TRIBAL CIVIL JURISDICTION OVER NONMEMBERS

June 2001

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1. Introduction.

There is no consensus in the United States concerning the proper role of government power over individual persons and their property. Because the extent of governmental jurisdiction at every level of government is controversial, it is not surprising that the civil jurisdiction of Indian tribal governments is a controversial and evolving topic. The very existence of Indian tribes as recognized governmental entities is also under constant challenge; *a fortiori* so too is the civil jurisdiction of tribal governments.

This paper begins with a general description of tribal civil jurisdiction as recognized by the courts of the United States prior to 1978. We then trace the development of federal common law of tribal civil jurisdiction over nonmembers and suggest analysis of cases in terms of four types of jurisdiction: (1) consensual relationships;

(2) threatening conduct; (3) congressionally delegated or recognized authority; and (4) authority over Indian lands.

Rulings by the federal courts, particularly the United States Supreme Court, on tribal authority over nonmembers have become erratic and standardless. The Court's 1978 announcement that tribal authority has been withdrawn "by implication as a necessary result of their dependent status," *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978), represented an about-face on the theoretical underpinnings of tribal sovereignty. Subsequent analyses of "necessary implication" and "dependent status" find little support in history, anthropology or logic. Rulings that reject a particular tribe's effort to exercise inherent tribal authority are presumed to set limits on all tribes' inherent authority and are quickly applied in factually different contexts. An obvious movement away from acknowledging tribal territorial jurisdiction and inherent sovereignty continues to appear in recent cases that address the scope of tribal civil jurisdiction over nonmembers.

2. Civil Jurisdiction Before 1978.

In the first 200 years of the United States of America the course of judicial decisions on the nature of Indian tribal powers was marked by adherence to three fundamental principles: (1) an Indian tribe possesses, in the first instance, all the powers of any sovereign state; (2) conquest renders the tribe subject to the legislative power of the United States, terminating the external power of the tribe but not affecting the internal sovereignty of the tribe; and (3) except where expressly qualified, full powers of internal sovereignty are vested in Indian tribes and their duly constituted organs of government. F. Cohen, *Handbook of Federal Indian Law* 230-35 (R. Strickland ed. 1982).

From the earliest days of the republic, Indian tribes were recognized as "distinct, independent, political communities." *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515, 559 (1832). Indian tribes qualified to exercise powers of self-government, not by virtue of any delegation of powers from the federal government but by reason of their original tribal sovereignty. Tribes' sovereignty predated the Constitution, and this is acknowledged in the Commerce Clause's grouping of the "Indian Tribes" with "foreign Nations" and "the several States." Thus, treaties and statutes were looked to by the courts as limitations upon original tribal powers or, in some cases, recognition of particular powers. Courts applied the general principle that "it is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror." *Wall v. Williamson*, 8 Ala. 48, 51 (1845) (upholding tribal law of divorce). In *Worcester v. Georgia*, Chief Justice Marshall adopted principles of

European law holding that weak States, in order to provide for their safety, may place themselves under the protection of one more powerful, without stripping themselves of the right of government and ceasing to be States.

Later, the gradual establishment of permanent reservations for most surviving Indian tribes in the mid-nineteenth century produced a body of law concerning the civil jurisdiction of tribal governments over nonmembers. This is illustrated in decisions concerning taxing power.

In *Maxey v. Wright*, 54 S.W. 807 (Ind. Terr. Ct. App.), *aff'd*, 105 Fed. 1003 (8th Cir. 1900), the right of a tribe to levy a tax upon nonmembers of the tribe, attorneys practicing in federal court and residing on the reservation, was held to be an essential attribute of tribal sovereignty. The Court said:

> [I]n the absence of express contradictory provisions by treaty, or by statute of the United States, the Nation (and not a citizen) is to declare who shall come within the boundaries of its occupancy, and under what conditions.

54 S.W. at 809.

Morris v. Hitchcock, 194 U.S. 384 (1904), arose within the Chickasaw Reservation in what later became Oklahoma. The Interior Department sought to remove livestock pastured within the reservation without a tribal permit or license and to close businesses conducted without 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, 30 Stat. 495, June 28, 1898, that tribal law would apply upon executive approval:

> [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."[1] 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.

The Attorney General had issued a similar opinion, 23 Ops. Atty. Gen. 528 (1900); *see also* 7 Ops. Atty. Gen. 174, 177-78 (1855), with respect to the right of the Cherokee Nation to impose an export tax on hay grown within the limits of the reservation. The opinion of the Attorney General suggested that tribal authority to impose such a tax would remain "even if the shipper was the absolute owner of the land on which the hay was raised." This suggestion was referred to and approved by the Supreme Court in *Morris v. Hitchcock*, 194 U.S. at 392.

The Creek Nation won a similar case, *Buster v. Wright*, 135 Fed. 947, *app. dismissed*, 203 U.S. 599 (1906). In that case non-tribal members contended that the sale of lots to them and the incorporation of cities and towns within Creek territory, as authorized by Congress, segregated the town sites and lots from the territory of the Creek Nation and deprived the Creeks of governmental jurisdiction to impose a permit tax on the privilege of trading within the Creek Nation. The Court said:

> But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title of the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances. Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein enclosed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by its citizens or foreigners.

135 Fed. at 952.[2]

In 1934, Congress authorized tribes to exercise authorities in addition to the "powers vested in any Indian tribe or tribal council by existing law." 25 U.S.C. ' 476. That section of the Indian Reorganization Act led to a Nathan Margold, Interior Department Solicitor, opinion on what powers were vested in tribes and tribal councils by then existing law. Margold's seminal opinion, 55 I.D. 14, 1 Ops. Sol. Int. 445 (Oct. 25, 1934),[3] notes that the powers of Indian tribes can only be answered generally because individual tribes' authority is affected by special treaties and acts of Congress. Margold found that:

> [O]ver all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business.

