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NORTHERN CHEYENNE TRIBE V. ADSIT: ARE STATE JURISDICTIONAL DISCLAIMERS STILL THE INDIAN'S ASSURANCE OF FEDERAL JURISDICTION?

A. INTRODUCTION

In *Northern Cheyenne Tribe v. Adsit*,[1] the Ninth Circuit held that Montana's[2] failure to repeal disclaimers of jurisdiction over Indian lands contained in the state's constitution and enabling act barred it from assuming jurisdiction over these lands.[3] The lower court[4] had relied on the Supreme Court's decision in *Colorado River Water Conservation District v. United States*,[5] (commonly referred to as *Akin*),[6] to hold that the McCarran amendment[7] granted jurisdiction to state courts to determine water rights within their borders. Reversing, the Ninth Circuit held[8] that Montana's litigation did not involve factors establishing the exceptional circumstances[9] which would justify dismissal of a federal action in favor of state jurisdiction in a water rights

1. 668 F.2d 1080 (9th Cir.) (per Ferguson, J.; the other panel members were Choy, J. and Merrill, J., dissenting), *cert. granted*, 103 S. Ct. 50 (1982).

2. The *Adsit* case was consolidated with the following cases: San Carlos Apache Tribe v. State of Arizona, 668 F.2d 1093 (9th Cir.), *cert. granted*, 103 S. Ct. 50 (1982), and Navajo Nation v. United States, 668 F.2d 1100 (9th Cir.), *cert. granted*, 103 S. Ct. 50 (1982). The issue in all three cases was that of determining the proper forum for adjudication of the Indians' reserved water rights. The *Adsit* case originated in Montana; both the *San Carlos* and the *Navajo Nation* cases originated in Arizona.

3. 668 F.2d at 1087. The disclaimer provision is found at MONT. CONST. art. I. The enabling act was approved by Congress at 25 Stat. 676 (1889). For a discussion of the disclaimer, see *infra* note 37 and accompanying text.

4. Northern Cheyenne Tribe v. Tongue River Water Users, 484 F. Supp. 31 (D.C. Mont. 1979).

5. 424 U.S. 800 (1976).

6. *Colorado River Water Conservation District* was decided concurrently with Akin v. United States, 424 U.S. 800 (1976).

7. 43 U.S.C. § 666 (1976). See *infra* note 33 for text.

8. The Ninth Circuit first determined that *Akin* and the McCarran amendment did not act to repeal disclaimers of jurisdiction over Indian lands. Therefore, the court's entire discussion of the factors establishing the exceptional circumstances in *Akin* is dictum.

9. 668 F.2d at 1090. For a discussion of the exceptional circumstances, see *infra* note 44.

controversy. Furthermore, the court took the opportunity to apply a narrow interpretation of the exceptional circumstances factors established in *Akin*.[10] The Ninth Circuit's holding in *Adsit* is in direct conflict with the recent Tenth Circuit decision in *Jicarilla Apache Tribe v. United States*.[11]

B. Procedural Background

In 1975, the Indian tribes[12] sued in federal district court to adjudicate water rights[13] of Montana's Tongue River and Rosebud Creek.[14] Subsequently, the United States brought two suits[15] for the same purpose in its fiduciary capacity as trustee for the Indian tribes. The defendant state agency and individuals[16] then brought suit in state court for a determination of all existing rights to the Tongue River and Rosebud Creek. The district court consolidated the federal cases and stayed proceedings pending the outcome of the Supreme Court's decision in the factually similar *Akin* case. *Akin* was decided in 1976.

In May, 1979, Montana enacted a state water consolidation plan.[17] The district court found that the state litigation, coupled

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10. *See infra* note 44.

11. 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979).

12. The plaintiffs included the Northern Cheyenne tribe and several other reservation tribes.

13. The specific water rights issue was to determine the quantity that should be allocated to the Indians. In the landmark case of Winters v. United States, 207 U.S. 564 (1908), the Supreme Court held that there is an implied reservation of water sufficient to sustain the tribal existence. The exact quantity of water reserved was not determined by *Winters*. For a discussion of how the *Winters* rights allocations conflict with state water allocations, see *infra* notes 23-26 and accompanying text.

14. Jurisdiction was alleged under 28 U.S.C. § 1362 (1976), which provides: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

15. Jurisdiction was alleged under 28 U.S.C. § 1345 (1976) which provides that "[T]he district courts shall have original jurisdiction of all civil actions, or proceedings commenced by the United States, or by any agency or officer thereof . . . ." Traditionally, Indian water rights have been reserved in trust to the federal government. Winters v. United States, 207 U.S. 564 (1908). It is out of this trust relationship that the United States brought suit as a fiduciary for the Indians.

16. The defendants included the Montana Department of Natural Resources and other individuals and corporations who claimed water rights under differing legal theories. In all, there were nearly 9,000 defendants. *See* Northern Cheyenne Tribe v. Tongue River Water Users, 484 F. Supp. 31, 36 (D.C. Mont. 1979).

17. Mont. Code Ann. §§ 85-2-211—85-2-243 (1979). The enactment of this bill was undoubtedly an attempt to fall within the purview of *Akin*.

with the comprehensive water plan, was similar to and therefore controlled by *Akin*.[18] Thereafter, the district court determined that the factors in *Akin* favoring state jurisdiction were present in the *Adsit* case.[19] Consequently, the district court dismissed all pending federal actions as an exercise of "wise judicial administration"[20] as provided for by *Akin*.[21] Plaintiff Indian tribes and the United States appealed the finding of state jurisdiction.

C. Legal Background

Judicial doctrines to resolve jurisdictional questions over reservation Indians involve much complexity, contradiction, and ambiguity. Unraveling the complex jurisdictional issues presented in *Adsit* requires an analysis of state jurisdictional disclaimers, pertinent legislative enactments and related Supreme Court decisions. Furthermore, sensitive state interests[22] must be integrated into the judicial analysis.

Development of the Federal-State Relationship of Western Water Law

During the nineteenth century the arid West developed the doctrine of prior appropriation to govern water rights. The prior appropriation system favors users who first divert water for beneficial use, regardless of proximity to the stream.[23] In 1877, Congress passed the Desert Land Act,[24] making state law the exclu-

18. 484 F. Supp. at 36.

19. *Id.*

20. For a discussion of "wise judicial administration," see *infra* note 43.

21. 484 F. Supp. at 36.

22. There are several state interests which must be considered. First, recognition of federally reserved water rights restricts the exercise of state sovereignty and in some instances preempts provisions of state constitutions or statutes. Second, the rights interfere with efficient operation of the state prior appropriation system. This occurs because federally reserved water rights are withdrawn from public domain without consideration of prior use. This disruption of the state's water allocation scheme is particularly disturbing to the western states where water is scarce. The conflict arises since the states would like to manage water use to the benefit of their own citizens and to their economic advantage. For an excellent survey of the multi-faceted federal-state relationship in western water law, see 2 R. Clark, Waters and Water Rights §§ 100.1-107.3 (1967) [hereinafter R. Clark.]; Hosktyk, *Who Controls the Water? The Emerging Balance Among Federal, State, and Indian Jurisdictional Claims and its Impact on Energy Development in the Upper Colorado and Upper Missouri River Basins*, 18 Tulsa L.J. 1 (1982).

23. *See* R. Clark, *supra* note 22, at §§ 4.1-2.

24. Act of Mar. 3, 1877, ch. 107, 19 Stat. 377 (current version at 43 U.S.C. §§ 321-339 (1976)).

sive source for obtaining appropriate water rights on public lands.

Disputes often arise when the federal government and states disagree about the management of federally reserved water rights. In *Winters v. United States*,[25] the Supreme Court upheld federal claims to reserved water rights and tacitly acknowledged a continuing federal interest in unappropriated waters. This judicial vindication of federal claims has been a source of substantial frustration to the states since it interferes with the prior appropriation system.[26]

State Jurisdictional Disclaimers

In 1887, Montana was admitted to statehood on condition that it disclaim all rights and titles to jurisdiction over Indian land.[27] The disclaimer in the enabling act was reinforced by a disclaimer of jurisdiction in Montana's constitution.[28]

Originally, states with jurisdictional disclaimers were powerless to adjudicate claims involving any Indian rights or titles.[29] Recently, the trend has been to allow states greater authority in adjudicating Indian rights claims.[30] In *White Mountain Apache Tribe v. Arizona*, the Ninth Circuit held that a disclaimer state could impose fishing and hunting fees on non-Indians on a reservation.[31] The court reasoned that the state's interest in preserving wildlife living or migrating within the boundries of both the state and the reservation was sufficiently strong to override the

25. 207 U.S. 564 (1908). *Winters* involved reservation of non-navigable waters by withdrawal from the public domain for use as an Indian reservation. Specifically, the *Winters* Court found that when a reservation is created out of the public domain there is an implied reservation of water sufficient to sustain the tribal existence. *Id.* at 576.

26. *See supra* note 22.

27. Montana's enabling act provides that the state "disclaim all right and title to the unappropriated public lands . . . owned or held by any Indian or Indian tribes . . . ." 25 Stat. 676 (1889).

28. The constitutional disclaimer provides: "[A]ll lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the United States . . . ." MONT. CONST. art. I. The disclaimers were part of the treaty agreements negotiated between the United States and Indian tribes. By agreeing to discontinue fighting, the Indians were promised several parcels of land in newly admitted states.

29. *See* Worchester v. Georgia, 31 U.S. 515 (1832).

30. The trend allowing greater jurisdictional authority to the states is called the assimilationist trend. *See* Dellwo, *Recent Developments in the Northwest Regarding Indian Water Rights*, 20 NAT. RESOURCES J. 101 (1980) [hereinafter Dellwo].

31. 649 F.2d 1274, 1284 (9th Cir. 1981).

disclaimer.[32] Consequently, the Ninth Circuit's holding avoided any determination of reserved rights in a state with a jurisdictional disclaimer.

