NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION
LONG RANGE PLANNING STUDY

Tribal Jurisdiction Over Non-Indians

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Introductory Notes

In recent times, Indian tribes and Alaskan native groups have been under increased pressure to come to grips with planning and implementation efforts consistent with a federal policy of encouraging native self-determination. In addition, doubts have been raised about the expanded scope of tribal jurisdiction over non-members and whites found within reservation boundaries. Resolution of this issue becomes crucial as tribes work to amend self-imposed legal impediments to the exercise of jurisdiction over non-Indians within reservation areas.

Much controversy has arisen after the passage of the so-called "Indian Civil Rights Act of 1968," Title II, Pub. L. 90-284, the act of April 11, 1968, 25 U. S. C. Section 1302 et seq. The popular name associated with these civil rights Act amendments has perhaps caused ambiguity in interpretation of that legislation and may have led tribes, courts, and scholars to ignore an implied mandate of the act, i. e., compliance necessitates the extension of tribal jurisdiction over all persons within the jurisdiction, including non-Indians and corporate entities.

In terms of tribal action and strategy, then, it may be less fruitful to focus upon the wisdom of Congress in enacting Pub. L. 90-284 than to focus upon the pragmatic steps that tribes must take in order to assure the peace and dignity of the tribes as well as providing a forum through which disputes arising upon the reservations may be resolved, irrespective of the racial background or legal classification of the parties.

There is merit in arguments which advance the exercise of expanded tribal jurisdiction over all persons, including non-Indians within "Indian country." 1/ First, the extension of exclusive misdemeanor and concurrent felony criminal jurisdiction over all persons protects the personal well-being and property interests of both Indian and non-Indian residents while preserving the dignity of the tribes. Second, an Indian court of general jurisdiction promotes reservation economic development in that it allows all creditors access to a forum to secure judgements and executions where breaches of contract or defaults occur for transactions arising on reservations. 2/ Third, an Indian court of general jurisdiction, established consistently with 25 U. S. C. Section 1302 (8), solicitiously affords non-Indians equal protection and due process of law without jeopardizing the tribe's political control over its internal affairs. 3/ Finally, such expanded jurisdiction precludes the advancement of counter-arguments posited upon the Williams v. Lee 4/ "infringement test," as has been advanced in one state. 5/

Overview

Any discussion of the possible conflicts raised by the relationship of tribal governments and non-Indian individuals in a contemporaneous setting should begin with Williams v. Lee, supra. That case involved a non-Indian creditor who sought judicial relief in a state court against reservation Indian debtors where the transaction had occurred on the reservation. Speaking for the Court, Justice Black not only reaffirmed the validity of Worcester v. Georgia, 6/ but pointed out that even in private disputes today

arising upon reservations and between Indians and non-Indians, there remain two hurdles to the extension of state civil jurisdiction over reservations, i. e., the federal government in its regulation of Indian affairs and the tribe's own independent interest in self-government. The Court was keenly impressed by the Navajo Tribe's interest in self-government which had developed to such a point so as to allow its court system to handle private suits by "outsiders against Indian defendants."[7]

The scholarly and judicial confusion that has developed in the aftermath of Williams v. Lee emanates from various interpretations of the "infringment" test:

> ". . . [A]bsent governing Acts of Congress, the question has always been whether state action infringed on the right of reservation Indians to make their own laws and be ruled by them. [citations omitted]"

This confusion is further amplified when legal analysis occurs in a vacuum devoid of necessary references to historical facts and circumstances.

For example, an oft-recited statement on the subject is to be found in the Handbook of Federal Indian Law (1958): ". . . Attempts of tribes to extend jurisdiction over non-Indians have been generally condemned by the federal courts since the end of the treaty making period . . ."[8] The only case cited for this point is Ex parte Kenyon,[9] an 1878 case where the Court, in dictum, stated that a particular Indian court did not have personal jurisdiction over a non-Indian.

The Kenyon case, then, has been used by some to establish the broad rule against the extension of tribal jurisdiction over non-Indians. A careful review of that case, though, reveals that the actual holding of the case turned on the fact that the place of the commission of a criminal act was beyond the territorial

limits of the courts jurisdiction.[10] As one commentator has pointed out, the last quarter of the nineteenth century was a time in which the federal courts, Indian courts, and Indian agents of the Executive Branch exercised concurrent jurisdiction with respect to judicial administration in Indian reservations.[11] For example, "[Indian courts] applied tribal customary law, for the common law was not yet presumed to run in Indian country." Davidson v. Gibson, 56 F. 443. If there was no tribal law to cover a situation, no action could be taken. In re Mayfield, 141 U. S. 107 (1890).

The fact that there was no blanket rule against tribes exercising criminal jurisdiction over their own members had been raised in the Ex parte Crow Dog[12] case and settled. With respect to tribal jurisdiction over non-Indians though, the basis for holding that state jurisdiction obtained for felony criminal actions occurring between non-Indians may, in truth, be quite narrow in light of the federal policy of encouraging tribal self-government. United States v. McBratney, 104 U. S. 621 (1882), Draper v. United States, 164 U. S. 240 (1896).

