Winner, Best Appellate Brief in the 1994 Native American Law Student Association Moot Court Competition

Andrew J. Bobzien

John H. Martin

Follow this and additional works at: https://digitalcommons.law.ou.edu/ailr

Part of the Indian and Aboriginal Law Commons

Recommended Citation

This Special Feature is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.
Issues Presented

I. Whether the district court erred in finding that the Tribe had the inherent sovereign power to take Landuser's land.

II. Whether the district court erred in finding that it had jurisdiction to hear Landuser's case for alleged violations of the Indian Civil Rights Act (ICRA) because tribal sovereign immunity did not bar Landuser's claim in federal court.

III. Whether the district court erred in finding that it had jurisdiction to hear Landuser's case for alleged violations of the ICRA because that Act impliedly created a cause of action in federal court.

IV. Assuming that the district court had jurisdiction to hear the case, whether the court erred when it decided to use federal "taking" jurisprudence and not tribal standards, to determine whether a "taking" had occurred.

Jurisdictional Statement

This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291 (1988).

Statement of the Case

Plaintiff-petitioner, Joe Landuser (Landuser), brought this action to challenge the validity of the defendant-respondent Washteh Indian Tribe's (Tribe) Sacred Lands Ordinance. Landuser owns and farms 160 acres of fee land within the reservation boundaries. The dispute arose when the Washteh Tribal Council (Council), which derives its power from the Tribe, passed an ordinance designating certain lands, including Landuser's, as sacred and prohibiting all commercial activity on those lands. The ordinance denies Landuser all rights to farm, or otherwise use his fee owned land for commercial purposes, because it is located on sacred tribal land.


The NALSA Moot Court competition is an annual appellate advocacy competition focused on a topic of recent interest in federal Indian law. Participants prepare a brief for a given appellant and compete in round robin oral arguments hosted by a local NALSA chapter. The authors wish to thank the University of Utah NALSA for their hospitality in hosting the second annual competition. The 1995 competition will be hosted by the Oklahoma City University NALSA.
Landuser initially challenged the ordinance in the Washteh tribal court. He claimed that the Tribe lacked the civil regulatory jurisdiction to take his land for a public purpose. Landuser also claimed that even if the Tribe did have the jurisdiction to take his land, he should receive just compensation for the taking pursuant to section 1302(5) of the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1303 (1988 & Supp. V 1993). The tribal court found that the Tribe did have the power to take Landuser's land for a public purpose and that, under tribal common law, the Tribe's sovereign immunity barred Landuser's ICRA claim in tribal court. This result effectively denied Landuser any tribal forum to resolve the merits of his claim.

Landuser subsequently brought this action in the Federal District Court for the State of Utopia, invoking jurisdiction under 28 U.S.C. § 1331 (1988) and the ICRA. The district court held that (1) the Tribe did have the inherent power to take Landuser's land, (2) Landuser was allowed to bring his action in the district court because he had been denied a tribal forum, and (3) the takings issue must be decided under federal Fifth Amendment jurisprudence rather than by tribal customs and norms; and under that rule a taking had occurred.

Following that ruling, this Court granted the parties' motions for leave to appeal the district court's findings.

Argument

I. The Tribe Does Not Have Civil Regulatory Jurisdiction To "Take" Petitioner's Land Incidental to Its Inherent Sovereignty

The Washteh Tribe has no inherent authority to "take" Landuser's property by prohibiting commercial activity under the Tribe's Sacred Lands Ordinance. The test of a Tribe's power to exercise civil regulatory jurisdiction pursuant to its inherent sovereignty over non-Indians on fee lands is clear: The exercise of tribal power beyond what is necessary to protect tribal authority over "internal" relations is inconsistent with the dependent status of tribes, and thus cannot survive without express congressional delegation (hereafter called the "dependency" rule). Montana v. United States, 450 U.S. 544, 564 (1981); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 425-26 (1989); South Dakota v. Bourland, 113 S. Ct. 2309, 2319-20 (1993). In addition, when a tribe does not have "exclusive" use of former trust lands within a reservation, it loses any "incidental" civil regulatory jurisdiction over such lands. Bourland, 113 S. Ct. at 2316-17. Further, as a matter of policy and democratic principles, allowing a tribe to have civil regulatory jurisdiction only over its internal affairs is consistent with the concept that a sovereign should only be able to regulate those who consent to be governed and who have a political voice in political decisions made by the sovereign.

Under the facts presented, the Tribe's regulation of commercial activity on Landuser's land is beyond what is necessary for the Tribe to exercise authority over internal tribal matters and politics. In addition, the Tribe has lost
"exclusive" use of Landuser's land and therefore any incidental civil regulatory jurisdiction over his land is lost. The instant case also presents the possibility of democratic failure should the Tribe be authorized to exercise its regulatory power over Landuser when he has not consented to tribal authority and does not have a political voice in tribal politics.

For the foregoing reasons petitioner requests that this Court reverse the district court's finding that the Tribe has the inherent sovereignty to preclude Landuser's legitimate use of his fee land.

A. The Tribe's Inherent Sovereignty To Restrict Landuser's Commercial Use of His Fee Lands Through Tribal Ordinance Is Divested Because Such Civil Regulatory Power Is Beyond What Is Necessary for the Tribe To Govern Itself or Control Its Internal Relations

Indian tribes possess limited civil regulatory jurisdiction over non-Indians on non-Indian lands, or in other words over their "external" relations, because a tribe's ability to regulate such external relations is inconsistent with a tribe's dependent status. *Montana v. United States*, 450 U.S. at 564. In *Montana*, the Supreme Court focused on whether, and under what conditions, a tribe could exercise civil regulatory jurisdiction over non-Indians on non-Indian lands. The specific question was whether the tribe could regulate non-Indian hunting and fishing on non-Indian fee lands.

