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TRIBAL COURT JURISDICTION OVER COLLECTION SUITS BY LOCAL MERCHANTS AND LENDERS: AN OBSTACLE TO CREDIT FOR RESERVATION INDIANS?

Jesse C. Trentadue*

Introduction

Merchants provide goods and services but payment is not received. Customer accounts become overdue and delinquent. A debtor's checks are dishonored or returned for lack of funds. These are typical collection problems encountered by local or community businesses. State courts, particularly small claims courts, are the traditional forums for collecting these business debts. Yet in many western states there exist court systems separate and apart from the state courts. These other courts are Indian tribal courts.

North Dakota is a western state with a significant Indian population.¹ There are five tribal court systems in North Dakota, and each functions as part of a separate reservation government. The existence of many diverse Indian legal systems made North Dakota an ideal place for this research on the interaction between local businesses and reservation courts.²

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The author is grateful to all individuals and institutions who contributed to this project and without whom this study could not have been completed. These would necessarily include the tribal court personnel, local merchants, financial officers, and attorneys who gave of their time by submitting to personal interviews or answering questionnaires.

There are others, however, who merit special thanks, especially Dr. Larry Dobesh, Director of the University of North Dakota's Bureau of Business and Economic Research, who gave much encouragement and support throughout a difficult and often controversial research project. The author also owes a considerable debt to Sherry King, Assistant Executive Director, State Bar Association of North Dakota, who contributed data on North Dakota attorneys; and to Judges Lawrence Joshua and J.A. Chaske, and Clerk of Court Myra Hunt, who patiently explained the functioning of the Fort Totten Tribal Court.

1. According to 1980 national census data, Indians comprise approximately 3 percent (3.1%) of the total North Dakota population. See U.S. BUREAU OF THE CENSUS, SUPPLEMENTARY REPORT, AMERICAN INDIAN AREAS AND ALASKA NATIVE VILLAGES: 1980 CENSUS OF POPULATION 24 (1984). Nationally, persons of Indian, Eskimo, or Aleut ancestry comprise less than one-half of 1 percent (.0062%) of the total United States resident population. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 31 (105th ed. 1985).

2. For the initial results of this research, see Trentadue, *The Role of Indian Tribal*

Research Objectives

The primary objective of this study was to determine the role, if any, that Indian courts play in the collection practices of local businesses. In addition to compiling and analyzing data on the jurisdiction and use of these particular Indian court systems for debt collection, this research also focused upon the potential tribal courts have for the recovery of business debts.

It was not an objective of this project to evaluate tribal courts on fairness, procedure, or results,³ nor does this study purport to do so. Instead, the emphasis was on how tribal courts were perceived in terms of fair treatment, just results, and overall procedures by those persons who either have used or are likely to use Indian courts for collecting business debts. That a tribal court may be viewed as unfair by local merchants and lenders does not mean the opinion is either accurate or well founded. Should such an attitude exist, however, it would be significant.

If tribal courts are seen as unfair, unjust, or unreliable by a certain class of litigant, these persons are not likely to use the reservation court system. Moreover, business owners who distrust Indian courts might not freely extend credit if default will necessitate looking to a tribal legal system for collection. Therefore, additional goals of this research were to explore the attitudes of local business owners toward tribal courts and to consider the possibility that a negative opinion by these persons results in a denial of credit when nonpayment would require them to bring suit in an Indian court.

Research Methodology

A tripartite format was used to accomplish the research objec-

Courts in the Collection of Business Debts: Tool or Bane of Local Business?, N.D. ECON. STUDIES, No. 39 (1985). Although this project was funded in part by a grant from the University of North Dakota's Bureau of Business and Economic Research, and further supported by the North Dakota State Bar Association, these institutions did not direct or control the empirical research. Nor do the author's opinions and conclusions presented in this study necessarily reflect those of these sponsoring institutions.

3. Several studies have been done on Indian courts, but these generally focus upon the needs of tribal court systems rather than their fairness or judicial competence. *See, e.g.,* AM. INDIAN LAW. TRAINING PROG., INC., INDIAN SELF-DETERMINATION AND THE ROLE OF TRIBAL COURTS (1977); 2 NAT'L AM. INDIAN COURT JUDGES ASS'N, JUSTICE AND THE AMERICAN INDIAN: THE INDIAN JUDICIARY AND THE CONCEPT OF SEPARATION OF POWERS (1974). *See generally* NAT'L AM. INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE (1978). *But see* S. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COST OF SEPARATE JUSTICE (1978) (a study highly critical of Indian courts including several North Dakota tribal courts).

tives of this study. First, the jurisdictional parameters of the various tribal courts were determined because a court that lacks the authority to hear collection actions cannot be of use to local businesses. This determination of tribal court jurisdiction was made for four possible categories of litigants: (1) Indian creditor and Indian debtor; (2) Indian creditor and non-Indian debtor; (3) non-Indian creditor and Indian debtor; and (4) non-Indian creditor and non-Indian debtor. Identifying a tribal court's civil jurisdiction over these types of cases required a review and analysis of federal Indian policy, treaties, and tribal codes and constitutions, as well as federal and state constitutions and legislative acts.

Second, all North Dakota lawyers having offices on or within 50 miles of an Indian reservation were surveyed about their experiences with and attitudes toward tribal court collection suits. A 50-mile survey radius was selected because only those attorneys practicing near a reservation are likely to represent local business owners in tribal court. This survey was designed to collect litigation data from the previous year (1984), and it was conducted by means of a written questionnaire.⁴ Data from these questionnaires were separately compiled for each tribal court, and to ensure candid answers the respondents were allowed to remain anonymous.

Third, in-person and telephone interviews were conducted with tribal court personnel and local business owners. These interviews had a twofold purpose: (1) to obtain data on the use of tribal courts by banks, savings and loans, and merchants during 1984; and (2) to discover the opinions, if any, these local business people held about tribal court.

I. *Tribal Courts*

American Indians have formed and are continuing to form their own reservation governments, and these governments are attempting to exercise authority over a broad range of social, political, and economic activities.⁵ A key appendage of this asser-

4. Questionnaires were mailed to 372 attorneys. Responses were received from 186 attorneys.

5. The scope and validity of these efforts to exercise tribal authority have been extensively litigated by non-Indians. See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (corporate challenges to tribal mineral extraction tax); *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980) (state of Washington's opposition to tribal sales tax and automobile licensing); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (resisting application of tribal criminal code to non-Indians); *Cardin v. De La*

tion of tribal power has been the emergence of an Indian court system.⁶ This legal system, however, did not develop in a vacuum. It is a product of decades of changing and varied federal Indian policy.

Federal Indian Policy and the Development of Tribal Courts

Congress forever altered the independent status of tribal entities in 1871 when it passed legislation providing that Indian tribes would no longer be recognized or acknowledged as independent nations with whom the United States would contract by treaty.⁷ This act marked a dramatic shift in federal Indian policy. The federal government had previously negotiated with tribes as though they were foreign nations; many of the early treaties were extremely conciliatory toward the Indians.⁸ By 1871, though, the United States had expanded both geographically and militarily, and several foreign wars and a civil war had been fought and won. The decision to deal no longer with tribes as foreign nations undoubtedly reflected a determination on the part of the United States that Indians were at last a conquered and dependent people.

Congress passed a General Allotment Act in 1887.⁹ Also known as the Dawes Act, this law initiated a policy of assimilation for the Indians.¹⁰ The Dawes Act provided that individual Indians were to be allotted parcels of reservation land with title held in trust by the federal government.¹¹ Throughout the trust or wardship period the land was restricted and could not be en-

Cruz, 671 F.2d 363 (9th Cir. 1982), *cert. denied*, 459 U.S. 967 (non-Indian business contesting regulation under tribal building and safety code); *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982) (attacking tribal zoning law prohibiting non-Indian development).

6. See AM. INDIAN LAW. TRAINING PROG., *supra* note 3. The power to establish an Indian court system is derived from a tribe's retained sovereignty. See, e.g., *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) (Oglala Sioux Tribal Court was established under Indians' retained sovereign powers rather than an act of Congress). See *infra* notes 107-168 for a discussion of retained tribal sovereignty.

7. This law specifically provided that treaties ratified before Mar. 3, 1871, would not be invalidated or impaired. 25 U.S.C. § 71 (1982) (originally enacted as Act of Mar. 3, 1871, ch. 120, 16 Stat. 566).

8. See, e.g., Treaty with Delaware Nation, 7 Stat. 13 (1778) (forgiving prior offenses by the Indians; requiring Delaware Tribe to assist the United States in war; offering tribe possibility of representation in Congress).

9. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.

10. See S. TYLER, A HISTORY OF INDIAN POLICY 95-107 (1973).

11. See ch. 119, §§ 1, 5, 24 Stat. 388 (1887).

cumbered or sold by the Indian allottee, but after the expiration of twenty-five years the allottee was given fee simple title and United States citizenship.¹² Once unrestricted title was received, an Indian landowner could sell or mortgage his or her property.¹³ Though exercise of this power of alienation by Indian allottees, non-Indians acquired title to reservation lands and thus came into increasing contact with tribal governments.¹⁴

The 1920s and 1930s witnessed still another shift in federal Indian policy, this time away from assimilation and toward self-government. Indians were granted United States citizenship in 1924.¹⁵ In 1934 the Indian Reorganization Act became law,¹⁶ and with its passage the keel for modern tribal self-government was laid.

Commonly known as the Wheeler-Howard Act, the 1934 Indian Reorganization Act is perhaps the single most important piece of Indian legislation.¹⁷ This law prohibited further allot-

12. *Id.* §§ 5, 6 (current version at 25 U.S.C. § 348 (1982)).

13. *See id.* § 5. *See generally* United States v. Rickert, 188 U.S. 432 (1903) (Indians have no right to make contracts respecting allotted lands).

14. The Dawes Act was not the only means by which non-Indians acquired reservation land. In concert with the General Allotment Act, the federal government entered into an extensive period of reducing Indian ownership of reservations and making this "surplus land" available to non-Indians. *E.g.*, Act of Apr. 12, 1924, ch. 93, 43 Stat. 93 (sale of property no longer needed for tribal administration); Act of May 31, 1918, ch. 88, § 2, 40 Stat. 592 (sale of lots on Fort Hall Reservation); Act of Feb. 27, 1917, ch. 133, 39 Stat. 945 (agricultural entries on tribal lands). By 1934 when the allotment system finally ended, Indians had parted with title to 90 million acres of former reservation lands, presumably to non-Indians. *See* H.R. REP. No. 1804, 73d Cong., 2d Sess. 6 (1934). *See also* Act of Feb. 14, 1913, ch. 54, 37 Stat. 675 (sale of surplus land on Standing Rock Reservation); Act of June 1, 1910, ch. 264, 36 Stat. 455 (sale of surplus land on Fort Berthold Reservation); Act of Apr. 27, 1904, ch. 1620, 33 Stat. 319, 321 (providing for disposition of former Devil's Lake Reservation land under general provisions of homestead and townsite laws). *See generally* Act of May 17, 1900, ch. 479, § 1, 31 Stat. 179 (free homesteads for settlers on former Indian lands).

15. Act of June 2, 1924, ch. 233, 43 Stat. 253.

16. Act of June 18, 1934, ch. 576, § 1, 48 Stat. 984 (current version at 25 U.S.C. §§ 461-491 (1982)).

17. Not only does the Indian Reorganization Act of 1934 provide a mechanism for creating a formal tribal governmental structure, but tribes organized under this law qualify for a variety of federal benefits. *See, e.g.*, 25 U.S.C. § 488 (1982) (organized tribes qualify for loans from the Farmers Home Administration Direct Loan Account). Once a tribe organizes under the Indian Reorganization Act of 1934 and is a recognized governing unit, it may qualify for federal aid and grants along with other units of local government. *E.g.*, 42 U.S.C. § 5303 (1982) (community development moneys); 31 U.S.C. § 6701(a)(5)(B) (1982) (federal revenue sharing). Although it may come as a surprise to many, there are tribes that have not been recognized by the federal government. *See, e.g.*,

ment of reservation lands,¹⁸ and it continued indefinitely the trust status on lands previously allotted but to which fee simple title had not issued.¹⁹ However, the real significance of the Wheeler-Howard Act was that it authorized tribes to organize, adopt tribal constitutions, and incorporate and function as units of local government.²⁰

Tribal termination was the legislative goal of the 1950s when,²¹ in yet another change in policy, Congress attempted to transfer civil and criminal jurisdiction over Indians and Indian lands to the states.²² Public Law 83-280 was a key instrument in this effort to terminate tribal government.²³ This Act provided two means whereby states could acquire control over reservation lands and Indians. First, to Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin, Congress granted civil and criminal jurisdiction over some or all of the reservations located in these states and the Indians residing upon them.²⁴

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (unrecognized group of Indians claiming compensation from the United States for the taking of timber from lands claimed by them); Duwamish Indians v. United States, 79 Ct. Cl. 530 (1934), *cert. denied*, 295 U.S. 755 (1935) (nontreaty Indians seeking compensation for alleged taking of tribal lands by the United States).

Tribes can be recognized through treaty, statute, or executive order. As long as a tribe remains unrecognized, its members are legally indistinguishable from other non-Indian citizens. *Cf. Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) (Bureau of Indian Affairs employment preference was for members of federally recognized tribes; not a racial group consisting of Indians). Members of unrecognized tribes may likewise be fully subject to state governmental authority. *Cf. Washington v. Confederated Tribes of the Colville Res.*, 447 U.S. 134, 161 (1979) (nonmember Indians were subject to the state of Washington's taxing authority). Fortunately, though, identifiable but previously unrecognized groups of Indians have a procedure for becoming a federally recognized tribe. See 25 C.F.R. pt. 83, §§ 83.1 to 83.11 (1985) ("Procedures For Establishing That An American Indian Group Exists As An Indian Tribe"). Authority even exists for creating a reservation for "newly" recognized tribes. See 25 U.S.C. § 467 (1982) (authorizing the Secretary of the Interior to proclaim new Indian reservations).

18. Act of June 18, 1934, ch. 576, § 1, 48 Stat. 984 (current version at 25 U.S.C. § 461 (1982)).

19. *Id.* § 2 (current version codified at 25 U.S.C. § 462 (1982)).

20. 25 U.S.C. §§ 476, 477 (1982). A majority of tribal governments are organized and formed pursuant to the Indian Reorganization Act of 1934.

21. See S. TYLER, *supra* note 10, at 181-83. See generally Wilkinson & Briggs, *The Evolution of Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

22. See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-89 (partially at 18 U.S.C. § 1162 (1982) and 28 U.S.C. § 1360 (1982)).

23. See 2 F. PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIAN* 1044-46 (1984).

24. 18 U.S.C. § 1162 (1982) (criminal jurisdiction); 28 U.S.C. § 1360 (1982) (civil

The second method by which Public Law 83-280 proposed to transfer control was through state assumption of jurisdiction.²⁵ Public Law 83-280 authorized the remaining states to amend their enabling acts and constitutions in order to assume such additional civil and criminal jurisdiction over Indians and Indian lands as their respective state legislatures deemed appropriate.²⁶ Some states opted to assume jurisdiction over matters of particular concern.²⁷ Still others assumed broad civil and criminal jurisdiction

jurisdiction). Jurisdiction was granted to these particular states because most of the Indian tribes located there and practically all of the respective state officials were in agreement over the transfer of power. See S. TYLER, *supra* note 10, at 183.