Following the Draper decision, supra, there were attempts to fill in the void created by that decision. House Report No. 2074, 57th Cong., 1st Sess., contains language which pointed out that:

> "As the law now stands . . . offenses committed by half-breeds or white persons, whether upon an Indian or other person, are not cognizable by federal courts and generally go unpunished. This state of law is causing serious conditions of disorder within those Indian reservatations."

At page One.

That Congress should be called upon to fill a perceived void in terms of criminal law enforcement is nothing new. As David C. Etheridge has pointed out [13] the Courts of Indian Offenses as then currently established were designed to implement the objectives of federal Indian policy far different from that being encouraged today. See United States v. Clapox, 35 F. 575 (1888). Federal enclave law has always been a traditional area in which Congress from time to time addresses. Williams v. United States, 327 U. S. 711 (1946), United States v. Antelope, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977).

For example, beginning in April 30, 1790, with the Federal Crimes Act, 1 Stat. 112, to the Major Crimes Act, 18 U. S. C. Section 1153, Congress has acted to fill gaps in the federal Criminal Code where no action has previously been taken to define the missing offenses. Williams v. United States. Where Congress has not specifically acted to define an explicit criminal offense, federal criminal prosecution has been grounded upon the substantive state law as incorporated into the particular enclave by the Assimilative Crimes Act, 18 U. S. C. Section 1152. That federal prosecution of an Indian defendant for an alleged crime occurring on an Indian reservation may vary from state prosecution of the same offense is established by the Antelope case. There the U. S. Supreme Court held that impermissable racial classifications were not employed in defendants' felony murder convictions but that the defendants were subjected to federal criminal jurisdiction because they were enrolled members of a federally recognized tribe and not because of their racial background, citing Morton v. Mancari, 417 U. S. 535 (1974).

That Congress in nowise sought to withdraw criminal jurisdiction over non-Indians by enactment of the General Crimes Act, 18 U. S. C. Section 1152, seems readily apparent from the legislative history associated with that act. First, Section 1152 originated as Section 4 of the Indian Trade and Intercourse Act of 1802, 2 Stat. 141, reenacted in 1817 (3 Stat. 383), 1834 (as Section 25 of the Trade and Intercourse Act, 4 Stat. 733), and 1854 (Section 3 of the act of March 27, 1854, 10 Stat. 270). Second, there is language in the legislative history of the 1834 Trade and Intercourse Act indicating an intent upon the part of Congress to protect Indian tribes from depredations by "unprincipled white men." 14/

Language from that Report indicates the view of Congress as regards the extension of federal jurisdiction in the special circumstances then at hand:

> "/I7t is rather of courtesy than of right to punish crimes committed in that territory by and against our own citizens. And this provision of /Section 25 of the Trade and Intercourse Act/ is retained principally on the ground that it is unsafe to trust to Indian law in the early stages of their government."

at page 13.

That the federal exercise of criminal jurisdiction over non-Indians was designed to be temporary is reinforced by other language:

> ". . . As to those persons not required to reside in Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes."

at page 18.

Current Controversy: The Spectre of "Indian Justice"

As is evidenced by the Indian Education Amendments of 1972, the Indian Financing Act of 1974, and the Indian Self-Determination and Education Assistance Act of 1975, the thrust of federal legislative and Executive Branch policy is focussed upon the strengthening of tribal governments and Indian communities. Recently, the Court of Appeals for the Ninth Circuit noted [15] that courts are:

> ". . . not obligated in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected, particularly when to do so will interfere with the present Congressional approach to what is, after all, an on-going relationship."

While the three federal branches of the federal government seem to be in accord on the direction of tribal government with respect to the jurisdiction, it appears that it is the tribes themselves who are reluctant to address this matter. This reluctance, if it exists, is not without a possible basis. For example, brute economic pressure can be brought to bear upon individual tribal members so that they will voice opposition to a tribe's efforts to expand its jurisdictional base. Many Indian allotment owners and tribal councils qua beneficial owners of land will no doubt be subjected to scare stories, however unfounded, that the tribal exercise of jurisdiction over non-Indians will have adverse economic consequences. Some federal officials within various federal agencies can be expected to criticize such tribal efforts as well. Finally, whites and others with established economic interests will initially be greatly apprehensive about perceived changes in the political status quo or economic conditions resulting from such moves.

Arguments that tribes are somehow estopped from the exercise of jurisdiction over non-Indians where states have ostensibly asserted police powers pursuant to the Williams "infringement" test, supra, must fall in light of the clear implications of Pub. L. 90-284. Both the Indian Reorganization Act of 1934 and the Civil Rights Amendments of 1968 must be viewed in the context of Congressional affirmance of pre-existing tribal self-governmental powers. This understanding becomes especially crucial when issues are raised as tribes gear up to remove self-imposed legal impediments to the extension of tribal jurisdiction over all persons within "Indian country," as that term is defined by 18 U. S. C. Section 1151. The Williams "infringement" test is applicable only where Congress is silent as to private disputes between Indian and non-indian persons on reservations. With respect to conflicts arising between white non-members and tribal governments, Congress seems to have clearly spoken with the enactment of Pub. L. 90-284 by reaffirming the tribes' inherent right of self-government while at the same delegating to the tribes the responsibility of assuring that due process, equal protection, and individual civil rights standards were guaranteed to all persons, 25 U. S. C. Section 1302.