The McCarran Amendment and Public Law 83-280

Two pieces of federal legislation passed during the 1950's have worked together to enhance state jurisdictional powers over Indian affairs. In 1952, Congress enacted the McCarran amendment which granted state courts jurisdiction over the United States when litigation involved comprehensive adjudication of water rights and the United States was a necessary party.[33] The amendment resulted in extending the consent of the United States to be joined in litigation regarding water rights by waiving federal sovereign immunity in certain instances.[34] While the McCarran amendment did not specifically refer to Indian water rights or reservation land, it is applicable where the federal government litigates as trustee for Indian tribes.

A year after passage of the McCarran amendment, Public Law 83-280[35] (PL-280) was enacted, establishing the mechanism for transfering criminal and civil jurisdiction over Indian lands from the federal to state governments. Five states received a mandatory transfer of jurisdiction under PL-280.[36] All other states had the option to assume jurisdiction if they so elected. A

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32. An example of regulatory authority is a state's interest in conserving fish and game. This arises because a tribe cannot claim to "own" the fish and game on a reservation. Consequently, the state has a "special interest in regulating and preserving wildlife for the benefit of its citizens." 649 F.2d at 1283, citing Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 392 (1978).

33. 43 U.S.C. § 666 (1976). The pertinent portion of the McCarran Act states:

> (a) Consent is given to join the United States as a defendant in any suit (1) for adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necesary party to such suit.

34. *See supra* note 33.

35. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (now codified as amended in 28 U.S.C. § 18 (1976)).

36. Originally, the statute automatically transferred to five willing states, and offered to all others, civil and criminal jurisdiction over reservation Indians regardless of the Indians' preference for continued autonomy. The five states were: California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was added in 1958. Act of Aug. 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545 (1958).

1968 amendment to PL-280 imposed the requirement that the states obtain the consent of Indian tribes before exercising jurisdiction over Indian affairs.[37] The amendment also increased the difficulty for those states, like Montana, to repeal their jurisdictional disclaimers affecting Indian lands.

In *Washington v. Yakima Indian Nation,*[38] the Supreme Court held that states with disclaimers could validly assume jurisdiction so long as the state utilized the proper legislative repeals.[39] While *Yakima* made clear that a state constitutional amendment was not necessary to adopt PL-280 jurisdiction, it did not establish clear guidelines as to what constitutes a valid legislative repeal.

Although PL-280 makes no mention of water rights, it has operated, in conjunction with the McCarran amendment, to drastically decrease traditional federal protection over Indian water rights. Matters previously under either federal or tribal authority[40] have been opened to state jurisdiction.

Concurrent Jurisdiction Under the McCarran Amendment

In *United States v. District Court for Eagle County,*[41] the Supreme Court held that state jurisdiction is permissible in cases involving general adjudication of all rights of water users. The Court also held that the McCarran amendment's consent to jurisdiction includes reserved water rights claims.[42] Relying on *Eagle County,* the Court in *Akin* extended permissive state jurisdiction to encompass Indian reserved rights. The Court inter-

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37. 25 U.S.C. §§ 1322-26 (1976). Section 1326 provides:

> State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians . . . .

38. 439 U.S. 463 (1979).

39. What constitutes appropriate legislative repeals has been the focal point of considerable litigation, including the *Adsit* case. For an excellent historical overview of PL-280, see Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 U.C.L.A. L. REV. 535 (1975) [hereinafter Goldberg].

40. For a discussion of the federal-tribal-state role in Indian affairs and its current development, see Dellwo, *supra* note 30.

41. 401 U.S. 520 (1971).

42. *Id.* at 524.

preted the McCarran amendment to mean that jurisdiction over Indian water rests concurrently in the federal and state courts. Specifically, the Court held that considerations of "wise judicial administration"[43] justify dismissal of a federal suit. Several exceptional circumstances were listed that justify state adjudication of Indian water rights.[44] Furthermore, the Court held that in state comprehensive water plan litigation, states could join the United States as a party defendant.[45]

The Tenth Circuit's Application

Since *Akin* arose in Colorado, a state that did not disclaim jurisdiction over Indian rights or land in its constitution or enabling act, the *Akin* Court was not faced with determining the effect of jurisdictional disclaimers. The Tenth Circuit, however, faced this question in *Jicarilla Apache Tribe v. United States,*[46] and held that the presence of a disclaimer in the state's constitution or enabling act does not justify treating the state differently than a state without a disclaimer.

The Tenth Circuit was persuaded by the *Akin* rationale and previous Supreme Court decisions.[47] Particularly influential was *Organized Village of Kake v. Egan*[48] (*Kake*), which held that a disclaimer state could regulate the fishing of off-reservation Indians. The Tenth Circuit interpreted the holding in *Kake* to

43. *Akin*, 424 U.S. at 818. The principle of "wise judicial administration" relates to the determination that the *Akin* factors exist. If these factors do exist, the federal court must consent to state court adjudication.

44. *Id.* The exceptional circumstances present in *Akin* are commonly known as the "*Akin* factors." They include the following: (1) The state litigation involved a completed proceeding, while the federal proceedings were infantile; (2) The state proceeding was comprehensive, while the federal proceeding was piecemeal; (3) The state proceeding was initiated prior to the federal proceeding; (4) The federal proceeding was 300 miles from the district in question, therefore suggestive of a forum non conveniens; (5) The federal government was participating in state water rights proceedings in other parts of the state, indicating a potential conflict of interest.

45. The *Akin* Court rejected the argument advanced by the United States that the McCarran amendment granted consent to join the United States as a party defendant in a state court proceeding only if the water rights of the United States were acquired pursuant to state law. The Court held that the state court was dealing with an all-inclusive statute concerning "the adjudication of rights to the use of water of a river system" including those waters reserved by the United States for the use of the Indian reservations. 424 U.S. 800, 810, citing *Eagle County*, 401 U.S. 520, 524.

46. 601 F.2d 1116 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979).

47. *Id.*

48. 369 U.S. 60 (1962).

mean that disclaimers are limited to matters of a proprietary nature.[49] As a result, it held that the McCarran amendment authorizes a state, which disclaimed jurisdiction upon entering the Union, to assume jurisdiction over federally reserved Indian water rights.[50] The *Jicarilla* court's holding is consistent with the trend, particularly evident since *Akin,* of increasing state jurisdiction over Indian affairs.[51]

D. The Ninth Circuit Decision

The plaintiffs in *Adsit* argued that because of the disclaimers in Montana's constitution[52] and enabling act, the federal courts had exclusive jurisdiction over Indian water rights. They maintained that *Akin* was not controlling because it did not involve a state with jurisdictional disclaimers. Furthermore, the plaintiffs argued that since the disclaimers had not been repealed by Montana, state jurisdiction was barred.[53]

The defendants argued that jurisdictional disclaimers only preclude a state from adjudicating proprietary interests. They asserted that the Montana litigation involved water rights, and therefore the disclaimers did not bar the state from assuming jurisdiction. The defendants maintained that the exceptional circumstances[54] in *Akin* which overcame policies favoring federal adjudication of Indian water rights were also present in *Adsit.* Consequently, in the interest of "wise judicial administration,"[55] a comprehensive adjudication of all related water rights issues in state court was necessary.

1. *The Majority Opinion*

The Disclaimer Issue

Beginning its analysis with a discussion of jurisdictional disclaimers, the Ninth Circuit found that *Akin* was not controlling because Colorado, the state where *Akin* arose, did not have ju-

49. The Tenth Circuit held that a disclaimer state could assert jurisdiction over Indian lands as long as such interference did not "interfere with reservation self-government or impair a right granted or reserved by federal law." 610 F.2d at 1135.

50. *Id.*

51. *See* Dellwo, *supra* note 30.

52. *See supra* note 28.

53. 668 F.2d at 1083.

54. *See supra* note 44.

55. 424 U.S. at 818-19.

risdictional disclaimers.[56] Since Montana did have a valid jurisdictional disclaimer, the court focused on the enactment and repeal of the disclaimer.

The distinction between states with and without jurisdictional disclaimers was predicated on an analysis of the legislative intent underlying the passage of PL-280. The court found that PL-280 was enacted primarily to control "the problem of lawlessness on certain Indian reservations . . . [that lack] adequate tribal institutions for law enforcement."[57] With this in mind, the Ninth Circuit examined section 6 of PL-280 which states: "The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be."[58] This section imposes the requirement that a state take affirmative action before assuming jurisdiction over Indian affairs.[59]

Despite the apparent unambiguous language of section 6, Montana argued that amendment was not a prerequisite to the assumption of jurisdiction under PL-280 because Congress had delegated its regulatory authority in Indian country to the states when it passed the McCarran amendment.[60] The Ninth Circuit, however, found that the Supreme Court's decision of *Washington v. Yakima Indian Nation*[61] was controlling. In *Yakima,* the Court held that for a state to repeal its disclaimer of jurisdiction, the state must follow its usual procedural means of amending its constitution.[62]

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56. 668 F.2d at 1085.

57. *Id.* at 1084. *See* H. R. REP. No. 848, 83d Cong., 1st Sess. 5-6 (1953), *quoted in* Bryan v. Itasca County, 426 U.S. 373, 379-80 (1975).

58. 25 U.S.C. § 1324 (1976).

59. S. REP. No. 699, 83d Cong., 1st Sess. 5, 6-7 (1953) (including report on PL-280 by Department of Interior).

60. Montana argued that its disclaimers prohibit regulation, alienation, encumbrance, or taxation of Indian property held in trust by the United States, but no more; therefore, repeal is not necessary before the state can accept jurisdiction under PL-280. Alternatively, it noted that the disclaimers only require that Indian reservations "shall be and remain under the absolute jurisdiction and control of the United States." Since Congress can repeal PL-280 at will and return jurisdiction to itself, Montana claimed Indian lands are never outside the absolute control of Congress under the Act. *See* State *ex. rel.* McDonald v. District Court, 159 Mont. 156, 496 P.2d 78 (1972).