25. See 18 U.S.C. § 1162 (1983) (criminal jurisdiction); 28 U.S.C. § 1360 (1982) (civil jurisdiction).

26. Act of Aug. 15, 1953, ch. 505, §§ 6, 7, 67 Stat. 588. Public Law 83-280 merely 'vested states with *additional* civil and criminal jurisdiction over Indians and their lands. Through a series of Supreme Court decisions it had already been established that states had jurisdiction over non-Indians and their property even when located within the confines of a tribal reservation. Public Law 83-280 had little if any effect upon this state authority over non-Indians. See *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499 (1946) ("In the absence of limiting treaty obligation or Congressional enactment each state has a right to exercise jurisdiction over Indian reservations within its boundaries."); *Utah & N. Ry. v. Fisher*, 116 U.S. 28 (1885) (Territory of Idaho permitted to tax non-Indian-owned property which passed through Fort Hall Reservation); *United States v. McBratney*, 104 U.S. 621 (1881) (Colorado had criminal jurisdiction over non-Indian who killed another non-Indian within the boundaries of a reservation).

27. See, e.g., 1963 Wash. Laws ch. 36 (which obligated the state of Washington to assume civil and criminal jurisdiction over eight subject areas and in other matters with consent of the tribe). Now codified as WASH. REV. CODE § 37.12.010 (1964), that law provided:

The state of Washington hereby obliges and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the Act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservations and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 [tribal consent] have been invoked, except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads, and highways: *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

over reservations and Indians but later retroceded most of this governmental authority.²⁸ A few states acquired no jurisdiction pursuant to Public Law 83-280.²⁹

North Dakota agreed to assume all additional jurisdiction over Indians and Indian lands that the tribes or individual members decided to delegate to the state.³⁰ State law provided a mechanism by which Indians could cede civil jurisdiction to the North Dakota courts,³¹ but this transfer of authority has apparently not taken place on any North Dakota reservation.³²

1963 Wash. Laws ch. 36. The state of Idaho assumed similar jurisdiction. See 1963 Idaho Sess. Laws ch. 58, § 1 (currently IDAHO CODE § 67-5101) (1980)).

28. See, e.g., 1961 S.D. Sess. Laws ch. 464, §§ 1-4 (currently S.D. CODIFIED LAWS ANN. §§ 1-1-18 to 1-1-21 (1980)).

29. For example, North Dakota agreed to assume all the civil or criminal jurisdiction over Indians and their reservations that the tribe or individual members chose to delegate to the state. N.D. CENT. CODE §§ 27-19-01 to 27-19-13 (Supp. 1985). But no such delegation has taken place. See *White Eagle v. Dorgan*, 209 N.W.2d 621 (N.D. 1973). North Dakota did not, therefore, acquire any civil or criminal jurisdiction over Indians residing within the exterior boundaries of an Indian reservation pursuant to Public Law 83-280. See *Malaterre v. Malaterre*, 293 N.W.2d 139, 143 (N.D. 1980) (no action has been taken in North Dakota to acquire jurisdiction over Indians residing upon reservations pursuant to Public Laws 83-280 or 90-284 and, consequently, the state obtained none).

North Dakota's Enabling Act required it to disclaim title to Indian lands. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676 (enabling act for Montana, North Dakota, South Dakota, and Washington). North Dakota's constitution also disclaims jurisdiction over Indian lands. N.D. CONST. art. XIII, § 1(2). Although North Dakota did not otherwise acquire jurisdiction over Indians pursuant to Public Law 83-280, state courts do have jurisdiction over collection suits brought by Indians or the tribe against non-Indians, even if the debt arose on the reservation. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 106 S. Ct. 2305 (1986). The *Wold* decision did not, however, give state courts any jurisdiction over reservation Indian debtors. See *id.* Assuming that individual Indians or tribes are able to show the requisite jurisdiction, they can also sue in federal court. See *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982) (28 U.S.C. § 1332 (1982) (diversity jurisdiction over Indian litigants)). By law, federal courts have expressly been given jurisdiction over many kinds of cases involving individual Indians or a tribe. See, e.g., 28 U.S.C. § 1353 (1982) (original jurisdiction over any civil action involving Indian allotments); 28 U.S.C. § 1362 (1982) (federal courts can hear civil actions brought by tribes whenever controversy arises under the Constitution, laws, or treaties of the United States).

30. N.D. CENT. CODE §§ 27-19-01 to 27-19-13 (Supp. 1985).

31. *Id.* §§ 27-9-02, 27-19-05 (1974).

32. See *White Eagle v. Dorgan*, 209 N.W.2d 621 (N.D. 1973). Other states have assumed jurisdiction under Public Law 83-280, and this extension of state authority over Indians and their lands has been judicially approved. See, e.g., *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979) (upholding Washington assumption of jurisdiction in areas of compulsory school attendance, domestic relations, public assistance, mental illness, juvenile delinquency, adoption, dependent children, and motor vehicle regulation).

The most recent congressional change in federal Indian policy occurred with passage of the Indian Civil Rights Act of 1968 (ICRA).³³ This law launched the federal government on its present course of tribal self-determination.³⁴ The ICRA prohibited further state assumption of jurisdiction under Public Law 83-280 without the consent of the tribes affected;³⁵ it authorized those states already having acquired civil and criminal jurisdiction over Indians and their lands to retrocede this authority to the federal government;³⁶ and it granted limited due process and other civil rights to all persons subject to the authority of tribal governments.³⁷ Extending limited constitutional protections to those persons subject to tribal authority was a very important aspect of the ICRA.

If a person is subject to the authority of a tribal government, and this would include tribal courts as well, state and federal constitutional protections do not generally apply.³⁸ The only rights and safeguards available against abuses by tribal authorities are those contained in the 1968 Indian Civil Rights Act,³⁹ and these do not include the full panoply of constitutional rights normally accorded United States citizens.⁴⁰ The Indian Civil Rights Act does not, for example, prohibit the establishment of religion, nor

33. Act of Apr. 11, 1968, §§ 201 to 701, 82 Stat. 77-80 (current version codified at 25 U.S.C. §§ 1302-1326 (1982)).

34. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978). President Nixon declared tribal termination a failure in 1970 and called upon Congress to enact legislation whereby tribes would be permitted to manage their own affairs. See 116 CONG. REC. 23258 (1970). The 1970s witnessed a series of federal laws intended to foster tribal self-government. See, e.g., Indian Self-Determination & Education Assistance Act of 1975, 25 U.S.C. §§ 450-459 (1982); Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543 (1982).

35. Act of Apr. 11, 1968, §§ 401, 402, 82 Stat. 78-79 (current version at 25 U.S.C. §§ 1321, 1322 (1982)).

36. *Id.* § 403, 82 Stat. 79 (current version at 25 U.S.C. § 1323 (1982)).

37. *Id.* § 202, 82 Stat. 77 (current version codified at 25 U.S.C. § 1302 (1982)).

38. See, e.g., *Talton v. Mayes*, 163 U.S. 376 (1896) (holding that federal constitutional due process guarantees did not apply to Indian defendant under death sentence from tribal court).

39. See *Trans-Canada Enter. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476 (9th Cir. 1980) (unless they are made explicitly binding by the Constitution or otherwise imposed by Congress, constitutional rights do not apply to the exercise of governmental powers by an Indian tribe). *Accord*, *Settler v. Lameer*, 507 F.2d 231, 241-47 (9th Cir. 1974) (before passage of the Indian Civil Rights Act of 1968, constitutional rights were not applicable to Indian tribes and Indians living on reservations).

40. The full text of the rights imposed upon tribal governments by Congress reads as follows:

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging

does it require a trial in civil cases or the appointment of counsel for indigent criminal defendants.⁴¹ While Indian courts can no longer impose the death sentence upon violators of tribal law, they can punish with a fine of \$500 and six months imprisonment per offense.⁴² Moreover, the 1968 Indian Civil Rights Act only guarantees due process and equal protection of tribal law, not the due process and equal protection of state or federal law.⁴³

the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and *at his own expense to have the assistance of counsel for his defense*;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no way 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;

(8) deny to any person within its jurisdiction *the equal protection of its law* or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302 (1982) (emphasis added).

41. See *id.* §§ (1), (6).

42. 25 U.S.C. § 1302(7) (1982). Tribal courts have no criminal jurisdiction over non-Indians. See *Oliphant*, 435 U.S. at 191. As an obvious adjunct to the lack of criminal jurisdiction over non-Indians, tribal governments also lack the authority to seize non-Indian property used in violation of tribal law. See, e.g., *Quechan Tribe v. Rowe*, 531 F.2d 408 (9th Cir. 1976) (tribal authorities lacked power to confiscate weapons of non-Indians unlawfully hunting on tribal lands because seizures constituted a quasi-criminal proceeding in violation of the tribal constitution which expressly limited tribal criminal authority to members only).

The usual means of enforcing tribal law against non-Indians appears to be through the federal courts. See, e.g., *Knight*, 670 F.2d at 900 (suit by Shoshone and Arapahoe tribes to enforce tribal zoning laws). Indians who are not tribal members but happen to be upon the reservation probably enjoy the same legal status as non-Indians and thus remain beyond the tribe's criminal authority. Cf. *Colville*, 447 U.S. at 161 (for purposes of defining state taxing authority nonmember Indians were treated the same as non-Indians).

43. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 n.14 (1978). *Accord*, *Tom v. Sutton*, 533 F.2d 1101, 1104-05 n.5 (9th Cir. 1976) (as used in the Indian Civil Rights Act, "due process" and "equal protection" are construed with due regard for historical,

The paucity of constitutional safeguards available to those persons subject to tribal authority is a troublesome aspect of Indian governments. Even more disturbing to most persons, however, is the lack of a meaningful remedy for those who have been denied the limited protections granted by the Indian Civil Rights Act. Tribal governments enjoy sovereign immunity, and this insulates them from most damage suits.⁴⁴ Victims of tribal abuse cannot seek redress under civil rights laws because these do not apply to Indian governments.⁴⁵ A federal writ of habeas corpus is the only nontribal court remedy for correcting or preventing an Indian tribe's violation of personal rights; federal courts lack the authority to grant civil declaratory or injunctive relief.⁴⁶

There are definite limits on tribal authority,⁴⁷ and federal courts do have jurisdiction to determine whether an Indian government has exceeded its authority in a particular instance.⁴⁸ Nevertheless, those seeking to redress an unlawful exercise of tribal governmental power face an additional hurdle: They must first exhaust the tribal remedies available to them before seeking a federal forum.⁴⁹

governmental, and cultural values of Indian tribe and, therefore, these terms are not always given the same meaning as they come to represent under the United States Constitution).

44. *Martinez*, 436 U.S. at 58-59. A tribe's sovereign immunity can be limited only by explicit tribal consent or congressional authorization. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 519 F. Supp. 418, 424 (D. Ariz. 1981) (citing *Martinez*, 436 U.S. at 58). Indian tribes do not implicitly waive their sovereign immunity by commencing an action. See, e.g., *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1053 (9th Cir.), *rev'd on other grounds*, 106 S. Ct. 289 (1985) (by suing for declaratory and injunctive relief, Chemehuevi Tribe did not consent to a counterclaim for tax moneys allegedly due and owing to state of California).

45. See, e.g., *R.J. Williams Co. v. Fort Belknap*, 719 F.2d 979, 982 (9th Cir. 1983).

46. See *Martinez*, 436 U.S. at 59-72.

47. Tribal governmental powers may be limited by treaty, an act of Congress, or by implication if the particular power is inconsistent with the status of Indians as a dependent people. See *Oliphant*, 435 U.S. at 210. A tribe's jurisdiction may also be restricted by its constitution or tribal code. See *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138 (1984).

48. *National Farmers Union Ins. Co. v. Crow Tribe*, 105 S. Ct. 2447, 2454 (1985). Jurisdiction is supplied by 28 U.S.C. § 1331 (1982) (whether a tribe has exceeded the limits of its civil or criminal governmental authority necessarily encompasses a substantial federal question).

49. *Id.* at 2454. The Supreme Court indicated in *National Farmers Union Ins.* that it would not be necessary for a petitioner to first exhaust tribal remedies when tribal jurisdiction is motivated by a desire to harass, or is conducted in bad faith, or the action is clearly in violation of express jurisdictional prohibitions, or when exhaustion would otherwise be futile. See *id.* at 2454 n.21. There is, however, no exhaustion required for

North Dakota Tribal Courts

Within the borders of North Dakota lie part or all of five Indian reservations,⁵⁰ and each has its own court system. These reservations are: Fort Berthold Reservation, Fort Totten Reservation, Sisseton-Wahpeton (Lake Traverse) Reservation, Standing Rock Reservation, and Turtle Mountain Reservation. Population figures for these reservations are given in Table 1.

Table 1

North Dakota Reservation Populations*

Reservation	Indians Living on Reservations	Total Indian Population Including Those Living Off-Reservation**	Non-Indians Living on Reservations
Fort			
Berthold	2,640	3,081	2,937
Fort Totten	2,261	3,109	1,052
Sisseton- Wah- peton	24	299	1,945
Standing Rock	2,341	4,017	1,279
Turtle Mountain	4,021	9,583	290

* North Dakota reservation population figures were extracted from data compiled during the 1980 national census. See U.S. BUREAU OF THE CENSUS, SUPPLEMENTARY REPORT, AMERICAN INDIAN AREAS AND ALASKA NATIVE VILLAGES: 1980 CENSUS OF POPULATION 24 (1984) (containing population statistics for identified reservations). These figures, however, only include those Indians and non-Indians actually residing upon a North Dakota reservation. Omitted from this table are those persons who happen to reside upon portions of the Sisseton-Wahpeton or Standing Rock reservations located in South Dakota.

** These totals represent Indians living either on the reservation or in nearby off-reservation communities. These figures were obtained from data collected by the Bureau of Indian Affairs. See U.S. BUREAU OF INDIAN AFFAIRS, INDIAN SERVICE POPULATION AND LABOR FORCE ESTIMATES (1983).

nonmembers challenging tribal criminal authority through habeas corpus proceedings. See *Oliphant*, 435 U.S. at 191.

50. See U.S. DEPT OF COMMERCE, FEDERAL AND STATE INDIAN RESERVATIONS AND INDIAN TRUST AREAS 427-37, 502-04 (1974) (containing location, acreage, and Indian populations for all reservations).

Fort Berthold Reservation

Located in west-central North Dakota, Fort Berthold is home to the Three Affiliated Tribes: Arikara, Hidatsa, and Mandan.⁵¹ The reservation was established by executive orders of Presidents Grant and Hayes,⁵² and it now consists of approximately 980,500 acres of land. The Three Affiliated Tribes own 45,044 acres. Individual Indians have been allotted 327,259 acres, and 174 acres belong to the federal government. Non-Indians own 563,023 acres.⁵³

Tribal headquarters are located at New Town, North Dakota.⁵⁴ The Three Affiliated Tribes are organized under the Indian Reorganization Act of 1934.⁵⁵ An elected tribal business council is the governing body,⁵⁶ but only tribal members can hold elected office or vote in tribal elections.⁵⁷ The tribal court claims civil jurisdiction over any cause of action involving a tribal member if it arises within the reservation boundaries or affects property located within the reservation, and in all other cases in which the litigants have consented to jurisdiction either in writing or through conduct.⁵⁸ At the discretion of the tribal judge, a jury trial is provided in civil suits, but nonmembers cannot serve on the jury.⁵⁹

Fort Totten Reservation

Fort Totten Reservation is adjacent to Devil's Lake, North

51. *Id.* at 427.

52. 1 C. KAPPLER, *INDIAN AFFAIRS: LAWS AND TREATIES* 883 (1976).