In short, by guaranteeing the protection of individual civil rights of all persons under the Civil rights Amendments, Congress, through the assistance of the federal courts, has opened the door for Indian tribes to exercise general regulatory powers over all persons and all land within Indian country by the requirement that tribes provide avenues through which relief may be sought by any person who believes himself to be adversely affected by tribal governmental action. Carried to its logical conclusion,

statutory and federal case law would seem to indicate that an affirmative exercise of such jurisdiction on the part of tribes over non-Indians may be necessary to avoid Section 1302 (8) Equal Protection claims brought by members for any preferential treatment given by the tribal government to non-Indians.[16]

The Issue of Jurisdiction in North Dakota

In order to understand existing limitations upon the state exercise of jurisdiction within "Indian country," it may be best to examine the state-of-the-law in one jurisdiction. North Dakota may perhaps be suited for such a discussion.

There are four Indian reservations within North Dakota: Standing Rock (which straddles the boundary between North and South Dakota), Fort Totten, Turtle Mountain, and Fort Berthold.[17] To date, none of the tribal governments within these reservation areas have acted affirmatively to exercise jurisdiction over non-Indians who come onto the reservations.

One result has been a possible incipient collision between that state's supreme court and the U. S. Court of Appeals for the Eighth Circuit over access by persons claiming relief against the state's Unsatisfied Judgement Fund, Section 39-17 et seq. of the North Dakota Century Code (1972), as the result of car accidents occurring on state highways within Indian reservations.[18] That the state has no jurisdiction over a person alloged to have committed a crime under state laws against one who is Indian where the crime was allegedly committed on an Indian reservation within North Dakota is well established. State v. Kunz, 66 N. W. 2d 531 (N. Dak. 1954), State v. Lohnes, 69 N. W.

2d 508 (N. Dak. 1955).

It is in the area of civil jurisdiction, then, that the cases from this jurisdiction are pertinent. The cases discussed herein concern tort claims based upon motor vehicle accidents occurring upon state highways passing through Indian reservations. Generally, each case arose as the plaintiff sought to obtain monetary relief against the state Unsatisfied Judgement Fund where the defendant was an uninsured Indian motorist. The Unsatisfied Judgement Fund is comprised of a pool maintained by the contribution of $1 from each registrant of a motor vehicle within the state. Indians residing on Indian reservations and owning motor vehicles also contribute to the Fund.

Vermillion v. Spotted Elk, 85 N. W. 2d 432 (1957) was one such case.[19] The accident occurred on the Standing Rock Indian Reservation. Both drivers were Indian. Appearing on behalf of the Defendant, the North Dakota Attorney General's office argued that the district court was in error to try the case. The North Dakota Supreme Court, however, held otherwise grounding its decision on the fact that the drivers, though enrolled members of the Standing Rock Sioux Tribe, were citizens and residents of state.

Spotted Elk remained the law until 1973.

A decade after the enactment of Pub. L. 80-280, North Dakota, in 1963, amended its constitutional disclaimer clause, Section 203 of the North Dakota Constitution, to allow for acceptance of 280 jurisdiction. Thereafter, the Legislative Assembly enacted Chapter 242, 1963 Sess. L., Chapter 27-19-01 (N. D. C. C.) whereupon

state civil jurisdiction over causes of action would be extended upon acceptance by tribes in the manner provided by the act, 27-19-03 (N. D. C. C.). To date, none of the tribes within North Dakota have consented to state civil jurisdiction.

Shortly after Section 27-19 was enacted, the North Dakota Supreme Court had occasion to review a case involving a county welfare office's attempt to terminate the parental rights of an Indian couple living on the Fort Berthold reservation, In re Whiteshield, 124 N. W. 2d 694 (N. Dak. 1964). With regard to the jurisdictional question, the Court said: "The effect of this legislation is to completely disclaim state jurisdiction over causes of action arising on an Indian reservation unless the Indians themselves have acted to accept jurisdiction in the manner provided by the statute."

Matters remained in limbo until 1973. In Gourneau v. Smith, 207 N. W. 2d 256 (N. Dak. 1973), as in Spotted Elk, supra, both parties were Indians. Here though, the North Dakota Supreme Court, in reversing a lower court ruling denying the North Dakota Attorney General's motion to dismiss for lack of jurisdiction, overturned its holding in Spotted Elk. The Supreme Court noted that state highways, being "rights-of-way" under 18 U. S. C. Section 1151, are part of Indian reservations. The Court also noted that Pub. L. 90-284, amending Public Law 280, required certain procedural steps which the state had to meet in order to assume civil jurisdiction, citing Kennerly v. District Court of the Ninth Judicial District of Montana, 400 U. S. 423 (1971).