Id. at 50.

While much of Margold's opinion addresses the authority of tribes over their own members, its discussion of taxes, licensing, and the power to exclude remains important to analysis of tribal civil jurisdiction over nonmembers. *See also* F. Cohen, *Handbook of Federal Indian Law* 122, 323 (1945).

Williams v. Lee, 358 U.S. 217 (1959), also made clear that tribes retained jurisdiction over nonmembers. This case remains a 20th Century landmark ruling on tribal civil jurisdiction over nonmembers. There, an action by a non-Indian against reservation Indians was held to fall within the exclusive jurisdiction of the Navajo tribal courts. The Court noted that the transaction occurred on the reservation and said: "The cases in this Court have consistently guarded the authority of Indian governments over their reservations," 358 U.S. at 223.

Up through *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court also generally adhered to an analytical approach that required a clear and specific expression of congressional intent to extinguish tribal authorities and immunities. *E.g., Menominee Tribe v. United States*, 391 U.S. 404 (1968) (treaty rights not specifically extinguished continue to exist); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (Public Law 280 read narrowly to preserve tribal authority). Nevertheless, in retrospect, cracks were starting to appear in the rule that tribal civil authority exists except where affirmatively limited by a specific treaty provision or statute.

3. Jurisdiction Over Nonmembers, 1978-2000.

In 1973, the Court signaled its departure from the doctrine that reserved tribal authority stemming from inherent sovereignty was plenary, alterable only by express statute or treaty provision. In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), the Supreme Court ruled that Arizona had no jurisdiction to impose a tax on the income of Navajo families residing on the reservation whose income was wholly derived from reservation sources. The Court noted that the principles governing the resolution of the tax question were "not new," and cited *Worcester* and other cases for the proposition that tribes are distinct political communities having territorial boundaries within which their authority is exclusive. However, Justice Marshall warned that inherent tribal sovereignty had been diminished:

> This is not to say that the Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law, has remained

> static during the 141 years since *Worcester* was decided. Not surprisingly, the doctrine has undergone considerable evolution in response to changed circumstances. . . .
>
> This line of cases was summarized in this Court's landmark decision in *Williams v. Lee*, 358 U.S. 217 (1959): "Over the years this Court has modified [the *Worcester* principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . ." *Id.*, at 219-220 . . .
>
> The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power . . . The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read . . . [Indian nations Indian tribes] "were, and always have been, regarded as having a semi-independent position when they preserve their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." *United States v. Kagama*, 118 U.S. at 381-82.

Id. at 173.

The clouds in the *McClanahan* victory foreshadowed a sea change in federal common law of tribal jurisdiction in 1978.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), 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." *Id.* at 208 (emphasis added). 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*."[4] In the years since *Oliphant* the federal courts have embarked on a wide ranging search for powers believed to be "inconsistent with the tribes' dependent status." Many such limitations have been found.

In *Oliphant*, 435 U.S. 191 (1978), 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." *Id.* at 196. The case involved defendants charged with assaulting a police officer and resisting arrest or with recklessly endangering another person as a result of a high-speed chase and collision with a tribal police vehicle. The Court noted that the exercise of criminal jurisdiction over non-Indians by tribal courts was a relatively new phenomenon. Even though some tribes had formal criminal systems during the 19th century, the *Oliphant* Court stated that treaties with the tribes assumed that the tribes did not have criminal jurisdiction over non-Indians "absent a congressional statute or treaty provision to that effect." *Id.* at 197.

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. Instead the Suquamish and other tribes "acknowledged their dependence on the government of the United States." *Id*. at 207. 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 rejected evidence to support that view. *Id.* at 207, n.16.

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." *Id*. at 208. 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." *Id.* at 210. 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." *Id.* at 211-12.

The stunning decision in *Oliphant* immediately led to arguments that tribes lacked civil jurisdiction as well as criminal jurisdiction over nonmembers within their reservations. Initially, the United States Supreme Court refused to embrace that approach. (However, the Court's new analysis based on implicit divestiture of tribal authority was reiterated just two weeks after *Oliphant* in *United States v. Wheeler*, 435 U.S. 313 (1978) (no double jeopardy in federal and tribal prosecution of same offense by tribal member)).

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), rejected the State of Washington's contention that inherent tribal authority to tax the activities or property of non-Indians 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.

447 U.S. 134, 153 (emphasis added).

The *Colville* court acknowledged the implicit divestiture analysis of *Oliphant* and *Wheeler* but noted that such divestiture had only been found when tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts. Also, while the Court found that the IRA "confirmed" the tribal power to tax events on Indian land,[5] it did not find that Congress had also preempted state taxing power over nonmember transactions. Thus, in *Colville*, the Court upheld the tribe's authority to impose cigarette taxes on nonmember purchasers on reservations on the basis of inherent authority and the IRA's ratification of that authority, and it also upheld the state's authority to tax the same transactions.

Colville illustrates that the analysis of statutes concerning tribal authority 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. Second, the Court found none of the statutes 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.

447 U.S. at 156.

In contrast, the lower court in *Colville* believed 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*, 424 U.S. 382 (1976). In *Fisher*, an 1877 statute provided that Congress would "secure" to the Northern Cheyenne Tribe "an orderly government." 19 Stat. 256. As authorized later by the Indian Reorganization Act, the Tribe adopted a Constitution and established a tribal court with jurisdiction over adoptions. *Fisher*, however, involved enactments that affected only Indians and did not authorize preemption of state law through ordinances affecting non-Indians.

