THE CRUCIBLE OF SOVEREIGNTY: ANALYZING ISSUES OF TRIBAL JURISDICTION

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I. INTRODUCTION

Tribal courts are of growing significance and importance throughout Indian country. This is especially true in light of the recent United States Supreme Court decisions in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*[1] and *Iowa Mutual Insurance Co. v. LaPlante*,[2] which hold that tribal courts are the primary forums for adjudicating civil disputes on the reservation. As Justice Marshall wrote in the *Iowa Mutual* case, "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development."[3] As a result of this continued and growing recognition, tribal courts have become the frontline tribal institutions that struggle to analyze and identify the permissive range and scope of tribal jurisdiction and sovereignty.

This Article develops a conceptual framework for performing an analysis of the scope of tribal jurisdiction and sovereignty and examines some of the attendant problems such as the "no forum" and "no law" issues and jurisdiction over non-member Indians. The Article concludes by delineating the emerging contours of the relationship of tribal courts to the federal judicial system.

The special force of the *National Farmers Union* and the *Iowa Mutual* decisions comes not just from their general recognition of the importance of tribal courts, but more decisively, from their explicit rules which curb the most prevalent attempts to undermine and circumvent tribal court jurisdiction.[4] Both of these cases laid to rest mechanisms used by litigants to prematurely attack or avoid tribal court jurisdiction.

For example, in *National Farmers Union*, a member of the Crow Tribe obtained a default judgment in tribal court against a non-Indian school district for an alleged tort that took place within the defendant's school

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An earlier version of this Article was presented at the State Bar of South Dakota Continuing Legal Education meeting on Indian Law (1987).

1. 471 U.S. 845 (1985).
2. 480 U.S. 9 (1987).
3. *Id.* at 14-15.
4. *See infra* text accompanying notes 131-56.

grounds on fee land within the exterior boundaries of the reservation.[5] Without attempting to attack the default judgment in either the Crow Tribe trial court or in its court of appeals, the defendant school district and its insurer brought an action in federal court seeking injunctive relief based on a claim that the Crow Tribal Court had no subject matter jurisdiction over a civil action against a non-Indian.[6]

Observing that jurisdiction in federal court is premised on "federal question" jurisdiction under 28 U.S.C. section 1331, the district court found that the Crow Tribal Court had no jurisdiction over a civil action against a non-Indian and entered an injunction against further proceedings in the tribal court.[7] The Ninth Circuit Court of Appeals reversed, determining that the district court had no jurisdiction to enter such an injunction.[8] The Supreme Court overturned the Ninth Circuit's ruling, holding that whether a tribal court has exceeded the lawful limits of its jurisdiction is a question that must be answered by reference to federal law, including federal common law, and therefore it is an appropriate "federal question" under section 1331.[9]

The Court also ruled that such a proceeding in federal court is proper only upon the exhaustion of tribal court remedies.[10] The Court observed that this directive to federal courts to stay their hand is necessary to allow a tribal court a full opportunity to determine its own jurisdiction and to rectify any errors it may have made.[11] According to the Supreme Court, "[e]xhaustion of tribal court remedies . . . will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review."[12]

In *National Farmers Union*, the Supreme Court thus established two important principles that are central to comprehending issues of tribal jurisdiction. First, actions properly brought in tribal court are not subject to *jurisdictional* attack in federal court until there is an exhaustion of tribal remedies,[13] and second, questions about the permissible limits of tribal court jurisdiction are ultimately legitimate federal questions under section 1331. The Court, without expressly acknowledging the process, also appeared to begin to delineate the procedural and jurisdictional relationships between tribal courts and federal courts.[14] The *Iowa Mutual* case explicitly rejected

5. *National Farmers Union*, 471 U.S. at 847.

6. *Id. See also id.* at 856 n.22 (indicating that a specific tribal court procedure was available to set aside the default judgment).

7. *Id.* at 848.

8. *Id.* at 847.

9. *Id.* at 852-53.

10. *Id.* at 857.

11. *Id.*

12. *Id.*

13. *But see id.* at 856 n.21, where the Court sets forth the limitations to the exhaustion requirement, observing that exhaustion is not required where the assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, where the action is patently violative of express jurisdictional prohibition, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the Court's jurisdiction. *Id.*

14. *See infra* text accompanying notes 230-38.

any attempt to avoid tribal court jurisdiction in the first instance by establishing independent federal jurisdiction through diversity jurisdiction as a means to obtain a federal forum to litigate a reservation-based cause of action. In so doing, it advanced beyond the holding in *National Farmers Union*.[15]

In *Iowa Mutual*, the plaintiff, a tribal resident of the Blackfoot Reservation, brought a tort action in tribal court against a Montana corporate ranch and its insurer for injuries suffered while in its employ on the reservation.[16] The tribal court refused to grant the insurer's motion to dismiss for lack of subject matter jurisdiction. The insurer subsequently filed an action in federal court denying liability to the insured, premising federal court jurisdiction on diversity jurisdiction.[17] Noting that the tribal court must first be given an opportunity to determine its own jurisdiction, the district court dismissed the suit on the ground that the court lacked subject matter jurisdiction.[18] The Court of Appeals for the Ninth Circuit affirmed the district court's order.[19]

The Supreme Court reversed, holding that the Ninth Circuit correctly decided that the issue of tribal jurisdiction should be resolved by the tribal courts in the first instance, but the Court should not have affirmed the district court's dismissal for lack of subject matter jurisdiction.[20] The Court ruled that "regardless of the basis for federal jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction'."[21] This includes any applicable tribal appellate procedures.[22]

The Court also stated that tribal authority over activities on reservation lands is an important part of tribal sovereignty. Accordingly, civil jurisdiction over such activities lies presumptively in tribal courts unless affirmatively limited by a specific treaty provision or federal statute.[23] Quoting *Merrion v. Jicarilla Apache Tribe*,[24] the Court observed that a tribe retains all the inherent attributes of sovereignty that have not been divested by the federal government.[25] Thus, the proper inference from silence is that sovereign power (and hence tribal jurisdiction) remains intact.[26] *Iowa Mutual* accordingly bolstered the Court's exhaustion of the tribal remedies rule set forth in *National Farmers Union*. The impact of these Supreme Court decisions at the tribal court level is to place a strict premium on precise and rigorous tribal court analysis of its own jurisdictional parameters. Because of the unique history surrounding these issues, it is important to describe the

15. *Iowa Mutual*, 480 U.S. at 17.
16. *Id.* at 11.
17. *Id.* at 12-13.
18. *Id.*
19. *Id.* at 13.
20. *Id.* at 19-20.
21. *Id.* at 16.
22. *Id.* at 17.
23. *Id.* at 18.
24. 455 U.S. 130 (1982).
25. *Iowa Mutual*, 480 U.S. at 17 (quoting *Merrion*, 455 U.S. at 149 n.14).
26. *Id.*

background in which jurisdictional disputes arise before proceeding to develop an analytical framework for performing this task.

II. JURISDICTION IN INDIAN COUNTRY

The allocation of jurisdiction in Indian country and the often competing interests of federal, state and tribal governments create a unique jurisdictional collage. Issues of tribal jurisdiction often emerge from this web of interests and rules. Therefore, an explanation of the genesis of tribal jurisdiction provides the necessary background for a proper understanding of its parameters and its future.

A. *Criminal Jurisdiction in Indian Country*

Two major federal statutes govern the primary apportionment of criminal jurisdiction in Indian country: the Indian Country Crimes Act[27] and the Major Crimes Act.[28] The Indian Country Crimes Act provides for federal, not state, jurisdiction over interracial crimes occurring in Indian country.[29] The reference to "the local law of the tribe" permits concurrent tribal jurisdiction,[30] and although the statute, on its face, makes no exception for crimes committed by one non-Indian against another non-Indian, such an exception was carved out in *United States v. McBratney*.[31] As a result, the statute essentially governs interracial criminal activity in Indian country.

The Assimilative Crimes Act[32] is a general law of the United States made applicable to Indian country through the Indian Country Crimes Act. It permits federal prosecutions by "assimilating" state criminal law as a "gap filling" device when there is no applicable federal substantive criminal law. These prosecutions seem unwarranted in light of the ability of the tribal court to punish minor crimes involving Indian defendants. Nevertheless, the application of the Act is undisputed.[33]

In 1883, in the case of *Ex parte Crow Dog*,[34] the Supreme Court ruled that tribes had exclusive jurisdiction over crimes among Indians, that is, in

27. 18 U.S.C. § 1152 (1984). This statute is supplemented by the Assimilative Crimes Act, 18 U.S.C. § 13 (1984). *See infra* text accompanying note 32.

28. 18 U.S.C. § 1153 (1982 & Supp. 1986), *as amended by* Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646 § 87(e)(5), 100 Stat. 3623 (1986).

29. The statute specifically states:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian country.
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> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. § 1152 (1982).

30. *See, e.g.*, Vollman, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387, 391-92 (1974).

31. 104 U.S. 621 (1882) (State has jurisdiction over a homicide committed by one non-Indian against another non-Indian on the Ute Reservation in Colorado.).

32. 18 U.S.C. § 13 (1984).

33. *See* D. GETCHES & C. WILKINSON, FEDERAL INDIAN LAW 406-07 (2d ed. 1986).

34. 109 U.S. 556 (1883).

any offense involving Indians as both perpetrators and victims. Congress abrogated this rule two years later by enacting the Major Crimes Act. The Act mandated federal jurisdiction over seven major crimes and made no provision for state jurisdiction. Congress has since amended the Act several times; it now includes a total of sixteen major crimes.[35] The Major Crimes Act applies only when the perpetrator of the enumerated crime is Indian.[36] Despite the occasional applicability of state law,[37] all prosecutions are federal proceedings in federal court. It is unsettled whether the Major Crimes Act divests the tribal courts of concurrent jurisdiction.[38]

Tribal courts have exclusive criminal jurisdiction over Indian defendants for all crimes not covered by the Indian Country Crimes Act or the Major Crimes Act and concurrent jurisdiction over matters involving the former, and possibly the latter.[39] Tribal courts do not have any criminal jurisdiction over non-Indians.[40]

These rules govern most crminal jurisdictional issues, but occasional questions remain concerning "victimless" crimes,[41] the applicability of the Assimilative Crimes Act,[42] and criminal jurisdiction over non-member Indians. A later section of this Article addresses this last problem as a prototypical example of a tribal court jurisdiction issue.[43]

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35. The statute now reads:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under § 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the state in which such offense was committed as are in force at the time of such offense.
>
> In addition to the offenses of burglary and incest, any other of the above offenses which are not defined, and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the law of the state in which such offense was committed as are in force at the time of such offense.

18 U.S.C. § 1153 (1982 & Supp. 1986), *as amended by* Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646 § 87(e)(5), 100 Stat. 3623 (1986).

36. *Id.*

37. *Id.*

38. *See, e.g.*, D. GETCHES & C. WILKINSON, *supra* note 33, at 401-02.

39. The penalty that may be imposed in tribal court is limited by the Indian Civil Rights Act of 1968 (codified at 25 U.S.C. § 1302 (1982), *as amended by* the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 4217, 100 Stat. 3207 (1986)) to a maximum of one year in jail, a $5,000 fine, or both.

40. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). *See e.g.*, Justice Rehnquist's broad assertion:

> By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." . . . It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

Id. at 210.

41. Examples include adultery, gambling and prostitution. *See, e.g.*, Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 535-36 (1976).

42. *See, e.g.*, United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977) (upholding the applicability of Washington State's fireworks law on the Puyallup Indian Reservation).

