Tribal Court Jurisdiction over Civil Disputes Involving Non-Indians: An Assessment of *National Farmers Union Insurance Cos. v. Crow Tribe of Indians* and a Proposal for Reform

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Long before their contact with Europeans, North American Indian tribes were independent, self-governing communities with virtually unlimited power over their own members. Several centuries of dealings with European nations, and later the United States, have left them in the peculiar position of being nations within a nation—entities that the federal government, courts, and legal scholars continue to recognize as sovereign powers but that are subject to the "plenary power" of Congress. On the one hand, the tribes, as nations, are said to possess inherently all powers held by any sovereign government. The European nations and the United States, until 1871, made treaties with the tribes as they would with any other sovereign nation, in recognition of their sovereign powers. On the other

3. In Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall's opinion for the Court noted that the term "nation" has been generally applied to the Indians, recognizing them as "a people distinct from others." Id. at 559. "Nation" is a word of our own language that has "a definite and well understood meaning" and has been applied to the Indians in the same sense as to the other nations of the earth. Id. at 559-60.
4. See infra notes 19-31 and accompanying text.
5. See infra note 36 and accompanying text.
hand, these sovereign powers are subject to limitation or divestment by Congress.9

The powers of a sovereign government are generally understood to include the power to establish courts and exercise jurisdiction over disputes arising within the boundaries of its territory.10 Indian tribes certainly retain such powers to some degree, but the exact extent of this retention of authority is uncertain. Although the courts have recognized exclusive tribal court jurisdiction over reservation-based civil cases involving only Indians,11 the scope of tribal jurisdiction over civil cases involving both Indians and non-Indians12 is not yet fully determined. The extensive interaction between Indians and non-Indians on reservations13 and the increasing willingness and ability of tribal

9. See infra notes 32-47 and accompanying text.

10. "The powers of sovereign governments are familiar: the power to enact laws; the power to establish court systems; [and] the power to require people to abide by established laws . . . ." 1 AIPRC Final Report, supra note 6, at 99.

11. F. COHEN, supra note 1, at 342. The issue of tribal criminal jurisdiction over both Indians and non-Indians is more complicated. See generality id. at 335-41. In Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), the Supreme Court concluded that Indian tribes do not possess retained criminal jurisdiction over non-Indians because such jurisdiction would be "inconsistent with their status." Id. at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976), rev'd, 435 U.S. 191 (1978)). Whether tribes retain criminal jurisdiction over Indians who are members of other tribes remains uncertain. F. COHEN, supra note 1, at 253 n.90. The General Crimes Act of 1948, 18 U.S.C. § 1152 (1982), specifically reserves to the tribes jurisdiction over crimes committed by one Indian against another. The Indian Crimes Act of 1976, 18 U.S.C. § 1153 (Supp. III 1985), establishes federal jurisdiction over 16 enumerated crimes. This is generally understood to eliminate tribal jurisdiction over those offenses, although such a conclusion is not required by a literal reading of the statute or by its legislative history. AIPRC Task Force Four, supra note 2, at 36-37.

12. This Note will use the term "non-Indians" to include Indians who are not members of the tribe whose court system is asserting jurisdiction. "Indians" refers to members of the tribe asserting adjudicatory jurisdiction.

13. The United States holds title to approximately 52.5 million acres of land in trust for Indian tribes and individuals. F. COHEN, supra note 1, at 471. Tribal property is held in common for the benefit of all living tribal members. Id. at 472. Federal statutory restraints on the alienation of tribal land preserve the Indian land base. Id. at 509. From 1887 to 1934, however, the tribal land base was seriously depleted by federal allotment policy. The General Allotment Act of 1887, 25 U.S.C. § 331 (1982 & Supp. III 1985), authorized allotment of reservation lands to individual Indians. Eventually, a large portion of the allotted land was conveyed to non-Indians. Further allotment of Indian lands was prohibited by the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1982 & Supp. III 1985)). Those reservations that were subject to allotment "frequently have 'a crazy patchwork quilt or checkerboard' pattern of land ownership: non-Indian lands held in fee patent, individual Indian allotments held in trust, and tribal lands held in trust." AIPRC Task Force Four, supra note 2, at 94. On some reservations, the majority of the land ownership and the population within reservation boundaries is non-Indian. Id. at 94-95. For a more complete discussion of tribal property, see F. COHEN, supra note 1, at 471-574.
courts to claim and exercise broader jurisdiction\textsuperscript{14} make it necessary to determine definitively the extent of tribal adjudicatory authority where non-Indian litigants are involved.

This Note examines the issue of tribal court jurisdiction over cases in which both Indians and non-Indians are parties and discusses the Supreme Court's most recent statement on the issue. In \textit{National Farmers Union Insurance Cos. v. Crow Tribe of Indians},\textsuperscript{16} an Indian minor brought a personal injury action in Crow Tribal Court\textsuperscript{16} against a Montana school district operating a school on state-owned land within the Crow Reservation. The Supreme Court concluded that the tribal court itself should first determine whether it has the power to exercise civil subject-matter jurisdiction over non-Indian property owners in a tort case.\textsuperscript{17} Defendants contesting tribal court jurisdiction can seek federal review of the tribal exercise of jurisdiction in district court only after exhausting the remedies available in the tribal court system.\textsuperscript{18}

Part I of this Note sets out the relationship between the tribes and the federal government and traces the development of the tribal court systems. Part II discusses the \textit{National Farmers Union} case and critiques the Supreme Court opinion. Part III proposes a plan for formal federal recognition of individual tribes' civil jurisdiction over cases in various subject-matter areas in which both non-Indians and Indians are parties. Such a program would end uncertainty over the scope of tribal court civil jurisdiction and secure to the tribes the authority to adjudicate reservation-based civil disputes, thus aiding in the fulfillment of the federal policy of strengthening tribal government.

\section{I. The Federal-Indian Relationship and Indian Tribal Courts}

The United States and the Indian tribes enjoy a unique relationship. Although Indian tribes possess attributes of sovereignty that, as a general rule, exempt them from state laws and

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  \item \textsuperscript{14} Recently, tribes have been more willing to assert jurisdiction over cases involving non-Indians. \textit{National Am. Indian Court Judges Ass'n, Indian Courts and the Future} 31, 47 (1978) [hereinafter \textit{Indian Courts and the Future}].
  \item \textsuperscript{15} 471 U.S. 845 (1985).
  \item \textsuperscript{17} 471 U.S. at 856.
  \item \textsuperscript{18} \textit{Id.} at 856-57.
\end{itemize}
state regulation, the tribes are subject to the plenary authority of the federal government. The exercise of the United States' power, however, is limited by the federal government's fiduciary duties toward the tribes. As part of its fiduciary responsibility, the federal government has sought to guarantee to tribes the administration of justice on reservation lands—a crucial element of tribal self-government.

A. Tribal Sovereignty

The proper starting point for any discussion or decision with respect to Indian tribes and the jurisdiction they possess is the concept of tribal sovereignty.\(^1\) Congress and the courts have recognized the sovereign status of Indian tribes from the earliest days of the Republic.\(^2\) The most important judicial statement on this subject was made by the Supreme Court in *Worcester v. Georgia*.\(^3\) In holding that state law could have no effect on Cherokee lands in Georgia,\(^4\) Chief Justice John Marshall found that Indian tribes were "distinct, independent political communities."\(^5\) European nations, and later the United States, entered into treaties with the Indians, in recognition of "their title to self-government."\(^6\)

Although respect for tribal sovereignty has waned at times with vacillations in the federal government's Indian policy,\(^7\) it has nonetheless survived and has received increasing support from the federal government since the 1960's. The Indian Self-

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1. AIPRC Final Report, supra note 6; at 101; AIPRC Task Force Four, supra note 2, at 1.
2. F. Cohen, supra note 1, at 233; see also 1 AIPRC Final Report, supra note 6, at 100 ("The status of Indian tribes as sovereigns, or governments, has been uniformly recognized by Congress and the courts from prerevolutionary days through the present.").
4. Id. at 561 ("The Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force . . . .").
5. Id. at 559.
6. Id. at 560.
7. In the late 19th and early 20th centuries, the Supreme Court emphasized the plenary authority of Congress in relation to tribal sovereignty as Congress began to exercise its broad power to deal with Indian affairs. . . .
8. With passage of the Curtis Act of 1898 and the abolishment of the Indian Territory, tribal government lapsed into a period of dormancy. The policy trend toward destruction of tribal government was reversed in 1934 with passage of the Indian Reorganization Act.