The first major restriction of tribal civil jurisdiction over nonmembers came in 1981 with the decision in *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, non-Indian fee land owners challenged the power of the Crow Tribe to restrict their hunting and fishing on and near the Big Horn River. The tribe sought to rely on its ownership of the bed of the Big Horn River. In a six-to-three decision, the Supreme Court held that the riverbed passed to the State upon its admission into the Union and that the authority of the Crow Tribe recognized in the Fort Laramie Treaty to control hunting and fishing could only extend to land on which the tribe exercised absolute and undisturbed use and occupation. *Montana* established that, in general, tribes lack plenary regulatory authority over activities of nonmembers on lands alienated to non-Indians as a result of the General Allotment Act. The Court applied the implicit divestiture of sovereignty notion from *Oliphant* and established as a "general proposition" that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, subject to several exceptions. *Id*. at 564-66.

Montana v. United States, 450 U.S. 544 (1981), establishes the benchmark: 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." *Id.* at 564-66.

By 1989, *Montana v. United States* began to be viewed as the Rehnquist Court's seminal opinion on tribal civil jurisdiction over nonmembers. In particular, two of the exceptions to *Montana's* general rule, the consensual relationship exception and the

threatening conduct exception, have come to be known as *Montana* Exceptions 1 and 2. It is important to recognize that reliance on these exceptions oversimplifies both the *Montana* decision itself and current federal common law on tribal civil jurisdiction over nonmembers.

Initially, it is critical to recall that *Montana* addressed tribal regulation of nonmembers on lands alienated to non-Indians, so neither its general rule nor its exceptions apply to activities on tribal land. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court upheld a tribal severance tax on oil and gas production on tribal reservation land, concluding that the taxing power is an inherent attribute of tribal sovereignty that has not been divested by any treaty or act of Congress. In a six-to-three decision the Court found the tribe's taxing power in its general authority, as a sovereign, to control economic activities within its jurisdiction and to defray the cost of providing governmental services.

The Court majority and minority divided over the question whether the tribe's power to tax was derived solely from its power to exclude non-Indians from the reservation. Petitioners operated under approved long-term leases with the tribe. The Court held that although the tribe had agreed to sell the right to use the land, it had not abandoned its sovereign powers simply by failing to expressly reserve them in a contract. The majority did not rely upon consensual jurisdiction and never cited *Montana v. United States*. Instead the Court relied upon *Washington v. Confederated Tribes of the Colville Indian Reservation*, *supra*. The majority also refused to recharacterize *Morris v. Hitchock*, *Buster v. Wright*, and *Maxey v. Wright*, discussed *supra*, as having relied upon the power to exclude. The Court said:

> Instead, these cases demonstrate that a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.

Id. at 141-42. In *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985), the Court also upheld the Navajo Nation's authority to impose a possessory interest tax on lands leased to a nonmember mining company doing business on the reservation, although the Nation's ordinance was not approved by the Secretary of the Interior.

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987), involved an accident in which a member of the Blackfeet Indian Tribe was injured while driving a cattle truck within the boundaries of the reservation. The injured member was employed by a Montana corporation that operated a ranch on reservation land owned by tribal members. The member sued in tribal court. The insurer commenced a federal court action asserting diversity jurisdiction, a case that was later dismissed. The Supreme Court held that the case should have been stayed pending exhaustion of tribal court remedies and said:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980); *Fisher v. District Court*, 424 U.S. 382, 387-89 (1976). Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute . . . In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion.

Id. at 18.

With the benefit of hindsight, we know that the Court's reference to tribal courts "presumptively" having jurisdiction was overbroad and that the requirement that the insurer exhaust tribal court remedies may no longer apply, at least in the Ninth Circuit. *See Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). However, in historical context, the 1987 decision in *Iowa Mutual* fit comfortably within an analysis based on *Martinez*, *Colville*, *Montana*, and *Merrion*.

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), 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 property of Brendale, a nonmember, but lacked authority over the Wilkinson property under *Montana* Exception 2. 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, split 4-2-3, 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 Indian 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 conflicting opinions of the Court make it difficult to determine whether tribal authority over the land and person of nonmembers is an application of *Montana* Exception 2, or Exception 1, or a special category of its own.

The plurality opinion of Justices White, Rehnquist, Scalia and Kennedy disposed of the Yakama Nation's critique of 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 to assert jurisdiction conflicted with *Washington v. Confederated Tribes of the Colville Indian Reservation*. The Court distinguished *Colville* noting that it involved transactions on trust land and significantly involved tribal members. *Montana* cited *Colville* as an example of the sort of "consensual relationship" that might support tribal authority over nonmembers on fee lands. 492 U.S. at 427 (citing *Montana*, 450 U.S. at 565-66).

South Dakota v. Bourland, 508 U.S. 679 (1993), involved a tribal assertion of jurisdiction over nonmember hunting and fishing activities on lands that were taken from tribal ownership pursuant to statute for reservoir purposes. *Bourland* contains additional dicta regarding the limited authority of tribes over nonmembers on fee lands but is best understood as a case in which Congress expressly limited tribal authority.

Strate v. A-1 Contractors, 520 U.S. 438 (1997), further muddled tribal civil jurisdiction over nonmembers and illustrates the callous fashion in which the Court occasionally treats Indian tribal governments.[6] In *Strate*, the Supreme Court held that a tribal court could not entertain jurisdiction over a personal injury claim involving two non-Indians. That case arose from an auto accident on a right-of-way through the Fort Berthold Reservation acquired and maintained by the State of North Dakota as a public highway. *Strate* involved a claim "distinctly non-tribal in nature . . . between two non-Indians involved in a run-of-the-mill highway accident," *id.* at 457, said Justice Ginsburg for a unanimous Court.

