempted by incompatible federal law. *Id.* at 147-51.

166. LAW AND ORDER CODE OF THE SHOSHONE AND ARAPAHO TRIBES OF THE WIND RIVER INDIAN RESERVATION, WYOMING tit. I, § 1-2-3; LAW AND ORDER CODE FOR THE UTE INDIAN TRIBE OF THE UTAH AND OURAY RESERVATION, UTAH ch. 2, § 1-2-3.

167. *Williams v. Lee*, 358 U.S. 217 (1959). See *infra* text accompanying notes 173-76.

168. See *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

169. See *supra* text accompanying notes 160-65.

*VIII. Subject Matter Jurisdiction**A. General Civil Litigation*

As with the case of personal jurisdiction, there are no federal limits on the subject matter jurisdiction of tribal courts. Rather, the only limits on a tribal court's subject matter jurisdiction would be prescribed by a tribal code. Most tribal codes are expansive in their grant of subject matter jurisdiction to tribal courts. For example, many tribal codes vest the tribal court with "jurisdiction over all civil causes of action arising on the reservation."¹⁷⁰ Other codes are slightly more restrictive, conferring upon the tribal court jurisdiction to hear all civil causes of action *except* one which

does not involve either the Tribe, its officers, agents, employees, property or enterprises, or a member of the Tribe, or a member of a federally recognized tribe, if some other forum exists for the handling of the matter and if the matter is not one in which the rights of the Tribe or its members may be directly or indirectly affected.¹⁷¹

Even the Courts of Indian Offenses are empowered to hear "all suits wherein the defendant is a member of the tribe or tribes within [the court's] jurisdiction, and of all other suits between members and nonmembers which are brought before the courts by stipulation of both parties."¹⁷²

Where a state has not assumed civil jurisdiction pursuant to Public Law 280, state court jurisdiction over civil actions arising in Indian Country is severely limited. In the landmark case of *Williams v. Lee*,¹⁷³ the Supreme Court held that state courts have no jurisdiction over a breach of contract action filed by a non-Indian against an Indian when the claim arises in Indian Country. The Court found that an assertion of jurisdiction under those circumstances would "infringe on the right of reservation Indians to make their own laws and be governed by them."¹⁷⁴ A state court would have jurisdiction only "where essential tribal rela-

170. *E.g.*, LAW AND ORDER CODE OF THE SHOSHONE AND ARAPAHO TRIBES OF THE WIND RIVER INDIAN RESERVATION, WYOMING tit. I, § 1-2-5.

171. *E.g.*, LAW AND ORDER CODE OF THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, UTAH ch. 2, § 1-2-5.

172. 25 C.F.R. § 11.22 (1988).

173. 358 U.S. 217 (1959).

174. *Id.* at 220.

tions were not involved and where the rights of Indians would not be jeopardized."¹⁷⁵

Since the rule of *Williams* divests state courts of subject matter jurisdiction over claims arising in Indian Country and filed by a non-Indian against an Indian, it follows even more strongly that state courts have no jurisdiction to hear claims arising in Indian Country when both parties are Indians.¹⁷⁶ Moreover, since *Williams* deprives the state courts of subject matter jurisdiction, the parties cannot confer jurisdiction by their consent.

While *Williams* precludes state courts from hearing actions filed by non-Indians against Indians on claims arising in Indian Country, it does *not* prevent the state from accepting jurisdiction over an action filed by an Indian against a non-Indian. Even if the claim arises in Indian Country — at least where the tribal code deprives the tribal court of jurisdiction over the action — the Indian may file in state court. In *Three Affiliated Tribes of the Fort Berthold Indian Reservation v. Wold Engineering*,¹⁷⁷ North Dakota attempted to deny jurisdiction over actions brought by the tribes unless the tribes waived their sovereign immunity and consented to state jurisdiction over all actions arising on the reservation. The Supreme Court held that Public Law 280 precluded the state from denying jurisdiction in that manner.¹⁷⁸ Several state decisions have also guaranteed Indian plaintiffs access to state courts by invoking the equal protection clause.¹⁷⁹

State courts have jurisdiction over suits by non-Indians against non-Indians, even when the claim arises in Indian Country, but only if Indian interests are not affected.¹⁸⁰ State courts also have jurisdiction over suits against Indian defendants that arise outside of Indian Country, such as when an Indian leaves the reservation and enters a commercial transaction to be performed off-reservation.¹⁸¹

B. Exhaustion of Tribal Remedies

The recent Supreme Court cases may affect the power of state courts to hear cases arising in Indian Country, even when they

175. *Id.* at 219-20. See also *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

176. See, e.g., *Fisher v. District Court*, 424 U.S. 382, 386 (1976).

177. 476 U.S. 877 (1986).

178. *Id.* at 884-87.

179. See *Paiz v. Hughes*, 76 N.M. 562, 417 P.2d 51 (1966); *Bonnet v. Seekins*, 126 Mont. 24, 243 P.2d 317 (1952).

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

181. E.g., *Smith Plumbing Co. v. Aetna Casualty & Sur. Co.*, 149 Ariz. 524, 531, 720 P.2d 499, 506 (1986).

have subject matter jurisdiction over such actions. In *National Farmers Union Inc. v. Crow Tribe*,¹⁸² a tribal court had entered a default judgment against a non-Indian defendant in a tort action that arose in Indian Country.¹⁸³ Instead of appearing specially to challenge the tribal court's jurisdiction or filing a motion to set aside the default judgment, the defendant's insurer filed an action in federal court challenging the tribal court's jurisdiction to enter an order against a non-Indian defendant. The Supreme Court acknowledged that whether the tribal court had jurisdiction over a non-Indian defendant in an action arising in Indian Country was justiciable under 28 U.S.C. § 1331. However, rather than resolving the jurisdictional dispute, the Court ruled that a federal court should abstain from deciding the issue until the tribal court determined its own jurisdiction in the first instance. The Court made it clear that *Oliphant v. Suquamish Indian Tribe*,¹⁸⁴ which held that tribes have no criminal jurisdiction over non-Indians, did not control the question of the tribes' civil jurisdiction.¹⁸⁵

Similarly, in *Iowa Mutual Insurance Co. v. LaPlante*,¹⁸⁶ the Court ruled that a federal court should stay its hand in a case over which the court had diversity jurisdiction,¹⁸⁷ in order to permit a tribal court to determine its own jurisdiction over parallel tribal court proceedings against a non-Indian defendant. Again, the Supreme Court did not actually decide whether the tribal court had authority to hear a case against a non-Indian defendant. However, the Court's language suggests that tribal

182. 471 U.S. 845 (1985).

183. The tort occurred on state-owned property within the exterior boundaries of the Crow Indian Reservation. *Id.* at 847.

184. 435 U.S. 191 (1978).

185. *Oliphant*, 471 U.S. at 854.

186. 480 U.S. 9 (1987).

187. For a number of years, it was assumed that federal courts' diversity jurisdiction was more limited in Indian Country than elsewhere. The limitation was thought to arise from the fact that a federal court in a diversity case sat as an alternative to the state courts and applied state law. Therefore, it was believed that the federal court could not entertain any case that the state court could not hear (such as a claim arising in Indian Country and filed against an Indian defendant) even if diversity of citizenship existed and the jurisdictional amount was satisfied. *See, e.g., Hot Oil Serv. Co. v. Hall*, 366 F.2d 295 (9th Cir. 1966); *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966).

The rule was changed in *Iowa Mutual*. In that case, an insurance company sued in a tribal court brought a diversity action in federal court seeking a determination that its policy did not cover the disputed claim. The defendant in the federal action was an Indian, and the Supreme Court assumed that the state courts would have no jurisdiction over the case. Nevertheless, the Court held that the technical requirements of diversity jurisdiction were present. *Iowa Mutual*, 480 U.S. at 13.

courts do have jurisdiction over actions arising in Indian Country and involving a non-Indian defendant: "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 a specific treaty provision or federal statute."¹⁸⁸

These cases suggest that, in order to avoid undue interference with tribal self-government, a state court would be precluded from hearing a case over which it has concurrent jurisdiction if parallel proceedings were pending in tribal court.¹⁸⁹

C. Domestic Relations

1. Divorce

As *Williams v. Lee*¹⁹⁰ suggests, state courts lack jurisdiction to grant a divorce when both parties are Indians domiciled in Indian Country.¹⁹¹ Rather, the tribal court has exclusive jurisdiction.¹⁹² However, when both parties are domiciled outside Indian Country, the state court does have jurisdiction to grant a divorce.¹⁹³ Similarly, when both parties are non-Indians domiciled in Indian Country, the state court has jurisdiction over the divorce action on the ground that such jurisdiction does not infringe upon tribal self-government.