43. *See infra* text accompanying notes 186-229.

B. *Civil Jurisdiction in Indian Country*

Civil jurisdiction in Indian country, in contrast to criminal jurisdiction, is *not* largely governed by federal statutes and, therefore, its contours are less clear.[44] The Supreme Court's recent decisions render the scope of tribal court jurisdiction ever more uncertain. For example, in *National Farmers Union*, the Court refused to extend *Oliphant*'s bright-line, no-jurisdiction rule into the civil arena.[45] While undoubtedly a correct result, the Court, by so holding, increased rather than decreased the complexity in determining tribal court civil jurisdiction. The Court's ruling in *National Farmers Union*, which requires plaintiffs to exhaust tribal court remedies, admittedly bolsters the authority of tribal courts and correspondingly increases the volume of the litigation in those courts, but fails to establish clear-cut guidelines for deciding in what circumstances tribal court jurisdiction is appropriate. This complexity is extended even further with the corollary recognition articulated in *Iowa Mutual* that "[t]ribal authority over the activities of non-Indians on reservation land is an important part of tribal sovereignty."[46]

This unresolved issue[47] usually manifests itself in either one or both of the following questions:

(1) What is the extent of tribal court judicial jurisdiction over non-Indians and their property?

(2) What is the extent of tribal legislative and regulatory authority over non-Indians and their property?

C. *Legislative vs. Judicial Jurisdiction*

Tribal legislative and judicial jurisdiction are *not* the same thing. They may often intersect and overlap, but they are not necessarily coterminous. This Article treats each of these strands independently and seeks to describe the unique rules and treatment the federal courts have provided in each area. Tribal legislative jurisdiction concerns the issue whether a tribal legislative body, such as a tribal council, has, on the one hand, the authority as a matter of tribal law to make laws governing the conduct of non-Indians, and on the other hand, whether such authority is proscribed by federal law. Tribal judicial jurisdiction refers to the question whether a tribal court is, on the one hand, empowered by tribal law to hear a particular kind of case, and on the other hand, whether such tribal court authority is limited by federal law.

For example, if a tribal court decides that it does not have judicial jurisdiction, it cannot reach the issue of legislative jurisdiction and must dismiss the case for want of jurisdiction. If a tribal court decides it has proper judi-

44. As noted by the Supreme Court, "[a]lthough the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, . . . their civil jurisdiction is not similarly restricted." *Iowa Mutual*, 480 U.S. at 15.

45. *National Farmers Union*, 471 U.S. at 855.

46. *Iowa Mutual*, 480 U.S. at 18.

47. There is also the corollary issue of when the states may have legislative and/or judicial jurisdiction on the reservation. The leading case analyzing the reach of state authority on a reservation is White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). State authority does not generally apply to Indians or their property on the reservation unless there is special federal legislation such as the Act of August 15, 1953, Pub. L. No. 280, 67 Stat. 588 [hereinafter Public Law 280].

cial jurisdiction over the lawsuit, it must then decide whether the tribe has proper legislative jurisdiction to establish the particular laws governing non-Indian conduct. If there is no legislative jurisdiction, the action must also be dismissed for failure to state a cause of action on which relief may be granted. It is only after a tribal court decides that it has judicial jurisdiction and that the tribe, itself, has legislative jurisdiction that it can proceed to decide the case on the merits. This distinction between legislative and judicial jurisdiction was particularly emphasized in the *Iowa Mutual* case.

In *Iowa Mutual*, the Supreme Court emphasized that the tribal court must decide two separate issues. First, the tribal court has to determine whether it possesses judicial jurisdiction over the suit. And second, the court must resolve whether the tribe has the legislative authority to regulate the conduct of non-Indians engaged in the activities at issue.[48] The *Iowa Mutual* Court did not rule on the tribal court's findings that it had judicial jurisdiction over the controversy and that the tribe had legislative jurisdiction over the non-Indian tortious conduct in issue, but remanded for further proceedings consistent with its opinion.[49] The failure of the Court to demonstrate or spell out the kind of analysis it expects in this area unnecessarily reinforces the lack of clarity that often permeates questions of Indian law jurisdiction.

III. TRIBAL JURISDICTION OVER NON-INDIANS

A. *Background*

The extent of tribal authority over non-Indians and their property is largely dependent on an analysis of the extent of tribal sovereignty in the particular circumstances at issue. The classic statement on tribal sovereignty comes from Felix Cohen:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the power of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of the sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[50]

The federal courts, however, have not consistently adhered to Cohen's formulation. In fact, some scholars[51] suggest that at the beginning of the modern era two parallel, but contradictory, lines of authority developed.

48. *Iowa Mutual*, 480 U.S. at 12.
49. *Id.* at 19-20.
50. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942 ed.).
51. *See, e.g.*, D. GETCHES & C. WILKINSON, *supra* note 33, at 278-80.

Decisions such as *Ex parte Crow Dog*[52] and *Talton v. Mayes*[53] were prototypical affirmations of the tribal sovereignty doctrine while such cases as *United States v. Kagama*,[54] *Lone Wolf v. Hitchcock*,[55] and *United States v. McBratney*[56] all evinced a view that the authority of Indian tribes had been severely eroded by the increased presence and dominance of non-Indian society and that tribal sovereignty therefore must be appropriately reduced.[57] None of these cases specifically concerned or addressed the ambit of tribal jurisdiction over non-Indians and their property, but they do provide a striking overview of the conceptual contrast with which the courts continue to grapple. This contrast often focuses on the issue of how much weight should be accorded to the change of circumstances that has taken place on any particular reservation.

This approach often examines such questions as whether, and under what circumstances, the tribe has historically exerted the authority at issue or whether it has previously deferred or accommodated itself to the state exercise of that authority. Of course, the historical particulars alone do not always provide definitive answers, and it is therefore necessary to also review the nature of a tribe's sovereignty in terms of treaties, the current status of the tribe's own laws and judicial system, the nature of the landholding patterns on the reservation, and the federal government activity in the particular area. As a result, there has been no ease or real predictability in determining the extent of tribal jurisdiction over non-Indians.

B. *Tribal Judicial Jurisdiction*

A proper analysis of whether a tribal court has judicial jurisdiction over any particular lawsuit involves an examination of at least three issues: whether the tribal court has proper subject matter, personal, and territorial jurisdiction over the controversy. There may also be additional collateral and ancillary issues that arise from questions concerning the local execution of judgments and comity and recognition of tribal judgments in sister jurisdictions. These latter concerns do not, however, directly affect whether a tribal court has jurisdiction over a particular matter, but more often raise questions of litigation strategy and choice of forum.

The most concise and effective analysis of these issues flows from a two-stage approach. The first stage requires an inspection of federal Indian law to determine whether there are any controlling federal statutes, decisional law, or treaties. If there are any pertinent statutes, judicial decisions, or treaties which limit the tribal court's jurisdiction, they must be given decisive effect. For example, under the Supreme Court's decision in *Oliphant v.*

52. 109 U.S. 556 (1883) (The tribe has jurisdiction over a homicide committed by one Indian against another Indian on the reservation.).

53. 163 U.S. 376 (1896) (Tribal powers predate the United States Constitution and therefore are not directly subject to its control.).

54. 118 U.S. 375 (1886) (Tribes are wards of the United States and subject to its superior power.).

55. 187 U.S. 553 (1903) (Tribes are subject to the "plenary power" of Congress over their affairs.).

56. 104 U.S. 621 (1882).

57. D. GETCHES & C. WILKINSON, *supra* note 33, at 279.

Suquamish Indian Tribe,[58] a tribal court does not have criminal jurisdiction[59] over non-Indians, and any assertion of such jurisdiction must necessarily fail, preferably as a result of the tribal court's own decision and analysis. Interestingly enough, there are no federal statutes or decisions that categorically bar tribal court jurisdiction over certain civil matters. Because of the general absence of federal statutes that deal with the allocation of civil jurisdiction, few civil cases will be disposed of at this stage of analysis.

1. *Subject matter jurisdiction*

After an issue of tribal court jurisdiction has been refracted through the pertinent body of federal Indian law without adverse result, the second stage analysis begins. This analysis involves an examination of whether the tribal court has jurisdiction as a matter of tribal law. In the absence of controlling federal law, tribal courts presumably have jurisdiction over disputes involving Indians and non-Indians on the reservation.[60] Nevertheless, this range of judicial jurisdiction may be limited by express restrictions found within tribal law itself or even, occasionally, by the absence of positive tribal law on point.

This line of analysis requires a threshold examination to identify the possible sources of tribal law available for scrutiny. The primary sources of tribal law would include treaties, the tribal constitution, the tribal code, and tribal decisional law. Two potential additional sources of tribal law should be mentioned. The first is tribal customary and traditional law, which is seldom codified and must often be identified as part of the oral tradition and culture. The second is a directive—mandatory or directory in nature—within a tribal code to consider and/or apply pertinent federal or state law. For example, the tribal code of the Sisseton-Wahpeton Tribe of South Dakota provides that civil matters shall be governed by the laws, customs, and usage of the tribe. The tribal code also provides that the laws of the State of South Dakota may be employed as a guide.[61]

This tribal statutory provision neatly illustrates the range of analysis. In any situation federal Indian law is primary and preempts any tribal law to the contrary.[62] In the absence of conflicting federal Indian law, tribal law controls. In the example of the *Sisseton-Wahpeton Tribal Code*, tribal law

58. 435 U.S. 191 (1978).

59. *Id.* (judicial or legislative jurisdiction, though the opinion itself does not make that distinction).

60. *See, e.g., Iowa Mutual*, 480 U.S. at 18 (quoting *Merrion*, 455 U.S. 149 n.14). *See also supra* text accompanying notes 24-26.

61. SISSETON-WAHPETON TRIBAL CODE ch. 33, § 1 (1982). The tribal code specifically provides:

> [c]ivil matters shall be governed by the laws, customs and usage of the tribe not prohibited by the laws of the United States, applicable federal laws and regulations and decisions of the Department of Interior. The laws of the State of South Dakota may be employed as a guide. Where doubt arises as to the customs and usage of the Tribe, the court shall request the address of tribal elders familiar with tribal customs and usages. Where appropriate, the laws of the State of South Dakota may be employed to determine civil matters. The laws of the State of South Dakota shall not be used as a substitute for existing tribal law.

Id.

62. Federal law also preempts any contrary state law. *See, e.g., White Apache Tribe*, 448 U.S. 136; Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

includes non-codified tribal custom and usage. If there is doubt about a particular custom and usage, advice and testimony of tribal elders familiar with tribal traditions are to be sought. If after performing such an analysis there is still a gap of applicable law, it is permissible to use pertinent South Dakota state law. Even in the absence of such a graceful statutory scheme, this form and order of analysis is richly suggestive of a helpful conceptual approach to the necessary jurisdictional scrutiny.

