FEDERAL DELEGATION OF TRIBAL JURISDICTION OVER NONMEMBERS

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TABLE OF CONTENTS

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1. Introduction.

The doctrine of inherent tribal sovereignty in the federal courts lies in shreds.(1) Determinations of inherent tribal sovereignty, particularly in the United States Supreme Court, have become more an exercise of political revisionism than inquiries into history and anthropology. Rulings rejecting a particular tribe's effort to exercise inherent tribal authority are presumed to set limits on all tribes' inherent authority and are quickly applied to other situations.

The federal courts' obvious movement away from acknowledging tribal territorial jurisdiction and the legal effect of inherent sovereignty will continue to taint federal common law that addresses the scope of inherent tribal sovereignty. This paper searches for more precise grounds to support exercises of tribal authority: specific federal statutes authorizing particular tribes' authorities. Congressional "authorization" or "express delegation" can be a basis for tribal authority over nonmembers in both the civil and criminal areas. We look first at the enunciation of the test, next its jurisprudential antecedents, and finally, recent cases and authorities addressing congressional authorization of tribal authority. The concept of congressional delegation of authority leads to some constitutional complications, as we shall see below.

2. The Analytical Framework for Tribal Jurisdiction Over Nonmembers.

Montana v. United States(2) establishes the benchmark that tribal jurisdiction over nonmembers exists if one of three tests is met: (1) "express congressional delegation," (2) "taxation, licensing, or other means [regulating] the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements," or (3) "conduct of non-Indians on fee lands within [the] reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."(3)

In Oliphant v. Suquamish Indian Tribe,(4) the Supreme Court stated: "[A]n examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."(5) The Court went on to declare that tribes retain elements of "quasi-sovereign" authority, but the retained powers are limited by more than the specific restrictions in treaties and congressional enactments. "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers inconsistent with their status."(6) In the 21 years since Oliphant the federal

courts have embarked on a wide ranging search for powers believed to be "inconsistent with the tribes' dependent status."

As noted above, our focus here is on the first of the three alternative bases for tribal jurisdiction over nonmembers: congressional authorization. This basis for tribal jurisdiction has been variously described. Montana v. United States uses the phrase "express congressional delegation."(7)Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation asks whether "Congress has expressly delegated . . . the power."(8)South Dakota v. Bourland merely quotes the Montana phrase "cannot survive without express congressional delegation."(9) However, Strate v. A-1 Contractors states the test this way: "Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances."(10)This paper contends that congressional "authorization" or "approval" is better than "delegation" as a way to frame the test for this variety of tribal jurisdiction.

3. The Supreme Court's Use of the Congressional Authorization Basis for Jurisdiction.

Morris v. Hitchcock is given as an example of consensual jurisdiction (Montana "exception one"),(11) but it can also be seen as an example of congressional authorization. Morris v. Hitchcock(12) arose within the Chickasaw Reservation in what later became Oklahoma. The Interior Department had ruled that it had a duty to remove livestock pastured within the reservation without a tribal permit or license and to close businesses conducted without required permits. In 1902 Congress protected the rights of resident nonmembers by prohibiting the Interior Department from removing them. However, Congress also provided in the Curtis Act(13) that tribal law would apply:

[N]o act . . . of . . . the Choctaw or Chickasaw tribes . . . shall be of any validity until approved by the President of the United States. . . . Said acts . . . when so approved, shall be published in at least two newspapers . . . .

The Court concluded that the Curtis Act was intended "to permit the continued exercise, by the legislative body of the tribe, of such a power as is here complained of, subject to a veto power in the President over such legislation as a preventive of arbitrary and injudicious action."(14) The Court thus upheld the permit tax on livestock within the Chickasaw Reservation whether or not the livestock owners lawfully possessed parcels of land in towns and cities in the Reservation.

United States v. Mazurie(15) is the leading case on "delegation" to tribes of authority over non-Indians. The Mazuries operated a bar on fee land within the Wind River Reservation in Wyoming. They were denied a tribal liquor license by the tribe

under its option to regulate the introduction of liquor into Indian country. The United States prosecuted them and obtained a conviction for violating 18 U.S.C. § 1154.

The Mazurie opinion focuses on the phrase in § 1154 exempting "fee-patented lands in non-Indian communities" within Indian reservations from the Indian liquor laws. However, for our purposes the important statute is 18 U.S.C. § 1161, a 1953 congressional local-option act allowing tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country (so long as state law is not violated). Section 1161 exempts from federal prosecution acts "in conformity . . . with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the federal register." Note that this statute does not directly delegate authority to any tribe nor expressly approve any particular tribe's ordinance. However, it makes clear that tribal liquor ordinances, duly adopted, certified by the Interior, and published in the Federal Register will have legal effect for federal criminal law purposes.