53. U.S. DEPT OF COMMERCE, *supra* note 50, at 427.

54. *Id.*

55. *Id.*

56. THREE AFFILIATED TRIBES CONST. art. III.

57. *Id.*, arts. II, IV.

58. FORT BERTHOLD TRIBAL CODE, subch. I, § 2(d) (1980). Shortly after the empirical research for this project was completed, the Three Affiliated Tribes amended their tribal constitution to claim jurisdiction over "all persons and all lands" within the exterior boundaries of the Fort Berthold Reservation. See THREE AFFILIATED TRIBES CONST. art. I. The tribes had previously amended their tribal code to vest the Fort Berthold Tribal Court with civil jurisdiction over all causes of action arising within the reservation boundaries, but this amendment was not reflected in the 1980 tribal code. See *Three Affiliated Tribes v. Wold Eng'g*, 104 S. Ct. at 2271 n.1. For a discussion of the effect of tribal constitutions and tribal codes upon tribal court subject matter jurisdiction, see *infra* notes 93, 167-168, 176 and accompanying text.

59. The Fort Berthold Tribal Code does not expressly provide for jury trials in civil suits, but the trial judge may permit them at his discretion. The tribal code does allow jury trials in criminal cases, but restricts jury participants to members only. See FORT BERTHOLD R. CRIM. P. 23.

Dakota. The reservation was created by treaty in 1867,⁶⁰ and it is occupied by the Santee and Teton Sioux.⁶¹ The Devil's Lake Sioux Tribe claims title to 473 acres. Individual members have been allotted a total of 47,640 acres. The federal government owns approximately 1,800 acres. Non-Indians own 192,794 acres of the original reservation lands.⁶²

A tribal council governs the reservation, and it is an elected body.⁶³ Nonmembers cannot hold tribal elected office or vote in tribal elections.⁶⁴ Tribal headquarters are at Fort Totten, North Dakota.⁶⁵ The tribal court asserts civil jurisdiction over all persons and causes submitted to it.⁶⁶ Jury trials are allowed in civil suits, but nonmembers cannot serve on the jury.⁶⁷

Sisseton-Wahpeton (Lake Traverse) Reservation

Established by treaty in 1867, the Sisseton-Wahpeton (Lake Traverse) Reservation was set aside for the Santee Sioux.⁶⁸ Although tribal headquarters are in Sisseton, South Dakota, 2,592 acres of the reservation extend into North Dakota.⁶⁹

An elected tribal council is the governing body.⁷⁰ However, only tribal members can hold elected tribal office or vote in tribal elections.⁷¹ The tribal court claims civil jurisdiction when the defendant is an Indian and in cases in which a non-Indian defendant consents to tribal court jurisdiction.⁷² A jury trial is apparently permitted in civil suits, but nonmembers cannot be jurors.⁷³

60. Act of Feb. 19, 1867, art. IV, 15 Stat. 505, 506.

61. See U.S. DEP'T OF COMMERCE, *supra* note 50, at 430.

62. *Id.*

63. DEVIL'S LAKE SIOUX TRIBE CONST. art. IV.

64. *Id.*, arts. III, V.

65. U.S. DEP'T OF COMMERCE, *supra* note 50, at 430.

66. DEVIL'S LAKE SIOUX TRIBE LAW & ORDER CODE ch. I, tit. A, §§ 162(3), 202(1).

67. *Id.* § 203(1).

68. Act of Feb. 19, 1867, art. III, 15 Stat. 505, 506. A substantial portion of the original Lake Traverse Reservation was terminated pursuant to an agreement between the Indians and Congress. See Act of Mar. 3, 1891, ch. 543, 26 Stat. 1035, 1036. Consequently, these terminated lands passed back into state control. See *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

69. U.S. DEP'T OF COMMERCE, *supra* note 50, at 502.

70. SISSETON-WAHPETON SIOUX CONST. art. III.

71. *Id.*, art. II, § 1; art. V, §§ 2, 4.

72. SISSETON-WAHPETON LAW & ORDER CODE ch. II, §§ 2(c), (d) (1974).

73. *Id.*, ch. XIII, § 5(2)(1).

Standing Rock Reservation

Close to Bismarck, the Sioux Tribe's Standing Rock Reservation straddles the border between North Dakota and South Dakota.⁷⁴ It was created by treaty and executive order of President Grant and encompasses 847,799 acres of land.⁷⁵ Tribal land holdings consist of 294,840 acres. Approximately 542,700 acres have been allotted to individual Indians. The federal government owns 10,258 acres. There are apparently no published figures on non-Indian land ownership.⁷⁶

Tribal headquarters are located at Fort Yates, North Dakota.⁷⁷ The tribal government consists of an elected council. Tribal members serve on the tribal council,⁷⁸ and tribal members are the only persons authorized to vote in tribal elections.⁷⁹ Standing Rock Tribal Court asserts civil jurisdiction over cases in which all the parties are Indian. Jurisdiction is also claimed in suits by a non-Indian against a tribal member if the non-Indian is either a resident of or doing business upon the reservation and the amount in controversy does not exceed \$300.⁸⁰ The plaintiff in a civil suit is not entitled to a jury trial as a matter of right, but if a jury trial is permitted nonmembers cannot serve on the jury.⁸¹

Turtle Mountain Reservation

Established by treaty and executive order of President Arthur,⁸² the Turtle Mountain Reservation is situated in north-central North Dakota. The reservation is occupied by the Turtle Mountain Band of Chippewa.⁸³ Of the total reservation acreage, 35,579 are owned by the tribe, and 34,144 acres have been allotted. The federal government claims title to 517 acres. There was an absence of published data on non-Indian land holdings.⁸⁴

74. See U.S. DEP'T OF COMMERCE, *supra* note 50, at 433.

75. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888, 889; 1 C. KAPPLER, *supra* note 52, at 884.

76. See U.S. DEP'T OF COMMERCE, *supra* note 50, at 433.

77. *Id.*

78. STANDING ROCK SIOUX TRIBAL CONST. art. II; art. III, §§ 1, 4.

79. *Id.*, art. V, § 1.

80. STANDING ROCK SIOUX TRIBAL CODE OF JUSTICE § 1.2(c) (1980).

81. *Id.* §§ 11.4, 11.5(a).

82. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 193, 194; 1 C. KAPPLER, *supra* note 52, at 885.

83. U.S. DEP'T OF COMMERCE, *supra* note 50, at 435.

84. *Id.*

Tribal headquarters are located at Belcourt, North Dakota,⁸⁵ and the governing body is a tribal council.⁸⁶ Tribal members vote,⁸⁷ hold elected office,⁸⁸ and serve on tribal juries.⁸⁹ Non-members are not permitted direct participation in tribal government.

A right to a jury trial is present in any civil action involving more than \$200, but a jury trial is discretionary with the court when the claim is less.⁹⁰ The tribal court claims jurisdiction over actions in which all the parties are Indians, and over suits involving non-Indians to the extent they submit to the court's authority by commencing suit or otherwise consenting to jurisdiction.⁹¹

II. *Tribal Court Jurisdiction in Debtor-Creditor Cases*

Subject matter jurisdiction is the court's right to exercise judicial power over a particular kind of case.⁹² It is, in other words, the court's authority to hear and decide disputes of a specific type or character. Within the context of this study, subject matter jurisdiction would be the power of North Dakota tribal courts to hear and decide debtor-creditor cases.

Parameters of Tribal Authority

When a tribe's constitution or tribal code limits the tribal court in the type of cases it may hear, these restrictions on subject matter jurisdiction are binding.⁹³ Yet an Indian court will not automatically have subject matter jurisdiction over lawsuits merely because the tribal constitution or tribal code states it has such authority. Rather, the tribal court's power to hear cases of a specific character has its origins beyond the tribal code and constitution. If North Dakota tribal courts have subject matter jurisdiction over collection actions involving Indians and non-Indians, this authority will have three possible origins—treaty,

85. *Id.*

86. TURTLE MOUNTAIN CHIPPEWA TRIBAL CONST. art. IV.

87. *Id.*, art. V.

88. *Id.*

89. TURTLE MOUNTAIN TRIBAL CODE § 2.0903 (1976).

90. *Id.* § 2.0901.

91. *Id.* 2.0102.

92. *Kelly v. Nix*, 329 N.W.2d 287, 290 (Iowa 1983).

93. *See Three Affiliated Tribes v. Wold Eng'g*, 104 S. Ct. at 2271.

congressional delegation, or inherent tribal sovereignty. These same origins are the sources for all tribal governmental power.

Treaty

With the advice and consent of the Senate, the President is empowered to execute treaties.⁹⁴ Treaties are also the cornerstone of Indian law.⁹⁵ Since treaties are on an equal footing with other federal laws,⁹⁶ the supremacy clause dictates that they are superior to all conflicting state law whether contained in state constitutions or statutes.⁹⁷ Thus the proper place to begin any inquiry into the extent of a tribe's power is the treaty or treaties that tribe may have with the United States. If the authority claimed can be found in a valid (i.e., ratified) treaty, the tribe has the power in question, including the right to vest its courts with subject matter jurisdiction.

Treaties negotiated between the United States and various Indian tribes do not generally license tribal courts with subject matter jurisdiction over collection suits, nor do these instruments otherwise reference the judicial authority of the respective tribes.⁹⁸ But these treaties do set aside land for the use of the Indians, and arguably, because a reservation was established for them, Indians can impose the conditions under which persons will be permitted to remain on reservation land. One condition is submission to the judicial authority of the tribal courts.

Compelling as this argument may seem, it is not likely to constitute a general source of tribal court jurisdiction over collection cases.⁹⁹ Similar arguments have been made by Indian govern-

94. U.S. CONST. art. II, § 2, cl. 2.

95. The Constitution places a treaty on the same footing as any other act of Congress. See U.S. CONST. art. IV, cl. 2. Both are the supreme law of the land and no superior efficacy is given to one over the other. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). If there is a conflict between a treaty and a federal law, as a general rule the last in time controls. *Id.* at 194.

96. See 1 U.S. CONG., AMERICAN INDIAN POLICY REVIEW COMM'N FINAL REPORT 109 (1977); F. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 63 (R. Strickland ed. 1982). See also *Edye v. Robertson*, 112 U.S. 580, 598 (1884) (treaties are accorded equal dignity with federal statutory law).

97. See, e.g., *Havenstein v. Lynham*, 100 U.S. 483, 490 (1880) (treaties are superior to state law including state constitutions); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (supremacy clause of the United States Constitution applies to Indian treaties).

98. See, e.g., Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189 (treaty with Chippewa); Act of Mar. 2, 1889 ch. 405, 25 Stat. 888 (treaty with Sioux); Act of Feb. 19, 1867, arts. III, IV, 15 Stat. 505 (treaty with Santee Sioux).

99. However, engaging in some commercial enterprise with the tribe or otherwise oc-

ments for the existence of other tribal powers and these have not been successful.¹⁰⁰ This argument has not been accepted because by enacting legislation that allowed and even encouraged non-Indians to settle upon reservation lands,¹⁰¹ Congress effectively repealed many treaties insofar as the Indians' right to exclusive use is concerned.¹⁰² Hence, as Indian lands became non-Indian lands through the transfer of ownership, tribal powers based upon a treaty right of exclusive use disappeared.¹⁰³

Congressional Delegation

The Supreme Court has upheld congressional delegation of governmental power to Indian tribes.¹⁰⁴ While Congress may be able to vest tribal courts with the authority to hear collection cases involving nonmembers as well as members, it has not specifically done so.¹⁰⁵ Furthermore, the Indian Reorganization

cupping tribal property may bring one under tribal court authority as to that particular commercial activity or property. See *infra* note 166 and accompanying text.

100. See *Oliphant*, 435 U.S. at 195 n.6 (tribal criminal jurisdiction over non-Indians).

101. See *supra* note 14 and accompanying text for examples of legislative acts permitting non-Indians to acquire land within boundaries of tribal reservations.

102. See *Reid v. Covert*, 354 U.S. 1, 18 (1957) (to the extent that an earlier treaty conflicts with an act of Congress, the statute renders the treaty null).

103. See *Montana v. United States*, 450 U.S. 544 (1981) (when reservation lands were transferred to nonmembers the absolute and undisturbed use provided by treaty no longer extended to this property and, therefore, the tribe had no treaty authority to regulate hunting and fishing by nonmembers on nonmember-owned land); *Puyallup Tribe v. Washington Game Dep't*, 433 U.S. 165 (1977) (Puyallup Tribe lost exclusive treaty right to fish in reservation waters when both tribe and United States transferred land in fee simple to non-Indians).

104. See, e.g., 18 U.S.C. § 1161 (1982) (exempts from federal criminal laws the on-reservation sale of alcoholic beverages in accordance with tribal ordinances). The effect of this statute has been to license tribal governments with the authority to control all reservation liquor sales, both Indian and non-Indian. See *United States v. Mazurie*, 419 U.S. 544 (1975) (upholding federal criminal prosecution of non-Indian in violation of 11 U.S.C. § 1161). Of course, in granting regulatory authority to tribal courts, Congress could not give away or otherwise impinge upon the constitutional rights of non-Indians. See *Reid*, 354 U.S. at 1 (Congress may not, by treaty or statute, give away the fundamental rights of United States citizens).

105. The Bureau of Indian Affairs has established Courts of Indian Offenses for those tribes that have not adopted their own law and order code. 25 C.F.R. §§ 11.1 to 11.37 (1984). These courts are given jurisdiction over all civil suits in which the defendant is a member of the tribe, and in all other actions if the parties stipulate to jurisdiction. 25 C.F.R. §§ 11.22 to 11.22C (1984). Courts of Indian Offenses are not functioning on North Dakota reservations because each tribe has enacted its own tribal code and established a tribal court system. However, Courts of Indian Offenses and tribal courts are not mutually exclusive. It is possible to have both a tribal court and a federal Court of Indian Offenses on the same reservation. See *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965).

Act of 1934 has already been considered and rejected by the Supreme Court as a general source of tribal jurisdiction over both members and nonmembers.¹⁰⁶

Tribal Sovereignty

Inherent tribal sovereignty is the theory that Indian tribes retain a fundamental governmental power over everything and everyone within their reservations. Supporters of Indian sovereignty assert that since tribes were once free and independent nations, they still retain all vestiges of governmental power that have not been *expressly* taken from them by treaty or act of Congress.¹⁰⁷ Advocates of complete tribal sovereignty claim that unless specifically denied by treaty or federal law, Indian tribes retain the full range of governmental powers including the authority to raise revenue by taxation and licensing of business, property, and persons; the power to condemn or take property by eminent domain; the right to regulate health, safety, and commercial activities; and all other powers of government, be they legislative, executive, or judicial.

Tribal sovereignty is not a recent concept. It was argued by proponents of Indian rights throughout the nineteenth century and received both judicial recognition and recognized limitations.¹⁰⁸ Yet it has only been in recent years that the full impact of tribal sovereignty claims have been felt.¹⁰⁹ Often wrapped in the trappings of government provided by the Wheeler-Howard Act,¹¹⁰ and with federal funding available for a variety of governmental functions,¹¹¹ Indian tribes began to actively assert and establish their

106. *United States v. Wheeler*, 435 U.S. 313, 328 (1978); *Oliphant*, 435 U.S. at 195.

107. See, e.g., U.S. CONG., *supra* note 96, at 101 (setting forth basic doctrine that tribes continue to hold all governmental powers not expressly taken from them).