In order to determine whether a tribal court has subject matter jurisdiction over a particular controversy, it will be necessary to determine whether tribal law authorizes, and federal law does not prohibit, such a cause of action. If none of the above sources, such as the tribal constitution, the tribal code, tribal decisional law, or tribal custom, specifically recognize (or prohibit) the contemplated cause of action, it may be urged upon the tribal court that, as a court of general jurisdiction, it may entertain jurisdiction in the contemplated cause of action as part of its inherent judicial sovereignty. In this regard, the most fruitful analogy is to the general jurisdiction of state courts. Despite the fact that general subject matter jurisdiction may exist in a tribal court, there may be self-imposed tribal limitations regarding available remedies. For example, a tribal code may place a ceiling on monetary damages[63] or explicitly bar certain kinds of relief.[64]

2. *Personal jurisdiction*

Even though there may be subject matter jurisdiction over the cause of action, tribal court judicial jurisdiction may still fail because of the inability to obtain personal jurisdiction over the individual or corporate defendant. Constraints involving personal jurisdiction may arise, again, through self-imposed limitations and through perceived gaps in tribal law. Tribally imposed limitations in the area of personal jurisdiction are exemplified in such areas as race and residence. For example, the *Rosebud Sioux Tribal Code*,[65] prior to its recent amendment, provided that in civil actions jurisdiction obtained only in those situations where the defendant was a resident of the reservation. Therefore, any plaintiff (whether a reservation resident or not) in a reservation-based cause of action with a non-resident nevertheless would be foreclosed from establishing tribal court jurisdiction.[66] The shortcomings of such a provision obviously favored the recent amendment.

More curious, perhaps, are the instances where tribal constitutions or codes limit or condition jurisdiction based on race. For example, the Cheyenne River Sioux Tribe of South Dakota conditions civil jurisdiction in a suit between Indians and non-Indians by requiring a stipulation of the parties.[67]

63. *See, e.g.*, Schantz v. White Lightning, 231 N.W.2d 812, 814 (N.D. 1975) (The *Standing Rock Sioux Tribal Code* limited relief not to exceed $300.00.).

64. *See, e.g.*, ROSEBUD SIOUX TRIBAL CODE tit. 4-1-57 (1986), which bars any claim for declaratory relief.

65. ROSEBUD SIOUX TRIBAL CODE ch. 2, § 1 (1979), *as amended by* tit. 4-2-6 (1986).

66. Of course, in a non-Indian versus non-Indian situation there is state court jurisdiction because there is no infringement of tribal law. *See, e.g.*, Williams v. Lee, 358 U.S. 217 (1959). *See also infra* text accompanying notes 130-85 (regarding the "no forum" possibility).

67. CHEYENNE RIVER SIOUX TRIBE BY-LAWS art. V, § 1(c) (1935). Despite this organic limitation, the *Cheyenne River Sioux Tribal Code* asserts jurisdiction over all actions where the persons

This is not the prototypical situation where the parties attempt to circumvent or to invoke a court's jurisdiction by private agreement, but rather the converse, where the jurisdiction's organic law itself requires a stipulation of the parties. The *Oglala Sioux Tribal Constitution* contains a similar limitation by providing that its judicial powers shall extend to all cases involving members of the Oglala Sioux Tribe arising under the constitution, by-laws, or ordinances of the Tribe and to other cases in which all parties consent to jurisdiction.[68]

These provisions which were part of the original tribal constitutions and by-laws enacted in 1934 and 1935, respectively, seem to reflect the drafting handiwork of the Bureau of Indian Affairs (BIA) and its commitment to act cautiously with regard to jurisdiction involving non-Indians. Whatever the philosophy at the time, this policy is clearly at odds with the current trend toward meaningful self-determination[69] and the support for tribal court authority evinced in the *National Farmers Union* and *Iowa Mutual* cases.[70] Such limitations can also create jurisdictional voids and the potentially volatile "no forum" situations[71] in which the federally recognized allocation of jurisdictional authority is subject to change in a way that is likely to be adverse to tribes.[72] Such jurisdictional limitations that exist in the tribe's organic law are subject to melioration through tribally initiated amendments in the necessary organic law.[73]

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are present or residing within the reservation. CHEYENNE RIVER SIOUX TRIBAL CODE § 1-4-3 (1978). There is also a tribal appellate decision in which the Cheyenne River Court found that the signing of a contract between an Indian and a non-Indian provided the necessary "consent." Duchenaux v. First Fed. Sav. & Loan Ass'n of Rapid City, No. 85-002-A (1986).

68. OGLALA SIOUX TRIBAL CONST. art. V, § 2 (1935).

69. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (In the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303, the Court found congressional intent to protect sovereign immunity.).

70. *See supra* text accompanying notes 1-26.

71. *See infra* text accompanying notes 130-85.

72. *Id.*

73. All tribal constitutions contain amendment provisions. Most Indian Reorganization Act constitutions contain a provision like the representative provisions of article IX of the CHEYENNE RIVER SIOUX TRIBE CONST. (1935).

> Sec. 1. This constitution and the appended by-laws may be amended by a majority of qualified voters of the tribe voting at an election called for that purpose by the Secretary of the Interior provided that at least 30 per cent of those entitled to vote shall vote in such elections; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior.
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> Sec. 2. It shall be the duty of the Secretary of the Interior, upon presentation of a petition signed by at least two hundred (200) legal voters of the tribe, and upon request by the council, to call an election on any proposed amendment.

See also the amended article IX of the ROSEBUD SIOUX TRIBE CONST. (1985), which provides for a potential tribal constitution convention:

> Article IX - Amendments
>
> Sec. 1. This constitution and by-laws may be amended by a majority vote of the qualified voters of the Rosebud Sioux Tribe voting at an election called for that purpose by the Secretary of the Interior, provided that at least thirty (30) per cent of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior. It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment, upon receipt of a written resolution signed by at least three-fourths (3/4) of the membership of the council.
>
> Sec. 2. Upon receipt of a petition that contains the signatures of at least thirty (30) per cent of the voters in the last tribal election, the Tribal Secretary shall refer this petition to the next Tribal Council meeting which shall call a Tribal Constitution convention to

These limitations also raise potential due process and equal protection claims under the Indian Civil Rights Act of 1968[74] and similar tribally adopted protections.[75] This is particularly likely if the tribe is asserting legislative jurisdiction over non-Indians. Such concerns raise the question whether a tribe may regulate non-Indian conduct legislatively, but condition access to its courts to litigate claims centering on the same subject matter by requiring a stipulation by the parties. For example, suppose that a tribe passes an ordinance requiring all retail sellers of used cars to provide a thirty day written warranty to purchasers and that failure to provide such a warranty subjects the retailer to a fine of five hundred dollars and revocation of its tribal business license. Enforcement of the statute is by the tribe's Department of Consumer Affairs. May a tribe regulate commercial activities in this manner and yet, at the same time, condition non-Indians' access to tribal courts to collect on a defaulting Indian consumer by requiring the defaulting consumer's consent?[76]

The incongruities created by these limitations do not appear to reflect any coherent policy considerations that would justify their continued use. These anomalies[77] are not only without public policy justification, but they suggest serious due process, equal protection, and potential "no forum" problems that are inimical to tribal sovereignty in general and tribal court development and integrity in particular. Such problems, which are often permeated with unique historical and policy considerations,[78] illustrate the complex issues that tribal courts often confront.

These difficulties exist independently of service of process issues posed by a defendant who is not present on the reservation. Again, proper analysis, federal authority to one side, begins with the tribal constitution and

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commence within thirty (30) days and to appoint a seven-member Tribal Constitutional Task Force, consisting of tribal members outside the Tribal Council, to conduct this Convention for the purpose of hearing proposed amendments and to approve those of which shall be referred to the Secretary of the Interior, and upon receipt of them, it shall be the duty of the Secretary of the Interior to set an election as described in Section 1 above. [Amendment No. XIX, effective September 23, 1985].

74. 25 U.S.C. §§ 1301-1303 (1982 & Supp. 1987).

75. *See, e.g.*, article X of the ROSEBUD SIOUX TRIBE CONST., which added a Bill of Rights amendment in 1966:

Article X - Bill of Rights

Sec. 1. All members of the tribe and all Indians on the reservation shall enjoy without hindrance freedom of religion, speech, press, assembly, conscience and association.

Sec. 2. Any Indian on the reservation accused of any offense shall have the right to a speedy and public trial and to be informed of the nature and cause of the accusation, and to be confronted with witnesses against him. Any Indian accused of any offense shall have the right to the assistance of counsel and to demand trial by jury. Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Sec. 3. No person shall be subject for the same offense to be twice put in jeopardy; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be denied equal protection of law. [Adopted by Amendment XI, effective May 2, 1966].

76. The same problem arises when there is an Indian retailer and a defaulting non-Indian consumer.

77. Such "consent to suit" provisions are generally not replicated in federal or state statutes or constitutions.

78. For example, it is hard to fathom why the BIA put these provisions in some tribal constitutions and not in others. Timidity, ineptitude, or unique tribal circumstances are all plausible, if not totally justifiable, reasons.

code. In the absence of an applicable code provision, at least one tribal court has applied traditional federal long arm jurisdictional analysis.

In *Rosebud Housing Authority v. LaCreek Electric Cooperative*,[79] the issue before the tribal court was whether there was personal jurisdiction over the LaCreek Electric Cooperative which provided and performed services on the reservation but maintained no specific office or "residence" on the reservation. After reviewing the holding of the United States Supreme Court in the seminal personal jurisdiction case of *International Shoe v. Washington*,[80] the tribal court held that it had personal jurisdiction over the defendant because there were sufficient "minimum contacts" to establish the necessary "presence" to avoid a due process challenge.[81]

By adopting the rationale of *International Shoe*, the tribal court demonstrated a commitment to recognize extensive personal jurisdiction as long as it comported with tribal law and the basic concepts of due process. It is interesting to note that the notion of due process in *Rosebud Housing*, which is so central in such an analysis, does not emanate, despite the ambiguous language in the opinion, from the United States Constitution, but rather from the Indian Civil Rights Act of 1968 and the dictates of *tribal* constitutional provisions.[82] The tribal court's thoughtful rationale seems firmly grounded in its commitment to tribal sovereignty.

Service of process[83] and the application of the full faith and credit clause[84] deserve brief note because they can occasionally lead to unique problems that do not arise in a state or federal context. In the state or federal context, non-resident defendants seldom ignore service of process because the likely result will be a default judgment, which is subject to execution in any state or federal court pursuant to the full faith and credit provisions of the United States Constitution.[85] The full faith and credit

79. 13 Indian L. Rep. 6030 (Rosebud Sioux Tribal Court 1986).

80. 326 U.S. 310 (1945).

81. *Rosebud Hous. Auth.*, 13 Indian L. Rep. at 6032. The tribal court stated:

> The defendant admits in its answer continuous and systematic activity on the Rosebud Reservation. In addition the defendant enjoys and benefits from the protection of tribal law while on the reservation. The alleged breach of the oral contract sued upon here arose out of defendant's activities within the reservation. The defendant has had more than minimum contacts on the reservation to constitute a "presence" so that assertion of personal jurisdiction over it by this court will not violate due process or the Constitution. The term "resident" as included in the former tribal code includes foreign corporations who have "presence" on the reservation, *i.e.*, those corporations who have engaged in sufficient activity to meet the "minimum contacts" requirement of *International Shoe*. The defendant in this case clearly meets the test, and, therefore, the court holds that it has personal jurisdiction over it.

Id.

82. The tribal court found personal jurisdiction could be asserted, both under the tribal law and within the "minimum contacts" confines of *International Shoe*. *Id.* at 6031. *See, e.g.*, Talton v. Mayes, 163 U.S. 376 (1896) (holding that since Indian tribes exercise powers that predate (and have no source in) the United States Constitution, federal constitutional limitation and guaranties do not apply to the exercise of tribal authority, despite the fact that the tribal actions are subject to the supreme legislative authority of the United States).

83. *See, e.g.*, FED. R. CIV. P. 4(e). For an extensive analysis of service of process in Indian country, see Laurence, *Service of Process and Execution of Judgment on Indian Reservations*, 10 AM. INDIAN. L. REV. 257 (1982).