In *Strate*, the Court determined that the right-of-way granted for a public highway was the equivalent of the non-Indian fee land in *Montana*, based upon several factors, including (1) the legislation creating the right-of-way; (2) whether the right-of-way was acquired with the consent of the Tribe; (3) whether the Tribe had reserved the

right to exercise dominion and control over the right-of-way; (4) whether the land was open to the public; and (5) whether the right-of-way was under state control. *See* 520 U.S. at 456; *see also Montana DOT v. King*, 191 F.3d 1108, 1113 n.1 (9th Cir. 1999) (listing criteria applied in *Strate*). These factors suggest that caution must be used in considering the effect of *Strate* in other situations. The *Strate*Court also emphasized that the cases cited in *Montana* in support of the first and second exceptions, indicate the character of the tribal interests the Court intended to protect. *See* 520 U.S. at 458.

Atkinson Trading Co., Inc. v. Shirley, ___ U.S. ___, No. 00-454 (May 29, 2001), rejected the Navajo Nation's claim that inherent sovereignty supported imposition of a hotel occupancy tax upon nonmembers on non-Indian fee land within its reservation. The Court analyzed the first and second *Montana* exceptions and held them inapplicable. The Court rejected broad language in *Merrion* and earlier cases and found the analysis of *Brendale* to be inapplicable because the effects of the trading post did not endanger the Navajo Nation's political integrity.

In *Atkinson Trading*, a non-Indian hotel proprietor sued members of the Navajo Tax Commission seeking a declaratory judgment that the Navajo Nation had no jurisdiction to impose an hotel occupancy tax on the proprietor's guests. The New Mexico District Court entered summary judgment in favor of the Commission members. Atkinson Trading appealed. The Court of Appeals held that: (1) district courts in reviewing tribal court decisions on jurisdictional issues should review findings of fact for clear error and conclusions of law de novo; (2) the District Court did not abuse its discretion in finding that Navajo tribal courts were not fundamentally unfair or biased, and that clear error discretion thus should be given to the tribal courts' findings of fact; (3) the fact that the hotel was situated on fee land did not compel a finding that the Nation lacked jurisdiction over the proprietor's nonmember guests; (4) the District Court applied the appropriate test for determining whether the proprietor entered into a consensual relationship with the Navajo Nation; and (5) a consensual relationship existed between Nation and guests, such that Nation had inherent jurisdiction to tax. Circuit Judge Briscoe dissented. 210 F.3d 1247 (10th Cir. 2000). On petitions for rehearing, the Court of Appeals split evenly so rehearing was denied.

The Supreme Court's unanimous opinion reversing made no comment on the standards for reviewing tribal court decisions but rejected the Tenth Circuit's finding of consensual relationships between the Navajo Nation and the hotel guests or the trading post. The Court stressed that the case involved no claim of statutorily conferred power. Slip op. at 8, n.5. The Court noted that neither the Indian Trader's

Statute, 25 U.S.C. ' 261, nor the regulations adopted under that statute, authorized the hotel occupancy tax at issue. Slip op. at 10 and n.10.

State of Nevada v. Hicks, No. 99-1994, ___ U.S. ___ (June 25, 2001), involved an action by a tribal member against state officials in their individual capacities arising from tort and civil rights violations while executing a search warrant on Indian-owned land. Judge Betty Fletcher, for a divided appellate panel, upheld tribal court jurisdiction. Carefully analyzing *Strate*, the Ninth Circuit found that the Supreme Court had expressed no view on the governing law or proper forum when an accident occurs on tribal land within a reservation. *Strate v. A-1 Contractors*, 520 U.S. at 442. The *Strate* court emphasized that the decision in *Montana* related to "reservation land acquired in fee simple by non-Indian owners." *Id.* at 446. Judge Fletcher explained that the Ninth Circuit's post-*Strate* opinions "are consistent with evolving Supreme Court precedent that stresses membership and rights of land ownership as sources of tribal power." 196 F.3d at 1026 (citations omitted). Amended opinion at http://laws.findlaw.com/9th/9617315v2.html. Here, she reasoned:

> Unlike *Montana*, *Strate*, *Wilson*, *County of Lewis*, and *King* the incidents underlying the instant case occurred on Indian-owned, Indian-controlled land, over which the tribe retained its right to exclude non-members. In the absence of federal statutes limiting it, the Tribe has exclusive criminal jurisdiction in Indian Country over minor crimes committed by Indians. . . .
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> Unlike the Agreement in *County of Lewis*, the warrant in this case bestows no broad grant of authority upon the State of Nevada. The tribe retains sovereignty over the land upon which the search and seizure took place. The land on which Hicks' residence stood was neither open to the public, nor controlled or maintained by any entity other than the tribe . . .
>
> We find that the *Montana* presumption against tribal court jurisdiction does not apply in this case. Instead, in line with *Strate* and *County of Lewis*, we look to the tribe's power to exclude state officers from the land at issue. The tribe's unfettered power to exclude state officers from its land implies its authority to regulate the behavior of non-members on that land.

196 F.3d at 1027-28.

The Supreme Court reversed and filed five opinions, *Nevada v. Hicks*, No. 99-1994,__U.S. __ (June 25, 2001). All Justices agreed that the Ninth Circuit erred.

Justice Scalia's opinion for the Court began with the facile equation from *Strate* that tribal adjudicative jurisdiction does not exceed tribal legislative jurisdiction. He then noted that tribes don't necessarily have regulatory authority over nonmembers on tribal land because *Oliphant* didn't rely on land status. *Brendale,* he found, is the only case in which the Court has approved tribal authority over a nonconsenting nonmember's fee land.