61. 439 U.S. 463 (1979).

62. *Id.* at 493.

In rejecting Montana's argument, the *Adsit* court held that the McCarran amendment "cannot be read to amend a state constitution disclaiming subject matter jurisdiction over such matters."[63] Furthermore, the Ninth Circuit held that the district court erred by failing to determine whether or not such a valid legislative repeal had been accomplished.[64] Because the *Adsit* court determined that the disclaimers had not been repealed, it did not examine the waiver of sovereign immunity provisions of the McCarran amendment or the *Akin* decision.[65]

Having determined that the existence of jurisdictional disclaimers was decisive, and distinguishing *Akin* on this basis, the Ninth Circuit chose not to follow the Tenth Circuit's reasoning in *Jicarilla*. Since *Jicarilla* did not recognize the distinction between states with disclaimers and those without, the Ninth Circuit disagreed with the *Jicarilla* court's application of *Kake*.[66]

The Ninth Circuit viewed the *Kake* and *White Mountain* cases as extensions of the state's judicial power to an area already effectively under state jurisdiction.[67] Even though both *Kake* and *White Mountain* dealt with states having jurisdictional disclaimers,[68] the Ninth Circuit opined that the regulatory rights involved in these cases fell "far short of the power to adjudicate a direct challenge to Indian water rights in and to the waters of streams."[69] Therefore, the effect of both cases on Indian rights was minimal and thus insufficient precedent to extend state jurisdiction over substantive property rights.

The Akin *Factors*

The Ninth Circuit found that even if the jurisdictional dis-

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63. 668 F.2d at 1085.

64. *Id.* at 1086.

65. *Id.* at 1085-86.

66. *See supra* text accompanying notes 46-51.

67. 668 F.2d at 1087.

68. *White Mountain* originated in Arizona, a state that disclaimed jurisdiction. *Kake*, originated in Alaska, a state that repealed its disclaimers in 1958. The state was, however, attempting to claim that it could regulate pursuant to the exception in PL-280 protecting hunting and fishing rights. The Court treated Alaska as if it still had a disclaimer by holding that Alaska did not need the exception in PL-280 to assert jurisdiction over the fishing area in question because Congress had never reserved the territory for the Indians. The scope of the disclaimer was thus irrelevant. For an excellent discussion of PL-280, see Goldberg, *supra* note 39.

69. 668 F.2d at 1087.

claimers had been repealed it would nonetheless be compelled to reverse the lower court.[70] In dictum, the court discussed the exceptional circumstance factors set forth in *Akin.*

The Ninth Circuit analyzed the exceptional circumstances and disposed of each under the facts of *Adsit:* (1) Colorado had an extensive ongoing water plan, whereas Montana's began four years after the federal suits were filed; (2) in *Akin,* the state proceeding was comprehensive while the federal proceeding was piecemeal; in *Adsit,* however, the federal proceeding was no more piecemeal than was the state's;[71] (3) in *Akin,* the state proceeding was initiated prior to the federal suit; in *Adsit* the federal proceeding was the predecessor;[72] and (4) in *Akin* the federal proceeding was 300 miles from the water district in question, whereas in *Adsit,* the factor of an inconvenient forum was not present.[73]

Finally, the Ninth Circuit expressed concern over the risk of creating a conflict of interest by requiring the United States to represent all of its diverse interests.[74] Specifically, the court's concern was that when Indian tribes are a necessary party to a state proceeding, and neither the federal government nor the tribal nation has consented to such a suit in state court, imposing state jurisdiction would violate the tribe's sovereign immunity.[75] The tribe could only protect its rights by intervening, at the expense of waiving its soveriegn immunity. The Ninth Circuit considered it inappropriate to place the tribe in such a "Hobson's choice."[76]

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70. *Id.*

71. 668 F.2d at 1088-89. The *Adsit* court stated that the district court never made any findings on the issue of comprehensiveness. It then pointed out that *Akin* stressed federal dismissal only when the federal proceeding is piecemeal and the state proceeding is comprehensive. Without this determination, the *Adsit* court determined that the federal court may not abdicate its judicial obligations. *Id.* at 1089.

72. The *Adsit* court stated that this factor was not determinative, however, as both proceedings were in their infancy. *Id.*

73. *Id.*

74. The diverse interests the United States may potentially have to protect include the national parks, national monuments, and reclamation projects. *See* Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The* Colorado River *Decision,* 30 STAN. L. REV. 1111 (1978).

75. 668 F.2d at 1090.

76. *Id.*

2. *The Dissenting Opinion*

The dissent adopted the Tenth Circuit's analysis in *Jicarilla,* finding that there was no proprietary claim made over Indian lands or water rights.[77] For the dissent, the sole question was whether the language "absolute jurisdiction and control of the United States"[78] as stated in Montana's constitution should be construed to mean "exclusive jurisdiction" of the federal courts over all suits involving Indian lands or property rights.[79]

The dissent relied on *Kake* for the proposition that "absolute" jurisdiction and control does not mean "exclusive" jurisdiction, thereby indicating that in certain instances there may be concurrent jurisdiction.[80] In addition, because personal jurisdiction was unobtainable over all the defendants,[81] the principles of "wise judicial administration," allowing the state to adjudicate the action, should be invoked.[82] This was particularly true in light of the fact that the rights of the Indians would first be determined in federal court, and the entire issue then relitigated in state court.

The dissent concluded by discussing the policy factors weighing in favor of state adjudication, emphasizing that water adjudication is primarily a local concern. Because of the scarcity of water in the western states,[83] it is important that each state distribute its water in an appropriate manner. Therefore, as long as Montana "gives recognition to Indian water rights and their establishment pursuant to federal law, [there is] . . . no good reason why Indians should not be joined with all other water users in the state in order to achieve a comprehensive state adjudication."[84]

E. SIGNIFICANCE

In *Adsit,* the Ninth Circuit expressly disagreed with the Tenth Circuit's decision in *Jicarilla* and held that a state's juris-

77. *Id.* at 1091.
78. *Id.*, quoting MONT. CONST. art. I.
79. *Id.* at 1091.
80. 369 U.S. 60, 71-72 (1962). *See supra* note 48 and accompanying text.
81. There were nearly 9,000 defendants in the *Adsit* case. *See supra* note 16.
82. 668 F.2d at 1092.
83. *See* R. CLARK, supra note 22.
84. 668 F.2d at 1092.

dictional disclaimers prohibits it from assuming jurisdiction over reserved Indian water rights. The Ninth Circuit determined that the McCarran amendment, which overrides federal immunity in comprehensive water adjudications, "cannot be read to amend a state constitution disclaiming subject matter jurisdiction"[85] over Indian affairs.

Having determined that the district court's ruling on the disclaimer issue was incorrect, the court could have remanded the case for a determination of whether Montana had validly repealed their disclaimer of jurisdiction.[86] Instead, it determined that the disclaimer had not been repealed. No further analysis was needed to reach a decision. However, the court used the *Adsit* case as a vehicle to discuss *Akin*'s special circumstance factors.

The Ninth Circuit's narrow interpretation of the *Akin* factors reflects its disapproval of diminishing federal jurisdiction over Indian water rights litigation. The court's underlying fear of accepting *Akin* as controlling authority lies in *Akin*'s potential for prohibiting Indians from ever fully litigating their rights in federal court. Each time a tribe sued in federal court, the state could join the United States as a party to obtain dismissal.[87]

The Ninth Circuit's concern over such a liberal interpretation of the McCarran amendment's grant of jurisdiction is well founded. As the *Adsit* case demonstrates, a state may attempt to prevent Indians from litigating in federal court by stalling long enough and enacting a comprehensive statute.[88] Clearly, *Akin* was predicated on allowing the state to adjudicate a water rights proceeding when the state had a comprehensive water plan.

85. *Id.* at 1085.

86. In *Adsit*'s companion case, San Carlos Apache Tribe v. State of Arizona, 668 F.2d 1093 (9th Cir.), *cert. granted*, 103 S. Ct. 50 (1982), the Ninth Circuit remanded the dispute to the district court to determine whether or not Arizona had properly asserted jurisdiction pursuant to PL-280. *Id.* at 1098.

87. 668 F.2d at 1090.

88. Montana's water consolidation plan did not take effect until 1979, four years after the Indians first brought suit in federal court. This delay in the enactment of the water plan suggests that Montana may have been forum shopping. When litigation arose that appeared to be unfavorable to the state's own interests, Montana formulated a water plan in an attempt to fall within the purview of *Akin* and thereby circumvent federal jurisdiction.

Akin was not intended to defeat federal jurisdiction when it appeared that the state's strong self-serving interests would be treated more favorably in state court.[89]

The Ninth Circuit's holding in *Adsit* is based on a reasoned application of legislative history, which supports its interpretation of state jurisdictional disclaimers and PL-280.[90] The court also carefully distinguished the *Kake* and *White Mountain* cases. *Jicarilla*'s reliance on the differences in proprietary and governmental functions seems to go "too far."[91] However, further judicial guidance is needed on how to categorize what is a legitimate governmental regulation. In many instances, Indian tribes continue to need the protection of sovereign immunity and federal jurisdiction. Without these shields, adjudication of their rights would too often be at the discretion of frequently biased state courts.[92]

Despite the majority's sound opinion, the dissent raises several valid points. The dissent's support of state jurisdiction focused on the complications of piecemeal adjudication inherent in instances of concurrent jurisdiction. This concern was considered to be the dispositive factor in the *Akin* decision. The dissent stressed the policy of water allocation as being a local concern deserving local adjudication.

However valid the desires to avoid piecemeal adjudication and to protect state's rights to allocate water may be, it can be strongly argued that federal reserved water rights should take precedent over legitimate state interests. The determination of Indian and other reserved rights should turn not on issues of diversion, but rather on Congress' original intent to reserve a certain amount of water to support federal and Indian lands.[93]

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89. *See supra* note 22 and accompanying text.