108. See, e.g., *Talton v. Mays*, 163 U.S. 376 (1896) (upholding the right of the Cherokee Tribe to execute a member for a violation of tribal law); *In re Mayfield*, 141 U.S. 107 (1891) (denying Cherokee criminal jurisdiction over nonmember charged with violation of tribal law).

109. See Martone, *American Indian Self-Government in the Federal System: Inherent Right of Congressional License?*, 51 NOTRE DAME L. 600 (1976).

110. Currently codified at 25 U.S.C. §§ 461-491 (1982).

111. Tribal governments are eligible to receive financial and technical assistance through a variety of federal programs. E.g., Indian Self-Determination & Education Assistance Act of 1975, 25 U.S.C. §§ 450-59 (1982); Indian Financing Act of 1974, 25 U.S.C. §§ 1451 to 1543 (1982); Federal Water Pollution Prevention & Control Act, 33 U.S.C. §§ 1251 to 1376 (1982); Crime Control Act of 1976, 42 U.S.C. §§ 3701 to 3797 (1982). Of course, recent federal budget cuts and other federal funding problems have significantly affected tribal governments, which are so heavily dependent upon federal moneys. See PRESIDENTIAL COMM'N ON INDIAN RESERVATION ECON., REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES 89-98 (1984).

sovereign rights during the 1970s. This increase in claims of civil rights has been termed a "new civil war."¹¹²

Tribal governments have retained or residual governmental powers that federal and state courts readily acknowledge.¹¹³ The full scope of this authority, however, has never been judicially determined, nor has there been much guidance from the federal courts in clearly defining the limits of tribal power. Instead, the tribal right to govern is being determined power by power and case by case according to the analytical framework established by four recent United States Supreme Court decisions. Thus a tribal court's authority to hear and decide collection suits involving Indians and non-Indians will exist, if at all, on the basis of the legal principles articulated in *Oliphant v. Suquamish Indian Tribe*,¹¹⁴ *United States v. Wheeler*,¹¹⁵ *Washington v. Confederated Tribes of Colville*,¹¹⁶ and *Montana v. United States*.¹¹⁷

Oliphant concerned the power of a tribal government to enact a criminal code and enforce its law against non-Indians. The non-Indian defendants in *Oliphant* were accused of assaulting tribal police officers, injuring tribal property, and other violations of the Suquamish Tribal Law and Order Code.¹¹⁸ The incidents leading to the arrests and charges occurred on the Port Madison Reservation in western Washington.¹¹⁹ Non-Indians living on the Port Madison Reservation were not entitled to vote in tribal elections; they had no voice in the passage of the tribal law and order code; they could not hold tribal office including law enforcement; and nonmembers were prohibited from serving on tribal juries.

The non-Indian defendants applied to the federal court for a

112. See Martone, *supra* note 109, at 600. It is a challenge by American Indian tribes to the governmental structures of both the states and the United States, and the federal courts are the principal battlegrounds. *Id.*

113. A tribe may regulate the activities of nonmembers through taxation, licensing, or other means when the nonmembers enter into a consensual relationship with the tribe or its members in the course of commercial dealings, contracts, or leases. *Williams v. Lee*, 358 U.S. 217, 223 (1959). Tribal governments likewise have the retained sovereign power to punish tribal offenders, determine tribal membership, and prescribe rules of inheritance for members of the tribe. *Wheeler*, 435 U.S. at 322 n.18. See also *supra* note 5 and accompanying text for overview of tribal governmental powers.

114. 435 U.S. 191 (1978).

115. 435 U.S. 313 (1978).

116. 447 U.S. 134 (1980).

117. 450 U.S. 544 (1981).

118. 435 U.S. at 191.

119. *Id.* at 194.

writ of habeas corpus, but the U.S. District Court for the Western District of Washington ruled in favor of the tribe.¹²⁰ The defendants appealed and the Court of Appeals for the Ninth Circuit affirmed.¹²¹ The court of appeals upheld the lower court's decision because it believed that the Suquamish tribal government had the inherent power to enact a law and order code and to try non-Indians and punish them for offenses under that code.¹²² The Supreme Court reversed both the trial and appellate courts.

The Supreme Court reasoned that tribal sovereign powers included only those powers not expressly limited by specific treaty provisions and acts of Congress, or otherwise inconsistent with the status of Indians as dependent people:

[F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. *By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.*¹²³

Stated otherwise, not only can tribal sovereign powers be taken away by treaty or act of Congress, but tribal authority over non-members can also be lost by implication if the claimed governmental power is inconsistent with the status of Indians as a dependent people.

Finally, the Supreme Court quickly dismissed the Suquamish Tribe's contention that it could try non-Indians according to Indian law and in derogation of basic criminal due process rights guaranteed by the United States Constitution. *Oliphant* held that insofar as non-Indian criminal defendants are concerned, there are only state and federal laws to be complied with:

Indians are within the geographical limits of the United States. *The soil and people within these limits are under the political*

120. See *Oliphant v. Schlie*, 544 F.2d 1007, 1008 (9th Cir. 1976), *rev'd*, 435 U.S. 191 (1978).

121. *Id.* at 1007.

122. *Id.*

123. 435 U.S. at 210 (emphasis added).

control of the Government of the United States, or the States of the Union. There exists, in the broad domain of sovereignty but these two. There may be cities, counties and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these.¹²⁴

The second major Indian sovereignty case was *United States v. Wheeler*,¹²⁵ and it too involved a question of tribal criminal jurisdiction. The issue in *Wheeler* was the origin of a tribe's power to try and punish its own members for violation of tribal law. Was this a retained sovereign power or one given to the tribal government by Congress?

Wheeler, a member of the Navajo Tribe, pled guilty in tribal court to a misdemeanor violation of the tribal criminal code, but was thereafter indicted by a federal grand jury on a felony charge arising out of the same incident.¹²⁶ The federal trial judge reasoned that since the tribal court was merely an arm of the federal government, the subsequent federal prosecution was barred by the double jeopardy clause of the United States Constitution.¹²⁷ The federal district court therefore dismissed the indictment.¹²⁸

The Court of Appeals for the Ninth Circuit affirmed the trial court's dismissal,¹²⁹ but the Supreme Court reversed because in punishing its members a tribe acts as an independent sovereign and not as an extension of the federal government.¹³⁰ More important than the holding in *Wheeler* was the Court's analysis in arriving at a decision respecting double jeopardy.

The Supreme Court first scrutinized federal law in an attempt to ascertain whether tribal jurisdiction over members was granted by act of Congress and concluded that federal law did not create the Indians' power to govern themselves.¹³¹ Rather, the *Wheeler* Court determined that the ultimate source for tribal governmental powers over members was retained sovereignty.¹³² When nonmembers are concerned, though, the Court was careful to emphasize that Indian tribes have lost many of their sovereign attributes:

124. *Id.* at 211 (quoting *United States v. Kagama*, 118 U.S. 375 (1886) (emphasis added)).

125. 435 U.S. 313 (1978).

126. *See* 435 U.S. at 315.

127. *See United States v. Wheeler*, 545 F.2d 1255, 1258 (9th Cir. 1977).

128. *Id.* at 1258.

129. *Id.*

130. 435 U.S. at 323-28.

131. *Id.* at 327-29.

132. *Id.* at 328.

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*.

These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to *determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.¹³³

*Washington v. Confederated Tribes of Colville*¹³⁴ was decided two years after *Wheeler*, and it addressed a multitude of state and tribal jurisdictional issues. *Colville* was a consolidated case in which several Indian tribes and the state of Washington were claiming the right to impose their respective taxes on cigarette sales by reservation tobacco outlets known as "smoke shops."¹³⁵

Washington had an excise tax on cigarettes as well as a retail sales tax.¹³⁶ Both taxes purported to cover certain reservation cigarette sales.¹³⁷ The state retail sales tax was not imposed upon purchases by tribal members,¹³⁸ but it did apply to nonmember cigarette buyers.¹³⁹ The excise tax was enforced through stamps affixed to packages of cigarettes and with one exception, dealers were required to sell only stamped cigarettes.¹⁴⁰ The one exception related to Indians.¹⁴¹

133. *Id.* at 326 (emphasis added).

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

135. See *Confederated Tribes of the Colville Res. v. State of Washington*, 446 F. Supp. 1339, 1344-45 (E.D. Wash. 1978). Secondary issues in *Colville* were the state's authority to tax Indian vehicles and Washington's assumption of criminal and civil jurisdiction over the Colville, Lummi, and Makah reservations. See *id.* at 162-64. The court held that Washington could not tax on-reservation vehicle use and that the state's assumption of jurisdiction was legal. *Id.*

136. See WASH. REV. CODE § 82.24.020 (1976) (\$1.60 per carton excise tax on the "sale, use, consumption, handling, possession or distribution" of cigarettes within the state of Washington); WASH. REV. CODE § 82.08.020 (1976) (taxing the sale of personal property, including cigarettes).

137. See *Colville*, 447 U.S. at 141-42.

138. See WASH. ADMIN. CODE § 458-20-192 (1977).

139. See *Colville*, 447 U.S. at 142 n.8.

140. WASH. REV. CODE § 82.24.030 (1976).

141. Washington initially argued that it could tax all tribal cigarette sales, regardless of whether the purchaser was Indian or non-Indian. The state based this argument on the

Washington law permitted Indian tribes to possess unstamped cigarettes for resale to tribal members.¹⁴² When sales were to non-Indians or Indians who were not members of the tribe, state law required reservation tobacco dealers to sell the stamped and therefore taxed cigarettes.¹⁴³ To prevent fraudulent sales and excise tax avoidance, Washington law required reservation tobacco shop operators to keep detailed records of all cigarette sales, both taxable and nontaxable.¹⁴⁴ The operators had to record and maintain for state inspection the number and dollar volume of all sales to nonmembers.¹⁴⁵ For sales to tribal members, not only did records have to be kept of the names of exempt purchasers, tribal affiliation, date, time, place, and amount of each purchase, but unless actually known to the dealer, the Indian purchaser had to present a tribal identification card.¹⁴⁶

The tribes also imposed their own tax on all cigarette sales,¹⁴⁷ and these tax revenues were important. Had the Washington retail and excise taxes been imposed in addition to the tribal tax, reservation outlets would no longer have been able to underprice cigarettes offered by off-reservation merchants.¹⁴⁸ Since the majority of on-reservation sales were to non-Indians, losing this price advantage would seriously impair the ability of reservation smoke shops to continue in business.¹⁴⁹

To preserve an important source of revenue, the Confederated Tribes refused to collect the state taxes.¹⁵⁰ In order to force the Indians to comply with its laws, Washington seized unstamped cigarettes bound for the reservation.¹⁵¹ The Colville tribes responded with a lawsuit, challenging not only the lawfulness of

theory that it had assumed general on-reservation taxing authority pursuant to Public Law 83-280. This theory was subsequently rejected by the Supreme Court in *Bryan v. Itasca County*, 426 U.S. 373 (1976). Thereafter, Washington abandoned any claim of authority to tax sales to members. See *Confederated Tribes of Colville*, 446 F. Supp. at 1346 n.4.

142. WASH. REV. CODE § 82.24.260 (1976).

143. See *Confederated Tribes of Colville*, 446 F. Supp. at 1346; WASH. REV. CODE § 82.24.260 (1976); WASH. ADMIN. CODE § 458-20-192 (1977).

144. See *Colville*, 447 U.S. at 159.

145. *Id.*

146. WASH. REV. CODE § 82.24.260 (1976); *id.* § 458-20-192 (1977).

147. See *Confederated Tribes of Colville*, 446 F. Supp. at 1347.

148. *Id.*

149. 447 U.S. at 144-45.

150. See *Confederated Tribes of Colville*, 446 F. Supp. at 1339-47.

151. *Id.* at 1346.

the seizures but also the legality of all taxes imposed by the state.¹⁵²

The tribes were not successful in their attempt to oust state taxation. Washington did have the authority to tax the sale of cigarettes to nonmembers, to seize contraband (unstamped cigarettes), and to require smoke shop operators to keep detailed records of cigarette purchases.¹⁵³ The state also had the right to tax Indians who purchased cigarettes from reservation tobacco outlets if they were not tribal members. In the Court's opinion, nonmember Indians had the same legal status as non-Indians in general.¹⁵⁴

Although the Colville Indians were not able to prevent the state of Washington from taxing sales to nonmembers, the tribes themselves still enjoyed taxing authority over all reservation sales, including those to nonmembers. The *Colville* Court reasoned that the sovereign power to tax nonmembers had not been lost through implication because there was no "overriding federal interest that would necessarily be frustrated by tribal taxation."¹⁵⁵

In *Montana v. United States*, decided several years after *Colville*, the issue was the extent of tribal civil regulatory power over non-Indians on non-Indian lands.¹⁵⁶ The Crow Tribe of Montana had enacted an ordinance (Tribal Resolution 74-05) that prohibited hunting and fishing within the reservation by anyone who was not a member.¹⁵⁷ The Crow contended that this law even applied to non-Indians hunting and fishing upon non-Indian-owned lands.¹⁵⁸ Montana claimed the right to regulate hunting and fishing by non-Indians upon non-Indian-owned lands located within reservation boundaries, and the United States brought suit on behalf of the Crow Indians, challenging the state's regulatory authority.¹⁵⁹

152. *Colville*, 447 U.S. at 138-39.

153. *Id.* at 134.

154. *Id.* at 161.

155. *Id.* at 154.

156. 450 U.S. 544 (1981). The Crow Tribe was also claiming title to the bed of the Big Horn River, but the Court held that title passed to the state of Montana upon its admission into the Union. *Montana*, 450 U.S. 556-57.

157. *Id.* at 549.

158. *Id.* at 557-63.

159. See *United States v. Montana*, 457 F. Supp. 599 (D. Mont. 1978). The United States sued in its own right and as a fiduciary for the Crow Tribe. *Id.* The district court essentially ruled in favor of the state by recognizing Montana's exclusive right to regulate on-reservation hunting by nonmembers. *Id.* at 611. The Ninth Circuit Court of Appeals reversed in part the decision of the lower court, holding that the Crow Tribe had a con-

Dealing first with the assertion that the exclusive use of original reserved lands granted by treaty to the Crow Tribe was also an implicit grant of regulatory power over non-Indian lands, the Court concluded that if the 1868 treaty was a source of tribal power, that power could not be applied to lands owned in fee simple by non-Indians.¹⁶⁰ The Crow no longer possessed a treaty right to regulate these alienated lands because they no longer enjoyed the exclusive use, occupation, and control of them.¹⁶¹

Turning next to sovereignty as a source of the tribe's regulatory power, the Court declared:

To be sure, Indian tribes retain inherent sovereign powers to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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. . . . 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.*¹⁶²

The Court concluded, however, that the state of Montana could regulate hunting and fishing by non-Indians upon non-Indian-owned lands, but that the Crow Tribe could not.¹⁶³ The Crow Tribe could not regulate nonmember hunting and fishing because, under the facts in the case, there was no showing that these non-Indian activities either threatened or otherwise had a direct effect on tribal political integrity, economic security, health, or welfare.¹⁶⁴

What then can be gleaned from *Oliphant*, *Wheeler*, *Colville*, and *Montana* regarding the general sovereign powers remaining to tribal governments? First, it is obvious from *Wheeler* and *Colville* that tribal governments have the broadest of sovereign powers over their members, property belonging to tribal

current right to regulate nonmember hunters and fishermen. See *United States v. Montana*, 604 F.2d 1162 (9th Cir. 1979).

160. See *Montana*, 450 U.S. at 557-61.

161. *Id.* at 557-63.

