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Richard E. Ransom
William G. Gilstrap

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INDIANS—CIVIL JURISDICTION IN NEW MEXICO—STATE, FEDERAL AND TRIBAL COURTS

RICHARD E. RANSOM and WILLIAM G. GILSTRAP*

1 INTRODUCTION

"Indian jurisdiction" has as its basis the anomaly of a separate but assimilated nation of people; rather than accepted Anglo-American principles of enforceable rights and duties attaching to recognized subject matters in controversy. For the purpose of this article, "Indian jurisdiction" will concern itself with those disputes in which Indians or Indian country are involved and to which a court addresses its power armed only with precedents of much confusion and debate.

Although jurisdiction may be exercised by tribal courts, the existence of jurisdiction in nontribal courts may affect whether disputes involving Indians or Indian country are to be adjudicated with the same results as in litigation of like issues between other citizens where neither Indians nor Indian country is involved. It has been said that "Indian law' embraces treaties, executive orders, statutes, judicial decisions, administrative regulations, and tribal custom more ancient than all of these." At issue in this article is whether ancient tribal customs and prevailing Indian practices govern those disputes to the exclusion of the general law of a state. Whether they should govern these disputes is beyond the scope of this article.

The scope of this article is further limited to an examination of existing civil court powers and related legislation, and no attempt is made to consider other governmental jurisdiction over Indian affairs. The binding effect of legislation and regulations purporting to govern Indians or conduct on Indian lands, or judicial disputes involving the same, are not germane to this discussion, although some examples may serve to illustrate court jurisdiction over the subject matter of

*Members of the New Mexico State Bar; practicing with the law firm of Smith, Ranson & Deaton in Albuquerque, N.M.

1. "Indian country" is defined in 18 U.S.C. § 1151 (1966) as:
   "(a) All the land within the limits of any Indian reservation under the jurisdiction of the United States Government . . .
   (b) All dependent Indian communities within the borders of the United States . . . and,
   (c) All Indian allotments, the Indian titles to which have not been extinguished . . . ."

such disputes, as with state regulation of fishing practices on Indian land, taxation and extradition.

Further caveats are in order: This article is not designed as a sociological probe into the reasons for the law as it now exists; and it is not intended to offer panaceas for solving problem areas that may be apparent.

II

HISTORICAL PERSPECTIVE

Prior to the appearance of the European on the North American continent, tribal units dealt with internal disputes according to the traditional custom of the tribe. Through conquest and subjugation, European powers confronted American Indian tribes with foreign law and custom, giving birth to "Indian jurisdiction".

Chief Justice Marshall, in the landmark Worcester v. Georgia decision, remarked upon the property rights and dominion over natives which early explorers acquired for the several governments to whom they belonged, or by whom they were commissioned: "[P]ower, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend."6

Court treatment of Indians and their tribes in the Colonial era is, unfortunately, not well-documented. When the Colonial States ratified the Constitution and created the United States, any rights retained through conquest were surrendered to the new government. The Commerce Clause provides that Congress shall have the power "To regulate Commerce with foreign Nations, and among these several states, and with the Indian Tribes"; and Article II deprives the states of treaty making powers. By the Tenth Amendment, powers not delegated to the United States are reserved to the states.

These Constitutional provisions were applied to the Indian jurisdiction question by Chief Justice Marshall in Worcester v. Georgia, and earlier in Cherokee Nation v. Georgia. Although Cherokee Nation case decided only whether the Cherokees could sue the State

3. For a general discussion of the sociological and psychological factors bearing upon the legal status of the Indian, see e.g., W. Brophy and S. Aberle, The Indian, America's Unfinished Business (1966); The Indian: The Forgotten American, 81 Harv. L. Rev. 1818 (1968).
5. Id.
6. Id., at 543.
7. See, however, Oliver, The Legal Status of American Indian Tribes, 38 Ore. L. Rev. 193, 197-198 (1959); Cohen, Handbook of Federal Indian Law, 383-384 (1942) which gives an account of the status of Pueblo Indians under Spanish and Mexican law.
of Georgia in federal court, it was used as a vehicle for a general discussion of the relationship between Indians and the federal government. Marshall concluded that it resembled that of a ward to his guardian.

In *Worcester*, Marshall was presented with the opportunity of directly deciding the question of state jurisdiction over Indian lands. Mr. Worcester, a white man residing within Cherokee lands, was prosecuted by the State of Georgia for violating a state law requiring procurement of a license from the State in order to inhabit the Indian region.