The court of appeals in Mazurie expressed doubt that Congress has power to regulate businesses on non-Indian fee land. Part III of the Supreme Court's opinion dismissed that doubt on the basis of the Indian commerce clause(16) and the string of cases involving sale of alcoholic beverages to tribal Indians whether on or off a reservation.

In Part IV of its opinion the Court held that Congress has the power to delegate its authority to tribes. The Court noted cases limiting the authority of Congress to delegate its legislative power, discussed below, but upheld the delegation in § 1161 as follows:

[W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter. We need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26. It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority "to regulate Commerce . . . with the Indian tribes." Cf. United States v. Curtiss-Wright Export Corp., [299 U.S. 304 (1936)].

The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion.(17)

Mazurie is a landmark case upholding the authority of Congress to authorize tribes to exercise jurisdiction over non-Indians when those matters "affect the internal and social relations of tribal life." It does not impose a requirement that a tribe possess inherent sovereignty over a subject in order to support congressional delegation; to the contrary, as the interpretation of the Montana exceptions have shown, the tests for inherent sovereignty are much narrower than Congress' ability to authorize tribal authority.

Washington v. Confederated Tribes of the Colville Indian Reservation(18) rejected the State of Washington's contention that inherent tribal authority to tax the activities or property of non-Indian is inconsistent with the overriding interests of the national government. The Court said:

[A]uthority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476.(19)

But while the Court found the tribal power to tax events on Indian land to have been "confirmed" by the Indian Reorganization Act,(20) it did not find that Congress had intended to preempt state taxing power over nonmember transactions, despite the economic consequences to the tribes of double taxation. In Colville, the Court upheld the tribe's authority to impose cigarette taxes on nonmember purchasers on reservations but also upheld the state's authority to tax the same transactions.

Colville illustrates that the analysis is a two-step process. In Colville, the Court first examined statutes fostering tribal self-government and found that they confirmed tribal power to act but none was intended to give tribal enterprises a competitive advantage over all other businesses, nor to comprehensively regulate all sales by Indians to nonmembers of the tribe. The Court noted that Congress could create that power:

[A]lthough the Tribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so, cf. Fisher v. District Court, 424 U.S. 382, 390 (1976) (per curiam); United States v. Mazurie, 419 U.S. 544 (1975), we do not infer from the mere fact of federal approval of the Indian taxing ordinances, or from the fact that the Tribes exercise congressionally sanctioned powers of self-government, that Congress has delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe.(21)

In contrast, the lower court in Colville had determined that the tribal tax preempted the state tax. It reasoned that because Congress can validly delegate legislative authority to a tribe, when a tribe exercises such delegated authority and the result is a tribal ordinance that conflicts with an otherwise valid state statute, the state statute is preempted. The lower court relied upon Fisher v. District Court.(22) Fisher, however, involved a statute that affected only Indians and did not authorize preemption through ordinances affecting non-Indians.

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation(23) upheld a tribal zoning ordinance over some reservation fee lands, but not others. Most of the fee land on the Yakama Reservation, including Wilkinson's property, is found in three towns. The rest, including Brendale's land, is scattered throughout the reservation in a checkerboard pattern. The district court held that the tribe had exclusive jurisdiction over the Brendale property but lacked authority over the Wilkinson property under the second Montana exception. The Ninth Circuit Court of Appeals upheld tribal zoning authority throughout the reservation, reasoning that denying the tribe local governmental police power to zone fee land would destroy its capacity to engage in comprehensive planning.

In a badly divided decision, the U.S. Supreme Court upheld tribal jurisdiction to zone areas where the amount of nonmember owned land was small enough that the tribe retained the power to define the area's essential character. The Court rejected tribal authority to zone the Wilkinson property, which was located in an area of the reservation that contained a large proportion of fee land owned by nonmembers.

