LEAVING THE RESERVATION: THE EIGHTH CIRCUIT ELIMINATES TRIBAL COURT SUBJECT MATTER JURISDICTION OVER SUITS BETWEEN NONMEMBERS IN A-1 CONTRACTORS v. STRATE

INTRODUCTION

In three opinions written by Chief Justice John Marshall between 1823 and 1832, the United States Supreme Court gave voice to the principles that have defined and governed the legal status of American Indian tribes. In these opinions, Chief Justice Marshall envisioned the tribes as having characteristics similar to those of a state and constituting distinct political organizations capable of self-government. This view of tribal autonomy gave rise to the doctrine of inherent sovereignty — the notion that Indian tribes had sovereignty over the geographical territory they occupied. However, later Supreme Court opinions, while continuing to recognize a geographical component to tribal sovereignty, have rejected tribal authority based exclusively on geographical territory. Instead, the Court has adopted a view of sovereignty based on membership in the political entity known as the tribe.

Recently, in A-1 Contractors v. Strate, the United States Court of Appeals for the Eighth Circuit adopted this “membership-based” notion of tribal sovereign authority and concluded that an Indian tribal court lacked civil jurisdiction over an action arising between non-tribal members within the boundaries of an Indian reservation. The Eighth Circuit relied on the 1981 Supreme Court opinion of Montana v. United States, in which the Court limited tribal authority over non-members, on nonmember lands, to situations where tribal interests

5. Id.
were at stake. The federal circuit court found that under Montana, the mere presence of a nonmember on the reservation was insufficient to sustain subject matter jurisdiction over the nonmember. The court held that because no consensual relationship existed between the nonmember defendants and the tribe, and no significant tribal interest was implicated, the tribal court could not assert subject matter jurisdiction over the action.

This Note will first review the Eighth Circuit's opinion in A-1 Contractors v. Strate and the facts giving rise to the jurisdictional dispute. This Note will then review a series of Supreme Court decisions illustrating the origins of modern tribal authority. Next, this Note will examine contemporary tribal sovereignty disputes, demonstrating a presumption in favor of tribal authority, absent divestiture. Finally, this Note will criticize the Eighth Circuit for: 1) incorrectly extending the rule in Montana to determine tribal authority over nonmembers on tribal land; 2) incorrectly applying the exceptions to the rule in Montana to the facts of A-1 Contractors, and; 3) incorrectly establishing a presumption against tribal jurisdiction over nonmembers.

FACTS AND HOLDING

On November 9, 1990, a car driven by Gisela Fredericks collided with a gravel truck operated by Lyle Stockert and owned by Stockert's employer, A-1 Contractors. The accident occurred on North Dakota State Highway 8 within the boundaries of the Fort Berthold Indian Reservation in west-central North Dakota. As a result of the collision, Fredericks sustained serious injuries requiring twenty-four days hospitalization and incurred medical expenses totaling $30,000.

At the time of the collision, A-1 Contractors, a non-tribal company with an off-reservation principal place of business, was under a sub-
contract agreement with LCM Corporation.\textsuperscript{19} LCM was located on the reservation and was owned exclusively by the Tribes of the Fort Berthold Reservation.\textsuperscript{20} The subcontract required A-1 Contractors to perform certain services in connection with the construction of a tribal building on the reservation.\textsuperscript{21}

Gisela Fredericks owned property within the Fort Berthold Reservation boundaries and resided on the reservation.\textsuperscript{22} Although Fredericks was not a member of the Tribe, each of her five adult children were recognized as enrolled tribal members.\textsuperscript{23}

In May 1991, Mrs. Fredericks and her five children ("the Frederickses") brought action in the Tribal Court for the Three Affiliated Tribes of the Fort Berthold Indian Reservation against A-1 Contractors, Lyle Stockert, and their insurer, Continental Western Insurance Company.\textsuperscript{24} The Frederickses sought damages in excess of $13,000,000 for personal injury, loss of consortium, and medical expenses.\textsuperscript{25} A-1 Contractors, Stockert, and Continental Western appeared specially and filed a motion to dismiss the suit for lack of personal and subject matter jurisdiction.\textsuperscript{26} The Tribal Court denied the defendants' motion, finding that the Tribal Court had both subject matter and personal jurisdiction over the suit brought by nonmember plaintiff Gisela Fredericks.\textsuperscript{27} The court found its assertion of personal jurisdiction over the parties proper based on Chapter 1, Section 3 of the Tribal Code, citing Mrs. Fredericks' status as a resident of the reservation and the fact that A-1 Contractors had "entered and transacted business within the territorial boundaries of the Reservation."\textsuperscript{28} Further, the Tribal Court found subject matter jurisdiction over the Frederickses' claims to be appropriate because, in the court's opinion,

\textsuperscript{19} A-1 Contractors, 1994 WL 666051, at *1.
\textsuperscript{20} Id.
\textsuperscript{21} A-1 Contractors, 76 F.3d at 932. Under the subcontract A-1 Contractors performed excavating, berming, and recompacting work for LCM Corporation. Id. It is unclear whether Stockert, a nonmember residing off the reservation, was engaged in performance of the contract at the time of the accident. Id. at 932 n.1.
\textsuperscript{22} A-1 Contractors, 76 F.3d at 932; A-1 Contractors, 1992 WL 696330, at *1.
\textsuperscript{23} A-1 Contractors, 1992 WL 696330, at *1. Fredericks' husband, now deceased, was also a member of the tribe. Id.
\textsuperscript{24} A-1 Contractors, 1994 WL 666051, at *1. The Three Affiliated Tribes — Mandan, Hidatsa, and Arikara — comprise a federally recognized sovereignty exercising authority under a constitution approved pursuant to the Indian Reorganization Act of 1934. Id. at *10 n.3. For statutes relating to the Indian Reorganization Act, see 25 U.S.C.A. §§ 461-79 (West 1996).
\textsuperscript{25} A-1 Contractors, 1994 WL 666051, at *1.
\textsuperscript{26} Id.
\textsuperscript{27} A-1 Contractors, 76 F.3d at 933.
\textsuperscript{28} Id. For relevant sections of the Tribal Code of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, see infra note 43.
no treaty or federal statute had divested the Tribe of its power to hear claims originating on the reservation.\textsuperscript{29}

The defendants appealed the Tribal Court's assertion of jurisdiction over the suit to the Northern Plains Intertribal Court of Appeals.\textsuperscript{30} The appellate court affirmed the decision of the Tribal Court and remanded the case for further proceedings.\textsuperscript{31}

On February 5, 1992, prior to any further proceedings in the Tribal Court, A-1 Contractors and Lyle Stockert sought declaratory and injunctive relief in the United States District Court for the District of North Dakota against the Frederickses, the Associate Tribal Judge for the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, and the Tribal Court ("the tribal defendants").\textsuperscript{32} A-1 Contractors requested that the district court issue an order declaring that the Tribal Court lacked jurisdiction and thus enjoin the Frederickses from continuing proceedings in the Tribal Court.\textsuperscript{33} A-1 Contractors' principal argument was based on the 1981 United States Supreme Court opinion in \textit{Montana v. United States},\textsuperscript{34} in which the Supreme Court announced a test for determining tribal jurisdiction over nonmembers within the exterior boundaries of an Indian reservation.\textsuperscript{35} A-1 Contractors argued that the \textit{Montana} rule limited tribal civil jurisdiction to actions where at least one party included tribal members.\textsuperscript{36} Moreover, A-1 Contractors argued that under the \textit{Montana} rule, a tribal court could retain civil jurisdiction over a suit arising between nonmembers only when a nonmember party entered into

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\item \textsuperscript{29} \textit{A-1 Contractors}, 76 F.3d at 933. Because the Tribal Court concluded that it had jurisdiction over the claims of nonmember Gisela Fredericks, the question of jurisdiction over the consortium claims of her tribal-member children were not reached. \textit{Id.}
\item \textsuperscript{30} \textit{A-1 Contractors}, 1994 WL 666051, at *2.
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.} Disposition by the Northern Plains Intertribal Court of Appeals exhausted the appellant's tribal remedies requirement and permitted review in federal court. \textit{Id.} (citing National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985)).
\item \textsuperscript{33} \textit{A-1 Contractors}, 1992 WL 696330, at *2.
\item \textsuperscript{34} 450 U.S. 544 (1981).
\item \textsuperscript{35} \textit{A-1 Contractors}, 1992 WL 696330, at *3-4. The \textit{Montana} rule provided generally that, the inherent sovereign authority of an Indian tribe did not extend to nonmembers of the tribe. \textit{Montana v. United States}, 450 U.S. 544, 565 (1981). However, the Court announced two exceptions to this rule whereby a tribe retained power over nonmembers. \textit{Montana}, 450 U.S. at 565-66. The first exception allowed a tribe to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." \textit{Id.} at 565. The second exception allowed a tribe to exercise civil authority over nonmembers whose "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." \textit{Id.} For further discussion of \textit{Montana}, see infra notes 298-340 and accompanying text.
\item \textsuperscript{36} \textit{A-1 Contractors}, 1992 WL 696330, at *2.
\end{itemize}
a consensual relationship with the tribe or its members, or the conduct of a nonmember party threatened the political integrity, economic security, or health or welfare of the tribe.\textsuperscript{37} A-1 Contractors argued that neither exception could be demonstrated with respect to the tort action at issue in this case.\textsuperscript{38}

Contending that the \textit{Montana} rule was limited to cases involving only non-Indian fee lands, the tribal defendants argued that tribal civil jurisdiction extended to the boundaries of the Tribe’s geographic territory.\textsuperscript{39} This was so, the tribal defendants argued, irrespective of the membership status of the parties, unless that jurisdiction had been limited by treaty or federal statute.\textsuperscript{40} The tribal defendants further argued that, even if the application of the \textit{Montana} rule was correct, both exceptions to the rule were satisfied because the contractual agreement between A-1 Contractors and LCM created a consensual relationship, and the alleged tort created a potentially significant threat to the economic security of the Tribe.\textsuperscript{41}

The district court affirmed the Tribal Court’s finding of jurisdiction over the suit between the nonmember parties.\textsuperscript{42} In reaching this conclusion, the district court found that certain provisions of the Tribal Code provided for personal jurisdiction over Gisela Fredericks, A-1 Contractors, and Lyle Stockert.\textsuperscript{43} Specifically, the court found that

\begin{verbatim}
37. Id. at *4.
38. Id.
40. Id.
42. Id. at *5.
43. Id. The Tribal Code of the Three Affiliated Tribes of the Fort Berthold Indian Reservation ("Tribal Code") provides in relevant part:
Chapter 1, Section 3: Jurisdiction of the Courts.
Subsection 3.2 — Jurisdiction — Territorial. The jurisdiction of the court shall extend to any and all lands and territory within the Reservation boundaries, including all easements, fee patented lands, rights of way; and over land outside the Reservation boundaries held in trust for Tribal members or the Tribe.
Subsection 3.3 — Jurisdiction — Personal. Subject to any limitations or restrictions imposed by the Constitution or the laws of the United States, the Court shall have civil and criminal jurisdiction over all persons who reside, enter, or transact business within the territorial boundaries of the Reservation; provided that criminal jurisdiction over non-Indians shall extend as permitted by case law.
Subsection 3.5 — Jurisdiction — Subject Matter. The Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation, and over all criminal offenses which are enumerated in this Code, and which are committed within the exterior boundaries of the Reservation.
Chapter 2, Section 3(f): Long Arm Statute. Any person subject to the jurisdiction of the Tribal Court during any of the following acts:
1) The transaction of any business of the Reservation;
\end{verbatim}
the Tribal Court had jurisdiction: over Mrs. Fredericks, because she elected the Tribal Court as her choice of forum; over Lyle Stockert, because of his presence on the reservation and his actions thereon resulting in the "accrual of a tort action"; and over A-1 Contractors, by virtue of its presence on, and transaction of business within, the boundaries of the reservation. The district court further found that the Tribal Court correctly asserted subject matter jurisdiction because the collision giving rise to the initial suit occurred within the exterior boundaries of the reservation. The district court concluded that the Tribal Court may exercise civil jurisdiction over nonmembers, unless the Tribe's authority to do so has been specifically divested by the federal government. As a result, summary judgment was entered in favor of the Frederickses.

A-1 Contractors appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit, contending that the district court erred in finding that the Tribe had subject matter jurisdiction over the claims of Gisela Fredericks. The Eighth Circuit reviewed de novo the issue of whether a tribal court had subject matter jurisdiction to hear a tort action arising between two nonmembers on an Indian reservation. The Eighth Circuit affirmed the district court's grant of summary judgment in favor of the Frederickses, holding that civil jurisdiction over the activities of nonmembers on reservation lands "presumptively lies in the tribal courts," unless otherwise limited by treaty or federal statute.

The Eighth Circuit began its inquiry by examining the Montana rule and closely reviewed the issue before the United States Supreme Court when that rule was first announced in 1981. The circuit court found that issue — whether an Indian tribe had the authority to regulate the usage of fee lands owned by nonmembers within the boundaries of the reservation — persuasive in determining that, as applied to A-1 Contractors, the Montana test was not applicable. Conceding

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2) The commission of any act which results in the accrual of a tort action within the Reservation;
3) The ownership, use or possession of any property, or any interest therein, situated within the Reservation.