Marshall reversed the state court judgment against Mr. Worcester, concluding that the State of Georgia had no jurisdiction over him or his activities while on Indian lands. The Supreme Court had jurisdiction in the case, since the indictment and plea placed at issue the validity of treaties made by the United States with the Cherokee Tribe, and the resulting conflict with a state statute. The Chief Justice said:

> From the commencement of our government, Congress has passed Acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these Acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States. The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States. The act of the State of Georgia, in which the plaintiff in error was prosecuted, is, consequently void, and the judgment a nullity.\(^9\)

Chief Justice Marshall’s concept of exclusive federal power over Indian affairs and lands has been the cornerstone of subsequent decisions. From this base, Congress has legislated in what is considered an exclusive domain.\(^{10}\)


\(^{10}\) Most legislation pertaining to Indians has been codified in Title 25 of the United States Code.
In the area of state jurisdiction, Congress required certain states to disclaim jurisdiction over Indian land as a condition to statehood. Article XXI of the New Mexico Constitution (the Compact with the United States) adopting the Enabling Act for the State’s formation of a constitution and government, provides in section 2 that:

The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; and that the lands and other property belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein shall preclude this state from taxing as other lands and property are taxed, any lands and other property outside of an Indian reservation, owned or held by any Indian, save and except such lands as have been granted or confirmed to any Indian or Indians under any act of Congress; but all such lands shall be exempt from taxation by this state so long and to such extent as the Congress of the United States has prescribed or may hereafter prescribe.

In 1953, by Public Law 280 superseded in 1968 by the Civil Rights Act, Congress granted several states civil jurisdiction over causes of action arising in Indian country, and to which Indians would be parties, in the same manner that the states have jurisdiction over other civil causes of action. By section 7 of the Act, consent was given to other states, who were not specifically granted jurisdiction, the power to assume jurisdiction through the adoption of appropriate legislation. These two groups of states included those

11. Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah and Washington.
13. 28 U.S.C. § 1360: "The consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, oblige and bind the State to assumption thereof." This was repealed by Pub. L. No. 90-284, § 402(a) (April 11, 1968), 25 U.S.C. § 1322(a). 79 and replaced by Pub. L. No. 90-284, § 402 (a) (April 11, 1968), 25 U.S.C. § 1322(a). The replacement section in the 1968 Act differed
which had never disclaimed jurisdiction. For those states who had previously disclaimed jurisdiction over Indian country, Congress gave consent for them to amend existing constitutional or statutory provisions to remove any legal impediment to the assumption of civil jurisdiction.\textsuperscript{14} New Mexico has not passed legislation to effect the assumption of civil jurisdiction over Indian country.\textsuperscript{15}

III

**NEW MEXICO STATE COURTS**

The existence of Indian jurisdiction in New Mexico state courts is considered in relation to four separate aspects of litigation: (1) Issuance and Service of Process, (2) Infringement of Governmental Interests of the Tribe, (3) Fourteenth Amendment Equal Protection, and (4) Indian-Indian Country Relationships. The latter aspect has separate considerations as to (a) whether an Indian is suing or being sued by another Indian or non-Indian; and (b) whether the occurrence or transaction in question arose in Indian country and, if so, whether it involves an interest in land.

In one of the few decisions rendered on the subject of issuance and service of process, *Langford v. Monteith*,\textsuperscript{16} the United States Supreme Court held that, in a suit between two non-Indians involving title to real estate located on the Nez Perce Reservation in Idaho, a Justice of the Peace Court had no subject matter jurisdiction over the action. Regarding the power of a Court to issue process, the Court, in dicta, said.

...and where no such clause [excluding lands of the tribe from territorial or state jurisdiction] or language equivalent to it is found in a treaty with Indians within the exterior limits of Idaho, the lands held by them are a part of the Territory and subject to its juris-

\begin{footnotes}
\item[14] Section 6 of the Act of August 15, 1953 (67 Stat. 588), 28 U.S.C. \$ 1360, note (1964), which provided, "Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this Act: Provided, that the provisions of this Act 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." An identical provision was passed into law by \$ 404 of the Act of April 11, 1968, Pub. L. No. 90-284, 25 U.S.C. \$ 1324.
\item[15] The proposed New Mexico Constitution as adopted by the 1969 Constitutional Convention, in \$ 2 of Article VIII, the Compact with the United States, provided that by appropriate legislation the state could assume jurisdiction over Indian country with consent of the members of Indian tribes affected.
\item[16] 102 U.S. 145 (1880).
\end{footnotes}
diction, so that process may run there, however, the Indians them-
selves may be exempt from that jurisdiction.\textsuperscript{17}

The Supreme Court interpreted the Idaho disclaimer clause as pro-
hibiting exercise of state jurisdiction only if a treaty with the Indians
forbade assumption of state jurisdiction. The Idaho disclaimer has
been recognized as identical to that of New Mexico and others which
affirmatively preclude the state's assertion of right and title to lands
owned by Indians or Indian tribes, and recognize the "absolute"
jurisdiction and control of the United States over such lands.\textsuperscript{18}

The treaty between the United States and the Navajo Tribe, pro-
claimed on August 12, 1868,\textsuperscript{19} provided, in Article II, that no
persons other than authorized government personnel were to enter
on the Reservation. Arguably then, this treaty precludes issuance of
process by the state. More recent United States Supreme Court
opinions, however, do not allude to this strict criterion but rather
establish other tests for determining state jurisdiction.