1 AIPRC Final Report, supra note 6, at 101 (citations omitted).
Determination and Educational Assistance Act of 1975\textsuperscript{26} recognized “the obligation of the United States to respond to the strong expression of the Indian people for self-determination”\textsuperscript{27} by providing a mechanism whereby the tribes themselves could administer many federal programs on the reservations.\textsuperscript{28} The Supreme Court has also reaffirmed the continuing vitality of the concept of tribal sovereignty.\textsuperscript{29} Finally, the executive branch has sought to strengthen tribal sovereignty.\textsuperscript{30} President Reagan has stated that he wishes “to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments . . . to resume control over their own affairs.”\textsuperscript{31}

\section*{B. Federal Authority over the Tribes}

Although \textit{Worcester v. Georgia}\textsuperscript{32} held that Indian tribes are not subject to state law within the reservation and have exclusive authority within their territorial boundaries,\textsuperscript{33} later cases have made it clear that the tribes are subject to the superior authority of the United States.\textsuperscript{34} Thus, although the states generally cannot regulate affairs on reservations, the United States


\textsuperscript{27} Id. § 450a(a).

\textsuperscript{28} Id. §§ 450a, 450f, 450g. For citations of other important Indian legislation of the 1970's, see M. PRICE & R. CLINTON, LAW AND THE AMERICAN INDIAN 88-89 (2d ed. 1983).

\textsuperscript{29} See, e.g., United States v. Mazurie, 419 U.S. 544, 557 (1975) (upholding the congressional power to delegate authority to a tribal council to regulate distribution of alcoholic beverages on the reservation and stating that “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory”).

\textsuperscript{30} “In 1970 President Nixon served notice in a message to Congress that he intended to steer a policy course designed to strengthen tribal sovereignty, transfer control of Indian programs from federal to tribal governments, restore and protect the Indian land base, and forever declare an end to involuntary termination.” M. PRICE & R. CLINTON, supra note 28, at 88 (citing MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970)).

\textsuperscript{31} President's American Indian Policy Statement, 19 WEEKLY COMP. PRES. DOC. 98, 101 (Jan. 24, 1983). More recently, in proclaiming American Indian Week, 1986, President Reagan stated: “We look to the future with the expectation of even stronger tribal governments and lessened Federal control over tribal government affairs. We look to a future of development of economic independence and self-sufficiency, and an enhanced government-to-government relationship that will allow greater Indian control of Indian resources.” 51 Fed. Reg. 42,815 (1986).

\textsuperscript{32} 31 U.S. (6 Pet.) 515 (1832); see supra notes 21-24 and accompanying text.

\textsuperscript{33} Id. at 557.

\textsuperscript{34} See, e.g., United States v. Wheeler, 435 U.S. 313, 327 (1978) (“It is true that in the exercise of the powers of self-government, as in all other matters, the Navajo Tribe, like all Indian tribes, remains subject to ultimate federal control.”).
can. Federal power over Indian affairs is in fact often described as "plenary." In construing the scope of this power, the Supreme Court has relied primarily on the Indian Commerce Clause, the Treaty Clause, and the Supremacy Clause as sources of broad federal power over Indian affairs. Aside from the Indian Commerce Clause, the Constitution mentions Indians explicitly only in article I and in the fourteenth amendment, which exclude "Indians not taxed" from the count for determining apportionment of taxes and representatives to Congress. Federal authority over the tribes has also been supported by congressional power to spend money for the "general Welfare of the United States," the Necessary and Proper Clause, the Property Clause, and the war powers of Congress. The combination of these specific constitutional provisions constitutes a single power over Indian affairs in the hands of the federal government.

35. 1 AIPRC Final Report, supra note 6, at 100:
While the opinion in Worcester v. Georgia holds that Indian tribes are not subject to state law, later cases make it clear that Indian tribal sovereignty, or self-government, is subject to the superior legislative authority of Congress. To put it another way, Georgia could not regulate affairs on the Cherokee reservation, but the United States could.
36. Id. at 101; F. Cohen, supra note 1, at 207.
39. U.S. Const. art VI, cl. 2. Valid exercises of federal constitutional power over Indian affairs are the "supreme Law of the Land" and supersede conflicting state constitutional and statutory provisions. F. Cohen, supra note 1, at 211.
40. These three constitutional clauses are the ones that courts most often refer to in discussing the source of federal power over Indian affairs. F. Cohen, supra note 1, at 211.
41. U.S. Const. art. I, § 8, cl. 3.
42. Id. amend. XIV, § 2.
43. Id. art. I, § 8, cl. 1; see also 1 AIPRC Final Report, supra note 6, at 106; F. Cohen, supra note 1, at 210 n.21 (citing Morton v. Ruiz, 415 U.S. 199 (1974)).
44. U.S. Const. art. I, § 8, cl. 18; see also F. Cohen, supra note 1, at 211 n.24 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).
45. U.S. Const. art. IV, § 3, cl. 2. For a discussion of congressional power over Indian affairs under the Property Clause, see F. Cohen, supra note 1, at 209-10.
47. F. Cohen, supra note 1, at 211.
Although federal authority over the tribes has been described as "plenary," the Supreme Court has recognized limitations on the exercise of this authority. These limitations stem from the Constitution itself, respect for Indian sovereignty, and the special trust relationship between the United States and the tribes.

Chief Justice Marshall first explained the trust relationship in *Cherokee Nation v. Georgia.* Noting that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist [nowhere] else," Marshall described their relationship with the United States as that of a ward and guardian. As "domestic dependent nations," the Indian tribes rely on the federal government for protection.

Marshall underscored this protective relationship in *Worcester v. Georgia.* He stated that the United States had assumed the role of providing protection to the Indians. This did not, however, extinguish the tribes' status as sovereign governments. Instead, the United States assumed a fiduciary obligation to guarantee the security and integrity of the tribes as independent political communities in exchange for their friendliness.

48. Felix Cohen summarized the meaning of Congress' "plenary" power over the Indians as follows: "[A]lthough in practice Congress leaves much governing authority to the tribes, federal power over Indians is 'plenary' in the sense that in Indian matters Congress can exercise broad police power, rather than only the powers of a limited government with specifically enumerated powers." *Id.* at 220. "Plenary" is thus not synonymous with "absolute" or "total," but rather "appears to be used as a summary of the congressional powers over Indians." *Id.* at 219.

49. For a discussion of the limitations on the exercise of federal power, see *id.* at 217-28.

50. See *id.* at 217-20.


52. 30 U.S. (5 Pet.) 1 (1831).

53. *Id.* at 16.

54. *Id.* at 17.

55. *Id.*

56. *Id.*

57. 31 U.S. (6 Pet.) 515 (1832).

58. *Id.* at 552.

59. *Id.* at 560-61.
to the United States. The Supreme Court has stated that the federal government’s exercise of its authority over Indians must be rationally related to the fulfillment of this obligation and “based on a determination that the Indians will be protected.”