90. *See supra* note 59 and accompanying text.

91. 668 F.2d at 1087.

92. Under *Jicarilla*, states would be allowed to create comprehensive regulatory statutes for Indian affairs over which they wish to obtain jurisdiction. This suggests that the only restraint on the states would be the commerce clause of the United States Constitution.

The Indians' fear of unfair treatment stems from the economic advantage the states would gain if water rights were allocated more favorably to its citizens. *See supra* note 22 and accompanying text.

93. Winters v. United States, 207 U.S. 564 (1908). For a discussion of the *Winters* case, see *supra* note 25.

Consequently, if the litigation takes place in state court, there is still the need to have separate proceedings prior to the overall adjudication of water rights.[94] These proceedings would determine the amounts of reserved water to be allocated to the Indians. Virtually this same process of separate adjudication would be necessary in both the state and federal forum. In essence, federal court adjudication would be no more piecemeal than would state court adjudication.

F. Conclusion

The *Adsit* court's holding is an expression of the Ninth Circuit's dissatisfaction with diminishing federal jurisdiction over Indian affairs. The court also used the case to urge clarification of the issue by the Supreme Court.[95] At a minimum, *Adsit* assures Indians in Montana that their reserved water rights will be litigated in federal court. Optimally, however, the Ninth Circuit's plea for clarification will be answered either by the Supreme Court or Congress. If the Supreme Court or Congress does not heed this plea, the Ninth Circuit has left no doubt that it is limiting the expansion of state power over Indian rights.

*Mark R. Peterson**

REHNER v. RICE: STATE JURISDICTION OVER LIQUOR TRANSACTIONS IN INDIAN COUNTRY

A. Introduction

In *Rehner v. Rice*,[1] a consolidation of three cases involving Indian tribes in California and Washington, the Ninth Circuit held that Indian tribes have exclusive licensing and distribution jurisdiction over liquor transactions on Indian lands.[2] In the Cal-

94. Colorado River Water Conservation District v. United States, 424 U.S. 800, 824-25 (Stewart, J., dissenting).

95. The Supreme Court recently consolidated *Adsit*, *San Carlos*, and *Navajo Nation* and granted certiorari, 103 S. Ct. 50 (1982).

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1. 678 F.2d 1340 (9th Cir.) (en banc), *cert. granted*, 103 S. Ct. 291 (1982).

2. 678 F.2d at 1342.

ifornia case,[3] a federally licensed Indian trader was denied an exemption from a California law requiring a license for the sale of liquor.[4] In the two cases from Washington,[5] the state, seeking to enforce its liquor monopoly laws, seized liquor enroute to the Muckleshoot and Tulalip reservations.[6] The Ninth Circuit held that 18 U.S.C. section 1161 preempts state licensing and distribution jurisdiction over liquor transactions.[7] Washington, however, would not be precluded from seizing liquor if the district court on remand found the state sales tax valid.[8]

This note will examine the Ninth Circuit's use of traditional federal Indian preemption principles to limit state assertion of regulatory jurisdiction despite section 1161's requirement that liquor transactions be "in conformity with state law."[9] The question remains, however, whether federal preemption is sufficient to invalidate the state tax on liquor sales to non-tribal members in light of a recent Supreme Court decision validating a state sales tax on cigarettes sold on a reservation.[10]

B. Facts

The California Case: Rehner v. Rice

Eva Rehner, a federally licensed Indian trader, owned and operated a small general store on the Pala Reservation.[11] She

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3. Rehner v. Rice, No. 77-24094 (S.D. Cal. 1977).

4. 678 F.2d at 1342.

5. Muckleshoot Indian Tribe v. State of Washington, No. C78-783V (W.D. Wash. 1979), *reprinted in* 6 Indian L. Rep. (Am. Indian Law. Training Program) F-36 (1979) and Tulalip Indian Tribes v. State of Washington, No. 79-4404 (W.D. Wash. 1979).

6. 678 F.2d at 1342.

7. *Id.* at 1349.

8. *Id.*

9. 18 U.S.C. § 1161 (1976) provides:

> The provisions of sections 1154, 1156, 3133, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

10. Washington v. Confederate Tribes of the Colville Reservation, 447 U.S. 134 (1980).

11. 678 F.2d at 1342. Federal law requires that any person desiring to sell goods to Indians inside a reservation must secure federal approval. 25 U.S.C. § 262 (1976). Such

sought an exemption from a California law requiring a liquor license for the sale of intoxicants for off-premises consumption.[12] When the California Department of Alcoholic Beverage Control denied her request, she brought an action in federal district court for injunctive and declaratory relief.[13] The district court dismissed her case on the ground that she failed to state a claim and concluded she needed a state license.[14]

The Washington Cases: Muckleshoot Indian Tribe v. State of Washington *and* Tulalip Indian Tribes v. State of Washington

The Muckleshoot and Tulalip tribes passed ordinances pursuant to their authority under 18 U.S.C. section 1161 purporting to comprehensively and exclusively regulate the introduction, purchase, sale, licensing and taxation of liquor transactions within their respective boundaries.[15] While both ordinances allowed a grace period during which persons currently holding valid state licenses would be permitted to operate subject to application and approval of a license from the tribal government,[16]

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persons are subject to extensive federal regulation. 25 C.F.R. § 140 (1982).

12. CAL. BUS. & PROF. CODE 23394 (West Supp. 1982) provides: "An off-sale general license includes the privileges specified in Section 23393 and authorizes the sale, to consumers only and not for resale . . . of distilled spirits for consumption off the premises where sold."

13. CAL. BUS. & PROF. CODE § 23090 (West Supp. 1982) provides that all appeals from decisions of the Alcoholic Beverage Control Appeals Board be taken to the California Supreme Court or the Court of Appeals on a writ of review.

14. 678 F.2d at 1342.

15. The Muckleshoot Liquor Ordinance, 43 Fed. Reg. 26,616 (1978) states the purpose of providing for the exclusive purchase and sale of liquor through tribal enterprise as increasing the ability of the tribal government to control reservation liquor distribution and possession and to provide for an "important" source of revenue for the continued operation of the tribal government and delivery of tribal services. *Id.* at § 1(d). The ordinance specifically provides that any liquor transaction not in conformity with the ordinance would be subject to the federal Indian liquor laws. *Id.* at § 5. A Liquor Division was created which has general regulatory power to purchase liquor, fix prices and collect and levy taxes. *Id.* at § 7. The Muckleshoot Liquor Commission was created to control and manage all liquor sales and sales outlets. *Id.* at § 9. Finally, the ordinance provides that all tax revenues will be used for the reservation and tribal community with priority given to tribal courts and delivery of basic social services. *Id.* at § 10.

The Tulalip Liquor Ordinance No. 43, 42 Fed. Reg. 46,612 (1977) also provides for the exclusive tribal control of the introduction, purchase, sale and taxation of liquor transactions. The Tulalip Liquor Commission was granted power to enter into contracts, purchase liquor, manage sales, and collect and issue licenses, taxes, and fees. *Id.* at § 6. The Tulalip Liquor Store was created as the tribal outlet for sales. *Id.* at § 8. All revenue is to be remitted to the general fund of the Tulalip Tribes. *Id.* at § 7.

16. Muckleshoot Liquor Ordinance, *supra* note 15, at § 5; Tulalip Liquor Ordinance, *supra* note 15, at § 6. Both ordinances provide that Washington state substantive "stan-

neither the tribes nor their subordinates applied for a liquor license from the Washington State Liquor Control Board.

The State of Washington holds a monopoly over all liquor sales within state boundaries so that liquor must be sold through state authorized stores.[17] The revenue earned is distributed to local governments, but not to Indian tribal governments.[18] In 1978, the Liquor Control Board seized shipments of liquor enroute to the Muckleshoot and Tulalip reservations claiming that its liquor monopoly laws and the state sales taxes extended to reservation liquor transactions.[19]

The tribes brought actions in federal district court for injunctive relief, and Washington counterclaimed for injunctive and monetary relief.[20] The district court held that the tribes exercise exclusive regulatory jurisdicton over liquor transactions on Indian reservations, and enjoined the state from seizing liquor enroute to the reservations. The court then granted summary judgment in favor of the tribes on Washington's counterclaim.[21]

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dards" are applicable:

> Nothing herein contained shall be construed to supercede the substantive laws of the State of Washington effective within the exterior boundaries of the Tulalip Indian Reservaton and, where not inconsistent herewith, the substantive standards of the criminal laws of the State of Washington regarding sale, consumption and use of liquor shall apply.

Tulalip Ordinance No. 43, 42 Fed. Reg. 46,612 (1977).

17. WASH. REV. CODE § 66.32.010 (1974) provides: "Except as permitted by the board, no liquor shall be kept or had by any person within this state unless the package in which the liquor was contained had, while containing that liquor, been sealed with the official seal adopted by the board . . . ."

18. 678 F.2d at 1343.

19. The Muckleshoot and Tulalip tribes contracted with the Central Liquor Company, a federally licensed distributor located in Oklahoma City for the purchase of liquor. The liquor seized was enroute from Oklahoma City. *Id.* at 1342.

20. 678 F.2d at 1343.

21. Muckleshoot Indian Tribe v. Washington, No. C78-783V (W.D. Wash., 1979). Subsequent to this decision, the Washington Court of Appeals in Washington *ex rel.* Maleng v. Ankeen District Court, No. 10351-2-1 (Wash. Ct. App., May 5, 1982), *reprinted in* 9 INDIAN L. REP. (AM. INDIAN LAW TRAINING PROGRAM) 5062 (1982) upheld the conviction of persons who purchased and transported liquor outside the reservation in violation of WASH. REV. CODE § 66.44.160 (1974) which makes it illegal to possess liquor not sold through a government authorized store. The court noted that the *Muckleshoot* decision had only enjoined the state from seizing liquor enroute to the reservation, but it also pointed out that its decision was narrow in that defendants had not raised the issue of whether WASH. REV. CODE § 66.44.160 (1974) was in conflict with congressional plenary authority to regulate commerce among the Indian tribes pursuant to Art. I, § 8 of

C. BACKGROUND

Application of State Liquor Laws under 18 U.S.C. section 1161

The *Rehner* court was required to examine section 1161's provision that Indian liquor transactions be "in conformity both with the laws of the state in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction,"[22] to determine if Congress intended that state licensing and monopoly laws applied.