In the often-cited case of \textit{Williams v. Lee},\textsuperscript{20} the United States
Supreme Court, in reversing a decision of the Arizona Supreme
Court, held that state courts of Arizona had no jurisdiction over a
civil action brought by a non-Indian licensed as a trader on the
Navajo Reservation against an Indian for merchandise sold on the
Reservation. Exercise of jurisdiction would "infringe on the right of
the Indians to govern themselves."\textsuperscript{21}

The Arizona Supreme Court had focused its attention on the
power of the state courts to issue process on the Navajo Reservation,
stating,

\begin{quote}
Our view is that if the subject matter of the litigation is one that the
state has jurisdiction to try and determine and the Federal Govern-
ment has not reserved sole and exclusive jurisdiction over the ter-
ritory involved, the state officers may enter such territory under the
state's sovereign authority and serve the necessary process to enable
it to exercise its legitimate jurisdiction.\textsuperscript{22}
\end{quote}

The Court determined that the Arizona disclaimer of right and
title applied to proprietary, not governmental interests, and, there-
fore, the State of Arizona had sovereignty over Indian territory if not
pre-empted by Congressional legislation—in effect, concurrent jur-
diction.

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} at 147.
\item \textsuperscript{18} \textit{Organized Village of Kake v. Egan}, 369 U.S. 60, 68 (1962).
\item \textsuperscript{19} 15 Stat. 667.
\item \textsuperscript{20} 358 U.S. 217 (1959).
\item \textsuperscript{21} \textit{Id.} at 223.
\item \textsuperscript{22} 319 P.2d 998, 1000, 83 Ariz. 241, (1958).
\end{itemize}
The United States Supreme Court, in reversing the state court judgment, did not specifically decide the process issue and instead fashioned the broad “infringement” test. This test implied, however, that despite state jurisdictional disclaimers or Public Law 280, the federal government does not have “exclusive” jurisdiction in the field. The Court did not rule that a state court could not issue process. A logical corollary to the Williams test is the assumption that if the exercise of jurisdiction would not infringe the rights of Indians to govern themselves, process could issue to a Reservation.

The United States Supreme Court has gone further in interpreting disclaimer clauses. In Organized Village of Kake v. Egan, a suit by non-treaty Alaskan Indians to enjoin the enforcement by the state of regulations affecting the use by off-Reservation Indians of fishing traps, the Court, in upholding the power of the state to so regulate, characterized the resulting federal jurisdiction as a consequence of state disclaimer:

Draper and Williams indicate that “absolute” federal jurisdiction is not invariably exclusive jurisdiction.

* * *

The disclaimer of right and title by the state was a disclaimer of proprietary rather than governmental interest.

The Kake and Williams decisions indicate the following:

(1) Federal jurisdiction over Indians is not exclusive;
(2) State disclaimer clauses preclude assertion, by the state, of proprietary interests;
(3) Failure of a state expressly to have assumed jurisdiction does not preclude later assumption of jurisdiction, if not pre-empted by Congress;
(4) A state may assert such jurisdiction if assertion does not infringe the right of Reservation Indians to be governed by themselves.

The New Mexico Supreme Court has recognized the foregoing principles in cases involving Indian jurisdictional disputes.

The 1962 case of Montoya v. Bolack involved an election contest in which the Reservation was held by the Supreme Court of New Mexico to be politically and governmentally part of the state. The Court referred to the Williams decision of the United States Supreme Court; and the test, “whether the state action infringed on the right of Reservation Indians to make their own laws and be ruled by them”, was deemed of particular consequence.

24. Id. at 68-69.
25. 70 N.M. 196, 372 P.2d 387.
From an extensive review of the subject by Justice Carmody, the New Mexico Supreme Court stated:

It is obvious that the Navajo Indian Reservation is not a completely separate entity existing outside of the political and governmental jurisdiction of the State of New Mexico. The state has some (and, we might say, considerable) jurisdiction, and there is not and never has been what might be termed "exclusive federal authority".26

In the following year, the New Mexico Supreme Court rendered its opinion in State v. Warner,27 which involved a charge of driving while intoxicated against a non-Indian for an offense which occurred on the Reservation. The New Mexico Constitutional disclaimer of right and title clause which had formed the basis of earlier decisions was stated by Justice Noble to be clearly a disclaimer of proprietary rather than governmental interest, and the Supreme Court reaffirmed the Williams test deemed of particular consequence in the case of Montoya v. Bolack.

Before deciding Montoya v. Bolack and State v. Warner, the New Mexico Supreme Court in 1961 had rendered an opinion in Valdez v. Johnson,28 in which the trial court had found as follows: (1) plaintiff and defendant were both residents of Isleta Pueblo; (2) that the subject automobile accident occurred on land of the Isleta Pueblo within an area embraced by Valencia County; (3) that the Pueblo Indians of New Mexico were under jurisdiction of the United States; (4) that the accident did not occur on land of the State of New Mexico; (5) that title to the land of the Isleta Pueblo was in the Indian Tribe and had never been extinguished.

The trial court concluded that the State of New Mexico lacked jurisdiction over Indian lands within the state and that no jurisdiction existed to try a civil dispute between two Indians living at the same Pueblo and arising out of an alleged civil wrong occurring at the Pueblo. The New Mexico Supreme Court affirmed the trial court's judgment of dismissal and specifically rejected the argument of appellant on appeal that the lands of the Pueblo Indians in New Mexico are "territorially" a part of the State of New Mexico for purposes of venue and residence in actions otherwise maintainable in New Mexico courts. In so holding, the New Mexico Supreme Court relied upon two earlier cases, Your Food Stores, Inc., v. Village of Espanola,29 and State v. Begay.30

26. Id. at 205, 372 P.2d at 394.
28. 68 N.M. 476, 362 P.2d 1004.
In the case of Your Food Stores, Inc., v. Village of Espanola, the New Mexico Supreme Court pointed to the heart of the decision as follows:

If the municipality was without jurisdiction to annex the Indian lands it is not a taxing authority with jurisdiction to levy such taxes within the Indian Lands.