84. U.S. CONST. art. IV, § 1, cl. 1.

85. *Id.* This clause is addressed in Comment, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397 (1985).

clause, by its terms,[86] does not, however, apply to tribes, and therefore, the enforcement of tribal court judgments in other jurisdictions is more problematic and wholly dependent on the local law of the enforcing jurisdiction. A few states, as a matter of state common law, require that full faith and credit be given to tribal court judgments.[87] Other states, like South Dakota, apply some form of the principle of comity.[88]

The South Dakota statute requires reciprocity in most instances as a necessary condition for the application of its comity doctrine, but even if all the statutory conditions are met, comity, apparently, remains discretionary. These same problems arise with respect to the enforcement of state court orders or judgments as well as other tribal court orders or judgments in a particular tribal court. For example, none of the eight largest tribes in South Dakota specifically provides for the enforcement of foreign judgments.[89] The lone federal statute that deals with this issue is the Indian Child Welfare Act[90] which requires as a matter of federal law that states give full faith and credit to *all* tribal court orders and judgments rendered pursuant to the

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86. U.S. CONST. art. IV, § 1, cl. 1. The full text of the full faith and credit clause reads as follows and does not mention Indian tribes: "Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State." *Id.*

Congress extended the full faith and credit clause to all territories and possessions of the United States. 28 U.S.C. § 1738 (1982).

87. *E.g.*, New Mexico, as the result of Jim v. CIT Financial Services Corp., 87 N.M. 362, 533 P.2d 751 (1975); and Washington, as a result of *In re* Buehl, 87 Wash. 2d 649, 555 P.2d 1334 (1976). The United States Supreme Court has not directly addressed the issue, but has stated that "judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts." *Santa Clara Pueblo*, 436 U.S. at 65 n.21.

88. South Dakota provides comity to tribal court judgments which meet the following statutory requirements:

> WHEN ORDER OR JUDGMENT OF TRIBAL COURT MAY BE RECOGNIZED IN STATE COURTS. No order or judgment of a tribal court in the state of South Dakota may be recognized as a matter of comity in the state courts of South Dakota, except under the following terms and conditions:
>
> (1) Before a state court may consider recognizing a tribal court order or judgment the party seeking recognition shall establish by clear and convincing evidence that:
>
> (a) The tribal court had Jurisdiction over both the subject matter and the parties;
>
> (b) The order or judgment was not fraudulently obtained;
>
> (c) The order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and a hearing;
>
> (d) The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; and
>
> (e) The order or judgment does not contravene the public policy of the state of South Dakota.
>
> (2) If a court is satisfied that all of the foregoing conditions exist, the court may recognize the tribal court order or judgment in any of the following circumstances:
>
> (a) In any child custody or domestic relations case; or
>
> (b) In any case in which the jurisdiction issuing the order or judgment also grants comity to orders and judgments of the South Dakota courts; or
>
> (c) In other cases if exceptional circumstances warrant it; or
>
> (d) Any order required or authorized to be recognized pursuant to 25 U.S.C. § 1911(d) or 25 U.S.C. § 1919.

S.D. CODIFIED LAWS ANN. § 1-1-25 (1986).

89. *See, e.g.*, F. POMMERSHEIM, SOUTH DAKOTA TRIBAL COURT HANDBOOK (1988). Tribal code silence does not, however, prevent tribal courts from determining as a matter of tribal common law to apply the principle of comity in particular situations.

90. 25 U.S.C. §§ 1901-1963 (1982).

Act.[91]

3. *Territorial jurisdiction*

A number of reservations in Indian country have been diminished.[92] This means that their original boundaries as established by treaty or agreement were reduced by subsequent treaties or agreements or by unilateral acts of Congress. One of the results of diminishment is that there often continues to be both tribal and individual Indian trust land located outside the boundaries of the diminished reservation.[93] This trust land, as well as any "dependent Indian community,"[94] nevertheless remains part of Indian country[95] and therefore constitutes a potential basis for tribal court jurisdiction. Despite the fact that the definition of "Indian country" is part of a criminal statute, the Supreme Court has found that it "generally applies as well to questions of civil jurisdiction."[96]

The fact of diminishment can thus become a complicating factor in considering issues of tribal court jurisdiction. Does a tribal court have civil jurisdiction over a civil transaction that took place outside the boundaries of the diminished reservation but on trust land within the original borders of the reservation? The apparent answer is yes.[97] Without federal statutory law or case law to the contrary, the focus of analysis must be on tribal law. Accordingly, the proper inquiry is whether the tribal constitution, pertinent tribal statute, or case law specifically limits tribal court jurisdiction to the territorial boundaries of the diminished reservation. The analysis should also consider whether there is an affirmative claim of territorial jurisdiction

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91. 25 U.S.C. § 1911(d) (1982). Note also that the Secretary of the Interior must give full faith and credit to tribal actions under tribal ordinances limiting descent and distribution of trust or restricted or controlled lands. 25 U.S.C. § 2207 (1982).

92. A determination of diminishment is often made by the Judiciary through a determination of legislative intent. *See, e.g.*, the Rosebud Sioux Reservation, in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); the Sisseton-Wahpeton Reservation, in DeCoteau v. District County Court, 420 U.S. 425 (1975); and the Red Lake Reservation, in Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980).

93. As the result of the ravages of the allotment process and the sale of "surplus" land after allotment, much land within the original boundaries of many reservations is held by non-Indians as well as individual Indians and the tribe. If diminishment of any reservation resulted from such congressional action (and the judicial ratification thereof), some tribal land and individual Indian allotments would then be located outside the diminished reservation's boundaries. For example, as the result of the decision in *Rosebud Sioux Tribe*, 430 U.S. 584, over 350,000 acres of tribal and individual trust land (and approximately 2,000 tribal members) are located outside the boundaries of the diminished Rosebud Sioux Reservation but within the boundaries of the original reservation.

94. "Dependent Indian community" is defined at 18 U.S.C. § 1151 (1984) as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

95. *Id.*

96. *DeCoteau*, 420 U.S. at 427 n.2.

97. *Id.* at 446 (The Court noted "[i]n such a situation [*i.e.*, diminishment], exclusive tribal and federal jurisdiction is limited to the retained allotments.").

within the original boundaries of the reservation or, alternatively, whether the situation is ambiguously silent.

In the absence of dispositive tribal law, a credible argument might emphasize that because there is tribal and trust land involved as well as individual Indians and non-Indians, the tribe, and not the state or federal government, has an enduring responsibility to provide a local forum for adjudication of cases. The holding of *Williams v. Lee*[98] supports this view that state jurisdiction ought not infringe the right of reservation Indians to make their own laws and be governed by them.[99] Such a result is particularly compelling if there are recognized Indian communities and individuals in these areas who participate in the social, cultural, and political life of the particular tribe. Regardless of outcome, the fact of diminishment makes geography a pertinent factor in ascertaining tribal court jurisdiction and is a salutary reminder that jurisdictional concerns do not automatically end at a diminished reservation's boundaries. Jurisdictional analyses therefore must be flexible and responsive to the unique history of any particular reservation.

C. *Tribal Legislative Authority*

After a tribal court determines that it has judicial jurisdiction over a controversy,[100] it must then decide whether the tribe has the necessary legislative authority to enact the laws governing the non-Indian conduct at issue. The leading contemporary case involving the extent of tribal legislative authority over non-Indians and their property is *Montana v. United States.*[101] In that case, the central issue was whether the Crow Tribe of Montana could regulate duck hunting and trout fishing by non-Indians within the reservation. The Ninth Circuit Court of Appeals ruled the tribe could regulate such hunting and fishing of non-Indians on both tribal and other trust land and on non-Indian fee patented land.[102] The Supreme Court readily agreed that the tribe had the authority to regulate non-Indian hunting and fishing on tribal and other trust lands,[103] but reversed the Ninth Circuit's conclusion that the tribe could regulate hunting and fishing on fee patented land within the reservation.[104]

In reaching that decision, the Court reviewed the doctrine of tribal sovereignty and found that incorporation of the tribe into the United States along with treaties, statutes, and others actions resulted in the loss of many attributes of sovereignty.[105] The Court specifically stated that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[106] From the *Oliphant* case, which held that tribes do not have criminal jurisdic-

98. 358 U.S. 217 (1959).
99. *Id.* at 223.
100. *See supra* text accompanying notes 58-90.
101. 450 U.S. 544 (1981).
102. *Id.* at 557.
103. *Id.*
104. *Id.*
105. *Id.* at 564-65.
106. *Id.* at 564.

tion over non-Indians,[107] the Court extrapolated the general proposition that the inherent powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.[108] This sweeping statement was, nevertheless, immediately and substantially qualified by Justice Stewart's caveat that tribes retained authority over non-Indians who enter consensual relationships with the tribe or its members or whose activities otherwise directly affect the political integrity, the economic security, or the health or welfare of the tribe.[109]

The Court's extensive caveat might well permit tribal regulation of hunting and fishing on fee patented lands on another reservation *if* other facts were present. The Court specified two unique sets of facts on the Crow Reservation that precluded tribal regulation. First, despite treaty recognition of hunting and fishing rights, the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing and hunting were not important to their diet or way of life at the time these treaty rights were established.[110] Second, and perhaps even more important, was the Court's finding that the state of Montana had exercised "near exclusive" jurisdiction over hunting and fishing on fee lands within the reservation and that the parties had accommodated themselves to state regulation.[111] Given this history, the Court held that tribal regulation was not necessary to Crow self-government.[112]

Montana v. United States does not establish a bright line test for tribal regulatory and legislative jurisdiction over non-Indians, but it does identify the crucial variables in such determinations. They include the history of such regulation on the particular reservation; treaty provisions and tribal practices; consensual arrangements involving Indians and non-Indians; and activity that affects the political integrity, economic security, or health and welfare of the tribe. The primary effect of *Montana* is to create a threshold presumption that tribes do not have legislative and regulatory jurisdiction over non-Indians on fee lands within the reservation. This view contrasts sharply with the Court's own analysis of tribal court *judicial* jurisdiction as articulated in the *National Farmers Union* and *Iowa Mutual* cases. There, the Court evinced a unique commitment to tribal courts as the primary forums for adjudicating civil disputes on the reservation.[113]

It is interesting to note that in each decision the Court took a different view about the importance of the *Oliphant* case in the civil arena. In *Mon-*

107. *Oliphant*, 435 U.S. at 195.
108. *Montana*, 450 U.S. at 565.
109. *Id.* at 565-66. Justice Stewart specifically stated:
> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its 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. (citations omitted).
110. *Id.* at 556.
111. *Id.* at 566.
112. *Id.* at 567.
113. *See supra* text accompanying notes 1-26.

tana, the Court found that, despite the fact that *Oliphant* involved a question of criminal jurisdiction over non-Indians, "the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[114] In contrast, the same Supreme Court in *National Farmers Union* explicitly rejected an analogous extension of *Oliphant* into the area of tribal judicial jurisdiction. The Court stated, "[t]hus, we conclude that the answer to the question whether a tribal court has the power to exercise civil subject matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require."[115] This inconsistent analysis by the Supreme Court continues to vitiate any hope for conceptual coherence and analytical unity within Indian law. This troubling inconsistency appears rooted in the Court's continuing inability to identify, much less apply, appropriate doctrinal formulations with which to analyze issues of tribal jurisdiction.