162. *Id.* at 565-67 (emphasis added).

163. *Id.* at 557-61.

164. *Id.* at 566-67.

members, and commercial activities involving nonmembers and either the tribe or tribal members. Members are subject to tribal authority because of their status and the unique nature of Indian governments.¹⁶⁵ Nonmembers typically become subject to a tribe's regulatory authority by some on-reservation commercial involvement with the tribe. If nonmembers are going to do business with the Indians, they will do business according to the rules and regulations established by the tribe.¹⁶⁶

Montana indicates that even in the absence of a direct contact with tribal members, tribal sovereign powers may exist over both nonmembers and nonmember-owned property if the Indian government can show the necessary nexus between the regulatory authority sought and a vital tribal interest. Whether there exists the requisite "effect" upon tribal integrity, economic security, or welfare to create the sovereign right to regulate nonmembers is an issue of fact, and the tribe has the burden of proof on this issue.¹⁶⁷ Tribal governmental authority over nonmembers will, in short, be decided on the facts existing each time a particular power is claimed. Therefore, a judicial determination that a tribal government possesses regulatory authority over nonmembers in one instance may have no significance respecting subsequent efforts to exercise the same authority over other nonmembers, or to efforts by yet other tribal governments to exercise similar powers.¹⁶⁸

165. See *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

166. See *Colville*, 447 U.S. at 152-53.

167. See *Montana*, 450 U.S. at 566.

168. Consider for example, *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d at 901, recognizing a tribal government's authority to zone and regulate non-Indian land use within the Wind River Reservation in Wyoming. The Shoshone and Arapahoe tribes were able to apply their land-use law to non-Indian developers because the federal court found the necessary connection with a valid tribal interest: "*conduct which threatened or had some direct effect on the political integrity, economic security or health and welfare of the tribe.*" *Id.* at 903.

The non-Indian land development consisted of several subdivisions within an area where tribal ceremonies were held annually, and they were reasonably close to Indian cemeteries, an Indian activity hall, and predominantly Indian schools. A federal judge found that the tribes had a "*significant and substantial interest in the area*" because of the Indian activities and this was sufficient to create tribal civil jurisdiction over this particular non-Indian land. *Id.* (emphasis added).

The *Knight* court did not hold that the Crow could regulate all non-Indian land lying within the reservation nor could the tribe do so without first showing the tribal interest necessary to create regulatory authority over non-Indian lands. Thus, efforts by the Arapahoe and Shoshone tribes to regulate non-Indian land use elsewhere on the Wind River Reservation would not be sustained without a strong showing of a necessity to

Tribal Court Jurisdiction in Debtor-Creditor Cases

Using the principles of law established in *Oliphant*, *Wheeler*, *Colville*, and *Montana*, it is possible to analyze the subject matter jurisdiction of the various North Dakota tribal courts over collection suits. This analysis will be undertaken for each potential combination of Indian and non-Indian litigants.¹⁶⁹

Indian Creditor and Indian Debtor

Indian tribes are unique aggregations possessing governmental power over both their members and their territory.¹⁷⁰ Subject only to the limitations contained in the Indian Civil Rights Act of 1968,¹⁷¹ tribal governments have broad authority over tribal members.¹⁷² All of the North Dakota tribal courts claim jurisdiction over actions involving members,¹⁷³ and they clearly have the authority to hear collection suits when all the litigants belong to the tribe.¹⁷⁴ Moreover, if the cause of action (debt) arose on the reservation or the collateral is located within the reservation boundaries, North Dakota state courts cannot hear the case.¹⁷⁵

regulate in order to protect traditional Indian activities and culture. Similar proof and findings would be required in each instance where a tribal court claimed subject matter jurisdiction over nonmember litigants.

169. As used in this analysis, the term "Indian" refers to members of that particular tribe. Indians who happen to be before a tribal court but who are in fact members of another tribe should be treated as non-Indians for jurisdictional purposes. See *supra* note 154 and accompanying text.

170. *Wheeler*, 435 U.S. at 323.

171. See *supra* notes 35-43 and accompanying text.

172. See *Martinez*, 436 U.S. at 49 (tribal membership and right of inheritance); *Wheeler*, 435 U.S. at 313 (general criminal jurisdiction); *Talton v. Mays*, 163 U.S. at 376 (death penalty). See also F. COHEN, *supra* note 96, at 342. See generally 55 Int. Dec. 14 (1934) (powers of Indian tribes). However, Indians who are not members of the tribe are treated the same as non-Indians for jurisdictional purposes. See *Confederated Tribes of Colville*, 447 U.S. at 160-61 (treating nonmember Indians as non-Indians for purpose of state taxation).

173. See *supra* notes 58, 66, 72, 80, 91.

174. See F. COHEN, *supra* note 96, at 342. Cf. *Fisher v. District Court*, 424 U.S. 382 (1976) (adoption proceeding); *Whyte v. District Court*, 140 Colo. 334, 346 P.2d 1012 (1959), cert. denied, 363 U.S. 829 (1960) (divorce action).

175. When the debtor is a tribal member and the debt arose on the reservation, a collection suit cannot be brought in state court. *Kennerly v. District Court*, 400 U.S. 423 (1971); *Williams v. Lee*, 358 U.S. 217 (1959); *Hot Oil Serv., Inc. v. Hall*, 366 F.2d 295 (9th Cir. 1966). Likewise, if the collateral is personal property located on the reservation, state courts are without the authority to compel its return. Cf. *R.J. Williams Co. v. Fort Belknap*, 509 F. Supp. 933 (D. Mont. 1981), rev'd on other grounds, 719 F.2d 979 (9th Cir. 1983) (because tribal courts have repeatedly been recognized as appropriate forums

Indian Creditor and Non-Indian Debtor

Both the Fort Berthold and Fort Totten tribal codes provide for or claim subject matter jurisdiction over collection suits between members and non-Indian debtors.¹⁷⁶ The Sisseton-Wahpeton and Turtle Mountain courts will apparently hear these kinds of collection cases with the consent of the nonmember defendant,¹⁷⁷ but the Standing Rock Tribal Code precludes actions against non-Indians.¹⁷⁸

Assuming the debt was incurred on the reservation and tribal law does not otherwise prohibit suits against nonmembers, there would seemingly exist sufficient tribal interest to justify a tribal court's authority to hear the case.¹⁷⁹ If the debt was incurred off the reservation and the non-Indian debtor objects to the exercise of tribal court jurisdiction, then the Indian court will probably be without the right to try the matter.¹⁸⁰ Yet, even if the tribal court

for the exclusive adjudication of disputes affecting important personal and property interests of both Indian and non-Indians, federal court was without jurisdiction to order return of non-Indian property seized by order of the tribal court). *But cf. National Farmers Union Ins.*, 105 S. Ct. 2447 (recognizing federal court jurisdiction under 28 U.S.C. § 1331 (1982) to review acts in excess of tribal authority). If land is pledged as security for the debt, and this is Indian-owned and lying within a reservation's boundaries, North Dakota courts have no jurisdiction over the property. *See Act of Feb. 22, 1889, 25 Stat. 676* (enabling act requiring North Dakota to disclaim title to Indian lands); N.D. CONST. art. III, § 1(2) (disclaiming jurisdiction over Indian lands).

176. *See supra* text accompanying notes 58, 66, 72.

177. *See supra* notes 72, 91 and accompanying text. The voluntary relinquishment of jurisdiction over non-Indians is binding upon the tribal court. *See Three Affiliated Tribes v. Wold Eng'g*, 104 S. Ct. at 2271. *But see R.J. Williams Co.*, 509 F. Supp. at 933, *rev'd on other grounds*, 719 F.2d 979 (9th Cir. 1983) (although the tribal court may have lacked civil jurisdiction to seize non-Indian property with a tribal court writ, federal courts had no power to prevent the attachment). The Supreme Court's recognition of federal court jurisdiction to review action in excess of tribal authority in the *National Farmers Union Ins.* case, raises some doubt about the validity of the *R.J. Williams Co.* decision.

178. *See supra* text accompanying note 80.

179. *See Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1707 (1984) (upholding Navajo Tribal Court's jurisdiction over non-Indian automobile dealers attempting to repossess collateral located within reservations boundaries). *Cf. Cardin*, 671 F.2d at 363 (recognizing tribal right to enforce health and safety code against non-Indian business); *Knight*, 670 F.2d at 900 (enforcing tribal zoning law against non-Indian developers).

180. *Cf., Swift Transp., Inc. v. John*, 546 F. Supp. 1185 (D. Ariz. 1982), *vacated as moot*, 574 F. Supp. 710 (D. Ariz. 1983) (tribal court had no jurisdiction to hear personal injury case against a non-Indian when accident occurred on non-Indian-owned land located within reservation boundaries). *But cf. National Farmers Union Ins.*, 105 S. Ct. at 2447 (seemingly indicating that under the right factual circumstances tribal courts may have jurisdiction over such cases).

had subject matter jurisdiction over a non-Indian debtor, the court has little power to enforce its decision beyond the reservation boundaries.¹⁸¹

Non-Indian Creditor and Indian Debtor

North Dakota tribal courts are unanimous in asserting the authority to try cases brought by a non-Indian creditor against a tribal member.¹⁸² The Standing Rock Tribal Code restricts its tribal court to actions involving \$300 or less and further requires that the non-Indian plaintiff either be a resident of or doing business on the reservation.¹⁸³

Collection suits against tribal members certainly meet the *Montana* sufficient and substantial tribal interest test for exercise of jurisdiction.¹⁸⁴ Not only has the use of tribal courts in such cases

181. See, e.g., *Brown v. Babbit Ford, Inc.* 117 Ariz. 192, 571 P.2d 689 (Ariz. Ct. App. 1977) (Arizona courts were not required to give full faith and credit to Navajo tribal resolution under either 28 U.S.C. § 1738 (1982) or U.S. CONST., art. IV, § 1. *But see* *Jim v. CIT Fin. Serv. Corp.*, 87 N.M. 362, 533 P.2d 751 (1975) (holding that laws of the Navajo Indian Tribe are entitled by federal law, 28 U.S.C. § 1738, to full faith and credit in New Mexico state courts). North Dakota apparently would not give full faith and credit to a tribal court judgment. *Cf. Malaterre*, 293 N.W.2d at 144 (concluding that the Turtle Mountain Tribal Court would not give full faith and credit to child custody modification order from a North Dakota district court).

Even though the debt arose on the reservation, an Indian creditor may still sue a non-Indian debtor in state court. See *Wold Eng'g.*, 106 S. Ct. at 2305. Moreover, if the requisite jurisdiction exists, the tribal member may also be able to sue in a federal forum. See, e.g., *Poitra v. Demarrias*, 502 F.2d 23 (8th Cir. 1974) (federal diversity jurisdiction existed in case involving only Indian litigants). The tribe always has the right to proceed in federal court when the controversy arises under the Constitution, laws, or treaties of the United States. See 28 U.S.C. § 1362 (1982).

182. See *supra* text accompanying notes 58, 66, 72, 80, 91.

183. See *supra* note 80. The Standing Rock Tribal Code seems to create a jurisdictional void. The tribal court cannot hear collection suits involving more than \$300 dollars. State courts have no jurisdiction if the debt arose on the reservation or involves collateral located within the reservation boundaries. Many non-Indian creditors will, therefore, be left without a forum in which to collect debts of more than \$300 when the requisites for federal court jurisdiction are not present. *Cf. R.J. Williams Co.*, 509 F. Supp. at 933 (discussing similar jurisdictional void on Crow Reservation in Montana).

184. See *supra* notes 160-168 and accompanying text. *Montana* did not use the "sufficient and substantial interest" language in discussing the test for a tribe's civil regulatory authority over non-Indians and their property. See *Montana*, 450 U.S. at 565-67 (a tribe retains civil regulatory authority over non-Indians or non-Indian-owned land when the non-Indian conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"). The "significant and substantial interest" standard was developed by lower federal courts applying the *Montana* test. See *Knight*, 670 F.2d at 903.

received the highest judicial approval,¹⁸⁵ but there is no other forum in which the non-Indian creditor can have the matter tried.¹⁸⁶

Non-Indian Creditor and Non-Indian Debtor

Notwithstanding their claims to the contrary, it is not likely that tribal courts possess nonconsensual jurisdiction over civil suits involving only nonmembers. Tribal courts are unable to obtain jurisdiction in cases involving only non-Indians because of the difficulty in establishing the direct effect on Indians or their property, which is the prerequisite for subject matter jurisdiction established by *Montana*.¹⁸⁷

Even though tribal courts cannot exercise jurisdiction over nonmember collection suits, they may still play a significant role in non-Indian debt collection practices. The North Dakota tribes, for example, prohibit self-help repossession, which requires a creditor to seek the aid of the tribal court in seizing collateral.¹⁸⁸ These laws are enforced irrespective of the nonmember status of the parties, and jurisdiction exists because of a vital tribal interest in avoiding breaches of the peace that might result from a creditor's self-help repossession.¹⁸⁹

III. *Survey of North Dakota Attorneys*

Format of Survey

Part of the research methodology for this project consisted of surveying attorneys about their experiences with and opinions concerning the use of tribal courts for collecting business debts.

185. *E.g.*, *Kennerly*, 400 U.S. at 423; *Williams*, 358 U.S. at 217; *Hot Oil Serv., Inc.*, 366 F.2d at 295.

186. See *supra* note 174. Tribal courts have a monopoly on jurisdiction in these types of cases because reservation Indians have the right to make their own laws and be governed by them. See *Williams*, 358 U.S. at 217.

187. See *supra* note 168 and text. See also F. COHEN, *supra* note 96, at 343.

188. Either by tribal code or tribal common law, all North Dakota tribes prohibit self-help repossession. If the debtor surrenders the collateral, tribal law will not bar non-judicial repossession, but absent this voluntary relinquishment a creditor has no right to take the collateral without a tribal court order. Nevertheless, a secured creditor can obtain immediate delivery of collateral on the Turtle Mountain Reservation without a court order if he brings a replevin action and posts security in an amount equal to twice the value of the personal property pledged. See *TURTLE MOUNTAIN TRIBAL CODE* ch. 4.03 (1976).

189. *E.g.*, *Babbitt Ford, Inc.*, 710 F.2d at 587 (upholding tribal proscription of self-help repossession against non-Indian automobile dealer).

This survey was accomplished with a written questionnaire, which was mailed to licensed North Dakota lawyers having offices on or within 50 miles of a reservation. The 50-mile radius was selected because these are the attorneys most likely to have experience with a North Dakota tribal court. These lawyers are more likely to have tribal court experience because it is cost-prohibitive in most instances for creditors to employ legal counsel and have them travel great distances to attend a court session. Nor would businesses many miles from a reservation be likely to resort to an Indian court system on collection matters.

Questionnaires were sent to 372 lawyers and 186 (50%) responded by answering some or all of the relevant inquiries. The respondents were permitted to remain anonymous in an attempt to obtain candid answers to sensitive questions, but the questionnaires were color coded so that those returned could be correlated with a particular tribal court. Table 2 shows the distribution by reservation of attorneys contacted and the number who responded.

Table 2

Number of Attorney Respondents
for Each Reservation

Reservation	Total Attorneys Contacted	Number of Respondents*
Fort Berthold	26	11
Fort Totten	34	16
Sisseton-Wahpeton	19	9
Standing Rock	284	145
Turtle Mountain	9	5

* Summary questionnaires encapsulating basic data obtained are shown in Appendices A through F. Information derived from an analysis of the surveys is set forth in the body of this report.

