1-1-1981

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

Stephen Lafferty

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

Part of the [Indigenous, Indian, and Aboriginal Law Commons](#)

Recommended Citation

Stephen Lafferty, *Sovereignty: Tribal Sovereign Immunity and the Claims of Non-Indians Under the Indian Civil Rights Act*, 9 AM. INDIAN L. REV. 289 (1981),
<https://digitalcommons.law.ou.edu/ailr/vol9/iss2/5>

This Note 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 Law-LibraryDigitalCommons@ou.edu.

SOVEREIGNTY: TRIBAL SOVEREIGN IMMUNITY AND THE CLAIMS OF NONINDIANS UNDER THE INDIAN CIVIL RIGHTS ACT

Stephen Lafferty*

Introduction

Federal Indian policy has simultaneously accepted dual and conflicting premises about Indian tribal autonomy: tribes are "dependent domestic nations"¹ yet have sovereign powers which predate the Constitution.² 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 Constitution³ 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 1968⁴ that Congress exercised its plenary

* Second-place Winner, 1982 Writing Competition.

1. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 25 (1831).

2. *Talton v. Mayes*, 163 U.S. 376, 384 (1896). See also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); F. COHEN, *FEDERAL INDIAN LAW* 122 (1942) [hereinafter cited as COHEN]; Note, *A New Constitutional Approach to the Doctrine of Tribal Sovereignty*, 6 AM. INDIAN L. REV. 371, 391 (1978).

3. See *Talton v. Mayes*, 163 U.S. 376 (1896); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 556 (8th Cir.), cert. denied, 358 U.S. 932 (1958).

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-

powers⁵ to constrain tribal governments against arbitrary or abusive conduct toward both Indians and non-Indians⁶ 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*,⁷ 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*,⁸ and *R.J. Williams Co. v. Fort Belknap Housing Authority*,⁹ 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 Council¹⁰ 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.¹¹ The Tenth Circuit Court of Ap-

ments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of \$500, or both;

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

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

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

5. Congress's major source of power in Indian affairs is derived from U.S. CONST. art. I, § 8, cl. 3. "[The Congress shall have Power] to regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes." See *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Sandoval*, 231 U.S. 28 (1913); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Kagama*, 118 U.S. 375 (1886).

6. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 n.6 (1978). See *Schantz v. White Lightning*, 502 F.2d 67, 70 n.5 (8th Cir. 1974); *Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969).

7. 436 U.S. 49 (1978).

8. 623 F.2d 683 (10th Cir. 1980).

9. 509 F. Supp. 933 (D. Mont. 1981).

10. 623 F.2d 683 (10th Cir. 1980). The Arapahoe and Shoshone tribes have a Joint Business Council composed of each tribe's Business Council. The councils are elected and serve as the legislative, executive, and judicial bodies for the tribes.

11. 25 U.S.C. §§ 1301-1303 (1976). See note 4, *supra*. Party defendants in the first

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.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.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.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.¹⁵ The suit was dismissed for lack of jurisdiction and Williams was without a remedy.

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.

. . . The limitations and restrictions present in *Santa Clara* should be applied. There has to be a forum where the dispute can be settled.

623 F.2d 682, 685 (1980).

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).

14. William's refusal to consent to the tribe's jurisdiction meant that the tribal court was without the jurisdiction to order the attachment. The extant tribal code did not confer jurisdiction upon the court. Besides the Indian Civil Rights Act, 25 U.S.C. § 1302, the plaintiff alleged jurisdiction based on diversity, 28 U.S.C. § 1332; federal question, 28 U.S.C. § 1331(a); and a civil rights claim, 42 U.S.C. § 1983, in conjunction with 28 U.S.C. § 1343(3). The last three bases were dismissed. 509 F. Supp. 933, 939 (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."¹⁶

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.¹⁷ Tribes began their relationships with the federal government as sovereign nations and later agreed to their roles as weaker powers. They did not surrender tribal independence or the right of self-government and jurisdiction over the persons and property within their territorial boundaries.¹⁸ While no

v. Martinez, 436 U.S. 49 (1978); *Trans-Canada Enter., Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980).

16. 433 U.S. 165, 178-79 (1977) (Blackmun, J., concurring).

17. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Kagama*, 118 U.S. 375 (1886); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

18. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *United States v. Wheeler*, 435 U.S. 313 (1978); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); COHEN, *supra* note 2, at 122. See also Note, *Indian Sovereignty and Judicial Interpretations of the Indian Civil Rights Act*, 1979 WASH. U.L.Q. 897, 899. The treaty-making process was intended to ensure a certain degree of dominion over separate territories controlled by the tribes.

longer possessed of the full attributes of sovereignty,¹⁹ tribes remain as a separate people²⁰ with the power to regulate their internal and social relations.²¹

The exercise of tribal sovereignty has been severely limited by the asserted power of the "overriding sovereign."²² 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.²³ Divestiture cannot be inferred but must be explicit.²⁴

19. *United States v. Kagama*, 118 U.S. 375, 381 (1886).

