Sovereignty: Tribal Sovereign Immunity and the Claims of Non-Indians Under the Indian Civil Rights Act

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Introduction

Federal Indian policy has simultaneously accepted dual and conflicting premises about Indian tribal autonomy: tribes are "independent domestic nations" yet have sovereign powers which predate the Constitution. Such equivocation has confused the status of tribal governments and their exercise of power over those within their domain. Tribes, for instance, are not bound by either the fifth or fourteenth amendments to the United States Constitution and, thus, tribal members do not have constitutional rights that are enforceable against the tribe. It was not until the Indian Civil Rights Act of 1968 that Congress exercised its plenary

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4. The language and substance differ from the United States Constitution. There is no establishment clause, no recognition of the interwoven relationship of religion to all Indian activities, nor any provisions such as the second, third, or seventh amendments to the Constitution. See Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971). Section 1302 of the Indian Civil Rights Act of 1968 provides in its entirety:

  No Indian Tribe in exercising powers of self-government shall

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

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

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

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

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

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

  (7) require excessive bail, impose excessive fines, inflict cruel and unusual punish-
powers to constrain tribal governments against arbitrary or abusive conduct toward both Indians and non-Indians on the reservation.

Because a tribe’s conduct is proscribed by the Indian Civil Rights Act, the question becomes: Can the tribe be sued for alleged deprivation of individual rights or is there tribal immunity? In *Santa Clara Pueblo v. Martinez*, the United States Supreme Court affirmed tribal sovereign immunity when a tribal member sued her tribe for injunctive and declaratory relief under the Act. However, two recent cases, *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes* and *R.J. Williams Co. v. Fort Belknap Housing Authority*, questioned the application of tribal immunity to civil rights challenges by non-Indians on the reservation and reached two opposite conclusions.

In *Dry Creek Lodge*, non-Indians on the Wind River Reservation built a guest lodge on their own fee land without acquiring the necessary right-of-way across the land of all the Indian families concerned. When the lodge was completed, one of the families obtained assistance from the tribes’ Joint Business Council to barricade the roadway. This action led to the subsequent closing of the lodge. When the non-Indian plaintiffs were denied access to tribal court, they sued for injunctive relief and damages under the Indian Civil Rights Act. The Tenth Circuit Court of Ap-

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peals distinguished *Santa Clara* as being an intratribal dispute where internal relief was available to an Indian plaintiff. Contrary to the principles of *Santa Clara*, the court held that the limitations upon tribal sovereign immunity disappeared and were implicitly waived when a non-Indian was denied a tribal remedy.\(^\text{12}\)

*Williams* also involved a non-Indian's suit against a tribal government for deprivation of due process rights. Williams had a contract with the Fort Belknap Housing Authority to build fifty homes. Due to a warranty dispute, the Authority obtained a writ of attachment from the tribal court.\(^\text{13}\) Though his property was attached, Williams refused to stipulate to tribal court jurisdiction and filed for injunctive and declaratory relief under the Indian Civil Rights Act.\(^\text{14}\) The district court expressed displeasure with the breadth of the *Santa Clara* holding regarding sovereign immunity and sought, unsuccessfully, to distinguish the cases. The court was forced to conclude, however, that *Santa Clara* is the prevailing law and the tribe was immune to suit for injunctive and declaratory relief.\(^\text{15}\) The suit was dismissed for lack of jurisdiction and Williams was without a remedy.

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*Dry Creek Lodge* suit in 1974 included the Secretary of Interior, the reservation superintendent, the United States, individuals in the complaining family (the Bonatsies), and the Joint Business Council. The court of appeals dismissed the claims against the United States and its agents but found jurisdiction over the tribes and remanded. The jury returned a plaintiff's verdict and, on motion by the tribes, a new trial was granted. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), was handed down before the retrial and then, based on *Santa Clara*, the district court dismissed. This appeal followed.

12. The court stated:

The reason for the limitations and the references to tribal immunity also disappear when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian.

13. The writ of attachment was ordered without giving Williams prior notice or an opportunity to be heard. 509 F. Supp. 933, 938 (D. Mont. 1981).