In 1975, the North Dakota Supreme Court decided another case which --- as opposed to Spotted Elk and Gourneau involved a non-Indian plaintiff, Nelson v. Dubois, 232 N. W. 2d 54 (1975). A motor vehicle accident having taken place on a state highway within the Fort Totten Indian Reservation, the plaintiff sued the decedent's estate and the decedent's mother, owner of the vehicle, under the Family Purpose Doctrine. The Indian vehicle owner had been prevailed upon to sign an individual consent form, i. e., individual consent to state jurisdiction pursuant to N. D. C. C. Section 27-19-05. Under the 1963 state statutory scheme, such an individual consent form was to bind the person and his property to state court judgements. Earlier, in Rolette County v. Eltobgi, 221 N. W. 2d 645 (N. Dak. 1974), Judge Vogel, in dictum, noted that Pub. L. 90-284 had "probably" made Section 27-19-05 ineffective.[20] Here, the state Attorney General's office appeared on behalf of the Indian defendant and argued against state civil jurisdiction over a transaction occurring on an Indian reservation. The North Dakota Supreme Court agreed and followed its decision in Gourneau (Vogel, J., dissenting).

The approach favored by the North Dakota Supreme Court is to be contrasted with that followed by the Court of Appeals for the Eighth U. S. Circuit. Two recent cases are Poitra v. Demarrias, 369 F. Supp. 257 (D. N. D. 1973), reversed, 502 F. 2d 23 (8th Cir. 1974), cert. denied, 421 U. S. 934 (1975), and Schantz v. White Lightning, 502 F. 2d 67 (8th Cir. 1974).

In Poitra, both parties were Indian and resided on the Standing Rock Sioux Reservation. The plaintiff lived in the North Dakota portion, the defendent in South Dakota. The plaintiff, as in the cases discussed previously, sought to establish the defendant's liability in order to obtain relief from the state Fund, supra.

At the trial level, the District Court had granted the Motion to dismiss for lack of jurisdiction on the part of the defendant, again represented by the state Attorney General's Office. On appeal, the Court of Appeals for the Eighth Circuit reversed the dismissal. The defendant petitioned for a writ of certiorari. The petition was denied. Ironically, the Standing Rock Sioux Tribe filed an amicus curiae brief in support of federal diversity jurisdiction.

That the Poitra case presented problems for the Court is evident from its decision. The Court found support for its decision based on a 1961 case from the Fourth Circuit where it had been held that when a state provides a substantive right and a remedy for its enforcement through a judicial proceeding in any state court, a judicial controversy involving the state-created right may be adjudicated by a U. S. District Court. Markham v. City of Newport-News, 292 F. 2d 711 (4th Cir. 1961). The Court took note of the Ninth Circuit approach, i. e., that no federal jurisdiction arises when state courts have no subject-matter jurisdiction, Hot Oil Service, Co. v. Hall, 366 F. 2d 955 (9th Cir. 1966), Littell v. Nakai, 244 F. 2d 486 (9th Cir. 1965), but the Court distinguished the instant case holding that the Williams "infringement" test was not a bar in a situation involving neither tribal land leases nor tribal attorney contracts.

That the Court of Appeals for the Eighth Circuit was somewhat concerned about the response of the Standing Rock Sioux tribe to the implications of Pub. L. 90-284 seems apparent from the following statement:

". . . Although the state courts of North Dakota are open to Indians, the Standing Rock Reservation has not consented to jurisdiction in the manner prescribed under [25 U. S. C.] Section 1322 (e). Thus, no policy of the State of North Dakota is at issue in this case. Rather, it is the Indians themselves who, by not deciding to consent to state jurisdiction, have created the federal jurisdictional problem we face in this case."

Read in the narrowest sense, the Poitra decision appears to imply that only where tribes have affirmatively acted to limit the access of non-Indians to the only appropriate forum where civil causes of action may be brought (the Indian court) will federal court jurisdiction arise; but perhaps only in the hiatus until the tribe amends its code to expand its jurisdictional base or enters into an agreement --- ratified by the voters --- with the state for formal extension of state civil jurisdiction over certain areas. The question then arises whether any person adversely affected by a tribe's inaction might seek a writ of mandamus to compel the appropriate tribal officials to exercise a non-discretionary duty of putting the issue before the tribe for a decision. The Court of Appeals decision in Schantz v. White Lightning, supra, seems to suggest that possibility.

In White Lightning, the defendants were Indian residents of the Standing Rock Sioux Reservation. The non-Indian plaintiffs based their claim for federal court jurisdiction on 28 U. S. C. Section 1331 (a), the amount in controversy alleged to be in excess of $10,000. The federal district court had granted the defendant's motion to dismiss. The defendant was being represented by the North Dakota Attorney General's office. The Court of Appeals affirmed the dismissal. In doing so, however, the

Court indicated its dissatisfaction with the result:

> "The legal anomaly is therefore obvious --- the non-Indian litigants are left without a forum in which to prove their claims."