D. The Development of Tribal Courts

One of the traditional attributes of sovereignty that the United States, as fiduciary and guardian, has undertaken to guarantee to the tribes is adjudicatory authority. Such authority over disputes within its territory is a crucial element of any sovereign’s self-government. The Indian tribes exercised this authority, until the late nineteenth century, in keeping with traditional mechanisms of tribal justice, which differed from tribe to tribe as well as differing from “Western” systems of justice. Tribal and civil jurisdiction were exclusive within the tribe’s territory; this still remains the case, except where the federal government or actions of the tribes have imposed limitations.

60. “The United States assumed a fiduciary obligation, insuring the tribes’ continuing integrity as self-governing entities within certain territory.” F. Cohen, supra note 1, at 234. One manifestation of the United States’ fiduciary obligation is the federal government’s holding title to land within reservation boundaries in trust for the tribe or, in some cases, individuals. See supra note 13. The trust also encompasses the obligation to provide related services and to take actions necessary to protect self-government. 1 AIPRC Final Report, supra note 6, at 105.

61. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court concluded that statutes conferring upon tribal Indians a preference for employment in the Bureau of Indian Affairs did not violate the fifth amendment. “As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.” Id. at 555.

62. F. Cohen, supra note 1, at 221. The trust obligation also constrains federal power procedurally. In recognition of the federal trust responsibility, the courts have developed canons to construe federal action when possible as protecting Indian rights. The primary canons were first developed in treaty cases and require “that treaties be liberally construed to favor Indians, that ambiguous expressions in treaties must be resolved in favor of the Indians, and that treaties should be construed as the Indians would have understood them.” Id. at 222 (footnotes omitted); see also Note, The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification, 17 U. Mich. J.L. Ref. 681 (1984).

63. See supra note 10 and accompanying text.

64. F. Cohen, supra note 1, at 332. The tribes generally “utilized governing modes premised upon communal property concepts and administered on the basis of oral customs.” American Indian Lawyer Training Program Inc., Justice in Indian Country 164 (1980) [hereinafter Justice in Indian Country]; see also AIPRC Task Force Four, supra note 2, at 121.

65. See 1 AIPRC Final Report, supra note 6, at 114-17; F. Cohen, supra note 1, at 332.
judicatory authority has thus historically been a strong element of tribal sovereignty.

Eventually the traditional tribal legal systems declined as a result of dealings with European nations and the United States. The federal government, in recognition of the importance of having adequate reservation institutions for adjudication of disputes, established Courts of Indian Offenses, beginning in 1883. By 1890, Courts of Indian Offenses operated at two-thirds of reservation agencies.

During the 1930's, the federal government decided to encourage the Indian tribes to develop their governments. Improvement of reservation court systems was recognized as a crucial element in revitalizing tribal governmental authority. Under the Indian Reorganization Act of 1934, tribes were to organize their own governments by adopting constitutions and bylaws.

In 1935, Commissioner of Indian Affairs John Collier promulgated a revised Code of Indian Tribal Offenses for the Courts of Indian Offenses. The new Code expressly set out the right of the tribes to replace the Courts of Indian Offenses and the Bureau of Indian Affairs (BIA) Code with their own courts and

66. F. COHEN, supra note 1, at 332-33. There were some exceptions to this general decline in traditional legal systems. At the time the Courts of Indian Offenses, see infra notes 67-68 and accompanying text, were being developed, the Five Civilized Tribes (Choctaw, Cherokee, Chickasaw, Creek, and Seminole), the New York Indians, the Osage, the Pueblos, and the Eastern Cherokees all had their own justice systems. AIPRC TASK FORCE FOUR, supra note 2, at 123 n.7. The Cherokees established a central government incorporating Anglo-American institutions. F. COHEN, supra note 1, at 332 n.4.

67. F. COHEN, supra note 1, at 333. Aside from filling a void perceived in the provision of law and order on reservations where traditional legal systems had declined, these courts were also intended as a competing center of authority to reduce the remaining power of traditional tribal leaders. Id.

68. AIPRC TASK FORCE FOUR, supra note 2, at 123; see also JUSTICE IN INDIAN COUNTRY, supra note 64, at 165 (noting widespread tribal resistance to the Courts of Indian Offenses). Congress never expressly authorized the courts, but began funding them in 1888. F. COHEN, supra note 1, at 333 n.15. The validity of the courts was sustained in United States v. Clapox, 35 F. 575 (D. Or. 1888). See infra notes 163-65 and accompanying text.


71. F. COHEN, supra note 1, at 333; see 25 C.F.R. pt. 11 (1986). A Code of Indian Offenses was first set out in regulations issued by the Secretary of the Interior in 1884. JUSTICE IN INDIAN COUNTRY, supra note 64, at 165. The 1935 revised Bureau of Indian Affairs (BIA) Code, with minor changes, is still in force. F. COHEN, supra note 1, at 333. Since publication of the 1935 BIA Code in the Code of Federal Regulations, Courts of Indian Offenses have also been called “CFR courts.” JUSTICE IN INDIAN COUNTRY, supra note 64, at 167 n.40. Changes in the BIA Code have recently been proposed. See 50 Fed. Reg. 43,235 (1985); see also 51 Fed. Reg. 400 (1986) (extending comment period).
codes.\textsuperscript{72} Tribal approval was required for appointments of judges to the remaining Courts of Indian Offenses.\textsuperscript{73}

Since 1935, most tribes have shown their interest in exercising their adjudicatory authority by developing their own court systems and adopting judicial codes.\textsuperscript{74} Almost all of the tribes, however, chose to base their codes and judicial systems at least in part on the BIA Code and courts.\textsuperscript{76} Consequently, most tribes have courts and codes based on Anglo-American concepts of civil and criminal law.\textsuperscript{76} Although the tribal court systems are thus not truly "Indian" legal systems, what is most significant about them is that they are operated by the tribes themselves and provide for \textit{tribal} administration of justice on the reservation.

Some tribal court systems further reflect the influence of the BIA Code by limiting their civil jurisdiction to that of the Courts of Indian Offenses: "all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and . . . all other suits between members and nonmembers which are brought before the courts by stipulation of both parties."\textsuperscript{77} Federal courts,\textsuperscript{78} Congress,\textsuperscript{79} and the executive

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  \item \textsuperscript{72} 25 C.F.R. § 11.1(e) (1986).
  \item \textsuperscript{73}  Id. § 11.3(b).
  \item \textsuperscript{74}  F. COHEN, supra note 1, at 334; JUSTICE IN INDIAN COUNTRY, supra note 64, at 171. Such courts are referred to as "tribal courts," in contrast to the remaining Courts of Indian Offenses, or CFR courts. INDIAN COURTS AND THE FUTURE, supra note 14, at 11.
  \item \textsuperscript{75}  F. COHEN, supra note 1, at 334; INDIAN COURTS AND THE FUTURE, supra note 14, at 11. Only a very few tribes, principally the Pueblos of New Mexico, maintain traditional systems of justice based on unwritten customs. Id.; JUSTICE IN INDIAN COUNTRY, supra note 64, at 170. Indian courts thus fall into three categories: "tribal courts," operating under constitutions and codes adopted by the tribes; "CFR courts," the remaining Courts of Indian Offenses established pursuant to provisions of the \textit{Code of Federal Regulations}; and "traditional courts," customary judicial institutions like those maintained by the Pueblo tribes in New Mexico, which little resemble Anglo-American models. Id. at 170-71. A discussion of the CFR courts and traditional courts is beyond the scope of this Note.
  \item \textsuperscript{76}  F. COHEN, supra note 1, at 334.
  \item \textsuperscript{77}  25 C.F.R. § 11.22 (1986); see also Canby, \textit{Civil Jurisdiction and the Indian Reservation}, 1973 Utah L. Rev. 206, 221.
  \item \textsuperscript{78}  In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Supreme Court stated: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." \textit{Id.} at 65. In Williams v. Lee, 358 U.S. 217 (1959), the Supreme Court recognized exclusive tribal court jurisdiction in an action brought by a non-Indian against an Indian upon a reservation-based debt. The Court stated: "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations." \textit{Id.} at 223.
  \item \textsuperscript{79}  Congress has never enacted general legislation to provide a federal or state forum for civil disputes between Indians and non-Indians on the reservation. In 1953, Congress
branch, however, have acknowledged that the tribes do not have to limit their jurisdiction to such an extent, and have recognized the validity of tribal adjudicatory jurisdiction over civil cases arising on the reservation in which non-Indians as well as Indians are parties. Some tribes have elected to extend tribal court jurisdiction over all civil cases arising within the reservation.81 Recently, more tribes have decided to expand the exercise of their jurisdiction over civil cases involving non-Indians.82