15. The sole federal court remedy for violation of the Indian Civil Rights Act is habeas corpus relief, 25 U.S.C. § 1303, and, therefore, based on *Santa Clara*, the tribe was immune to suits seeking other relief. 509 F. Supp. 933, 941. See *Santa Clara Pueblo*
While the Supreme Court apparently settled the question of a waiver of tribal immunity under the Civil Rights Act, *Dry Creek Lodge* and *Williams* raise important questions about the continuing viability of the doctrine as it applies to suits by non-Indians. As Justice Blackmun said, concurring in *Puyallup Tribe v. Washington Dep't of Game*: "I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.* [Citation omitted.] I am of the view that that doctrine may well merit reexamination in an appropriate case."  

In light of Justice Blackmun's admonition, these are two extremely important cases. This note will examine some of the implications for tribal immunity and tribal sovereignty raised by these conflicting decisions. In order to provide a background for analyzing these cases, this note will first review the development of the doctrine of tribal sovereignty and sovereign immunity. Next, the Supreme Court's interpretation of the Indian Civil Rights Act in *Santa Clara* will be discussed. Finally, it will be argued that the tribes must resolve this conflict by incorporating their traditional values and practices into a tribal judicial process that protects the rights of all Indians and non-Indians on the reservation.

**Sovereign Immunity and Tribal Sovereignty and the Indian Civil Rights Act**

The extent to which Indian tribes can exercise their powers as sovereigns has been questioned throughout the judicial history of the United States.  


longer possessed of the full attributes of sovereignty, tribes remain as a separate people with the power to regulate their internal and social relations.

The exercise of tribal sovereignty has been severely limited by the asserted power of the "overriding sovereign." The basic premise is that Indian tribes have subordinated their sovereign powers to the federal government, and the limited character of tribal authority is subject to the complete defeasance by Congress. Divestiture cannot be inferred but must be explicit.

20. Tribes also have been referred to as "unique aggregations possessing attributes to sovereignty," Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832), and "a good deal more than 'private, voluntary organizations,'" United States v. Mazurie, 419 U.S. 544, 557 (1975). Neither accords a status indicative of a sovereign capable of having treaty relations with another sovereign. In 1871, Congress declared an end to the recognition of the tribe as "an independent nation, tribe or power with whom the United States may contract by treaty." Act of Mar. 3, 1871, ch. 120, 16 Stat. 566. United States v. Kagama, 118 U.S. 375, 379 (1886), however, solidified the view that tribes are not foreign nations. See also Choctaw Nation v. United States, 119 U.S. 1 (1886) (an Indian tribe is not an independent state or sovereign nation).

Justice Stevens, in his dissent in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 170 (1982), has even suggested that in many respects "Indian tribes' sovereignty over their own members is significantly greater than the States' power over their own citizens."
23. United States v. Wheeler, 435 U.S. 313, 323 (1978); United States v. Sandoval, 231 U.S. 28 (1913) (Congress' right to determine when to terminate "guardianship" status). Even the Supreme Court's recent holding that the power to tax non-Indians conducting business on the reservation is an inherent power necessary to tribal self-government, and territorial management is qualified by the comment that "the federal government can take away this power." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
Silence does not constitute a waiver but is a reservation of that right until "clear indications of legislative intent" are enunciated. Tribes possess only those aspects not withdrawn by treaty, statute, or as a necessary result of their dependent status. The anomaly of tribal sovereignty is, therefore, that tribes are considered to possess those powers of a sovereign state, including the powers of internal governance over the tribal members and territory, yet, at the whim of the overbearing sovereign, they are confined to the role of wards whose freedom to act is limited by the plenary powers of Congress. Congress has demonstrated its willingness to wield its power. Even the presence of substantial energy resources, institutions of higher education, and tribal enterprise (which contradict the basic notions of incompetency

25. "To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power . . . turns the concept of sovereignty on its head, and we do not adopt this analysis." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982).


27. United States v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The concept of tribes as "domestic dependent nations" was enunciated by Chief Justice Marshall who, at the same time, described the tribal relationship to the United States as that of "ward to his guardian." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Congress and the courts have never shaken this notion of the Indians as too incompetent to manage their own affairs ably.


30. Congress's plenary powers to regulate commerce with the Indian tribes, U.S. CONST. art. I, § 8, cl. 3, is the primary source for the pervasive control asserted by the federal government in Indian affairs. Talton v. Mayes, 163 U.S. 376 (1896).