The questionnaire contained eight questions, some with sub-parts, and it was designed to obtain information in four areas. Questions one through four provided the following data: (1) the volume of collection suits brought by the surveyed North Dakota attorneys during 1984; (2) how frequently they appeared for a creditor as opposed to a debtor; (3) the number of Indian clients

represented in these cases; (4) the total number of attorney-involved collection suits in the various tribal courts that year.

Question five, consisting of six subparts, was posed to all lawyers who had appeared in tribal court on collection cases. Those with tribal court experience were asked: (1) their opinion respecting the competence of the tribal court judge and tribal court personnel; (2) whether they believed the tribal court system was fair to both Indian and non-Indian; (3) if the tribal court rules and procedures were similar to those of North Dakota state courts; (4) how they felt about appearing in tribal court; (5) if the results in their particular cases were comparable to what would have been achieved had suit been brought in the state court system; (6) whether they would recommend tribal court to a non-Indian creditor.

Attorneys with no experience in tribal court collection actions were requested to answer question six. There were three subparts to this question that focused upon the attitudes of these attorneys regarding use of an Indian court system for collecting business debts. Attorneys responding to this question were asked: (1) whether they believed a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian; (2) if they expected the tribal court rules and procedures to be substantially different from those used in the state courts; (3) would they recommend tribal court to a non-Indian creditor when the debtor is a member of the tribe.

The opinions held on these questions could be important for a variety of reasons. If a significant number of attorneys believed that tribal courts operated under rules and procedures with which they had little familiarity, they would not be inclined to bring collection actions in the Indian court system. When attorneys are of the opinion that tribal courts are unfair or otherwise unjust, they might transmit to their business clients the same attitudes and prejudices. If the client holds the tribal court system in low esteem, he is not likely to resort to Indian courts on collection matters, nor will credit be as freely extended when tribal court is the creditor's only recourse in the event of default.

Questions seven and eight asked whether each attorney surveyed would be interested in learning about tribal court practice and procedure, either through a seminar or a law review issue devoted to these subjects. These questions were a supplement to question six. The purpose of questions seven and eight was to determine if and how it might be possible to educate lawyers on the Indian court system. Educating practicing attorneys about

tribal court procedure seemed the best way to alleviate their apprehensions, if any, about using these courts to collect business debts.

Comprehensive Summary

The overall results from this survey indicated that responding attorneys had been involved in 1,950 collection suits in 1984,¹⁹⁰ and that 92 of the cases (4.7%) were in a tribal court. In 1,695 (86.9%) actions attorneys appeared on behalf of creditors,¹⁹¹ but of these only ninety-three creditor-clients (4.7%) were Indians.

Twenty-five lawyers (13.4%) were experienced in tribal court collection actions, and their responses were generally favorable to the Indian court system as a whole. Fifteen (60%) felt tribal judges and court personnel were competent, and thirteen (52%) believed tribal courts were fair to both non-Indian and Indian alike. Thirteen attorneys (54.2%) stated that tribal court rules and procedures were not similar to those used in state court, but a majority (68%) of these attorneys were still comfortable practicing in Indian courts. Slightly more than half the lawyers (54%) with tribal court experience believed that a different result would have been attained had their case been tried in state court, and they would not recommend tribal court to non-Indian creditors.

The attorneys without tribal court experience were not as favorably disposed toward the tribal court system. Fifty-five of these respondents (43%) did not believe a non-Indian creditor would be fairly treated when the debtor is a tribal member. Only nineteen (14.8%) would advise a non-Indian creditor to use tribal court when state court is available as an alternative forum. Sixty (46.9%) expected the tribal court rules and procedures to differ markedly from those used in state court.

There were 164 and 151 responses to questions seven and eight, respectively. Ninety-two attorneys (61%) favored law review treatment of tribal court rules, procedures, and jurisdiction, but a majority of respondents were against the seminar.

Data from these questionnaires were separately compiled for

190. See *infra* Appendix A for comprehensive results of the survey. The author wishes to emphasize that not all respondents answered every question that pertained to him or her. Thus, the data presented for each question relates only to the attorneys who responded to that question.

191. It is possible to attribute the obvious underrepresentation of debtors to a lack of funds. If the debtor is not financially capable of paying the underlying obligation, then he is not likely to retain defense counsel.

each reservation. These results, however, did not vary significantly from those stated above. A summary of the data from this survey is provided in Table 3.

Table 3

Summary of Attorneys' Survey

Number of Collection Suits	1,950
Creditor Cases	1,695
Tribal Court Cases	92
Indian Clients Represented	93
Number of Responding Attorneys	186
Counsel With Tribal Court Experience	25
Attorneys With Tribal Court Experience Who Would Recommend that Court System to a Non-Indian Creditor	11
Attorneys Without Experience in a Tribal Court Who Believed that a Non-Indian Creditor Would Be Fairly Treated in the Indian Court System	21

Fort Berthold Summary

Questionnaires were sent to twenty-six attorneys practicing within or near the Fort Berthold Reservation boundaries, and eleven (42.3%) were returned.¹⁹² There were 217 collection suits and in almost 80 percent of the cases attorneys were representing the creditor. Fourteen collection actions involved Indian clients and thirty-eight suits (17.5%) were in tribal court.

Five attorneys had appeared before the Fort Berthold Tribal Court, but only two felt comfortable practicing in that forum. The answers were evenly divided for the remainder of question five. Two respondents had favorable experiences with tribal court, and two did not.

Sixty-six percent of the attorneys who had not been to tribal court did not believe non-Indians would be fairly treated, nor would they recommend use of tribal court to a non-Indian creditor if the matter could be brought in state court. Fort Berthold attorneys generally expected tribal rules of practice and procedure to be similar to those in use in state courts. Table 4 presents a summary of the Fort Berthold survey data.

192. See *infra* Appendix B for complete results of the Fort Berthold Survey.

Table 4

Summary of Fort Berthold Survey

Number of Collection Suits	217
Creditor Cases	154
Tribal Court Cases	38
Indian Clients Represented	14
Number of Responding Attorneys	11
Counsel With Tribal Court Experience	5
Attorneys With Tribal Court Experience Who Would Recommend that Court System to a Non-Indian Creditor	2
Attorneys Without Experience in a Tribal Court Who Believed that a Non-Indian Creditor Would Be Fairly Treated in the Indian Court System	0

The questionnaire did not seek written comments or other unsolicited opinions on the tribal court system, and no space was provided for such personal expressions. Nevertheless, unsolicited comments were received, and they ran the gamut from those sympathetic to the needs of Indians and the role of tribal courts, to statements openly hostile toward both Indians and their governments. There was also a good measure of humor in some comments. The following attorney statements are a representative sample of those received in the Fort Berthold survey:

"Prior to 1981 I had several opportunities to appear in tribal courts, both at Fort Totten and at Belcourt [Turtle Mountain Reservation]. It was my experience that the tribal courts were run on a very political basis. The results depended in a major part on who the plaintiff was. Race did *not* seem to be a major factor in the judge's decisions. The written rules for the courts are almost identical to the state's, however, in most instances the rules are not followed, anyway."

"You must realize that there are four tribal courts in North Dakota, each is unique and separate from the others."

"Rather than being compared with the white man's district court, one might better compare tribal court to our city court. . . . [W]e select a farmer's son (who has never seen a university) as and for our city judge, and no doubt he does the best he can."

Fort Totten Summary

Thirty-four attorneys were questioned in the Fort Totten portion of this research project and sixteen (47.1%) responses were received.¹⁹³ There were 211 collection cases involving these lawyers and they represented creditors 87 percent of the time. Indians were clients in only ten of the cases (4.7%), and eight actions (3.8%) were tried in tribal court.

Six attorneys had appeared in tribal court. Two practitioners were satisfied with their tribal court experience, while the remaining four were not. Forty-four percent of the attorneys with no practical experience in tribal court expected the rules and procedures to be similar to state practice. Five respondents (55.6%) did not believe non-Indians would be fairly treated, and six (75%) would not recommend tribal court to a non-Indian creditor. A majority of the Fort Totten lawyers (57.1%) were not interested in a seminar on tribal court practice, but ten (71.4%) said they would like to see a law review issue dealing with the subject. Table 5 summarizes the Fort Totten data.

Table 5

Summary of Fort Totten Survey

Number of Collection Suits	211
Creditor Cases	184
Tribal Court Cases	8
Indian Clients Represented	10
Number of Responding Attorneys	16
Counsel With Tribal Court Experience	6
Attorneys With Tribal Court Experience Who Would Recommend that Court System to a Non-Indian Creditor	2
Attorneys Without Experience in a Tribal Court Who Believed that a Non-Indian Creditor Would Be Fairly Treated in the Indian Court System	0

The following are typical of the attorney comments received on the Fort Totten questionnaire:

"I refuse to appear in tribal court."

193. See *infra* Appendix C for complete results of Fort Totten survey.

"I don't feel the tribal court provides justice to the Indian or non-Indian. Unfortunately, the result would depend more upon who the people involved are rather than the case."

"Tribal court is not used because of a lack of results."

Sisseton-Wahpeton (Lake Traverse) Summary

Nine of the nineteen attorneys (47.4%) contacted in the Sisseton-Wahpeton survey returned their questionnaires.¹⁹⁴ These members of the North Dakota Bar appeared in seventy-one collection suits in 1984 but represented only two Indians. In 83 percent of these cases the Sisseton-Wahpeton lawyers had the creditor as a client. No action had been brought in tribal court by the responding attorneys, and none of these counsel had any experience with the tribal court system.

The responses were generally noncommittal (i.e., "No Opinion") when it came to using tribal courts in collection suits, and there was little interest in learning about tribal court practice. In fact, the only comment on the Sisseton-Wahpeton questionnaire concerned the inquiry about having a law review treatment of tribal court practice and procedure and the response was "Definitely Not!" Table 6 capsulizes the Sisseton-Wahpeton results.

Table 6

Summary of Sisseton-Wahpeton Survey

Number of Collection Suits	71
Creditor Cases	59
Tribal Court Cases	0
Indian Clients Represented	2
Number of Responding Attorneys	9
Counsel With Tribal Court Experience	0
Attorneys With Tribal Court Experience Who Would Recommend that Court System to a Non-Indian Creditor	N/A
Attorneys Without Experience in a Tribal Court Who Believed that a Non-Indian Creditor Would Be Fairly Treated in the Indian Court System	0

Standing Rock Summary

The Standing Rock sampling area included Bismarck, North

194. See *infra* Appendix D for complete results of the Sisseton-Wahpeton survey.

Dakota, which accounts for the greater number of respondents. A total of 284 attorneys were mailed the questionnaire and 145 (51.1%) were returned.¹⁹⁵ These attorneys appeared in 1,408 collection suits during 1984. In 1,245 of the cases (88.4%) the attorneys represented the creditor, eighteen suits (1%) were in tribal court, and sixty-two of their clients (4.4%) were Indian.

Eleven respondents had either brought or defended collection cases in tribal court. These lawyers were generally evenly divided in their opinions of tribal court practice, except for the seven attorneys (70%) who would not recommend that a non-Indian creditor use tribal court.

The majority of the attorneys without a history of practice before tribal court did not believe a non-Indian creditor would be fairly treated in that forum, nor would they advise a non-Indian client to use tribal court when suit could be brought in state court. Approximately 38 percent of those responding were amenable to seminars on the tribal court system, while 63 percent were receptive to dealing with the subject in a law review.

Fifty (47.2%) expected tribal practice and procedure to differ substantially from state court. Thirty (28.3%) did not believe there would be a significant difference between practicing in tribal court and state court. Twenty-six (24.5%) had no opinion on the matter. The data from Standing Rock are shown in Table 7.

Table 7

Summary of Standing Rock Survey

Number of Collection Suits	1,408
Creditor Cases	1,245
Tribal Court Cases	18
Indian Clients Represented	62
Number of Responding Attorneys	145
Counsel with Tribal Court Experience	11
Attorneys With Tribal Court Experience Who Would Recommend that Court System to a Non-Indian Creditor	3
Attorneys Without Experience in a Tribal Court Who Believed that a Non-Indian Creditor Would Be Fairly Treated in the Indian Court System	20

195. See *infra* Appendix E for complete results of Standing Rock survey.

The attorney comments from the Standing Rock survey were the most vitriolic of all those received. The following opinions were expressed by attorneys answering the Standing Rock survey:

"My experience with native Americans has not been such that I can comment favorably. I have been informed that tribal courts are not comparable, some being biased and some fair to the extreme. Native American debtors in this area have not been easy to deal with."

"I am sure every white creditor would rather sue in county court where he or she can take advantage of a jurisdiction which has been unfair to Indians."

"My experience in the past has left a bad taste for tribal courts."

"The defendant on the [witness] stand admitted he owed the debt. The court refused to direct a verdict and the jury returned a verdict of dismissal."

"Tribal courts face two basic problems: [1] Funding is often uncertain even if the tribal council wants to provide adequate funds. [2] [The] Tribal court is not sufficiently removed from tribal politics."

"I can't get paid after I win in state court either."

"The idea of special sovereign status for native Americans is not consistent with the Constitution. If a history of persecution of a minority by the majority . . . means sovereignty and special rights, then we have other such minority blocks in our population. I am partly of Irish descent. Their record of discrimination and persecution extends back 800 years, not 200 or so as in the case of native Americans."

Turtle Mountain Summary

There were nine attorneys contacted in the Turtle Mountain segment of this research project and five (55.6%) returned questionnaires.¹⁹⁶ These respondents appeared in forty-three collection suits during the year and represented creditors in forty-two (97.6%) of the cases. More than half of these actions (65.1%) were in tribal court, but there were only five (11.6%) Indian clients.

Four of the answering attorneys had practiced in the tribal court, and the Turtle Mountain court system received a good rating. These lawyers believed the court personnel were compe-

196. See *infra* Appendix F for complete results of Turtle Mountain survey.

tent and were unanimous in recommending tribal court to non-Indian creditors.

The one lawyer with no tribal court experience expected the rules of practice and procedure to be markedly different from the state court standards. This lawyer did not think a non-Indian creditor would be fairly treated in tribal court, nor would he recommend the Indian court system to a non-Indian creditor if state court was an option.

Respecting the education questions, the law review article was favored over attending a seminar. There was only one attorney interested in the seminar. Table 8 summarizes the Turtle Mountain data.

One written comment was received, and it was directed to a specific question. The question asked if the respondent would recommend tribal court to a non-Indian creditor, and the comment was: "What choice do I have?"

Table 8

Turtle Mountain Survey

Number of Collection Suits	43
Creditor Cases	42
Tribal Court Cases	28
Indian Clients Represented	5
Number of Responding Attorneys	5
Counsel With Tribal Court Experience	4
Attorneys With Tribal Court Experience Who Would Recommend that Court System to a Non-Indian Creditor	4
Attorneys Without Experience in a Tribal Court Who Believed that a Non-Indian Creditor Would Be Fairly Treated in the Indian Court System	0

IV. *Personal Interviews*

Tribal court personnel and local business owners were interviewed as a part of this research project. These interviews were either conducted in person or by telephone, and they were intended to obtain information on the actual use of tribal courts by local merchants, banks, and other financial institutions. A secondary objective of these interviews was to discover the opinions local business persons held about tribal courts and to consider

what effect, if any, these opinions had upon the extension of credit to Native Americans.