Because of its broad authority over Indian affairs, Congress could statutorily define the limits of the civil jurisdiction of tribal, state, and federal courts in reservation-based disputes, as it has done to some extent in the area of criminal jurisdiction,83 and thus end uncertainty over whether tribes have the authority to exercise jurisdiction over reservation-based civil cases that involve both Indians and non-Indians. It has declined to do so, however, and has, thus far, left resolution of the issue to the courts. The Supreme Court, as well, has declined to state an across-the-board rule. The tribes and their members, as well as any individuals or entities that have dealings with the reservations and their residents, are thus faced with uncertainty as to whether tribal court exercises of jurisdiction will be respected or struck down by federal courts. This situation discourages the full development of tribal self-government and tribal economies,84 thus undercutting congressional and executive policy toward the tribes.


80. "An Indian tribe may exercise a complete jurisdiction over its members and within the limits of the reservation, subordinate only to the expressed limitations of Federal law." Powers of Indian Tribes, 1 Op. Solic. Interior 445, 475 (1934) (footnote omitted) (emphasis added). This statement seems to encompass tribal adjudicatory jurisdiction over all causes of action arising within reservation boundaries.

81. See, e.g., infra note 86 and accompanying text.

82. See supra note 14 and accompanying text.

83. See supra note 11.

84. See generally Oversight of Economic Development on Indian Reservations: Hearing Before the Senate Select Comm. on Indian Affairs, 97th Cong., 2d Sess. (1982). As Senator William Cohen stated, "The existence of a reliable tribal government, however, is critical to the development of the reservation. Without that, private sector inter-
II. **National Farmers Union Insurance Cos. v. Crow Tribe of Indians**

In *National Farmers Union*, the Supreme Court reaffirmed tribal sovereignty by requiring exhaustion of tribal court remedies before a federal district court can review tribal assertions of civil adjudicatory jurisdiction. This reaffirmation is undermined, however, by the establishment of a layer of federal court review above the tribal court system. Because of this judicial interference with the federal policy of strengthening tribal self-government, the decision does not provide a wholly satisfactory approach to the jurisdictional issue.

A. **The National Farmers Union Decision**

Leroy Sage, a member of the Crow Tribe and a student at Lodge Grass Elementary School on the Crow Reservation, was struck by a motorcycle on school grounds after returning from a school outing, and sustained severe injuries to his leg.\(^8\) The child and his guardian brought a negligence suit against the school district in Crow Tribal Court, which the tribe had given authority to exercise jurisdiction “over all civil causes of action arising within the exterior boundaries of the Crow Indian Reservation.”\(^8\) Process was served on the chairman of the school board, but the school district did not answer the complaint or appear in tribal court to contest jurisdiction. The tribal court found the school district negligent under Montana law\(^8\) and en-

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\(^8\) 10 Indian L. Rep. at 6019.
tered a default judgment in favor of the plaintiff in the amount of $153,010.88

When the school district received notice of the default judgment, it notified its insurer, National Farmers Union Insurance (National), of the suit. Neither the school district nor National contested the default judgment in tribal court or appealed to the Crow Tribal Court of Appeals.89 Instead of pursuing these tribal remedies, National and the school district obtained a temporary restraining order from the United States District Court for the District of Montana prohibiting Sage from enforcing his default judgment.90 They also filed suit against the Crow Tribe,91 seeking a permanent injunction against enforcement of the tribal court judgment.

The district court determined that it had jurisdiction over the suit under 28 U.S.C. § 133192 “to determine whether the Tribal Court has exceeded the lawful limits of its jurisdiction,”93 and ruled that National’s claim arose under federal common law.94 The district court held that the Crow Tribal Court did not have jurisdiction over the tort claim because such jurisdiction was not delegated to the tribe by statute or treaty,95 and is not a retained element of inherent sovereignty.96 The court noted that,

88. Id. at 6019-20.
90. See 736 F.2d at 1321-22.
91. Also named in the suit as defendants were the Tribal Council, the Tribal Court, judges of the Court, and the Chairman of the Tribal Council. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 848 (1985). Leroy Sage and his guardian were later added as parties defendant. Id.; see also 736 F.2d at 1322 n.1.
94. The court stated,

"The jurisdictional question . . . places at issue the extent of tribal court civil jurisdiction over non-Indians as developed by the Supreme Court in Montana v. United States—developments that are not drawn from any specific statute or treaty, but raise the overriding federal interest in determining the extent of tribal sovereignty and therefore form a part of federal common law."

Id. at 214-15 (citation omitted).
95. Id. at 215, 216.
96. Id. at 216-17. In examining this second possible basis for tribal court jurisdiction, the court assumed that the tribe’s adjudicatory and regulatory authority must be coextensive—an assumption that the Court of Appeals found untenable. 736 F.2d at 1322 n.3. Having made this assumption, the district court analyzed the issue according to the language set out in a case dealing with tribal regulatory jurisdiction over hunting and fishing, Montana v. United States, 450 U.S. 544 (1981). The court interpreted Montana as providing that a tribe may regulate activities of a non-Indian on non-Indian land within the reservation only where (1) the non-Indian has entered consensual relationships with
because the tribe did not have power to extend jurisdiction over the suit and because the tort claim does not present grounds for federal jurisdiction, the claim belonged in state court.\textsuperscript{97} The court issued a permanent injunction against execution of the tribal court judgment.\textsuperscript{98}

The Court of Appeals for the Ninth Circuit did not reach the merits of National's challenge to tribal court jurisdiction because it concluded that the district court's exercise of jurisdiction was not supported by any constitutional, statutory, or common law ground. The Ninth Circuit found that National's equal protection and due process claims cannot arise under the Constitution because tribes are not constrained by the fourteenth amendment.\textsuperscript{99} Furthermore, although tribes are bound by the Indian Civil Rights Act to exercise their jurisdiction in a manner consistent with due process and equal protection,\textsuperscript{100} Congress has limited federal court review of claimed violations of the Act to the single remedy of the writ of habeas corpus.\textsuperscript{101} Finally, the court concluded that recognizing a common law cause of action for alleged abuse of tribal adjudicatory jurisdiction would be contrary to the tribe or its members, or (2) where the conduct of the non-Indian "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 560 F. Supp. at 216 (quoting \textit{Montana}, 450 U.S. at 565-66). The court held that the first exception did not apply because a personal injury, rather than a consensual arrangement, was at the center of the dispute. \textit{Id}. This seems to be a misinterpretation of \textit{Montana}, which arguably concludes that the tribe may regulate \textit{all} activities of non-Indians who enter consensual relationships with the tribe or its members—like the school district here—not just activities related to specific contracts or leases: "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 dealings, contracts, leases, or other arrangements." \textit{Montana}, 450 U.S. at 565. The court found that the second exception did not apply because the conduct in question only affected the health and welfare of an individual rather than the tribe. 560 F. Supp. at 217. This ignores the fact that the allegedly hazardous conditions were a threat to all tribal members who might cross the schoolyard. \textit{See} \textit{Sage v. Lodge Grass School Dist., 10 Indian L. Rep. (Am. Indian Law. Training Program) 6019, 6019 (Crow Trib. Ct. 1982).}

\textsuperscript{97} 560 F. Supp. at 218.