Id. at *4-5 (quoting the Tribal Code).
45. *Id.* at *5 (citing Subsection 3.5 of the Tribal Code).
46. *Id.* at *5.
47. *Id.*
48. *A-1 Contractors*, 1994 WL 666051, at *1. On February 3, 1992, Continental Western, A-1 Contractors' insurer, was dismissed as a defendant without prejudice and was not a party to the subsequent appeals to the Eighth Circuit. *Id.* at *10 n.2.
50. *Id.* at *5 (quoting Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987)).
51. *Id.* at *3.
52. *Id.* at *3-4.
that the Supreme Court had found that there was no tribal authority to regulate non-Indian fees, the Eighth Circuit found both the rule and its two exceptions inapposite to the present case. The Eighth Circuit narrowly interpreted Montana to apply only to fee lands owned by nonmembers and chose not to extend the rule to exclude tribal jurisdiction over all civil matters occurring within the reservation. The Eighth Circuit determined that the two exceptions to the Montana rule did not become relevant until tribal authority had been divested through alienation of land within the reservation. The court concluded that a presumption of civil jurisdiction existed over actions arising between nonmembers on Indian reservations unless the tribe's authority over such actions has been affirmatively limited by a specific treaty provision or federal statute.

The Eighth Circuit then discussed, arguendo, an alternative interpretation of Montana assuming that the Montana rule was not limited to tribal authority over fee lands held by nonmembers. Assuming that a tribe had no inherent authority to adjudicate civil matters between nonmembers, the Eighth Circuit reasoned that civil jurisdiction would be retained by the tribal court under both exceptions articulated in Montana. Under the first exception, the Eighth Circuit agreed with the tribal and district courts and determined that A-1 Contractors had subjected itself to the jurisdiction of the Tribal Court by entering into the subcontract agreement with LCM, a tribal-owned corporation. That subcontract, the court noted, constituted a "consensual relationship with the tribe." Under the second exception, the court reasoned that providing a forum for the disposition of matters involving the personal and property interests of individuals injured within its geographical borders was essential to the concept of tribal sovereignty. To deny the Tribe authority over claims arising in "Indian country" based solely on the membership status of the parties would have a serious and detrimental effect on the "political integrity" of the Tribe as a self-governing political unit. Thus, the Eighth

53. Id. at *4.
54. Id. at *4-5.
55. Id. at *4 (quoting United States ex rel. Morongo Band of Mission Indians v. Rose, 34 F.3d 901, 906 (9th Cir. 1994)).
56. Id. at *4-5.
57. Id. at *5.
58. Id.
59. Id.
60. Id.
61. Id. at *6.
62. Id. Federal law defines "Indian country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation . . . ." 18 U.S.C. § 1151 (1994). Although § 1151 provides this definition in
Circuit concluded that tribal jurisdiction over the claim could be sustained under both *Montana* exceptions.\(^{63}\)

Circuit Judge David Hansen dissented, arguing that the court's theory of a geographically-based tribal civil jurisdiction departed from established precedent.\(^{64}\) The dissent contended that the issue of tribal jurisdiction over nonmembers was controlled by *Montana*, which required that some tribal interest be at stake before the Tribal Court may properly assert jurisdiction.\(^{65}\) Additionally, the dissent argued that the court misinterpreted several other opinions in support of its conclusion that a presumption of territorial jurisdiction existed over all civil matters unless a tribe's authority had been affirmatively limited by the federal government.\(^{66}\) The dissent reasoned that this presumption arose only after a tribe had demonstrated the existence of some tribal interest, thereby satisfying one or more of the *Montana* exceptions.\(^{67}\) The dissent concluded that no tribal interest existed to implicate tribal jurisdiction, finding that: (1) the "consensual relationship" created by the subcontract between A-1 and LCM was completely unrelated to the personal injury claim by Gisela Fredericks and could not be the basis for establishing jurisdiction over Mrs. Frederick's claim against A-1; and (2) the claim by Gisela Fredericks concerned only the interests of nonmembers and in no way affected the "political integrity" of the Tribe, neither detracting from the Tribe's ability to govern its peoples' conduct nor limiting the Tribe's ability to protect its peoples' rights.\(^{68}\) A-1 Contractors requested that the decision of the Eighth Circuit panel be reviewed *en banc*.\(^{69}\)

Sitting *en banc*, the Eighth Circuit granted the appellants' request, vacated the opinion of the three-judge panel, and reviewed *de novo* the issue of the district court's order granting summary judgment in favor of the tribal defendants.\(^{70}\) The Eighth Circuit reversed the district court, finding that the issue of tribal civil jurisdiction over nonmembers was controlled by the standards set forth in *Montana*.\(^{71}\)

Writing for the majority of the circuit court judges, Judge Hansen held that it was the existence of a tribal interest, rather than geography, the context of criminal jurisdiction, the Supreme Court has recognized this definition as applying to questions of civil jurisdiction as well. *See* DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975) (employing 18 U.S.C. § 1157 (1994) to assert jurisdiction in civil matters).

64. Id. (Hansen, J. dissenting).
66. Id. at *8 (Hansen, J. dissenting).
67. Id. (Hansen, J. dissenting).
68. Id. at *9-10 (Hansen, J. dissenting).
69. *A-1 Contractors*, 76 F.3d at 934.
70. Id. at 932, 934.
71. Id. at 934, 941.
that played the decisive role in determining tribal sovereign authority over claims between nonmembers.\textsuperscript{72}

The Eighth Circuit's analysis of the issue of civil authority began with an in-depth review of the language employed by the Supreme Court in \textit{Montana} and those cases further defining the extent of tribal authority.\textsuperscript{73} Although the Court in \textit{Montana} addressed the issue of tribal authority over non-Indian fee land, the Eighth Circuit could find no language in the opinion to suggest that the holding was limited to non-Indian fees, and therefore extended the \textit{Montana} rule to apply to Indian country in general.\textsuperscript{74} Recognizing that Indian tribes retained many aspects of their inherent sovereign authority, the court established that some authority, particularly civil authority over nonmembers of a tribe, was necessarily divested in accordance with a tribe's status as dependent upon the federal government.\textsuperscript{75} However, the court noted that two situations exist in which a tribe retains sovereign authority over nonmembers.\textsuperscript{76} First, tribes retain authority over certain matters "when nonmembers 'enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'"\textsuperscript{77} Second, tribes possess this sovereignty "when a nonmember's 'conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'"\textsuperscript{78} The Eighth Circuit found no such tribal interest at stake in the dispute.\textsuperscript{79}

The tribal defendants argued that the first \textit{Montana} exception was satisfied by virtue of the subcontract agreement between A-1 Contractors and LCM Corp.\textsuperscript{80} However, the court disagreed, finding that because the dispute did not concern the contract or the relationship of the parties to the contract, the subcontract agreement did not serve as a basis for tribal jurisdiction over an unrelated tort claim.\textsuperscript{81} The tribal defendants further contended that because the acts giving rise to Mrs. Fredericks' claim occurred within the reservation, the dispute necessarily affected the political integrity of the Tribe and its ability to enforce prescribed rules of conduct.\textsuperscript{82} The court again disagreed, find-
ing that a tribe's political integrity concerns only the tribe's authority to govern its own members and not the affairs of nonmembers who find themselves in Indian country.\textsuperscript{83} Because the tribal parties failed to establish a legitimate tribal interest, the Eighth Circuit concluded that the Tribe did not retain the sovereign authority to exercise subject matter jurisdiction over Gisela Fredericks' claim against A-1 Contractors and Lyle Stockert.\textsuperscript{84}

Circuit Judge C. Arlen Beam concurred in part and dissented in part.\textsuperscript{85} Judge Beam agreed with the majority's conclusion that a tribe must demonstrate a legitimate interest before exercising civil jurisdiction, but stated that once a valid interest was implicated, a presumption of tribal authority existed unless that jurisdiction was affirmatively limited by the federal government.\textsuperscript{86} However, Judge Beam disagreed with the majority's application of the \textit{Montana} rule and the court's conclusion that tribal membership, as opposed to geographical territory, was the primary consideration in establishing tribal jurisdiction over civil actions.\textsuperscript{87} Judge Beam concluded that, according to the Supreme Court, a tribe's geographic territory was a significant aspect of tribal sovereign authority and should be given considerable weight when determining whether a tribe's political integrity, economic security, health or welfare has been affected.\textsuperscript{88}

Circuit Judge Floyd Gibson dissented from the opinion of the court.\textsuperscript{89} Judge Gibson found the court's view of "limited sovereignty" to be so narrow as to afford the Tribe no authority at all.\textsuperscript{90} Judge Gibson found the authority to adjudicate common disputes arising within the boundaries of a sovereign's territory to be a necessary and indispensable component of sovereign power.\textsuperscript{91}

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\item \textsuperscript{83} \textit{Id.} In fact, the court stated that "this case has nothing to do with the Indian tribe's ability to govern its own affairs under tribal laws and custom." \textit{Id.}
\item \textsuperscript{84} \textit{A-1 Contractors}, 76 F.3d at 941.
\item \textsuperscript{85} \textit{Id.} (Beam, J., dissenting). Judge Beam was joined by Circuit Judges Floyd R. Gibson, Theodore McMillian, and Diana E. Murphy. \textit{Id.}
\item \textsuperscript{86} \textit{A-1 Contractors}, 76 F.3d at 941 (Beam, J., dissenting) (quoting \textit{A-1 Contractors}, 76 F.3d at 939).
\item \textsuperscript{87} \textit{Id.} at 941-42 (Beam, J., dissenting).
\item \textsuperscript{89} \textit{Id.} at 944 (Gibson, J. dissenting). Judge Gibson was joined by Circuit Judges Theodore McMillian, C. Arlen Beam, and Diana E. Murphy. \textit{Id.}
\item \textsuperscript{90} \textit{A-1 Contractors}, 76 F.3d at 944 (Gibson, J. dissenting).
\item \textsuperscript{91} \textit{Id.} (Gibson, J. dissenting). Judge Gibson's dissent also discussed the implications of tribal interests under both \textit{Montana} exceptions and found that the Tribe would retain jurisdiction under either exception. \textit{Id.}
\end{itemize}
Circuit Judge Theodore McMillian also dissented from the opinion of the majority. Judge McMillian contended that the tribal courts and the federal district court correctly held that the Tribal Court possessed civil jurisdiction. According to Judge McMillian, there existed an initial presumption of tribal court jurisdiction, absent a treaty provision or federal statute to the contrary. This presumption, Judge McMillian found, was consistent with the Tribe's inherent powers of sovereignty over its members as well as its territory. Furthermore, Judge McMillian disagreed with the court's position that Montana controlled the jurisdictional question regarding nonmembers. Judge McMillian found that Montana and its progeny were inapplicable and limited the rule set forth in those cases to disputes arising on non-Indian fees within Indian country. Judge McMillian concluded that, even if the appellate court's reliance on Montana was proper, the Tribe would have retained civil authority over A-1 Contractors under both exceptions espoused by the Supreme Court. Judge McMillian found that the subcontract between A-1 Contractors and the Tribe was a consensual relationship under the first Montana exception. Additionally, Judge McMillian found that A-1 Contractors' allegedly tortious conduct threatened the Tribe's interests in ensuring "the safe operation of motor vehicles on the roads and highways on the reservation," thus satisfying the second Montana exception.

BACKGROUND

Prior to contact with the Europeans, most North American Indian tribes enjoyed unconditional independence as self-governing societies. This original sovereignty was recognized by the federal government and provided the basis for initial understandings between Indian tribes and the United States. However, once under the au-

92. A-1 Contractors, 76 F.3d at 945 (McMillian, J., dissenting). Judge McMillian was joined by Circuit Judges Floyd R. Gibson, C. Arlen Beam, and Diana E. Murphy. Id.
93. A-1 Contractors, 76 F.3d at 945 (McMillian, J., dissenting).
94. Id. at 946 (McMillian, J., dissenting) (quoting Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987)).
95. Id. at 946 (McMillian, J., dissenting).
96. Id. at 947 (McMillian, J., dissenting).
97. Id. (McMillian, J., dissenting).
98. Id. at 950-51 (McMillian, J., dissenting).
99. Id. at 950 (McMillian, J., dissenting).
100. Id. at 950-51 (McMillian, J., dissenting).
ority of the United States, tribal power over external aspects of self-government became subject to considerable limitation.\textsuperscript{103} Through exercise of congressional authority, the federal courts have steadily altered tribal sovereignty from what was once unlimited “land-based” sovereignty over tribal territory to what has been termed “consent-based” authority over tribal members.\textsuperscript{104} Currently, the extent to which a tribe may assert judicial authority over nonmembers remains largely unsettled.\textsuperscript{105}

**The Origins of Modern Tribal Authority**

Tribal courts play an important role in the exercise of tribal self-government.\textsuperscript{106} Tribal courts are charged with providing reliable and equitable adjudication of routine matters that are presented for their review.\textsuperscript{107} Moreover, tribal courts have also struggled to define the scope and range of tribal jurisdiction and sovereignty.\textsuperscript{108} However, the authority of these tribal courts to assert jurisdiction over certain matters has been questioned by federal courts over the years.\textsuperscript{109} The conceptual framework for modern interpretations of the limits of tribal court authority was first developed in three early decisions of the United States Supreme Court.\textsuperscript{110} These opinions, written by Chief Justice John Marshall, articulated the principles by which the legal status of modern tribes has been defined.\textsuperscript{111}