The narrow presumption against tribal legislative and regulatory authority over non-Indians on fee land that is articulated in the *Montana* case is often successfully rebutted. Subsequent cases uphold tribal legislative and regulatory authority over non-Indians on fee land within the reservation. These include both federal and tribal court decisions. The cases affirm tribal legislative and regulatory authority in such diverse subject matter areas as zoning,[116] health regulation,[117] riparian rights,[118] and seismic activity of mineral lessees.[119] Tribal courts have also upheld tribal legislative and regulatory authority in other areas such as contracts,[120] corporate business activities,[121] and the tortious conduct of a non-Indian school district.[122]

Tribal legislative and regulatory authority over non-Indians can also be affected by the existence of any pertinent federal statute. For example, in *United States v. Mazurie*,[123] the Supreme Court upheld a congressional delegation of authority to tribes, conditioned upon individual tribal approval by the Secretary of the Interior, to regulate the introduction of liquor into Indian country by both Indians and non-Indians, so long as state law was not violated. Tribal regulatory authority does not, however, automatically require federal approval of the Secretary of the Interior unless it is specified by statute.[124] Such requirements may, however, be part of tribal constitutions[125] and create self-imposed provisos to the exercise of authority over non-Indians.

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114. *Montana*, 450 U.S. at 565.
115. *National Farmers Union*, 471 U.S. at 855.
116. Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (1st Cir. 1982).
117. Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982).
118. Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982).
119. Superior Oil Co. v. United States, 605 F. Supp. 675 (D. Utah 1985).
120. Sandoval v. Tinian, 13 Indian L. Rep. 6041 (Nav. D. Crown Point 1986).
121. *Rosebud Hous. Auth.*, 13 Indian L. Rep. at 6033.
122. Sage v. Lodge Grass School Dist. No. 27, 13 Indian L. Rep. 6035 (Crow Ct. App. 1986).
123. 419 U.S. 544 (1975). The statutory delegation is found in the Act of Aug. 15, 1953, Pub. L. No. 277, 67 Stat. 586 (1953)(codified at 18 U.S.C. § 1161 (1983)).
124. *See, e.g.*, Kerr McGee v. Navaho Tribe of Indians, 471 U.S. 195 (1985).
125. *See, e.g.*, ROSEBUD SIOUX TRIBE CONST. art. IV, §§ 1(h), (i), (k), (q) (1935), which, prior to a 1985 amendment, required all ordinances enacted by the tribe pursuant to these sections to be approved by the Secretary of the Interior.

Tribal taxation of non-Indians and their property, often the crux of true self-determination and economic development, raises special questions. The tribal power to tax non-Indians and non-Indian corporate entities involved in transactions on trust lands with a tribe or its members is a fundamental attribute of sovereignty, which the tribes retain unless divested of it by federal law or the necessary implication of their dependent status.[126] The Court's analysis of specific tribal taxes often closely examines a tribe's specific history, its provision of services to the individuals and entities taxed, whether the economic value of the resource is generated on the reservation, and whether there are any legitimate state interests to the contrary.[127] The two most potentially explosive tribal taxes involving non-Indians would likely be a property tax and an income tax, but neither of these have been asserted and consequently there is no decisional law on point.[128] Such taxes, if and when they come, will certainly extend tribal legislative and regulatory authority to its broadest, most significant limits.

IV. CHOICE OF FORUM AND OTHER JURISDICTIONAL PROBLEMS

A. *The "No Forum" Issue*

The *National Farmers Union* and *Iowa Mutual* cases clearly direct that all civil causes of action that arise on the reservation must be litigated, in the first instance, in tribal court.[129] Yet, this mandate, which does much to prevent the circumvention of tribal court forums, does little to answer other problems in the sometimes bewildering thicket of Indian law jurisdiction. The first of these issues may be broadly stated as the "no forum" problem.[130]

In neither *National Farmers Union* nor *Iowa Mutual* did the Supreme Court address what should happen after a tribal court correctly decides, as a matter of tribal law, that it does not have jurisdiction—judicial or legislative—and accordingly dismisses the case before it and where there is also no basis for state or federal jurisdiction. Such situations, particularly when the controversy appears as one that is normally cognizable in a state or federal forum, have greatly perplexed state and lower federal courts and have led to wide-ranging judicial responses.

Some examples are illustrative. In *Schantz v. White Lightning*,[131] a non-Indian plaintiff attempted to bring suit in state court against an Indian defendant in a wrongful death action arising from a car accident on that portion of the Standing Rock Indian Reservation located in North Dakota.[132] The Supreme Court of North Dakota held that pursuant to its own precedents, as well as the United States Supreme Court's holding in *Wil-*

126. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

127. *Id.*

128. A property tax and income tax directly raise the problem of double taxation in areas where it has never existed. Such taxes also reach areas which states regard as intimately related to their sovereignty. Broad political and legal conflict would be inevitable, and it may yet come as tribes actively pursue the limits of their sovereignty.

129. *See supra* text accompanying notes 1-26.

130. *See, e.g.*, Note, Iowa Mutual Insurance Co. v. LaPlante *and Diversity Jurisdiction in Indian Country: What If No Forum Exists?*, 33 S.D.L. REV. 528 (1988).

131. 231 N.W.2d 812 (N.D. 1975).

132. *Id.* at 813.

liams v. Lee,[133] it did not have subject matter jurisdiction over a cause of action arising on the reservation. The federal courts also denied jurisdiction.[134] The Supreme Court of North Dakota candidly addressed this "no forum" situation in the following language: "The appellants are asking this court to assume the duties and responsibilities which are vested solely in the United States Congress. The arguments presented should be addressed to that body."[135]

The *Schantz* situation is almost identical to the commonplace situations on such reservations as the Oglala Sioux and Cheyenne River Sioux Reservations in South Dakota, which permit civil actions between Indians and non-Indians only upon the consent of *both* parties.[136] Putative defendants, whether Indian or non-Indian, are not prime candidates for consent and the no-forum result is quite likely in many instances. In such a situation, the *Schantz* analysis precludes any finding of state or federal jurisdiction and directs responsibility for change to Congress in its role as the plenary authority in Indian Country.[137] Legislative change, where appropriate, may also issue from the tribal legislative body *if* that is the source of the jurisdictional limitation.[138] Such changes in tribal jurisdiction raise important public policy questions about how a tribe may choose to exercise its sovereignty and may include considerations beyond the simple availability of a forum.[139]

Other courts have strained to fill such jurisdictional gaps. The most notorious example is probably the Tenth Circuit's decision in *Dry Creek Lodge v. Arapahoe and Shoshone Tribe*,[140] which found that a non-Indian could successfully sue an Indian tribe in federal court under the Indian Civil Rights Act of 1968.[141] The Tenth Circuit found jurisdiction despite the Supreme Court's explicit ruling in *Santa Clara Pueblo v. Martinez*[142] that the statute did *not* waive the tribe's immunity from suit except in limited situations such as a habeas corpus proceeding.[143]

In *Dry Creek Lodge*, non-Indian plaintiffs constructed a hunting lodge on fee patented lands within the Wind River Reservation with BIA-access across an individual Indian's trust allotment.[144] The Indian allottee, however, denied access to the plaintiffs and the tribal court denied jurisdiction.[145] The Tenth Circuit was deeply concerned that while the case implicated important rights such as those identified in the Indian Civil Rights Act, there might potentially be no forum in which to enforce them. The court ultimately provided that forum, concluding that "[t]here has to be

133. 358 U.S. 217 (1959).
134. Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974).
135. *Schantz*, 231 N.W.2d at 815-16. It is interesting to note that this action was never actually brought in tribal court, apparently because of a $300.00 jurisdictional limit. *Id.* at 814.
136. *See supra* text accompanying notes 67-68.
137. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).
138. *See supra* text accompanying notes 65-73.
139. *See infra* text accompanying notes 182-84.
140. 623 F.2d 682 (10th Cir. 1980).
141. 25 U.S.C. § 1301-1303 (1982 & Supp. 1987).
142. 436 U.S. 49 (1978).
143. *Dry Creek Lodge*, 623 F.2d at 685.
144. *Id.* at 684.
145. *Id.* at 685.

a forum where the dispute can be settled."[146] While *Dry Creek Lodge* has not been directly followed,[147] it does signify how far a court will exert itself to provide a forum for non-Indian plaintiffs who would otherwise be without one.

Several other courts have intimated that diversity jurisdiction—while it cannot be used to divest a tribal court of jurisdiction—may be available, in the absence of the expected tribal forum, to fill any resulting jurisdictional void. In both the Eighth and Ninth Circuits, pre-*Iowa Mutual* decisions seem to suggest such potential. For example, in *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*,[148] the Eighth Circuit did not find federal diversity jurisdiction despite the nominal diversity of the parties because such a holding might impinge on the tribe's right to self-government.[149] In this action between a non-Indian contractor and a tribal housing authority, the court nevertheless held out the possibility that if, on remand to the tribal court, there was a finding of no tribal court jurisdiction, the Eighth Circuit might do something about the lack of a forum by invoking diversity jurisdiction.[150]

Similarly, in *R.J. Williams Co. v. Fort Belknap Housing Authority*,[151] the Ninth Circuit did not find diversity jurisdiction—despite the nominal diversity of the parties—because of the tribe's exclusive jurisdiction over all controversies within the reservation.[152] Yet, the court, in analyzing the controversy between a non-Indian contractor and a tribal housing authority, noted that if the tribe did not manifest an interest in adjudicating the dispute, the federal courts would *not* be divested of federal diversity jurisdiction.[153]

Although not followed because of the availability of a tribal forum, the court in *Superior Oil v. Merritt*[154] specifically approved the notion that federal courts maintain the potential availability of diversity jurisdiction.[155] This case involved a lawsuit by a non-Indian operator of oil and gas leases issued by the Navaho Tribe against tribal members who allegedly interfered with the leases on tribal land. The court specifically noted that its jurisdictional ruling on the diversity issue might well be different if the tribal court lacked jurisdiction over the matter.[156]

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146. *Id.*

147. *See, e.g.*, Gover & Lawrence, *Avoiding* Santa Clara Pueblo v. Martinez: *The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 HAMLINE L. REV. 497, 509, 512-15 (1985) and the cases cited therein.

148. 797 F.2d 668 (8th Cir. 1986).

149. *Id.* at 674.

150. *Id.* The court specifically stated:

> [W]e do not pass on the question whether the tribal court has jurisdiction over the parties, nor whether diversity jurisdiction could be appropriately extended to this case should the tribal court determine that the Housing Authority is not a member of the tribe. [If the Housing Authority were deemed not a member of the tribe, tribal jurisdiction would not exist.]

Id.

151. 719 F.2d 979 (9th Cir. 1983).

152. *Id.* at 984.

153. *Id.*

154. 619 F. Supp. 526 (D. Utah 1985).

155. *Id.* at 535 n.3.

156. *Id.*

All of these cases, *Schantz*, *Weeks Construction*, *R.J. Williams*, and *Superior Oil*, vividly illustrate, regardless of the ultimate result, the importance of the *National Farmers Union* and *Iowa Mutual* directives that these cases be heard initially in tribal court. In none of these important cases was there any tribal court analysis of the jurisdictional issue because, in most instances, the non-Indian plaintiffs, for whatever reasons, apparently attempted to avoid the tribal forum. As a result, the federal courts were left to speculate whether the tribal court would have found and asserted jurisdiction. The Supreme Court's corrective disposition in *National Farmers Union* is refreshingly lucid in its requirement that the examination of tribal sovereignty and jurisdictional analysis be conducted in the first instance in the tribal court itself.[157]

The Court in *Iowa Mutual* also seemed to cast significant doubt about the vitality of the doctrine of diversity jurisdiction as a potential jurisdictional gap-filler when it noted that the diversity statute makes no specific reference to Indians and, in fact, Indians were not even considered state citizens when the statute was first adopted in 1789.[158] Application of the diversity doctrine in federal courts today is also clearly at odds with current federal Indian policy supporting tribal court development. Yet, the Court might see the issue differently if there is no tribal forum whose jurisdiction is being circumvented.