31. Without fully recounting history, one need only consider the forced march along the Trail of Tears; the General Allotment Act, which took tribal lands and disbursed much of it to whites; the cultural upheaval that took children from their homes and denied the right to practice traditional religious ceremonies; the termination and relocation policies of the post-World War II decade; the Indian Reorganization Act's requirement that the Secretary of the Interior grant his approval of substantial tribal decisions; the sweeping transfer of tribal powers to the states under Public Law 280 and to the United States under the Major Crimes Act. See generally S. TYLER, A HISTORY OF INDIAN POLICY (1973).

32. Approximately 3% of the nation's oil and gas reserves and between 7 and 13% of the identifiable coal deposits are found on Indian lands. Vast deposits of uranium, phosphates, and oil shale exist. The Council of Energy Resource Tribes (CERT) was organized to address the energy-related concerns of twenty-nine tribes. There are sixteen colleges chartered by tribal enabling legislation. These include Sinte Gleska Community College on the Rosebud Reservation, Navajo Community College, the Turtle Mountain (Chippewa) Community College, and Lummi Indian School of Aquaculture. Tribally owned and managed economic ventures include the White Mountain Apache ski resort,
and wardship³³) have not negated the federal government’s authority.

Tribes can stave off further diminution of their right of self-determination and autonomy by preserving their immunity to suit. Sovereign immunity is an inherent aspect of a tribe’s sovereignty that was never relinquished, not a power conferred by Congress.³⁴ Tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers³⁵ and cannot be sued without their consent.³⁶

Tribal sovereign immunity is crucial to the integrity of tribal self-government and autonomy. Constant subjection to suits could financially debilitate a tribe and would demand an inordinate amount of resources to respond to the demands of private parties so as to cripple the operation of tribal government.³⁷ As the Supreme Court has said: “[T]he sovereignty possessing immunity should not be compelled to defend . . . away from its own territory or in courts not of its own choice. . . . This reasoning is particularly applicable to Indian nations with their government organization and peculiar problems.”³⁸ This is consistent with the federal policy of tribal self-determination and, more important, underlines the function of tribal values, customs, and cultural powers.

tribal ranches, the Lummi fishery, small industrial complexes, and timber development. See generally 1 AMERICAN INDIAN POLICY REVIEW COMMISSION: FINAL REPORT (1977).


37. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Thebo v. Choctaw Tribe of Indians, 66 F. 372 (8th Cir. 1895). See also COHEN, supra note 2, at 283-84.

traditions in creating valid tribal governments. Tribal values of justice, equity, and fundamental fairness are worthy of deference so as to permit civil disputes to be resolved away from the scrutiny of federal court.\textsuperscript{39}

Sovereign immunity, like other aspects of tribal sovereignty, is subject to the plenary and supreme powers of the federal government.\textsuperscript{40} A waiver of sovereign immunity requires affirmative statutory authorization\textsuperscript{41} and is of such a character that it "cannot be implied but must be unequivocally expressed."\textsuperscript{42} Statutory silence demonstrates Congress's specific intention to maintain tribal sovereignty as a central component of tribal self-determination.\textsuperscript{43}

Unlike federal and state government sovereignty, Indian tribal sovereignty predates the Constitution and was not incorporated into the Constitution.\textsuperscript{44} Because their sovereignty is not a constitutional creation, tribal governments are viewed as unconstrained by

\textsuperscript{39} Tribal governments and their courts are not monolithic. Each tribe has fashioned structures that intertwine tribal values with Anglo legal systems established under the Indian Reorganization Act. Just as the states and the federal government establish the bases for suits against them, so too should the tribes employ their own values to determine how best to preserve the tribe. Permitting tribes to be continually subject to legal action in federal courts gives federal judges the power and freedom to weigh tribal interests. See McCurdy v. Steele, 353 F. Supp. 629 (D. Utah 1973); Note, \textit{Indian Law—Jurisdiction—"Closing the Door to Federal Court,"} 1978 \textit{LAND \\& WATER L. REV.} 14:625 (1979).