It is far from settled whether state or tribal courts have jurisdiction over divorce actions between Indian and non-Indian spouses domiciled in Indian Country. *Williams* and its progeny suggest that a non-Indian spouse would have to file a petition for divorce in tribal court, while an Indian spouse could file in tribal or state court. However, states have traditionally based divorce jurisdiction on the domicile and status of the plaintiff. The plaintiff's domicile and status remain important even in states that have adopted the Uniform Marriage and Divorce Act, which permits jurisdiction to be based on the domicile of either party. Accordingly, there is a tendency for state courts to accept jurisdiction over a divorce action brought by a non-Indian against

188. *Iowa Mutual*, 480 U.S. at 18 (citations omitted).

189. At least one federal court has applied this rule even where no tribal court action was pending. See *Wellman v. Chevron, Inc.*, 815 F.2d 577 (9th Cir. 1987).

190. 358 U.S. 217 (1959). See *supra* text accompanying notes 173-76.

191. See *In re Marriage of Limpy*, 195 Mont. 314, 636 P.2d 266, 269 (1981); *Whyte v. District Court*, 140 Colo. 334, 346 P.2d 1012, 1015 (1959), *cert. denied*, 363 U.S. 829 (1960).

192. *Id.*

193. *United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975).

an Indian domiciled in Indian Country.¹⁹⁴ However, accepting jurisdiction in this situation clearly infringes on tribal self-government.

2. *Adoption and Child Custody*

In 1978, Congress became concerned that “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies, and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”¹⁹⁵ To reverse “[t]he wholesale separation of Indian children from their families,”¹⁹⁶ Congress enacted the Indian Child Welfare Act of 1978 (ICWA).¹⁹⁷

The purposes of the Act are (1) to protect the best interests of Indian children and (2) to promote the stability and security of Indian tribes and families.¹⁹⁸ To accomplish these goals, Congress established minimum federal standards to govern the removal of Indian children from their families and the placement of Indian children in foster or adoptive homes or institutions.

The minimum federal standards established by the ICWA apply to state court actions if the proceedings:

- (1) involve (i) a foster care placement; (ii) termination of parental rights; or (iii) pre-adoptive or adoptive placement;¹⁹⁹ *and*

194. W. CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* 154 (1988).

195. 25 U.S.C. § 1901(4) (1988); *see also* H.R. REP. NO. 1386, 95th Cong., 2d Sess. 9, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7530, 7531 (reporting that, according to a survey of five States conducted before the ICWA was enacted, Indian children were at least 10 times more likely to be separated from their families as non-Indian children. According to a 16-state survey, 85 percent of Indian children in foster care were living in non-Indian homes and 90 percent of non-relative adoptions of Indian children were made by non-Indians.).

196. H.R. REP. NO. 1386, 95th Cong., 2d Sess. 9, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7530, 7531.

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

198. H.R. REP. NO. 1386, 95th Cong., 2d Sess. 9, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7530, 7530.

199. 25 U.S.C. § 1903(1) (1988). Expressly excluded from the definition of “child custody proceeding,” to which the ICWA applies, are (1) placements based on acts of a child that are essentially criminal in nature; and (2) custody awards in divorce proceedings. *Id.*

The jurisdictional provisions of the ICWA apply whether the “child custody proceeding” is voluntary or involuntary. *See id.* § 1913(a) (requiring a voluntary termination of parental rights or consent to foster care placement to be “executed in writing and recorded before a judge of a court of competent jurisdiction” (emphasis added)). *See also* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 51 n.26 (1989) (finding that a voluntary consent to adoption of reservation-domiciled children was effective only if recorded before a tribal court judge).

(2) concern an "Indian child," i.e., an unmarried minor who is (i) a member of an Indian tribe or (ii) the biological child of a member of an Indian tribe where the child is also eligible for membership in the tribe.²⁰⁰

If the ICWA applies, the Act specifies under what circumstances state courts have jurisdiction.²⁰¹ Other provisions of the ICWA set procedural and substantive safeguards for those child custody proceedings that occur in state court. The procedural safeguards include requirements concerning notice to the child's tribe and appointment of counsel for the child's parents or Indian custodian;²⁰² parental and tribal rights of intervention²⁰³ and petition for invalidation of illegal proceedings;²⁰⁴ procedures governing voluntary consent to termination of parental rights;²⁰⁵ and a full faith and credit obligation in respect to tribal court decisions.²⁰⁶ The substantive safeguards include the applicable standard of proof²⁰⁷ and the preferences which must be followed if the child is placed in foster or adoptive care.²⁰⁸

Generally, state courts have jurisdiction over civil actions involving an Indian who is present outside of Indian Country.²⁰⁹ The general rule does not necessarily pertain, however, when the civil action is a child custody proceeding²¹⁰ involving an Indian

200. 25 U.S.C. § 1903(4) (1988).

201. *Id.* § 1911(a)-(b).

202. *Id.* § 1912(a)-(b).

203. *Id.* § 1911(c). An Indian child's parents, Indian custodian, *see id.* § 1903(6), and tribe have a right to intervene at any point in state court proceedings for the foster care placement of or termination of parental rights to an Indian child. *Id.* § 1911(c).

204. *Id.* § 1914.

205. *Id.* § 1913.

206. *Id.* § 1911(d).

207. *Id.* § 1912(e)-(f). A parents' rights may be terminated only if the evidence, supported by the testimony of qualified expert witnesses, establishes beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damage to the child. *Id.* § 1912(f). An Indian child may not be placed in foster care involuntarily unless there is clear and convincing evidence, supported by the testimony of qualified expert witnesses, that continued custody by the parent is likely to result in serious emotional or physical damage to the child. *Id.* § 1912(e).

208. *Id.* § 1915.

209. *See, e.g.,* *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *Puyallup Tribe, Inc. v. Department of Game*, 391 U.S. 392, 398 (1968); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75-76 (1962); *Tulee v. Washington*, 315 U.S. 681, 683 (1942).

210. *See supra* text accompanying note 199 for a definition of "child custody proceeding."

child.²¹¹ The Indian child's tribe²¹² has exclusive jurisdiction over a child custody proceeding when the child is a ward of the tribal court or "resides or is domiciled within the reservation."²¹³ Section 1911(a) does not apply "where such jurisdiction is otherwise vested in the State by existing Federal law."²¹⁴

Although determining whether a tribe has exclusive jurisdiction over a child custody proceeding depends upon the Indian child's domicile,²¹⁵ the ICWA does not define "domicile." In a recent decision the Supreme Court concluded that, notwithstanding the statute's absence of a definition of domicile, "Congress intended a uniform law of domicile for the ICWA."²¹⁶ The Court further found that, for ICWA purposes, an illegitimate child acquires the domicile of his or her mother²¹⁷ even though:

- (a) the child had never resided on or physically been present at the mother's domicile;²¹⁸ and

211. See *supra* text accompanying note 200 for a definition of "Indian child."

212. The Indian child's tribe is defined as

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

25 U.S.C. § 1903(5) (1988).

213. *Id.* § 1911(a). This provision, granting exclusive jurisdiction over the child custody proceedings involving an Indian child domiciled on the reservation has a strong basis in pre-ICWA case law. See, e.g., *Fisher v. District Court*, 424 U.S. 382, 387-89 (1976) (per curiam) (tribal court has exclusive jurisdiction over adoption proceeding where all parties are tribal members and reservation residents); *Wisconsin Potowatomies v. Houston*, 393 F. Supp. 719, 730-31 (W.D. Mich. 1973) (tribal court has exclusive jurisdiction over custody of Indian children found to be domiciled on reservation); *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228, 237-38 (1975) (same); *In re Adoption of Buehl*, 87 Wash. 2d 649, 555 P.2d 1334, 1341 (1976) (state court lacks jurisdiction over custody of Indian children placed in off-reservation foster care by tribal court order).