\textsuperscript{98} \textit{Id}.

\textsuperscript{99} 736 F.2d at 1322. The court cited R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 982 (9th Cir. 1983), \textit{cert. denied}, 472 U.S. 1016 (1985), and Trans-Canada Enterprises v. Muckleshoot Indian Tribe, 634 F.2d 474, 476-77 (9th Cir. 1980).

\textsuperscript{100} 25 U.S.C. \textsuperscript{§} 1302(8) (1982). Title I of the Indian Civil Rights Act of 1968, 25 U.S.C. \textsuperscript{§§} 1301-1303 (1982), imposed many Bill of Rights provisions on Indian tribes. It also restricted penalties that tribal courts can impose in criminal cases by stating that tribal courts can "in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both." \textit{Id}. \textsuperscript{§} 1302(7).

\textsuperscript{101} 736 F.2d at 1323. This was the holding of Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66-70 (1977). \textit{See infra} note 137.
to Congress' purposeful restriction of federal court interference with tribal court proceedings to the review of petitions for habeas corpus.\textsuperscript{102} The court added that the tribal court is the proper forum to determine the scope of its own jurisdiction, at least in the first instance.\textsuperscript{103}

Judge Wright dissented in part and concurred in part. He argued that the plaintiff had stated a federal common law cause of action involving a substantial federal question over which the district court had subject matter jurisdiction under 28 U.S.C. § 1331.\textsuperscript{104} He concluded, however, that plaintiffs should be required to exhaust remedies available in the tribal court system before seeking federal intervention.\textsuperscript{105}

The Supreme Court agreed with the district court holding that federal district courts have jurisdiction over a case such as National's. Whether a tribe retains jurisdiction over reservation-based disputes that involve non-Indians is a federal question and must be answered by reference to federal law.\textsuperscript{106} The district court may determine under 28 U.S.C. § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.\textsuperscript{107}

The Supreme Court distinguished \textit{Oliphant v. Suquamish Indian Tribe},\textsuperscript{108} which held that tribal courts do not have inherent criminal jurisdiction to try non-Indians for offenses committed on the reservation.\textsuperscript{109} First, there is no legislation giving the fed-

\begin{itemize}
\item \textsuperscript{102} 736 F.2d at 1323; see also infra note 137.
\item \textsuperscript{103} Id. at 1324.
\item \textsuperscript{104} Id. at 1324, 1325.
\item \textsuperscript{105} Id. at 1326.
\item \textsuperscript{106} National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985).
\item \textsuperscript{107} Id. at 853.
\item \textsuperscript{108} 435 U.S. 191 (1978).
\item \textsuperscript{109} In his opinion for the Court in \textit{Oliphant}, Justice Rehnquist noted what he found to be a "commonly shared presumption of Congress, the Executive Branch and the lower federal courts" that tribal courts lack the power to try non-Indians. \textit{Id.} at 206. He concluded that Indian courts lack such jurisdiction absent an affirmative delegation by Congress, \textit{id.} at 208, because "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." \textit{Id.} at 210. He recognized that Indian tribal courts today "resemble in many respects their state counterparts" and that non-Indian crime is prevalent on reservations, but concluded that these are considerations for Congress to weigh in deciding whether to authorize jurisdiction. \textit{Id.} at 211-12.

In his dissenting opinion, in which Chief Justice Burger joined, Justice Marshall stated his view that "[i]n the absence of affirmative withdrawal by treaty or statute, . . . Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation." \textit{Id.} at 212.

For one discussion of the \textit{Oliphant} decision that questions the accuracy of Justice Rehnquist's historical and textual analysis, see M. \textsc{Price} & R. \textsc{Clinton}, supra note 28, at 275-76.
\end{itemize}
eral courts jurisdiction over civil disputes between Indians and non-Indians, as there is for criminal matters.\textsuperscript{110} Second, principles governing civil jurisdiction on reservations and rules dealing with tribal criminal jurisdiction have developed in a markedly different way.\textsuperscript{111}

Having decided against extending \textit{Oliphant}, the Court adopted the exhaustion requirement suggested by Judge Wright.\textsuperscript{112} Determination of

the existence and extent of a tribal court’s jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.\textsuperscript{113}

Requiring that this examination be conducted in the first instance in the tribal court itself, the Court noted, recognizes Congress’ commitment to supporting tribal self-government and self-determination, serves the orderly administration of justice by allowing development of a full record in the tribal court, encourages tribal courts to explain the precise basis for exercising jurisdiction, and provides other courts with the benefit of the tribal court’s expertise in the event of further judicial review.\textsuperscript{114}

\textbf{B. The Self-Defeating Rationale of National Farmers Union}

To a certain extent, the Supreme Court’s decision is quite favorable to the interests of the tribes. By requiring exhaustion of tribal remedies, the decision reaffirms the sovereignty of the tribes and their retention of inherent powers of self-government.\textsuperscript{115} It reiterates the basic principle that tribal court juris-

\textsuperscript{110} 18 U.S.C. § 1153 (Supp. III 1985); \textit{see supra} note 11.

\textsuperscript{111} 471 U.S. at 854 n.16, 855 n.17. Congress has never enacted general legislation to establish a federal or state forum for adjudicating civil disputes between Indians and non-Indians on reservations. Furthermore, Indian treaties did not provide for tribal relinquishment of civil jurisdiction over non-Indians, although they sometimes did require tribes to surrender non-Indian criminal suspects to federal or state authorities. \textit{Id.} at 855 n.17; \textit{see also supra} note 11.

\textsuperscript{112} \textit{See supra} notes 104-05 and accompanying text.

\textsuperscript{113} 471 U.S. at 855-56 (footnotes omitted).

\textsuperscript{114} \textit{Id.} at 856-57.

\textsuperscript{115} \textit{Id.} at 856.
diction is an element of tribal sovereignty that survives intact unless altered by federal law.\textsuperscript{116} The decision thus indicates continuing judicial respect for the sovereignty of Indian tribes.

The Supreme Court decision also recognizes the commitment of Congress to a policy of supporting tribal self-determination and self-government.\textsuperscript{117} An important element of self-determination and self-government is exercising authority over disputes that arise within the territorial boundaries of the reservation. The tribe has a strong interest in protecting the interests of tribal members and in governing both Indian and non-Indian behavior on the reservation.\textsuperscript{118} Also, as a governmental body, the tribe has a strong interest in providing a forum for the peaceful resolution of disputes arising on the reservation, as well as an obligation to provide such a forum.\textsuperscript{119} Affording the tribal court the first opportunity to evaluate the basis for a challenge to its jurisdiction recognizes tribal interests and obligations and furthers congressional policy regarding tribal governments.