*The Doctrine of Inherent Sovereignty*

In the first part of the nineteenth century, the Supreme Court of the United States handed down a series of decisions that attempted to identify the nature of Indian tribal authority.\textsuperscript{112} These opinions established, and ultimately defined, the doctrine of inherent sovereignty.\textsuperscript{113} The doctrine of inherent sovereignty provides that “those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather

\textsuperscript{103} Hansen, 16 AM. INDIAN L. REV. at 321.
\textsuperscript{105} Dussias, 55 U. PIT. L. REV. at 3 (citation omitted).
\textsuperscript{106} Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987) (citation omitted).
\textsuperscript{107} Frank Pommersheim, Braid of Feathers: American Indian Law and Contemporary Tribal Life 57 (1995) [hereinafter Pommersheim].
\textsuperscript{108} Id.
\textsuperscript{109} Gould, 96 COLUM. L. REV. at 883.
\textsuperscript{110} Hansen, 16 AM. INDIAN L. REV. at 321.
\textsuperscript{111} Id.
\textsuperscript{112} Gould, 96 COLUM. L. REV. at 816.
\textsuperscript{113} Id.
inherent powers of a limited sovereignty which has never been extinguished." 114

Among the first opinions to illustrate that inherent tribal sovereignty was indeed limited was that of Johnson v. McIntosh. 115 In McIntosh, the Supreme Court addressed the issue of whether title to land conveyed by certain Indian tribes to private individuals was valid and recognizable in the federal courts. 116 The dispute arose when the lessee of Joshua Johnson and Thomas J. Graham brought an ejectment action against William McIntosh concerning lands located in the State of Illinois. 117 Johnson and Graham claimed title to the lands through purchase from various Indian tribes, and McIntosh, as acquired by grant from the United States. 118 The United States District Court of Illinois entered judgment in favor of McIntosh. 119

Johnson and Graham's lessee appealed the district court's decision, and the United States Supreme Court affirmed, holding that Johnson and Graham did not have title that could be sustained in a federal court. 120 In finding for the defendant, the Supreme Court cited the well-established doctrine of discovery, which held that discovery of lands by the European nations conferred absolute title to the discoverers. 121 While Indian tribes did retain title of occupancy to the lands they inhabited, they could transfer absolute title only to the discoverers. 122 The Court reasoned that under this doctrine, the title to the lands occupied by the Indians, as well as the power to alienate those lands, had vested in the United States by virtue of the treaty which concluded the Revolutionary War. 123 The Court stated that while the Indians still retained their rights of occupancy, they no longer possessed any right to confer title to the land. 124

Nine years later in Cherokee Nation v. Georgia, 125 the Supreme Court again addressed the issue of Indian tribal sovereignty. 126 In Cherokee Nation, the Cherokee Nation of Indians sought an injunction

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114. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (reprint 1988) (1942) [hereinafter COHEN]. The late Felix Cohen is recognized as one of the leading scholars in the field of federal Indian law and his treatise, HANDBOOK OF FEDERAL INDIAN LAW, is regarded as having "literally created the field of Indian law." POMMERSHEIM, supra note 107, at 51.
118. Id. at 543.
119. Id.
120. Id. at 605.
121. Id. at 592.
122. Id.
123. Id. at 584.
124. Id. at 574.
125. 30 U.S. (5 Pet.) 1 (1831).
from the United States Supreme Court to prohibit the State of Georgia from enforcing Georgia laws within the Cherokee territory. The bill submitted by the Cherokee Nation alleged that the State of Georgia had enacted legislation with the purpose of incorporating Cherokee territory into the surrounding counties, and that such legislation was in violation of certain treaties between the Cherokee Nation and the United States.

However, before the Supreme Court reached the merits of the case, Chief Justice John Marshall reviewed the Court's jurisdiction and held that the Supreme Court was an inappropriate forum for the Cherokee Nation to seek injunctive relief. The Cherokee Nation had presented itself to the Court as "a foreign state, not owing allegiance to the United States, nor to any State of [the] Union." Chief Justice Marshall found, however, that the Cherokee Nation did not qualify as a "foreign state," as was requisite to sustaining the Court's assertion of original jurisdiction. Although the Court rejected the Cherokee Nation's contention that it was a foreign state, the Court determined that the character of the Cherokee Nation was similar to that of a state, constituting a distinct political organization capable of governing itself. This status, however, was qualified by Chief Justice Marshall, who found the Tribe to be a "domestic dependent nation" and the Tribe's relationship with the United States to be "that of a ward to his guardian." Holding that the Supreme Court was not

129. Id. at 15, 20.
130. Id. at 2-3.
131. Id. at 17. Article III, section 2 of the United States Constitution confers original jurisdiction on the Supreme Court, providing that:

[1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

133. Id. at 17.
the appropriate forum for an analysis of the propriety of the Georgia legislation, the Cherokee Nation was denied relief.\textsuperscript{134}

Only one year later, the Supreme Court again reviewed the constitutionality of efforts by the Georgia Legislature to eliminate the Cherokee tribal government.\textsuperscript{135} In \textit{Worcester v. Georgia},\textsuperscript{136} Samual Worcester was charged and convicted in the superior court for the County of Gwinnett, Georgia of violating a Georgia statute which prohibited white persons from residing within Cherokee territory without a license.\textsuperscript{137} Worcester appealed his conviction under the Georgia statute directly to the United States Supreme Court, challenging the constitutionality of the Act as violating certain treaties between the Cherokee Nation and the United States.\textsuperscript{138}

On appeal, the Supreme Court concluded that the laws of Georgia had no effect within the boundaries of the Cherokee territory and reversed Worcester's conviction.\textsuperscript{139} In addressing the constitutionality of the statute, Chief Justice Marshall reviewed the relationship between the federal government and the Indian tribes, and he found that historically Indian tribes had been considered independent political communities.\textsuperscript{140} As such, the Court reasoned that Indian nations possessed the rank and power to enter into treaties with the United States and to maintain a national character.\textsuperscript{141}

\textit{McIntosh, Cherokee Nation,} and \textit{Worcester} each played a significant role in developing the doctrine of inherent sovereignty.\textsuperscript{142} These early Supreme Court opinions established that Indian tribes existed as sovereign entities with respect to the states in which they were located.\textsuperscript{143} Accordingly, tribes were found to be “domestic dependent nations,” complete with the right to occupy their own territories and to govern their own affairs free from the interference of the states, subject only to the ultimate authority of the federal government.\textsuperscript{144} References to “territorial boundaries,” within which tribal authority was

\begin{footnotes}
\item 134. \textit{Id.} at 20.
\item 135. \textit{Cohen, supra} note 114, at 123.
\item 136. 31 U.S. (6 Pet.) 515 (1832).
\item 137. \textit{Worcester v. Georgia}, 31 U.S. (6 Pet.) 515, 528 (1832). In addition to prohibiting whites from residing on Cherokee territory, the Act prohibited the assembly of Cherokees for the purpose of enacting laws, prohibited the Cherokees from holding court for the purpose of adjudicating legal matters, and established a Georgia state guard to “protect the mines” located within the Cherokee territories. \textit{Worcester}, 31 U.S. at 522-24 (quoting the text of the acts).
\item 138. \textit{Worchester}, 31 U.S. at 532, 540-41.
\item 139. \textit{Id.} at 561.
\item 140. \textit{Id.} at 559.
\item 141. \textit{Id.} at 559-60.
\item 142. Gould, 96 COLUM. L. REV. at 817.
\item 143. Dussias, 55 U. PITT. L. REV. at 16.
\item 144. Gould, 96 COLUM. L. REV. at 817.
\end{footnotes}
exclusive, indicated the deference the Court gave to a geographically-based notion of tribal sovereignty.\textsuperscript{145}

**The Doctrine of Trust Responsibility**

In addition to the doctrine of inherent sovereignty, the Marshall trilogy gave rise to another significant component of the relationship between the federal government and the Indian tribes — that of the doctrine of trust responsibility.\textsuperscript{146} In *Cherokee Nation*, the Court stated conclusively that Indian tribes were not foreign states, but rather that they existed "in a state of pupilage," their relationship with the federal government resembling that of "a ward to his guardian."\textsuperscript{147} This language suggested the existence of a fiduciary relationship between the government and the Cherokee Nation whereby Congress offered its protection against incursions by the States in return for the exclusive right to regulate the external relations of the tribe.\textsuperscript{148}

Initially, the trust responsibility doctrine was used as a means of protecting the Indian tribes from ill treatment at the hands of the states, and concerned primarily the external relations between the tribes and the states in which they were located.\textsuperscript{149} However, following *Ex parte Crow Dog*,\textsuperscript{150} Congress began employing the trust responsibility doctrine in regulating the internal affairs of the Indian tribes.\textsuperscript{151} Crow Dog, a member of the Brule Sioux band of the Sioux Indian Nation, was found guilty of the murder of an Indian of the same band within Indian country.\textsuperscript{152} Crow Dog was tried and convicted in the United States District Court for the District of Dakota.\textsuperscript{153} Imprisoned and awaiting execution, Crow Dog petitioned the Supreme Court for a writ of habeus corpus, claiming that the judgment and sentence were void because the district court lacked personal jurisdiction.\textsuperscript{154}

The Supreme Court granted the writ and overturned the conviction of Crow Dog on grounds that the district court lacked jurisdiction to try the case.\textsuperscript{155} In granting the writ, the Supreme Court found that the treaty between the federal government and the Sioux Nation had

\begin{itemize}
\item \textsuperscript{145} Dussias, 55 U. Pitt. L. Rev. at 16.
\item \textsuperscript{146} Pommersheim, supra note 107, at 41-42.
\item \textsuperscript{147} Cherokee Nation, 30 U.S. at 17.
\item \textsuperscript{148} Gould, 91 Colum. L. Rev. at 826.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} 109 U.S. 556 (1883).
\item \textsuperscript{151} Gould, 91 Colum. L. Rev. at 826.
\item \textsuperscript{152} Ex parte Crow Dog, 109 U.S. 556, 557 (1883).
\item \textsuperscript{153} Ex parte Crow Dog, 109 U.S. at 557.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id. at 572.
\end{itemize}
specifically provided that the laws of the territory of Dakota were not to apply to crimes between the Sioux Indians committed in Indian country.\footnote{156} The Court reasoned that the intent of the provision was to promote tribal self-government and the regulation of domestic affairs by allowing tribes to administer their own laws in the maintenance of peace.\footnote{157} Thus, the Supreme Court protected the Sioux Nation from the district court’s attempt to impose upon tribal prerogatives and abrogate tribal sovereignty in the absence of congressional authorization.\footnote{158}

In 1885, Congress, now aware that the federal courts were powerless to prosecute crimes between Indians committed in Indian territory, passed the Major Crimes Act.\footnote{159} The Major Crimes Act established that certain major felonies, when committed in Indian country, were federal crimes over which federal courts had exclusive jurisdiction.\footnote{160} This statute was among the first attempts by Congress to control the internal affairs of Indian tribes.\footnote{161} Less than one year would pass before the constitutionality of the Act would be challenged.\footnote{162}

In United States v. Kagama,\footnote{163} the Supreme Court found the Major Crimes Act to be both a valid and necessary assertion of congressional authority over Indian tribes.\footnote{164} In Kagama, the Supreme Court examined the constitutionality of the Major Crimes Act and whether the federal courts of the United States had jurisdiction over crimes committed by Indians, against other Indians, on Indian reservations.\footnote{165} Kagama was an Indian who had been charged with the murder of another Indian that had occurred within the limits of the Hoopa Valley Reservation in the State of California.\footnote{166} Kagama demurred as to the indictment, challenging the constitutionality of the statute and the jurisdiction of the federal courts.\footnote{167} The issues

\begin{itemize}
\item \footnote{156} Id. at 567.
\item \footnote{157} Id. at 568.
\item \footnote{158} COHEN, supra note 114, at 125.
\item \footnote{159} Gould, 96 COLUM. L. REV. at 827 & n.112.
\item \footnote{160} Dussias, 55 U. PIT. L. REV. at 18-9. See 18 U.S.C.A. § 1153 (West 1996); 18 U.S.C. § 3242 (1994). The Code, as amended, provides that murder, manslaughter, kidnapping, maiming, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and other felonies committed by Indians are subject to the exclusive jurisdiction of the United States. 18 U.S.C. § 1153 (1994).
\item \footnote{161} Gould, 96 COLUM. L. REV. at 827.
\item \footnote{162} Id.
\item \footnote{163} United States v. Kagama, 118 U.S. 375 (1886).
\item \footnote{164} Kagama, 118 U.S. at 376.
\item \footnote{165} Id.
\item \footnote{166} Id. at 375-76.
\end{itemize}
reached the Supreme Court on certificate of division from the Circuit Court of the United States for the District of California.\textsuperscript{168} Holding that the law was constitutional, the Court found that enforcement of the laws of the United States in federal court was necessary for the protection of both the Indians and other nonmembers residing among them.\textsuperscript{169} However, the Supreme Court found that the power of Congress to enact such legislation was not derived from the Constitution; rather, it existed by virtue of the fact that the federal government was seized of authority over all within its geographical limits.\textsuperscript{170} The Court concluded that because the power of the Indian tribes had weakened over the years, it had become necessary for Congress to regulate certain internal affairs in order to promote external relations.\textsuperscript{171}