214. This proviso refers to Public Law 280. See *supra* text accompanying notes 116-49. The ICWA permits a tribe over whose reservation a state has assumed civil jurisdiction to reassume jurisdiction over child custody proceedings upon petition to the Secretary of the Interior. 25 U.S.C. § 1918 (1988).

215. See *supra* text accompanying note 213.

216. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47 (1989). The case concerned the illegitimate twins of enrolled members of the Mississippi Choctaw Tribe. Both parents were domiciled on the Reservation. The parents had arranged for the children to be born in a hospital 200 miles from the Reservation. Thirteen days after the twins were born, the parents executed a voluntary consent to the children's adoption before a state court judge. Five days later, a non-Indian couple petitioned the state court to adopt the twins. Twelve days later, the state court entered a final decree of adoption. *Id.* at 38.

217. *Id.* at 48-49.

218. *Id.* at 45-49.

- (b) the parents voluntarily consented to the child's adoption;²¹⁹ and
- (c) the child's parents went to great lengths to ensure that the child was born away from the mother's domicile.²²⁰

If a child is not domiciled or residing on the reservation at the time proceedings are initiated, the Act creates concurrent jurisdiction in the state and tribal court.²²¹ However, the ICWA evidences a preference for tribal court jurisdiction by requiring a state court to transfer proceedings for foster care placement or termination of parental rights to tribal court upon the petition of the child's parent(s) or tribe.²²² If the state court receives a petition to transfer a proceeding, it may refuse to transfer the proceeding only if (i) the tribal court declines jurisdiction; (ii) a parent objects to the transfer; or (iii) the state court finds "good cause" not to transfer.²²³

3. *Probate*

State courts have no jurisdiction over the probate of Indian trust property. Such jurisdiction is exclusively federal.²²⁴ Application of *Williams v. Lee*²²⁵ prevents the states from exercising jurisdiction over the probate of non-trust movables of an Indian who died domiciled in Indian Country. State courts do have jurisdiction over the probate of any land located outside of Indian Country and may exercise ancillary jurisdiction over mov-

219. The Court expressly found it "clear that a rule of domicile that would permit individual Indian parents to defeat the ICWA's jurisdictional scheme is inconsistent with what Congress intended." *Id.* at 50.

The Court also found that the parents' consent to termination of their parental rights, recorded before a state court judge, was ineffective on the ground that such consent must be recorded before a "judge of a court of competent jurisdiction." *Id.* at 51 n.26. The Court held that, in the case of reservation-domiciled children, a consent to termination of parental rights was effective only if it was recorded before a tribal court judge. *Id.* at 51.

220. *Id.* at 39.

221. 25 U.S.C. § 1911(b) (1988).

222. *Id.* § 1911(b). As to the preference for tribal court jurisdiction, see *Holyfield*, 490 U.S. at 36.

223. 25 U.S.C. § 1911(b) (1988). When a state court retains jurisdiction over an ICWA proceeding, it must place Indian children in foster or adoptive care according to the preferences specified at *id.* § 1915. See *Holyfield*, 490 U.S. at 40 n.13.

224. See 25 U.S.C. §§ 371-380 (1988). Probate of Indian trust property is administered by the Department of the Interior. *Id.* § 372.

225. 358 U.S. 217 (1959). See *supra* text accompanying notes 173-76.

ables located outside of Indian Country which are part of the estate of an Indian who died domiciled in Indian Country.²²⁶

State courts also have jurisdiction over the non-trust estates of Indians who died domiciled outside Indian Country and over the estates of non-Indians who died domiciled in Indian Country, at least where the heirs are non-Indian. It is unsettled whether state courts have jurisdiction over the probate of a non-Indian who died domiciled in Indian Country with Indian heirs. Arguably, state jurisdiction under those circumstances would interfere with internal tribal affairs.

D. Tribal Water Rights

There are two aspects of civil jurisdiction over the reserved water rights of Indians and Indian tribes: jurisdiction to adjudicate the right and jurisdiction to regulate or administer the right.

1. Adjudicatory Jurisdiction

Adjudicatory jurisdiction in most instances has been vested in state courts by virtue of the Act of July 10, 1952,²²⁷ commonly known as the McCarran Amendment. The McCarran Amendment waived the sovereign immunity of the United States in any suit "for the adjudication of rights to the use of water of a river system or other source."²²⁸ In *United States v. District Court in and for Eagle County*,²²⁹ the Supreme Court held that this waiver applied to federal non-Indian reserved water rights in a state general stream adjudication.²³⁰ Five years later the Court held that the waiver in the McCarran Amendment also applies to adjudications of Indian reserved water rights.²³¹

There are exceptions and limitations on the waiver of immunity found in the McCarran Amendment. In the first place, the waiver only applies to a "general stream adjudication."²³² There is no waiver in state court for suits seeking to adjudicate only federal or Indian reserved water rights.²³³ The Act requires that the rights

226. *Id.* at 222-23.

227. Pub. L. No. 495, 66 Stat. 549 (codified at 43 U.S.C. § 666 (1986)).

228. 43 U.S.C. § 666(a) (1988). The McCarran Amendment also waives the United States' immunity for any suit "for the administration of such rights." *Id.* The extent of that waiver has not been fully litigated or determined. See *infra* text accompanying notes 241-51.

229. 401 U.S. 520 (1971).

230. *Id.* at 524-26.

231. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

232. See *Dugan v. Rank*, 372 U.S. 609 (1963); *In re Snake River Basin Water System*, 764 P.2d 78 (Idaho 1988).

233. See *Metropolitan Water Dist. v. United States*, 830 F.2d 139, 144 (9th Cir. 1987).

of all claimants within the river system be joined for the United States or a tribe to be subject to state court jurisdiction.²³⁴

A federal court forum may be available for adjudication of Indian-reserved water rights. However, there have been very few instances where the United States has filed such federal court actions. Also, the Supreme Court has made it clear that water rights suits brought in federal court are subject to dismissal in favor of concurrent comprehensive state adjudications.²³⁵

A second limitation upon the McCarran Amendment's waiver of immunity is extremely narrow and should not impact very many cases. This concerns the "disclaimer clauses" found in certain state Enabling Acts whereby, as a condition to admission to the Union, the state disclaimed jurisdiction over the Indian reservations within their state's possessive boundaries.²³⁶ The presence of these disclaimers represents a potential state law barrier to adjudication of Indian-reserved water rights. In *Arizona v. San Carlos Apache Tribe*,²³⁷ the Court specifically addressed this potential bar and entered two holdings. First, it held that "whatever limitation the Enabling Acts or federal policy may have originally placed on state court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment."²³⁸ Thus, there is no federal bar to such suit. Second, the Court held that, to the extent a bar to state jurisdiction is based upon a disclaimer within a state constitution, "that is a question of state law over which the state courts have binding authority."²³⁹ In several recent cases, tribes have sought dismissal based upon a state's alleged failure to amend its constitution to eliminate this disclaimer.²⁴⁰ However, none of these cases have been successful.

In summary, the issue of adjudicatory jurisdiction has largely been settled. In cases involving a general stream adjudication, Indian reserved water rights will be adjudicated in state court

(finding that the McCarran amendment "does not authorize private suits to decide priorities between the United States and particular claimants").

234. *Dugan v. Rank*, 372 U.S. 609, 618 (1963).

235. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

236. The states having disclaimers are Alabama, Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. F. COHEN, *supra* note 1, at 368 n.175 (1982). Idaho and Wyoming, which were both admitted to statehood in 1890 without prior enabling acts, nevertheless inserted disclaimers in their state constitutions. See IDAHO CONST. art. 21, § 19; WYOMING CONST. art. 21, § 26.

237. 463 U.S. 545 (1983).

238. *Id.* at 564 (citations and footnote omitted).

239. *Id.* at 561.

240. See, e.g., *In re Rights To Use Water In The Big Horn River*, 750 P.2d 681,

pursuant to the McCarran Amendment unless a related federal court proceeding is well advanced when the state court proceeding is initiated. However, a number of cases, involving less than all of the users in a basin, will be adjudicated in federal court.