One reason for concern on the part of the Court was the limitation placed upon the civil jurisdiction of the Standing Rock tribal court by the Code of Justice of the Standing Rock Sioux Tribe (July, 1973). Under Section 1.2 (c) of the Code, the jurisdiction of the tribal court over causes of action brought against a tribal member was limited in that a non-Indian plaintiff had to be a resident or doing business on the reservation for one year prior to filing the complaint. Further, the Code limited the tribal court's jurisdiction to causes of action where the amount in controversy did not exceed $300. There is dictum in White Lightning, though, which seems to suggest that tribes seriously reconsider such bars to the exercise of civil jurisdiction, i. e., ". . . The scope of Section 1302 (8) is not limited to Indians. It applies to all persons within tribal jurisdiction." 502 F. 2d 67, at 70, n. 5.

The Court also seemed to indicate its willingness to hear claims by non-Indians under 25 U. S. C. Section 1302 (8), but noted that the issue, in order to be properly raised, must be in the form of a federal question. Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F. 2d 529 (8th Cir. 1967).

The Court of Appeals for the Eighth Circuit has yet to decide upon the degree of recognition that North Dakota must give to tribal court orders and judgements. However, in a closing footnote in White Lightning, the Court said:

> "We emphasize that North Dakota has in no way acted to bar Indians from its courts or to exclude them from the benefits of the Unsatisfied Judgement Fund. In fact, it would appear that if the tribal court had assumed jurisdiction in this case, its judgement would have been accorded full faith and credit for purposes of disbursement out of that Fund . . ."

502 F. 2d 67, at 70, n. 4.

Here, it should be noted that in the Nineteenth Century, it had been held that decrees from Cherokee tribal courts were entitled to the same full faith and credit given to courts of territories, Mechlin v. Ice, 56 F. 12 (1893). Federal courts, though, had some difficulty with Indian laws governing ownership of property but nevertheless sought to apply them. Eddy v. Lafayette, 163 U. S. 456 (1896), Journeycake v. Cherokee Nation, 28 Ct. of Cls. 281 (1893). As early as 1855, Supreme Court Justice McLean praised one tribe's court procedures by noting that letters of administration were granted by Cherokee probate judges ". . .with as much regularity and responsibility as letters of administration are granted by the state courts of the Union." Mackey v. Coxe, 59 U. S. 100. In 1886, and in response to continued depredations by whites into Indian lands in violation of the 1834 Intercourse Act, Judge Isaac Parker, the "Hanging Judge" of Fort Smith, Arkansas, handed down strongly worded opinions defending the right of Indians to possess their own lands unmolested. See, In re Wolf and Another, 27 F. 606 (D. C. W. D. Ark. 1866), a decision said to have been handed down in response to another decision by Judge Bryant in Texas allowing the introduction of malt liquor into that part of Indian territory comprising the Chickasaw and Choctaw nations.

The purpose of controlling federal legislation at this era in time was clear, i. e., the Trade and Intercourse acts were designed to regulate non-Indian entry and activities within Indian country. This is perhaps understood best by some as a federal "preemption" of the field.

As Reid points out,[21] the failings of the federal government in enforcing the provisions of the 1834 Intercourse act is a factor that historians must evaluate with the same weight as land hunger and gold fever which cause the extinguishment of vast areas of Indian country:

> "It explains why gold prospectors were able to rush into the Black Hills despite the Army's determination to keep them out. The Army might remove them but they always returned. The Sioux, seeing treaties violated, took to the warpath. The Army was obliged to protect the intruders and, in the process, crushed the Indians . . ."

Without fear of much contradiction, it can be argued that the Federal policy toward tribes remains about the same today as it did one hundred years ago, i. e., the willingness and vigor on the part of the federal government to the protection of tribal property interests continues to be conditioned by other pressures so familiar to students of the processes attendant to westward expansion. The difference being that today, and by virtue of Congress' passage of the Indian Reorganization Act and the Civil Rights Amendments (of 1968), the formal reaffirmation of tribal inherent sovereignty requires tribes --- to avoid political extinction --- to exercise to the fullest measure possible a degree of interest in self-government in order not only to assure economic survival, but ultimately, the maintenance of an identifiable tribal universe. This, perhaps, is truly the type of "benign neglect"

that sociologist (now U. S. Senator) Daniel P. Moynihan had in mind during the first term of the Nixon administration.

With respect to state recognition of tribal court Orders, the present view within states is conflicting. In Begay v. Miller, 70 Ariz. 380, 222 P. 2d 624 (1950), the Arizona Supreme Court noted that "full faith and credit" applies only between states. The county court, however, was held bound to recognize a tribal court decree under the general rule that a divorce valid where granted is recognized as valid everywhere.

In Jim v. C. I. T. Financial Services Corp., 87 N. M. 362, 533 P. 2d 751 (1975) the court held that pursuant to 28 U. S. C. Section 1738 tribal laws were entitled to full faith and credit in state courts and the complaint had been erroneously because the real issue was one of choice of law.

Comity has been defined as the doctrine under which the court that first acquires jurisdiction of a question retains it, State v. Maier, 127 N. W. 2d 665 (N. Dak. 1964), and is further understood as a willingness on the part of a court of another sovereign to grant a privilege not as a matter of right but out of deference and good will. Dow v. Lillie, 26 N. D. 512, 144 N. W. 1082 (N. Dak. 1914).