The opinion of Justices White, Rehnquist, Scalia and Kennedy disposed of the Yakama Nation's attack on the notion of congressional delegation of tribal power over nonmembers, and particularly the language in Montana v. United States, which rejected Crow tribal regulation of hunting and fishing on fee lands owned by non-Indians in the absence of an express congressional delegation. The Yakama Nation contended that insistence on a congressional delegation conflicted with Washington v. Confederated Tribes of the Colville Indian Reservation. However, the Court noted that Colville involved transactions on trust land and significantly involving tribal members and Montana cited Colville as an example of the sort of "consensual relationship" that might support tribal authority over nonmembers on fee lands.(24) Justice White commented that Brendale involved "no contention . . . that Congress has expressly delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe."(25)

Justice White then cited four examples of express statutory delegation (using the signal "cf."). The first citation is to the definition of Indian country,(26) and the

second, the authorization of tribal local option ordinances that were at issue in United States v. Mazurie.(27)

The third and fourth citations are particularly important as they refer to § 518 of the Clean Water Act. Justice White's fourth citation, 33 U.S.C. § 1377(h)(1), defines "federal Indian reservation" in exactly the way Indian country is defined by 18 U.S.C. § 1151, i.e., all reservation land, notwithstanding patents and rights of way. The third statute cited, 33 U.S.C. § 1377(e), sets up a process by which tribes can exercise a series of important powers under the Clean Water Act if they satisfy the EPA Administrator that they meet certain conditions:

The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, and 1344 of this title to the degree necessary to carry out the objectives of this section, but only if-

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Such treatment as a State may include the direct provision of funds reserved under subsection © of this section to the governing bodies of Indian tribes and the determination of priorities by Indian tribes, where not determined by the Administrator in cooperation with the Director of the Indian Health Service.

Under § 518, tribes may exercise the same authority as states for several purposes, including setting water quality standards and issuing certification of compliance with standards, water discharge permits, and wetlands permits. Section 518 does not expressly grant any power or approve any particular tribe's ordinance. Instead it sets up a process under which the EPA Administrator can approve tribal enactments that thereby become enforceable against members and nonmembers alike.

Unfortunately, the EPA has taken a narrow view of § 518, essentially limiting its applicability to situations in which the tribal government can show it possesses inherent sovereign authority under Montana exceptions 1 and 2.(28) In Montana v. U.S. EPA, the Agency's decision to grant "treatment as a state" status to the Confederated Salish and Kootenai Tribes was upheld.(29) The state of Montana used EPA's requirement that a tribe show its inherent authority as an opening to redetermine the scope of inherent authority. However, the Ninth Circuit upheld the regulation, noting that EPA had taken a cautious view of the second Montana exception and finding that the regulation reflected "appropriate delineation and application of inherent Tribal regulatory authority over non-consenting nonmembers."(30) The district court would have found § 518 by itself to be an ample delegation of federal authority.(31)

Bugenig v. Hoopa Valley Tribe(32) upheld a tribal ordinance barring logging in a sacred zone within the boundaries of the Hoopa Valley Reservation in California. In 1994, as part of the Hoopa Valley Tribe's 10-year forest management plan, the tribe notified land owners in the Bald Hill portion of the reservation of the proposed establishment of a half-mile no-cut buffer zone around a sacred dance trail and sites. Written notice of the proposed buffer zone was sent to the owners of the land that was later purchased in fee by Roberta Bugenig, a nonmember of the tribe. In 1995, the Hoopa Valley Tribal Council officially approved the buffer zone. The Bureau of Indian Affairs approved establishment of the buffer zone.

After establishment of the buffer zone, Roberta Bugenig purchased 40 acres within the zone and prepared to log the timber on her property. She contacted the Humboldt County Planning Department and wrote to the California Department of Forestry asserting that she was exempt from state timber harvesting plan requirements because her proposed logging involved less than three acres. However, she entered into a log sale agreement to harvest all the timber on her property. Bugenig also met with the Tribal Council to request a permit to haul her logs over tribal roads, which the Tribal Council denied. Bugenig proceeded to log within the buffer zone.

The Hoopa Valley Tribe sued Bugenig in tribal court seeking injunctive relief and damages. The court granted a temporary restraining order and ultimately issued final judgment upholding the tribe's authority.(33) Bugenig appealed to the Northwest Regional Tribal Supreme Court, the final appellate court for the Hoopa Valley Tribe. The Pacific Legal Foundation offered free representation to Bugenig.