2. Regulatory Jurisdiction

A second issue concerns a tribe's jurisdiction to regulate water rights and water use. A tribe's authority to regulate its own members' water usage appears to be unquestioned.²⁴¹ To the extent that the McCarran Amendment allows "administration" by the state of adjudicated rights, the tribes may, however, be subject to "incidental monitoring" by a state engineer.²⁴² That supervision does not sanction actual administration by the state, but only enforcement through the state court system under federal law.²⁴³

A tribe's authority to regulate non-Indians' use of non-tribal water within the exterior boundaries of a reservation is far less settled. The two leading cases from the Ninth Circuit reach different conclusions. In *Confederated Tribes of the Colville Indian Reservation v. Walton*,²⁴⁴ the Ninth Circuit held that state regulation of the particular creek involved was preempted by the creation of the Colville Indian Reservation.²⁴⁵ In so holding, the court emphasized that the creek involved was located entirely within the reservation boundaries and use of water from the creek would have no off-reservation impacts.²⁴⁶

Three years later, the Ninth Circuit reached a different conclusion in *United States v. Anderson*.²⁴⁷ The court held that the state possessed regulatory authority over non-tribal "excess water" used by non-Indians within the water system that runs through the reservation. The court found no preemption of state law since there was no "direct effect on the political integrity, the economic security or the health or welfare of the Tribe."²⁴⁸ The *Walton* decision was distinguished on the basis that the

692-93 (Wyo. 1988) (reprinted at 753 P.2d 76); *United States v. Superior Court*, 144 Ariz. 265, 697 P.2d 658, 669 (1985).

241. See, e.g., *United States v. Adair*, 723 F.2d 1394, 1416 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984); F. COHEN, *supra* note 1, at 604.

242. *In re Big Horn River*, 750 P.2d at 720.

243. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983).

244. 647 F.2d 42 (9th Cir. 1981).

245. *Id.* at 51.

246. *Id.* at 52-53.

247. 736 F.2d 1358 (9th Cir. 1984).

248. *Id.* at 1365.

water system involved there was located totally within the reservation boundaries, whereas in *Anderson* there was an impact to off-reservation water users.

In the future the tribes may have difficulty in establishing regulatory power over non-Indian water users, especially when there may be off-reservation impacts.²⁴⁹ The *Anderson* court applied the test from *Montana v. United States*²⁵⁰ to this issue. In a recent decision, four justices would add a gloss to the *Montana* test, placing an even heavier burden upon tribes to justify regulation of non-Indians on non-tribal land located in Indian Country.²⁵¹

IX. Taxation

A. State Taxation

1. State Taxation of Tribes and Individual Indians in Indian Country

State powers of taxation are severely limited in Indian Country, particularly when Indian interests are affected. It has long been settled that states have no authority to tax Indian trust property, whether that property is held by individuals or the tribe.²⁵² It is equally settled that the states have no power to tax non-trust property held by Indians, when that property is located in Indian Country.²⁵³

Of course, Congress can authorize the states to tax Indian trust and non-trust property located in Indian Country. However, the Court will find the Indians' exemption from state taxes lifted

249. There are often off-reservation impacts since river systems are often hydrologically interconnected. See *id.* at 1366.

250. 450 U.S. 544, 565-66 (1981) (finding that a tribe may regulate the activities of non-Indians who enter consensual relationships with the tribe, or its members, or when the non-Indian's conduct "threatens or has a direct effect on the political integrity, economic security, or health and welfare of the tribe").

251. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 109 S. Ct. 2994, 3008 (1989) ("The impact [of non-Indian conduct on non-Indian land] must be 'demonstrably serious' and must 'imperil' the political integrity, economic security or the health and welfare of the tribe.").

252. See *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866) (state taxation of tribal trust lands); *Squire v. Capoeman*, 351 U.S. 1 (1956) (state taxation of proceeds derived from tribal trust lands).

253. See *Bryan v. Itasca County*, 426 U.S. 373 (1976); *supra* text accompanying notes 133-35.

only when "Congress has made its intention to [authorize state taxation] unmistakably clear."²⁵⁴

In 1924 Congress authorized the states to tax Indians and tribes royalty income from leases of Indian trust lands.²⁵⁵ However, in a later statute the provision authorizing state taxation was omitted.²⁵⁶ In *Montana v. Blackfeet Tribe of Indians*,²⁵⁷ the Supreme Court found that Congress had impliedly rescinded the states' authority to tax Indian royalty interests from trust land.²⁵⁸ Consequently, states may not tax Indian royalties from leases of trust land entered into after 1938.

Recent litigation has focused on whether tribal Indian-owned and individual Indian-owned fee land within a reservation is subject to state property taxes. States argue that Congress authorized state taxation of Indian-owned fee lands through section 6 of the General Allotment Act. Section 6 reads, in pertinent part:

[T]he Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . . : *Provided further*, that until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States.²⁵⁹

In *Confederated Tribes of the Yakima Indian Nation v. Yakima County*,²⁶⁰ the Ninth Circuit ruled in favor of the states,

254. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 179 (1989) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985)); see also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) (stating that the Court has adopted a per se rule prohibiting states from taxing Indian tribes and tribal members within Indian Country absent Congressional authorization) (dictum); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (stating "in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation").

255. Indian Mineral Leasing Act of 1924, 25 U.S.C. § 398 (1988).

256. Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1988).

257. 471 U.S. 759 (1985).

258. *Id.* at 768.

259. 25 U.S.C. § 349 (1988).

260. 893 F.2d 1044 (9th Cir. 1990).

holding that section 6 contains the "unequivocal consent" required to find that Congress authorized state taxation of individual Indian-owned fee land.²⁶¹ The Associate Solicitor, Division of Indian Affairs, Department of the Interior, and Attorneys General of Idaho, North Dakota, and Oregon have reached a different result,²⁶² and the issue is likely to be litigated in other circuits until the Supreme Court finally resolves it.

The Supreme Court held in the landmark decision of *McClanahan v. Arizona State Tax Commission*²⁶³ that states lack the authority to tax the income of Indians earned in Indian Country. Reading the relevant statutes and treaties in light of the history of Indian sovereignty and self-government, the Court ruled that the state's power to tax was preempted by federal law and policy.²⁶⁴ In addition, the Court noted that it was very difficult to see how the state could impose or collect its tax when it lacked civil and criminal adjudicatory jurisdiction over Indians in Indian Country.²⁶⁵

When *McClanahan* and earlier cases restricting state taxation of Indians in Indian Country were decided, it was assumed that the restriction prohibited the states from taxing *any* Indian in Indian Country. However, in 1980 the Supreme Court distinguished between members of the tribe that govern a particular reservation and other Indians not members of that tribe. In *Washington v. Confederated Tribes of the Colville Indian Reservation*,²⁶⁶ the Court authorized the state to impose its cigarette and sales tax on sales made to non-member Indians in Indian Country.²⁶⁷ The Court reasoned:

Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe. We do not so read the Major Crimes Act, . . . which at most provides for federal-court jurisdiction over crimes committed by

261. *Id.* at 1044.

262. See Memorandum from Associate Solicitor, Indian Affairs to Field Solicitor, Twin Cities (April 21, 1989); Memorandum from David G. High, (Idaho) Deputy Attorney General to Paul Adams (March 31, 1982); 1985 N.D. Op. Att'y Gen. 37 (opinion no. 85-12); Letter from (Oregon) Assistant Attorney General Ted E. Barbera to James Manary, Administrator, Assessment & Appraisal Division, Department of Revenue (Mar. 14, 1983).

263. 411 U.S. 164 (1973).

264. See *supra* text accompanying notes 105-07.

265. *McClanahan*, 411 U.S. at 174-75.

266. 447 U.S. 134 (1980).

267. *Id.* at 159.

Indians on another Tribe's reservation. . . Similarly, the mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934 . . . does not demonstrate a congressional intent to exempt such Indians from state taxation.

Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation.²⁶⁸

In *Colville*, the state had a particularly great interest in imposing its sales and cigarette taxes. The state was trying to overcome a "magnet" effect, which was drawing purchasers to Indian Country to buy cigarettes and other goods free of state taxes. The *Colville* ruling may be limited to that situation. If the language quoted above is read expansively, states may have the power to levy taxes on the income and nontrust property of nonmember Indians in Indian Country, as long as those taxes do not interfere with the self-government of the resident tribe.

Since Public Law 280 does not authorize the states to tax Indian owned property located in Indian Country,²⁶⁹ the rules established in the cases discussed above apply throughout Indian Country.