\textsuperscript{42} United States v. King, 395 U.S. 1, 4 (1969). A waiver of a tribe's sovereign immunity is similarly sacrosanct. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Therefore, a tribe's appearance on behalf of an individual tribal member is not a waiver, Puyallup Tribe v. Washington Dep't of Game, 433 U.S. 165 (1977); nor does a tribe's acceptance of state benefits constitute an abandonment of sovereign immunity, see Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 587 (1st Cir. 1979). Since sovereign immunity is an affirmative defense, the failure to raise it may constitute a waiver, but as a sovereign power (like others not relinquished) it cannot necessarily be \textit{presumed} to be waived. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982).


\textsuperscript{44} COHEN, \textit{supra} note 2, at 122-23; Note, \textit{A New Constitutional Approach to the Doctrine of Tribal Sovereignty}, 6 \textit{AM. INDIAN L. REV.} 371 (1978).
limitations such as individual rights. This view was crystallized by the Supreme Court in 1896 in *Talton v. Mayes*: “As the powers of local government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, . . . had for its sole object to control the powers conferred by the Constitution on the National Government.” The *Talton* progeny has extended this concept beyond the fifth amendment to other provisions of the Bill of Rights and the fourteenth amendment of the Constitution.

In 1968, Congress enacted the Indian Civil Rights Act to safeguard the rights of individuals from tribal authorities. The Act was intended to harmonize the federal policy of tribal self-government, the need for substantive protection of individual rights, and the values inherent in tribal cultures. The “broad constitutional rights afforded to other Americans” were now to be secured for American Indians. Congress’s deliberate choice of “any person” and “the people” rather than “American Indians” makes it clear that Act is specifically intended to apply to both Indians and non-Indians who may be subject to a tribe’s civil jurisdiction.

In the first decade after the Civil Rights Act, federal courts had difficulty applying constitutional standards to Indian tribes. The Supreme Court eliminated the erratic interpretations in *Santa Clara Pueblo v. Martinez*. *Santa Clara* presents the most useful

46. 163 U.S. 376, 382 (1896).
47. Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967) (due process clause of fourteenth amendment); Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (first amendment); Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir.) (fourteenth amendment), cert. denied, 358 U.S. 932 (1958); Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir.) (fifth amendment), cert. denied, 356 U.S. 960, reh. denied, 357 U.S. 924 (1957).
51. See cases cited at note 6, *supra*.
analysis of the Indian Civil Rights Act. The Supreme Court con-
considered three crucial issues:
(a) There is no waiver of immunity to suit in federal court
under the Act;
(b) The Act was intended to strengthen the tribe in relation
to individual rights and tribal court is the proper place to take
challenges to ICRA violations, and;
(c) Habeas corpus relief is the only available remedy under
the Act.

Before Santa Clara, federal courts held the Indian Civil Rights
Act to waive tribal immunity.54 The courts reasoned that since the
Act was designed to protect individuals against tribal abuses,
Congress must have intended federal court jurisdiction for all al-
leged violations.55 In the process, the courts ignored the traditional
concept of sovereign immunity: suits against the sovereign require
explicit consent. There is nothing on the face of the Act expressly
waiving immunity, though, concededly, Congress had the power
to do so.6 Thus, the courts should have interpreted this failure to
act as a deliberate intention not to waive immunity. Santa Clara
reaffirms and strengthens the premises that (1) sovereign immuni-
ty must be “unequivocally” waived;57 (2) a waiver cannot be in-
ferred from silence;58 and (3) the courts must “tread lightly in the
absence of clear legislative intent.”59 Courts may no longer
assume that alleged deprivations of individual rights create a
waiver of tribal immunity in federal court.

The only federal court relief expressly available for an Indian
Civil Rights Act violation is habeas corpus.60 The Supreme Court
in Santa Clara interpreted this as a limited form of relief deliber-
ately designed to provide a less obtrusive review from de novo re-
view61 and as an alternative to other relief which Congress had

54. Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975) (following
Santa Clara this case resurfaced as 623 F.2d 682 (10th Cir. 1980)); Daly v. United States,
483 F.2d 700 (8th Cir. 1973); Williams v. Sisseton-Wahpeton Sioux Tribal Council, 387 F.
55. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978); Dry Creek Lodge, Inc.
v. United States, 515 F.2d 926 (10th Cir. 1975).
57. Id. at 58. See also United States v. Sherwood, 312 U.S. 584 (1941).
60. “The privilege of the writ of habeas corpus shall be available to any person, in a
court of the United States, to test the legality of his detention by order of an Indian
the power to authorize. Claims against the tribe that sought other relief did not create a waiver. Habeas corpus relief, the Court said, was the only relief necessary to "fulfill the purposes of the ICRA."  