The principal concern, however, in the instant case is not whether the property of non-Indians located on a reservation may be taxed either by the state or its political subdivisions, but, rather, whether the Pueblo lands may lawfully be annexed to and be made a part of a municipality theretofore lying outside the boundaries of such Indian lands. It is not the taxation of non-Indian property that would infringe upon the rights of the Indians to self-government, but that of making that portion of the Indian territory subject to legislative action by the municipality.

* * * *

The only question before us is the power of a municipality to extend its municipal limits to include Indian lands and to enforce the collection of a municipal sales tax limited by statute to the municipal boundaries. The right of the state to tax non-Indians or their property located within an Indian reservation is not before us and we do not decide it.\(^3\)

The second case relied upon by the New Mexico Supreme Court in Valdez v. Johnson, was that of State v. Begay, stating that:

In State v. Begay, supra, we held that where the authority under which the state was permitted to construct a highway over a Navajo Indian Reservation failed to extinguish title of the Navajo Indian Tribe to the lands in question and, in view of the fact that the state had no jurisdiction over Indian lands until title of the Indian had been extinguished, the state did not have jurisdiction over an Indian driving an automobile on a portion of the highway in the Navajo Reservation.\(^2\)

This reasoning contained in State v. Begay has been expressly overruled by the New Mexico Supreme Court.

In Paiz v. Hughes,\(^3\) an Indian sued a non-Indian for personal injuries and wrongful death resulting from an automobile collision occurring on the Reservation. The case was dismissed in District Court upon the ground that the Court lacked jurisdiction because the accident occurred on Indian lands, control to which had not been relinquished by the Congress of the United States. The Supreme Court of New Mexico reversed the District Court, stating that:

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31. 68 N.M. at 334-335, 336, 361 P.2d at 956-957.
32. 68 N.M. at 478, 362 P.2d at 1006.
33. 76 N.M. 562, 417 P.2d 51 (1966).

The second reason urged for holding a lack of jurisdiction in the state court is that the accident out of which the causes arise occurred within the territorial limits of an Indian Reservation, and in State v. Begay, . . . we held that the State of New Mexico lacks jurisdiction over acts of Indians on Indian lands. In the Begay case we held the state did not have jurisdiction over Indian lands, and consequently lacked criminal jurisdiction over an Indian for an offense committed on a public highway, where the underlying title to the lands over which the highway passed still remained in the Indians.

The decision in the Begay case was expressly overruled in State v. Warner, supra, insofar as the same conflicts with the opinions in the cases of Your Food Stores, Inc., (NSL) v. Village of Espanola, . . . and Montoya v. Bolack, supra. In the cases of Your Food Stores, Inc., (NSL) v. Village of Espanola, supra; Montoya v. Bolack, supra; State v. Warner, supra, and Batchelor v. Charley, supra, we quoted with approval from the opinion in the case of Williams v. Lee, supra. In that case it was held that the test of the validity of state action is whether such action interferes with the right of reservation Indians to make their own laws and be ruled by them. The test is not, as was suggested by the opinion in State v. Begay, supra, the exclusive jurisdiction of the Indians, or of the United States, over Indian reservation lands.

[5] In the case of Batchelor v. Charley, supra, we quoted from Cohen's Handbook of Federal Indian law at 379 as follows: "In matters not affecting either the Federal Government or the tribal relations an Indian has the same status to sue and be sued in state court as any other citizen."34

At this writing, it would not appear as though any rule has emerged to delineate the "governmental infringement" test. The test may be considered in relation to specific interests or activities of government as, for example: (1) Interest in Lands; (2) Sociological Fulfillment; (3) Governmental Activities; (4) Internal Sovereignty; and (5) Exercise of Sovereign Control. The latter consideration may arise from (a) Determined Exercise, through tribal law, adjudication, or executive action, or (b) Foreseeable Exercise.

In the cornerstone "governmental infringement" case of Williams v. Lee,35 title to and control of Indian land, as between the trader
and the Reservation Indian, was not in issue. Dealings between the parties and the contracted debt in question, however, did arise on Reservation land. The Supreme Court, following a thorough analysis of the specific facts and circumstances of the case, and the history of Indian jurisdiction law, concluded with the statement that "It is immaterial that [plaintiff trader] is not an Indian. He was on the Reservation and the transaction with the Indian took place there." Whether the governmental infringement test is to be defined by this general statement, on the one hand, or the specific facts and circumstances of the case, on the other, is a real basis of divergence in later opinions relying upon Williams. The specific facts lend themselves well to being considered as within either the "interest in land" criterion or the "exercise of control" criterion for determining governmental infringement.