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).

21. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). Tribal powers over reservations' internal affairs have been generally upheld. See, e.g., *United States v. Quiver*, 241 U.S. 602 (1916) (domestic relations); *Ex parte Crow Dog*, 109 U.S. 556 (1883) (criminal justice involving tribal members); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975) (regulation of economic and land use); *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 (8th Cir. 1975) (tribal elections); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958) (taxing use of trust land).

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."

22. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

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).

24. *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979); *Thebo v. Choctaw Tribe*, 66 F. 372 (8th Cir. 1895). But cf. *United States v. Wheeler*, 435 U.S. 313, 326 (1978), the Court discussed three areas of implicit divestiture owing to the tribes' dependent status: first, the right to alienate freely Indian land to non-Indians, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974); second, the right to enter into direct commercial or governmental relations with foreign nations, *Worcester v. Georgia*, 32 U.S. (6 Pet.) 515, 559 (1832); and, third, criminal trials of nonmembers in tribal courts, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Silence does not constitute a waiver²⁵ but is a reservation of that right until "clear indications of legislative intent"²⁶ are enunciated. Tribes possess only those aspects not withdrawn by treaty, statute, or as a necessary result of their dependent status.²⁷ The anomaly of tribal sovereignty is, therefore, that tribes are considered to possess those powers of a sovereign state, including the powers of internal governance²⁸ over the tribal members and territory, yet, at the whim of the overbearing sovereign, they are confined to the role of wards²⁹ whose freedom to act is limited by the plenary powers of Congress.³⁰ Congress has demonstrated its willingness to wield its power.³¹ Even the presence of substantial energy resources, institutions of higher education, and tribal enterprise³² (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).

26. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

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.

28. See *Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976); *United States v. E.K.*, 471 F. Supp. 924 (D. Ore. 1979).

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

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

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

33. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

34. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1065-66 (1st Cir. 1979).

35. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940). Sovereign immunity has been held not to depend upon status as a federally recognized tribe, *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979), nor on the type of relief being sought, *United States Fidelity & Guar. Co., supra* (damages), *Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 165 (1977) (declaratory and injunctive relief). Cf. *The United States is immune to suit in federal court as a matter of federal common law. See Turner v. United States*, 248 U.S. 354 (1919); *United States v. Lee*, 106 U.S. 196, 204 (1882).

36. *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895). See also *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Aubertin v. Colville Confederated Tribes*, 446 F. Supp. 430 (D. Wash. 1978).

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.

38. *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940). Cf. *State courts may not exercise jurisdiction over tribes, Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 165, 172 (1977); *State ex rel. California Dep't of Fish & Game v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979).

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.³⁹

Sovereign immunity, like other aspects of tribal sovereignty, is subject to the plenary and supreme powers of the federal government.⁴⁰ A waiver of sovereign immunity requires affirmative statutory authorization⁴¹ and is of such a character that it "cannot be implied but must be unequivocally expressed."⁴² Statutory silence demonstrates Congress's specific intention to maintain tribal sovereign immunity as a central component of tribal self-determination.⁴³

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

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, *Indian Law—Jurisdiction—"Closing the Door to Federal Court,"* 1978 LAND & WATER L. REV. 14:625 (1979).

40. See note 5, *supra*. See also *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973); Note, *Indian Sovereignty and Judicial Interpretations of the Indian Civil Rights Act*, 1979 WASH. U.L.Q. 897, 899-905.

41. "Congress has not given the Solicitor General authority to waive the immunity of an Indian tribe." *Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 165, 170 n.9 (1977). See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940); COHEN, *supra* note 2, at 283. Cf. *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

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 presumed to be waived. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982).

43. Cf. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.9 (1982); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

44. COHEN, *supra* note 2, at 122-23; Note, *A New Constitutional Approach to the Doctrine of Tribal Sovereignty*, 6 AM. INDIAN L. REV. 371 (1978).

limitations such as individual rights.⁴⁵ 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."⁴⁶ 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.⁴⁷

In 1968, Congress enacted the Indian Civil Rights Act⁴⁸ 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.⁴⁹ The "broad constitutional rights afforded to other Americans" were now to be secured for American Indians.⁵⁰ 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.⁵¹

In the first decade after the Civil Rights Act, federal courts had difficulty applying constitutional standards to Indian tribes.⁵² The Supreme Court eliminated the erratic interpretations in *Santa Clara Pueblo v. Martinez*.⁵³ *Santa Clara* presents the most useful

45. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Talton v. Mayes*, 163 U.S. 376, 382 (1896); COHEN, *supra* note 2, at 123.