\textit{The Plenary Power Doctrine}

Prior to the Court's decision in \textit{Kagama}, the Supreme Court generally regarded Indian tribes as domestic dependent nations, exhibiting many of the same characteristics as states.\textsuperscript{172} However, this notion of tribal sovereignty was brought to an abrupt end by the Court's opinion in \textit{Kagama}.\textsuperscript{173} \textit{Kagama} has been interpreted as providing Congress with unlimited power to define the extent of tribal rights of self-governance.\textsuperscript{174} Thus, the trust responsibility doctrine had evolved into what has been referred to as the plenary power doctrine.\textsuperscript{175} The plenary power doctrine provided an "extra-constitutional" power source which Congress would use to further assert control over the Indian tribes.\textsuperscript{176} As established, the plenary power doctrine provided the mechanism by which tribal political authority became subject to complete defeasance at the hands of Congress.\textsuperscript{177}

Among early congressional attempts to eliminate tribal governments and assimilate the Indian people into the general American populace was the General Allotment Act ("the Dawes Act").\textsuperscript{178} The Dawes Act provided, generally, that reservation lands would be allotted to Indians in severalty, at which time the Indians would become

\begin{footnotes}
\item[168.] Id. at 375.
\item[169.] Id. at 384-85.
\item[170.] Id. at 380 (citing Murphy v. Ramsey, 114 U.S. 15, 44 (1885)).
\item[171.] Id. at 384.
\item[173.] Clinton, 46 ARK. L. REV. at 112.
\item[174.] Id.
\item[175.] Gould, 96 COLUM. L. REV. at 828.
\item[176.] Clinton, 46 ARK. L. REV. at 99.
\item[177.] Id. at 112.
\item[178.] POMMERSHEIM, \textit{supra} note 107 at 19.
\end{footnotes}
subject to the jurisdiction of the state or territory in which the allotment was located.\textsuperscript{179} Under the Dawes Act, the head of each Indian household was to receive 160 acres of land to be held in trust by the federal government for twenty-five years, at which time the holder would receive a fee patent.\textsuperscript{180} Although the intent of the Dawes Act was to "civilize" the Indians by transforming them into farmers, the results of the act were quite devastating.\textsuperscript{181} Because the surplus of reservation lands not allotted to the Indians was sold primarily to white settlers, Indians collectively held but a fraction of the acreage originally possessed by them.\textsuperscript{182} As a result, Indian communities became increasingly impoverished.\textsuperscript{183}

In 1903, the Supreme Court decided \textit{Lone Wolf v. Hitchcock}\textsuperscript{184} and recognized the validity of the plenary power doctrine as asserted by Congress to restrict the political autonomy of Indian confederations.\textsuperscript{185} In \textit{Lone Wolf}, the Court upheld the unilateral abrogation of a treaty between certain Indian tribes and the United States.\textsuperscript{186} The Confederated Tribes of the Kiowa, Comanche, and Apache Indians had entered into a treaty with the federal government concerning the disposition of lands occupied by those Tribes.\textsuperscript{187} Subsequently, Congress passed an act that purported to deny the Indians certain rights guaranteed by the treaty, including the right of exclusive use of their land.\textsuperscript{188} Seeking to enjoin the activities of the State pursuant to the legislation, the Tribes filed an action in the Supreme Court for the District of Columbia.\textsuperscript{189} The Tribes’ application was denied, and the matter was appealed to the United States Court of Appeals for the District of Columbia, which later affirmed.\textsuperscript{190}

On appeal, the United States Supreme Court upheld the constitutionality of the Dawes Act and found that Congress held paramount authority over land held by the Indians by reason of Congress’ trustee


\textsuperscript{180} Pommersheim, \textit{supra} note 107, at 19.

\textsuperscript{181} Furber, 14 U. Puget Sound L. Rev. at 235.

\textsuperscript{182} Gould, 96 Colum. L. Rev. at 829-30.

\textsuperscript{183} Id. at 829.

\textsuperscript{184} 187 U.S. 553 (1903).


\textsuperscript{186} Lone Wolf, 187 U.S. at 566. Although Congress had previously passed an act departing from the policy of contracting with Indian tribes through treaties to governance by statutory acts, that act expressly provided that no valid treaties then in existence were to be invalidated or impaired. \textit{Id.} (quoting United States v. Kagama, 118 U.S. 375, 382 (1885)).

\textsuperscript{187} Lone Wolf, 187 U.S. at 554.

\textsuperscript{188} Id. at 559.

\textsuperscript{189} Id. at 560.

\textsuperscript{190} Id. at 562-63.
relationship with the tribes. This power, said the Court, authorized Congress to act in direct disregard of express treaty provisions when necessary to benefit the country or the Indians themselves. Such broad assertions of power, however, would not be limited to situations where Congress attempted to abrogate treaties with the Indian tribes.

In 1913, the Supreme Court, in *United States v. Sandoval,* upheld the constitutionality of a federal statute prohibiting the introduction of intoxicating liquors into Pueblo Indian country. Felipe Sandoval had been indicted in the United States District Court for the District of New Mexico under this statute for carrying liquor onto the Santa Clara Pueblo. Sandoval demurred, asserting that the indictment did not state an offense against federal law. The district court sustained the demurrer and dismissed the indictment, finding that the law was an unconstitutional usurpation of state police power. The United States appealed the decision of the district court to the United States Supreme Court.

On appeal, the Supreme Court reversed and found that, notwithstanding the Pueblos' status as citizens of the United States, and the fact that the Tribe now held title to their lands in fee simple, federal proscription of the introduction of liquor was nonetheless a legitimate assertion of congressional power. The Court stated that the United States was a "superior and civilized nation" with a duty to foster and protect the less civilized Indian communities. It was the uncivilized nature of the Indian people, the Court concluded, that enabled Congress to legislate so broadly against the Indians.

The forces set into motion by the Dawes Act would continue to plague Indian tribes through the first quarter of the twentieth century. In 1928, the Institute for Government Research released the Meriam Report which documented the massive expropriation result-

191. *Id.* at 565.
192. *Id.* at 566.
193. See infra notes 194-210 and accompanying text.
194. 231 U.S. 28 (1913).
197. *Sandoval,* 198 F. at 541.
199. *Id.* at 28.
200. *Id.* at 47-48.
201. *Id.* at 46.
202. *Id.* at 48.
203. Clinton, 46 ARK. L. REV. at 104.
Citing poor health, inadequate living conditions, poverty, and general suffering, the Meriam report documented the tragedies which Congress would attempt to alleviate through subsequent legislation.205

In 1934, Congress passed the Wheeler-Howard Act, commonly known as the Indian Reorganization Act ("the IRA"), with the purpose of reconciling the unjust treatment of Indian tribes that resulted from the allotment process.206 The IRA established policies which encouraged self-determination among the tribes.207 The IRA expressly repudiated the practice of allotting lands to the Indians in severalty, extended periods of trust with respect to Indian lands held by the government, authorized the restoration of tribal ownership to remaining surplus lands, and authorized the incorporation of Indian tribes in accord with congressional policy encouraging tribal self-determination.208

Although analysis of the legislative history of the IRA suggests that Congress intended the act to restore some tribal self-governance, the extent to which tribal authority was to extend was not defined.209 Ultimately, the issue of tribal sovereignty was left to the courts.210

Finding The Limits Of Indian Tribal Sovereignty

The Cherokee cases laid the foundation upon which modern interpretations of tribal sovereignty have been built.211 In these early opinions, Chief Justice John Marshall recognized that tribal sovereignty was based on the notion of tribal authority over members of the tribal entity as well as authority over an established geographic territory.212 Subsequent Supreme Court decisions have indicated that, although the Court continues to acknowledge tribal sovereignty to include authority over a tribe's reservation, tribal membership is increasingly favored as the basis for sustaining tribal authority.213 Contemporary decisions have further narrowed the scope of tribal

[204. Id. (citing INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928)).
205. Id. (citing INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 3-8 (1928)).
207. Gould, 96 COLUM. L. REV. at 832.
208. Id.
209. Id. at 833.
210. Id. at 833-34.
211. Hansen, 16 AM. INDIAN L. REV. at 321.
213. Id. at 4.]
sovereignty, as the trend towards membership-based authority continues.2\textsuperscript{14}

In 1975, in United States v. Mazurie,\textsuperscript{215} the United States Supreme Court reaffirmed the notion of a territorial-based sovereignty.\textsuperscript{216} In Mazurie, the Supreme Court held that an Indian tribe could regulate the sale of alcohol by nonmembers on fee lands located within the boundaries of the reservation.\textsuperscript{217} The Mazuries were convicted of violating a federal law in the United States District Court for the District of Wyoming for noncompliance with a tribal ordinance requiring liquor retailers to obtain both state and tribal liquor licenses.\textsuperscript{218}

The Mazuries appealed the judgment of the district court to the United States Court of Appeals for the Tenth Circuit, where their convictions were reversed.\textsuperscript{219} The Tenth Circuit held that the Mazuries were not subject to the tribal ordinance because their business was located on fee-patented land owned by non-Indians.\textsuperscript{220} The United States Supreme Court granted certiorari to decide whether Congress had the authority to regulate the sale of alcohol in Indian country and whether that authority was delegable to Indian tribes.\textsuperscript{221}

On appeal, the Supreme Court reversed and held that the Commerce Clause of the Constitution afforded Congress the power to prohibit or regulate the sale of alcohol in Indian country and that this power was delegable to Indian tribes based on the tribe's independent authority over the matter.\textsuperscript{222} The Court reasoned that Indian governments retained authority over their reservations, at least until Congress legislated to the contrary.\textsuperscript{223} The Court's notion of inherent tribal authority, and the deference it paid to the aspect of geography, however was soon to abate.\textsuperscript{224}

In 1978, the Supreme Court in Oliphant v. Suquamish Indian Tribe\textsuperscript{225} addressed the issue of tribal criminal jurisdiction over non-

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\textsuperscript{214} Id. at 4-5.
\textsuperscript{215} 419 U.S. 544 (1975).
\textsuperscript{216} United States v. Mazurie, 419 U.S. 544, 558 (1975).
\textsuperscript{217} Mazurie, 419 U.S. at 553-54.
\textsuperscript{218} Id. at 547-48. See 18 U.S.C. § 1161 (1994) (authorizing Indian tribes to regulate the introduction of alcohol into Indian country, provided no state law is violated).
\textsuperscript{219} Mazurie, 419 U.S. at 549.
\textsuperscript{220} Id. at 549-50.
\textsuperscript{221} Id. at 546.
\textsuperscript{222} Id. at 554. Article I, Section 8, Clause 3 of the United States Constitution (the "Commerce Clause") gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.
\textsuperscript{223} Mazurie, 419 U.S. at 558 (citations omitted).
\textsuperscript{224} See infra notes 225-33 and accompanying text.
\textsuperscript{225} 435 U.S. 191 (1978).
In Oliphant, two non-Indians were arrested and charged with violating certain provisions of the Tribal Code. Following arraignment before the Tribal Court, the defendants applied for writs of habeus corpus to the United States District Court for the Western District of Washington, arguing that the Tribal Court lacked criminal jurisdiction over non-Indians. The district court disagreed with the defendants’ argument and denied their petitions. On appeal to the United States Court of Appeals for the Ninth Circuit, the Ninth Circuit affirmed denial of the writ with respect to defendant Oliphant, and the Supreme Court granted certiorari.

On appeal, the United States Supreme Court held that, absent some affirmative delegation by Congress, Indian tribal courts lacked criminal jurisdiction to punish non-Indians. Citing its own precedent, the Supreme Court stated that to allow Indian tribes to exercise criminal jurisdiction over non-Indians would be “inconsistent with their status” as dependents of the federal government. The Court reasoned that, upon a tribe's incorporation into the United States, certain aspects of sovereignty were necessarily constrained as incompatible with the overriding interests of the federal government.

In National Farmers Union Insurance Companies v. Crow Tribe of Indians, the United States Supreme Court established federal court review of tribal court assertions of jurisdiction. In National Farmers, a member of the Crow Tribe brought an action in the Crow Tribal Court against a public school located on the Crow Reservation after sustaining injuries on the school grounds. The Tribal Court entered a default judgment against the defendant school district for $153,000. The school district and its insurer, National Farmers

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227. Oliphant, 435 U.S. at 194. Mark David Oliphant was charged with assaulting a tribal officer and resisting arrest; Daniel B. Belgarde was charged “with 'recklessly endangering another person' and injuring tribal property.” Id.
228. Oliphant, 435 U.S. at 194.
229. Id. at 194-95.
230. Id. at 195. Defendant Belgarde's appeal was still pending when the Supreme Court granted cert. Id.
233. Id. at 209.
236. National Farmers, 471 U.S. at 847. The injuries were sustained by Leroy Sage, a Crow minor, when he was struck by a motorcycle while on the school's parking lot. Id.
237. National Farmers, 471 U.S. at 847-48. Although process was served on the Chairman of the School Board, Wesley Falls Down, he failed to notify anyone of the suit filed against the School District. Id. at 847.
Union, filed a complaint in the United States District Court for the
District of Montana seeking to enjoin enforcement of the Tribal
Court's judgment. The district court granted the school district and
its insurer a permanent injunction against execution by the Tribal
Court, holding that the Crow Tribe lacked subject matter jurisdiction
over the original tort claim.