The Supreme Court’s decision ensures that initial proceedings will occur within the court system most able to give the litigants quick access to a judicial forum.\textsuperscript{120} Most Indian reservations are located in rural areas without ready access to federal or state courts.\textsuperscript{121} If any county courts are available nearby, they are likely to be unsympathetic to or even hostile toward Indian litigants.\textsuperscript{122} Tribal courts provide a forum within the territory in which the dispute arose and are thus convenient for evidentiary purposes, and will often be the forum most convenient to the litigants, especially if they all live on or near the reservation. Because Indian tribal court proceedings and Indian tribal codes\textsuperscript{123} are largely modeled on Anglo-American models, and because proceedings are generally conducted in English,\textsuperscript{124} non-Indian litigants should not find any marked contrast between the tribal court system and local, state, and federal courts,\textsuperscript{125} other

\begin{footnotes}
\item[116] See \textit{ supra \textsuperscript{76}} note \textsuperscript{77} and accompanying text.
\item[117] \textit{ supra \textsuperscript{79}} at 79. By comparison, a survey of Indians and non-Indians indicated that the only serious bias against non-Indians in tribal courts was that non-Indians were given heavier fines instead of jail sentences. \textit{ supra \textsuperscript{79}}.
\item[118] \textit{ supra \textsuperscript{79}} note \textsuperscript{78}.
\item[119] \textit{ supra \textsuperscript{79}} note \textsuperscript{79}.
\item[120] INDIAN COURTS AND THE FUTURE, \textit{ supra \textsuperscript{79}} note \textsuperscript{80}, at 89.
\item[121] \textit{ supra \textsuperscript{79}} at 89.
\item[122] \textit{ supra \textsuperscript{79}} at 79. By comparison, a survey of Indians and non-Indians indicated that the only serious bias against non-Indians in tribal courts was that non-Indians were given heavier fines instead of jail sentences. \textit{ supra \textsuperscript{79}}.
\item[123] \textit{ supra \textsuperscript{79}} notes \textsuperscript{75-76} and accompanying text.
\item[124] INDIAN COURTS AND THE FUTURE, \textit{ supra \textsuperscript{79}} note \textsuperscript{80}, at 68.
\item[125] \textit{ supra \textsuperscript{79}} at 44, 61.
\end{footnotes}
than perhaps the lower cost of litigation in the tribal court. As the Supreme Court noted, allowing the development of a full record in the tribal court also promotes efficiency and the orderly administration of justice in the federal courts and gives the federal courts the benefit of tribal court expertise in the event of federal judicial review.

Finally, and most importantly, the tribal court may be the only forum available to the litigants where there is no diversity between the parties and no federal question as the basis of the suit, and where jurisdiction over civil causes of action arising on the reservation has not been delegated to the state. In National Farmers Union, for example, complete diversity of citizenship did not exist so there was no diversity jurisdiction, and there was no federal question jurisdiction over the tort claim itself. The State of Montana has not obtained jurisdiction over civil causes of action arising within the Crow Reservation. Consequently, the injured child and his guardian could turn only to the tribal court.

Requiring exhaustion of tribal remedies also provides encouragement to tribal courts, which have endeavored to provide fair, efficient systems of justice using institutions and concepts of justice that were essentially foreign to the tribes and were initially thrust upon them. Low levels of funding have inhibited the development of the tribal court systems, as has the difficulty of receiving recognition of judgments by surrounding jurisdictions. To train the personnel needed to operate the system, programs were set up for tribal judges and for lawyers who will practice before the tribal courts. Supreme Court deference to tribal jurisdiction necessarily increases the importance of tribal courts and their decisions recognizes their efforts to in-

126. One reason for the lower cost of litigation in tribal courts is the extensive use of lay advocates. See id. at 65.
127. 471 U.S. at 856-57; see supra text accompanying note 114.
128. F. COHEN, supra note 1, at 342; Canby, supra note 77, at 220-23. Even if there is diversity of citizenship between the parties, if the case is one that could not have been litigated in state court, the federal court may refuse to exercise diversity jurisdiction. Id. at 219 (citing Hot Oil Serv. v. Hall, 366 F.2d 295 (9th Cir. 1966), and Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965), cert. denied, 382 U.S. 986 (1966)); see also supra note 79.
129. Brief for Respondents, supra note 118.
130. See supra notes 67-68 and accompanying text.
131. INDIAN COURTS AND THE FUTURE, supra note 14, at 57.
132. Id. at 80-81; AIPRC TASK FORCE FOUR, supra note 2, at 128; see also infra notes 191-93 and accompanying text.
133. AIPRC TASK FORCE FOUR, supra note 2, at 125, 127.
134. Id. at 125.
135. INDIAN COURTS AND THE FUTURE, supra note 14, at 89.
stitute and maintain fair and efficient proceedings, and encourages them to exercise fully the authority they possess and to continue to improve tribal court systems.\textsuperscript{136}

On the other hand, although the Supreme Court’s exhaustion of tribal remedies requirement is a reaffirmation of tribal sovereignty, providing for an appeal of questions of tribal court jurisdiction to federal district court tends to undercut the tribal system and to make the exhaustion requirement seem like an empty gesture. In effect, a layer of federal court review is inserted above the tribal court system. This frustrates congressional policy that discourages federal court interference with the tribal courts.\textsuperscript{137}

The \textit{National Farmers Union} decision also undermines present tribal court jurisdiction by providing an opportunity for litigants to contest tribal court jurisdiction over areas in which it is well-established.\textsuperscript{138} Federal and state courts have recognized exclusive tribal jurisdiction over adoption proceedings\textsuperscript{139} and divorce proceedings\textsuperscript{140} where the parties are Indians. Courts have also upheld tribal jurisdiction over suits brought by non-Indians against Indians over debts,\textsuperscript{141} torts,\textsuperscript{142} and child custody.\textsuperscript{143} On the basis of the \textit{National Farmers Union} decision, litigants may

\begin{itemize}
  \item \textsuperscript{136} "Federal judicial deference means that Indian courts must respond to demands for interpretations of tribal law, review of administrative decisions, and determinations of the legitimacy of specific tribal actions. Consequently, more judicial business is indicated . . . ." \textit{Id.}
  \item \textsuperscript{137} In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), for example, the Supreme Court stated that the Indian Civil Rights Act "was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303." \textit{Id.} at 70. The Court noted further that this general understanding on the part of Congress, coupled with "Congress' rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review." \textit{Id.}
  \item \textsuperscript{138} As Felix Cohen has stated, "Tribal authority over cases involving non-Indians is well established in some circumstances and may exist in others." F. Cohen, \textit{supra} note 1, at 342.
  \item \textsuperscript{139} \textit{Id.} (citing Fisher v. District Court, 424 U.S. 382 (1976)).
  \item \textsuperscript{140} \textit{Id.} (citing Whyte v. District Court, 140 Colo. 334, 346 P.2d 1012 (1959), cert. denied, 363 U.S. 829 (1960)).
  \item \textsuperscript{141} \textit{Id.} (citing Kennerly v. District Court, 400 U.S. 423 (1971); Williams v. Lee, 358 U.S. 217 (1959); Hot Oil Serv. v. Hall, 366 F.2d 295 (9th Cir. 1966)).
  \item \textsuperscript{142} \textit{Id.} (citing Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974); Enriquez v. Superior Court, 115 Ariz. 342, 565 P.2d 522 (1977); Nelson v. Dubois, 232 N.W.2d 54 (N.D. 1975); Schantz v. White Lightning, 231 N.W.2d 812 (N.D. 1975)).
\end{itemize}
contest tribal jurisdiction over these areas by arguing that tribal jurisdiction must be reexamined in accordance with the analysis suggested by the decision. The State court decisions on jurisdiction may be especially vulnerable to attack because of the National Farmers Union holding that the extent of tribal jurisdiction is a federal question to be examined by federal district courts. Litigants may also, however, attack federal court tribal jurisdiction decisions for not being based on the National Farmers Union analysis. The decision thus creates greater uncertainty about tribal court jurisdiction when civil cases involve non-Indians. Tribal courts will have to deal with the uncertainty of not knowing whether an exercise of jurisdiction will be simply a waste of time and limited resources.

The opportunity to contest tribal court jurisdiction in federal court also invites abuse. Litigants who object to the jurisdiction of the tribal court are unlikely to pursue their objection if they are satisfied with the result of the litigation in tribal court. Only if they object to the decision on the merits will they be likely to challenge jurisdiction in federal court. This amounts to an attack on the merits of the tribal court decision and could further undermine tribal authority. Such a result is contrary to Congress' and the executive branch's intent to strengthen tribal government, of which the courts are an important element.