Approaching the issue of inherent sovereignty, the Court examined the principles set out in *United States v. Wheeler*, 435 U.S. 313 (1978), which differentiated between regulatory power over external relations (relations with non-Indians) and internal relations (relations with members of the tribe). The Court stated that areas in which "implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. . . ." *Montana*, 450 U.S. at 564 (quoting Wheeler, 435 U.S. at 326). The limitations on sovereignty "rest on the fact that the dependent status of Indian tribes . . . is necessarily inconsistent with their freedom independently to determine their external relations." *Id*. The Court concluded that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564. *Montana* thus sets out the general rule for determining when a tribe has exceeded its civil regulatory jurisdiction while also taking into account the inherent rights of a tribe.

In 1989, the Supreme Court reexamined and reaffirmed the bright-line "dependency" rule it had developed in *Montana*. In *Brendale v. Confederated Tribes of the Yakima Indian Nation*, 492 U.S. 408 (1989), the Yakima tribe contended that it had the right to impose its zoning and land use laws on non-Indians on non-Indian lands. Like the *Montana* Court, the *Brendale* plurality opinion distinguished between inherent sovereignty with respect to internal relations on the one hand, and external relations on the other. Similar to
Montana, the Brendale plurality found that inherent sovereignty is divested to the extent it is inconsistent with a tribe's dependent status — to the extent it involves a tribe's "external relations." Brendale, 492 U.S. at 425-26 (quoting Wheeler, 435 U.S. at 326).

The Brendale plurality also discussed Montana's two exceptions to the general divestment of inherent sovereignty. Id. at 428. The second exception proposes that a tribe may have inherent power to regulate conduct of non-Indians on fee lands within its reservation when the conduct "threatens or has some direct effect on the political integrity . . . or the health or welfare of the tribe." Id. (quoting Montana, 450 U.S. at 566) (emphasis added).1 According to the Brendale plurality, it is significant that the second Montana exception is prefaced by the word "may," a qualification which means that tribal authority "depends on the circumstances." Id. at 429. In fact, the Brendale plurality rejected the Ninth Circuit's interpretation of inherent sovereignty which equated the tribe's retained sovereignty with a local government's police power as contrary to Montana itself. Id. Thus, the controlling principle is that a tribe "has no authority itself by way of tribal ordinance" to regulate the use of fee land owned by non-Indians. Id. at 430.

On application to the facts in the instant case, it is apparent the Tribe has lost its inherent sovereignty to exercise civil regulatory jurisdiction over a non-Indian on non-Indian land. The Tribe's inherent jurisdiction extends only to internal relations. The Tribe's inherent sovereignty to regulate Landuser's land has been divested as a result of the Tribe's dependent status. The tribal ordinance attempts to restrict the use of Landuser's property with a regulation that goes beyond what is justifiable as necessary for the Tribe to (1) protect tribal self-government or (2) control internal relations. The Tribe's self governance and internal control will not be hindered if Landuser is allowed to continue commercial activity on his fee land. The Tribe will retain its authority over elections, tribal membership, and other political and internal matters. Landuser has, by nature and definition, an "external" relation to the Tribe because he is a non-member of the Tribe. Supreme Court precedent requires a finding that the Tribe has been divested of inherent sovereign power to dictate its relation with Landuser.

As a result of Landuser's "external" relation to the Tribe, the dependent status of the Tribe precludes the Tribe's ability to regulate Landuser's commercial activities under the guise of inherent sovereignty.

1. The main cases leading up to Brendale can be reconciled based on consent to tribal civil jurisdiction through entry onto trust lands. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980) (holding that tribe had the power to tax transactions "occurring on trust lands"); Montana, 450 U.S. at 557 (holding that tribe did not have civil jurisdiction over non-Indian lands, but the tribe could regulate non-Indians on "land belonging to the tribe or held in trust for the tribe"); Merrion v. Jacarilla Apache Tribe, 455 U.S. 130, 133 (1982) (holding that non-Indian company which had contracted with the tribe and which had entered on "tribal trust property" was liable for a tribal tax).
The Tribe will contend that the circumstances of this case fall squarely within the second exception of *Montana*, that the Tribe has the inherent power to regulate Landuser's conduct because the conduct "threatens" or has a "direct" effect on the "political integrity" and the "health or welfare" of the Tribe. The Tribe argues that the Ordinance protects an interest (sacred lands) that is inextricably intertwined with its politics and general well-being; that unlike white society, Indian culture, spirituality and politics cannot be separated from each other. However, the Tribe's argument that all aspects of its culture are interrelated runs counter to the requirement that conduct must have a "direct" effect on the Tribe's political integrity or health and welfare. To hold otherwise would allow the Tribe to preclude almost any activity by non-Indians on the reservation on the premise that all aspects of the Tribe's society are interrelated. The Tribe also argues that tribes possess "those aspects of sovereignty not withdrawn . . . by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323. The Tribe contends that implicit divestiture of inherent sovereignty only occurs when such power is inconsistent with the overriding authority of the United States, as when tribes "seek to . . . alienate their lands to non-Indians without federal consent." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153-54 (1980). However, *Colville* did not involve the regulation of fee lands, as is the case here. Moreover, *Colville* was an example of the sort of "consensual" relationship that might support authority over non-Indians on fee land. See *supra* note 1.