The primary goal of the Indian Civil Rights Act was to engraft specific constitutional provisions into the existing tribal political systems which embody the unique cultural, social, and economic interests of the tribes. The autonomous tribal governments were not to be undermined or uprooted but accorded deference in resolving civil matters within their jurisdiction. As the Court said in Santa Clara, those "issues likely to arise in a civil context will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts." The Act was not intended to open new forums but to change the operation of tribal forums to ensure that individual rights are protected. Justice Marshall stated:

[I]mplication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. . . . Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

Santa Clara is less clear whether the tribal court must be the forum for civil rights challenges. Can a plaintiff argue that it is futile or potentially a mockery of justice to use the tribal court?

62. A person can state a claim alleging that the tribe violated a provision of the Act (see note 4, supra), but relief other than habeas corpus would not constitute a waiver. Injunctive or declaratory relief and monetary damages are not available to a plaintiff suing on an Indian Civil Rights Act claim in federal court.
64. Id. at 62, 75.
65. Id. at 61-71.
66. Id. at 71.
69. Kenai Oil & Gas v. Dep't of Interior, 522 F. Supp. 521 (D. Utah 1981), suggests that such an argument alone is insufficient to obtain federal court jurisdiction. The court did find, however, that if a plaintiff exhausted available tribal remedies and still was unable to get a fair hearing, federal court jurisdiction would be appropriate. Id. at 531. But see Takes Gun v. Crow Tribe of Indians, 448 F. Supp. 1222 (D. Mont. 1978) (where such litigation would be futile if tribal court parties would not be required to exhaust remedies that would be available in form only).
A requirement that all tribal remedies be exhausted prior to seeking any federal court action would strengthen the tribal governments and reaffirm the concept that tribal forums are appropriate for vindicating the individual rights created by the Act. If a tribe (or tribal official executing tribal policy) abridges provisions of the Indian Civil Rights Act, such as freedom of speech, the imposition of excessive fines, or the taking of private property without just compensation, habeas corpus relief is inappropriate. It is logical, therefore, that claims against a tribe be filed in the tribal forum. In this respect a tribe's immunity to suit in its own court may be implicitly waived.

**Tribal Forums and Waiver of Sovereign Immunity**

Justice Marshall's analysis in *Santa Clara* of the relationship of individual rights to tribal sovereign immunity caused federal courts to reassess challenges by non-Indians to tribal government conduct. *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes* represents a situation capable of repetition on other reservations. In that case the only access road to a non-Indian-owned lodge on the Wind River Reservation was closed under the direction of the tribal government. As a result, the business was closed and the owners were subjected to foreclosure. The non-Indian plaintiffs

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72. *Id.* at 59-60; Puyallup Tribe v. Washington Dep't of Game, 433 U.S. 165, 173 (1977). Suits against the tribes in tribal courts would not violate the premise of *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940), that a sovereign "possessing immunity should not be compelled to defend ... away from its own territory ..."; nor would such suits undermine tribal authority or self-determination. See *Santa Clara*, supra, at 59-60.

73. 623 F.2d 683 (10th Cir. 1980).

74. The plaintiffs Cook, who are non-Indians, owned a ranch and 160 acres of fee land on the Wind River Reservation for about ten years. The only access to their property was by a dirt road that crossed several properties held by Indian families. Though the Cooks never had a right-of-way, use was never denied. In 1974 the plaintiffs obtained a $250,000 Small Business Administration loan to convert their ranch to a guest lodge for hunting. The owners failed to obtain the necessary commercial right-of-way from one of the Indian families, the Bonatsies, before the lodge was completed. On the day of the formal opening the Bonatsies sought and obtained assistance from the Joint Business Council of the Arapahoe and Shoshone Tribes to blockade the road. Subsequently, Dry Creek Lodge was forced to close and legal action ensued for injunctive relief and damages.
sought, but were denied, access to the most logical forum,75 the tribal court. Suit was then filed against the tribes in federal district court for injunctive relief and damages under the Indian Civil Rights Act.