The tribal defendants appealed the judgment of the district court
to the United States Court of Appeals for the Ninth Circuit, which
reversed. Although the Ninth Circuit did not reach the merits of
the School District's challenge to tribal court jurisdiction, the court
held that the district court's assertion of jurisdiction over the matter
was improper. The Ninth Circuit could find no constitutional, stat-
tutory, or common law ground in support of federal jurisdiction.
The Supreme Court granted certiorari to consider whether the school
district's request for injunctive relief was properly entertained by
the district court.

On appeal, the United States Supreme Court reversed and held
that challenges to tribal court assertions of jurisdiction were subject to
review by federal courts as a matter of federal question. The Court
noted, however, that federal review was only appropriate after the
challenger had exhausted tribal remedies available under the existing
tribal court system. The Court unanimously found that, because
the boundaries of a tribe's judicial power were defined by federal law,
any contention that those boundaries had been violated necessarily
arose as a question of federal law. In response to the school dis-
trict's argument that the holding in Oliphant should be extended to
preclude tribal civil jurisdiction over nonmembers, the Court held that
unlike criminal jurisdiction, the Indians had not been divested,
whether affirmatively or implicitly, of civil jurisdiction over nonmem-
bers. The Court concluded that a determination of tribal jurisdic-
tion required careful analysis of a tribe's retained sovereignty by

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238. National Farmers, 471 U.S. at 848-49. The complaint named as defendants the
Crow Tribe of Indians, the Tribal Council, the Tribal Court, judges of the Tribal Court,
and the Chairman of the Tribal Council. Id. at 848.
240. Id. at 849.
241. Id.
242. Id.
243. Id. at 847.
244. Id. at 857.
requirement of exhaustion of tribal remedies through tribal appellate courts is not a
jurisdictional prerequisite, rather a matter of comity).
247. Id. at 853-55.
means of statutes, treaties, and judicial and administrative decisions.\textsuperscript{248}

In \textit{Iowa Mutual Insurance Company v. LaPlante},\textsuperscript{249} the Supreme Court extended the tribal court exhaustion requirement announced by the Court in \textit{National Farmers} to actions brought in federal courts under diversity of citizenship.\textsuperscript{250} In \textit{Iowa Mutual}, Edward LaPlante, a member of the Blackfeet Indian Tribe, was injured while under the employment of a ranch located on the Blackfeet Indian Reservation and owned by members of the Tribe.\textsuperscript{251} LaPlante brought action in the Tribal Court against the Wellman Ranch and its insurer, Iowa Mutual, seeking compensatory as well as punitive damages.\textsuperscript{252} Iowa Mutual, represented by Midlands Claim Service, moved the Tribal Court to dismiss the actions for failure to properly allege Tribal Court jurisdiction and for lack of subject matter jurisdiction.\textsuperscript{253} Although the Tribal Court dismissed the actions for failure to allege jurisdiction, the court allowed the LaPlantes to amend their complaint to allege facts sufficient for the court to determine whether it had jurisdiction.\textsuperscript{254} The Tribal Court found both subject matter and adjudicatory jurisdiction over the actions based on the commercial relationships between Iowa Mutual and the Tribe.\textsuperscript{255}

Upon the Tribal Court's jurisdictional determinations, Iowa Mutual brought action against the LaPlantes, the Wellmans, and the Wellman Ranch Co. in the United States District Court for the District of Montana, seeking a declaration that the injuries sustained by the LaPlantes were beyond the scope of the applicable insurance policies.\textsuperscript{256} Iowa Mutual alleged diversity of citizenship as the basis for federal jurisdiction.\textsuperscript{257} The LaPlantes moved the district court to dismiss the action, arguing that the federal court lacked subject matter

\textsuperscript{248} \textit{Id.} at 855-56.
\textsuperscript{249} 480 U.S. 9 (1987).
\textsuperscript{250} \textit{Iowa Mut. Ins. Co. v. LaPlante}, 480 U.S. 9, 16 (1987).
\textsuperscript{251} \textit{Iowa Mutual}, 480 U.S. at 11. Respondent, Edward LaPlante, was injured when the cattle truck he was driving up a hill within the reservation "jackknifed." \textit{Id.}
\textsuperscript{252} \textit{Iowa Mutual}, 480 U.S. at 11. The Wellman Ranch Co. who employed Mr. LaPlante, was a Montana corporation owned by the Wellman family, who were members of the Blackfeet Tribe and residents of the Reservation. \textit{Id.}
\textsuperscript{253} \textit{Iowa Mutual}, 480 U.S. at 11. The complaint, filed by Edward LaPlante, and his wife Verla, stated two causes action. \textit{Id.} The first action named the Wellman ranch, as well as its individual owners, as defendants and sought damages for both LaPlante's personal injuries as well as his wife's loss of consortium. \textit{Id.} The second action sought compensatory and punitive damages from Iowa Mutual. \textit{Id.}
\textsuperscript{254} \textit{Id.}
\textsuperscript{255} \textit{Id.}
\textsuperscript{256} \textit{Id.} at 12-13.
\textsuperscript{257} \textit{Id.} at 13.
jurisdiction over the claim. The district court granted the LaPlantes' motion, holding that the Tribal Court must be given an opportunity to determine its jurisdiction prior to review by federal courts. Iowa Mutual appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit affirmed the decision of the district court, dismissing Iowa Mutual's action. The Ninth Circuit found that the district court's conclusion concerning federal review of tribal jurisdiction to be consistent with the Supreme Court's holding in National Farmers. The United States Supreme Court granted certiorari to consider whether a federal court could exercise jurisdiction based on diversity of citizenship before a tribal court system has determined its own jurisdiction over the matter.

On appeal, the Supreme Court reversed the district court's order dismissing Iowa Mutual's claim holding that the district court should have considered whether the action should have been stayed pending Tribal Court proceedings. However, the Court agreed with the circuit court's holding that the exhaustion rule set forth in National Farmers applied to actions brought in federal courts based on diversity of citizenship. The Court found that regardless of the basis for federal jurisdiction, federal policy in favor of tribal self-government required federal courts to stay their review until the tribal courts had made their own determination of tribal jurisdiction. The Court found that in diversity actions, like federal-question actions, "unconditional access" to federal forums would impair the ability of tribal courts to manage reservation affairs. The Court held that although tribal determinations of jurisdiction were subject to review, available tribal remedies must be exhausted before a suit could be initiated in federal court.

258. Id.
259. Id. (citing R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979, 981 (9th Cir. 1983)).
260. Id. at 13.
261. Id.
262. Id. at 13-14 (citing National Farmers, 471 U.S. at 857).
265. Id. at 16.
266. Id. (quoting National Farmers, 471 U.S. at 857).
267. Id. at 16.
268. Id. at 19. Additionally, the Court stated that "[a]t a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." Id. at 17.
The United States Supreme Court has been inconsistent in its application of precedent when determining the limits of tribal authority over nonmembers. In Washington v. Confederated Tribes of the Colville Indian Reservation, the Supreme Court announced the principle whereby a tribe retained those powers over nonmembers so long as exercise of that power did not impair some overriding federal interest. Less than one year later, the Court, without expressly overruling Colville, announced a different test. In Montana v. United States, the Court stated that a tribe presumably had no authority over nonmembers, absent a showing of some significant tribal interest in the matter. This apparent inconsistency has led at least one federal circuit court to conclude that "[i]t is not clear whether the Montana rule (divestiture of powers not needed for tribal self-government or internal control) is meant to supersede that of Colville (divestiture of powers inimical to overriding federal interests)," and has created confusion in a number of other appellate decisions.

The Colville Test

In Washington v. Confederated Tribes of the Colville Indian Reservation, the Supreme Court addressed the issue of whether a state could enforce certain taxation requirements on Indian reservations. In Colville, the Confederated Tribes of the Colville Indian Reservation and the Confederated Tribes and Bands of the Yakima Indian Nation each filed an action in the United States District Court for the Eastern District of Washington seeking declaratory and injunctive relief bar-
ring the enforcement of Washington state taxes.\textsuperscript{277} Specifically, the Tribes contended that the State of Washington could not lawfully apply cigarette and tobacco taxes to sales by tobacco outlets located on reservations.\textsuperscript{278} The district court consolidated the two cases and granted permanent injunctions against state enforcement of the taxes, finding that application of the state tax was pre-empted by tribal taxing ordinances.\textsuperscript{279} The State appealed directly to the United States Supreme Court.\textsuperscript{280}

On appeal, the Supreme Court reversed in part and affirmed in part, holding that the State of Washington could lawfully levy taxes against nonmembers who purchased cigarettes on the reservation.\textsuperscript{281} In reaching this conclusion, however, the Supreme Court found unpersuasive the State's argument that the Tribes lacked taxing authority over nonmembers who entered the reservation.\textsuperscript{282} The Court determined that the power to tax transactions which occurred on the reservation was fundamental to the maintenance of tribal sovereignty and, unless divested by the federal government or by implication of the tribe's status as a dependent, would be retained by the tribes.\textsuperscript{283} Citing Oliphant \textit{v. Suquamish Indian Tribe}, the Court reasoned that tribal authority was not necessarily divested by virtue of a tribe's dependent status alone.\textsuperscript{284} Rather, the Court concluded that a tribe may exercise that authority which is consistent with the "overriding interests" of the federal government.\textsuperscript{285} Throughout its inquiry, the Court found no overriding federal interests which would have precluded the levy of a tribal tax on nonmembers.\textsuperscript{286} According to the Court, a tribe would retain that authority unless otherwise divested by federal law or implication, establishing a presumption of tribal civil authority over nonmembers that was extinguishable only when exercise of that authority was found to be inconsistent with an overriding federal interest.\textsuperscript{287}

\textsuperscript{277} \textit{Colville}, 447 U.S. at 139. Specifically, the Tribes sought to enjoin the State of Washington from seizing contraband cigarettes en route to the reservations. \textit{Id.}

\textsuperscript{278} \textit{Colville}, 447 U.S. at 139.

\textsuperscript{279} \textit{Id.} at 139, 140.

\textsuperscript{280} \textit{Id.} at 141.

\textsuperscript{281} \textit{Id.} at 161, 164.

\textsuperscript{282} \textit{Id.} at 152.

\textsuperscript{283} \textit{Id.}

\textsuperscript{284} \textit{Id.} at 152-53 (citing Oliphant \textit{v. Suquamish Indian Tribe}, 435 U.S. 191, 208-10 (1978)).

\textsuperscript{285} \textit{Id.} at 153-54. The Court found that divestiture of tribal power occurs when "exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights." \textit{Id.}

\textsuperscript{286} \textit{Colville}, 447 U.S. at 154.

\textsuperscript{287} See supra notes 281-86 and accompanying text.
The presumption expressed in *Colville* has been implemented to sustain tribal authority over nonmembers in a number of instances.\(^{288}\) For example, in *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen*,\(^{289}\) the Ninth Circuit found that tribal regulation of the riparian rights of a nonmember landowner within the reservation was not inconsistent with federal interests.\(^{290}\) In *Namen*, the Confederated Salish and Kootenai Tribes of the Flathead Reservation brought action against the Namens in the United States District Court for the District of Montana, alleging violations of a shoreline protection ordinance.\(^{291}\) The district court held that the Tribe lacked authority to regulate the use of land held by nonmembers within the reservation.\(^{292}\) The Tribe appealed this decision to the United States Court of Appeals for the Ninth Circuit.\(^{293}\)

On appeal, the Ninth Circuit reversed and held that the Tribe could regulate the use of riparian land held by nonmembers.\(^{294}\) The court of appeals stated that it could identify no overriding interest impaired by the Tribe’s assertion of regulatory authority over the Namens.\(^{295}\) Moreover, the Ninth Circuit found no merit in the countervailing federal interests suggested by the Namens; namely, the prevention of intrusions on nonmembers’ personal liberties and fulfilling the “justifiable expectations” of nonmembers.\(^{296}\) Finding the United States’ participation in the litigation on behalf of the Tribe particularly convincing of the Tribe’s jurisdiction, the court upheld the Tribe’s assertion of civil authority.\(^{297}\)

**The Montana Rule and the Exceptions Thereto**

In 1981, the Supreme Court placed significant limitations on Indian tribal authority over nonmembers in *Montana v. United States*, as the Court addressed the question of tribal regulatory authority of

\(^{288}\) See Whiteside, 828 F.2d at 533 (citing *Colville* as means of determining extent of tribal authority); Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 601 (9th Cir. 1983) (recognizing the importance of *Colville* in maintaining broad-based tribal civil jurisdiction).

\(^{289}\) 665 F.2d 951 (9th Cir. 1982).

\(^{290}\) *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen*, 665 F.2d 951, 963 (9th Cir. 1982).

\(^{291}\) *Namen*, 665 F.2d at 954. After consolidation of several suits, the parties named as defendants the Namens, the City of Polson, Montana, and the State of Montana, and the Tribes, as well as the United States on behalf of the Tribes, as plaintiffs. *Id.* at 954-55.

\(^{292}\) *Namen*, 665 F.2d at 954.

\(^{293}\) *Id.*

\(^{294}\) *Id.* at 963-64.

\(^{295}\) *Id.*

\(^{296}\) *Id.* at 963 n.30.