2. State Taxation of Tribes and Individual Indians Outside Indian Country

It is equally settled law that Indians and Indian property located outside Indian Country are "subject to nondiscriminatory state law [including state tax laws]" absent express federal law to the contrary.²⁷⁰ Even an Indian tribe is subject to state taxation as to business activities operated outside of Indian Country.²⁷¹

268. *Id.* at 160-61.

269. *Bryan v. Itasca County*, 426 U.S. 373 (1976) (striking down a state tax levied on a tribal member's personal property located on trust land within a Public Law 280 reservation).

270. *See Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928) (upholding a state tax imposed on off-reservation individual Indian land purchased with the accumulated royalties from an individual Indian's restricted allotted lands).

271. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (upholding nondiscriminatory state gross receipts tax imposed on income earned by a tribal enterprise located outside Indian Country). No instance has been found where a state attempted to tax the governmental activities of a tribe outside Indian Country; it is likely that the federal guardianship of tribes would preclude a tax of that sort. *See* 1980 Iowa Rep. Att'y Gen. 693 (opinion no. 80-5-2).

Where state taxes are applied to Indian activities occurring both on and off a reservation, the incidence of the state tax must be examined to determine whether the state is taxing on- or off-reservation activity.²⁷² When the taxing event occurs on-reservation, a state tax may not be imposed on Indians or Indian property. For example, in *Moe v. Confederated Salish & Kootenai Tribes*,²⁷³ the Supreme Court disallowed a state personal property tax on vehicles owned by reservation Indians although the vehicles were driven outside the reservation.²⁷⁴ The district court had found that the state tax was based on the principal location of the vehicle, not on highway use, and that the state had not sought to tax vehicles, other than those owned by reservation Indians, on the basis of highway use.²⁷⁵

A number of tribes retain federally protected rights to hunt, fish, or gather plants free of state regulation outside Indian Country.²⁷⁶ In *Tulee v. Washington*,²⁷⁷ the Supreme Court reversed the conviction of an Indian for fishing without a license, holding that the treaty right to fish outside the reservation "forecloses the state from charging the Indians a fee . . . [I]t acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve."²⁷⁸ The rationale of *Tulee* appears

272. An Indian residing within a reservation, but earning income off the reservation, can be taxed to the extent of the off-reservation income, provided that the state bases its income tax on place of earning. Similarly, an Indian residing off a reservation, but earning income on the reservation, can be taxed for income earned on the reservation, provided that the state bases its income tax on residence. *Dillon v. Montana*, 451 F. Supp. 168, 173-74 (D. Mont. 1978). However, the state's authority to tax can be preempted as to specific sources of income. See *Squire v. Capoeman*, 351 U.S. 1, 6-9 (1956) (exempting from federal taxation income derived directly from restricted Indian allotments).

273. 425 U.S. 463 (1976).

274. *Id.* at 480-81.

275. *Confederated Salish & Kootenai Tribes v. Montana*, 392 F. Supp. 1325, 1327 (D. Mont. 1975) (three-judge court), *aff'd sub nom. Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

276. *E.g.*, Treaty with the Yakimas, June 9, 1855, 12 Stat. 951, 953 (reserving to the Indians the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory"); Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132, 1133 (reserving "the privilege of hunting . . . on open and unclaimed lands"); Treaty with the Eastern Band of Shoshone and Bannock, July 3, 1868, 15 Stat. 673, 674 (reserving "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and the Indians on the borders of the hunting districts"); Treaty with the Ottawas, Mar. 28, 1836, 7 Stat. 491, 495 (reserving the "right of hunting on the lands, ceded with other usual privileges of occupancy").

277. 315 U.S. 681 (1942).

278. *Id.* at 684-85.

to preclude any direct state taxes on the exercise of treaty reserved or similar rights to hunt, fish, or gather outside Indian Country.²⁷⁹

3. *State Taxation of Non-Indians in Indian Country*

The states have long been authorized to impose their taxes on the property of non-Indians located within Indian Country.²⁸⁰ A state has been allowed to impose a possessory interest tax on non-Indian lessees of Indian trust lands, even though the effect may be to reduce the amount of rental the Indians are able to obtain for their land.²⁸¹ The states may also tax the income of non-Indians earned on an Indian reservation.²⁸²

Despite these general rules, there are important limitations on the authority of states to levy taxes on non-Indians in Indian Country. Primarily, states may not tax when the subject matter is preempted by federal law.

Federal law generally preempts state taxation of non-Indians in Indian Country in one of two circumstances. First, a state tax may be preempted because it interferes with the regulatory activities of the federal government. Second, and more common, a state tax may be preempted because, although imposed on non-Indians, it indirectly affects a tribe in such a manner as to frustrate federal policies of tribal self-determination.

In *Warren Trading Post v. Arizona State Tax Commission*,²⁸³ the Supreme Court held that Arizona could not tax the gross receipts of a non-Indian trader doing business on the Navajo Reservation.²⁸⁴ The Court noted that Indian traders must be licensed by the federal government and are subject to extensive federal regulation. The Court ruled that these regulations governed the business of Indian trading "so fully . . . that no room remains for state laws imposing additional burdens upon traders."²⁸⁵

279. See also *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (tribes have a reserved right to take fish at usual and accustomed places free of state regulation except as necessary for conservation of the fishery).

280. *Thomas v. Gay*, 169 U.S. 264 (1898); *Utah & N. Ry. v. Fisher*, 116 U.S. 28 (1885).

281. See *Fort Mojave Indian Tribe v. County of San Bernardino*, 643 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *Aqua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972).

282. *Kahn v. Arizona State Tax Comm'n*, 16 Ariz. App. 17, 490 P.2d 846 (1971), *appeal dismissed*, 411 U.S. 941 (1973).

283. 380 U.S. 685 (1965).

284. *Id.* at 690.

285. *Id.*

The Court expanded its rule in the case of *Central Machinery v. Arizona State Tax Commission*.²⁸⁶ There, the state sought to impose its gross receipts tax on a non-Indian whose permanent place of business was outside Indian Country and who was not a federally licensed trader. However, the sale was of machinery, which was to be delivered to the tribe in Indian Country, and federal statutes did apply to the sale. The Court found the state taxes were preempted by federal regulations that govern trading with Indians in Indian Country.²⁸⁷

More recently, the Supreme Court has invalidated state taxes imposed on non-Indian contractors engaged in sales or services to tribes in Indian Country. In *White Mountain Apache Tribe v. Bracker*,²⁸⁸ the Court struck down state motor carrier license and fuel use taxes imposed on a non-Indian who had contracted to cut timber on the reservation and deliver it to the tribal sawmill. The Court held the taxes were preempted by extensive regulations that apply to timber operations in Indian Country.²⁸⁹ Similarly, in *Ramah Navajo School Board v. Bureau of Revenue*,²⁹⁰ the Court struck down a gross receipts tax imposed on a non-Indian contractor who had been hired by an Indian school board to build a school on the reservation. In striking down the taxes, the Court noted that comprehensive federal regulations govern Indian education and that the state had abdicated all responsibility for educating the tribe's students.²⁹¹

In each of the preemption cases the Court has clearly established that preemption does not require an express congressional declaration invalidating state taxes. The Court has observed that "[t]he unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law."²⁹² Rather, the Court has stated that traditional notions of tribal sovereignty, as well as federal policies favoring tribal self-development, must inform the preemption analysis. "As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to preempt state activity."²⁹³

286. 448 U.S. 160 (1980).

287. *Id.* at 165-66.

288. 448 U.S. 136 (1980).

289. *Id.* at 151.

290. 458 U.S. 832 (1982).

291. *Id.* at 841-42.

292. *Bracker*, 448 U.S. at 143.

293. 458 U.S. at 838.

The Supreme Court has progressed even further by permitting state taxation of cigarettes that are sold in Indian Country. In *Moe v. Confederated Salish & Kootenai Tribes*,²⁹⁴ the Supreme Court held that a state excise tax could be imposed on cigarette sales by an Indian to a non-Indian in Indian Country when the legal incidence of the tax fell on the non-Indian purchaser.²⁹⁵ The Court also permitted the state to apply its law requiring the Indian seller to collect the tax and remit it to state authorities.