**B. The Tribe Cannot Restrict or Regulate Landuser's Legitimate Commercial Use of His Fee Land Because the Tribe's Authority To Regulate Landuser's Activities Is Incidental to the Tribe's Power To Exclude Non-Indians from the Reservation**

When the Tribe alienated its land to Landuser, it lost any former right to "exclusive" use of the land, and with such loss of exclusive use, the Tribe lost any former "incidental" civil regulatory jurisdiction. *South Dakota v. Bourland*, 113 S. Ct. at 2316-17. In *Bourland*, South Dakota sought an injunction to enjoin the Cheyenne Sioux Tribe from excluding non-Indian hunting and fishing on non-Indian lands. *Id.* at 2314. The majority in *Bourland* repeated the bright-line "dependency" rule of *Montana* that tribal sovereignty over non-Indians 'cannot survive' without congressional delegation. *Id.* at 2319-20.

As *Bourland* further explained inherent sovereign powers, when a tribe alienates lands to non-Indians, it loses any former right to "exclusive" use of such lands, and with such loss of exclusive use, a tribe also loses any former "incidental" regulatory jurisdiction. *Id.* at 2316-17. This reasoning reiterates prior Court reasoning. *Id.* at 2317 n.11 ("Certainly, the power to regulate is of diminished practical use if it does not include the power to exclude: regulatory authority goes hand in hand with the power to exclude.") (citing *Brendale*, 492 U.S. at 423-24). Because alienation of lands to non-Indians is incompatible with the power to then exclude others from those lands, any incidental power to
regulate that land is also lost. Thus, when as a result of congressional action, former trust land are "broadly" opened up to non-Indians, the alienation of those lands to a non-Indian destroys any previously existing tribal rights to regulate. Id. at 2318 (citing Montana, 450 U.S. at 560).

In this case, the Tribe should have lost the authority to regulate Landuser's commercial use of his land because the Tribe no longer has exclusive control of Landowner's fee owned land. With the loss of exclusive control of the former trust lands now owned by Landuser, any incidental authority the Tribe had to exercise civil jurisdiction over such lands, is necessarily lost.

The Tribe contends that the Bourland Court's reliance on Montana was inapposite with respect to the resulting rule that the power to regulate is incidental to the power to exclude, because in Montana the purpose behind removal of exclusive control by the tribe was different than the purpose behind removal of exclusive control in Bourland. In Montana the purpose behind removal of exclusive control was to assimilate Indians into majoritarian culture, but in Bourland, such purpose was to build a dam. The Tribe attempts to actually distinguish the purpose behind the resulting removal of exclusive control in Montana from the corresponding purpose in Bourland, and therefore, the Tribe argues that the Bourland Court's reliance on Montana was misplaced. In a nutshell, the Tribe contends that implied divestment of civil regulatory authority over former trust lands depends on the purpose behind the removal of exclusive control. However, the Supreme Court disagrees. What truly matters is the "effect of the land alienation occasioned" by the purpose behind removing exclusive tribal control. The only pertinent fact is that former trust lands have now been alienated out of tribal control. With such removal of exclusive control, any previous incidental Indian rights to regulatory control, is lost.

C. The Tribe Should Not Be Able To "Take" Landuser's Land Because the Tribe Should Only Be Able To Regulate Individuals Who Consent To Be Governed and Who Have a Political Voice in Tribal Politics

The preconstitutional underpinnings of Montana, Brendale and Bourland limit tribal power over nonconsenting non-Indians. The Declaration of Independence states that "all men are created equal," have "inalienable rights" of "life, liberty, and the pursuit of happiness" and, to secure these rights, governments derive their "just powers from the consent of the governed." The Declaration of Independence para. 2 (U.S. 1776) (emphasis added). The principle underlying the Declaration of Independence, that governments derive their power from the governed, is echoed in the first Indian law case decided by the Supreme Court, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). In Fletcher, the Court stated: "[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors from their markets; and

2. The United States Constitution is an embodiment of this idea.

https://digitalcommons.law.ou.edu/ailr/vol19/iss1/11
the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves." Id. at 147 (emphasis added). Justice Johnson thus described the scope of tribal sovereignty to extend only to the tribal members who consented to tribal jurisdiction as a result of membership. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978). More recently, in Duro v. Reina, 495 U.S. 676 (1990), the Supreme Court indicated that retained tribal sovereignty is but a recognition of tribal authority over Indians who consent to tribal membership. Id. at 693. Even though tribal governing and adjudicatory bodies often entail features that may fairly resolve disputes between tribes and non-Indians, confining tribal sovereignty to "internal relations" honors the notion of "consent of the governed," also appropriately termed "popular sovereignty." Recognition of "popular sovereignty" or "consent of the governed" properly allows tribes to influence their own members who consent to tribal governance by maintaining tribal membership. Furthermore, non-Indians who do consent to jurisdiction, for one reason or another, may also be covered by the umbrella of tribal civil regulatory jurisdiction through this consent. See supra note 1.

Constitutional property law theory also supports the proposition that tribes should not be able to use sovereignty as a basis to regulate or "take" non-Indian lands located on reservations, because nonmembers, in essence, have no voice in tribal politics. Sound theory suggests that property rights are to be regarded as political rights — that such rights are an indispensable ingredient in an individual's participation in society's processes for collectively regulating the conditions of social existence.

II. The District Court Had Jurisdiction over Landuser's Claim Because the Washteh Tribe's Sovereign Immunity Is Not an Absolute Bar to Federal Court Jurisdiction

The district court properly modified the Washteh Tribe's sovereign immunity to suit in federal court because tribal sovereign immunity is a common law doctrine which courts will and should ignore when equity demands, or certain countervailing important national interests are at stake. Equity counsels that the tribal sovereign immunity doctrine should give way in this case because  

3. See JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 16-17 (1947 ed.). Rousseau states: "It appears . . . that the act of association contains a reciprocal engagement between the public and individuals, and that each individual . . . is engaged under a double character; that is, as a member of the Sovereign engaging with the individual, and as a member of the State engaged with the Sovereign." Id.