In 1953, Congress passed section 1161 to permit the introducton of liquor in Indian country.[23] Congress, early in its history, had enacted prohibitions against the introduction, sale, and possession of liquor in Indian country.[24] These prohibitions remained in effect twenty years after the twenty-first amendment[25] ended the prohibition era and repealed federal criminal penalties for the transportation and use of liquor within the states. Congress, with the enactment of section 1161, conditionally lifted these prohibitions.

The sparse legislative history of this law suggests that the primary intent of the legislation was to end what the Indians claimed was unfair discrimination.[26] Section 1161 allows a state or local municipality or Indian tribe, if either so desires, and by enactment of proper legislation or ordinance, to restrict the sales

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the United States Constitution. *See infra* note 33.

22. 18 U.S.C. § 1161 (1976). *See supra* note 9 for text.

23. Act of Aug. 15, 1953, Pub. L. No. 83-277, ch. 502 § 267, 67 Stat. 586 (1953) (current version at 18 U.S.C. § 1161 (1976)).

24. These prohibitions are now codified at 18 U.S.C. §§ 1154, 1156, 3113, and 3488 (1976). Since 1834 federal law had penalized both the introduction of liquor into Indian country and the operation of distilleries therein. Possession of liquor was made a separate offense in 1918. For a detailed history of congressional action over liquor transactions, see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 306-07 (1982).

25. U.S. CONST. amend. XXI, § 2 provides: "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

26. S. REP. No. 722, 83d Cong., 1st Sess., *reprinted in* 1953 U.S. CODE CONG. & AD. NEWS 2399, 2400. In the "Explanation to the Bill" contained in the report, it was noted that Indians had complained that it was unfair to legislate specifically against them, regardless of the merits of prohibition. Section 1161 was enacted at the same time as other legislation aimed specifically at ending certain discriminatory laws against Indians. *See* Letter from Orme Lewis, Asst. Secretary of the Interior, to the Chairman of the House Committee on Interior Insular Affairs (July 7, 1953), *reprinted in* 1953 U.S. CODE CONG. & AD. NEWS 2400.

of intoxicants to Indians.[27] Neither the Act nor its legislative history, however, gives insight into Congress' intent concerning enforcement jurisdiction and the applicability of state licensing and monopoly schemes.

Although the Interior Solicitor had indicated, in 1954, that an Indian desiring to operate a bar on a reservation would have to obtain a state license,[28] the Solicitor held officially in 1971[29] that the state of Montana did not have enforcement or licensing jurisdiction over Indians operating liquor establishments on a reservation.[30] Two federal courts have held that reservation Indians need not obtain a state liquor license to sell liquor within the reservation.[31]

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27. S. REP. No. 722, *supra* note 26, at 2400.

28. Letter from the Interior Solicitor to John W. Stilley of the Arizona State Legislature (March 26, 1954), *cited in* 2 OP. SOLICITOR 2026, 2029 (1974).

29. Memorandum from Interior Solicitor to Comm'r of Indian Affairs (Feb. 3, 1971), *reprinted in* 2 OP. SOLICITOR 2026 (1974).

30. The Chippewa Tribe passed an ordinance in conformity with section 1161 authorizing liquor on the reservation. The tribe then applied for a liquor license from the Montana Liquor Control Board but there were no licenses available under the Montana quota system. The Solicitor held that had Congress intended to impose state enforcement jurisdiction, it could have done so expressly. The Solicitor concluded that Congress intended that state law should be used as a "standard of measurement" to define lawful and unlawful activity on the reservation. Any act not in conformity with state law would invoke federal penalties which had been conditionally lifted by section 1161. *Id.* at 2027. The Solicitor noted that Justice Black, in dicta, in Warren Trading Post v. Arizona State Tax Commission, 380 U.S. 685, 687 n.3 (1965), referred to section 1161 as permitting application of state liquor law "standards." 2 OP. SOLICITOR at 2027 n.1. The Solicitor also held that the tribe had, as an attribute of its inherent sovereign power, the right to license a subordinate entity or tribal member to operate a liquor establishment on the reservation. The imposition of a state liquor license requirement on these entities would be an unlawful infringement of the reservation Indians' right to tribal self-government. *Id.* at 2028.

31. Zaste v. North Dakota, No. A1-75-29 (D.N.D., June 21, 1977), *reprinted in* 4 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) F-128 (1977). Plaintiff was an enrolled member of the Turtle Mountain Band of Chippewa Indians and possessed a license from the Turtle Mountain Tribal Council for on and off premises sale of liquor. The Turtle Mountain Tribal Council had enacted a comprehensive liquor control ordinance. The court in its conclusions of law found that Congress had exclusive authority to regulate liquor transactions within Indian country. That power was delegated to and exercised by the tribes through section 1161. The section did not constitute consent to the states requiring Indian retailers to obtain licenses to sell liquor within Indian country. As a result, the North Dakota code was in conflict with federal law and was inapplicable to Indian liquor retailers. *Id.* at F-128-29. The court held that the holder of a valid tribal license does not need a state liquor license.

On facts substantially similar to *Rehner*, the Tenth Circuit, in United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978), *cert. denied*, 444 U.S. 634 (1979), held that the state of New Mexico could not require a tribe to obtain a state liquor license in order to

In *United States v. Mazurie*,[32] the Supreme Court, examining section 1161 in the context of tribal licensing authority, held that Congress, through section 1161, had delegated a portion of its plenary power over Indian liquor transactions to the tribes.[33] The tribes, therefore, were empowered to require non-Indians operating a liquor establishment on the reservation to obtain a tribal license.[34] The Court never reached the issue of a state licensing requirement because the bar owners were non-Indians admittedly subject to state law and the tribes had by ordinance required that a state license also be obtained.[35]

There has been no federal court ruling with respect to state liquor monopoly laws. The Associate Solicitor, however, issued an opinion in 1976 which found that Idaho's liquor monopoly laws were not applicable under section 1161.[36] The Associate Solicitor stated that state substantive standards were applicable. Only the tribe had the sovereign authority to determine which class of persons were permitted to make sales and to whom state

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operate a bar on the reservation. The court held that the tribe had sole jurisdiction over tribal-owned liquor outlets. It concluded that section 1161 did not constitute consent for New Mexico to extend its regulatory jurisdiction over liquor transactions on the reservation. *Id.* at 329. The court also noted that the trial court found that due to state quota restrictions, the cost of a license would be $50,000 and would place a financial burden on the Tribe. *Id.* at 325.

32. 419 U.S. 544 (1975).

33. The Court noted that Article I, § 8 of the Constitution gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." 419 U.S. at 554. It also noted that the Court had repeatedly held that this clause affords Congress the power to prohibit or regulate the sale of alcoholic beverages to Indians, and to prohibit or regulate the introducton of alcoholic beverages into Indian country. *Id.*

34. *Id.* at 557. It was argued that Congress could not delegate its power to regulate liquor transactions to the tribes. The Supreme Court held that the tribes' independent authority and special status with the United States was sufficient to protect Congress' decision to vest in tribal councils a portion of its plenary authority to "regulate commerce . . . with Indian Tribes."

35. The bar owners argued that they were non-Indians operating a bar on privately owned land within the reservation and therefore came within an exception provided in federal liquor laws for "fee-patented lands in non-Indian communities." 18 U.S.C. § 1154(c) (1976). The bar owners argued that they were in such a community, or, in the alternative, that the exception was unconstitutionally vague. The Court rejected these arguments, finding that the language was sufficient to advise them that they were subject to Indian licensing requirements. The Court noted that Congress had always had the authority to define "Indian country" broadly and to supersede state jurisdiction within the defined area. 419 U.S. at 555.

36. Letter from the Assoc. Solicitor for Indian Affairs, Dep't of the Interior, to Chief Counsel, Bureau of Alcohol, Tobacco & Firearms, Dep't of the Treasury (January 22, 1976), *reprinted in* 4 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) i-1 (1976).

standards were to apply. The opinion pointed out that both licensing and monopoly laws have the effect of determining who will be allowed to engage in wholesale or retail sales on the reservation. This right, however, was vested in the tribes under section 1161.[37]

Preemption of State Laws by Federal Laws and Treaties Governing Indian Affairs

Outside of express grants of jurisdiction to the states, or in cases where statutes are ambiguous, the Supreme Court has had to decide each assertion of state power on a case-by-case basis. In its decisions, the Court has used either an infringement analysis or a preemption analysis to determine the applicability of state laws to Indians.