The Tribal Supreme Court affirmed the tribal trial court's conclusion that the tribe lawfully exercised jurisdiction over Bugenig's logging activities. The Tribal Supreme Court jurisdiction was supported by a provision of the Hoopa-Yurok Settlement Act;(34) the court concluded that because logging posed such a significant

threat to the White Deerskin Dance sites and trail, the second Montana exception also supported the tribe's inherent jurisdiction over Bugenig's timber cutting activities.(35)

Having exhausted tribal court remedies, Bugenig filed suit in federal district court seeking declaratory judgment that the tribe lacks regulatory jurisdiction over her land and that the tribal court lacks subject matter jurisdiction over it as well. The district court granted the tribe's motion to dismiss on the grounds that Congress expressly granted the tribe jurisdiction over all lands within the reservation's boundaries, including Bugenig's land, through a section of the Hoopa-Yurok Settlement Act of 1988, 25 U.S.C. § 1300i-7. The statute provides:

The existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.

The "governing documents" referred to include the Tribal Constitution, which not only declares that the jurisdiction of the Hoopa Valley Tribe extends to all lands within the reservation boundaries but also gives the Hoopa Valley Tribal Council specific authority to:

[R]egulat[e] the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative.(36)

Like the statute in Morris v. Hitchcock, the statute in Bugenig expressly authorizes a tribal ordinance applying to nonmembers, but does so with the precaution that the Secretary of Interior's approval is also required.

The district court noted that correct construction of the Hoopa-Yurok Settlement Act is a question of law. It found no authority supporting Bugenig's contention that the phrase "ratified and confirmed" is ambiguous:

The Court concludes that the plain meaning of "ratified and confirmed" is to give every clause in the document being ratified the full force and effect of a congressional statute. Nothing in the legislative history of the Act evinces a clearly expressed legislative intention to the contrary. . . . Accordingly, the Court holds that § 1300i-7 of the Act unambiguously grants each clause of the Tribal Constitution the full force and effect of a congressional statute.(37)

The Pacific Legal Foundation, on behalf of Ms. Bugenig, timely appealed from the district court's judgment and briefs have just been submitted to the Ninth Circuit Court of Appeals.

4. Inherent Sovereignty and Congressional Authority Over Criminal Offenses.

In Oliphant v. Suquamish Indian Tribe(38) the Suquamish Tribe claimed authority to try non-Indians not on the basis of a "congressional statute or treaty provision but by reason of [its] retained national sovereignty."(39) The Court noted that the exercise of criminal jurisdiction over non-Indians by tribal courts was a relatively new phenomenon but that "a few tribes" during the 19th Century had formal criminal systems and the treaties with those tribes assumed that the tribes did not have criminal jurisdiction over non-Indians "absent a congressional statute or treaty provision to that effect."(40)

In the Treaty of Point Elliott, the Court found indications that the Suquamish and other tribes would not have criminal jurisdiction over non-Indians. Specifically, the Washington Treaty Commission prepared a draft treaty under which white offenders would be tried by the laws of the United States. However, that language was not used in the final treaty and instead the Suquamish and other tribes "acknowledged their dependence on the government of the United States."(41) The Tribe contended that the Treaty Commission returned to the original language because of tribal opposition to relinquishing criminal jurisdiction over non-Indians, but the Court found no evidence to support this view, concluding instead that the Commission "preferred to use the language that had been recommended by the Office of Indian Affairs."(42) The Court also noted another treaty provision in which the tribe agreed "not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial."(43) The Court concluded that by submitting to the overriding sovereignty of the United States, treaty tribes necessarily gave up their power to try non-Indian citizens of the United States "except in a manner acceptable to Congress."(44) The Court found that modern tribal courts resemble their state counterparts and that the applicability of the Indian Civil Rights Act of 1968 and the prevalence of non-Indian crime on reservations "are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians."(45)

United States v. Wheeler(46) was decided just two weeks after Oliphant. In Wheeler, a member of the Navajo Tribe pleaded guilty in tribal court to the charge of contributing to the delinquency of a minor and was sentenced. Subsequently, the United States prosecuted him for statutory rape arising out the same incident. The district court and the court of appeals held that the double jeopardy clause of the Fifth

Amendment barred Wheeler's federal trial. The United States Supreme Court reversed.