4. Frank I. Michelman, Property as a Constitutional Right, 38 WASH. & LEE L. REV. 1097, 1112 (1981); see Garreau v. Andrus, 676 F.2d 1206, 1210 (8th Cir. 1982) (finding that a writ of mandamus, forcing the Secretary of the Interior to consider appellant's petition calling for a secretarial election on the adoption of tribal constitutional amendments, was not in order because appellant had both the power to pass a resolution by referendum and, the power to vote out tribal council members).
Landuser would otherwise be without any forum or remedy to vindicate his federal Constitutional rights. The instant case involves numerous inequitable factors which have led at least one other federal court to modify tribal immunity. Dry Creek Lodge v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980). Landuser urges this Court to follow that court's lead and affirm the lower court decision finding proper jurisdiction to hear Landuser's case, the tribal sovereign immunity doctrine notwithstanding.

A. Tribal Sovereign Immunity Is a Common Law Doctrine Subject to Judicial Modification When Equity Demands


[T]he Court's holding [in Potawatomi] in effect rejects the argument that ... the Tribe is completely immune from legal process. By addressing the substance of the ... claim for prospective injunctive relief against the Tribe, the Court today recognizes that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief.

Id at 505 (Stevens, J., concurring). Tribal sovereign immunity is thus best understood as a common law doctrine which federal courts will modify in certain cases seeking equitable relief, where non-Indians are involved and countervailing federal interests justify a minimal burden on tribal sovereignty.

It is often stated that "suits against tribes are ... barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). However, sovereign immunity, like other legal concepts, is capable of evolution. Nevada v. Hall, 440 U.S. 410, 417-19 (1979). Congress has never enacted any positive law which establishes tribal sovereign immunity and which would constrain the evolution of the common law doctrine of tribal sovereign immunity.

Tribal sovereign immunity is thus unlike the sovereign immunity enjoyed by states pursuant to the Eleventh Amendment and foreign governments as established by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1601-1611 (1988 & Supp. V 1993). Tribal sovereign immunity to suit in federal or state court is not coextensive with the deceptively similar Eleventh Amendment jurisprudence which imposes constitutional limits on the abrogation of state sovereign immunity. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985) (holding that Congress may override Eleventh Amendment immunity, but its intent to do so must be "unmistakably clear"); Hans v. Louisiana, 134 U.S. 1, 17 (1890) ("A state may be sued by its own consent.") Instead, tribal sovereign immunity should be understood as a prudential limitation on when federal courts will subject tribes to suit in federal court.
This limitation is the result of judicial deference to Congress' plenary power over Indian tribes pursuant to the Indian Commerce Clause, U.S. Const., art. I, § 8. Some lower courts, however, have felt that the scope of tribal immunity was locked in "as it existed at earlier time." In re Greene, 980 F.2d 590, 595 (9th Cir. 1992). This understanding is contrary to the Supreme Court's holding in Potawatomi that tribal sovereign immunity did not excuse a tribe from its obligation to assist in the collection of validly imposed state sales taxes. Potawatomi, 498 U.S. at 512. In Potawatomi, Justice Stevens concurred in the otherwise unanimous opinion to emphasize that the Court had in effect modified the doctrine of tribal sovereign immunity by granting declaratory relief acknowledging the Oklahoma Tax Commission's right to collect taxes on tribal sales to non-Indians. Id. at 515.

Potawatomi clarified the law of sovereign immunity with respect to the collection of sales taxes on Indian lands, but in so doing also illuminated the circumstances which would justify a federal court in modifying the doctrine. These circumstances were present in Potawatomi because Congress had never authorized suits to enforce tax assessments, the state had an interest in assuring the payment of the taxes and otherwise, violations of the law by those subject to the tax would go virtually unchecked. Id. at 510, 512. As Justice Stevens paraphrased it, "I am not sure that the rule of tribal sovereign immunity . . . applies to claims for prospective equitable relief against a tribe." Id. at 515.

Thus the Court's most recent discussion of tribal sovereign immunity in Potawatomi qualifies the broad statement in Santa Clara Pueblo that tribal sovereign immunity bars claims for injunctive and declaratory relief for violations of ICRA. Santa Clara Pueblo, 436 U.S. at 72. Tribal sovereign immunity is not an absolute bar to bringing a claim against a tribe in federal court, especially where, as here, the claim is addressed to the court in equity.

B. In Eleventh Amendment Jurisprudence the Supreme Court Has Recognized that Individual Rights Are an Overriding National Interest Which Compel Modification of Sovereign Immunity

The Supreme Court, in the context of the Eleventh Amendment, has recognized that though sovereign immunity is installed in the Constitution, in certain instances it must give way to overriding national interests. The Court has felt compelled to modify state sovereign immunity where important federal rights are at issue. "Federal Courts have a primary obligation to protect the rights of the individual that are embodied in the federal Constitution and laws, . . . and generally should not eschew this responsibility based on some diffuse, instrumental concern." Pennsylvania v. Union Gas, 491 U.S. 1, 28 (1989) (Stevens, J., concurring). One example of this is the well-recognized irony of the Ex Parte Young fiction, which allows suits alleging violations of the Fourteenth Amendment (which declares that "No State shall make any law . . .") to be brought against state officials in their individual capacity, thus avoiding
the Eleventh Amendment. *Ex Parte Young*, 209 U.S. 123 (1908). In the instant case no such illogical reasoning is required to justify setting aside the tribal sovereign immunity doctrine; rather the court should recognize that in Landuser's case, the vindication of his personal civil rights as guaranteed by ICRA outweighs the importance of tribal sovereign immunity to suit in federal court. The district court recognized that the instant case provided an inequitable set of facts, that Landuser would otherwise be denied a meritorious resolution of his claim and thus set aside the Tribe's assertion of tribal sovereign immunity. This Court should recognize the propriety of that decision and affirm the lower court.