The infringement test, first enunciated in *Williams v. Lee*,[38] states that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[39]

The term "preemption" was first employed by the Supreme Court in *McClanahan v. Arizona Tax Commission*.[40] Its basic premise is that the federal purposes of Indian treaties and statutes are broadly preemptive of state law even in the absence of explicit language ousting state jurisdiction.[41] Thus, it has been stated that "the purpose of protecting tribal self-government preempts state laws which would otherwise govern the relations of Indians with one another, prescribe standards of criminal conduct and punishment, and impose regulations and taxes."[42]

The *McClanahan* Court articulated the doctrine as requiring a careful examination of all relevant statutes and treaties coupled with a recognition of traditional tribal sovereignty and a

37. *Id.* at i-2.
38. 358 U.S. 217 (1958).
39. *Id.* at 220.
40. 411 U.S. 164, 172 (1973).
41. For a detailed discussion comparing general federal preemption with preemption in Indian law, see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 270-79 (1982).
42. *Id.* at 275.

congressional policy of freeing Indians from state control.[43] If no preemption of state law is found from the language or the purposes of the statutes and treaties, the court must then balance the tribe's interests in self-government against legitimate state interests.[44] State laws may be enforced against non-Indians "up to the point where tribal self-government would be affected."[45]

The *McClanahan* Court developed several rules of construction to determine the scope of preemption. Preemption should give effect to the plenary and exclusive power of the federal government to regulate Indian affairs even against interference by the state.[46] State law will not apply to tribal Indians unless Congress has expressly provided that state law shall apply.[47] Ambiguities in the law will usually be resolved in favor of the tribes.[48] Determinations in favor of the Indians can be supported by a long standing policy of leaving Indians free from state control.[49] The fact that Congress has acted consistently on the assumption that states have no power to regulate the affairs of Indians on the reservation should be recognized.[50]

The *McClanahan* Court noted that the trend is toward a reliance on federal preemption to invalidate state law rather than toward Indian sovereignty.[51] Although the Court as recently as 1980 has stated that both federal preemption and infringement of tribal self-government are independent barriers to the assertion of state law,[52] it has only invalidated state law

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43. 411 U.S. 164, 174.

44. *Id.* at 171.

45. *Id.* at 179. It was argued that the state law at issue should be upheld because it did not actually infringe upon tribal self-government. The Court rejected this argument, stating that the *Williams* infringement test should be applied to the activities of non-Indians on the reservation. *Id.* at 140.

46. The Court later explained the *McClanahan* principles in Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976).

47. *Id.*, citing *McClanahan*, 411 U.S. at 168.

48. 411 U.S. at 174.

49. *Id.* at 169.

50. *Bryan*, 426 U.S. at 376 n.2.

51. 411 U.S. at 172.

52. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). The Court held that federal preemption and infringement of tribal self-government are independent barriers, either of which, "standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." *Id.* The Court noted, however, that the two tests are related in that "the right of tribal self-government is ultimately dependent on and subject to the broad power of Congress." *Id.*

where it found overriding federal activity in a given subject matter.[53]

State Taxation Cases

The Supreme Court clearly has relied on federal preemption principles to invalidate state tax schemes imposed on reservation activities. Where the subject matter is comprehensively regulated by federal law, the Court will generally invalidate the tax. The clearest example of such federal preemption was in *Warren Trading Post v. Arizona Tax Commission*,[54] where the Supreme court held that Arizona could not tax the gross receipts of a non-Indian trading post on the Navajo reservation.[55] The Court pointed out that Indian traders were federally licensed and subject to extensive federal regulation.[56] The Court therefore concluded that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."[57]

In *McClanahan v. Arizona State Tax Commission*,[58] the Court held that the state of Arizona could not impose an income tax on an Indian whose income was derived solely from the reservation, in the absence of express congressional authorization.[59] The Court stated, however, that when the state has a legitimate interest in regulating the affairs of non-Indians, that interest must be accomodated, at least to the point where Indian tribal self-government would be affected.[60]

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53. *Compare* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (invalidating a state motor carrier license and fuel use tax as preempted by extensive federal regulations over timber operations on Indian reservations) and Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 165 (1980) (invalidating state sales tax on the sale of farm equipment to an Indian Tribe as preempted by federal Indian trader statutes) *with* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) and Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980).

54. 380 U.S. 685 (1965).

55. *Id.* at 690.

56. *Id.*

57. *Id.*

58. 411 U.S. 164 (1973).

59. *Id.* at 171.

60. *Id.* at 179. The *McClanahan* Court distinguished situations involving Indians and non-Indians. Where state law affected Indians, careful scrutiny of the applicable statutes and treaties was required to determine if federal law preempted state law. It was argued in the court below that Arizona could impose its taxes because the tribe's right to self-government was unimpaired. The Court limited the *Williams* infringement test to situations involving non-Indians. In those cases, the states had a legitimate authority

Thus, in *Moe v. Confederated Salish & Kootenai Tribes,*[61] the Court validated a sales tax on the sale of cigarettes to non-Indians when the legal incidence of the tax fell on the non-Indian purchaser.[62] In *Moe,* the state of Montana attempted to impose personal property taxes on Indians and a cigarette vendor's license fee on tribal members selling cigarettes on the reservation. It also sought to require the tribe members to precollect a cigarette sales tax on all sales. The Court invalidated all taxes imposed directly on Indians, but validated the tax on sales to non-Indians.[63]

In *Washington v. Confederated Tribes of the Colville Reservation (Colville),*[64] the Court refused to distinguish *Moe* from a situation where the tribe was also imposing its own sales tax. The Court upheld the tribes' power to tax as a fundamental attribute of self-government.[65] Both the tribes and state, however, were free to impose their own tax schemes.[66] In dicta, the Court admitted that the tribes might preempt the state power to tax through a properly delegated federal power to do so, but such a delegation was not to be inferred by the mere approval by the federal government of the Indian tax ordinances.[67]

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over their citizens. The tribes had authority over their own citizens and also had an interest in asserting authority over non-Indians present within their territory. The Court concluded that the *Williams* test was designed to resolve the conflict in favor of the Indians by holding that the state could "protect its interest up to the point where tribal government would be affected." *Id.*

61. 425 U.S. 463 (1976).

62. *Id.* at 467-68.

63. *Id.* at 482. The Court's rationale was that the tax was paid by the consumer, who did not enjoy a tax immunity. The tribal smokeshop was merely precollecting the tax. The Court held this was a minimal burden justified by the state's interest in collecting its valid tax. *Id.*

64. 447 U.S. 134 (1980).

65. *Id.* at 152.

66. *Id.* at 158. The tribes argued that their involvement in the operation and taxation of cigarette sales should oust the state. The Court rejected this argument, stating that tribes, like all other state residents, are not exempt from state taxes on market goods. *Id.* at 155. The tribes also argued that a double taxation would result in a loss of revenue to the tribes. The Court held that Washington did not infringe on tribal self-government because the tax would deprive the tribes of revenue. *Id.* at 156.

Justice Brennan, in his dissenting opinion, argued that there was an infringement on tribal self-government. The dissent argued that there was an actual conflict of jurisdiction and sovereignty because the tax would inject state law into a transaction which the Indians had chosen to subject to their own laws. The tribes were forced to make a choice between exercising their right to tax (and losing revenues) and refraining from their right to tax in order to stay competitive. *Id.* at 173.

67. *Id.* at 156.

In two companion cases decided the same year, the dissenting judges in *Colville* were able to gather a majority to invalidate state taxes imposed on non-Indians doing business on the reservation. In *White Mountain Apache Tribe v. Bracker*,[68] the Court invalidated a state motor carrier tax imposed on a non-Indian contractor who cut timber on a reservation and transported it to an Indian sawmill. The Court found that the extensive federal regulations applying to timber operations in Indian country preempted the state tax.[69] Similarly, in *Central Machinery Co. v. Arizona State Tax Commission*,[70] the Court invalidated a state gross receipts tax imposed on a non-Indian business,[71] holding that extensive federal regulation over Indian trading preempted taxation on the sale of machinery to the tribe.[72]

D. The Ninth Circuit Decision

State Licensing and Distribution Jurisdiction over Indian Country Liquor Transactions

Washington and California argued that Congress had expressly delegated regulatory as well as substantive authority to the states through section 1161.[73] The Ninth Circuit began its analysis by setting out a basic preemption framework. The court noted that the federal government has a long history of legislation and control over Indian reservation liquor transactions.[74] In light of this history of pervasive control, the court found that there could be no ground for concluding that Congress had removed its "veil of preemption" unless section 1161 expressly au-

68. 448 U.S. 136 (1980).

69. *Id.* at 151. The Court noted that revenue from the timber operations is used to undertake a wide variety of measures to ensure the productivity of the forest, including reforestation, fire control, wildlife promotion, road improvement, safety inspections, and general policing of the forest. On the other hand, the state failed to show any legitimate regulatory interest or governmental function to be performed for those on whom the taxes fall. *Id.* at 150. Furthermore, the Court noted that there is a current federal policy of promoting tribal self-sufficiency and economic development. *Id.* at 143. The dissent argued that the taxes imposed did not substantially reduce tribal revenues and the majority had only *assumed* an interference with federal purpose. *Id.* at 159.

70. 448 U.S. 160 (1980).

71. *Id.* at 165.

72. *Id.* at 150-51.