The Dry Creek Lodge court interpreted Santa Clara narrowly, distinguishing it as limited to internal tribal matters involving tribal members who had an available tribal forum.76 The Court of Appeals for the Tenth Circuit reasoned that sovereign immunity under the Indian Civil Rights Act was inextricably linked to the availability of a tribal forum and denial of such a forum created a basis for federal court jurisdiction. The court ignored the strong language of Santa Clara that the Act was intended to preserve tribal autonomy and foster self-determination. Furthermore, it misconstrued the reference to tribal court functions. The tribal forum is the appropriate place to first address due process and equal protection; the refusal of the tribal court to stipulate to Dry Creek's access does not imply a waiver of tribal immunity. The court focused upon language in Oliphant v. Suquamish Indian Tribe,77 holding that tribes are prohibited from exercising powers "expressly terminated by Congress and those powers 'inconsistent with their status.'"78 The court reasoned that because Congress can limit tribal sovereignty, it is not illogical for the government's manifested preference for protection of individual rights and personal liberties to be considered as a limitation on the tribe. Therefore, any "unwarranted intrusion" on personal liberty79 would be fundamentally unfair and inconsistent with the underlying intent of the Indian Civil Rights Act. The failure of the Arapahoe and Shoshone tribes to provide access to tribal court, therefore, implicitly waived their immunity to suit, and the federal court had jurisdiction over the non-Indian's claim.

In the court's zeal to fashion a remedy, it neglected the Act's

75. According to 25 C.F.R. § 11.22, the tribal court has jurisdiction over all suits where the defendant is a member of the tribe or tribes within its jurisdiction and where the suits are between members and nonmembers, both parties to the action must stipulate or consent to jurisdiction of the court. The tribal court refused to consent to the suit by the Dry Creek Lodge plaintiffs.
78. Id. at 208 (emphasis by the court). See Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 683, 685 (10th Cir. 1980).
79. 623 F.2d at 684.
broad application to both Indians and non-Indians and the re-
requirement that a tribe’s immunity to suit must be explicit and un-
equivocal. According to the Dry Creek Lodge court, statutory
limits upon relief under the Act “disappear when the issue relates
to a matter outside the internal tribal affairs and when it concerns
an issue with a non-Indian.” This assertion is contrary to the
language of the Act and the legislative history, which reflect Con-
gress’s intent to protect the rights of Indians and non-Indians.
The court also misconstrues Santa Clara as focusing upon the
availability of a tribal forum to the Indian plaintiff. Justice Mar-
shall clearly stated that tribal forums are appropriate for the “ex-
clusive adjudication of disputes affecting . . . both Indians and
non-Indians.” The Dry Creek Lodge court then stresses that
since there “has to be a forum” and a remedy for violation of
“constitutional rights,” there is an implicit waiver of immunity.
Waivers, however, depend upon “clear indications of legislative
intent” and not upon the need for a forum. Santa Clara makes
it clear that asserted violations of due process and equal protec-
tion rights do not waive tribal immunity. The court of appeals de-
cision improperly negates the tribe’s inherent authority to deter-
mine the manner for resolving its conflicts. Perhaps the argument
should not be that denial of a tribal forum constitutes a waiver of
sovereign immunity, but that the sovereign subjects itself to suit
when its agents act in an unconstitutional manner.

The same conflict between due process rights and sovereign im-

munity was posed in R.J. Williams Co. v. Fort Belknap Housing

Authority. Williams had a contract with the Fort Belknap

Housing Authority to build homes on the reservation. As the pro-

ject neared completion, a dispute arose and the Housing Authori-

ty obtained an order from the tribal court attaching Williams’s

property. Williams sued the tribal court and Housing Authority


81. 623 F.2d 683, 685 (10th Cir. 1980).


83. 623 F.2d 683, 685 (10th Cir. 1980).


Unknown Named Agents, 403 U.S. 388 (1971); Larson v. Domestic & Foreign Commerce


87. See note 13, supra.
in federal court for injunctive relief and damages, alleging four jurisdictional bases. 88

Although the court stated its belief that Williams's due process rights were violated by the attachment, Judge Hatfield refused to follow the Dry Creek Lodge reasoning. Though considering Santa Clara "absurd" and "broad, uncategorical and regrettably not confined to the facts," he nevertheless conceded that Santa Clara was the prevailing rule of law. 89 "Section 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the Tribe or its officers." 90 Therefore, Williams could not obtain his desired relief in federal court.