C. Tribal Sovereign Immunity Should Not Bar a Claim Under ICRA When Plaintiff (1) Is a Non-Indian Alleging the Deprivation of Personal and Property Rights, (2) Would Otherwise Be Without a Forum or Remedy, (3) The Dispute Is Not Intratribal, and (4) A Federal Forum Would Not Contravene Any Congressional Policies Underlying ICRA

Federal courts have not found tribal sovereign immunity to bar federal court jurisdiction of ICRA claims when the plaintiff can show the "absolute necessity" for a federal forum. See *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980); accord *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984); *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992).

In *Dry Creek*, tribal sovereign immunity did not bar an ICRA claim in a case where the non-Indian owners of Dry Creek Lodge sought to bring suit against a tribe for blocking the sole road from the lodge to a highway and preventing access to the lodge. The plaintiffs initially sought relief in the tribal court, but consent to suit was not given by the tribe. The tribe contended that under *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) tribal sovereign immunity is abrogated under ICRA only in habeas corpus actions. In holding that the federal district court did have jurisdiction over the suit, the 10th Circuit reasoned that *Santa Clara Pueblo* did not apply when a non-Indian does not have a tribal

5. The Court stated in another case regarding the *Young* doctrine:
The *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' . . . *Ex parte Young* was the culmination of efforts by this court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights secured elsewhere in the Constitution. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1989).

6. In *Santa Clara Pueblo*, a tribal member's children were denied tribal membership because a tribal ordinance denied such membership to children of female tribal members who marry outside the tribe, but granted tribal membership to male tribal members who marry outside the tribe. The plaintiffs, the tribal member mother and her daughter brought suit under ICRA claiming a violation of "equal protection." The Supreme Court held that ICRA only waived tribal sovereign immunity in habeas corpus actions. *Santa Clara Pueblo*, 436 U.S. at 66-67.

https://digitalcommons.law.ou.edu/ailr/vol19/iss1/11
SPECIAL FEATURES

No. 1] 291

forum in which to resolve his dispute. *Dry Creek*, 623 F.2d at 685. Thus, there is an exception to the *Santa Clara Pueblo* holding that tribal sovereign immunity bars ICRA suits in other than habeas corpus actions.

*Dry Creek* was a case alleging violations of ICRA which presented those constellation of factors which led a federal court to decline to recognize tribal sovereign immunity. Landuser, like the plaintiffs in *Dry Creek*, is a non-Indian who has been denied tribal judicial and political forums to adjudicate his ICRA claims. Federal court jurisdiction, as in *Dry Creek*, would not disserve Congress' purpose behind ICRA. Landuser, like Plaintiffs Cook in *Dry Creek*, would otherwise be without a forum or remedy to vindicate his rights.

1. If Landuser Would Otherwise Be Without a Forum or Remedy a Federal Court Should Ignore Sovereign Immunity

Landuser will have neither a forum nor a remedy if a federal court does not have jurisdiction of this case because the Washteh Tribe's sovereign immunity bars claims against it in tribal court. Landuser has attempted to resolve this dispute through all available tribal forums but to no avail. In this respect Landuser's situation is like that of the plaintiffs in *Dry Creek*. In *Dry Creek*, plaintiffs sought to bring a claim in tribal court alleging a violation of their rights under ICRA, but the Tribe refused to consent to the jurisdiction of the tribal court. Both of these cases stand in contrast to the situation presented in *Santa Clara Pueblo*, where plaintiffs were free, after being dismissed from federal court, to pursue their claim in tribal forums.

Landuser will also be bereft of any remedies for the violation of his constitutional rights unless ICRA is enforced by a federal court. Like the plaintiffs in *Dry Creek*, Landuser is a non-Indian who has no representation in the internal tribal political process, another distinction between the instant case and the plaintiffs in *Santa Clara Pueblo*. Thus, without federal court jurisdiction, not only will he be without an efficient judicial remedy, he will be without any meaningful remedy to enforce his rights.

2. A Federal Court Should Also Consider that the Personal and Property Rights of a Non-Indian Are Being Deprived

Landuser's status as a non-Indian is important because it signifies that he does not have any political voice in the Tribe. The Court's opinion in *Santa Clara Pueblo* placed much importance on the fact that plaintiffs Martinez had access to the political forum of the tribe and its duly elected officials in addition to tribal court access. The Court was appropriately concerned with infringing on the right of the tribe to govern itself and maintain authority. *Santa Clara Pueblo*, 436 U.S. at 59. Unlike that case, Landuser has no such access to the tribal political process. In *Dry Creek*, this lack of a political voice militated in favor of the federal court finding jurisdiction. *Dry Creek*, 623 F.2d at 685. Because Landuser has no recourse to either the tribal judicial or political
forums, tribal sovereign immunity should not bar the jurisdiction of the federal court over the claim.

3. The Dispute Is Not Intratribal and Federal Court Jurisdiction Is Not at Odds with Congress' Stated Policies Underlying ICRA

Unlike Santa Clara Pueblo, which involved tribal membership requirements, the issue in both Dry Creek and the instant case involves a property dispute and does not involve matters of an intratribal nature or concern only tribal members. Thus, federal court jurisdiction would not contravene either of Congress' stated purposes for ICRA. Those policies are (1) to strengthen the position of individual tribal members vis-à-vis the tribe and (2) to promote the federal policy of furthering Indian self government. Santa Clara Pueblo, 436 U.S. at 62.