The Wheeler Court noted that the controlling question was the source of the tribe's power to punish tribal offenders, i.e., whether it is part of inherent tribal sovereignty or an aspect of federal sovereignty delegated to the tribe by Congress. The Court noted that treaties with the Navajo Nation provided for punishment by the United States of Navajos who commit crimes against non-Indians but that those provisions did not deprive the tribe of its own jurisdiction to punish tribal members for violations of tribal law. The Court declared that "no provision in the relevant treaties or statutes confers the right of self-government in general, or the power to punish crimes in particular, upon the Tribe."(47)

The Court noted that the IRA authorized the tribe to adopt a constitution but held that neither it nor other laws "created the Indians' power to govern themselves and their right to punish crimes committed by tribal offenders."(48) The Court stated:

Indeed, the Wheeler-Howard Act and the Navajo-Hopi Rehabilitation Act both recognized that Indian tribes already had such power under "existing law." See Powers of Indian Tribes, 55 I.D. 14 (1934). That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power.(49)

The Court's comments on the IRA were pure dictum in Wheeler, since the Navajo Tribe declined to accept the IRA.(50) While Wheeler is a strong affirmation of inherent sovereignty it is also notable for its consistent distinction between jurisdiction over tribal members and jurisdiction over others.

Montana v. United States(51) construed both the Crow treaties and 18 U.S.C. § 1165 as possible sources for the Tribe's power to regulate non-Indian hunting and fishing on non-Indian lands within the Reservation. The Ninth Circuit had held that the Federal Trespass Statute, 18 U.S.C. § 1165, "augmented" the Tribe's regulatory power over non-Indian land.(52) However, the Supreme Court held:

If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating in § 1165 the definition of "Indian country" in 18 U.S.C. § 1151 . . . Indeed, a Subcommittee of the House Committee on the Judiciary proposed that this be done. But the Department of the Interior recommended against doing so. . . .(53)

Note that the Montana Court's example of § 1165 demonstrates the difference between the showing required to satisfy the two Montana exceptions for inherent

sovereignty and the "certain degree of independent authority over matters that affect the internal and social relations of tribal life," which Mazurie indicates will support a congressional delegation of jurisdiction to a tribe.(54) The Montana Court rejected inherent sovereign authority over non-Indian hunting and fishing but also indicated that Congress could have delegated that authority by amending § 1165.

In Duro v. Reina(55) the Court held that a tribe may not assert criminal jurisdiction over a nonmember Indian. Justices Brennan and Marshall dissented. The Court commented that "[a]s in Oliphant, the tribal officials do not claim jurisdiction under an affirmative congressional authorization or treaty provision."(56) The Court noted that definitions of "Indian" in federal statutes that apply to all Indians without regard to membership in a particular tribe(57) "reflect the Government's treatment of Indians as a single large class with respect to federal jurisdiction and programs" and "are not dispositive of a question of tribal power to treat Indians by the same broad classification."(58)

The tribe and the United States argued that a void would be created if the Court did not recognize tribal inherent criminal jurisdiction over nonmember Indians. They noted that federal authority over minor crime provided in 18 U.S.C. § 1152 does not include "offenses committed by one Indian against the person or property of another Indian." The Court declined to address that issue directly but suggested that there might not be a problem.(59)

The practical problems created by the Duro opinion quickly led to a legislative fix. In Pub. L. 101-511, Congress amended the definition of "powers of self-government" in the Indian Civil Rights Act to add the phrase "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."(60) The "Duro amendment" also added a new definition to ICRA for "Indian" which "means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies." Initially the Duro amendment was enacted with a sunset clause, but it was made permanent in 1991.(61)

The Duro amendment has spawned its own complications. First is the question whether prosecution of nonmember Indians under its authority brings with it the full panoply of protections under the Bill of Rights. This may resolve a question left open in United States v. Wheeler, where the Court said:

By emphasizing that the Navajo Tribe never lost its sovereign power to try tribal criminals, we do not mean to imply that a tribe which was deprived of that right by statute or treaty and then regained it by Act of Congress would necessarily be an arm

of the Federal Government. That interesting question is not before us, and we express no opinion thereon.(62)

In Duro the Court cited Reid v. Covert,(63) a case that suggests constitutional limits on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. While the protections accorded criminal defendants in tribal court are very similar to those of the Bill of Rights, the Indian Civil Rights Act does not require, for example, that counsel be provided to indigent defendants.(64)

A second related question is whether a tribal court prosecution of a nonmember Indian bars the subsequent federal prosecution because of the Double Jeopardy Clause; in other words, whether the exercise of criminal jurisdiction over a nonmember is the exercise of delegated federal authority rather than the inherent authority held applicable in United States v. Wheeler.

In United States v. Weaselhead, a member of the Blackfeet Tribe of Montana was charged in Winnebago Tribal Court with sexual assault, contributing to the delinquency of a minor, etc. Weaselhead pled no contest to one count of first-degree sexual assault. That same day he was charged by the United States with engaging in sexual acts with an Indian female juvenile in violation of 18 U.S.C. §§ 2243 and 1153. The district court rejected Weaselhead's motion to dismiss on the basis of double jeopardy.