Justice Scalia then reasoned that states have authority over crimes committed off reservation and deduced that tribal authority over officers asserting state investigative power isn't necessary for self-government. He decided that exhaustion was unnecessary by admittedly broadening the exception that exhaustion is not required where it would serve no purpose other than delay. Finally, he devoted five pages to saying Justice O'Connor had exaggerated his opinion.

Justice Souter wrote for himself, Kennedy and Thomas, saying the Court was right but they would reach the result more directly by simply extending *Montana* to tribal land. Thus, the main rule for nonmember fee land is now the main rule for all land, and the inquiry into whether rights of way can be aligned with fee land, as *Strate* did, was arguably pointless.

Justice Ginsburg filed a separate one-page opinion to emphasize that the Court was only deciding the question of tribal court jurisdiction over state officers enforcing state law. Justice Stevens (with Justice Breyer) joined the Court's opinion except to reject the idea that tribal courts can't enforce claims under 42 U.S.C. 1983. Stevens points out that the majority had it backwards, in looking for a statute that authorizes tribal courts to hear such claims, when the real question was whether Congress has said tribal courts shouldn't hear such claims. It may be that a majority of the Court has changed the presumption drawn from Congressional silence about a tribal court.

Finally, Justice O'Connor (with Stevens and Breyer), agreed with the Court but declared that "Part II of the Court's opinion is unmoored from our precedents." Justice O'Connor joined Justice Scalia in declaring that *Montana's* main rule and exceptions governs all reservation lands. However, she was concerned that the Court had given too little emphasis to tribal land status as a factor to consider in applying the Montana exceptions. Justice O'Connor evidently believed a consensual relationship may exist for purposes of the *Montana* first exception. However, the Ninth Circuit erred in refusing to address the officers' immunity defenses.

Justice O'Connor also noted that some state-tribal agreements can confer tribal court authority even if the process of getting a search warrant didn't do so in this case. Her opinion, as well as Justice Scalia's opinion, emphasized that the tribe's authority here

was not founded on a Congressional authorization or delegation of power. The opinions cite several examples of Congressionally approved authority.

4. Post-*Strate* Appellate Decisions Construing the *Montana* Exceptions.

The Court's unanimous decision in *Strate* and its emphasis upon a narrow construction of the two *Montana* exceptions, has produced a series of appellate decisions that have tended to narrow tribal civil jurisdiction over nonmembers. In summary form, here are a number of those decisions.

In *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996), a member of the Crow Tribe sued in tribal court to enjoin Yellowstone County from imposing state property taxes on his land located within the reservation. The tribal court concluded that Montana's constitution bars the County from imposing taxes on Pease's land. The federal district court rejected tribal jurisdiction under both the first *Montana* exception and the second *Montana* exception. The Crow Allotment Act of 1920 does not give rise to a consensual agreement that enables the tribe to qualify for jurisdiction under the first *Montana* exception. Possible foreclosure on Pease's property does not establish a direct effect on the political integrity, the economic security, or the health or welfare of the tribe within the meaning of *South Dakota v. Bourland* and *Montana*.

In *Yankton Sioux Tribe v. Southern Mo. Waste Management Dist.*, 926 F. Supp. 888 (S.D.S.D. 1996), *rev'd on other grounds*, 118 S. Ct. 789 (1998), the tribe brought a declaratory judgment action to enforce its claimed right to approve and regulate a landfill site over which the State claimed jurisdiction on the basis that an 1894 statute disestablished or diminished the Yankton Reservation. The district court ruled that the Yankton Reservation was not disestablished but that the tribe did not have regulatory authority over the project. The court held that the tribe had not shown a right to *regulate* the landfill site since it had not established the applicability of either *Montana* exception. *Strate* shows that only matters affecting tribal self-government and consensual relations with the tribe are excepted from the general *Montana* rule.

In *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), a Blackfeet tribal member brought suit in tribal court and obtained a money judgment for tort damages arising from a traffic accident with a non-Indian on U.S. Highway 2 within the Blackfeet Indian Reservation. The tribal member then brought suit in United States district court to register the tribal court judgment against the non-Indian driver. Congress did not extend full faith and credit to all judgments of tribes under 28 U.S.C. ' 1738 so recognition of tribal judgment must rest on the principles of comity. Here the tribal court lacked subject matter jurisdiction, a determination "commanded by *Strate*." The

requirement of bringing individual tort claims in state or federal court does not have a demonstrably serious effect or imperil the political integrity, the economic security or the health and welfare of the tribe. *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994), has been effectively overruled.

Montana v. Gilham, 133 F.3d 1133 (9th Cir. 1998), posed the question whether the State of Montana may be subjected to an unconsented tort action filed by an individual plaintiff in Blackfeet Tribal Court; held, Montana's sovereign immunity bars such an action. Gilham was fatally injured when her car struck a highway sign at the intersection of U.S. Highways 2 and 89 within the boundaries of the Blackfeet Indian Reservation. Montana unsuccessfully appealed the immunity issue to the Blackfeet Court of Appeals and the Blackfeet Supreme Court, then filed an action for declaratory relief in U.S. district court. Because states have retained their historical sovereign immunity from suits by individuals, the inherent retained powers of tribes does not abrogate that immunity. Montana's waiver of immunity is limited to its own courts.