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).

48. 25 U.S.C. §§ 1301-1303 (1976).

49. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978); *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 (8th Cir. 1975); *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973).

50. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978).

51. See cases cited at note 6, *supra*.

52. *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974); Note, *Constitutional Law: Santa Clara Pueblo v. Martinez: Tribal Membership and the Indian Civil Rights Act*, 6 AM. INDIAN L. REV. 205, 212-14 (1978).

53. 436 U.S. 49 (1978). See Note, *supra* note 52; 1 AMERICAN INDIAN POLICY REVIEW COMMISSION 210-12 (1977).

analysis of the Indian Civil Rights Act. The Supreme Court 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 alleged 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.⁵⁶ 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 immunity must be "unequivocally" waived;⁵⁷ (2) a waiver cannot be inferred 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 deliberately designed to provide a less obtrusive review from *de novo* review⁶¹ 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. Supp. 1194 (D.S.D. 1975).

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).

56. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

57. *Id.* at 58. See also *United States v. Sherwood*, 312 U.S. 584 (1941).

58. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982).

59. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 68 (1978).

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 tribe." 25 U.S.C. § 1303 (1976).

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

the power to authorize. Claims against the tribe that sought other relief did not create a waiver.⁶² Habeas corpus relief, the Court said, was the only relief necessary to “fulfill the purposes of the ICRA.”⁶³

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.⁶⁴ The autonomous tribal governments were not to be undermined or uprooted but accorded deference in resolving civil matters within their jurisdiction.⁶⁵ 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.”⁶⁶ The Act was not intended to open new forums but to change the operation of tribal forums to ensure that individual rights are protected.⁶⁷ 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.⁶⁸

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?⁶⁹

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.

63. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

64. *Id.* at 62, 75.

65. *Id.* at 61-71.

66. *Id.* at 71.

67. Note, *Indian Law—Jurisdiction—“Closing the Door to Federal Court,”* LAND & WATER L. REV. 14:625 (1979).

68. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

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 remedies⁷⁰ 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.⁷¹ 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.⁷²

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*⁷³ 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.⁷⁴ The non-Indian plaintiffs

70. See *McCurdy v. Steele*, 506 F.2d 653, 656-57 (10th Cir. 1974); *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973); *Brunette v. Dann*, 417 F. Supp. 1382 (D. Idaho 1976); *Wounded Knee v. Andera*, 416 F. Supp. 1236 (D.S.D. 1976); *Citizens League for Civil Rights, Inc. v. Baker*, 464 F. Supp. 1389 (D. Wis. 1978).

71. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

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.

76. 623 F.2d 683, 685 (10th Cir. 1980). *Contra*, *Trans-Canada Enter., Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474 (9th Cir. 1980); *R.J. Williams Co. v. Fort Belknap Housing Auth.*, 509 F. Supp. 933 (D. Mont. 1981).

77. 435 U.S. 191 (1978).

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 requirement that a tribe's immunity to suit must be explicit and unequivocal.⁸⁰ 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."⁸¹ This assertion is contrary to the language of the Act and the legislative history, which reflect Congress'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 Marshall clearly stated that tribal forums are appropriate for the "exclusive adjudication of disputes affecting . . . both Indians and non-Indians."⁸² The *Dry Creek Lodge* court then stresses that since there "has to be a forum" and a remedy for violation of "constitutional rights,"⁸³ there is an implicit waiver of immunity. Waivers, however, depend upon "clear indications of legislative intent" and not upon the need for a forum.⁸⁴ *Santa Clara* makes it clear that asserted violations of due process and equal protection rights do not waive tribal immunity. The court of appeals decision improperly negates the tribe's inherent authority to determine 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.⁸⁵

The same conflict between due process rights and sovereign immunity was posed in *R.J. Williams Co. v. Fort Belknap Housing Authority*.⁸⁶ Williams had a contract with the Fort Belknap Housing Authority to build homes on the reservation. As the project neared completion, a dispute arose and the Housing Authority obtained an order from the tribal court attaching Williams's property.⁸⁷ Williams sued the tribal court and Housing Authority

80. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *United States v. Mitchell*, 445 U.S. 535 (1980), *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

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

82. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

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

84. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978). See generally *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940); *Thebo v. Choctaw Tribe*, 66 F. 372 (8th Cir. 1895).

85. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Cf. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

86. 509 F. Supp. 933 (D. Mont. 1981).

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 court⁹² 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*.

89. 509 F. Supp. 933, 939, 941 (D. Mont. 1981).

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 relations⁹⁶ 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

94. *R.J. Williams Co. v. Fort Belknap Housing Auth.*, 509 F. Supp. 933, 941 (D. Mont. 1981).

95. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978).

96. *United States v. Kagama*, 118 U.S. 375 (1886) (tribes as dependent communities, weak and helpless requiring government protection); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (tribes in status of ward).

97. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 519 F. Supp. 418 (D. Ariz. 1981).

98. 450 U.S. 544, 565 (1981).

Santa Clara indicates that under the Indian Civil Rights Act a tribal forum is appropriate for the vindication of alleged violations of civil rights.⁹⁹ *Dry Creek Lodge* and *Williams* suggest that tribes have the authority to, and should, develop adjudicative systems that combine traditional values and constitutional safeguards to promote fundamental fairness for Indians and non-Indians alike.

In *Dry Creek Lodge* and *Williams*, tribal governments were accused of violating non-Indians' civil rights. Contrary to the *Dry Creek Lodge* holding, *Santa Clara* has made it clear that there is no waiver of the tribes' sovereign immunity under the Indian Civil Rights Act.¹⁰⁰ Tribes cannot, however, insulate themselves from statutory due process and equal protection requirements.¹⁰¹ *Santa Clara* should be read as implying a waiver to suit in tribal court because tribal "forums are available to vindicate rights created by the ICRA" and have been repeatedly recognized as the proper forum for the "exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."¹⁰² Indians and non-Indians with civil rights claims should exhaust available remedies before seeking federal court review, except for habeas corpus.¹⁰³

To read *Santa Clara* otherwise gives credence to the *Dry Creek Lodge* premise that only Indians are prevented from suing in federal courts on violations under the Act. Such an interpretation cannot withstand the statute's due process requirements. A non-Indian who enters into a commercial or contractual relationship with a tribe must have access to the tribal court. If access is

99. 436 U.S. 49, 65 (1978).

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

101. *Talton v. Mayes*, 163 U.S. 376 (1896), indicates that due process, equal protection, and other constitutional safeguards of the Bill of Rights and the fourteenth amendment do not apply to Indian tribes. The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1976), is a statutory guarantee of selectively incorporated aspects of the Bill of Rights. See note 4, *supra*.

102. 436 U.S. 49, 65 (1978).

103. Prior to *Santa Clara*, many cases interpreted the Indian Civil Rights Act as requiring an exhaustion of tribal remedies. See, e.g., *McCurdy v. Steele*, 506 F.2d 653 (10th Cir. 1974); *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973); *Brunette v. Dann*, 417 F. Supp. 1382 (D. Idaho 1976); *Wounded Knee v. Andera*, 416 F. Supp. 1236 (D.S.D. 1976).

Santa Clara reaffirms 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 reservations¹⁰⁴ 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."¹⁰⁵ 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.¹⁰⁶ 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."¹⁰⁷

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."¹⁰⁸ *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.¹⁰⁹

104. NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 47-48 (1978).

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.

106. See *International Shoe v. Washington*, 326 U.S. 310 (1945).

107. 450 U.S. 544, 565-66 (1981). See also *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 519 F. Supp. 418 (D. Ariz. 1981).

108. *Dry Creek Lodge, Inc. v. Arapaho & Shoshone Tribes*, 623 F.2d 683, 684 (10th Cir. 1980).

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 suit¹¹⁰ by creating a tribal analog of 42 U.S.C. § 1983,¹¹¹ a tribal version of the Federal Tort Claims Act,¹¹² or a waiver similar to that in the Administrative Procedures Act.¹¹³

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*.¹¹⁴

Justice Blackmun's concurrence in *Puyallup Tribe v. Washington Dep't of Game* regarding the viability of the doctrine of tribal immunity¹¹⁵ suggests that *Dry Creek Lodge* and/or *Williams*

tive to obtain compensation. Since the compensation is limited to the amount of damage suffered, it is questionable whether there is any "intrusion." See *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 519 F. Supp. 418 (D. Ariz. 1981).

110. Since a tribe can consent to a waiver of its immunity, it is logical that a tribe can enact its own legislation to modify its tribal immunity. Cf. *Turner v. United States*, 248 U.S. 354 (1919). See also COHEN, *supra* note 2, at 283-84.

111. 42 U.S.C. § 1983 (1976) protects individuals against the deprivation of rights, privileges, and immunities secured under the Constitution by persons acting under color of state law. Tribes could enact legislation to protect Indians and non-Indians from deprivation of rights under the Indian Civil Rights Act by tribal officials or those "acting under color of tribal law." Damages and equitable relief would be analogously appropriate.

112. 28 U.S.C. § 1346(b) (1976).

113. 5 U.S.C. § 706 (1976).

114. 435 U.S. 191 (1978).

115. 433 U.S. 165 (1977). See text accompanying note 3, *supra*.

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.

116. 436 U.S. 49, 65 (1978).