The rule of *Moe* was extended in *Washington v. Confederated Tribes of the Colville Indian Reservation*.²⁹⁶ There, the Court held that sales by a tribal organization to non-Indians and non-member Indians were taxable by the state, but that sales to tribal members were not.²⁹⁷ The state could require the tribal organization to affix state tax stamps to packages of cigarettes and to keep records of exempt and non-exempt sales. None of these provisions were found to interfere with tribal self-government or to be federally preempted, although the tribe imposed its own tax on sales of cigarettes.²⁹⁸ The Court reasoned that:

The principle of tribal self-government . . . seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.²⁹⁹

In upholding the imposition of the state tax on sales to non-Indians, the Court found Washington's interest in preventing the tribe from "marketing [its] tax exemption to nonmembers who do not receive significant tribal services" to be greater than the tribe's interest in raising revenues.³⁰⁰ However, the Court did

294. 425 U.S. 463 (1976).

295. *Id.* at 483.

296. 447 U.S. 134 (1980).

297. *Id.* at 160.

298. *Id.* at 156.

299. *Id.* at 156-57 (citation omitted).

300. *Id.* at 157.

suggest that a state tax stacked upon a tribal tax might be struck down as an interference with tribal self-government if the tribal tax had a regulatory purpose that was hindered by the state tax.³⁰¹

There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other. Although taxes can be used for distributive or regulatory purposes, as well as for raising revenue, we see no nonrevenue purposes to the tribal taxes at issue in these cases³⁰²

Many relied on the language quoted above to predict that the Supreme Court would invalidate state severance taxes that were levied on minerals produced in Indian Country, if those minerals were also subject to a tribal severance tax.³⁰³ Unlike the cigarettes at issue in *Colville*, tribal minerals *are* "value generated on the reservation."³⁰⁴ Similarly, the federal government imposes comprehensive regulations governing Indian mineral production. Nevertheless, when presented with the issue, the Court ruled against the tribes, at least where (1) dual taxation has not hindered the tribe's ability to collect or impose higher taxes; (2) state taxation has not deterred production from tribal lands; (3) the economic burden of the state tax does not fall on the tribe; and (4) the state has not completely abdicated responsibility for on-reservation mineral development.³⁰⁵

B. Tribal Taxation

Although taxation is one of the most basic powers of self-government, tribes have only recently begun to exercise the power. Because of traditional Indian hostility to taxation and the incredibly high incidence of poverty in Indian Country, few tribal taxes are aimed at the member population. Rather, most tribal taxes are directed towards non-Indian businesses conducted in Indian Country.

The Supreme Court has made it clear that the tribes may tax non-Indians. In *Washington v. Confederated Tribes of the Colville Indian Reservation*,³⁰⁶ the Court upheld the imposition of a

301. *Id.*

302. *Id.* at 158.

303. *E.g.*, C. WILKINSON, *supra* note 111, at 98.

304. *Colville*, 447 U.S. at 156-57.

305. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

306. 447 U.S. 134 (1980).

tribal cigarette tax on non-Indian purchasers.³⁰⁷ *Colville* also indicated that a legitimate tribal tax is not preempted by a state tax on the same subject matter: “[E]ven if the State’s interests were implicated by the tribal taxes . . . it must be remembered that tribal sovereignty is dependent on and subordinate to only the Federal Government, not the States.”³⁰⁸

The Court’s broad view of tribal taxing power was confirmed in *Merrion v. Jicarilla Apache Tribe*.³⁰⁹ There, the Court upheld a tribal severance tax applied to non-Indian lessees who mined oil and gas on the reservations.³¹⁰ The lessees had argued that the tribal power to tax was based solely upon the tribe’s right to exclude nonmembers from the reservation, and that the power could not be exercised against lessees whose leases conferred a right of entry.³¹¹ The Supreme Court held that the power of exclusion was sufficiently broad to support the tax, but also rejected the lessees’ limited view of the nature of the tribe’s power to tax. “The power does not derive solely from the Indian tribe’s power to exclude non-Indians from tribal lands. Instead, it derives from the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services.”³¹²

The Jicarilla Apache Tribe’s constitution required the approval of the Secretary of the Interior to adopt a tax.³¹³ However, there is no law requiring secretarial approval in order for a tribal tax to be effective. In *Kerr-McGee Corp. v. Navajo Tribe*,³¹⁴ the Supreme Court ruled that tribes which have no internal requirement of secretarial approval may impose a possessory interest and business activity tax on conduct occurring in Indian Country without involvement of the Department of the Interior.³¹⁵

X. Regulatory Jurisdiction

A. General Regulatory Authority

1. Tribal Regulatory Authority

Tribes have the exclusive authority to regulate Indian and non-Indian conduct occurring on trust land in Indian Country. Tribes

307. *Id.* at 156.

308. *Id.* at 154.

309. 455 U.S. 130 (1982).

310. *Id.* at 137.

311. *Id.* at 137-38.

312. *Id.* at 137.

313. *Id.* at 155.

314. 471 U.S. 195 (1985).

315. *Id.* at 200.

also have the authority to regulate members' conduct off-reservation when important tribal interests are involved. For example, a tribe may regulate off-reservation treaty fishing rights exercised by its members.³¹⁶ In a case arising out of the Navajo-Hopi land dispute, the Navajo Nation was held to have authority to order its members to remove structures they had built on Hopi lands.³¹⁷

The tribes also have substantial authority to regulate non-Indians engaged in activity in Indian Country. In *Montana v. United States*,³¹⁸ the Court proposed two tests to determine when a tribe may retain its authority over the conduct of non-Indians on lands within a reservation. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements."³¹⁹ Second, a tribe "retains inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."³²⁰

2. State Regulatory Authority

The question of state authority to regulate in Indian Country is generally approached in the same manner as questions of state power to tax, i.e., state regulatory power is preempted when it "interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."³²¹ The Supreme Court has held that even when a state has asserted civil jurisdiction over Indian Country under Public Law 280, the state lacks authority to regulate a tribal member's conduct on trust property.³²² The Court suggested that tribal governments were

316. See *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974).

317. *Sidney v. Zah*, 718 F.2d 1453 (9th Cir. 1983).

318. 450 U.S. 544 (1981).

319. *Id.* at 565. This test was used to uphold a tribe's authority to regulate on-reservation repossession of motor vehicles by off-reservation dealers. See *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 592-94 (9th Cir. 1983).

320. 450 U.S. at 566. This test was used to uphold the tribe's authority to regulate non-Indian conduct occurring on fee land within a reservation. See *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982), *cert. denied*, 459 U.S. 967 (1982); *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982). But see *Brendale v. Confederated Tribes of the Yakima Indian Nation*, 492 U.S. 408 (1989); *infra* text accompanying notes 325-26.

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

322. See *Bryan v. Itasca County*, 426 U.S. 373 (1976); *supra* text accompanying notes 126-41.

likely to be destroyed "if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers . . . of state and local governments."³²³ Thus, even in Public Law 280 states, the tribes retain the exclusive authority to regulate conduct on trust land.

Until very recently, it was assumed that the *Montana* tests³²⁴ severely limited the states' power to regulate non-Indian activities occurring in Indian Country. However, in *Brendale v. Confederated Tribes of the Yakima Indian Nation*,³²⁵ the Court upheld the state's authority to zone non-Indian fee land within a reservation in certain circumstances.³²⁶

Brendale concerned the tribe's and Yakima county's attempts to zone two parcels of fee land located within the Yakima Indian Reservation. The tribes' zoning regulations were somewhat more restrictive than the county's, in terms of the parcels usages. One parcel was situated in an area of the reservation that had been "closed" to the public at least since 1972 to protect its wilderness values, which included religious and cultural significance to the tribes. Only three percent of the land in the "closed" area was owned in fee. The second parcel was located near the northern boundary of the reservation, in an area where half the land was owned in fee and half held in trust. The area in which the second parcel was situated had never been closed to the public and was referred to as the "open" area. In three separate opinions, each applying a different analysis,³²⁷ the Court concluded that the

323. *Bryan*, 426 U.S. at 388.

324. See *supra* text accompanying notes 318-20.

325. 492 U.S. 408 (1989).

326. *Id.* at 448.

327. Justice White, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, concluded that tribes lack the inherent authority to zone nonmember fee land. The four would require tribes to pursue state remedies to stop a use which impacts tribal interests and, failing to obtain relief through state administrative procedures, to file an action in federal court to enjoin the non-Indian's use of land. A federal court could enjoin "demonstrably serious" conduct that "imperils" tribal interests. *Id.* at 421-33.