It is also helpful to point out a related issue: any application of the diversity doctrine in the tribal court jurisdiction situation has potentially discriminatory effects. Diversity jurisdiction is premised on the notion that in-state plaintiffs have ready, if not favorable, access to state forums, and diversity jurisdiction allows a non-resident plaintiff access to a more neutral federal forum. But this scheme breaks down in the context of diversity in the tribal court situation because no plaintiff has access to a state forum.[159] The result is that one class of plaintiffs (non-residents of the state in which the reservation is located) will have access to federal court while another class of plaintiffs (residents of the state in which the reservation is located) will have

157. *National Farmers Union*, 471 U.S. at 855-56. The Court specifically stated:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> We believe this examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.

Id.

158. *Iowa Mutual*, 480 U.S. at 17.

159. This is not a problem in Public Law 280 jurisdictions because that statute grants the state court jurisdiction over such causes of action. *See, e.g.*, Pommersheim & Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D.L. REV. 553, 568-72 (1986); Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965); Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127 (D. Alaska 1978).

access to neither federal nor state court.[160] It is highly unlikely that federal courts can ratify the use of diversity jurisdiction given that it leads to such unfair and discriminatory results.

The "no-forum" issue, where it exists, confronts tribes with the challenge of providing a forum to resolve civil disputes involving Indians and non-Indians on the reservation. Failure to do so risks federal legislative action[161] or the apparent willingness of some federal courts to fill jurisdictional voids with misapplications of diversity and other jurisdictional doctrines.[162] Such possibilities hold the potential to winnow even further the permissible range of tribal court jurisdiction.

B. *The "No Law" Issue*

A more subtle issue that is related to, but different from, the "no forum" question, may be described as the "no law" problem. For example, a bank brings an action to foreclose a properly executed mortgage of trust property on the reservation in tribal court. The trial court and the tribal court of appeals dismiss the claim for failure to state a claim upon which relief may be granted. There is no tribal law—statutory, traditional, or common law—which authorizes such a cause of action. Such a cause of action is routinely actionable in state courts, but state jurisdiction is not available here because the cause of action arises against an Indian party on the reservation. What alternatives, if any, might be pursued?

The easy part of this problem has been answered by the Eighth Circuit in *Northwest S.D. Production Credit Association v. Smith*.[163] In that case, the plaintiff creditor brought its foreclosure action against defendant tribal member directly in federal court.[164] Plaintiff Production Credit Association [PCA] asserted federal question jurisdiction premised on 25 U.S.C. section 483a, which requires secretarial approval of any mortgage executed against individual trust property and which provides, *inter alia*, that:

> Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the State or Territory in which the land is located.[165]

The court ruled that the statute did not create a federal cause of action for foreclosure of mortgages on Indian trust lands because the statute secured no *federal* right.[166] The plaintiff PCA and Indian defendant agreed that there was no state jurisdiction, and the PCA claimed it would therefore have no other forum in which to enforce its mortgage agreement.[167] The Eighth Circuit rejected this claim stating:

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160. These examples assume that the defendant is a tribal member or tribal entity that is a resident and citizen of the state in which the reservation is located.

161. *See, e.g.*, S. 2747, 100th Cong., 2nd Sess. (1988), proposed by Senator Orrin Hatch of Utah to amend the Indian Civil Rights Act of 1968 to allow federal district court review on the merits of tribal court decisions involving this act.

162. *See, e.g., supra* text accompanying notes 137-53.

163. 784 F.2d 323 (8th Cir. 1986).

164. *Id.* at 324.

165. *Id.*

166. *Id.* at 326.

167. *Id.*

> This is not to say, however, that PCA is left without a forum in which to bring its foreclosure action. PCA has not presented its claim to the Cheyenne River Sioux Tribal Court. Although it appears to us to be the proper forum, the Tribal Court should decide in the first instance whether it has jurisdiction over the foreclosure action. *See National Farmers Union Insurance Cos. v. Crow Tribe of Indians.*[168]

Yet, it remains to be seen what the court would do if the tribal court decided it did not have jurisdiction. This is the hard part. Would or should the federal court reconsider, and perhaps, find the necessary predicate in diversity jurisdiction? As noted earlier,[169] however, diversity jurisdiction itself may be unavailable, despite the presence of the nominal diversity of the parties. The problem is particularly troubling in this instance, because the federal statute clearly seems to envision the availability of some forum to hear the foreclosure action.

Even without the presence of a relevant federal statute, this type of "no law" problem is likely to occur in other circumstances. The following sample of cases in the enforcement of judgments area is illustrative. For example, in *Joe v. Marcum*,[170] the Tenth Circuit held that a New Mexico state court judgment could not be enforced against a Navaho Indian on the Navaho Indian Reservation through a state court writ of garnishment.[171] The court properly ruled that to do so would impinge upon tribal sovereignty. The court noted that it was "significant" that the Navaho Tribal Court provided methods of post-judgment enforcement, but garnishment was not one of them.[172] The court also seemed to take solace in the fact that garnishment was a matter upon which there was no unanimity of thought—some states permitted it, while others did not.[173] Similarly, the court noted that a sovereign such as the Navaho Tribe could deny garnishment if it so chose.[174] This all seems correct, but what if there were state unanimity in permitting garnishment? Would this preclude tribal law to the contrary? The court's holding might then begin to wobble, as it did in the analogous situation in *Little Horn State Bank v. Stops*[175] in Montana where the Crow Tribal Court did not provide for honoring state court judgments. There the Montana Supreme Court found no infringement of tribal sovereignty, and permitted a state writ of execution to be enforced against tribal members on the reservation.[176]

An even more "creative" approach is found in *Annis v. Dewey County Bank*.[177] In *Annis*, the Federal District Court for South Dakota held that a state court judgment could not be enforced on the reservation through a state court writ of attachment because South Dakota had not complied with

168. *Id.* at 327.
169. *See supra* text accompanying notes 148-56.
170. 621 F.2d 358 (10th Cir. 1980).
171. *Id.* at 360-61.
172. *Id.* at 361.
173. *Id.*
174. *Id.*
175. 555 P.2d 211 (Mont. 1976).
176. *Id.* at 213.
177. 335 F. Supp. 133 (D.S.D. 1971).

Public Law 280 as the congressionally sanctioned method for obtaining such jurisdiction.[178] The plaintiff Indian in the federal case was the defendant judgment debtor in the state case. Conversely, the defendant bank in the federal suit was the plaintiff and judgment creditor in the state civil action. In the federal action, the plaintiff Indian sought injunctive relief against the state-issued writ of attachment and the defendant bank counterclaimed for the money owing on the judgment obtained in state court.[179] The court granted the injunctive relief, but also ruled that the defendant had filed a proper and compulsory counterclaim and consequently rendered judgment for the defendant bank, ordering the United States Marshall to sell the named security to satisfy the judgment.[180] The court observed:

> In rendering this decision the court is not unmindful of the fact that to hold otherwise would be to leave the defendant bank with an actual out of pocket loss and the plaintiff with the unjust enrichment of cattle not owned by him. . . . The result of granting plaintiff an injunction without granting defendant relief on his counterclaim would be to cut off credit to enrolled Indians living within the closed portions of the reservation.[181]

These examples, although they are all in the enforcement of judgments area, illustrate the "no law" problem. What will state and federal courts do when confronted with situations where there is or has been a forum, but there is no applicable tribal law with which to proceed? In each of these cases, express rationales to one side, the courts found or pointed to positive law in some forum to resolve the impasse. For example, *Joe v. Marcum*[182] cited tribal law. In the absence of tribal law, *Little Horn State Bank v. Stops*[183] permitted the use of state law, while in the apparent absence of tribal law and permissible state law, *Annis*[184] permitted the use of federal law. These case samples indicate the breadth of efforts courts will engage in to avoid leaving judgment creditors, particularly when they are non-Indians, without applicable law. Admittedly, there is more flexibility in the enforcement of judgments area because the governing question is not strictly jurisdictional in nature. Yet, the range of judicial approaches to the problem reflects the pervasive absence of any consistent, coherent analytical doctrine to apply.

From the point of view of tribal sovereignty and tribal self-determination, the *Joe v. Marcum* result is most appropriate. Yet, such situations require the existence of tribal law to deal with the issue at hand, whether it is a matter of enforcing off-reservation judgments or identifying some positive dispositive law to settle any conflict properly before a tribal court. The nature of tribal law, in such instances, might well be, in part, a statement of why any particular law that is common in state and federal forums does not exist on the reservation. For example, such state or federal law may conflict

178. *Id.* at 135.
179. *Id.* at 134.
180. *Id.* at 136, 138.
181. *Id.* at 138.
182. 621 F.2d at 361.
183. 555 P.2d at 215.
184. 335 F. Supp. at 138.

with tribal tradition and culture. In other words, the apparent absence of tribal law, in some instances, is not a void, but rather a well considered tribal public policy judgment. The cases discussed above forcefully illustrate the judicial discomfort of state and federal courts, when confronted with situations that appear as if they ought to be resolved routinely according to dominant federal and state practice, but are not because of the unique rules and historical forces at work in the field of Indian jurisdiction.

The "no law" question, in turn, reveals another significant issue concerning the scope of federal review of tribal jurisdiction determinations. That is, what is to be the nature of the federal review of a tribal court's determination of jurisdiction as a result of tribal, not federal, law? For example, in a case of mortgage foreclosure, the tribal court determines that it does or does not have jurisdiction as a matter of tribal law. The losing party believes the tribal court's determination to be erroneous as a matter of tribal law. How should a federal court approach the question of what tribal law requires?

The Eighth Circuit recently addressed this important question in *Twin City Construction Co. v. Turtle Mountain Band of Chippewa Indians.*[185] Although the opinion was eventually vacated after a rehearing en banc, the court's analysis is helpful in illustrating the significance of this issue. In this case, Twin City Construction, a non-Indian corporation, entered into a contract with the BIA to build a school on the Turtle Mountain Reservation in North Dakota. Twin City subcontracted with Ernest Parisien, a tribal member, to perform water, storm, and sanitary sewer work. This contract went awry and Parisien brought suit in tribal court for payment for work already performed. The trial court dismissed the case for want of jurisdiction. The Turtle Mountain Court of Appeals reversed. Twin City then sought declaratory and injunctive relief in federal district court. The federal district court in turn granted Twin City an injunction against further proceedings in the Turtle Mountain Tribal Courts, holding that the Turtle Mountain Tribal Court did not have jurisdiction.

In a two-to-one decision, the Eighth Circuit originally reversed. In accordance with *National Farmers Union*, the court observed that the federal district court under 28 U.S.C. section 1331 had subject matter jurisdiction to determine whether federal law restricted the exercise of the Turtle Mountain Tribal Court's jurisdiction over the dispute between Parisien and Twin City. The federal appellate court held that there was no *federal* impediment to tribal jurisdiction. The court then went on to examine whether there was any *tribal* impediment to tribal jurisdiction. The Eighth Circuit noted that the tribal appellate court decided that the trial court did have jurisdiction under tribal law. The court then held that the district court did have jurisdiction to construe the tribe's jurisdictional statute, but was bound, in exercising such jurisdiction, to accept and apply the law on the matter as declared by the highest tribal court. The court found this situation analogous to a case in which a federal court applies state law as the rule of decision on some aspect of the case where there is also a clear and proper basis

185. 857 F.2d 1177 (8th Cir. 1988), *vacated* after *reh'g en banc.*

for federal jurisdiction for the case as a whole. In such instances, the court stated, an on-point construction of state law by the highest state court is binding upon the federal court.