Adjudicating in federal court the question of whether the Tribe's ordinance worked a taking does not present the same likelihood of undermining tribal authority as did federal jurisdiction in Santa Clara Pueblo. The issue in the instant case concerns the Tribe's external relations with nonmembers and non-Indians. This relationship does not implicate the same type of "self government" concerns as did the issue of tribal membership standards in Santa Clara Pueblo. The Court's view of tribal "self government" concerns should be influenced by the limits set on inherent tribal sovereignty. Tribal zoning ordinances impacting non-Indians are just the type of "external" issues which are not left to tribal discretion. See Brendale, 492 U.S. at 445.

Furthermore, this case is similar to Dry Creek in that Landuser did not attempt to circumvent a tribal forum, but instead sought his initial remedy with the Tribe. Federal jurisdiction would thus not be at odds with Congress' policy of supporting tribal court development because any undermining of the authority of tribal forums has resulted from the Washteh Tribe's own failure to provide such forums.

III. ICRA Impliedly Creates a Cause of Action for Non-Indian Landowners who Allege a Taking of Private Property and Have Been Denied a Forum and Remedy in Tribal Court

Admittedly, ICRA does not on its face create a cause of action to redress violations of its provisions, with the exception of section 1303 authorizing habeas corpus actions. However, a federal court may look beyond the face of a statute and find an implied cause of action if congressional intent would support such a private cause of action. Thompson v. Thompson, 484 U.S. 174, 179 (1988). Congressional intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment. Thompson, 484 U.S. at 179 (quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979)). The Court in Thompson recognized that the implied cause of action doctrine was not limited to implying only those claims which Congress actually had in mind but forgot to codify into law, but also would sanction those
claims which an inferred congressional intent would support. *Thompson*, 484 U.S. at 179-80. An inquiry into Congress' perception of the problem it was addressing with ICRA supports the implication of a private cause of action for Landuser as necessary to effectuate congressional intent. A cause of action would also be consistent with all stated congressional policies for ICRA.

Congress' intentions for section 1302 of ICRA, as discerned by the Supreme Court in *Santa Clara Pueblo*, were twofold. "Two distinct and competing purposes are manifest in the provisions of ICRA: In addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal policy of furthering Indian self-government." *Santa Clara Pueblo*, 436 U.S. at 62. Another central purpose of ICRA was to secure for the American Indian the broad constitutional rights afforded to other Americans. *Id.* at 61 (quoting S. Rep. No. 841, 90th Cong., 1st Sess. 5-6 (1967)).

These congressional policies speak primarily to the relationship between Indians and their tribes and do not directly implicate non-Indians. Indeed, the one Supreme Court case which has addressed the issue of implied causes of action under ICRA referred to non-Indians only once, in a reference to judicial (not congressional) recognition of the appropriateness of tribal forums for the adjudication of non-Indian personal and property interests. *Santa Clara Pueblo*, 436 U.S. at 65. *Santa Clara Pueblo* is not a dispositive interpretation of congressional intent regarding the propriety of implying a cause of action for a non-Indian alleging a violation of section § 1302(5) of the ICRA who has been denied a forum and remedy in tribal court. *Santa Clara Pueblo* can be distinguished from the instant case as one which addressed the propriety of implying a cause of action for a different class of persons (Indian tribal members and their children) asserting a different section of ICRA (25 U.S.C. § 1302(8)) and where the assertion of the right (equal protection) had a profoundly different impact on Congress' stated policies.

A. The Context, Language and Congressional Intent for ICRA Favor Inferring a Private Cause of Action

Although there is no mention of non-Indians in Congress' general statements of intent for ICRA, the statute was intended to benefit non-Indians who live on reservations. Because Congress intended to secure for Indians the broad constitutional rights enjoyed by other Americans, it can be inferred that Congress also intended to extend to non-Indian U.S. citizens living on reservation those constitutional rights arguably lost as a result of living in Indian country. The statute, 25 U.S.C. § 1302(5)\(^7\) also creates a federal right in favor of Landowner which protects him from having his land taken without just compensation. A federal cause of action would be consistent with the

---

underlying purposes of the federal scheme. The authority of the Washteh tribal court would not be undermined in this case because it had the initial opportunity to address the merits of Landuser's ICRA claim, but chose instead to eviscerate ICRA in Washteh tribal court. A federal cause of action would not be an undue or precipitous interference into tribal internal affairs because this dispute concerns the external relations of the Tribe with non-Indians. Arguments by the Tribe based on the costs of defending against a federal claim are disingenuous because the Tribe seeks to avoid all avenues which might subject it to legal liability for taking Landuser's land. Congress' policy of furthering tribal self government likewise cannot be strenuously argued by the Tribe because to do so would be to acknowledge no limits on tribal self government. The Washteh Tribe would in effect be sanctioned to engage in unreviewable restrictive zoning. This deference to tribal self government is not congressional policy; in fact, ICRA was intended as a federally imposed limit on tribal autonomy.

The structure of the statute supports this view. The bill selectively incorporated and in some instances modified the safeguards of the Bill of Rights to accommodate the unique needs and structures of tribal governments. Indeed the provision at issue in *Santa Clara Pueblo*, 25 U.S.C. § 1302(8), was modified to apply only to the tribe's laws, rather than the more expansive "the laws" of the Fourteenth Amendment. *See Santa Clara Pueblo*, 436 U.S. at 64 n.14. In contrast, the takings clause at issue here, section 1302(5) is imported wholesale from the Fifth Amendment, with a minor change from passive to active voice. The inference to be drawn from this is that Congress fully intended tribes to be subject to takings claims in the same way state and federal governments are liable, through private lawsuits and ultimately in federal court.