Justice Stevens, joined by Justice O'Connor, concluded that tribes have the inherent authority to regulate non-Indians' conduct within the reservation. However, they found that power to be diminished because tribes cannot deny a non-Indian landowner access to his property. They held that, where large numbers of non-Indians have settled in an area of the reservation, the tribe has lost the power to define the "essential character" of the area and the concomitant power to regulate non-Indian conduct in the area. *Id.* at 438-47.

Justice Blackmun, joined by Justices Brennan and Marshall, determined that tribes possess the inherent power as sovereigns to regulate on-reservation, non-Indian conduct when that conduct threatens or has a direct effect on the tribe's economic security, health and welfare, or political integrity. Since they also conclude that there is no power more

tribes had exclusive authority to regulate land use in the "closed" area, but that the county could regulate uses of fee land in the "open" area.

The opening to state power to regulate conduct in Indian Country created by *Brendale* may widen. States may be able to regulate nonmember Indians to the same extent as they are permitted to regulate non-Indians in Indian Country.³²⁸

B. Hunting, Fishing and Gathering Rights

Probably no issue has generated more conflict between Indians and non-Indians than disputes centering on the tribes' exercise of their treaty-reserved rights to hunt, fish, and gather on, and often off, their reservations.

1. On-Reservation Rights

It is well settled that the establishment of a reservation by treaty, statute, agreement, or executive order includes an implied right of Indians to hunt, fish, and gather on that reservation free of state regulation.³²⁹ The Indians' immunity from state regulation applies even in states that have asserted civil and/or criminal jurisdiction over Indian Country by Public Law 280. That statute provides that it shall not "deprive any Indian or any Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."³³⁰

The tribes have the authority to regulate Indian hunting and fishing on their reservations.³³¹ In addition, under the federal government's plenary power over Indian affairs, the Secretary of the Interior may issue regulations governing Indian hunting and/or fishing, and has done so on a few reservations.³³²

central to maintaining the economic security and health and welfare of a tribe than the power to regulate land use, the three Justices would permit tribes to zone Indian and non-Indian fee land within a reservation under any circumstances. *Id.* at 448-68 (Blackmun, J., concurring).

328. *Washington v. Confederated Tribes*, 447 U.S. 134, 161 (1980) (finding "[f]or most practical purposes [nonmember] Indians stand on the same footing as non-Indians resident on the reservation.").

329. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971).

330. 18 U.S.C. § 1162(b) (1988).

331. *United States v. Jackson*, 600 F.2d 1283 (9th Cir. 1979).

332. See 25 C.F.R. § 241 (1988) (fishing on the Annette Islands Reserve); *id.* § 244 (hunting on the Wind River Indian Reservation); *id.* § 250 (fishing on the Hoopa Valley Reservation).

The tribes also have the authority to regulate hunting and fishing on trust or tribal-owned land within the reservation, at least where the animal or fish resource does not migrate off the reservation.³³³ State laws that are inconsistent with tribal regulations are preempted in these circumstances.³³⁴ The tribes may regulate non-Indian hunting and fishing on non-Indian land within a reservation, only if the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."³³⁵

The implied treaty right to hunt and fish free from state law is not extinguished merely by congressional termination of the trust relationship between a tribe and the federal government. Rather, Congress must clearly indicate an intent to extinguish hunting and fishing rights.³³⁶

2. Off-Reservation Rights

In addition to impliedly reserving the Indians' right to hunt, fish, and gather on a reservation, a treaty may expressly reserve the Indians' right to hunt, fish, and gather off the reservation.³³⁷ Where a treaty reserves the right to fish at "all usual and accustomed places," the state may not interfere with Indians' access to those places,³³⁸ nor may it require a license fee from Indians to fish there. A tribal member who exercises the treaty right to hunt on "open and unclaimed" lands within his tribe's aboriginal territory, but outside of its reservation, or on ceded lands "in common with all other persons" is not subject to state limitations on hunting season.³³⁹

However, the state may impose regulations that are essential to conservation of animal and fish species,³⁴⁰ provided the state can demonstrate that its regulation is a "reasonable and necessary conservation measure, . . . and that its application to the Indians is necessary in the interests of conservation."³⁴¹ Further, the state

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

334. *Id.* at 344.

335. *Montana v. United States*, 450 U.S. 544, 566 (1981).

336. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *United States v. Felter*, 752 F.2d 1505 (10th Cir. 1985). Congress abrogated the treaty right to hunt eagles through enactment of the Eagle Protection Act, 16 U.S.C. § 668(a) (1988). *See also* *United States v. Dion*, 476 U.S. 734 (1986).

337. *United States v. Winans*, 198 U.S. 371 (1905).

338. *Id.* at 381-82.

339. *Antoine v. Washington*, 420 U.S. 194, 206 (1975); *State v. Sasso*, 172 Mont. 242, 563 P.2d 562, 564-65 (1977).

340. *Puyallup Tribe v. Department of Game (Puyallup I)*, 391 U.S. 392, 398 (1968).

341. *Antoine v. Washington*, 420 U.S. 194, 207 (1975) (emphasis in original).

regulations must not discriminate against Indian fishing or hunting.³⁴²

Where a tribe cedes title to lands without indicating an intent to retain hunting and fishing rights there, the state may regulate Indians on the ceded lands.³⁴³ Of course, absent treaty rights, Indians outside of Indian Country are subject to the same state laws as any other hunter, fisher, or gatherer.³⁴⁴

C. *Liquor Regulation*

Control of liquor has historically been one of the most comprehensive federal activities in Indian affairs. However, under 18 U.S.C. § 1161, liquor transactions in Indian Country are no longer subject to federal prohibitions "provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction."³⁴⁵

In *United States v. Mazurie*,³⁴⁶ the Supreme Court sustained the conviction of two non-Indians who sold liquor in Indian Country without the tribal permission required by section 1161.³⁴⁷ In *Rice v. Rehner*,³⁴⁸ the Court held that a state could require a state license from a tribal member who sold liquor on-reservation pursuant to a license issued from the tribe. The Court's rationale was based in part upon section 1161.³⁴⁹ The *Mazurie* and *Rice* decisions reflect that if a tribe permits the sale of liquor in Indian Country, the tribe's regulations governing such sales must be at least as restrictive as the state's laws and a tribal licensee must also comply with state licensing laws.

D. *Gaming Regulation*

The Court's decision in *Rice* has not been extended to permit state regulation of other nontraditional activities now conducted

342. *Puyallup I*, 391 U.S. at 398. See also *Department of Game v. Puyallup Tribe, Inc.*, 414 U.S. 44 (1973) (finding that limiting steelhead fishing to hook-and-line had the effect of granting the entire run to non-Indian sports fishermen, in violation of the non-discriminatory standard specified in *Puyallup II*).

343. *Oregon Dep't of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753 (1985).

344. *But see Frank v. State*, 604 P.2d 1068, 1074 (Alaska 1979) (the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1988), prohibits the state from prosecuting an Indian for taking a moose out of season when the moose is central to an Indian funeral potlatch).

345. 18 U.S.C. § 1161 (1988).

346. 419 U.S. 544 (1975).

347. *Id.* at 553.

348. 463 U.S. 713 (1983).

349. *Id.* at 733-34.

or licensed by tribes. In *California v. Cabazon Band of Mission Indians*,³⁵⁰ the Court held that the state was preempted from applying its regulatory gaming laws to Indian Country.³⁵¹ Although it rejected any *per se* rule that state law could not apply to tribal operations, the Court held that federal and tribal interests in tribal self-government and self-sufficiency outweighed any state interest in discouraging organized crime.³⁵² Tribal regulations governing gaming activities in Indian Country must now comply with the Federal Indian Gaming Regulatory Act.³⁵³

E. Federal Environmental Laws

During the 1960s and 1970s, Congress enacted a number of laws designed to preserve and improve the natural environment. Often, states were given authority to implement the federal environmental statutes. While many of the early federal acts granted tribes the status of "municipalities," the laws overlooked the possibility that tribes would resist state attempts to regulate the environment in Indian Country and would, instead, seek to assert their own sovereign authority over reservation lands.

As tribes increasingly asserted governmental authority over Indian Country, disputes predictably arose concerning the power of states to impose their regulations, designed to implement federal environmental law, in Indian Country. Congress responded to these disputes with amendments that provide the tribes with the opportunity to assume a role in implementing federal environmental laws in Indian Country that is comparable to the states' role outside Indian Country.