\(^{297}\) *Id.* at 964.
nonmembers on non-Indian fees located within reservation boundaries.\textsuperscript{298} In \textit{Montana}, the United States brought action against the State of Montana in the United States District Court for the District of Montana, as a fiduciary of the Crow Tribe of Indians.\textsuperscript{299} The United States sought a declaratory judgment establishing that authority to regulate hunting and fishing on the Crow Reservation belonged to the Tribe and the United States as opposed to the State.\textsuperscript{300} Citing \textit{Oliphant}, the district court denied the United States relief, holding that Indian tribes possessed neither the power nor the authority to regulate the activities of non-Indians unless Congress affirmatively provided such authority.\textsuperscript{301} The United States appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit.\textsuperscript{302}

In reversing the district court, the Ninth Circuit found that treaties existing between the federal government and the Crow Indian Tribe authorized the Tribe to regulate hunting and fishing by nonmembers within the reservation.\textsuperscript{303} The court held that, pursuant to agreements between the Crow Indians and the United States, the Tribe could regulate hunting and fishing by nonmembers within the reservation, though it could not deprive resident nonmembers from hunting and fishing on those lands held in fee by nonmembers.\textsuperscript{304} The court further stated that the Crow Indians could not impose criminal sanctions on nonmembers on the reservation.\textsuperscript{305} The State appealed to the United States Supreme Court.\textsuperscript{306}

On appeal, the Supreme Court held that although a tribe could regulate nonmembers on tribe-owned lands, or lands held in trust for the tribes by the United States, the retained inherent authority of Indian tribes did not include the power to regulate activities of nonmembers on lands owned by nonmembers.\textsuperscript{307} Extending the principles set forth in \textit{Oliphant}, the Court found that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to con-

\begin{footnotesize}
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\item [\textsuperscript{298}] \textit{Montana}, 450 U.S. at 547.
\item [\textsuperscript{299}] Id. at 549.
\item [\textsuperscript{300}] Id. The United States also sought to quiet title to a certain river bed running through the Crow reservation, as well as an injunction requiring the State of Montana to obtain the Tribe's permission before issuing licenses to hunt or fish on the reservation. \textit{Id.}
\item [\textsuperscript{301}] \textit{Montana}, 450 U.S. at 549.
\item [\textsuperscript{302}] Id. at 550.
\item [\textsuperscript{303}] Id. The Ninth Circuit did state, however, that the Allotment Acts implicitly divested the Tribe of regulatory authority over owners of fee lands, on those fee lands within the reservation. \textit{Id.} at 549.
\item [\textsuperscript{304}] \textit{Montana}, 450 U.S. at 550.
\item [\textsuperscript{305}] Id.
\item [\textsuperscript{306}] Id.
\item [\textsuperscript{307}] Id. at 564-65.
\end{itemize}
\end{footnotesize}
trol internal relations is inconsistent with the dependent status of the tribes." Although the Crow Tribe had no authority to regulate hunting and fishing by nonmembers on non-Indian fees within the Crow Reservation, the Court stated that where sufficient tribal interests were at stake, a tribe could exercise limited civil jurisdiction over nonmembers on non-Indian fees.

The Court announced specific exceptions to the more general proposition that inherent tribal authority did not reach the activities of nonmembers. These two "exceptions" would allow a tribe to assert jurisdiction over nonmember parties in situations where the tribe would otherwise lack authority. The first exception concerned a nonmember party who entered a "consensual relationship" with the tribe or one of the tribe's members. A tribe could regulate the activities of nonmembers who engaged in commercial dealings, contracts, leases, or other agreements with the tribe. The second exception, said the Court, involved a tribe's inherent power to exercise authority over nonmembers within a reservation when "substantial tribal interests" were at stake. The Court stated that a tribe could exercise authority over nonmembers whose conduct threatened or had a direct effect on a tribe's political integrity, economic security, or health or welfare.

The "consensual relationship" exception to the presumption against tribal authority over nonmembers was applied by the United States Court of Appeals for the Ninth Circuit to sustain application of a tribal ordinance mandating hiring preferences on a reservation. In *FMC v. Shoshone-Bannock Tribes*, the Ninth Circuit found contractual relations between a non-Indian manufacturer and the Tribe sufficient to establish regulatory authority over the manufacturer, even though the facilities were located on fee land. FMC, a non-Indian owned chemical manufacturer, operated a plant located on the

308. Id. at 564 (citations omitted).
309. Id. at 565-66.
310. Id.
313. Id.
314. Id. at 566.
315. Id.
316. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990).
317. 905 F.2d 1311 (9th Cir. 1990).
In 1980, the Tribal Business Council adopted the Tribal Employment Rights Ordinance ("TERO") requiring employers located on the reservation to exercise hiring preferences in favor of Indians.\(^3\)

Dissatisfied with FMC's compliance with the ordinance, the Tribe filed civil charges in the Tribal Court.\(^3\) FMC challenged the Tribal Court's jurisdiction over the action in the United States District Court for the District of Idaho, and the district court enjoined the Tribe from enforcing any judgment against FMC until the Tribal Court addressed the jurisdictional question.\(^3\) Both the Tribal Court and the Tribal Appellate Court found subject matter jurisdiction over the Tribe's action proper, and judgment was entered.\(^3\) Subsequently, the district court reversed the decision of the Tribal Court, and the Tribe appealed.\(^3\)

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the decision of the district court, finding the Tribal Court's assertion of jurisdiction appropriate.\(^3\) In addressing the issue, the court found certain mining leases and contracts between FMC and the Tribe adequate to satisfy the consensual relationship prong of the Montana exceptions.\(^3\) In response to FMC's argument that the connections between FMC and the Tribe were not sufficiently related to employment so as to support application of the TERO, the court found that FMC, by contracting extensively with the Tribe and employing its members, had effectively subjected itself to the jurisdiction of its courts.\(^3\)

In *Hardin v. White Mountain Apache Tribe*, the Ninth Circuit found a tribal ordinance permanently excluding certain nonmembers from the reservation to be a permissible exercise of authority under the second Montana exception concerning the protection of "significant tribal interests."\(^3\)

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319. *FMC*, 905 F.2d at 1312. FMC corporation manufactured elemental phosphorus. *Id.* FMC was the largest employer on the reservation with 600 employees. *Id.*
320. *FMC*, 905 F.2d at 1312.
321. *Id.* at 1313.
322. *Id.*
323. *Id.* The Tribal Appellate Court entered a compliance agreement whereby FMC was required to award 75% of all new hires and 100% of all promotions to Indians, required one-third of all internal training operations be given to local Indians, and levied an annual TERO fee of $100,000 on FMC. *Id.*
324. *FMC*, 905 F.2d at 1312.
325. *Id.* at 1315.
326. *Id.* at 1314.
327. *Id.* at 1314-25. Specifically, the leases and contracts involved phosphate mines located on the reservation which FMC mined in connection with the production of elemental phosphorus. *Id.* at 1312.
328. 779 F.2d 476 (9th Cir. 1985).
Apache Reservation, had been convicted in a federal court for concealing stolen federal property. Subsequent to Hardin’s conviction, the Tribe passed a resolution authorizing a petition to the Tribal Court to permanently exclude Hardin from the reservation. Hardin appealed the Tribal Court’s exclusion order to the Tribal Appeals Court, which affirmed the order. Prior to the appellate court ruling, the tribal police forcibly removed Hardin from the White Mountain Reservation.

Hardin brought action against the Tribal Court and certain tribal officials in the United States District Court for the District of Arizona, seeking declaratory and injunctive relief, as well as damages. Hardin’s action was dismissed by the district court for failure to state a claim, and the Tribe was awarded attorneys’ fees. Hardin appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit.

On appeal, the Ninth Circuit affirmed the decision of the district and tribal courts on both the issue of Tribal Court jurisdiction as well as the award of attorneys’ fees. The court of appeals found that the removal of a person who “threatens or has some direct effect on the . . . health or welfare of the tribe” was a legitimate exercise of civil regulation under the second Montana exception. Further, the court held that jurisdiction over Hardin could be sustained under the “consensual relationship” exception, as Hardin was present on the reservation “under color of a lessee” of the Tribe. Thus, the Ninth Circuit concluded that the Tribal Court had acted within its jurisdiction when it enforced the petition to permanently exclude Hardin from the reservation.

330. Hardin, 779 F.2d at 478. Hardin was convicted of concealing several solar cell panels and batteries from a federally maintained observatory on the White Mountain Apache Reservation. Id.
331. Hardin, 779 F.2d at 478.
332. Id.
333. Id.
334. Id. Hardin’s suit named as defendants: the Tribe, the Tribal Court, and the Tribal Council, as well as various tribal officials in their individual capacities. Id.
335. Hardin, 779 F.2d at 478.
336. Id.
337. Id. at 479-80.
338. Id. at 478-79 (quoting Montana, 450 U.S. at 566).
339. Id. at 479. Prior to his exclusion, Hardin had resided on land leased from the Tribe by his parents. Id. at 478.
340. Hardin, 779 F.2d at 479. For an earlier case demonstrating both exceptions to the Montana rule, see Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982). In Cardin, John Cardin, a non-Indian, was the proprietor of a grocery and general store located within the exterior boundaries of the Quinault Indian Reservation. Cardin, 671 F.2d at 364. Cardin’s business was located on a thirty-acre tract of land held by him in fee. Id. Cardin had purchased both the store and the land it was located on in 1978. Id. At that
SUPERME COURT DECISIONS IN THE WAKE OF MONTANA

In Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, the Court addressed the influence of tribal zoning regulations on non-Indian lands located within the Indian reservation. In Brendale, the Confederated Tribes and Bands of the Yakima Indian Nation brought separate actions against Philip Brendale, Stanley Wilkinson, and the County of Yakima in the United States District Court for the Eastern District of Washington. The Tribe sought a declaration that it had exclusive authority to zone properties held by Brendale and Wilkinson, as well as an injunction restraining land use or county approval of land use inconsistent with tribal regulations. Brendale's parcel, held by him in fee, was located in what the court designated as the "closed area" of the reservation. Wilkinson's time, Cardin met with tribal officials to discuss certain unsanitary and dangerous conditions that allegedly violated the Tribe's building, health, and safety regulations. Id.

In 1979, without taking measures to correct the alleged violations, Cardin opened the store. Id. at 364-65. The Tribe brought action in the tribal court and obtained an injunction directing Cardin to close the store until he had secured a "certificate of occupancy." Id. at 365. Refusing to comply with the tribal court's order, tribal police forcibly closed Cardin's store. Id.

Cardin then brought action in the United States District Court for the District of Washington, seeking to enjoin tribal regulation of his business. Id. The district court granted Cardin's request for injunctive relief, holding that the Tribe's sovereign authority did not extend to nonmembers. Id. The tribe appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit. Id. at 364.

On appeal, the Ninth Circuit reversed the judgment of the district court, holding that the Tribe retained the power to enforce building, health, and safety regulations against Cardin's business. Id. at 367. According to the Ninth Circuit, "[t]he Tribe's exercise of civil jurisdiction over appellee's business in the instant case belongs to both of the broad categories in which, according to Montana, Indian tribes retain their sovereign powers." Id. at 366. The Ninth Circuit noted that the Tribe could regulate Cardin's business because Cardin had entered a "consensual relationship" with the Tribe, and, because the operation of Cardin's business "threaten[ed] or [had] some direct effect on . . . the health or welfare of the [T]ribe." Id. (quoting Montana, 450 U.S. at 565-66).

In defining the "closed area" the court stated that the parties to this litigation, as well as the District Court and the Court of Appeals, have treated the Yakima Reservation as divided into two parts: a "closed area" and an "open area." The closed area consists of the western two-thirds of the Reservation and is predominately forest land. Of the approximately 807,000 acres of land in the closed area, 740,000 acres are located in Yakima County. Twenty-five thousand acres of the seven hundred and forty thousand acres are fee land. The closed area is so named because it has been closed to the general public at least since 1972 when the Bureau of Indian Affairs restricted the use of federally maintained roads in the area to members of the Yakima Nation and its permittees, who must be record landowners or associated with the Tribe.

Id. at 415.
land, also held in fee, was located in what the court considered the "open area." The district court held that the Tribe had exclusive authority to regulate the zoning of the Brendale property, but lacked the authority to zone the Wilkinson property.

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court with respect to the Brendale property, but reversed with respect to the Wilkinson parcel. The Ninth Circuit reasoned that the Tribe was acting within its police power in establishing and maintaining the zoning regulations and that to except tribal regulation of certain fee lands would undermine the effects of a comprehensive zoning scheme throughout the reservation. Brendale, Wilkinson, and Yakima County appealed the decision of the Ninth Circuit, and the Supreme Court granted certiorari.

On appeal, the United States Supreme Court held that the Tribe lacked authority to regulate zoning of Wilkinson’s land in the “open area.” Refusing to accept the Tribe’s claim of inherent power to zone within its reservation, Justice Byron White, writing for the plurality with respect to Wilkinson’s claim, found that alienation of substantial portions of reservation lands resulted in forfeiture of any right to regulate the use of those lands. Further, Justice White reasoned that no protectable interest was implicated that might invoke authority under some other principle. Conversely, the Court held that the Tribe did possess the authority to regulate zoning of Brendale’s land in the “closed area.” Justice John Paul Stevens, writing for the plurality with respect to the claim against Brendale, asserted that notwithstanding the transfer of a minimal amount of land in that area, the Tribe did have the power to preserve the character of those lands reserved for the exclusive use of the Tribe. This power existed, reasoned the Court, as necessary to preserve the health, safety, and welfare of the Tribe.