The court made two arguments in an unsuccessful attempt to distinguish Santa Clara. First, tribal membership constitutes a "more weighty" issue in tribal self-government than an issue of contract law, which does not raise questions of tribal tradition and custom. 91 This argument is weak, however, because a non-Indian's commercial relationship with a tribe involves more than routine issues of contract law. Contract negotiations and management are important aspects of a tribe's autonomy and are primary means of defining the tribe's relationship to the external world.

Second, the court stressed that the plaintiff in Santa Clara had access to tribal court and, therefore, redress for her claim under the Indian Civil Rights Act. This distinction fails since Williams refused to consent to the jurisdiction of the tribal court 92 and did not demonstrate that a tribal forum would have proven futile or unfair. 93

Williams was conducting business on the reservation and could have entered tribal court alleging conversion, breach of contract, or deprivation of due process. His election of federal remedy was a deliberate avoidance of the tribe's sovereign authority and was fatal to his claim. The court concluded that: "This court, therefore, must reluctantly hold that, although plaintiffs have a

88. See note 14, supra.
90. Id. at 939.
91. Id.
92. As a party plaintiff, Williams had access to tribal court under the extant Tribal Law and Order Code, section 14.1, but purposefully chose not to use that forum. The circumstances here are also distinct from Dry Creek Lodge v. Arapahoe & Shoshone Tribes, 623 F.2d 683 (10th Cir. 1980), where the non-Indian plaintiff desired access to tribal court and was denied.
93. See text accompanying note 71, supra.
federal right to due process in any proceeding by the Tribe to take plaintiff's property, plaintiffs have no legitimate remedy—federal or tribal—to redress the alleged violation of that federal right. 94

Habeas corpus was not the proper relief for Williams in federal court, but a remedy was available to him in tribal court. His right to due process is not the constitutional protection of the fifth and fourteenth amendments but was created by the Indian Civil Rights Act and could be addressed in the tribal forum. 95 The Act creates no other private causes of action and federal courts cannot rewrite the law and deny the tribe's authority over the conduct and disputes arising on the reservations.

The integrity of tribal sovereignty largely depends upon the wisdom and fairness with which the laws are exercised in tribal territory. The history of federal-Indian legal relations 96 demonstrates that the federal government has doubted the capacity of tribes to govern and has readily limited tribal powers when deemed to be in the national interest. 97 The Indian Civil Rights Act shows Congress's concern for the individual rights of persons under tribal jurisdiction and for strengthening the role of tribal government in addressing those rights. The increasing contact, and potential for conflict, with non-Indians on the reservation increases the tribes' need to preserve their sovereignty while protecting the rights of individuals.

Jurisdiction over non-Indians is of vital concern if tribes are to maintain their integrity as true sovereigns. In Montana v. United States, the Supreme Court said:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate through taxations, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. 98

100. Id. at 59. Accord, Trans-Canada Enter., Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474 (9th Cir. 1980).

Santa Clara re-affirms the role of tribal courts as the forum for adjudicating civil rights claims and, implicitly, requires exhaustion. Exhaustion of tribal remedies, however, does not constitute a waiver of sovereign immunity. Cf. Kenai Oil & Gas v. Dep't of Interior, 522 F. Supp. 521 (D. Utah 1981).
denied, it is likely that non-Indian contractors, business people, or potential agents will refuse to do business for fear of having no remedy.

The Arapahoe-Shoshone Tribal Court in *Dry Creek Lodge* and the Fort Belknap Tribal Court in *Williams* were like those on many reservations and required consent by both parties for suits by nontribal members. This is consistent with the Code of Federal Regulations model which premises jurisdiction on “stipulation.” This requirement allowed the tribes in *Dry Creek Lodge* to deny access to the non-Indians and allowed Williams to evade the tribe’s jurisdiction. The stipulation provision denies due process and, perhaps, equal protection as mandated by the Indian Civil Rights Act.