In *Hornell Brewing Co. v. Seth Big Crow*, 133 F.3d 1087 (8th Cir. 1998), the estate of Crazy Horse brought an action in tribal court asserting defamation and intentional infliction of emotional distress because of breweries' use of Crazy Horse name in alcoholic beverage. In 1996, the Rosebud Sioux Supreme Court held that the breweries had sufficient contacts with the Reservation to uphold service of process and that the estate had established prima facie subject matter jurisdiction. The United States district court enjoined the Rosebud Sioux Tribal Court from conducting further proceedings on the merits but directed an evidentiary hearing on the issues of personal and subject matter jurisdiction. The Eighth Circuit held that neither *Montana* nor subsequent cases allow tribes to exercise civil jurisdiction over the conduct of non-Indians occurring outside their reservations. The court emphasized footnote 14 in *Strate* declaring that exhaustion is not applicable where it is plain that no federal grant provides for tribal governance of nonmembers' conduct.

In *Enlow v. Moore*, 134 F.3d 993 (10th Cir. 1998), owners of restricted allotments filed a quiet title action in Muskogee Creek Nation Tribal Court against Enlow, a non-Indian property owner. Enlow filed his own quiet title action in state court, and also sued in federal court seeking an injunction prohibiting the tribal court from assuming jurisdiction in the case. The tribal court held that it had jurisdiction. Where no treaty provision or federal statute divests the tribal court of jurisdiction, it may properly exercise jurisdiction over a civil dispute involving a non-Indian and Indian land. On remand the federal district court must determine whether the tribal supreme court's finding that the disputed property lies within Indian country is clearly erroneous. *See Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996)

(holding that district court reviews tribal court findings of fact for clear error and conclusions of law *de novo*).

In *Montana v. U.S. EPA*, 137 F.3d 1136 (9th Cir. 1998), Montana attacked EPA's decision to grant TAS status for water quality standards purposes to the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation. The EPA regulations require the tribe to show that the regulated activities affect the political integrity, the economic security, or the health or welfare of the tribe and that the potential effects be serious and substantial. The Court upheld EPA, holding that EPA's decision to adopt inherent tribal authority as the standard intended by Congress is entitled to deference.

In *County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998) (*en banc*), a tribal member sued in tribal court for false arrest, stemming from an arrest for disturbing the peace. In 1965, a Nez Perce tribal resolution consented to have Idaho "assume and exercise concurrent criminal jurisdiction over offenses" other than major crimes. Held, the consent to criminal jurisdiction was tantamount to alienation of the land to non-Indians for the limited purpose of criminal law enforcement. *Montana* Exception 1 does not apply to an intergovernmental law enforcement agreement. Having divested itself of sovereignty over the activities that gave rise to the civil claim, this case does not threaten self-government or the political integrity, economic security or health and welfare of the tribe.

Johnson v. Gila River, 174 F.3d 1032 (9th Cir. 1999), held that a litigant need not exhaust his appellate remedies in tribal court where the tribal appellate court has not responded to initial pleadings for an extended period of time. The tribal court had subject matter jurisdiction because the claims arose out of a commercial relationship with the tribe on its reservation.

In *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999), TTEA managed a smokeshop on the Pueblo's reservation in El Paso. The management agreement had never been approved under 25 U.S.C. ' 81. The tribe sued in tribal court seeking a declaration that the agreement was void. Without holding a hearing, the court determined that it had jurisdiction and that the agreement was void. The federal district court dismissed for failure to exhaust. Because the tribal trial judge denied TTEA's appeal and no further remedies were available, no federal abstention was required. Although the district court had not examined the tribal court's jurisdiction under the Restoration Act, the 5th Circuit did so and concluded that TTEA's action should have been dismissed for failure to state a claim.

State of Montana Dep't of Transp. v. King, 191 F.3d 1108 (9th Cir. 1999), held that Fort Belknap TERO ordinance is not enforceable against employees of MDOT

performing road work on a right-of-way across the reservation. When tribes assumed their present dependent status, they did not possess the authority to regulate or sue the states. *Montana* Exception 2 must be narrowly applied.

In *Burlington N. Ry. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 2000), two members were killed when a train collided with their car while the train was traveling along a right-of-way within the Crow Reservation. The court rejected tribal court civil jurisdiction over the members' estates' tort claims. Under the *Strate* analysis, a federally created right-of-way is the functional equivalent of land alienated in fee to nonmembers. Accordingly, *Montana*'s main rule applies to an accident on a right-of-way granted by Congress to the Railroad's predecessor in interest. Under the first exception, a right-of-way created by congressional grant is a transfer of a property interest that does not create a continuing consensual relationship between a tribe and the grantee. Under *Strate* and *Marchington*, the injury of a tribal member does not satisfy *Montana* Exception 2.

The *Red Wolf* court's effort to harmonize its results with *Merrion* and *Burlington N. Ry. Co. v. Blackfeet Tribe* led the court to conclude that the tribe's taxing power is greater than its civil adjudicatory jurisdiction over nonmembers. That, of course, is contrary to the analysis of *Strate*, which dismissed the notion that tribal adjudicatory jurisdiction was different than regulatory jurisdiction.

In *Big Horn Electric v. Adams*, 219 F.3d 944 (9th Cir. 2000), affirming 53 F. Supp. 2d 1047 (D. Mont. 1999) subseq. op. at 1999 U.S. Dist LEXIS 20091 (1999), the Crow Tribe imposed an *ad valorem* tax on utility property located on power company rights-of-way on the Crow Reservation. The electric company sued officials of the Crow Tribe, seeking injunctive and declaratory relief against the tribal utility tax on the company's property on a right-of-way across tribal lands. The district court determined that the right-of-way was equivalent to fee land owned by nonmembers for purposes of deciding nonmember governance; it also ruled that the sale of power to the Tribe was taxable as an example of a consensual relationship. The court determined that the *ad valorem* tax on the property exceeded the Tribe's inherent sovereignty because it was not imposed on the activity which formed the consensual relationship, the sale of power. The court stated that *Strate* and *Wilson v. Marchington* had impliedly overruled *Blackfeet*.[7] Accordingly, the tribe lacked authority to impose an *ad valorem* tax on rights-of-way deemed to be the equivalent of fee land owned by nonmembers.