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346. Brendale, 492 U.S. at 418. In defining “open area” the Court stated that “[a]ccess to the open area, as its name suggests, is not likewise restricted to the general public. The open area is primarily rangeland, agricultural land, and land used for residential and commercial development. Almost half of the land in the open area is fee land.” Id. at 415-16. Both Brendale and Wilkinson wished to sub-divide and develop their land pursuant to zoning regulations maintained by Yakima County. Id. at 417-19.
347. Brendale, 492 U.S. at 419.
348. Id. at 420.
349. Id. at 421.
350. Id.
351. Id. at 428.
352. Id. at 422.
353. Id. at 430-31.
354. Id. at 448.
355. Id. at 442.
356. Id. at 444.
More recently, the Supreme Court considered whether, and to what extent, an Indian tribe could regulate the activities of nonmembers on reservation lands taken by the federal government.\textsuperscript{357} In \textit{South Dakota v. Bourland},\textsuperscript{358} the Supreme Court held that an act of Congress, taking certain lands within Indian territory, functioned to abrogate the Tribe’s right to regulate non-Indians within the ceded land.\textsuperscript{359} The Cheyenne River Sioux Tribe had entered an agreement with the federal government, memorialized as the Cheyenne River Act of Sept. 3, 1954, for the taking of 104,420 acres of trust land.\textsuperscript{360} Furthermore, pursuant to the Flood Control Act, the United States Government acquired an additional 18,000 acres held in fee by non-Indians within the Cheyenne River Reservation.\textsuperscript{361} Under the Cheyenne River Act, the Tribe conveyed all its interests in the specified lands, which were to be used in the construction of a dam and reservoir; but the Tribe retained the right to access freely the shoreline of the reservoir and to hunt and fish on the shoreline, subject to “regulations governing the corresponding use by other citizens of the United States.”\textsuperscript{362}

Following a dispute between the Tribe and the State of South Dakota concerning the 1988 deer season, the Tribe announced that it would not recognize state hunting licenses on the ceded land and that hunters within the reservation would be subject to tribal prosecution for violating tribal licensing laws.\textsuperscript{363} In reaction to this announcement, the State filed an action in the United States District Court for the District of South Dakota against the Tribe’s Chairman and Director of Game, Fish, and Parks.\textsuperscript{364} The State sought an order enjoining the Tribe from excluding nonmembers from hunting on the lands taken for the dam and reservoir, or in the alternative, a declaratory judgment that the taking had divested the Tribe of any authority over the lands by withdrawing the property from the reservation.\textsuperscript{365} The district court held that the congressional acts taking the land had abrogated the Tribe’s right to exclude nonmembers from all of the taken land, and granted the State’s injunction.\textsuperscript{366}

\textsuperscript{357} See infra notes 358-74 and accompanying text.
\textsuperscript{358} 508 U.S. 679 (1993).
\textsuperscript{361} Id. at 684.
\textsuperscript{362} Id. (quoting the Cheyenne River Act of Sept. 3, 1954, ch. 1260, 68 Stat. 1191).
\textsuperscript{363} Id. at 685.
\textsuperscript{364} Id.
\textsuperscript{365} Id.
\textsuperscript{366} Id. at 685-86.
The Tribe appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed in part and reversed in part.\textsuperscript{367} The Eighth Circuit agreed that the Tribe had no authority to regulate the 18,000 acres formerly held in fee by nonmembers, but found that the Cheyenne River Act had not divested the Tribe of its right to regulate the former trust land.\textsuperscript{368} The State appealed, and the United States Supreme Court granted certiorari.\textsuperscript{369}

On appeal, the Supreme Court recognized Congress' power to unilaterally alter the rights of Indian tribes that had been established by prior treaties with the federal government.\textsuperscript{370} The Court held that the Cheyenne River Act, which seized lands for public purposes, had effectively divested any rights to regulate non-Indian hunting and fishing otherwise enjoyed by the Tribe with respect to the taken lands.\textsuperscript{371} The Court reasoned that Congress' abrogation of the Tribe's right to exclusive use and benefit of the lands at issue extinguished any right to exclude non-Indians from the land and the incidental right to exercise regulatory authority over the land.\textsuperscript{372} The Court rejected the Tribe's argument that it possessed inherent sovereignty over lands located within the external boundaries of the reservation.\textsuperscript{373} The Court held that the exercise of power beyond that which was necessary to punish members of the Tribe, to regulate membership, or to maintain internal tribal relations was inconsistent with the dependent nature of tribal organizations.\textsuperscript{374}

ANALYSIS

In \textit{A-1 Contractors v. Strate},\textsuperscript{375} the Tribal Court for the Three Affiliated Tribes of the Fort Berthold Indian Reservation attempted to assert civil jurisdiction over an otherwise ordinary tort claim.\textsuperscript{376} Although the incidents giving rise to the claim occurred within the exterior boundaries of the Fort Berthold Reservation, the United States Court of Appeals for the Eighth Circuit, sitting \textit{en banc}, held that the Tribal Court lacked jurisdiction over the action.\textsuperscript{377} The

\textsuperscript{367} Id. at 686.
\textsuperscript{368} Id.
\textsuperscript{369} Id. at 687.
\textsuperscript{370} Id. The Court did state, however, that when Congress attempts to abrogate such rights "we usually insist that Congress clearly express its intent to do so." \textit{Id.}
\textsuperscript{371} \textit{Bourland}, 508 U.S. at 687.
\textsuperscript{372} Id. at 689.
\textsuperscript{373} Id. at 694-95 (quoting \textit{Montana}, 450 U.S. at 564).
\textsuperscript{374} Id. (citing \textit{Montana}, 450 U.S. at 564; \textit{United States v. Wheeler}, 435 U.S. 313, 326 (1978)).
\textsuperscript{375} 76 F.3d 930 (8th Cir.), \textit{cert. granted}, 117 S. Ct. 37 (1996).
\textsuperscript{377} \textit{A-1 Contractors}, 76 F.3d at 941.
Eighth Circuit held that no tribal interest existed as regards a traffic accident between non-tribal parties, and therefore, the Tribe did not retain inherent sovereign power to exercise subject matter jurisdiction over the suit.\(^{378}\) In arriving at this conclusion, the Eighth Circuit relied on the 1981 Supreme Court opinion in *Montana v. United States*,\(^{379}\) as dispositive of the issue of tribal authority over nonmembers.\(^{380}\) Because of the court's inappropriate reliance on *Montana*, the opinion in *A-1 Contractors v. Strate* is subject to criticism.\(^{381}\)

First, the Eighth Circuit incorrectly adopted an exceedingly narrow view of inherent tribal sovereignty by extending the rule in *Montana* to determine tribal authority over nonmembers on land held by the Tribe.\(^{382}\) Next, assuming *arguendo* that *Montana* did apply, the Eighth Circuit incorrectly applied the *Montana* exceptions and failed to find civil jurisdiction.\(^{383}\) Finally, the Eighth Circuit incorrectly established a presumption against tribal jurisdiction over nonmembers, because such a presumption is contrary to both the doctrine of inherent sovereignty and traditional notions of tribal sovereignty.\(^{384}\)

**Overextending the *Montana* Rule**

The United States Supreme Court has long held that Indian tribes retain certain "attributes of sovereignty over both their members and their territory," at least to the extent that "sovereignty has not been divested by federal statute or treaty."\(^{385}\) For example, in *Montana*, an Indian tribe attempted to regulate the hunting and fishing activities of nonmembers on non-Indian fees located within the boundaries of their reservation.\(^{386}\) The United States Supreme Court upheld the Crow Tribe's right to regulate nonmembers on lands held by the Tribe, or by the United States in trust for the Tribe.\(^{387}\) Moreover, the Court also found that the General Allotment Act of 1887 had divested the Tribe of any authority to control the activities of nonmembers on lands held in fee by nonmembers.\(^{388}\) However, in *A-1 Contractors*, the Eighth Circuit incorrectly relied on the analysis set

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378. *Id.*
380. *A-1 Contractors*, 76 F.3d at 941.
381. *Id.* at 946 (McMillian, J., dissenting). *See infra* notes 382-470 and accompanying text.
382. *See infra* notes 385-414 and accompanying text.
383. *See infra* notes 417-36 and accompanying text.
384. *See infra* notes 437-71 and accompanying text.
388. *Id.* at 559.
forth in Montana because, unlike Montana, A-1 Contractors involved an incident occurring on land held by the Tribe.389

The rule in Montana and its exceptions should have been read narrowly and applied only to those cases involving fee lands owned by nonmembers.390 In Montana, the Supreme Court framed the issue as "the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians."391 In A-1 Contractors, the traffic accident giving rise to Gisela Fredericks' claim against A-1 Contractors and Lyle Stockert occurred on a state highway which traversed the Fort Berthold Reservation.392 For purposes of civil jurisdiction, this highway was within the definition of "Indian country" as provided by federal law, and was considered to be held by the Tribe.393 Thus, the rule against tribal authority over nonmembers on non-Indian fees, as set forth in Montana, does not apply to the facts presented in A-1 Contractors.394

In support of its application of Montana to the instant case, the Eighth Circuit cited Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation395 and South Dakota v. Bourland396 as illustrative of the Supreme Court's broad application of the Montana rule to assertions of tribal authority over nonmembers.397 Although both cases addressed the nature of tribal authority over nonmembers and demonstrated the application of the Montana rule, neither case controlled the issues presented in A-1 Contractors.398 Brendale involved attempts by a tribe to enforce zoning regulations on lands located within the exterior boundaries of an Indian reservation, but held in fee simple by non-Indians.399 Similarly, Bourland concerned tribal lands, taken by congressional act, for the use and benefit of the public.400 Like Montana, both cases involved non-Indian fee land, over which tribal authority had been affirmatively divested.401 In Brendale, tribal authority had been extinguished by means of aliena-
tion.402 In Bourland, the Tribe's jurisdiction had been divested by means of a federal statute.403 As these cases involved disputed authority over lands no longer held by the tribes, neither case supports the Eighth Circuit's conclusion in A-1 Contractors, because this case concerned authority over lands owned by the Tribe.404

Circuit Judge Theodore McMillian's dissenting opinion in A-1 Contractors suggested that the majority, by extending the rule in Montana, adopted a presumption against tribal authority over nonmembers.405 Judge McMillian would have adopted the opposite presumption, a presumption in favor of tribal authority over nonmembers, absent divestiture by specific treaty provision or congressional act.406 In support of this proposition, Judge McMillian cited the 1980 Supreme Court opinion in Washington v. Confederated Tribes and Bands of the Colville Indian Reservation.407 Although Colville was cited by the Supreme Court in reaching its conclusion in Montana, the majority in A-1 Contractors did not recognize Colville or its precedential value in arriving at its conclusion.408

Colville, like A-1 Contractors, involved attempts by an Indian tribe to assert authority over nonmembers within an Indian reservation.409 In Colville, the Supreme Court held that divestiture of inherent tribal sovereignty was necessary only when exercise of sovereignty "would be inconsistent with the overriding interests of the National Government."410 This conclusion suggests a presumption of tribal civil jurisdiction over nonmembers in the tribal courts, unless that jurisdiction has been affirmatively limited by Congress, or is implicitly limited as contrary to significant federal considerations.411 Application of this rationale to the facts of A-1 Contractors, as Judge McMillian suggested, would have resulted in a presumption in favor of tribal court jurisdiction over the tort action between Gisela Fredericks and A-1 Contractors.412 The opinion in A-1 Contractors indicated no treaty provision or federal statute that would have effected divestiture of the Tribal Court's jurisdiction, and the Tribal Court's exercise of

403. Bourland, 508 U.S. at 687.
404. See supra notes 390-403 and accompanying text.
405. A-1 Contractors, 76 F.3d at 946 (McMillian, J., dissenting).
406. Id. (McMillian, J., dissenting) (quoting LaPlante, 480 U.S. at 18).
409. See infra notes 410-19 and accompanying text.
411. Colville, 447 U.S. at 152-54.
412. A-1 Contractors, 76 F.3d at 946-47 (McMillian, J., dissenting).
civil jurisdiction over the tort action arising within the boundaries of the reservation did not implicate overriding federal considerations. Arguably, A-1 Contractors could not have successfully rebutted this presumption.

**MISINTERPRETING THE MONTANA EXCEPTIONS**

In *A-1 Contractors*, the Eighth Circuit concluded that the question of subject matter jurisdiction over a suit between nonmembers was resolved by the *Montana* rule. Moreover, the court found that neither of the two exceptions to the *Montana* rule could sustain the Tribal Court's assertion of authority over the action between Gisela Fredericks and A-1 Contractors. Assuming that the *Montana* rule would have appropriately governed the jurisdictional question in *A-1 Contractors*, the majority incorrectly concluded that neither exception to the *Montana* rule was satisfied.

**Satisfying the Consensual Relationship Exception**

In *Montana*, the Supreme Court announced two exceptions to the general prohibition of tribal authority over nonmembers. The first exception involved situations where nonmembers entered "consensual relationships" with the tribe. The Court stated that "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." The commercial contracts between A-1 Contractors and the Tribe's wholly-owned corporation, LCM, were of the precise nature that would have invoked tribal jurisdiction over nonmembers under the "consensual relationship" exception.