The Williams case begins with a recitation of the fact that "[Plaintiff trader], who is not an Indian, operates a general store in Arizona on the Navajo Indian Reservation under a license required by federal statute." This fact is further footnoted to the effect that under federal law any person desiring to trade with the Indians on any Indian reservation shall establish that he is a proper person to engage in such trade and obtain a permit to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of the Indians. Control over the proprietary use of Indian land for a trading post can be said to have been in issue in the Williams case.

The Supreme Court case of Organized Village of Kake v. Egan, decided after Williams, recognized, at least for states who had disclaimed interest in Indian lands, that a state could not exercise proprietary control over Indian lands. Consistent with this view, Your Food Stores, Inc., v. Village of Espanola indicates that state court jurisdiction cannot be exercised when the control and use of Indian lands is at issue. Many courts have gone beyond this limited

36. Id. at 223.
37. Id. at 217.
38. "Exercise of control" is likewise emphasized in the recited facts. Further, the Supreme Court points out that Congress and the Bureau of Indian Affairs assisted in strengthening the Navajo Tribal government and its courts.
41. See also Hot Oil Service, Inc. v. Hall, 366 F.2d 295 (9th Cir. 1966) (lease of Reservation land); United States v. Blackfeet Tribal Court, 244 F.Supp. 474 (D.C. Mont. 1965) (lease of Reservation land).
view of the importance of Indian lands to the basis of decision. The reasoning of these cases indicates that the presence of the transaction or occurrence complained of on Indian land is determinative. As a corollary, it has been recognized that a state court will have jurisdiction of a suit against an Indian if the cause of action did not arise on nor the defendant reside in Indian country. Since an Indian, as plaintiff, may bring suit in a state court, it would seem that an action by one Indian against another would be entertained by a state court if the transaction or occurrence complained of does not arise on a reservation and the defendant does not live there. But when the question of title to and control over Indian land is not directly in issue, reliance by courts on the Indian land criterion may be misplaced in the light of other considerations which may more fully explain the "governmental infringement" concept.

There may be a legitimate tribal interest in advancing unique American Indian sociological fulfillment under ancient tribal customs and mores, uninfringed by Anglo-American concepts of civil rights and duties. If so, such would appear to be only of academic or sentimental interest to the non-Indian. This criterion for determination of government interests, unrelated to established tribal ordinance or other police power activity, does not appear to be the basis of any Indian jurisdiction decision which has been rendered to date.

A workable criterion for determining government interests which

42. See, e.g., Sigana v. Bailey, Minn. 164 N.W.2d 886 (1969) (automobile collision occurring on state highway within Red Lake Indian Reservation where all parties were residents of the reservation); Kain v. Wilson, S.D. 161 N.W.2d 704 (1968) (action by non-Indian owner of land within the exterior boundaries of a reservation, against an Indian for wrongful use of the land); Smith v. Temple, S.D., 152 N.W.2d 547 (1967) (action by one Indian against others for injuries suffered in automobile collision with train on Reservation).

In Vermillion v. Spotted Elk, N.D., 85 N.W.2d 432 (1957), one Reservation Indian brought an action against another arising out of an automobile collision occurring on the Reservation. The North Dakota Court, in upholding jurisdiction, held that the intent of Congress in requiring a state to disclaim interest over Indian land was not to reserve jurisdiction over the civil rights of Indians but only over rights that directly emanated from the Indian lands themselves. The South Dakota Court, in Smith v. Temple, viewed Williams v. Lee as eclipsing Vermillion and said that, in Vermillion, the North Dakota Court had considered the Enabling Act disclaimer as one over Indian land only and not of general jurisdiction over the Reservation. The application of Vermillion has been reversed by statute in North Dakota by a 1958 Act that provides jurisdiction over Indian tribes only if the Indians consent to jurisdiction. In matter of White Shield, N.D., 124 N.W.2d 694 (1963).

45. See, e.g., Native American Church of North America v. The Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (Navajo Tribal Ordinance prohibiting the use of peyote).
may not be infringed could be those governmental functions recognized as falling within the police powers, which may be said to include the powers of the tribal government to make, adjudicate, and execute policies to protect the health, safety, and general welfare of the tribe. This should exclude "proprietary" functions for which Anglo-American common law has come to recognize no governmental immunity. But if the "governmental infringement" test is to be ruled by such a criterion, it would seem to dictate that jurisdiction was erroneously exercised in Paiz v. Hughes,⁴⁶ a case involving the operation of motor vehicles on the reservation, an activity highly charged with police power interests.

The phrase "internal sovereignty" may be the key to determining what governmental functions of the tribe may not be infringed. In Native American Church of North America v. Navajo Tribal Council,⁴⁷ an action was brought in the United States District Court for the District of New Mexico by the Native American Church of North America and others against the Navajo Tribal Council to enjoin the enforcement of an anti-peyote ordinance adopted by the Council. Exercise of jurisdiction was denied on the alternative ground⁴⁸ that the subject matter was one of internal affairs of the Navajo Tribe. "Internal affairs" was stated to include police powers and ordinances passed for the purposes of regulating the conduct of the members of the tribe on the reservation.⁴⁹

"Internal affairs" is a term which would aptly describe a matter recognized only by tribal custom and law, such as, for example, a dispute over ancient religious practices, regardless of whether sovereign control of the tribe had been exercised. The ordinance in Native American Church of North America gives to that opinion a dimension which lends itself to analysis under the fifth criterion for determining infringement of governmental interests.