73. *See supra* note 9 for text of 18 U.S.C. § 1161 (1976)

74. 678 F.2d at 1343.

thorized state jurisdiction.[75] The court then outlined its basic rules of construction according to the *McClanahan* guidelines.[76]

Washington and California pointed to the grammatical structure of section 1161, arguing that section 1161 requires liquor transactions to conform to state as well as tribal law.[77] The court rejected this argument, however, stating that Washington placed too much emphasis on the isolated phrase "laws of the state." If "laws of the state" implicitly permitted exclusive state licensing and distribution jurisdiction, then the grammatical logic of the statute would require the implicit inclusion of a similar jurisdictional component in the phrase "ordinance duly adopted by the tribe." This construction would lead to the "unlikely result that a licensing and distribution monopoly could vest in both the state and the tribes."[78] The court noted that grants of power to the state must be express, while tribal power over internal affairs is inherent and exists without a grant from Congress. The court concluded that it was more likely that Congress intended that the tribes have licensing and distribution power, not the states.[79]

The court then looked at the modifying clauses in section 1161.[80] The phrase modifying "laws of the state" contained no jurisdictional reference. On the other hand, "ordinance duly adopted by the tribe" was followed by the phrase "having jurisdiction over such area of Indian country." The court noted that Congress could have substituted the phrase "laws of the state having jurisdiction" and could have deleted any reference to tribal jurisdiction to achieve a clearer result had it intended to confer jurisdiction to the states. On this basis, the court concluded that Congress only intended that the state function as a source of law to be applied by the tribal government.[81]

In support of this construction, the court compared the language of section 1161 with the Termination Acts[82] and Public

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75. *Id.*
76. *Id. See supra* text accompanying notes 46-50.
77. *Id.* at 1344. *See supra* note 9 for text of the statute.
78. *Id.*
79. *Id.*
80. *Id.* at 1345.
81. *Id.*
82. 25 U.S.C. § 726 (1976) states:

Law 280,[83] which were passed concurrently. Both statutes illustrated that Congress knew how to employ precise language to transfer jurisdiction when it wished to use such language. The court also examined the Assimilative Crimes Act[84] and the Major Crimes Act,[85] both of which employ language similar to section 1161. Both intended that state substantive law be incorporated into federal law. Federal courts, however, retained jurisdiction over the crimes covered by the acts.[86]

The court concluded that section 1161 was at best ambiguous.[87] Since ambiguities should be interpreted in favor of the tribes,[88] the court determined that there was insufficient evidence to show that Congress intended section 1161 to confer regulatory or licensing jurisdiction over on-reservation liquor traffic to the states.[89]

> [A]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the Alabama and Coushatta Tribes of Texas or the members thereof, . . . and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

83. The most pervasive transfer of federal jurisdiction to the states was contained in Public Law 280 (codified at 28 U.S.C. §§ 1360(a), 1162(a) (1976)) which was enacted during a period where Congress' policy was to terminate federal jurisdiction over the tribes and to transfer responsibility to the states. The law granted civil and criminal jurisdiction to certain voluntary states and permitted other states to assume jurisdiction under certain conditions. In Bryan v. Itasca County, 426 U.S. 373 (1976), the Supreme Court held that Public Law 280 granted states jurisdiction over civil causes of action, that the primary intent of the law was to provide a judicial forum for disputes involving Indians, and that the law did not confer upon the states the right to extend their regulatory power over Indian reservations. *Id.* at 384.

84. The Assimilative Crimes Act, 18 U.S.C. § 13 (1976), provides that state substantive law be incorporated for prosecutions of offenses committed in federal jurisdictions. The statute reads in pertinent part:

> Whoever . . . is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

85. 18 U.S.C. § 1153 (1976). Under this Act, the federal courts have jurisdiction over certain crimes, but the laws of the state are incorporated for crimes (such as burglary and incest) for which there are no federal counterparts.

86. 678 F.2d at 1347.

87. *Id.* at 1348.

88. *Id. See McClanahan*, 411 U.S. at 174.

89. 678 F.2d at 1348.

The court finally noted that Congress did require that no tribal ordinance be effective unless it was certified by the Secretary of the Interior. This indicated that the regulatory authority of the tribes was to be safeguarded by federal supervision. Referring to the Supreme Court's analysis in *Warren Trading Post v. Arizona,* the court reasoned that it was "presented with a congressional scheme in which comprehensive tribal ordinances and Department of Interior certification procedures are 'in themselves sufficient to show that Congress has taken . . . business . . . so fully in hand that no room remains for state laws imposing additional burdens . . . .' "[90] These comprehensive schemes and regulations were evidence that section 1161 preempts state licensing and distribution jurisdicton.[91]

State Taxation of Liquor Sales to Non-tribal Members

Turning to the question of whether Washington could impose a sales tax on Indian liquor sales, the court noted that the federal district court had issued its injunction against further state seizures of liquor shipments without deciding the issue of state taxes.[92] On appeal, Washington argued that *Colville* permitted state taxation of retail sales to non-tribal members.[93]

The *Rehner* panel stated that *Colville* resolved two issues. First, state taxation of sales to non-tribal Indians was neither preempted by nor contrary to principles of tribal self-government. Second, a state's interest in enforcing its valid sales tax was sufficient to justify seizure of cigarette shipments traveling to the reservation if the tribes failed to comply with state collection procedures.[94] The *Rehner* court ruled that it was improper for the district court to have granted an injunction without having first determining the validity of the tax.[95] Since *Colville* had not been decided when the district court issued its decision, the decision would be reversed and remanded for a hearing on the validity of the tax.[96]

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90. *Id.* at 1349, quoting Warren Trading Post v. Arizona State Tax Comm'n, 380 U.S. 685, 689-91.

91. 678 F.2d at 1349.

92. *Id.*

93. 447 U.S. at 154-59.

94. 678 F.2d 1349-50.

95. *Id.* at 1349.

96. *Id.* The court noted that beyond reversing the district court's grant of perma-

The Dissent

Judge Goodwin in his dissenting opinion stated that the result reached by the majority was equitable.[97] He concluded, however, that the decision did not seem consistent with the text of the law or its legislative history.[98] The dissent argued that when the twenty-first amendment was passed, the regulatory interests of the states were protected. When Congress passed section 1161, it intended to give Indians parity with the rest of the nation, but did not intend to confer greater rights upon the Indians.[99] In monopoly states, Indians would have the freedom to buy and import liquor at free market prices whereas other citizens would have to purchase liquor at government prices in government stores.[100] He concluded that while the majority's policy favoring the Indians was correct, it was not supported by section 1161. Rather, it is Congress' task to change the law to conform with this policy.[101]

E. Analysis

The Ninth Circuit relied on a preemption analysis to find that Congress had not granted regulatory authority to the states through section 1161. The court reasoned that had Congress wished to grant licensing and distribution "jurisdiction" to the states, it could have expressly done so. While Washington and California simply argued that "state laws" include all state laws, both substantive and regulatory, the court, in a strained dissection of the statutory language, found that section 1161's reference to state law lacked a jurisdictional component. The court

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nent injunctive relief, it would not rule on the merits of the following questions: (1) whether Washington's sales tax on sales to non-tribal members, with or without credit given to tribal sales taxes, is preempted or violative of tribal self-government; or, (2) whether Washington may impose recordkeeping requirements upon the tribes pursuant to the valid state taxing power. *Id.* In Part III of its opinion, the court rejected the state's argument that the twenty-first amendment permits state liquor licensing on Indian reservations. *Id.* at 1350. In Part IV of the opinion, the court held that Washington's counterclaim was barred by the doctrine of sovereign immunity. Section 1161 did not subject the tribes to suits for declaratory or injunctive relief. The tribes, by suing for injunctive relief, did not waive their sovereign immunity and consent to suit. A state cannot compel a waiver of tribal sovereign immunity by simply seizing goods owned by the tribes. *Id.* at 1351-52.

97. *Id.* at 1352.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

concluded that given this ambiguity, it would find in favor of the tribes.

Basic to the court's analysis, however, was that the licensing and monopoly laws were "regulatory" rather than substantive. Washington contended that its liquor monopoly was a substantive standard of conduct designed to discourage liquor consumption. The court refused to address this issue because Washington had failed to raise it at trial. Therefore, the court gave no guidelines to resolve cases where a state asserts its power as a substantive standard of conduct.

It would have been helpful had the court distinguished between policy and devices to implement policy. Thus, while the states could formulate policy that governs the nature and extent of liquor transactions, the tribes would be vested with the authority to implement that policy. As devices to implement policy, licensing and monopoly laws would be attributes of Indian self-government.

By relying on a preemption analysis, the court did not have to reach the issue of infringement of tribal powers which is in itself a bar to the application of state law. The court found it unnecessary to determine whether inherent tribal sovereignty independently excludes state licensing and monopoly laws.[102] The Supreme Court in *White Mountain Apache Tribe v. Bracker* noted that the right of "tribal self-government is ultimately dependent on and subject to the broad power of Congress."[103] The Court had already ruled in *United States v. Mazurie* that Congress had delegated its plenary power of Indian country liquor transactions to the tribes.[104] Given the assertion of that power by the Muckleshoot and Tulalip tribes to regulate and tax liquor transactions,[105] a clear conflict between state and tribal interests existed. *McClanahan* could have been invoked to hold state law inapplicable because the "point where tribal interests are affected" had been reached. The Muckleshoot and Tulalip ordinances, moreover, expressly stated that only state substantive standards would apply. State assertions of regulatory laws would

102. 678 F.2d at 1352.
103. 448 U.S. at 143.
104. 419 U.S. at 554.
105. *See supra* note 15.

be in conflict with the tribes' express desire not to have those laws apply. Once the conflict appears, state law should defer to tribal law.

The Ninth Circuit may have had another motive in relying on preemption principles. In *White Mountain Apache Tribe*[106] and *Central Machinery Co.*,[107] the Supreme Court invalidated taxes on non-Indian businesses because they engaged in activities on the reservation which were heavily regulated by federal law. Moreover, the *Colville* Court, citing *United States v. Mazurie*,[108] admitted that a tribe may preempt a state's power to tax by a properly delegated power to do so. In *Mazurie*, the Court found that Congress had delegated a portion of its plenary power over Indian liquor transactions to the tribes.[109] By finding that Indian liquor transactions were subject to comprehensive tribal schemes and federal regulation which preempted intrusion by state licensing and distribution laws, the district court would be left with no choice but to make a similar finding with respect to state taxation.