This proposition was squarely supported in *FMC v. Shoshone-Bannock Tribes*, where the Ninth Circuit held that certain mining leases and contracts between the Tribe and a non-Indian corporation

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413. *Id.* In *Coleville*, the Supreme Court suggested that overriding federal interests were implicated "when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights." *Colville*, 447 U.S. at 153-54.

414. *See supra* notes 409-13 and accompanying text.

415. *A-1 Contractors*, 76 F.3d at 934.

416. *Id.* at 940-41.

417. *Id.* at 944-45 (Gibson, J., dissenting).


419. *Id.* at 565.

420. *Id.* (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959)).

421. *A-1 Contractors*, 76 F.3d at 944-45 (Gibson, J., dissenting).

422. 905 F.2d 1311 (9th Cir. 1990).
were sufficient to subject the corporation to the jurisdiction of the Tribal Court. In FMC, the court reasoned that because FMC had contracted extensively with the Shoshone-Bannock Tribe, the corporation had effectively subjected itself to the Tribal Court's jurisdiction. Similarly, in A-1 Contractors, the traffic accident giving rise to Fredericks' claim would not have occurred but for A-1 Contractors' presence on the reservation, a presence resulting from A-1 Contractors' "consensual relationship" with LCM. Although the majority in A-1 Contractors stated that there was no proof to establish that Lyle Stockert was in performance of the contract at the time of the accident, it is difficult to explain his presence on the reservation, in a gravel truck, under any other pretense. Thus, the subcontract between A-1 Contractors and LCM was sufficient to subject A-1 Contractors to the jurisdiction of the Tribal Court under the "consensual relationship" exception to the Montana rule.

Implicating Tribal Interests

The second exception to the Montana rule permits a tribe to assert jurisdiction over nonmembers when the nonmember affects a significant tribal interest. As the Supreme Court in Montana stated, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." In A-1 Contractors, the Eighth Circuit failed to recognize the Tribe's interest in ensuring the safe operation of motor vehicles on its reservation and, although somewhat more abstract, the Tribe's interest in providing a judicial forum for those injured on the reservation.

In Hardin v. White Mountain Apache Tribe, the Ninth Circuit found that a tribal ordinance permanently excluding certain nonmembers from the reservation was an acceptable means of insuring the health, safety, and welfare of the Tribe, and thus permissible under the second Montana exception. Likewise, allowing a tribal court to

423. FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1315 (9th Cir. 1990).
424. FMC, 905 F.2d at 1315.
425. A-1 Contractors, 76 F.3d at 944 (Gibson, J., dissenting).
426. Id. at 945 (Gibson, J., dissenting).
427. See supra notes 418-26 and accompanying text.
428. Montana, 450 U.S. at 566.
429. Id.
430. A-1 Contractors, 76 F.3d at 950-51 (McMillian, J., dissenting).
431. 779 F.2d 476 (9th Cir. 1985).
determine and remedy a nonmember’s tortious conduct on a reservation is a valid exercise of tribal authority under the second *Montana* exception, because it ensures the safety of those on the reservation.\textsuperscript{433} Furthermore, a tribe has a legitimate interest in providing a judicial forum for those injured on its reservation.\textsuperscript{434} Failure to recognize tribal jurisdiction over such a claim as that presented by Fredericks threatens the political integrity of the Tribe by undermining the Tribe’s authority over reservation affairs.\textsuperscript{435} By failing to recognize either tribal interest, the Eighth Circuit erred in concluding that the tribal court lacked jurisdiction over Fredericks’ claim under the “significant tribal interest” exception to the *Montana* rule.\textsuperscript{436}

**Patently Disregarding Traditional Notions of Tribal Sovereignty**

Early in this country’s history of tribal association, the United States Supreme Court, in a series of opinions by Chief Justice John Marshall, held that Indian tribes were distinct sovereign nations complete with authority over their own territory.\textsuperscript{437} The tribes were recognized as having a character similar to that of a state, constituting a distinct political organization capable of self-government.\textsuperscript{438} The power of self-determination, however, was never considered a delegated power; rather, it was an inherent power that had never been extinguished.\textsuperscript{439}

**Ignoring the Doctrine of Inherent Sovereignty**

Implicit in the doctrine of inherent sovereignty is a presumption in favor of tribal civil jurisdiction, absent divestiture by the federal government.\textsuperscript{440} The Eighth Circuit’s holding in *A-1 Contractors*, denying the Tribal Court civil jurisdiction over nonmembers, shifted this presumption of tribal authority over nonmembers to a presumption against tribal authority over nonmembers.\textsuperscript{441} As such, the court's

\textsuperscript{433} *A-1 Contractors*, 76 F.3d at 950-51 (McMillian, J., dissenting).
\textsuperscript{434} Id. at 950 (McMillian, J., dissenting).
\textsuperscript{435} Id. at 951 (McMillian, J., dissenting).
\textsuperscript{436} See supra notes 428-35 and accompanying text.
\textsuperscript{438} Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).
\textsuperscript{439} COHEN, supra note 114, at 122.
\textsuperscript{440} Iowa Mutual, 480 U.S. at 18.
\textsuperscript{441} *A-1 Contractors*, 76 F.3d at 946 (McMillian, J., dissenting) (quoting *Iowa Mutual*, 480 U.S. at 18).
conclusion was inconsistent with historical conceptions of tribal sovereignty.442

In A-1 Contractors, the Eighth Circuit stated that the principles underlying the Supreme Court's holding in Oliphant v. Suquamish Indian Tribe443 extended to Montana, precluding tribal courts from asserting civil jurisdiction over nonmembers.444 In Oliphant, the Supreme Court held that tribal criminal jurisdiction over nonmembers was inconsistent with federal overriding considerations.445 Although it may be true that the exercise of tribal civil jurisdiction over nonmembers on lands owned by nonmembers may be inconsistent with the dependent status of tribes, the Supreme Court did not suggest that the same was true for nonmembers on tribal lands.446 According to the Ninth Circuit in Cardin v. De La Cruz,447 "[t]o hold that Indian tribes cannot exercise civil jurisdiction over non-Indians would, when combined with Oliphant, eliminate altogether any tribal jurisdiction over persons not members of the tribe, and thus reduce to a nullity the Supreme Court's repeated assertions that Indian tribes retain attributes of sovereignty over their territory."448

The doctrine of trust responsibility affords Congress plenary power over Indian tribes, undertaking the role of a fiduciary representing tribal interests.449 This doctrine provides that Congress may enact legislation that widely affects tribal interests, including a Tribe's external relations.450 For example, in Lone Wolf v. Hitchcock,451 the Supreme Court recognized Congress' authority to restrict the political autonomy of Indian confederations.452 The Court upheld a federal statute that unilaterally abrogated the Tribe's right to dispose of tribal lands under a treaty with the United States.453 The Supreme Court reasoned that because Congress had paramount au-

442. See infra notes 406-09 and accompanying text; supra notes 411-37 and accompanying text.
444. A-1 Contractors, 76 F.3d at 937.
446. A-1 Contractors, 76 F.3d at 947 (McMillian, J., dissenting).
447. 671 F.2d 363 (9th Cir. 1982).
448. Cardin v. De La Cruz, 671 F.2d 363, 366 (9th Cir. 1982).
450. Id.
authority over the land held by Indian tribes, Congress was not necessarily bound by the treaties between the United States and the tribes. Similarly, in *U.S. v. Sandoval*, the Supreme Court upheld a federal statute denying the Tribe the right to regulate the introduction of liquor onto the reservation. These cases demonstrate that while Congress does have the ability to limit tribal authority, such restrictions must take the form of a federal statute or treaty. In *A-1 Contractors*, the Eighth Circuit did not identify any legislation that purported to divest the Tribal Court's power to adjudicate civil matters between nonmembers, nor did the Eighth Circuit identify a specific treaty provision that would have divested tribal sovereignty over nonmembers. Because no federal statute or treaty provision limited the Tribe's authority pursuant to the plenary power doctrine, the proper assumption, therefore, was in favor of tribal court jurisdiction.

*The Implications of Limited Civil Jurisdiction*

The Eighth Circuit in *A-1 Contractors* adopted an “unduly narrow” view of sovereignty with respect to tribal court civil jurisdiction. The court's opinion denied the Tribal Court the authority to adjudicate the kind of basic disputes which arise daily within the boundaries of the Fort Berthold Reservation, unless a tribal member is involved in the dispute. This view of tribal sovereignty, as limited by the Eighth Circuit, effectively provides no true sovereignty at all.

Limiting the civil jurisdiction of the Tribal Court to those disputes involving members of the Tribe impairs the Tribe's ability to manage its reservation by compromising the Tribe's ability to regulate the conduct of nonmembers on the reservation. By refusing to extend civil jurisdiction to all persons within the reservation, the Eighth Circuit has diminished the Tribe's ability to remedy the conduct of nonmembers who enter the reservation and cause injury. Perhaps more importantly, the court's decision has limited the Tribe's ability to

454. *Id.* at 565.
455. 231 U.S. 28 (1913).
457. See *supra* notes 449-56 and accompanying text.
459. *Id.* at 946-47 (McMillian, J., dissenting).
460. *Id.* at 944 (Gibson, J., dissenting).
461. *Id.* (Gibson, J., dissenting).
462. *Id.* (Gibson, J., dissenting).
463. *Id.* (Gibson, J., dissenting).
regulate certain members of the reservation community. Many nonmembers, like Gisela Fredericks, reside on reservations without enrolling as members of the tribe. The court's decision in *A-1 Contractors* appears to reduce the Tribe's ability to deal with these nonmember residents.

One important attribute of sovereignty is a legitimate and effective judicial system. Indeed, it is inconceivable that the civil jurisdiction of a state court would be limited to only the citizens of that state. By analogy, Indian tribal court jurisdiction should not be limited to only those members of the tribe, because as noted by Chief Justice John Marshall, the Indian tribes are endowed with characteristics similar to those of the states. In the face of these long-standing and well-reasoned principles, the Eighth Circuit held that the Tribal Court lacked civil jurisdiction over the claim of a nonmember resident of the reservation.

**CONCLUSION**

In *A-1 Contractors v. Strate*, the United States Court of Appeals for the Eighth Circuit held that the Tribal Court for the Three Affiliated Tribes of the Fort Berthold Indian Reservation lacked civil authority over nonmembers who entered the Tribe's territory. In arriving at this conclusion, the Eighth Circuit adopted the rule announced by the United States Supreme Court in *Montana v. United States*. In *Montana*, the Supreme Court found that, generally, an Indian tribe's retained inherent sovereignty did not include the authority to regulate the activities of nonmembers on non-Indian fees in Indian country. However, nothing in the text of *Montana* suggested that its rule should extend to cases other than those involving non-Indian fee lands within a reservation. As noted by the four dissenting judges, the court's application of *Montana* to the facts as presented in *A-1 Contractors* was clearly erroneous.
In A-1 Contractors, the Eighth Circuit adopted an unduly narrow view of sovereignty by incorrectly extending the Montana rule to a dispute involving nonmembers on land held by the Tribe.\textsuperscript{478} Further, the court incorrectly applied the Montana exceptions and failed to find that A-1 Contractors had subjected itself to the jurisdiction of the Tribal Court.\textsuperscript{479} The court’s decision effectively shifted a presumption in favor of tribal authority to a presumption against tribal authority.\textsuperscript{480} The Eighth Circuit’s decision in A-1 Contractors represents a departure from the well-established notion that inherent tribal authority extends to both members and territory.\textsuperscript{481}

The court’s opinion in A-1 Contractors is likely to have a profound effect on tribal communities within the Eighth Circuit. Because a large number of reservation residents are not recognized members of the Indian tribe, tribal courts have been divested of the power to regulate the conduct of a significant component of the reservation community. Furthermore, the inability to regulate nonmembers poses a significant threat to the tribal community, as nonmember presence on the reservation is likely to increase. Nowhere is this more apparent than on those reservations hosting casino-type gambling operations.\textsuperscript{482} After A-1 Contractors, tribal courts may not retain the authority to address such necessary evils as may result from a massive influx of nonmember casino patrons injuring nonmember residents of the reservation. A tribe would be forced to yield jurisdiction over such matters to a non-tribal court, one not likely to give deference to the interests of the reservation community.

The extent to which other federal circuits will adopt such a narrow conception of tribal sovereignty as did the court in A-1 Contractors remains to be determined. It is unlikely that the Eighth Circuit’s inaccurate reliance on Montana will be adopted in subsequent examinations of tribal subject matter jurisdiction. Perhaps other Circuits will notice the debilitating effects the Eighth Circuit’s decision will have on tribal self-determination. Certainly other federal courts, addressing the issue of tribal authority over nonmembers on tribal lands, will recognize that “the type of ‘limited sovereignty’ allotted by this Court to the tribe is, in fact, no real sovereignty at all.”\textsuperscript{483}

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\textsuperscript{478} A-1 Contractors, 76 F.3d at 944 (Gibson, J., dissenting).
\textsuperscript{479} Id. (Gibson, J., dissenting).
\textsuperscript{480} Id. at 946 (McMillian, J., dissenting).
\textsuperscript{481} Id. (McMillian, J., dissenting).
\textsuperscript{483} A-1 Contractors, 76 F.3d at 944 (Gibson, J., dissenting).