III. A PROPOSED SOLUTION

The Department of the Interior has broad authority over Indian affairs, which has been held to include the power to set up courts on Indian reservations and prescribe their jurisdiction. The Department should establish a mechanism whereby tribes could petition for formal recognition of jurisdiction over all reservation-based civil causes of action in various subject areas. Once formally recognized by the federal government, such jurisdiction should be respected by the courts, thus providing greater certainty over tribal jurisdiction and strengthening the tribal court systems.

144. See supra note 113 and accompanying text.
145. See supra notes 106-07 and accompanying text.
146. See supra notes 26-31 and accompanying text.
147. See infra notes 163-65 and accompanying text.
A. The Petition Procedure

Retained tribal sovereignty and the traditional powers of any sovereign to govern disputes arising within its territory provide strong support for the exercise of tribal court jurisdiction over cases arising on the reservation that involve both Indians and non-Indians. Congressional and executive policy aimed at strengthening tribal government in furtherance of the federal trust responsibility and considerations of convenience and practicality buttress these principles. Establishing a mechanism for formal federal recognition of tribal court civil jurisdiction can result in greater certainty.

Because tribal court systems differ from each other in both their ability and their willingness to assume jurisdiction over civil cases involving both Indians and non-Indians, recognition of tribal court jurisdiction should proceed on a tribe-by-tribe basis. Similarly, because different tribal courts may wish to exercise jurisdiction over different subject matters, formal recognition should also proceed on a subject-by-subject basis. The

148. See supra notes 19-31 and accompanying text.
149. See supra note 10 and accompanying text; see also 1 AIPRC FINAL REPORT, supra note 6, at 113: "Jurisdiction is often a question of the specific geographic area which is covered by the sovereign powers of a given government."
150. See supra notes 26-31 and accompanying text.
151. See supra notes 48-62 and accompanying text.
152. See supra notes 120-27 and accompanying text.
153. Some tribal courts are unable to assert jurisdiction over cases involving Indians and non-Indians because the tribal constitution does not extend jurisdiction over non-Indians. INDIAN COURTS AND THE FUTURE, supra note 14, at 47-48, 101-02. The results of a 1976 survey of 100 reservations conducted by the American Indian Lawyer Training Program indicated that 39% of the tribes exerted jurisdiction over non-Indians and 46% were in the process of changing their laws to be able to assert such jurisdiction or wished to do so. Id. at 32. Also, a court may decide it is unable to exercise jurisdiction over a case because it considers the case too complicated. Id. at 47, 50.
154. The 1976 American Indian Lawyer Training Program survey, see supra note 153, indicated that 15% of the tribes did not wish to exert jurisdiction over non-Indians. Id. at 32.
155. For example, one area of jurisdiction which is of great importance to Indian tribes is child welfare. The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1982), see infra text accompanying note 171, was enacted to ensure that Indian tribes can be actively involved in Indian child welfare issues. Before the passage of the Act, 25-35% of all Indian children were separated from their families for placement in foster homes, adoptive homes, or institutions. H.R. REP. No. 1386, 95th Cong., 2d Sess. (1978). Most decisions as to whether Indian children should be removed from their homes, and where they would be raised, were made by non-Indian authorities. See 25 U.S.C. § 1901(4). The Act "changed the basis upon which state and federal agencies make decisions affecting the custody of Indian children to one with a more conscientious regard for the rights of Indian tribes, parents and children." Oversight of the Indian Child Welfare Act: Hearing Before the Senate Select Comm. on Indian Affairs, 96th Cong., 2d Sess.
ultimate goal of the recognition process is that interested tribes will exercise jurisdiction over all reservation-based civil cases in which both an Indian and a non-Indian are parties. This will further the long-term goal of developing tribal governments into fully operational sovereigns that exercise the same powers and shoulder the same responsibilities as other local governments. 156

Congress could enact a statute to establish a procedure for formal federal recognition of tribal court civil jurisdiction. One could argue, however, that the executive department with authority over Indian affairs, the Department of the Interior, already has the power to establish procedures for federal recognition of tribal court civil jurisdiction. Pursuant to its broad powers over Indian affairs, 157 Congress may restrict Indian tribal court jurisdiction, but congressional approval is not needed to give the tribes adjudicatory jurisdiction over civil cases arising within their territory. Tribes retain, as an element of their inherent sovereignty, civil jurisdiction over all causes of action arising on the reservation, regardless of whether a non-Indian is involved, provided that components of this jurisdiction are not limited by the federal government. 158 Such limitations on jurisdiction must be explicitly stated in acts of Congress or treaties. 159

The Department of the Interior, acting through the BIA, is the prime agent for ensuring that the federal government carries out the United States' "permanent obligation to protect and enhance Indian lands, resources, and tribal self-government." 160 The Commissioner of Indian Affairs has broad authority to manage "all Indian affairs and . . . all matters arising out of Indian relations." 161 Pursuant to this authority, the BIA set up Courts of Indian Offenses on reservations. 162 In a nineteenth century district court case, United States v. Clapox, 163 the court held

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118 (1980) (statement of Steven Unger, Executive Director, Association of Am. Indian Affairs, Inc.).

Other areas in which tribes may be especially interested in asserting jurisdiction in cases involving both Indians and non-Indians include divorce proceedings, consumer debt actions, and torts. See supra notes 140-42 and accompanying text; see also infra note 187.

156. 1 AIPRC Final Report, supra note 6, at 13.

157. See supra notes 32-47 and accompanying text.

158. See supra note 65 and accompanying text; see also AIPRC Task Force Four, supra note 2, at 89.

159. AIPRC Task Force Four, supra note 2, at 89.

160. 1 AIPRC Final Report, supra note 6, at 247.


162. See supra notes 67-68 and accompanying text.

163. 35 F. 575 (D. Or. 1888).
that the Department of the Interior has the authority to establish on a reservation a Court of Indian Offenses and “to specify the acts or conduct concerning which it shall have jurisdiction.” The court recognized the power of the Commissioner of Indian Affairs to set up courts on reservations and to specify the extent of their jurisdiction. Congress acknowledged the validity of the Commissioner’s action by providing funding for the Courts of Indian Offenses, which still exist today where they have not been replaced by tribal courts. Analogous to the authority to establish courts on Indian reservations is the authority to recognize formally the extent of the tribal courts’ jurisdiction. Accordingly, the Department of the Interior, acting through the BIA, is the appropriate entity to assume the responsibility for formally recognizing civil jurisdiction that is retained and claimed by Indian tribes. The exercise of BIA authority in this manner would support the federal government’s policy of strengthening tribal government. Such an assumption of responsibility is also quite consistent with the role of the BIA and the Department of the Interior in granting approval of other tribal actions.

The Department of the Interior already exercises responsibility for recognizing tribal court jurisdiction in one area. The Indian Child Welfare Act of 1978 provides a mechanism whereby tribes that have become subject to state jurisdiction pursuant to any federal law may reassume exclusive jurisdiction over child custody proceedings. Interested tribes must submit to the Secretary of the Interior a suitable plan for reassuming jurisdiction.