In summary, in the post-1978 era it is essential to distinguish between the civil jurisdiction that a tribe may possess over nonmembers on Indian lands from the general proposition of no jurisdiction that applies concerning activities on rights-of-

way or lands alienated to non-Indians.[8] The consensual relationship basis for jurisdiction, *Montana* Exception 1, has been found in several cases but virtually no conduct seems to pose a sufficiently serious threat to tribal interests to support tribal court jurisdiction on the basis of *Montana* Exception 2.[9] Accordingly, while the *Montana* exceptions can provide the basis for tribal civil jurisdiction over nonmembers on nontribal lands in appropriate cases, it is important to focus on the possibility of congressional authorization for tribal action, or delegation of authority, where it can be found.

5. Congressional Authorization or Delegation as a Basis for Tribal Authority over Nonmembers.

Because of the confused and increasingly narrow application for inherent tribal sovereignty, it is important to consider available statutes authorizing or delegating powers to Indian tribes. *United States v. Mazurie*, 419 U.S. 544 (1975), 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. This section is 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, *id.* at 554, 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.

Id. at 557 (emphasis added).

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.[(10)]

Montana v. United States, 450 U.S. 544 (1981), 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. *United States v. Montana*, 604 F.2d 1162, 1167 (9th Cir. 1979). 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. . . .

450 U.S. at 562.

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. 419 U.S. at 557.
The *Montana* Court rejected the tribe's contention that it had inherent sovereign authority over non-Indian hunting and fishing but also indicated that Congress could have delegated that authority by amending ' 1165.

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), also discussed above, is important not only for its discussion of *Montana* Exceptions 1 and 2 but also for its explanation of situations in which Congress has delegated authority to tribes. Mr. 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." *Id.* at 428.

Justice White then cited four examples of express statutory delegation (using the signal "*cf.*"). The first citation is to the definition of Indian country, 18 U.S.C. ' 1151, and the second, the authorization of tribal local option ordinances that were at issue in *United States v. Mazurie*. 18 U.S.C. ' 1161.

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 Clean Water Act authorizes the EPA Administrator to treat an Indian tribe as a state if it has a governing body carrying out substantial governmental duties and powers, proposes to manage water resources within an Indian reservation, and is found by the Administrator to be capable of carrying out water resource functions in a manner consistent with the Clean Water Act and its regulations. 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 in regulations, essentially limiting its applicability to situations in which the tribal government can show it possesses inherent sovereign authority under *Montana* exceptions 1 and 2. *See* Final Rule, 58 Fed. Reg. 67,966, 67,970-71 (Dec. 22, 1993). 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. 137 F.3d 1135, 1138 (9th Cir. 1998). 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 *Montana* Exception 2 and finding that the regulation reflected "appropriate delineation and application of inherent Tribal regulatory authority over non-consenting nonmembers." 137 F.3d at 1141. The district court would have found ' 518 by itself to be an ample delegation of federal authority.[(11)]

Arizona Public Service Co. v. Environmental Protection Agency, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 1600 (2001), is a major case on delegated authority. This case concerns amendments that specifically address the power of tribes to implement air quality regulations under the 1990 amendments to the Clean Air Act. Petitioners challenged the Environmental Protection Agency's regulations, promulgated in 1998, implementing the Amendments. *See* Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (1998) (to be codified at 40 C.F.R. pts. 9, 35, 49, 50, and 81).

The Clean Air Act amendments refer to tribal jurisdiction in several places. In section 7410(o) Tribal Implementation Plans may become applicable to all areas "located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." However, in section 7601(d)(1)(B) tribes may be treated as States "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." The Court of Appeals held that Congress delegated authority to tribes to regulate all lands within reservations, but Judge Ginsberg dissented from that holding, contending that Congress delegated authority only with respect to tribal implementation plans because in the other provision Congress failed to "include the formulaic 'notwithstanding' proviso-the gold standard for such delegations."

Bugenig v. Hoopa Valley Tribe, No. C 98-3409 CW (N.D. Cal. Mar. 31, 1999), appeal pending, 9th Cir., No. 99-15654, 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 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. *Hoopa Valley Tribe v. Bugenig*, 25 I.L.R. 6137 (Hoopa Valley Tr. Ct. July 11, 1996). 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's jurisdiction was supported by a provision of the Hoopa-Yurok Settlement Act, 25 U.S.C. " 1300i-7. The court concluded that because logging posed such a significant threat to the White Deerskin Dance sites and trail, *Montana* Exception 2 also supported the tribe's inherent jurisdiction over Bugenig's timber cutting activities. *Bugenig v. Hoopa Valley Tribe*, 25 I.L.R. 6139 (Hoopa Valley S. Ct. April 23, 1998).

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 declares that the jurisdiction of the Hoopa Valley Tribe extends to all lands within the reservation boundaries and 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.

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

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.

Bugenig v. Hoopa Valley Tribe, No. C 98-3409 CW, slip op. at 8 (N.D. Cal. Mar. 31, 1999); available at http://www.msaj.com/cases/bugenig.htm.