Tribal Informants

North Dakota tribal courts were contacted and data were gathered on the number and type of collection suits being brought. Fort Berthold, Sisseton-Wahpeton, Standing Rock, and Turtle Mountain data were collected through telephone interviews with tribal judges, clerks of court, and other court personnel. Fort Totten was visited and the information was obtained directly from the tribal judges, the clerk of court, and various Bureau of Indian Affairs employees. The data acquired from these tribal sources indicated a much greater use of tribal courts for business collections than one might have suspected from the results of the survey of North Dakota attorneys.

There may have been more than 1,300 collection suits brought in North Dakota tribal courts during 1984.¹⁹⁷ Fort Berthold reported approximately 300 cases. Fort Totten and Standing Rock each had 80 suits filed. Forty cases were brought at Sisseton-Wahpeton, and 811 actions were commenced in the Turtle Mountain Tribal Court. Tribal informants were also unanimous in stating that the majority of these collection actions were brought by non-Indian creditors against Indian debtors;¹⁹⁸ that attorneys rarely represented either party; and that the amounts in controversy were usually less than \$500. Table 9 compares the litigation data received from the attorneys' survey with that obtained from tribal informants.

197. The figures on tribal court collection cases were estimates from the persons interviewed. Tribal court records did not categorize civil actions by type of case and race of litigants.

198. *E.g.*, all cases at Fort Totten were filed by non-Indian creditors. The same was true of the Sisseton-Wahpeton tribal court.

Table 9

Comparison of Litigation Data

Reservation	Tribal Court Collection Suits	Tribal Court Collection Suits Involving North Dakota Attorneys	Total Number of Collection Suits Involving North Dakota Attorneys
Fort Berthold	300	38	217
Fort Totten	80	8	211
Sisseton- Wah- peton	40	0	71
Standing Rock	80	18	1,408
Turtle Mountain	811	28	43

Business Informants

Collecting information from non-Indian businesses and lending institutions about the granting of credit to Indians was the most difficult segment of this research project. The information could not be acquired with a questionnaire because it is illegal to discriminate in the granting of credit on the basis of the applicant's national origin, race, religion, color, or age.¹⁹⁹ Banks, merchants, and other persons who extend credit on a regular basis would not admit in writing that they refuse credit to Native Americans because of a distrust of the tribal court system.

It is, however, sometimes possible to obtain candid and forthright answers to sensitive questions during a personal interview,

199. 15 U.S.C. §§ 1591-1691(f) (1982). Known as the Equal Credit Opportunity Act, this law requires those extending credit on a regular basis to make it available to all credit-worthy customers without regard to race, sex, religion, color, age, or national origin. The Act applies to department stores, banks, savings and loan associations, realtors, automobile dealers, and even dentists if they regularly extend credit. Violation of the law exposes one to civil damages (actual and punitive), plus costs and attorney's fees. See 15 U.S.C. § 1691(e) (1982) (there is a \$10,000 cap on punitive damages in individual cases, and in class actions recoverable punitive damages are restricted to the lesser of \$500,000 or one percent of the creditor's net worth).

especially when the interrogator does not use written notes, carries no recording device, and presses for a truthful response. A face-to-face interview without paper, pencil, or tape recorder was the method used to acquire data from non-Indian business people. Employees of five lending institutions, two car dealers, and the president of the North Dakota Collectors' Association were interviewed in this manner.²⁰⁰

All those interviewed expressed some concern over the exclusive jurisdiction granted tribal courts when the debtor is an Indian and the contract either arose within reservation borders or involved collateral located on the reservation. One lender, in a community adjacent to a reservation, had no history of making consumer loans to Indians! The loan officer indicated, however, that once a history was developed and it became apparent that resorting to tribal court was going to be a problem in collecting defaulted loans, this fact would certainly be taken into consideration in deciding future credit extensions to Native Americans.

Another loan officer acknowledged that extending credit to Indians was a troublesome problem because of what his institution perceived as a lack of recourse in the event of default. This financial officer emphasized that while Native Americans were obtaining loans, the loans were made on the basis of the applicant's personal character rather than assets or other collateral located within the reservation boundaries. If the applicant was known and believed to be trustworthy from a repayment standpoint, the loan was made, but without this personal knowledge and evaluation of the would-be borrower's character, credit would not be extended.

Three of the lending officers interviewed openly admitted having great reluctance in making loans to Indians living upon a reservation and stressed that because of the discretion involved it was always possible to deny a credit request on grounds other than race. Yet, one informant's employer went further than the rest by giving the following written instructions to loan officers on how to treat credit applications from reservation Indians:

[I]f the banker has reason to believe that removal of the collateral to a particular reservation will impair his access in the event of default, he may be justified either in refusing the

200. Due to the serious legal implications of an unlawful denial of credit under the Equal Credit Opportunity Act, in all but one instance the informants will remain anonymous.

credit request outright or in imposing more stringent terms such as a larger down payment or shorter terms.

...
[W]e recommend even more strongly than before that you exercise extreme caution in granting secured credit to Indian applicants living on reservations. If you are presented with such an application for secured credit where the collateral will be physically located on a reservation you should probably treat the request as a "character loan" *i.e.* one where your credit decision is based principally on your evaluation of the applicant's character. *In other words, if, in your opinion, there is a strong and compelling reason to believe that your access to the collateral might be impaired, you should probably treat such requests as though they were for unsecured credit and evaluate the request accordingly.*²⁰¹

Of the two automobile dealers interviewed, one was evasive and noncommittal respecting tribal courts and credit sales to reservation Indians, whereas the other spoke frankly about what he believed was a very real and serious problem. This merchant related past difficulties in repossessing cars on the reservation in support of his decision not to extend credit to Indians, and he insisted that this practice was economically rather than racially motivated.²⁰²

201. Emphasis in original. This policy might very well be a violation of the Equal Credit Opportunity Act because the effect clearly is to treat Native Americans differently from similarly situated non-Indians. It certainly violates the spirit of that Act because in most cases a creditor is not even permitted to ask about an applicant's race or national origin. See 12 C.F.R. §§ 202.5(c)(5), 202.13 (1985) (prohibiting creditors from inquiring into a credit applicant's race, color, religion, or national origin except in transactions involving purchase of residential real property with a loan to be secured by a lien on that property). Moreover, this particular bank's lending policy respecting reservation Indians is very similar to a practice known as "red-lining."

Red-lining is mortgage credit discrimination based on the characteristics of the neighborhood surrounding the would-be borrower's dwelling. See *Town of Springfield v. McCarren*, 549 F. Supp. 1134, 1142 (D. Vt. 1982). The term originated from the banking practice of outlining barrios, ghettos, or economically depressed areas in red ink on a city map. These neighborhoods were red-lined because the persons living there were thought to constitute a significant risk to lenders. Consequently, home mortgage applications for the purchase of property in a red-lined community were summarily denied. Denying credit because the applicant lives in racially or ethnically segregated neighborhood is discrimination and a violation of the Equal Credit Opportunity Act. See, e.g., *Cherry v. Amoco Oil Co.*, 481 F. Supp. 727 (N.D. Ga. 1979) (plaintiff's allegations that oil company denied her a credit card because she lived in a predominantly black area of Atlanta was sufficient to state a cause of action under the Equal Credit Opportunity Act).

202. To illustrate this point, the informant stated: "Anytime I receive a credit ap-

Finally, David G. Knudsen, president of the North Dakota Collectors' Association, was interviewed. Mr. Knudsen seemed knowledgeable about collection problems associated with the tribal court system. He felt that it was often easier to collect an account located in Canada than one from a reservation. It was also Mr. Knudsen's opinion that the exclusive jurisdiction granted tribal courts over Indian debtors was a serious problem for all concerned: "Certainly many millions of dollars in debts are going uncollected, and Indians are not getting the credit they might otherwise."²⁰³

Analysis and Conclusion

This project was undertaken with limited funds. For that reason, as well as the difficulty in obtaining information and the breadth of the subject matter, it does not claim to be a definitive treatment of tribal courts and their role in the collection of business debts. Yet the results from this research are certainly suggestive of real problems for Indians and non-Indians alike. These problems are rooted both in the exclusive jurisdiction granted tribal courts over Indian debtors and in the perception of Indian courts held by non-Indian business owners and their attorneys.

plication by someone from West Virginia, I treat it in much the same way as one from a Native American." The author, being a native of Number 7, West Virginia, fully appreciated this analogy and was not in the least offended. Furthermore, the informant's analogy to West Virginia is not without validity.

There are, in fact, strong parallels between Native Americans and the inhabitants of the Southern Highlands. Like the Indians, Southern mountain people have an old and distinct culture and, ironically, both culture and people are of Indian ancestry. See H. CAUDELL, *NIGHT COMES TO THE CUMBERLANDS: A BIOGRAPHY OF A DEPRESSED AREA* 1-31 (1962). Like many reservations, the Southern Appalachians contain tremendous mineral resources, primarily owned or controlled by out-of-state corporations, and these holdings go largely untaxed. See C. GEISLER, *WHO OWNS APPALACHIA?: LANDOWNERSHIP AND ITS IMPACT* (1983) (For example, in Lincoln and McDowell counties, West Virginia, corporate-owned mineral rights are equivalent to 120% and 105%, respectively, of the total surface area). Yet despite its tremendous mineral wealth, sections of the Southern Appalachians, like most reservations, remain islands of poverty with inert economies. See U.S. BUREAU OF THE CENSUS, *GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS OF THE POPULATION OF WEST VIRGINIA: 1980 CENSUS OF POPULATION* (1981) (according to 1980 census data, approximately 24% of the residents of Lincoln and McDowell counties in West Virginia are living below the poverty level). See generally H. CAUDELL, *supra* (analyzing both reasons for and extent of Appalachian poverty). For a discussion of comparable economic conditions existing on Indian reservations, see *PRESIDENTIAL COMM'N ON INDIAN RESERVATION ECON.*, *supra* note 111.

203. Quoting David G. Knudsen, president, North Dakota Collectors' Association.

Although those attorneys who have practiced before a tribal court do not express overwhelming dissatisfaction with the Indian court system, a majority of all attorneys surveyed had a low opinion of tribal courts. Most, if not all, of these lawyers had no apparent basis for their distrustful attitude about the tribal court system, but the negative opinion nevertheless exists and it is undoubtedly transmitted to banks, savings and loans, and other business clients these counsel represent. The idea that these prejudices are being communicated to non-Indian lending institutions and merchants appears supported by the lack of attorney participation in tribal court collection suits and the relatively small amounts in controversy involved in tribal court cases.

Whenever the debt is incurred on the reservation or the collateral is located within the reservation's boundaries, tribal court is the only forum with authority to hear and decide the case against an Indian debtor. Indians are indeed being sued in tribal court for business debts. There are a substantial number of such actions brought each year in the North Dakota tribal courts. Yet, these cases are usually brought by non-Indian creditors and they involve insignificant amounts of money. These are typically small accounts for which it is cost-prohibitive to employ an attorney to represent the merchant's or lender's interest.

Tribal courts are obviously functioning like a small claims court in which creditors appear without counsel because the debt is so small. Tribal courts are not seeing the large credit cases because Indians are apparently not being extended large loans or lines of credit. Indians are not being given the credit they might otherwise obtain because non-Indian merchants and lenders do not have confidence in the tribal court system.²⁰⁴

How, if ever, the problem will be resolved was not a subject of this project, nor was there sufficient data collected to suggest a

204. Creditor distrust of the Indian court system and a corresponding lack of financing for reservation Indians seems to be a problem of national dimension. On January 14, 1983, President Reagan established the Presidential Commission on Indian Reservation Economies. See Exec. Order 12401, 48 Fed. Reg. 2309 (1983), amended by Exec. Order 12442, 48 Fed. Reg. 43,283 (1983). This Commission was charged with identifying obstacles to Indian reservation development and to promote the development of a healthy private sector in reservation economies. Exec. Order 12401, 48 Fed. Reg. 2309 (1983). But the Commission was specifically instructed by President Reagan not to focus on new federal financial assistance for Indian governments. *Id.* at § 2(a). The Commission's *Report and Recommendations to the President of the United States* was submitted on November 30, 1984. See PRESIDENTIAL COMM'N ON INDIAN INDIAN RESERVATION ECON., *supra* note 111.

comprehensive solution. Whatever the eventual solution, a vital element will undoubtedly be to educate attorneys and business

Regarding the retarded economies on reservations, the Commission found that tribal governments themselves were often a hinderance to development. Tribal courts and the sovereign immunity enjoyed by Indian tribes were singled out for criticism in the Commission's findings on obstacles to economic development:

5. Tribal Political Discrimination

Both Indians and non-Indians complain of political discrimination against them by tribal governments and by tribal courts which are arms of tribal governments. Access to tribal physical resources, to the benefits of tribally managed programs, and to tribal employment is considered to be unfair by many Indians. Decisions rendered by tribal courts, which are controlled by tribal councils, are also perceived to be unfair by Indians and non-Indians.

Businesses see uncertainty in situations where law is subordinate to the whims of tribal councils, especially where tribal governments are destabilized by frequent political turnover of elected office holders. There is a fear that tribal courts will not protect the property rights of non-Indians by according them due process of law or protecting individual non-Indian civil rights. Uncertainty increases risk and risk increases the cost of doing business on Indian reservations.

Tribal government patronage systems and the politicization of tribal courts are significant obstacles to Indian reservation economic development since they discriminate unfairly against individuals and businesses. A lack of sovereign responsibility deters investment.

Id. at 36.

8. Tribal Sovereign Immunity to Suit

Indian tribes are held to possess attributes of sovereignty. One of these attributes is sovereign immunity to suit. Of the 487 federally recognized Indian tribes and Alaskan Native groups, 134 (27%) have Indian Reorganization Act corporate charters which permit them to sue and be sued. Generally speaking, suits against a tribal sovereign have only been permitted where there were tribal or Congressional waivers of sovereign immunity and the remedy did not involve tribal property held in trust.

Sovereign immunity may be raised by tribes as a bar to suits brought against them by their own members or by non-members in cases involving civil rights, property, contracts, or a dispute of any kind.

Sovereign immunity to suit creates risks for businesses who engage in economic activity on Indian reservations since it makes actions by tribal governments immune from challenge and exposes investment to loss where a tribe decides to deny a claim by raising the bar.

Id. at 37-38.

In order to correct the problem of stagnant reservation economies, the Commission provided the President with a number of recommendations. Stressing the need to promote due process of law for those who live and do business within an Indian reservation, the Commission made three recommendations concerning tribal court systems in general:

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT TRIBAL GOVERNMENTS UNDERTAKE A PROCESS OF MODERNIZING THEIR CONSTITUTIONS TO ACHIEVE AN EFFECTIVE SEPARATION OF GOVERNMENTAL POWERS IN WHICH THE TRIBAL JUDICIAL SYSTEM CAN OPERATE WITHOUT POLITICAL INTERFERENCE FROM TRIBAL

persons about the tribal court system and instilling in them some faith in the tribal court process that does not seem to exist at this time. Tribal courts will also have to take a hand in solving this problem, and it will be difficult if not impossible to instill confidence in a judicial system that does not comport with traditional notions of Anglo-American jurisprudence.

Indian courts are designed to respect the cultural heritage, rules, and beliefs of Native Americans, but Indian people must interact with nonmembers of the tribe. Nowhere is this truer than in obtaining credit. Indian people have their own governments, including a system of tribal courts. These governments certainly are vested with authority, but the individual members and perhaps the tribes as a whole are paying a price for their separate system of government. This price seems to include not only a reduction in consumer credit to tribal members, but a corresponding denial of private sector development moneys as well.