In the New Mexico case of Legah v. The Navajo Tribe,⁵⁰ the defendants' motion attacking jurisdiction was denied by the District

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⁴⁶. 76 N.M. 562, 417 P.2d 51 (1966).
⁴⁷. 272 F.2d 131 (10th Cir. 1959).
⁴⁸. Jurisdiction was also denied on the ground that the plaintiffs had failed to show a federal question.
⁴⁹. In Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957), cert. den., 356 U.S. 960 (1958), where an Indian tribal member brought suit against the tribal government, it was held that the Indian tribe had complete authority to determine tribal membership, subject only to supervision and control of the federal government. See also the second Martinez case, 273 F.2d 731 (10th Cir. 1959) which presented similar questions to the first case and in which jurisdiction of the federal court was declined. In addition, see, Motah v. United States, 402 F.2d 1 (10th Cir. 1968) (tribal elections).
⁵⁰. Unreported (settled), No. A 20782, Second Judicial District Court for Bernalillo County (filed July, 1966).
Court where a member of the Navajo Tribe had brought suit against the Tribe for personal injury damages claimed to have been proximately caused by the negligence of the Tribe in the construction of certain housing which exploded when gas leaked from an abandoned uncapped gas line leading from under a house to a street main. The Tribe specifically waived its governmental immunity. Thus, an Indian was suing another Indian for a tort occurring on the Reservation, but there was no ordinance involved such as in \textit{Native American Church of North America.}

The plaintiff in \textit{Legah} advanced two theories in support of the Court's jurisdiction. The first involved absence of sovereign control by the tribal government with respect to wrongs which are the subject of transitory tort cases unrelated to any proprietary interest in land. At the time of filing of the suit, wrongful death, automobile collision, and products liability cases were not known to have actually come to a decision in the Tribal Courts. But since the filing of such cases had just recently been permitted, foreseeable exercise of subject matter control could be inferred.

As a second theory in support of state court jurisdiction, the plaintiff argued that the equal protection clause of the Fourteenth Amendment required state courts to exercise jurisdiction over the subject matter of the action because, as American citizens and citizens of New Mexico, Indians should have access to the state courts as would any other citizen. As a corollary to this argument, it was pointed out that the very separateness of tribal courts would make them unequal to state courts and, under traditional concepts of due process, the action would be adjudicated differently in state court than in tribal court.

\begin{itemize}
  \item 51. It has been recognized that tribal governments enjoy the same immunity as other sovereign political entities. Haile v. Saunooke, 246 F.2d 293 (4th Cir. 1957); Morgan v. Colorado River Indian Tribe, 7 Ariz. App. 92, 436 P.2d 484 (1968).
  \item 52. 272 F.2d 131 (10th cir. 1959).
  \item 53. Deposition statement in \textit{Legah} of Mr. Chief Justice Murray Lincoln, who at that time, June 21, 1968, had for 8 years been Chief Justice of the Courts of the Navajo Tribe, and who, prior to becoming Chief Justice, had sat as a trial court judge of the Navajo Tribe.
  \item 54. \textit{In Re Gault}, 387 U.S. 1 (1967), the Supreme Court ruled that the same Constitutional rights enjoyed by adult defendants in criminal prosecutions applied to juveniles. The clear implication of the holding is that Constitutional guarantees apply to all persons; Truax v. Corrigan, 257 U.S. 12 (1921) (access to state court).
  \item 55. See Brown v. Board of Education, 347 U.S. 483 (1954), where it was stated that "separate educational facilities are inherently unequal". 347 U.S. at 495.
  \item 56. In the making of a record for appeal of the \textit{Legah} jurisdictional decision, in advance of settlement, Mr. Chief Justice Lincoln was deposed at length regarding the presence and absence of tribal court practices which would bear upon the question of due process, in the Constitutional sense, present in tribal courts (see supra note 53). Because no written memorandum decision was filed in \textit{Legah}, it is not known whether the trial court ruled in favor of State Court jurisdiction because the Tribe had not exercised
\end{itemize}
State court denial of equal protection to its Indian citizens was the basis of state court assumption of jurisdiction in the earlier Colorado case of *Martinez v. Southern Ute Tribe*, in which an Indian sought damages from her tribe for wrongfully denying her membership to and benefits of membership in the tribe. The Court noted the plaintiff's unsuccessful efforts to adjudicate her claims in the federal courts and concluded:

"Thus it is seen that plaintiff, having sought and been denied relief in the Federal courts will be without a remedy of any kind if the state courts also decline to hear her grievance, and the State of Colorado will have denied her the qual protection of its laws in violation of the Fourteenth Amendment."  

The Colorado Court's holding would appear to be limited to situations where an Indian litigant would not have access to other courts for the adjudication of his dispute. The Court based its Constitutional conclusion on the basis of the plaintiff's inability to have her dispute litigated in he federal courts. Also, the Court distinguished the earlier Colorado case of *Whyte v. District Court*, where a tribal court was held to have exclusive jurisdiction over a divorce action between two Indians, on the grounds that, in that case, the action could be litigated in a tribal court, whereas, in *Martinez*, there was no showing of any court to which the plaintiff could bring suit other than the state courts.