A three-judge panel of the Ninth Circuit Court of Appeals reversed and remanded the district court's decision on October 3, 2000. *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (9th Cir. 2000), *reh'g en banc granted*, 240 F.3d 1215 (9th Cir. 2001). Judge O'Scannlain wrote on behalf of himself and Judges Reavley and Gould, holding that because of a presumption against tribal jurisdiction over nonmembers on fee lands, any congressional delegation must be truly express. If Congress uses the "notwithstanding" proviso then an appropriate delegation has been made. Any alternative formulation must, on its face, represent a pellucid delegation of the claimed authority. The panel opinion went on to address an issue not considered by the district court, that is, whether the Hoopa Valley Tribe possessed inherent tribal authority to exercise civil jurisdiction under the circumstances. The court found that the second *Montana* exception must be narrowly construed and allows tribal jurisdiction over nonmembers only when necessary to protect self-government or control internal relations. In a footnote, the court rejected the tribe's claim that *Brendale* supported tribal land use authority because the area at issue in *Bugenig* is dominated by tribal land ownership and the tribe maintains the right to determine the essential character of the area.

On February 28, 2001, the Ninth Circuit Court of Appeals granted en banc rehearing and prohibited further citation of the panel opinion within the Ninth Circuit pending the results of rehearing. Oral argument on the en banc rehearing is scheduled for June 19, 2001.

6. 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. 25 U.S.C. " 1901-1963. 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*, 490 U.S. 30 (1989).

An even broader authorization 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, 25 U.S.C. " 2801-2809, 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. 25 U.S.C. ' 2803(3). 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.

Elsewhere in the United States Code, Congress has also authorized the exercise of the tribal authority over nonmembers. For example, 18 U.S.C. ' 1161, discussed above, authorizes tribal regulation of liquor. In addition to the Clean Water Act, discussed above in connection with *Brendale* and *Montana v. U.S. EPA*, a number of federal statutes protecting and regulating environmental matters provide for the exercise of tribal authority under the Treatment as a State process or something similar. For example, tribes have substantial authority under the Clean Air Act, 42 U.S.C. ' 7401 *et. seq.*[12] Also, about 50 provisions in the United States Code call for consultation with Indian tribes and in several cases provide substantial tribal authority or procedural protection for tribal interests. *See generally*, Executive Order 13084 "*Consultation and Coordination with Indian Tribal Governments*" (May 4, 1998). The National Historic Preservation Act and the Archeological Resources Protection Act authorize substantial tribal authority. *See* 16 U.S.C. ' 470a, *et seq.*, and 16 U.S.C. ' 470ii, *et seq.*

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.

1. 194 U.S. at 393. *Morris v. Hitchcock* is given as an example of consensual jurisdiction (*Montana* "exception one"), but it can also be seen as an example of congressional authorization. *See Montana v. United States*, 450 U.S. at 565.

2. In a case discussed *infra*, *Atkinson Trading Co., Inc. v. Shirley*, ___ U.S. ___, No. 00-454 (May 29, 2001), the Court rejected *Buster's* "statement that an Indian tribe's 'jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it.'" Slip Op. at 7 n.4. The *Atkinson* Court claimed "we have never endorsed" that statement in *Buster*, although the majority plainly did so in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-43 (1982), and both the Court and commentators have consistently cited *Buster* with approval.

3. Also available in digital form from the author or at http://www.delphi.com/indianlaw/messages (under Legal Resources).

4. *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.

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

6. "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*, 520 U.S. at 457-58, 117 S. Ct. 1404, 1415 (1997).

7. In *Burlington N. Ry. Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992), a railroad sought to enjoin tribes from taxing the railroad's non-possessory interest in property within their reservations. The Ninth Circuit held that the tribes had the inherent sovereign authority to tax the rights-of-way granted to the railroad based upon the tribes' "continuing property interest" in the land. *Id.* at 904. The grant of a limited possessory interest to the railroad did not extinguish the tribes' interest in the land, therefore the tribes retained the authority to tax nonmembers doing business on reservation land for the tribal benefits they enjoy. The Ninth Circuit decision in *Blackfeet* was premised on the Supreme Court's decisions in *Merrion*. *Blackfeet* also arguably involved a consensual relationship with the tribes within the meaning of *Montana* Exception 1.

8. Virtually all of the case law discussed here addresses tribal jurisdiction within Indian Country, an area defined in 18 U.S.C. ' 1151. On lands not held in trust by the United States for a tribe or individual Indian and lying outside the established boundaries of an Indian reservation, a different analysis applies. In *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the Court held that land held by that tribe was not Indian Country because it was not an Indian reservation, dependent Indian community, or an Indian allotment. As a result, the tribe lacked authority to tax a private contractor building on the property. *See also, Blunk v. Arizona Dept. of Transportation*, 177 F.3d 879 (9th Cir. 1999) (billboard on non-

reservation fee land owned by Navajo Nation was outside Indian Country so state regulatory authority was not preempted).

9. *Cf., El Paso Natural Gas v. Neztsosie*, 136 F.3d 610, _____ n.5 (9th Cir. 1998); *rev'd on other grounds*, 526 U.S. 473 (1999) (it seems indisputable that a claim involving uranium contamination poses a danger to the health or welfare of the Tribe).

10. In *City of Timber Lake v. Cheyenne River Sioux*, 10 F.3d 554 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2741 (1994), the court relied on ' 1161, as construed in *Rice v. Rehner*, 463 U.S. 713 (1983), as authority for tribal regulation of liquor throughout the reservation with no exemption for non-Indian communities. Thus, while the reference to non-Indian communities at issue in *Mazurie* would affect federal criminal prosecutions it would not limit the tribal civil jurisdiction over nonmembers authorized by ' 1161.

11. 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).

12. *See generally, Washington Dept. of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985); *Arizona v. EPA*, 151 F.3d 1205 (9th Cir. 1998), as amended, 170 F.3d 870 (9th Cir. 1999). *See also, EPA American Indian Environmental Office Materials* at http://www.epa.gov/indian/matrix.htm.