Tribes have been judicially recognized as dependent political nations and wards of the United States with those characteristics of sovereignty not taken away by express act of Congress. Groundhog v. Keeler, 442 F. 2d 674 (10th Cir. 1971). However, the willingness of North Dakota courts to recognize tribal court orders and judgements, either under the notion of "full faith and credit" or under the doctrine of comity, has been placed into question by recent Supreme Court decisions.

For example, in handing down its decision in Nelson v. Dubois, 232 N. W. 2d 54 (N. Dak. 1975), the North Dakota Supreme Court acknowleged the Poitra and White Lightning decisions of the U. S. Court of Appeals for the Eighth Circuit but in nowise indicated any willingness to modify its previous holding in Gourneau, supra, where the Court denied the arguments of plaintiff (an enrolled member of the Turtle Mountain Chippewa Tribe) that the deprivation of her access to state courts was a denial of due process. The Court in Gourneau held that where an alleged tort was committed by an Indian on an Indian reservation where the tribe had not consented to state civil jurisdiction in the manner provided by federal law, state courts were without jurisdiction to hear the matter. In Nelson v. Dubois, the fact that the plaintiff was non-Indian did not move the Court to retreat from its position in Gourneau, a 1973 case.

Judge Vogel was the lone but vigorous dissenter in the Nelson v. Dubois case. Judge Vogel began his analysis with, "This is a case where there is a wrong without a remedy . . ." 232 N. W. 2d 54, at 59. Judge Vogel felt that the absence of a forum was a failing on the part of Congress:

> ". . . This is true because of the inaction on the part of Congress, which holds the key to open either the courts of the Federal Government or the state courts to litigants with valid claims who now have nowhere to take them."

A more recent and interesting case is Lohnes v. Cloud, 254 N. W. 2d 430 (N. Dak. 1977), which involved a judgement rendered by the Fort Totten tribal court against an Indian motorist in a tort action. Plaintiff, an enrolled member of the Fort Totten Sioux Tribe, had commenced his action in state district court but

it was dismissed for lack of jurisdiction (the auto-pedestrian accident having occurred on a state highway within the reservation). Subsequently, a complaint was filed in the U. S. District Court where another dismissal resulted. The action was then brought gefore the tribal court which entered a judgement for the plaintiff in the amount of $10,000. After execution was issued and returned unsatisfied, Lohnes then obtained an Order from the tribal court for payment from the state's Unsatisfied Judgement Fund. Payment was refused.

Lohnes then filed the tribal court judgement with the clerk of the court for Benson county district court and applied to the district court for an order directing payment from the Unsatisfied Judgement Fund. The application was dismissed and an appeal resulted.

Note that earlier, in a different matter, a 1975 Attorney General's Opinion upheld the state Director of Public Institutions in his refusal to honor a tribal court Order to have an Indian juvenile placed in a state institution. The A. G. Opinion narrowly construed the authority conferred upon the Director by the state's Legislature rather than discussing the validity of the Tribal Court Order for the tribal court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation.[22]

Lohnes v. Cloud was disposed of on statutory construction grounds, the Court said (at 435), rather than on jurisdictional grounds. The Court held that the tribal court judgement did not come within the scope of Section 39-17-03, N. D. C. C., as a judgement which entitled the plaintiff to benefits under the state's Unsatisfied Judgement Fund, and, so affirmed the district court's dismissal of the application!

The recent Lohnes v. Cloud decision puts the North Dakota Supreme Court at odds with the Court of Appeals for the Eighth Circuit. See discussion of White Lightning, supra.

Judge Vogel, in a lengthy separate opinion, dissented strenuously pointing out, as had the majority, that the validity of the tribal court judgement was not being questioned nor was the competence of the tribal court. In his view, the dispute boiled down to one between an Indian resident of the State, and the State itself, acting through the Unsatisfied Judgement Fund such that constitutional questions were raised in terms of equal protection and due process of law. The discrimination, according to Judge Vogel, is not against Indians, as such, but against all persons (whether Indian or non-Indian) injured by the negligence of uninsured drivers on Reservations within the state. /If ever there were procedural and substantive issues ripe for appeal, this would seem to be one such case. The time period for filing for a writ of certiorari having run, the Lohnes v. Cloud stands as law within North Dakota.--DTBB/

The Need to Strengthen Indian Courts

In Wounded Knee v. Andera, 416 F. Supp. 1236 (D. S. Dak. 1976), the District Court was greatly concerned about the relative degree of casualness with which the Crow Creek Tribal Council handled a criminal matter involving a tribal member (a delay of some six months in handling defendant's petition for appeal from claimed error in the denial of a fair trial under 25 U. S. C. Section 1302 (8), the due process provision):

> "The judicial system is Anglo-American and assuredly not Indian; adding the safeguards guaranteed in Anglo-American law certainly is no more of an encroachment upon the Indian way of life than the tribal court itself. Moreover, the tribe points to no specific values that will be lost but objects to a prosecutor on abstract grounds that some aspect of sovereignty will be threatened. To the extent that 28 U. S. C. Section 1302 et seq. limits tribal autonomy they are correct, but such limits are the law and this court is bound thereby."

at 1241-1242. In Wounded Knee, the District Court held that the whole tribal criminal justice system was violative of the due process provision, supra, where --- in the absence of a tribal prosecutor --- the Indian court judge assumed both the role of prosecutor on behalf of the Tribe and the role of trier-of-fact. The Court further noted that the person assuming the prosecutorial role in the Crow Creek tribal court could be a lay person.