As contrasted with the basis of decision in *Martinez*, the plaintiff in *Legah* had argued that a state's denial to its Indian citizens of access to the courts of the state, in a suit capable of adjudication in a tribal court, would violate the Fourteenth Amendment.

The case of *Tenorio v. Tenorio*, may be instructive on the effect of the exercise of control of a subject matter by a sovereign government, or its failure to do so. On the basis of an extensive review of the law, the Supreme Court of New Mexico concluded that, "It seems to be generally held that where the federal government has failed to take action relative to rights of tribal Indians to litigate questions between themselves, the federal court will not assume jurisdiction and state jurisdiction is recognized."  

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57. 150 Colo. 504, 374 P.2d 691 (1962).
58. *Id.* at 506, 374 P.2d at 694.
60. 44 N.M. 89, 98 P.2d 838 (1940).
61. *Id.* at 102, 98 P.2d at 846.
Another way of applying the same conclusion is to state that the "government infringement" test may be applied to preclude jurisdiction in non-tribal courts only with respect to a subject matter about which the federal government has not spoken. If Congress has legislated on a subject, it has exercised its sovereignty, and the government interest of the tribe ceases in terms of "Indian jurisdiction". On the other hand, in the absence of federal preemption, exercise of sovereign control by a tribal government may preclude state jurisdiction. \(^6\)

_Tenorio_ concerned a divorce sought by one Indian from another Indian, a question of litigation in which the federal government has not spoken. Further, it is a subject about which the Pueblo Indian government in question had not exercised sovereign control. The opinion points out that "it is not asserted either in pleading or proof that Pueblo customs and law provide a remedy in divorce". \(^6\) Pueblo Indians are not Treaty Indians, and the Supreme Court consequently did not reach the question as to whether exercise of jurisdiction is to be different for non-treaty Indians than for Treaty Indians. The later New Mexico cases discussed earlier in this article would indicate, however, that such distinction would not be decisive.

A state court, of course, may have concurrent jurisdiction over the subject matter to which Congress has addressed itself, \(^6\) as with the Civil Rights Act of 1968 \(^6\) which applied Constitutional freedoms and guarantees to tribal government activity. For example, in _Dodge v. Nakai_, \(^6\) where the plaintiffs relied on the 1968 Act for the exercise of federal court jurisdiction over an action against an Indian defendant involving a transaction or occurrence arising on the Navajo Reservation, it would seem that such action could as well have been brought in state court.

It may be, then, that exclusive Indian jurisdiction exists when an action involves a proprietary interest in Indian land; or when an Indian sues another Indian on a claim for relief recognized only by tribal custom and law; or, subject to the Fourteenth Amendment argument, when an Indian is suing or being sued by another Indian or non-Indian over an occurrence or transaction arising in Indian country about which the Tribe does, or foreseeably will, in the exercise of its police power, assume sovereign control through tribal law, court, or executive action.

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62. See, e.g., State v. Turtle, 413 F.2d 683 (9th Cir. 1969) (Extradition).
63. _Id._ at 103-104, 98 P.2d at 847.
64. _Claffin v. Houseman_, 93 U.S. 130 (1876).
IV

FEDERAL COURTS

An Indian is to be treated like any other litigant in federal court. Federal question, diversity and special jurisdictional tests must first be satisfied for a federal court to have jurisdiction in an Indian or Indian country-related dispute except where Congress, in the exercise of its superintending control over Indian affairs, has provided jurisdiction over special subjects of Indian concern.

Chief Justice Marshall’s characterization of the Indian as a “ward” of the federal government and an Indian tribe as a separate “sovereign nation” has led to anomalous treatment of the Indian and his tribe in the federal courts. An Indian tribe is not considered as a state of the Union or a foreign state with resort to original jurisdiction of the Supreme Court, nor a citizen for diversity purposes. Congress has, however, authorized suits by and against tribes in special types of litigation. Until 1924, an individual Indian, unless naturalized by some treaty or law of the United States, could not sue in federal court on the basis of diversity of citizenship. Conversely, his special status as a “ward” of the United

67. In Deere v. St. Lawrence River Power Co., 32 F.2d 550 (2d Cir. 1929), the Court said, “An Indian litigant has no greater right to sue in the federal court than any other litigant.”
71. In the Handbook of Federal Indian Law, Felix Cohen comments: “Whether a tribe can sue or be sued under the diversity of citizenship clause of § 41 (1) of Title 28 of the United States Code in the federal courts is a moot question, question. An Indian tribe as such is not a citizen within the meaning of that clause. If it were incorporated under the laws of the United States, it could not sue or be sued under the diversity of citizenship clause unless there were an act of Congress providing that a tribe should be considered as possessing a state citizenship for jurisdictional purposes.”