The Eighth Circuit's decision, although vacated, describes a rationale to recognize the authority of tribal courts to expound, unimpeded by direct federal review, on what tribal law is. This result squares directly with the policy embedded in *National Farmers Union* and *Iowa Mutual* to strengthen and support tribal courts. However, it is necessary to note that in the *Twin City* case the tribal court of appeals held that there was tribal jurisdiction, so there was no potential for the "no forum" issue to come into play. It is unclear whether the same result could prevail if the tribal court decision found no tribal jurisdiction and the federal court was directly confronted with the likelihood that there would be "no forum." The court suggested the safety valve promise of diversity jurisdiction. The court noted that a federal court will generally entertain the possibility of diversity only if a tribal court does not have jurisdiction. This reasoning seems clearly flawed, but it demonstrates anew the discomfort courts exhibit when they sense, much less confront, the "no forum" issue.

C. *The Non-Member Indian Problem*

1. *Background in the civil arena*

Until fairly recently, issues of Indian jurisdiction were conceptually drawn around only two categories of individuals: Indians and non-Indians. Despite the absence of any consistent definitions of these terms,[186] these were clearly the pertinent categories. However, several recent cases, particularly in the criminal jurisdiction arena, carve out a third category of individuals for purposes of jurisdictional analysis. This group is known as "non-member Indians" and consists of all individuals who meet the definition of Indian under some federal or tribal definition, but are *not* members of the tribe where the criminal action or crucial civil transaction takes place. That is, they are Indian, but are not members of the tribe whose tribal court is asserting jurisdiction over them. This newly emergent issue is properly identified as jurisdictional in nature and poses the question of what governing body—tribal, state, or federal—shall have jurisdictional authority over this group of people and for what purposes. The answer to this question obviously portends new developments on the ever-changing frontier of Indian jurisdiction.

The United States Supreme Court has examined this issue in only one narrow context. In *Washington v. Confederated Tribes of the Colville Indian Reservation*,[187] the Court ratified the right of the State of Washington to tax the sale of cigarettes on the reservations to both non-Indians and non-mem-

186. For example, the term "Indian" has been defined variously as membership in a federally recognized tribe, one-half or one-fourth Indian blood, in federal statutes such as the Indian Reorganization Act, 25 U.S.C. § 479 (1982) and the Johnson O'Malley Act, 25 U.S.C. §§ 452-457 (1982 & Supp. 1987), 25 C.F.R. § 273.12 (1988). Federal criminal jurisdiction, however, defines "Indian" as "whether the person in question has some demonstrable biological identification as an Indian and has been socially or legally recognized as an Indian." Clinton, *supra* note 41, at 520.

187. 447 U.S. 134 (1980).

ber Indians.[188] The tribes, on the other hand, the Court observed, may tax sales to tribal members, non-member Indians, and non-Indians.[189] The Court effectively determined that, at least for purposes of the cigarette taxes at issue in the case, the tribe and state had concurrent authority to tax non-Indians and non-member Indians, and the tribe had sole authority to tax tribal members.[190] The Court's ruling neither ousted nor reduced tribal authority over non-member Indians, but, by making jurisdiction concurrent, gravely undercut the taxes' economic development potential. As a result of the Court's decision, non-member Indians, instead of facing a single and lower tribal tax, now face a combined tax that is higher than the off-reservation state tax, thereby establishing a clear disincentive for members of this group as well as non-Indians to purchase cigarettes on the reservations. The Court's rationale was grounded in its conclusion that Washington's tax scheme was not preempted[191] by any federal statute and did not impinge on the right of reservation Indians to "make their own laws and be ruled by them."[192] The Court went on to conclude that non-member Indians, at least for taxing purposes, were more analogous to non-Indians than to tribal members.[193]

2. *Non-member Indians in criminal jurisdiction*

The Eighth and Ninth Circuits, the only courts which have addressed the issue on the criminal side, have not reached a finding similar to the Supreme Court's *Colville* decision recognizing concurrent authority between the state and tribe. These two circuits are split, with the Eighth Circuit, in *Greywater v. Joshua*,[194] ruling against tribal jurisdiction and the Ninth Circuit, in *Duro v. Reina*,[195] ruling in favor of tribal jurisdiction. Each circuit was aware of the other's decision, but refused to follow it.[196]

In *Greywater*, three members of Turtle Mountain Band of Chippewa Indians were charged under the *Devil's Lake Sioux Tribal Code* with possession of alcohol in a motor vehicle, public intoxication, and disorderly conduct.[197] The defendants' motion to dismiss for lack of jurisdiction over them

188. *Id.* at 151, 160-61.
189. *Id.* at 152-54.
190. *Id.*
191. *Id.* at 155-56.
192. *Id.* at 156 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).
193. *Id.* at 161. The Court stated:

> Nor would the imposition of Washington's tax on these purchases contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements. We find, therefore, that the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the state from imposing its taxes.

Id.
194. 846 F.2d 486 (8th Cir. 1988).
195. 851 F.2d 1136 (9th Cir. 1987).
196. *Greywater*, 846 F.2d at 488 (citing Duro v. Reina, 821 F.2d 1358 (9th Cir. 1987)). *Duro*, 851 F.2d at 1139-40 n.1 (acknowledging *Greywater*, 846 F.2d 486, but declining to follow it). Note that there are two different opinions issued by the court in the *Duro* case and therefore there are two different cites.
197. *Greywater*, 846 F.2d at 487.

as non-member Indians was dismissed by the tribal court.[198]

The petitioners then filed, pursuant to the Indian Civil Rights Act of 1968, writs of habeas corpus in federal district court. They claimed that the Devil's Lake Sioux Tribal Court in North Dakota did not have criminal jurisdiction over non-member Indians. The district court dismissed the application, without prejudice, for failure to exhaust tribal remedies pursuant to the mandate of the *National Farmers Union* case.[199]

The Eighth Circuit reversed, holding that exhaustion of tribal remedies was not a necessary predicate for federal jurisdiction in criminal cases and further that the Devil's Lake Sioux Tribal Court did not have criminal jurisdiction over non-member Indians.[200] The Court's decision stems from its reading of *Oliphant* and *Wheeler*[201] in a kind of one-two punch rationale. *Oliphant*, as previously discussed, held that tribes do not have criminal jurisdiction over non-Indians.[202] *Wheeler*, which was decided sixteen days after *Oliphant*, held that the double jeopardy clause of the fifth amendment did not bar the federal prosecution under the Major Crimes Act of a tribal member who had previously been convicted of a lesser included offense in the Navaho tribal court.[203]

Neither of these cases involved non-member Indians, but *Wheeler* in several instances used the member/non-member locution, instead of the more pertinent Indian/non-Indian distinction. The Eighth Circuit was unpersuaded that this might have been careless inadvertence and deferred to the Supreme Court's careless use of language.[204] The Eighth Circuit's narrow reading of tribal authority in this area appears even less persuasive when it is noted that the more limited Courts of Indian Offenses[205] specifically authorize such jurisdiction.[206]

In the Ninth Circuit, the court approached the issue much differently. In *Duro v. Reina*, the defendant was a member of the Torrez-Martinez band of Mission Indians and the criminal acts took place on the Salt River Indian Reservation in Arizona.[207] A federal grand jury indicted Duro for the first degree murder of another Indian, a member of the Gila River Indian Tribe. The defendant was also charged in tribal court with discharge of a firearm within the boundaries of the reservation. This was a misdemeanor under the

198. *Id.*
199. *Id.* at 487-88.
200. *Id.* at 488.
201. United States v. Wheeler, 435 U.S. 313 (1978).
202. *Oliphant*, 435 U.S. 191. *See supra* text accompanying notes 40, 107, 114-15.
203. *Wheeler*, 435 U.S. at 329-30.
204. *Greywater*, 846 F.2d at 488. Specifically, the court stated:
> In addition, the Devil's Lake Tribal Court is supported by the United States with a well written and persuasive brief in urging that the Supreme Court did not mean what it said in *Wheeler*. Although we acknowledge the complexity of the issue, until the Supreme Court says that we are wrong, we are persuaded that the Court intended to say what it said in *Wheeler*.

Id.
205. *See, e.g.*, W. HAGAN, INDIAN POLICE AND JUDGES 104-25 (1966).
206. 25 C.F.R. § 11.2(a) (1988). The regulations state: "[a] Court of Indian Offenses shall have jurisdiction over all offenses enumerated in §§ 11.38 through 11.87 when committed by an *Indian*, within the reservation or reservations for which the Court is established." *Id.* (emphasis added).
207. *Duro*, 851 F.2d at 1138.

tribal code.[208] The murder indictment was subsequently dismissed without prejudice. The tribal trial court denied defendant's motion to dismiss for lack of criminal jurisdiction.[209] The defendant's application for habeas relief was granted by the federal district court.[210]

The Ninth Circuit reversed the district court's grant of habeas relief.[211] The court described the issue as one of first impression within "the uncharted reaches of tribal jurisdiction."[212] The court, as in the Eighth Circuit's *Greywater* opinion, confronted the issue of the reach of the *Oliphant* and *Wheeler* decisions. *Oliphant*, it ruled, was by its terms and rationale limited to non-Indians.[213] The use of the term "non-member" throughout *Wheeler*, when the case did not involve a non-member, was "indiscriminate" and merely dictum and therefore not to be followed.[214] Concluding that the court should "give little weight to these casual references" the court stated that it certainly would not "extend the literal holding in *Oliphant* on the basis of them alone."[215]

The court found no evidence of Congress's intent to divest tribes of criminal jurisdiction over non-member Indians[216] and observed that the tribal assertion of such authority was reasonably related to the legitimate goal of improving law enforcement on the reservation.[217] Ultimately, however, the court adopted a "contacts" approach to the problem. The court concluded that because the defendant was an enrolled member of another tribe, was closely associated with the reservation through his girlfriend who was a tribal member, lived with his girlfriend's family on the reservation, and was employed with a tribal construction company, these "contacts" justified the tribal court's conclusion that the defendant was an Indian subject to its criminal jurisdiction.[218]

Both circuits also addressed the potential "no forum" problem embedded in their decisions. The *Greywater* court felt that such considerations were of "little relevance," but noted that the record of the lower court revealed that the defendant non-member Indians were also charged with criminal misdemeanor violations under state law for the offenses arising out of the same incident.[219] The *Duro* court was less sanguine. It reasoned that because the victim in the case was also a non-member Indian, this would probably grant state jurisdiction, but observed that the state had indicated no interest in jurisdiction.[220] If it had, an extension of state authority on the reservation would have its own disadvantages by being inconsistent with

208. *Id.*
209. *Id.* at 1139.
210. *Id.*
211. *Id.* at 1138 (vacating and remanding the district court decision).
212. *Id.* at 1139.
213. *Id.* at 1140-42.
214. *Id.* at 1140-41.
215. *Id.* at 1141.
216. *Id.* at 1141-43.
217. *Id.* at 1145.
218. *Id.* at 1144.
219. *Greywater*, 846 F.2d at 490 n.3.
220. *Duro*, 851 F.2d at 1145-46.

constitutional history and needlessly complex.[221] The court considered itself fortunate to be able to avoid this dilemma.[222]