That Congress explicitly provided for federal habeas corpus relief does not indicate an intention on the part of Congress to avoid all other avenues to federal court. A habeas corpus action under ICRA would provide for de novo review of a tribal court decision. That indicates only the instances in which Congress intended a federal district court to review a tribal court decision, this provision says nothing about an instance in which a tribal court has effectively declined to hear a claim, as is the case here. Congress should be presumed to have had comity between federal and tribal courts in mind rather than limits on federal court jurisdiction. In this case a federal court would not be displacing a tribal court by retrying the merits of a claim already adjudicated by a tribal court. As the *Santa Clara Pueblo* Court recognized, ICRA embodies two countervailing policies and courts should not construe the statute so as to undermine either of those policies. *Santa Clara Pueblo*, 436 U.S. at 64. Thus, in this instance, to prevent the extension of constitutional protections over Indian country from becoming a dead letter, the district court properly granted jurisdiction.

The cause of action Landuser seeks to have recognized is not one traditionally relegated to tribal law, instead, the limits of tribal judicial and regulatory sovereignty have always been a federal question. See South Dakota v. Bourland, 113 S. Ct. 2309 (1993) and National Farmers Union Insurance Co. Inc. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

Inferring a cause of action would not disserve either of Congress' dual objectives for ICRA. As noted above, a cause of action would not contravene any of the more specific concerns Congress had in mind when legislating. A cause of action is crucial, however, to give effect to Congress' objective of extending Constitutional norms to tribal self government. In this case no tribal forums are available to vindicate the rights created by ICRA and the district court properly recognized an implied cause of action.

B. Federal Courts Frequently Infer a Federal Cause of Action for the Enforcement of Civil Rights

Another factor counselling recognition of a remedy is the Supreme Court's willingness to utilize federal common law to infer causes of action from the Constitution and federal statutes to enforce civil rights. The Supreme Court has made it clear that it is more willing to imply a cause of action when the right involved is a federal civil right. This is especially true at the Constitutional level, where courts have implied a cause of action directly from the Constitution to enforce constitutional provisions. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (Fourth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (Fifth Amendment). The presumed availability of federal equitable relief to enforce federally protected rights also exists independent of explicit congressional authorization. Ex Parte Young, 209 U.S. 123 (1908).

The Supreme Court has also sanctioned this more permissive approach when analyzing whether a cause of action is available pursuant to 42 U.S.C. § 1983 to remedy violations by state officials of the Constitution and federal laws. Under this line of cases a court must presume a section 1983 right of action to exist in a federal statute unless there is evidence on the part of Congress to foreclose such an action. See Right v. City of Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987) and Maine v. Thiboutot, 448 U.S. 1 (1980).

These two lines of authority buttress the traditional view that "the very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). This reasoning is what induced the court in Dry Creek to endorse a private cause of action in federal court. "From the formation of the Union and the adoption of the bill of rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions in their personal liberty." Dry Creek, 623 F.2d at 685 (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191
Like the district court in this case properly implied a cause of action under ICRA not only as means of advancing congressional intent but also to vindicate the important function of the federal courts to uphold the Constitution and the laws of the United States.

IV. The District Court Was Correct When It Decided as a Matter of Federal Common Law That the Takings Claim Should Be Decided Under Fifth Amendment Standards Because Congress Did Not Intend Tribal Law To Govern and Tribal Law Would Significantly Conflict with Federal Objectives for ICRA As Well As Be Unconstitutional in This Case

Whether claims alleging violations of section 1302(5) should be decided with reference to tribal common law or by federal constitutional standards is a question of first impression for this Court. The appeals court should first look to legislative intent to determine the rule Congress meant to apply to takings under ICRA. The legislative history, general congressional policies, and language of ICRA support the conclusion that Fifth Amendment standards should define a taking under section 1302(5). This conclusion is supported by the reasoning of at least two other federal circuits. Additionally, federal common law dictates that Fifth Amendment standards should displace tribal common law because there is a need for a nationwide standard and tribal common law in this case would be unconstitutional as well as conflict with Congress' intentions for ICRA. For all these reasons, the district court correctly applied Fifth Amendment standards to the alleged taking in this case.

A. In Light of the Legislative History of ICRA, Fifth Amendment Standards Should Provide the Rule of Decision for Section 1302(5)

With ICRA, Congress imposed on the Washteh Tribe restrictions similar to those contained in the Bill of Rights. Congress' purpose for the bill, and corresponding intentions regarding the rule of decision to be applied to takings claims pursuant to section 1302(5), should be discerned first as a matter of congressional intent. Boyle v. United Technologies Corp., 487 U.S. 500, 515 (1988) (Brennan, J., dissenting) (stating that if Congress intends a rule, courts are bound to implement its will). Congress intended to protect individual Indians, and by inference non-Indians, from arbitrary and unjust actions of tribal governments. This goal was accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government. "These limitations are the same as those imposed on the Government of the United States by the United States Constitution and on the states by judicial interpretation." S. Rep. No. 841, 90th Cong. 1st Sess. 5-6 (1967). Thus, if legislative history is any guide, Congress intended the Constitution to provide the standards by which alleged violations of 25 U.S.C. § 1302(5) are to be judged.