*1. Safe Drinking Water Act*³⁵⁴

Enacted in 1974, the Safe Drinking Water Act (SDWA) established a federal regulatory system to ensure the safety of public drinking water systems.³⁵⁵ Under the Act the Environmental Protection Agency (EPA) sets maximum permissible levels for contaminants in drinking water.³⁵⁶ The states are designated as having primary enforcement responsibility for ensuring that public water

350. 480 U.S. 202 (1987).

351. For a discussion of the distinction the Court drew between criminal laws prohibiting certain conduct, and civil laws regulating conduct, see *supra* text accompanying notes 139-41.

352. *Cabazon*, 480 U.S. at 220-22.

353. 25 U.S.C. §§ 2701-2721 (1988).

354. 42 U.S.C. §§ 300f-300j-11 (1988).

355. *Id.* § 300f(4).

356. *Id.* § 300g-5.

systems meet or exceed the standards established by EPA.³⁵⁷ In addition, each state must establish an EPA-approved underground injection control (UIC) program, designed to prevent the endangerment of underground drinking water sources.³⁵⁸ The UIC program regulations set injection well specifications and regulate radioactive and hazardous waste disposal wells, industrial and municipal wells within one-quarter mile of an underground drinking water source, oil and natural gas recovery wells, and wells for the extraction of minerals and geothermal energy.³⁵⁹

In 1986 Congress amended the SDWA to allow tribes to be treated as states for SDWA programs.³⁶⁰ The EPA is authorized to delegate to tribes primary enforcement responsibility for public water systems and for underground injection control programs in Indian Country.³⁶¹ However, the programs operated by the tribes may not be "less protective of the health of persons" than the programs operated by a state.³⁶²

2. *Federal Water Pollution Control Act*³⁶³

Despite the federal government's traditional interest in protecting navigation before World War II, the federal government's role in water pollution control was limited to special problems, such as refuse discharged into navigable waters and oil spills.³⁶⁴ Beginning with the Federal Water Pollution Control Act of 1948, the federal government's role gradually expanded. In 1965 the Water Quality Act³⁶⁵ required all states to enact water quality standards for interstate navigable waters and provided for a cumbersome enforcement process in which judicial action was a last resort.

In 1972 Congress concluded that the water quality approach embodied in the Water Quality Act was not working. When enacting the Clean Water Act of 1972 (CWA), Congress departed

357. *Id.* § 300g-2.

358. *Id.* § 300h.

359. 40 C.F.R. § 122.32 (1988).

360. 42 U.S.C. § 300j-11 (1988).

361. *Id.*

362. *Id.* § 300j-11(b)(2).

363. 33 U.S.C. §§ 1251-1387 (1988) (commonly referred to as the Clean Water Act).

364. *See, e.g., id.* § 407 (prohibiting the discharge of "any refuse matter of any kind or description whatever, other than that flowing from streets and sewers and passing therefrom in a liquid state" without a permit from the Secretary of the Army); *United States v. Standard Oil Co.*, 384 U.S. 224, 226-29 (1966) (refuse includes valuable substances as well as valueless substances discharged into navigable waters even when navigable capacity is not threatened).

365. Act of Oct. 2, 1965, Pub. L. No. 89-234, 79 Stat. 903.

from earlier legislation by giving the federal government the primary role of setting water pollution policy and giving states the role of agents implementing federal policy.³⁶⁶

Under the CWA the states are given the opportunity to establish standards for the discharge of toxic pollutants into a surface water source. The standards must be based upon the existing or designated uses of the water source, e.g., public water supply, fish and wildlife propagation, recreation, agricultural, industrial, or navigation. The EPA reviews state water quality standards to determine whether those standards comply with the CWA requirements and do not interfere with the attainment of water quality standards in another state.³⁶⁷ States are also given an opportunity to certify that discharges into a surface water source do not violate the state's or a downstream water quality standard.³⁶⁸

Pursuant to 1987 amendments, the EPA may treat tribes as states for a variety of purposes,³⁶⁹ perhaps the most important of which are establishing water quality standards and certifying that discharges do not violate the tribe's or downstream standards. The amendments specifically authorize tribal programs to be administered on all land within the boundaries of a reservation,³⁷⁰ including non-trust and non-Indian land. By virtue of the amendments, tribes are eligible to control the quality of surface water located on or flowing through a reservation, subject only to federal water pollution control policy.

3. *Clean Air Act*³⁷¹

The basic framework of the Clean Air Act (CAA) calls for the federal government to establish regulatory standards and for the states to implement those standards. The Act provides for several programs to "protect and enhance the quality of the

366. 33 U.S.C. § 1251(b) (1988).

367. *Id.* § 1313.

368. *Id.* § 1341.

369. The Clean Water Act permits tribes to be treated as states for purposes of, inter alia: grants for pollution control programs under *id.* § 1256; grants for construction of treatment works under *id.* §§ 1281-1299; water quality standards and implementation plans under *id.* § 1313; enforcement of water quality standards under *id.* § 1319; clean lakes programs under *id.* § 1324; certification of National Pollutant Discharge Elimination System (NPDES) permits under *id.* § 1341; issuance of NPDES permits under *id.* § 1342; and issuance of permits for dredge or fill material under *id.* § 1344. *See also id.* § 1377(a) (applying policy to Indian tribes).

370. *Id.* § 1377(e)(2).

371. 42 U.S.C. §§ 7400-7642 (1988).

Nation's air resources,"³⁷² one of which is designed to prevent the significant deterioration of air resources in various air quality control regions.

Congress designated the air quality control regions in each state as either "class I" or "class II" areas.³⁷³ The designation of an area as class I or class II has important consequences, as the Act limits increases in concentrations of sulfur oxide, particulate matter, and other applicable pollutants in each area. Greater air quality degradation is permitted in class II areas than in class I areas.

The states were authorized to redesignate class II areas as class I areas.³⁷⁴ In 1977, Congress amended the Act to grant tribes the exclusive authority to redesignate all lands within the exterior boundaries of their reservations.³⁷⁵

4. *Federal Insecticide, Fungicide and Rodenticide Act*³⁷⁶

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizes states to assume responsibility for certifying persons who apply pesticides that are registered under the Act.³⁷⁷ Although no similar statutory authorization exists for tribes, EPA issued regulations in 1975 that permit tribes to assume responsibility for certifying applicators.³⁷⁸

5. *Resource Conservation and Recovery Act*³⁷⁹

Finally, the Resource Conservation and Recovery Act (RCRA) authorizes the states to establish hazardous waste management programs "in lieu of" the federal program administered by EPA that would otherwise apply.³⁸⁰ In *Washington Department of Ecology v. EPA*,³⁸¹ the Ninth Circuit Court of Appeals concluded that, given the general rule which precludes states from exercising jurisdiction over Indians in Indian Country unless Congress has

372. *Id.* § 7401.

373. *Id.* § 7472.

374. *Id.* § 7474.

375. *Id.* § 7474(c). See also *Nance v. EPA*, 645 F.2d 701, 709 (9th Cir. 1981) (the EPA had the authority to approve a tribe's request to redesignate its reservation as class I before the effective date of the 1977 amendments, notwithstanding § 107(a) of the Act, which delegated to the states responsibility "for assuring air quality within the entire geographic area comprising the state").

376. 7 U.S.C. §§ 136-136y (1988).

377. *Id.* § 136(a)(2).

378. 40 C.F.R. § 171.10 (1988).

379. 42 U.S.C. §§ 6901-6991i (1988).

380. *Id.* § 6926.

381. 752 F.2d 1465 (9th Cir. 1985).

clearly expressed an intention to the contrary,³⁸² the EPA could decline to grant a state primary enforcement responsibility over Indian lands within a state's borders. The Court reasoned:

[T]he EPA, having retained regulatory authority over Indian lands in Washington . . . can promote the ability of the tribes to govern themselves by allowing them to participate in hazardous waste management. To do so, it need not delegate its full authority to the tribes . . . It is enough that EPA remains free to carry out its policy of encouraging tribal self-government by consulting with the tribes over matters of hazardous waste policy.³⁸³

The Court's decision makes it clear that a federal agency may defer to tribal authority, to the exclusion of the states, for enforcement of federal environmental laws in Indian Country.

382. *Id.* at 1469.

383. *Id.* at 1472.