The issue of tribal criminal jurisdiction over non-member Indians is clearly on its way to the Supreme Court, yet it also contains some salutary reminders for a tribal court's analysis of its own jurisdictional parameters. As acknowledged in the *Greywater* decision, the performance of the Devil's Lake Sioux Tribal Court was inimical to ensuring maximum deference by a reviewing federal court. For example, the court easily rejected the necessity of exhaustion of tribal court remedies, required by both the *National Farmers Union* and *Iowa Mutual* cases, by its reference to *Oliphant* and a tribal court record that demonstrated "futility and lack of ultimate due process."[223] The court was particularly concerned about the tribal court's failure to hold a hearing and develop a record on the motion to dismiss for lack of jurisdiction.[224]

The Eighth Circuit's tone is undoubtedly paternalistic, but evokes a familiar refrain that tribal authority not "properly" exercised is subject to alteration and defeasance. These facts were apparently exacerbated in the court's eyes by its perception that even the limited hearing that was provided was not fair. The court made specific reference to the adverse comments of the tribal court judge to the non-member defendants and the fact that the one tribal member involved was not even arrested.[225] The court may have missed the likely deadpanned Indian humor in the tribal judge's observations, but unfortunately the actions of the tribal court opened the door to the intimation of "discrimination" which ultimately supported the court's unwarranted extension of *Oliphant*:

These non-member Indian Petitioners thus face the same fear of dis-

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221. *Id.* at 1146 (citing Clinton, *State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L. REV. 434, 445-46 (1981)). Clinton specifically noted:

> Thus, inheriting a clear constitutional history under the Indian commerce clause [as established for example in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)] opposed to state jurisdiction and a long historical legacy of doctrinal simplicity and clarity which for the most part excluded the force of state law from Indian country for Indians and non-Indians alike, the Burger Court has produced a complex legal structure which threatens to undermine the process of Indian self-government and encourage the progressive expansion in Indian Country of the very state authority and control that the framers sought to preclude.

Clinton, *supra*, at 446. *See also infra* text accompanying note 229.

222. *Id.* at 1146.

223. *Greywater*, 846 F.2d at 488-89.

224. *Id.* The Court stated:

> In the present case the Sioux Tribal Court denied Petitioner's motion to dismiss for lack of jurisdiction without a hearing and without a record. This is far removed from the suggestion in *National Farmers Union* that exhaustion would further serve to illuminate the jurisdictional issue by an evidentiary hearing and briefing. Encouraging the exercise of sovereignty by a tribal court through development and upgrading of its procedures is not served where the tribal court itself fails to do so.

Id. (citation omitted).

225. *Id.* at 489. The Court noted:

> The tribal court judge, moreover, *allegedly* chided Petitioners, that as nonmembers of the Sioux Tribe they would not receive a fair trial because only Sioux would be on the jury. The facts surrounding the arrest and charges lend additional corroboration to the concern. The person driving the car at the time of the arrest was a member of the Devils Lake Sioux Tribe as were the arresting officers. The passengers all were nonmember Chippewa Indians; only the non-members were arrested.

Id.

> crimination faced by the non-Indian petitioners in *Oliphant*: they would be judged by a court system that precludes their participation, according to the law of a societal state that has been made for others and not for them.[226]

The Eighth Circuit decision also seemed to take comfort in its collateral findings that non-Indians constituted a majority on the Devil's Lake Sioux Reservation, and therefore, it would be "anomalous" to subject non-member Indians to tribal jurisdiction,[227] and that there were also significant racial, cultural, and legal differences between the Devil's Lake Sioux Tribe and the Turtle Mountain Band of Chippewa Indians.[228] Given these findings, perhaps the Eighth Circuit decision can be limited to its special facts. This, of course, remains to be seen.

The decision itself provides no in-depth supporting analysis. There is just the harsh sound of tribal sovereignty splintering into ever smaller pieces. The court also does not assay the incredible practical difficulty left in the wake of its decision. Law enforcement officers now have to somehow decide who is a tribal member and who is merely a non-member Indian, which is not the general, well-understood, and common community distinction made between the terms "Indians" and "non-Indians." Errors of judgment might well result in claims of false arrest, particularly if there are no ongoing cross-deputization agreements between tribal and local and state law enforcement. This decision clearly exacerbates the problems of checkerboard jurisdiction.[229]

V. TRIBAL COURTS AND THE FEDERAL SYSTEM

Buried beneath the geologic holdings of the *National Farmers Union* and *Iowa Mutual* cases, there is movement to unify the continental drift between federal and tribal courts. The Court, without articulating and perhaps without even realizing it, appears to be gradually identifying the contours of the relationship of tribal courts to the federal system.[230] This process contains several paradoxical lines of development. For example, on the one hand, there is increasing recognition of the stature of tribal courts, but on the other hand, there is the companion development which seems to bring tribal courts more directly into the orbit of federal review. Or to say it another way, the more important tribal courts become, particularly in their authority over non-Indians, the more need there seems to be for increasing federal scrutiny.

Before *Santa Clara Pueblo*,[231] *National Farmers Union*,[232] and *Iowa*

226. *Id.* at 493.
227. *Id.*
228. *Id.*
229. Checkerboard jurisdiction is the anomalous pattern which exists in Indian country where the allocation of jurisdiction is often directly affected by the status of the land (*i.e.*, trust land vs. land held in fee simple title) and the identification of the parties (*i.e.*, Indian or non-Indian, and now this jurisdictionally troubling new category of "non-member Indians").
230. *See also* Pommersheim & Pechota, *supra* note 159, at 590-92.
231. *See supra* text accompanying note 142.
232. *See supra* text accompanying notes 1-26.

Mutual,[233] it was relatively easy to circumvent tribal courts. The notions of a direct federal cause of action under the Indian Civil Rights Act, federal question jurisdiction, and diversity jurisdiction permitted a significant bulk of civil causes of action arising on the reservation to be brought directly in federal courts, without any concern for the tribal forum. As a result, there was little federal concern for what occurred in tribal courts. There was also scant interest in the question of federal review and in the overall relationship of tribal courts to the federal system. But when direct access to federal courts was sharply curtailed, there was a concomitant growth of tribal court litigation and a renewed litigant and federal interest in prescribing the boundaries of tribal authority.

National Farmers Union and *Iowa Mutual* have staked out some of the territory.[234] Federal review, upon the exhaustion of tribal remedies, is available under the federal question doctrine to determine whether tribal courts have exceeded their jurisdiction. This much is clear. Federal review of tribal court decisionmaking on the merits is decidedly less lucid. The limited review afforded by the habeas provision[235] of the Indian Civil Rights Act is the only specific federal enactment in this area. Even under this provision, however, it remains unclear whether federal review will require tribal courts to meet the substantive standards of the analogous provisions in the Bill of Rights, or whether there will be a greater degree of flexibility in determining these standards.[236]

The amount of review provided by federal habeas relief seems ample. Tribal courts ought to be able to interpret and declare what tribal law is, for if tribal sovereignty and self-determination mean anything, they mean the authority to declare and interpret the law that will govern in tribal forums. Federal courts, therefore, should stay their hands unless tribal decisionmaking offends some specific federal law that applies to the tribes. Of course, under the plenary power doctrine, tribes remain subject to the supreme legislative authority of the United States.[237]

There is yet another paradox at work here. Increased federal respect and deference to tribal courts are premised upon a national policy that supports the growth and development of tribal courts. The paradox centers on what constitutes the growth, development, and competence of tribal courts. Is it simply the adequate mimicry of non-Indian state and federal courts? Or, is it a commitment to a reasonable autonomy for tribes and tribal courts to develop to meet the needs of local people, which, in turn, permits or recognizes the possibility of some divergence from the dominant canon?

The mandate for continuing tribal activity in these areas is as pressing as ever. Yet, it is important to note that tribal actions in these areas must

233. *Id.*
234. *Id.*
235. 25 U.S.C. § 1303 (1982).
236. *See, e.g.*, Smith v. Confederated Tribes of the Warm Springs Reservation, 783 F.2d 1409 (9th Cir. 1986) (The procedures that tribal courts choose to adopt are not necessarily the same procedures that the federal courts follow.); Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976) (Due process and equal protection under the Indian Civil Rights Act of 1968 are not necessarily defined in the same way as they are under the fourteenth amendment.).
237. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

not lose sight of the interest and concerns of the tribe's primary constituents. That is, what is the best law to be used in such situations as seen from the perspective of local people? For ultimately, the law is designed to serve the people, not the dictates of attorneys and the federal courts standing alone. As there is federal scrutiny from "above," there is also the more important scrutiny from "below." This is the scrutiny of the culture and the people themselves. While federal courts, rightfully or wrongfully, loom large in this process, they ought not to be made more ascendant than they lawfully are. In this regard, it is the wisdom and integrity of tribal law and tribal courts, properly and consistently informed by tradition and evolving contemporary tribal standards, that will stand as the best bulwark against overbearing federal encroachment. Without this continuing development, there can be little expectation for future stability and equilibrium.

VI. CONCLUSION

Tribal courts function at the cutting edge of tribal sovereignty and, as a result, they face steep challenges. This Article has attempted to set out a reliable conceptual framework with which tribal courts may properly analyze the parameters of their authority. It has also addressed some of the more pressing issues, such as the "no forum" and "no law" problems, jurisdiction over non-member Indians, and the emerging relationship of tribal courts to the federal system. In responding to these issues imposed from "above," tribal courts must not lose touch with the people and traditions that nourish them from "below." The best that might be said of this intense pressure is that it may fuel creative and progressive tension that will help tribal courts to continue to evolve to meet the yoked objectives of federal deference and tribal legitimacy.

The perspective that animates this discussion is that of the tribal courts. From their viewpoint, how might these pressing issues of sovereignty and analytic rigor appear? This is asked from the vantage point of an important tribal institution which must enact a discourse on sovereignty within the context of a case-by-case adjudication of disputes that come before it. One commentator describes this challenge and opportunity as follows:

> The decision in *National Farmers Union* places a tremendous responsibility upon, and presents a tremendous opportunity for, tribal courts and those who litigate disputes before these vital institutions of Indian self-government. Through the tools of the adversary process, relevant statutes, treaties, Executive Branch policy, and judicial decisions must be presented to tribal court as they decide in the first instance what tribal sovereignty means for their particular tribe's self-governing vision. The adequacy and thoroughness of the relevant record and judicial reasoning upon that record at the tribal court level will likely have a determinative impact on a non-Indian federal court's review of the initial tribal decision. Thus, Indian tribal courts have been presented with a unique wedge to drive home an Indian vision of tribal sovereignty in United States society. If affirmed by federal courts, the vision and discourse of sovereignty articulated in the tribal court opinion will have the force of law in United States society. Of

course, there is no guarantee that this vision articulated by tribal courts will always be affirmed.[238]

The Supreme Court decisions in the *National Farmers Union* and *Iowa Mutual Insurance* cases vigorously reaffirm the federal policy of encouraging tribal self-determination and tribal self-government. Tribal courts are properly seen as vital institutions for implementing this important national policy. As a result, tribal courts are the very visible standardbearers for charting much of the future of tribal self-determination. As part of this mission, they need greater understanding, growing support, and continued recognition as the enduring forums for rendering justice and fair play throughout Indian country.[239]

238. Williams, *The Discourses of Sovereignty in Indian Country*, XI INDIAN LAW SUPPORT CENTER REP. 9 (Sept. 1988).

239. F. POMMERSHEIM, *supra* note 89, at 42.