The Tribe may point out that Congress also recognized that some issues arising under ICRA would depend on questions of tribal tradition and custom and because Constitutional norms would interfere with the Tribe's ability to
maintain itself as a culturally and politically distinct entity, Congress thus had no intention of imposing Constitutional standards on tribes. However, the imposition of a zoning ordinance which deprives Landuser of the right to farm his land is the quintessence of an "external" matter. Matters external to the Tribe were not intended by Congress to be subject to tradition and custom: As a general principle the interpretation of ICRA should parallel the constitutional interpretation where the tribal procedure parallels that of the larger American society. Cf. Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 238 (9th Cir. 1976); Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988) ("The Tribe should take the tail with the hide."). A zoning ordinance is a prototypical modern legislative technique and has such a wide reaching effect that Congress did not intent its solicitude for tribal customs to extend to this "external" activity.

B. In Light of the Similarity in Language Between Section 1302(5) and the Fifth Amendment, Fifth Amendment Standards Should Provide the Rule of Decision for Section 1302(5)

The limitations imposed by, and the very language of section 1302(5) is virtually identical to that in the takings clause of the Fifth Amendment, with the one difference that the clause is stated in the active voice in ICRA and in the passive voice in the Constitution. Because ICRA purported to give Indians constitutional rights which other Americans enjoy, and the language at issue in this case does not deviate in any meaningful way from the right as it is stated in the U.S. Constitution, the district court was correct in applying the constitutional standard.

C. Two Federal Circuits Hold That Fourth Amendment Standards Govern the Conduct of Tribal Officials Under ICRA Section 1302(2) (Search And Seizure) Because of the Legislative History of ICRA and the Similarity Between That Section and the Analogous Constitutional Provision

The Eighth and Ninth Circuits have addressed the same question presented here, but in the context of subsection 1302(2) of the ICRA. That subsection secures the right of the people to be secure against unreasonable search and seizures, among other protections. These circuits have found the search and seizure provision of ICRA to impose the analogous Fourth Amendment standard on tribes. United States v. Lester, 647 F.2d 869 (8th Cir. 1981); United States v. Strong, 778 F.2d 1393 (9th Cir. 1985); see also Tracy v. Superior Court, 810 P.2d 1030, 1046 (Ariz. 1991). In reaching that conclusion, those Circuits reasoned that the striking similarity between the two provisions and the legislative history of ICRA provided evidence that Congress intended that provision to be governed by Fourth Amendment standards. No evidence could be found which would militate in favor of affording any less protection. Likewise, the district court in the instant case properly applied the Fifth
Amendment constitutional standard to disputes under section 1302(5) because Congress evinced no intention to entrust the definition of a taking to tribal law.

D. Tribal Common Law Should Not Govern Section 1302(5) Because There Is a Need for a Nationwide Standard and the Application of Tribal Law Would Frustrate Specific Objectives of the Statute

A court should endeavor to fill the interstices of a federal remedial scheme with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards. Kamen v. Kemper Financial Services, 111 S. Ct. 1711, 1717 (1991). There is a need for a uniform federal definition of a taking under ICRA so that all landowners who hold land in fee simple on Indian reservations based on patents from the U.S. government are governed by the same standards. Landowners, especially non-Indians, receiving land in fee from the U.S. government could in no way foresee that, pursuant to a federal statute, the extent of their property interests would be subject to the discretion of a sovereign not bound by the Constitution. The law governing section 1302(5) should be defined by the U.S. Constitution because the patent holders expected that their rights and obligations would be governed by such standards. Cf. Kamen, 111 S. Ct. at 1717 (holding that where private parties enter legal relationships based on the expectation that state law standards govern their rights and obligations, state law is presumed incorporated into federal common law.). To do otherwise would be to undermine their reasonable expectations and undermine the rule of law.

E. Tribal Common Law, When Applied as a Federal Rule of Decision, Must Conform to the Constitution

The court of appeals should also note that because ICRA is a federal statute, any common law rule, such as the Washteh tribal common law, incorporated as federal common law necessarily becomes federal in character. Kamen, 111 S. Ct. at 1717. Recognition of this fact serves to highlight one anomaly in the Tribe's reasoning. If the tribal law is incorporated as federal law, the tribal ordinance is admittedly held not to work a taking. In contrast, the ordinance would amount to a taking under federal constitutional standards. Under the Tribe's proposed scheme a federal rule of decision applied pursuant to a federal statute would not have to conform to the U.S. Constitution. This is an arguably unconstitutional result under the durable principle that no federal law may contravene the Constitution, first stated in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Thus, the district court was correct in declining to apply the tribal common law to this case.

F. The Application of Tribal Law Would Present a Significant Conflict with Federal Policy Underlying ICRA and Would Frustrate Congress' Objectives

The application of tribal law would frustrate ICRA's stated objective of extending constitutional rights to both Indians and non-Indians. To allow the
Washteh Tribe to craft its own definition of a taking would be to allow it to evade the strictures of ICRA at will. No court would ever be compelled to find a taking and as a result ICRA would be rendered nugatory as it applies to the Washteh Tribe. This result would be a significant conflict with stated congressional intent for ICRA.

Federal common law will displace state law when significant conflicts exist between an identifiable federal policy or specific objectives of federal legislation and the operation of state law. Boyle v. United Technologies Corp., 487 U.S. at 507, 511. This reasoning applies to the analogous choice between a federal or tribal rule of decision. Because the operation of tribal standards would significantly conflict with the objective of strengthening the position of individuals vis-à-vis the tribe, as a matter of federal common law, the tribal common law cannot govern this dispute. Thus, the district court judge properly held that tribal common law must be displaced by federal constitutional standards.

**Conclusion**

For the reasons stated above, Landuser asks that this Court find the district court erred in finding that the Tribe had the inherent power to "take" Landuser's fee land. Landuser also requests that this Court affirm the district court findings that federal jurisdiction existed and that the Fifth Amendment, not tribal common law, provided the rule of decision.