Left unstated by most of the decisions on licensing and taxation are the financial consequences of a decision in favor of the tribes or states. Licensing and monopoly schemes, as well as taxation, serve as sources of revenues for the states. A finding in favor of the tribes might lead to a significant reduction of revenues to the states if the tribes were able to sell at lower than market prices. This was certainly the concern of the Supreme Court in *Moe* and *Colville*. On the other hand, a finding in favor of the state would, as the majority pointed out in *White Mountain*, deprive the Indian tribes of a valuable source of revenue and defeat Congress' policy of tribal self-determinaton and commercial development.[110]

While the Ninth Circuit did not explicitly weigh these underlying considerations, the result it reached is correct since, as the Court noted in *White Mountain*, "traditional notions of Indian self government are so deeply ingrained in our jurispru-

106. 448 U.S. at 150.
107. *Id.* at 165.
108. 447 U.S. at 156.
109. 419 U.S. at 554.
110. 448 U.S. at 143.

dence that they have provided an important 'backdrop' against which vague or ambiguous federal enactments must always be measured."[111]

*May Lee Tong**

OTHER DEVELOPMENTS IN INDIAN LAW

A. Sovereign Power to Impose Civil Regulations on Non-Indians within the Reservation

In *Cardin v. De La Cruz*,[1] the Ninth Circuit held that an Indian tribe had "inherent sovereign power" to impose its building, health and safety regulations over a non-Indian's business within the reservation.[2] In addition, the Ninth Circuit determined that jurisdiction to decide such an issue was clearly a federal question because the action was based on "federal common law."[3]

The district court had enjoined the tribe from enforcing its building, health and safety regulations against the plaintiff,[4] relying on the Supreme Court decision of *Oliphant v. Suquamish*.[5] In reversing, the Ninth Circuit disapproved of the lower court's broad reading of *Oliphant*.[6]

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111. *Id.*

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1. 671 F.2d 363 (9th Cir. 1982) (per Pregerson, J.; the other panel members were Poole, J. and Kellam, D.J., sitting by designation), *cert. denied*, 103 S. Ct. 293 (1982).

2. 671 F.2d at 364.

3. *Id.* at 365. The "federal common law" referred to results from principles not found in any "specific statute or treaty" and therefore falls within the federal-question jurisdiction of 28 U.S.C. § 1331 (1976). *Id. See also* Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972).

4. Plaintiff, a non-Indian, owns a grocery store within the Quinault Indian Reservation. The tribe met with him when he purchased the store to discuss measures to correct alleged dangerous and unsanitary conditions. The plaintiff failed to remedy the alleged defects before opening the store and the tribe obtained an injunction from the tribal court closing the store. The plaintiff filed this action in the district court to enjoin the tribe from regulating his business. 671 F.2d at 364-65.

5. 435 U.S. 191 (1978).

6. 671 F.2d at 365-66.

The plaintiff argued that: (1) the federal courts had jurisdiction pursuant to statute,[7] (2) tribal power to regulate non-Indians within the reservation was controlled by *Oliphant*, and, (3) regulation of non-Indians within the reservation could only be the result of a consensual relationship when the activity being regulated is one that has a "direct effect on the health or welfare of the tribe."[8] The defendants argued that jurisdiction of the matter fell within the inherent sovereign power of the tribe and that the recent Supreme Court decision, *Montana v. United States*,[9] was controlling.

In a brief decision, the Ninth Circuit upheld the tribe's power to enforce its regulations based upon the *Montana* guidelines. After citing a series of High Court cases in support of tribal sovereign powers,[10] the *Cardin* court held that the "[t]ribe's exercise of civil jurisdiction . . . belongs to both of the broad categories" defined in *Montana*.[11] In essence the appellate court was persuaded that the tribe was regulating an activity that "threatens or has some effect on . . . the health or welfare of the tribe."[12]

The Ninth Circuit emphasized that *Oliphant* concerned only the criminal jurisdiction of tribal courts, and had no effect on Indian civil or regulatory jurisdiction over non-Indians.[13] The panel stated that any other reading of *Oliphant* would "reduce to a nullity the Supreme Court's repeated assertions that Indian tribes retain attributes of sovereignty over their territory, not

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7. 28 U.S.C. § 1331 (Supp. 1982) provides in part that jurisdiction is granted to the district courts over "civil actions arising under the Constitution, laws, or treaties of the United States."

8. 671 F.2d at 366.

9. 450 U.S. 544, *reh'g denied*, 452 U.S. 911 (1981). The plaintiff also asserted that the General Allotment Act of 1887, ch. 119, 24 Stat. 388, had impliedly withdrawn tribal jurisdiction. This was rejected without much discussion by the *Cardin* court. 671 F.2d at 367 n.5, citing Buster v. Wright, 135 F. 947, 952 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599.

10. Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894 (1982) (tribal severance tax imposed on oil and gas extracted by non-Indians from leased reservation land); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (power to tax non-Indian purchasers of goods on reservation); Williams v. Lee, 358 U.S. 217 (1959) (exclusive jurisdiction of tribal courts over civil suits by a non-Indian against reservation arising out of transaction on reservation).

11. 671 F.2d at 366.

12. *Id.*, quoting *Montana*, *supra* note 9, at 566.

13. 671 F.2d at 365.

just their members."[14]

In dicta, the Ninth Circuit addressed the plaintiff's argument that a "consensual relationship" and "direct effect on . . . the health or welfare of the tribe" are necessary to regulate non-Indians within the reservation. The *Cardin* court found that because the regulation of plaintiff's business was " 'an exercise of legitimate sovereign authority,' it cannot be overturned because of [plaintiff's] non-consent."[15] However, the *Montana* guidelines, relied upon by the Ninth Circuit, define a legitimate sovereign power as one which results from the existence of a "consensual relationship."[16]

Apparently the Ninth Circuit was persuaded that a consensual relationship did in fact exist or was not relevant to the decision because the other criteria evidencing a "legitimate sovereign authority" were present.[17] In any event the panel rejected the argument that both criteria need be present simultaneously.

Thus, in the Ninth Circuit, Indian tribes retain the power to impose civil regulations on the activities of a non-Indian on fee lands within the reservation. This decision is a further step in the progression of cases giving tribes "civil and regulatory jurisdiction over non-Indians"[18] within tribal lands.

B. Implicit Recognition of Expanded Criminal Jurisdiction

In *United States v. Bowman*,[19] the Ninth Circuit held that an Indian charged with an enumerated crime under the Major Crimes Act of 1885[20] could be convicted of and sentenced to a lesser included offense.[21] Defendant, an Indian, was charged

14. *Id.* at 366.

15. 671 F.2d at 367. *See also* Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894 (1982).

16. 671 F.2d at 366.

17. *Id.* at 367. The other criterion found in the *Montana* decision is that the exercise of "civil authority . . . threatens or has some direct effect on the . . . health or welfare of the tribe." 450 U.S. 544, 566.

18. *See supra* text accompanying note 11.

19. 679 F.2d 798 (9th Cir. 1982) (per Schroeder, J.; the other panel members were Wallace, J., and Henderson, D.J., sitting by designation, dissenting) (rehearing and rehearing en banc denied, Aug. 13, 1982).

20. 18 U.S.C. § 1153 (1977).

21. The same result was reached in United States v. John, 587 F.2d 683 (5th Cir. 1979) and United States v. Felicia, 495 F.2d 353 (8th Cir.), *cert. denied*, 419 U.S. 849

with assault resulting in serious bodily injury, one of the crimes specifically enumerated in the Major Crimes Act.[22] At trial, defendant requested and received a jury instruction on the lesser included offense of assault by striking, beating or wounding.[23] The jury found the defendant guilty of the lesser offense whereupon he appealed, contending the court lacked jurisdiction to sentence him on any crime not enumerated in section 1153.[24]

The *Bowman* court affirmed the lower court's determination that jurisdiction was present. The Ninth Circuit relied on the Supreme Court's holding in *Keeble v. United States*[25] that an Indian defendant is entitled to an instruction for a lesser included offense.[26] The *Keeble* Court, however, did not reach the question of whether the trial court had the power to sentence the defendant on the lesser included offense.

In *Bowman,* the Ninth Circuit argued that the *Keeble* Court had implicitly decided the issue of jurisdiction and the lower court's power to sentence a defendant on the lesser offense. The trial court in *Keeble* did not give the requested instruction because it believed it had no jurisdiction to do so. Therefore, in reversing the trial court, the *Keeble* Court was implicitly holding that the jurisdiction to give the instruction was present and that the lower court had the power to sentence a defendant on such a charge.[27]

The *Bowman* court found that the Supreme Court's emphasis on the desire for "parity of treatment"[28] of all criminal defendants in federal courts was compelling even in light of the fear that the holding would extend the reach of the Major Crimes Act.[29] The Ninth Circuit referred to the possible abuses related

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(1974).

22. The Major Crimes Act specifically enumerates several of the more serious crimes that come within the exclusive jurisdiction of the United States. The Indians retain jurisdiction over the lesser offenses included within the enumerated crimes.

23. FED. R. CRIM. P. 31(c) provides: "The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

24. 679 F.2d at 799.

25. 412 U.S. 205 (1973).

26. *Id.* at 214.

27. 679 F.2d at 799.

28. *Id.* at 800.

29. *Id.*

to the inclusion of lesser offense instructions under section 1153: the overcharging of a defendant to gain a conviction on a lesser offense. However, the facts of *Bowman* did not present this issue. The *Bowman* court also cited dicta from *Keeble* to support its limited consideration of the mutuality question.[30] The majority in *Bowman* concluded by reluctantly adhering to the *Keeble* rule while noting the difficulty of reconciling the rule with the history of section 1153 and "the congressional intent to confer only limited jurisdiction."[31]

The dissent in *Bowman* stressed that the majority's reliance on *Keeble* was a departure from the established jurisdictional structure of Indian criminal law.[32] The dissent argued that *Keeble* was only a determination of "procedural rights to which Indian defendants are entitled in federal court."[33] More importantly, the result of the holding in *Bowman* would be to deprive "the tribal courts of exclusive jurisdiction by implication . . . ."[34] The essence of the dissent's objection was that exclusive tribal jurisdiction can be extinguished only by an act of Congress and not by implication.[35]

Bowman represents another inroad into the area of tribal jurisdiction. Most importantly, the route taken by the Ninth Circuit, the implicit recognition of expanded jurisdiction, is a shortcut clearly threatening the diminishing powers of tribal courts.

30. *Id.*, citing *Keeble*, 412 U.S. at 214 n.14. *See also* United States v. Whitaker, 447 F.2d 314, 321 (D.C. Cir. 1971).

31. 679 F.2d at 800.

32. *Id.* at 801.

33. *Id.*

34. *Id.* at 802.

35. *Id.* at 803.