Jurisdiction and access to tribal court could apply the traditional minimum contacts standard for personam jurisdiction. In both *Dry Creek Lodge* and *Williams*, the plaintiffs would have also qualified by the implied standards of *Montana v. United States* that jurisdiction exists when the dispute arises out of a “consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” or “threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.”

In justifying its concern for the non-Indians’ lack of access to tribal court, the *Dry Creek Lodge* court cited *Oliphant v. Suquamish Indian Tribe*’s expression of fear of “unwarranted intrusion on . . . personal liberty.” *Oliphant* is distinguishable because it involved the tribe’s criminal jurisdiction. A tribe’s civil jurisdiction affords the victim an opportunity to be compensated rather than punished. The fear of intrusion expressed in *Oliphant* is less obvious in civil litigation where non-Indians have voluntarily come within a tribe’s jurisdiction.

105. 25 U.S.C. § 11.22 provides that tribal courts—shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and nonmembers which are brought before the courts by stipulation of both parties. No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense.
109. The non-Indian who is allegedly wronged on the reservation must take the initia-
Jurisdiction of the tribal court does not mean tribal immunity should be abandoned. Rather than force Congress to establish waivers, tribal governments should reexamine the scope of their immunity. Habeas corpus relief available under the Indian Civil Rights Act is inadequate. Consideration should be given to allowing suits against tribal officers who act *ultra vires* or in violation of due process and to providing writs of mandamus to compel the application of the Act's "constitutional" guarantees. Tribes should also consider modifying their immunity from suit by creating a tribal analog of 42 U.S.C. § 1983, a tribal version of the Federal Tort Claims Act, or a waiver similar to that in the Administrative Procedures Act.

The tribes must determine how to accommodate individual rights within their cultural, political, and social framework. Self-determination means that the tribes must define their relationships with the external world and identify those with whom their legal systems have contact. It is difficult to view the denial of a judicial forum to non-Indians as a means of strengthening tribal sovereignty. Furthermore, tribes ignore their own traditions of equity and fairness when parties such as Dry Creek Lodge, Inc., and Williams are deprived of their property without an opportunity to be heard. It is doubtful that Congress, in the exercise of its plenary power, will permit non-Indians to be deprived of a remedy when their rights are allegedly violated. It is not inconceivable that Congress would severely curtail tribal civil jurisdiction over non-Indians, following logic similar to that found in *Oliphant*.

Justice Blackmun's concurrence in *Puyallup Tribe v. Washington Dep't of Game* regarding the viability of the doctrine of tribal immunity suggests that *Dry Creek Lodge and/or Williams*
could be the appropriate type of case for reviewing sovereign immunity. Unless tribes act to protect the rights of both Indians and non-Indians within their jurisdiction, Congress may strip the tribes of a crucial aspect of their sovereignty.

**Conclusion**

The Indian Civil Rights Act was intended to preserve and strengthen tribal government while safeguarding the individual rights of all people against potential tribal abuses. The Act provides a single remedy in federal court—habeas corpus relief—for alleged deprivations of civil rights. The Supreme Court in *Santa Clara Pueblo v. Martinez* made it clear that tribal forums are appropriate for enforcing the rights created under the Indian Civil Rights Act and implied that the tribe itself may be subject to suit in its own court.\(^{116}\) Since the plaintiff, Julia Martinez, was a tribal member, *Santa Clara* has raised questions in subsequent cases concerning the Act’s application to non-Indians on the reservation.

*Dry Creek Lodge, Inc. v. Araphoe & Shoshone Tribes* held that where a tribal remedy is unavailable, the non-Indian could seek relief in federal court. This holding contradicts the traditional doctrine of sovereign immunity, the express language of the Indian Civil Rights Act, and the Supreme Court’s holding in *Santa Clara*. But, *Dry Creek Lodge* and a similar case, *R.J. Williams v. Fort Belknap Housing Authority*, demonstrates that real tension exists between sovereign immunity, which is crucial for tribal self-preservation, and individual rights, which are equally crucial in defining tribal sovereignty. This tension is one the tribes must resolve so that Congress and the Supreme Court do not act to further modify tribal sovereignty. The tribes’ viability as true sovereigns requires that they take steps to harmonize their inherent right of tribal immunity with the individual civil rights of both Indians and non-Indians on the reservation.