164. Id. at 577.
165. The court based its conclusion on statutory authority given to the Secretary of the Interior to supervise public business relating to the Indians; to the Commissioner of Indian Affairs to manage all Indian affairs and matters arising out of Indian relations (now codified at 25 U.S.C. § 2 (1982)); and to the President to prescribe regulations to carry into effect acts relating to Indian affairs (now codified at 25 U.S.C. § 9 (1982)). Id. at 576-77.
166. See supra note 68.
167. See supra notes 71-74 and accompanying text.
168. See generally supra notes 72-76 and accompanying text.
169. See supra notes 78-80 and accompanying text.
170. See, e.g., 25 U.S.C. § 81 (1982) (Contracts with Indian tribes or Indians); id. § 396a (Leases of unallotted lands for mining purposes; duration of leases); id. § 397 (Leases of lands for grazing or mining); id. § 476 (Organization of Indian tribes; constitution and bylaws; special election).
172. See supra note 79.
173. 25 U.S.C. § 1918 (1982). It has been made clear that tribes may reassume jurisdiction without relinquishing their legal arguments that they already had such jurisdiction concurrently with the state. 44 Fed. Reg. 45,092 (1979) (modifying 25 C.F.R. § 13.1).
This petition for reassumption must include a description of the tribal court system, copies of tribal rules and procedures for the exercise of jurisdiction over child custody matters, and citations to the tribal constitutional provision authorizing tribal jurisdiction over child custody matters. Once a tribe has presented a plan for exercising jurisdiction over child welfare cases, the Assistant Secretary for Indian Affairs reviews the petition and approves it if: (1) the petition is complete; (2) the tribal constitution authorizes such jurisdiction; (3) the tribal court appears able to exercise jurisdiction over Indian child custody matters in a manner consistent with due process and the other safeguards, patterned after the Bill of Rights, that are embodied in the Indian Civil Rights Act; (4) sufficient child care services will be available; and (5) the tribe has a procedure for clearly identifying persons who will be subject to the tribe’s jurisdiction. The Assistant Secretary publishes a notice of approval of the petition in the Federal Register. The notice must clearly define the territory subject to the reassumption of jurisdiction, and a copy of the notice must be sent to the tribe and to the attorney general, governor, and highest court of the state affected. Several tribes have already reassumed child custody jurisdiction under this procedure.

If the Assistant Secretary does not approve the plan submitted, the BIA must immediately send reasons for disapproval to

175. 25 C.F.R. § 13.11(a) (1986).
176. Id. § 13.12(a).
177. Id. § 13.14(a)(3).
178. Id. § 13.14(b).
the petitioning tribe and offer technical assistance to correct the defect in the original plan. After the tribe has taken action to overcome the deficiencies of the first petition, the tribe may re-petition for recognition. One tribe whose initial petition was not approved has reassumed jurisdiction under the re-petitioning procedure.

A similar procedure should be used for recognition of the civil adjudicatory jurisdiction of tribes that have not been made subject to state jurisdiction. A tribe seeking federal recognition of its civil adjudicatory jurisdiction in a certain subject area would submit a petition setting out its plan for exercising jurisdiction. The petition should include a citation to the provision in the tribal constitution authorizing the tribal court to exercise jurisdiction, a description of the tribal court, copies of tribal ordinances establishing court procedures, and an estimate of the population of the reservation. The Assistant Secretary for Indian Affairs should approve the petition as long as it is complete and the tribal court appears able to exercise jurisdiction in a manner that meets the requirements of the Indian Civil Rights Act. A tribe whose petition is not approved should receive technical assistance to correct the deficiencies perceived by the Assistant Secretary. The Assistant Secretary would publish a notice in the Federal Register stating that the Department of the Interior has approved a petition for recognition, and that the tribe will exercise jurisdiction over the subject area in question. The tribal court's jurisdiction should be recognized as exclusive, unless Congress has granted state jurisdiction, in which case it shall be concurrent.

Once a tribe's civil jurisdiction has been formally recognized in all civil subject-matter areas, its tribal courts will be able to operate with the certainty that their exercise of jurisdiction will be respected. Non-Indians who enter into reservation-based contracts, for example, will have notice that disputes over the contract will be decided in tribal court. Non-Indians entering the reservation, or residing on it, will have notice that torts they commit on the reservation will be litigated in tribal court. Tribal courts would be able to assume a complete role in the adjudica-

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181. Id. § 13.16.
182. Id. § 13.14(d).
184. See supra note 79.
tion of civil disputes involving both Indians and non-Indians on the reservation.

B. Implementation

To fully effectuate this Note's proposal, a number of important changes must first be made. Tribes that wish to assert jurisdiction over civil disputes involving non-Indians must modify tribal codes and constitutions that do not authorize their court system to exercise such jurisdiction. In some cases these modifications require approval by the BIA. Tribes must also determine what laws will be applied in the subject area in which they are seeking certification of their courts' jurisdiction, if they have not already done so, and fill in any gaps in the content of tribal law codes.

In some cases, changes are needed in the attitudes of tribal government officials. Judges in some tribal court systems have complained of tribal council interference with the courts. Tribal governments that have not yet done so must recognize the need for independent operation of the courts and the important role tribal courts play in furthering tribal self-government and self-determination.

Attitudes of neighboring jurisdictions also must change. Tribal courts have difficulty getting neighboring jurisdictions to recognize their judgments. Recognition, when given, is often informal and inconsistent. Very few states currently give full faith and credit to tribal judgments. Clearly, for formal certification by the federal government that a tribe has exclusive jurisdiction over a subject area to be meaningful, tribal exercises of that ju-

185. See supra note 153.
186. INDIAN COURTS AND THE FUTURE, supra note 14, at 41-42.
187. Tribal courts use a mixture of tribal code provisions and federal, state, and traditional law. Tribal codes commonly provide that state law can be applied when an area is not covered by code provisions. Id. at 43. For recommendations on tribal legislation and codification, see id. at 97 (inadequate tribal laws), 110-12 (codification and customary law), 113-14 (juvenile law). Reexamination of all tribal law and tribal codes was suggested. Id. at 156-61.
188. Id. at 39, 97.
189. Id. at 39-40, 70-71, 86, 94.
190. Id. at 86 ("Support for courts is increasing, and many judges stated that tribal government officials have begun to realize that the tribal court ultimately defends the tribe's sovereignty.").
191. Id. at 80.
192. Id.
193. As of 1978, only two states gave full faith and credit to tribal judgments. Id.
Tribal Court Jurisdiction

Jurisdiction must be recognized by other court systems. As the Solicitor of the Interior stated in 1934, "[I]n the fields of civil controversy the rules and decisions of the tribe and its officers have a force that State courts and Federal courts will respect."194 Once tribal courts have exclusive jurisdiction over all reservation-based civil cases formally recognized by the federal government, and their judgments receive full faith and credit in other jurisdictions, they will be able to exercise the same responsibilities as other local court systems,195 and thus play an important role in the full development of tribal self-government.

Conclusion

Indian tribal courts are an important element in the achievement of the congressional goal of Indian self-government and self-determination. Tribal court civil jurisdiction extends to all reservation-based disputes unless that jurisdiction has been restricted by federal action. In National Farmers Union Insurance Cos. v. Crow Tribe of Indians, the Supreme Court determined that the extent of tribal court jurisdiction over civil cases involving non-Indians is a question of federal law that should first be examined by the tribal court, but the tribal court jurisdictional decision can be reviewed in federal district court. A layer of federal court review is thus imposed above the tribal court systems, constituting a degree of federal court interference that is contrary to the intention of Congress and the Executive.

A better approach to establishing the boundaries of tribal court civil jurisdiction is to establish a procedure in the Department of the Interior whereby an individual tribe could petition for federal recognition of its exclusive, retained civil jurisdiction. Tribes could apply for recognition of jurisdiction over individual subject areas, so that recognition would take place in an orderly manner reflecting tribal interests and capabilities. Once the federal government formally recognizes tribal adjudicatory jurisdiction, reservation residents and visitors will have notice that tribal courts will exercise jurisdiction over reservation-based civil cases, and tribal judgments will be entitled to full faith and

195. 1 AIPRC Final Report, supra note 6, at 13.
credit. The tribal courts will then be able to play their proper role in tribal government.

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