(2) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe; provided, that the granting of citizenship under this sub-section shall not in any manner impair or otherwise affect the right of such person to tribal or other property;”

Lack of capacity to sue as a party for diversity purposes would not be a deterrent to Indians or Indian tribes invoking federal court jurisdiction on the grounds of federal question subject matter jurisdiction. In 1966, Public Law 89-635 (28 U.S.C. § 1362) gave district courts original jurisdiction in all civil actions brought by an Indian tribe where the
States did not entitle him to assume the identity of his guardian and sue as a party plaintiff in the federal court.\textsuperscript{74}

If it is determined that a federal court would normally exercise jurisdiction on the grounds of diversity of citizenship, federal question or some other jurisdictional ground, attention, as with state court jurisdiction, must ultimately be given to the Williams “governmental infringement” test.

In \textit{Littel v. Nakai},\textsuperscript{75} a non-Indian sued the Chairman of the Navajo Tribal Council to enforce a retainer contract he had with the Navajo Tribe. In response to the plaintiff’s contention that diversity of citizenship was determinative, the federal court, although acknowledging that exclusive tribal jurisdiction may be altered by Congress, relied on the evolved anti-discrimination principle of \textit{Erie v. Tomkins}\textsuperscript{76} and said,

\begin{quote}
"Here, it is apparent that if Littel were a citizen of Arizona, he would be precluded from suit in the Arizona courts under the doctrine of Williams \textit{v. Lee} and consistent with the fundamental principle of diversity jurisdiction we have just voiced, no reason appears why the result would be otherwise because Littel instituted his suit in a Federal Court. In short, even after granting that Littel’s suit falls within the letter of the diversity statute, we believe that the basic principle of diversity jurisdiction requires reference of the suit to the Navajo Tribal Courts."
\end{quote}

As noted in \textit{Littel}, the exclusive jurisdiction of tribal courts over those cases which would be susceptible of interfering jurisdiction by non-tribal courts is subject to Congress, power of pre-emption. By matter in controversy arises under the constitution, laws or treaties of the United States. This provision, however, is merely declarative of an already existing right to sue. In Quinault Tribe of Indians \textit{v. Gallagher}, 368 F.2d 648 (9th Cir. 1966), it was held on rehearing that the statute was identical with the general federal question statute and did not alter the original ruling except that the plaintiff tribe would not have to establish the requisite jurisdictional amount that would enable a district court to have jurisdiction under the general federal question statute.

\textsuperscript{74} Martinez \textit{v. Southern Ute Tribe}, 249 F.2d 915 (10th Cir. 1957); Deere \textit{v. St. Lawrence River Power Co.}, 32 F.2d 551 (2d Cir. 1921). In Paul \textit{v. Chilsoque}, 70 Fed. 401 (D.Ind. 1895), the Court said:

\begin{quote}
"While it would seem, since Indians are members of a dependent domestic tribe or nation, and are regarded as wards of the national government, the Courts of the United States ought to have jurisdiction of civil suits by or against them, it suffices to say that no such jurisdiction has been conferred. Congress has not seen fit to confer upon Indians, as such, the right to prosecute civil suits in the United States Courts or to remove them from the courts of the state into such courts, simply on the ground that they were Indians. \textit{Id.} at 403.
\end{quote}

\textsuperscript{75} 344 F.2d 486 (9th Cir. 1965).

\textsuperscript{76} \textit{Erie R. Co. v. Tomkins}, 304 U.S. 64 (1938).

\textsuperscript{77} 344 F.2d 486, 489 (9th Cir. 1965).
granting district courts general federal question jurisdiction, Congress has pre-empted control in those cases raising a federal question and which would otherwise fall within the exclusive jurisdiction of the tribal courts because of the "governmental infringement" test. Thus, unless Congress dictates exclusive federal jurisdiction in these matters, federal courts will have concurrent jurisdiction over them with the state and tribal courts.78

V

TRIBAL COURTS

In those cases where neither the federal nor state courts can exercise jurisdiction because of the "governmental infringement" doctrine and lack of Congressional pre-emption, tribal courts will have exclusive subject matter jurisdiction. In many cases, however, tribal courts will have concurrent jurisdiction with non-tribal courts, for it is apparent that a tribal court may exercise jurisdiction in a suit not within its exclusive jurisdiction, if the requisite jurisdictional requirements are met.

In the exercise of its plenary jurisdiction over Indian affairs, Congress has provided for the management of all Indian affairs by the Secretary of the Interior. Pursuant to this direction, regulations have been promulgated governing the administration of justice by tribes. The general jurisdictional regulation provides that:

"The Courts of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and non-members which are brought before the courts by stipulation of both parties."79

Although the regulation establishes limits of tribal court jurisdiction, tribal codes and ordinances should be consulted to determine the extent to which a tribal court will exercise its jurisdiction.80

78. The same principle recognizing state concurrent jurisdiction with federal courts in those cases where Congress has not made jurisdiction of the federal court exclusive, would seem to apply equally to tribal courts.
79. 25 CFR, Part 11.22.
80. See, e.g., 7 Navajo Tribal Code § 63:
   "The Trial Court of the Navajo Tribe shall have original jurisdiction over:
   * * * *
   (b) Civil Causes of Action. All civil actions in which the defendant is an Indian and is found within its territorial jurisdiction.
   * * * *
   (e) Miscellaneous. All other matters over which jurisdiction has been heretofore vested in the Navajo Tribal Courts of Indian Offenses, or which may hereafter be placed within the jurisdiction of the Trial Court by resolution of the Tribal Council."