The Eight Circuit Appeal Panel split two to one in favor of Weaselhead, upholding the double jeopardy defense. The panel majority held:

These post-Duro amendments reflect an attempt by Congress to rewrite the fundamental principles upon which Duro, Oliphant, and Wheeler were based by redefining the Indian tribes' "inherent" sovereign status as having always included criminal jurisdiction over nonmember Indians.4 Thus, we are presented with a legislative enactment purporting to recast history in a manner that alters the Supreme Court's stated understanding of the organizing principles by which the Indian tribes were incorporated into our constitutional system of government. The question we must address, then, is whether the amendment's authorization of criminal jurisdiction over nonmember Indians is, as Congress asserted, simply a non-substantive "recognition" of inherent rights that Indian tribes have always held or whether it constitutes an affirmative delegation of power.

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4Weaselhead concedes and we agree, that Congress's intent to do so is plain from the legislative history. See Mousseaux v. United States Comm'r of Indian Affairs, 806 F. Supp. 1433, 1441-43 (D.S.D. 1992), aff'd in part and remanded in part on other grounds, 28 F.3d 786 (8th Cir. 1994) (detailing legislative history of post-Duro amendments and intent of Congress to thereby create "legal fiction" that Duro was never decided).(65)

The government petitioned for rehearing en banc. This was granted; on rehearing an equally divided Court affirmed the district court without opinion.(66)

While the federal prosecutors appear to have dodged the bullet in Weaselhead, the issue is likely to be resolved by the Ninth Circuit in United States v. Enas. In Enas, an unpublished district court opinion upheld the double jeopardy defense of a nonmember Indian convicted in tribal court and subsequently prosecuted by the United States. The issues have been briefed to the Ninth Circuit and are pending in No. 99-10049.

In Means v. District Court of the Chinle Judicial District,(67) the Navajo Nation Supreme Court upheld tribal criminal jurisdiction over Russell Means, a member of the Oglala Sioux Nation, for criminal offenses committed within the Navajo Nation. Means was charged with threatening and battering his father-in-law, a member of the Omaha Tribe, and battering a Navajo member. The Navajo Supreme Court held oral arguments at Harvard Law School and subsequently issued a 23-page opinion upholding tribal criminal jurisdiction under the Navajo treaty of 1868. Under the treaty, lands are "set apart for the use and occupation" of the Navajo Nation. The treaty also covers "bad men." The tribal supreme court relied upon those treaty provisions and further held that individuals who "assume tribal relations" with Navajos by intermarriage, residence, and other activities are subject to the criminal jurisdiction of the Nation.

The Means opinion contains an extensive description of the criminal jurisdiction exercised by Navajo Nation courts. Means did not apply the Duro amendment, but the court rejected the argument that the classification of "nonmember Indian" might be a racial classification subject to strict scrutiny for equal protection purposes. The court also relied on 18 U.S.C. § 1152, noting that the statute gives the Navajo Nation the authority to punish any Indian committing an offense in Indian county. This interpretation of section 1152 is quite different from the United States Supreme Court's view of the statute in Duro.(68)

On June 14, 1999, Russell Means filed suit in United States District Court for the District of Arizona challenging the Navajo Nation's criminal jurisdiction over him.(69)

The double jeopardy problem illustrates an ambiguity in the federal authorization or delegation basis for tribal court authority: Is Congress creating a new authority, vested in tribal governments, which they did not previously have, such that when tribes exercise this authority, they are exercising a new wholly federally derived power? Congress is often deliberately ambiguous on that question, as in the Duro amendment, 25 U.S.C. § 1301(2), which refers to "the inherent power of Indian tribes, hereby recognized and affirmed."(70)Another variation of this phrasing is found in the IRA, 25 U.S.C. § 476(e), which says: "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest . . . the following rights and powers . . . " In Powers of Indian Tribes, 55 I.D. 14 (1934) Solicitor Margold explained in some detail what powers were already vested in tribes by existing law. Plainly, enactment of the IRA was intended to reinforce the ability to exercise those powers. Yet another variation is found in 25 U.S.C. § 1300i-7, the statute at issue in Bugenig v. Hoopa Valley Tribe, discussed above. There, the powers itemized in the tribe's constitution were "ratified and confirmed."