Conclusion

From Williams v. Lee to Wounded Knee v. Andera, it is not difficult to trace the concern of federal courts: To scrutinize existing tribal mechanisms for resolving conflicts and to assure, where necessary, that individual rights and liberties are protected.

Federal policy toward Indian tribes is designed to encourage the strengthening of tribal institutions. But only by the expanded exercise of tribal regulatory powers accompanied by an expanded jurisdictional base for the tribal judiciary, can tribes regulate on-reservation economic development in order to ameliorate the possible deleterious side-effects from competing economic interests operating within the reservation arena.

Only by going forward with the exercise of expanded jurisdiction will Indian tribes prevent the recurrence of anomalous legal situations represented by North Dakota where presently a jurisdictional void has been created by the failure of tribes to exercise jurisdiction over non-Indians in all matters, or, where the state courts refuse to give credence to undisputedly valid tribal Court Orders. The absence of tribal action gives rise to a situation described by one commentator as "Jurisdiction by Default" [23] as is occurring in Montana. See, State ex rel. Old Elk v. District Court, 552 P. 2d 1394 (1976) and Little Horn State Bank v. Stops, 555 P. 2d 211 (1976).

There is a growing body of federal case law which indicates that federal district courts are increasingly receptive to claims by non-Indian persons and corporate entities against tribal governmental action. See, Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968), Hickey v. Crow Creek Housing Authority, 379 F. Supp. 1002 (D. S. Dak. 1974), Dry Creek Lodge, Inc. v. U. S., 515 F. 2d 926 (9th Cir. 1975). See also, Schantz v. White Lightning, supra, dictum. Such decisions are only valid when it is presumed that tribes have some degree of jurisdiction, a fortiori, over the subject-matter and persons involved.

At the same time it is clear that Congress in passing the Civil Rights Amendments of 1968 did not intend to use the statute as an instrument for modifying cultural attitudes in order to facilitate assimilation of Indians into the non-Indian community. In fact, when objections were raised to proposed substantive requirements of non-establishment of religion and the Fifteenth Amendment prohibition on racial classificationiin voting, the Committee changed the bill to omit such requirements. See, 1965 Senate Hearings 18, 21, 221; 1966 Senate Comm. Print 9-11.

F O O T N O T E S

1/ 18 U. S. C. Section 1151.

2/ Suits by Indians against outsiders in state courts having already been sanctioned. See, Felix v. Patrick, 145 U. S. 317; United States v. Candalaria, 271 U. S. 432. See also, Harrison v. Laveen, 67 Ariz. 337, 196 P. 2d 456.

3/ Although patterned after Amendments to the U. S. Constitution, the Civil Rights Act amendments of 1968 differ significantly in that an Establishment clause is omitted, the tribal government is not required to provide free counsel to indigent criminal defendants, nor is the Fifteenth Amendment bar against racial classification for enfranchisement purposes made applicable to tribes. For a more complete discussion see, Note, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harvard L. Rev. 1343, 1359-1360 (1969).

4/ 358 U. S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

5/ Lynaugh, Developing Theories of State Jurisdiction Over Indians: The Dominance of the Preemption Analysis, 38 Mont. L. Rev. 63 (1977). Lynaugh asserts that the Montana courts have developed a theory of state jurisdiction by "default" utilizing the Williams "infringement" test. This might be conceptually possible in situations where C.F. R. courts exist, but in the main it appears that Kennerly v. District Court of the Ninth Judicial District of Montana, 400 U. S. 423 (1971), and cases following that decision, e.g., Blackwolf v. Distict Court, 493 P. 2d 1295 (Mont., 1971), Crow Tribe v. Deernose, 487 P. 2d 1153 (Mont., 1971), Annis v. Dewey County Bank, 335 F. Supp. 133 (D. S. Dak. 1971), would militate against such a result. See also, Martin v. Denver Juvenile Court, 495 P. 2d 1093 (Colo. 1972).

6/ 31 U. S. (6 Pet.) 515, 8 L. Ed. 483 (1832).

7/ 353 U. S. 217, at 222.

8/ at 451.

9/ 14 Fed. Cas. 353 (No. 7,720) (C. C. W. D. Ark. 1878).

10/ 5 Dillon 385, 390.

11/ John Phillip Reid, Conflict and Injustice: A Discussion of Francis Paul Prucha's "American Indian Policy in the Formative Years," 39 N. Dak. L. Rev. 50 (1963).

12/ 109 U. S. 556, 3 S. Ct. 396, 27 L. Ed. 1030 (1883).