GOVERNMENT; AND IN WHICH THERE IS AN EFFECTIVE SEPARATION BETWEEN THE TRIBAL EXECUTIVE AND LEGISLATIVE BRANCES OF GOVERNMENT.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT TRIBAL GOVERNMENTS UNDERTAKE A PROCESS OF SEPARATING THEIR CORPORATE BUSINESS FUNCTIONS FROM POLITICAL OR MANAGEMENT INTERFERENCE BY TRIBAL GOVERNMENTS.

THE PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES RECOMMENDS

THAT LEGISLATION BE PROVIDED FOR APPELLATE REVIEW OF TRIBAL COURT DECISIONS TO THE FEDERAL COURT SYSTEM WHERE CONSTITUTIONAL OR STATUTORY RIGHTS ARE INVOLVED.

Id. at 30 (emphasis in original).

Even Congress has become involved with determining why reservations remain economic backwaters. The Senate held a hearing on this problem in 1982. *See Oversight of Economic Development on Indian Reservations: Hearing Before the Senate Select Comm. on Indian Affairs*, 97th Cong., 2d Sess. (1982). Although the reasons for reservation economic stagnation were not as succinctly stated in the Select Senate Committee hearings as in the Commission on Indian Reservation Economies' report, many of the same root causes surfaced in the Senate hearings. *See id.* *See also* Mudd, *Jurisdiction and the Indian Credit Problem: Considerations for a Solution*, 33 MONT. L. REV. 307 (1972), and Schwechten, *Epilogue in Spite of the Law: A Social Comment on the Impact of Kennerly and Crow Tribe*, 33 MONT. L. REV. 317 (1972), for early discussions of the possible relationship between tribal court jurisdiction and a denial of credit to reservation Indians.

Appendix A
Comprehensive Results of Attorneys' Survey

1. Have you appeared as counsel of record in any collection action during the past year and, if so, how many cases?

Number of Cases: 1,950

2. Were you plaintiff's counsel in any of these suits and, if so, please state the percentage of cases in which you represented a creditor?

1,695 (86.9%) Creditor Cases

3. Were any of these actions before an Indian tribal court and, if so, how many?

92 (4.7%)

4. What percentage of your clients were Indian and what percentage were non-Indian?

Indian: 93 (4.7%) Non-Indian: 1,857 (95.2%)

5. If you have had occasion to appear in tribal court on a collection matter, please answer the following questions. However, if you have never been in tribal court on a collection case, please answer question 6.

Were the tribal judge and court personnel competent?

Yes: 15 (60%) No: 10 (40%)

Was the tribal court system fair to both Indian and non-Indian alike?

Yes: 12 (52%) No: 10 (40%)

No Basis For Comparison: 2 (8%)

Were the tribal court rules of practice and procedure similar to those in use in the state court system?

Yes: 11 (45.8%) No: 13 (54.2%)

Did you feel comfortable practicing before the tribal court?

Yes: 17 (68%) No: 8 (32%)

Were the results in tribal court comparable to what would have been achieved had the suit been brought in state court?

Yes: 11 (45.8%) No: 13 (54.2%)

Based upon your experience, would you recommend use of tribal court to a non-Indian creditor?

Yes: 11 (45.8%) No: 13 (54.2%)

6. If you have never had an opportunity to appear in tribal court on a collection matter, please answer the following questions.

Do you believe that a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian?

Yes: 21 (16.4%) No: 55 (43%) No Opinion:
52 (40.6%)

Would you expect the tribal court rules of practice and procedure to be markedly different from those used in state court?

Yes: 60 (46.9%) No: 36 (28.1%) No Opinion:
32 (25%)

Given the choice between proceeding on behalf of a non-Indian creditor in either state or tribal court, would you recommend use of tribal court if debtor is an Indian?

Yes: 19 (14.8%) No: 74 (57.8%) No Opinion:
35 (27.4%)

7. Would you be interested in a continuing legal education seminar on tribal court practice and jurisdiction?

Yes: 62 (37.8%) No: 74 (45.1%) No Opinion:
28 (17.1%)

8. Would you like to see a law review issue devoted to tribal court practice and jurisdiction?

Yes: 92 (61%) No: 37 (24.6%) No Opinion:
22 (14.4%)

Appendix B

Results of Fort Berthold Survey

1. Have you appeared as counsel of record in any collection action during the past year and, if so, how many cases?

Number of Cases: 217

2. Were you plaintiff's counsel in any of these suits and, if so, please state the percentage of cases in which you represented a creditor?

154: (78.9%) Creditor Cases

3. Were any of these actions before an Indian tribal court and, if so, how many?

38 (17.5%)

4. What percentage of your clients were Indian and what percentage were non-Indian?

Indian: 14 (6.45%) Non-Indian: 203 (93.55%)

5. If you have had occasion to appear in tribal court on a collection matter, please answer the following questions. However, if you have never been in tribal court on a collection case, please answer question 6.

Were the tribal judge and court personnel competent?

Yes: 3 (60%) No: 2 (40%)

Was the tribal court system fair to both Indian and non-Indian alike?

Yes: 2 (50%) No: 2 (50%)

No Basis for Comparison: 0

Were the tribal court rules of practice and procedure similar to those in use in the state court system?

Yes: 2 (50%) No: 2 (50%)

Did you feel comfortable practicing before the tribal court?

Yes: 2 (50%) No: 0

Were the results in tribal court comparable to what would have been achieved had the suit been brought in state court?

Yes: 2 (50%) No: 2 (50%)

Based upon your experience, would you recommend use of tribal court to a non-Indian creditor?

Yes: 2 (50%) No: 2 (50%)

6. If you have never had an opportunity to appear in tribal court on a collection matter, please answer the following questions.

Do you believe that a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian?

Yes: 1 (16.7%) No: 4 (66.6%) No Opinion: 1 (16.7%)

Would you expect the tribal court rules of practice and procedure to be markedly different from those used in state court?

Yes: 2 (33.3%) No: 3 (50%) No Opinion: 1 (16.7%)

Given the choice between proceeding on behalf of a non-Indian creditor in either state or tribal court, would you recommend use of tribal court if debtor is an Indian?

Yes: 0 No: 4 (66.6%) No Opinion: 2 (33.3%)

7. Would you be interested in a continuing legal education seminar on tribal court practice and jurisdiction?

Yes: 4 (40%) No: 3 (30%) No Opinion: 3 (30%)

8. Would you like to see a law review issue devoted to tribal court practice and jurisdiction?

Yes: 4 (40%) No: 4 (40%) No Opinion: 2 (20%)

Appendix C
Results of Fort Totten Survey

1. Have you appeared as counsel of record in any collection action during the past year and, if so, how many cases?
Number of Cases: 211
2. Were you plaintiff's counsel in any of these suits and, if so, please state the percentge of cases in which you represented a creditor?
184 (87.2%) Creditor Cases
3. Were any of these actions before an Indian tribal court and, if so, how many?
8 (3.8%)
4. What percentage of your clients were Indian and what percentage were non-Indian?
Indian: 10 (4.7%) Non-Indian: 201 (95.3%)
5. If you have had occasion to appear in tribal court on a collection matter, please answer the following questions. However, if you have never been in tribal court on a collection case, please answer question 6.
 Were the tribal judge and court personnel competent?
 Yes: 2 (33.3%) No: 4 (66.7%)
 Was the tribal court system fair to both Indian and non-Indian alike?
 Yes: 2 (33.3%) No: 4 (66.7%)
 Were the tribal court rules of practice and procedure similar to those in use in the state court system?
 Yes: 3 (50%) No: 3 (50%)
 Did you feel comfortable practicing before the tribal court?
 Yes: 2 (33.3%) No: 4 (66.7%)
 Were the results in tribal court comparable to what would have been achieved had the suit been brought in state court?
 Yes: 2 (33.3%) No: 4 (66.7%)
 Based upon your experience, would you recommend use of tribal court to a non-Indian creditor?
 Yes: 2 (33.3%) No: 4 (66.7%)
6. If you have never had an opportunity to appear in tribal court on a collection matter, please answer the following questions.
 Do you believe that a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian?
 Yes: 0 No: 5 (55.6%) No Opinion: 4 (44.4%)

Would you expect the tribal court rules of practice and procedure to be markedly different from those used in state court?

Yes: 4 (44.4%) No: 2 (22.2%) No Opinion: 3 (33.3%)

Given the choice between proceeding on behalf of a non-Indian creditor in either state or tribal court, would you recommend use of tribal court if debtor is an Indian?

Yes: 0 No: 6 (75%) No Opinion: 2 (25%)

7. Would you be interested in a continuing legal education seminar on tribal court practice and jurisdiction?

Yes: 5 (35.7%) No: 8 (57.1%) No Opinion: 1 (7.1%)

8. Would you like to see a law review issue devoted to tribal court practice and jurisdiction?

Yes: 10 (71.4%) No: 2 (14.3%) No Opinion: 2 (14.3%)

Appendix D

Results of Sisseton-Wahpeton (Lake Traverse) Survey

1. Have you appeared as counsel of record in any collection action during the past year and, if so, how many cases?

Number of Cases: 71

2. Were you plaintiff's counsel in any of these suits and, if so, please state the percentage of cases in which you represented a creditor?

59 (83%) Creditor Cases

3. Were any of these actions before an Indian tribal court and, if so, how many?

0

4. What percentage of your clients were Indian and what percentage were non-Indian?

Indian: 2 (2.8%) Non-Indian: 69 (97.2%)

5. If you have had occasion to appear in tribal court on a collection matter, please answer the following questions. However, if you have never been in tribal court on a collection case, please answer question 6.

Were the tribal judge and court personnel competent?

Yes: 0 No: 0

Was the tribal court system fair to both Indian and non-Indian alike?

Yes: 0 No: 0

Were the tribal court rules of practice and procedure similar to those in use in the state court system?

Yes: 0 No: 0

Did you feel comfortable practicing before the tribal court?

Yes: 0 No: 0

Were the results in tribal court comparable to what would have been achieved had the suit been brought in state court?

Yes: 0 No: 0

Based upon your experience, would you recommend use of tribal court to a non-Indian creditor?

Yes: 0 No: 0

6. If you have never had an opportunity to appear in tribal court on a collection matter, please answer the following questions.

Do you believe that a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian?

Yes: 0 No: 2 (33.3%) No Opinion: 4 (66.6%)

Would you expect the tribal court rules of practice and procedure to be markedly different from those used in state court?

Yes: 3 (50%) No: 1 (16.6%) No Opinion: 2 (33.3%)

Given the choice between proceeding on behalf of a non-Indian creditor in either state or tribal court, would you recommend use of tribal court if debtor is an Indian?

Yes: 1 (14%) No: 2 (29%) No Opinion: 4 (57%)

7. Would you be interested in a continuing legal education seminar on tribal court practice and jurisdiction?

Yes: 3 (37.5%) No: 5 (62.5%) No Opinion: 0

8. Would you like to see a law review issue devoted to tribal court practice and jurisdiction?

Yes: 3 (37.5%) No: 4 (50%) No Opinion: 1 (12.5%)

Appendix E Results of Standing Rock Survey

1. Have you appeared as counsel of record in any collection action during the past year and, if so, how many cases?
Number of Cases: 1,408

2. Were you plaintiff's counsel in any of these suits and, if so, please state the percentage of cases in which you represented a creditor?

1,245 (88.4%) Creditor Cases

3. Were any of these actions before an Indian tribal court and, if so, how many?

18 (1%)

4. What percentage of your clients were Indian and what percentage were non-Indian?

Indian: 62 (4.4%) Non-Indian: 1,346 (95.6%)

5. If you have had occasion to appear in tribal court on a collection matter, please answer the following questions. However, if you have never been in tribal court on a collection case, please answer question 6.

Were the tribal judge and court personnel competent?

Yes: 7 (63.6%) No: 4 (36.4%)

Was the tribal court system fair to both Indian and non-Indian alike?

Yes: 6 (54.5%) No: 4 (36.4%) No Basis for Comparison: 1 (9%)

Were the tribal court rules of practice and procedure similar to those in use in the state court system?

Yes: 5 (45.5%) No: 6 (54.5%)

Did you feel comfortable practicing before the tribal court?

Yes: 7 (63.6%) No: 4 (36.4%)

Were the results in tribal court comparable to what would have been achieved had the suit been brought in state court?

Yes: 4 (40%) No: 6 (60%)

Based upon your experience, would you recommend use of tribal court to a non-Indian creditor?

Yes: 3 (30%) No: 7 (70%)

6. If you have never had an opportunity to appear in tribal court on a collection matter, please answer the following questions.

Do you believe that a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian?

Yes: 20 (18.9%) No: 43 (40.6%) No Opinion: 43 (40.6%)

Would you expect the tribal court rules of practice and procedure to be markedly different from those used in state court?

Yes: 50 (47.2%) No: 30 (28.3%) No Opinion:
26 (24.5%)

Given the choice between proceeding on behalf of a non-Indian creditor in either state or tribal court, would you recommend use of tribal court if debtor is an Indian?

Yes: 18 (17%) No: 61 (57.5%) No Opinion:
27 (25.5%)

7. Would you be interested in a continuing legal education seminar on tribal court practice and jurisdiction?

Yes: 49 (38.6%) No: 56 (44.1%) No Opinion:
22 (17.3%)

8. Would you like to see a law review issue devoted to tribal court practice and jurisdiction?

Yes: 73 (63.5%) No: 11 (22.6%) No Opinion:
16 (13.9%)

Appendix F

Results of Turtle Mountain Survey

1. Have you appeared as counsel of record in any collection action during the past year and, if so, how many cases?

Number of Cases: 43

2. Were you plaintiff's counsel in any of these suits and, if so, please state the percentage of cases in which you represented a creditor?

42 (97.6%) Creditor Cases

3. Were any of these actions before an Indian tribal court and, if so, how many?

28 (65.1%)

4. What percentage of your clients were Indian and what percentage were non-Indian?

Indian: 5 (11.6%) Non-Indian: 38 (88.7%)

5. If you have had occasion to appear in tribal court on a collection matter, please answer the following questions. However, if you have never been in tribal court on a collection case, please answer question 6.

Were the tribal judge and court personnel competent?

Yes: 4 (100%) No: 0

Was the tribal court system fair to both Indian and non-Indian alike?

Yes: 3 (100%) No: 0

Were the tribal court rules of practice and procedure similar to those in use in the state court system?

Yes: 3 (75%) No: 1 (25%)

Did you feel comfortable practicing before the tribal court?

Yes: 4 (100%) No: 0

Were the results in tribal court comparable to what would have been achieved had the suit been brought in state court?

Yes: 3 (75%) No: 1 (25%)

Based upon your experience, would you recommend use of tribal court to a non-Indian creditor?

Yes: 4 (100%) No: 0

6. If you have never had an opportunity to appear in tribal court on a collection matter, please answer the following questions.

Do you believe that a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian?

Yes: 0 No: 1 (100%) No Opinion: 0

Would you expect the tribal court rules of practice and procedure to be markedly different from those used in state court?

Yes: 1 (100%) No: 0 No Opinion: 0

Given the choice between proceeding on behalf of a non-Indian creditor in either state or tribal court, would you recommend use of tribal court if debtor is an Indian?

Yes: 0 No: 1 (100%) No Opinion: 0

7. Would you be interested in a continuing legal education seminar on tribal court practice and jurisdiction?

Yes: 1 (20%) No: 2 (40%) No Opinion: 2 (40%)

8. Would you like to see a law review issue devoted to tribal court practice and jurisdiction?

Yes: 2 (50%) No: 1 (25%) No Opinion: 1 (25%)