The withdrawn Eighth Circuit panel opinion in United States v. Weaselhead suggested that Congress has no power to redefine the scope of inherent sovereignty as enunciated by the United States Supreme Court. The panel stated:

Although Congress possesses a sweeping, plenary power to regulate Indian affairs under the Indian Commerce Clause, that power remains subject to constitutional limitations. It is necessarily tempered by "judicially enforceable outer limits," including "the judiciary's duty 'to say what the law is,'" which extends to interpretation of the Constitution itself. United States v. Lopez, 514 U.S. 549, 566 (1995) (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)).

We conclude that ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and thus beyond the scope of Congress's authority to alter retroactively by legislative fiat.(71)

The Court relied upon City of Boerne v. Flores, 117 S. Ct. 2157 (1997), a case rejecting the ability of Congress to impose a strict scrutiny standard for actions alleged to interfere with religious freedom pursuant to the Religious Freedom Reaffirmation Act.(72)However, Congress' approval of tribal powers can be viewed as simply removing impediments identified by the Supreme Court to the exercise of dormant tribal authority. While the line may be difficult to draw in some cases, there are surely instances in which legislation that restores an inherent tribal power is within the authority of Congress and does not constitute a legislative effort to change a

constitutional decision. For example, the Supreme Court has often noted that because the United States asserted the ultimate title to land, tribes were forbidden to sell or transfer land to other nations or peoples without the consent of the United States.(73) But surely Congress under the Indian Commerce Clause would have the power to eliminate that restriction and repeal 25 U.S.C. § 177. In other words, there does not appear to be a constitutional problem to Congress restoring a power which in the past was seen as inconsistent with the tribes' dependent status.

5. Other Statutes Confirm Tribal Authority.

Title 25 of the United States Code contains many examples of congressional authorization for the exercise of tribal authority over nonmembers. An example is found in the Indian Child Welfare Act.(74) Section 1903(4) certainly applies to nonmembers because it includes in the definition of Indian child an unmarried juvenile who is "eligible for membership in an Indian tribe and is the biological child of a member." The statute was upheld in Mississippi Band of Choctaw Indians v. Holyfield.(75) An even broader example is found in the Indian Self-Determination Act, Pub. L. 93-638, as amended, under which tribes by contract or compact carry out functions and activities that would otherwise be performed by federal officials. As a result, under statutes such as the Indian Law Enforcement Reform Act,(76) BIA employees (and hence tribal employees under Pub. L. 93-638) may "make an arrest without a warrant for an offense committed in Indian country" under certain conditions.(77) Thus perhaps the need to use federal authorization or delegation of authority over nonmembers is yet another reason for tribes to enter into broadly framed self-governance compacts under which the tribe may exercise all delegable authorities of the Interior Department and the Department of Health and Human Services.

Congressional statutes that reflect an intention to ratify, confirm, reaffirm, or otherwise enable the exercise of tribal territorial jurisdiction, or other specific authorities, already exist. The Supreme Court has not suggested that the "express delegation" standard will be rigidly applied. Reliance on congressional authorization for tribal exercises of authority may reverse or slow the erosion of the inherent tribal sovereignty doctrine in the federal courts.

ENDNOTES

1. E.g., "Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if Montana's second exception requires no more, the exception

would severely shrink the rule. Again, cases cited in Montana indicate the character of the tribal interest the Court envisioned." Strate v. A-1 Contractors, 117 S. Ct. 1404, 1415 (1997).

2. 450 U.S. 544 (1981).

3. 450 U.S. at 564-66.

4. 435 U.S. 191 (1978).

5. Id. at 208 (emphasis added).

6. Id. (emphasis in original). Justice Marshall and then-Chief Justice Burger dissented on the ground that the power to preserve order on the reservation is a sine qua non of the sovereignty that the Suquamish originally possessed and that, absent affirmative withdrawal by treaty or statute, tribes retain the power to punish all offenders. That view lost and those Justices are gone.

7. 450 U.S. at 564.

8. 492 U.S. 408, 428 (1989).

9. 508 U.S. 679, 695 (1993).

10. 520 U.S. 438, 117 S. Ct. 1404, 1409 (1997).

11. 450 U.S. at 565

12. 194 U.S. 384 (1904).

13. 30 Stat. 495, June 28, 1898.

14. 194 U.S. at 393.

15. 419 U.S. 544 (1975).

16. 419 U.S. at 554.

17. 419 U.S. at 557.

18. 447 U.S. 134 (1980).