13/ See, David C. Etheridge, "CFR Courts," NAICJA Long Range Planning Study, Boulder, Colorado (1977), at pp. 1-2. Etheridge also points out that the courts of Indian Offenses were not derived from any organic legislation of Congress but were created pursuant to promulgated agency rules following a memorandum from the Secretary of the Interior to then U. S. Commissioner Hiram Price (December 2, 1882). These courts received express Congressional sanction in terms of appropriations dating back to 1888 and were further strengthened by passage of the Snyder Act of 1921, 25 U. S. C. Section 13. According to Etheridge, the 1968 Civil Rights Act amendments appear " to require C. F. R. courts to accord defendants both the rights listed in [25 U. S. C.] Section 1302 and those found in the United States Constitution."

If CFR courts are actually federal courts then defendants probably have all the rights accorded to them by the U. S. Constitution. Indigent criminal defendants tried in federal court have a right to free appointed counsel even when they are charged with only petty offenses. Argersinger v. Hamlin, 407 U. S. 25 (1972). Such an interpretation would explain some implicit premises underlying the Court's decision in Colliflower v. Garland, 342 F. 2d 369 (9th Cir. 1965), and would also serve to limit the applicability of that holding.

14/ H. R. Rep. No. 474, 23 Cong., 1st Sess. 98 (1834).

15/ Santa Rosa Band of Indians v. Kings County, 532 F. 2d 655 (9th Cir. 1975).

16/ There is however dictum in a recent case, Rosebud Sioux Tribe v. Kneip, __U. S. __, 4 Ind. L. Reptr. A-46 (1977), which suggests that tribes which choose not to exercise jurisdiction over all persons within the exterior boundaries of Indian reservations --- even where such forebearance is based upon reliance on the federal government --- may be barred from asserting jurisdiction later where a state has exercised jurisdiction without challenge for a period of years (here, approximately seventy years). See, ___U. S. ___, at ____, n. 27.

17/ Approximately 6,000 acres of the Sisseton-Wahpeton Indian reservation extends into southeastern North Dakota as well, but the bulk of that reservation is located in South Dakota.

18/ One commentator has suggested that North Dakota is a state at odds with decisions from other states with regard to state jurisdiction on Indian lands, citing Fournier v. Roed, 161 N. W. 2d 458 (N. Dak. 1968), discussed in Monroe E. Price, Law and the American Indian: Readings, Notes and Cases, Contemporary Legal Education Series, (Bobbs-Merrill Company, Inc., Indianapolis, 1973), at pp. 67, 348. Fournier involved a state sheriff who served an arrest warrant upon an Indian within the Fort Totten Reservation. Another commentator, however, pointed out that by the act of May 31, 1946, ch. 279, 60 Stat. 229, the state of North Dakota was granted criminal jurisdiction over the Fort Totten reservation. See, Carole E. Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 U. C. L. A. Law Rev. 535 (1975).

19/ Query: Whether the Spotted Elk case is perhaps more appropriate today than when it was decided, some twenty years ago. See especially, discussion of Judge Vogel's dissenting opinion in Lohnes v. Cloud, infra, where possible 14th Amendment Equal Protection and Due Process issues were raised in this 1977 decision.

20/ Elk v. Wilkins, 112 U. S. 94 (1894) dealt with a similiar question in terms of the Fourteenth Amendment some ninety years earlier. There Justice Gray quoted at length from Judge Deady of the District Court for the District of Oregon, then went on to note:

> "[A]n Indian cannot make himself a citizen of the United States without the consent and cooperation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States but does not of itself make him one . . ."

21/ Reid, op. cit., at 11.

22/ The Associate Judge issuing the tribal court order, Thomas Ewing, ironically, is a non-Indian attorney and a judge for a state County Court of Increased Jurisdiction (Stark County). Judge Ewing was understandably chagrinned by the state action and, in the end, issued another tribal Court Order releasing the juvenile -- a minor in need of supervision -- back to the custody of her parents, there being no available tribal diversion programs. (Interview with Thom. Ewing, July, 1975). In re Julia W.

23/ See, Lynaugh article, supra. For a comparision in another area, see M. Frances Ayer, Civil Jurisdiction, Manual of Indian Law (American Indian Lawyer Training Project, Oakland, 1976), for a discussion of 18 U. S. C. Section 1154, the Congressional regulation of alcohol within Indian reservations.

In United States v. Mazurie, 419 U. S. 544 (1975), the Court affirmed the validity of a Congressional delegation of responsibility to Indian tribes to regulate the sale of liquor within Indian reservations by Indians and non-Indians alike.

This approach appears to be favored by Congress in other areas as well. For example, the Safe Drinking Water Act of December 16, 1974, as amended by the Safe Drinking Water Amendments of 1977, by express language exempts the Department of the Interior (in its capacity as trustee for Indian lands) and Indian tribes from compliance with state and local regulations promulgated for the protection of underground sources of water. Section 1421 (b) (1) (D) (ii) and Section 1447 (c) (1) and (2), 42 U. S. C. 300h, as amended. Clearly, where the Department of the Interior becomes remiss in protecting the purity of underground sources of drinking water it becomes the responsibility of tribes to assure sanitary sources of drinking water from underground sources for both Indian and non-Indian residents within reservation areas.

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APPENDIX 2

DISCUSSION MATERIALS PREPARED FOR PROJECT ADVISORY COMMITTEE

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