19. 447 U.S. at 153 (emphasis added). The IRA provision reads: "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments." 25 U.S.C. § 476(e). The passage of that provision in 1934 prompted Interior Department Solicitor Nathan Margold to issue the seminal opinion, Powers of Indian Tribes, 55 I.D. 14, I Ops. Sol. Int. 445 (October 25, 1934).

20. Margold too cited the IRA as a "general confirmation of powers already recognized." Powers of Indian Tribes, I Ops. Sol. Int. 445, 447 (1934).

21. 447 U.S. at 156.

22. 424 U.S. 382 (1976).

23. 492 U.S. 408 (1989).

24. 492 U.S. at 427 (citing Montana, 450 U.S. at 565-66).

25. Id. at 428.

26. 18 U.S.C. § 1151.

27. 18 U.S.C. § 1161.

28. See Final Rule, 58 Fed. Reg. 67,966, 67,970-71 (December 22, 1993).

29. 137 F.3d 1135, 1138 (9th Cir. 1998).

30. 137 F.3d at 1141.

31. 941 F. Supp. 945 (D. Mont. 1996). See generally A. Skibine, The Chevron Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the "Tribes As States" Section of the Clean Water Act?, 11 St. Thomas L. Rev. 15 (1998); R. Cross, When Brendale Met Chevron: The Role of Federal Courts in the Construction of An Indian Environmental Law, 1 Great Plains Nat. Resources J. 1 (1996).

32. No. C 98-3409 CW (N.D. Cal. March 31, 1999); appeal pending, 9th Cir., No. 99-15654.

33. Hoopa Valley Tribe v. Bugenig, 25 I.L.R. 6137 (Hoopa Valley Tr. Ct. July 11, 1996).

34. 25 U.S.C. §§ 1300i-1300i-11.

35. Bugenig v. Hoopa Valley Tribe, 25 I.L.R. 6139 (Hoopa Valley S. Ct. April 23, 1998).

36. Constitution and Bylaws of the Hoopa Valley Tribe, art. IX, § 1(l) (approved as amended June 18, 1996).

37. Bugenig v. Hoopa Valley Tribe, No. C 98-3409 CW, slip op. at 8 (N.D. Cal. March 31, 1999).

38. 435 U.S. 191 (1978).

39. Id. at 196.

40. Id. at 197.

41. Id. at 207.

42. Id. at 207, n16.

43. Id. at 208.

44. Id. at 210.

45. Id. at 211-12.

46. 435 U.S. 313 (1978).

47. Id. at 327.

48. Id. at 328 (emphasis in original).

49. Id.

50. See Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985).

51. 450 U.S. 544 (1981).

52. United States v. Montana, 604 F.2d 1162, 1167 (9th Cir. 1979).

53. 450 U.S. at 562.

54. 419 U.S. at 557.

55. 495 U.S. 676 (1990).

56. Id. at 684 (emphasis added).

57. E.g., 18 U.S.C. §§ 1152-53; 25 C.F.R. § 11.2(a).

58. 495 U.S. at 689-90 (original emphasis).

59. Id. at 696-98.

60. Pub. L 101-511, § 8077(d), Nov. 5, 1990, 1014 Stat. 1893, as amended.

61. Pub. L. 102-137, October 28, 1991, 105 Stat. 646.

62. 435 U.S. 313, 328 n.28.

63. 354 U.S. 1 (1957).

64. 25 U.S.C. § 1302(6).

65. 156 F.3d 818, 823 (8th Cir. 1998).

66. 165 F.3d 1209 (8th Cir. 1999); petition for cert. filed, No. 98-9211 (April 29, 1999).

67. Navajo Nation Supreme Court No. SC-CV-61-98 (May 11, 1999).

68. The Means court also took pains to build a case for the proposition that a nonmember can, by adoption, become entitled to certain privileges in the tribe and make himself amenable to their laws. See United States v. Rogers, 4 How. 567 (1846); Nofire v. United States, 164 U.S. 657 (1897).

69. No. 99-CV-1057-PCT-LAC-SLV.

70. See generally A. Skibine, Duro v. Reina and The Legislation That Overturned It: A Power Play of Constitutional Dimensions, 66 SCALR 767 (1993).

71. 156 F.3d at 824.

72. 42 U.S.C. § 2000bb-2000bb-4.

73. E.g., United States v. Kagama, 118 U.S. 375, 381 (1886).

74. 25 U.S.C. §§ 1901-1963.

75. 490 U.S. 30 (1989).

76. 25 U.S.C. §§ 2801-2809.

77. 25 U.S.C. § 2803(3).