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## Nevada v. Hicks and Tribal Civil Liberties Jurisdiction: A Plea for Federal Consistency

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***Nevada v. Hicks* and Tribal Civil Liberties Jurisdiction:  
A Plea for Federal Consistency**

**Amy R. Pivetta Hoffman\***

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I. INTRODUCTION

When an Indian's civil rights are jeopardized on tribally owned land, he or she is limited to state or federal court in seeking a remedy. Under federal law, tribal courts do not have jurisdiction to protect their members from civil rights violations by non-tribal members or state officers.<sup>1</sup> The U.S. Supreme Court has failed to recognize the right of Indian Tribes to protect their members through adjudication of civil rights claims. In doing so, the Court has ignored congressional intent to expand tribal court jurisdiction.

The holdings of *Nevada v. Hicks* illustrate the dissonance between congressional intent and the jurisprudence of the Supreme Court. The Court attributes this dissonance to a lack of congressional authority, difficulties in removing cases from tribal courts, and the current tribal court status of limited jurisdiction.<sup>2</sup> However, Congress has authorized tribes to exercise regulatory jurisdiction,<sup>3</sup> retain minimal criminal jurisdiction over its members,<sup>4</sup> exercise complete civil jurisdiction over members,<sup>5</sup> and, under certain circumstances, exert civil jurisdiction over non-members and non-Indians.<sup>6</sup>

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1. *Nevada v. Hicks*, 533 U.S. 353, 368-369 (2001).

2. *Id.* at 367-68.

3. *Id.* at 367.

4. *Id.* at 366.

5. See generally *Worcester v. Georgia*, 31 U.S. 515 (1832).

6. *Williams v. Lee*, 358 U.S. 217 (1959).

This recognition of jurisdiction illustrates congressional intent to allow unlimited tribal jurisdiction, which would result in concurrent jurisdiction between tribal and state courts. Thus, unlimited tribal court jurisdiction would require the states to confer full faith and credit to tribal judgments. States, understandably, consider this possibility a threat to their sovereignty. Unlimited tribal court jurisdiction would change the face of current American jurisprudence, and challenge a long-held status quo.

This note criticizes the Court's decision in *Nevada v. Hicks* for maintaining the status quo, and failing to acknowledge Congress' intent to expand tribal jurisdiction and respect tribal sovereignty. Restriction of tribal court jurisdiction reflects antiquated, imperialistic notions of jurisprudence, inappropriate in this century. The Court's decision further restricts tribal sovereignty, and is inconsistent with social and legislative trends towards acknowledging the sovereignty of Tribal governments. To retain inherent sovereignty and strengthen self-government, tribes must have jurisdiction over matters arising on reservation land-including civil rights claims.

## II. THE FACTS OF *NEVADA V. HICKS*

*Nevada v. Hicks* illustrates the power struggle among the states, tribes, Congress, and the Judiciary. The State of Nevada wants jurisdiction over each individual within its borders, while the Fallon Paiute-Shoshone Tribe seeks to retain inherent sovereignty by exercising jurisdiction over each individual within reservation boundaries. Congress has an interest in maintaining control over the trust relationship it has with all tribes, and the Judiciary has an interest in developing and maintaining case precedent that facilitates congressional goals. *Nevada v. Hicks* demonstrates how these interests are at odds.

Floyd Hicks is a member of the Fallon Paiute-Shoshone Tribes and resides on the Tribe's Reservation in western Nevada.<sup>7</sup> In 1990, Hicks was suspected of killing a protected California big horn sheep outside Reservation boundaries. A Nevada state game warden secured a search warrant and obtained tribal permission to execute the warrant before searching Hicks' property, located on the reservation, for California big horn sheep remains. The game warden was accompanied by a Tribal police officer. The search yielded no indication of illegal activity and only the remains of an unprotected sheep species were found on Hicks' property.

Several months after the first search, a Tribal police officer re-alleged the existence of California big horn sheep remains on Hicks' property. Again, a search warrant was obtained, and the Tribe gave the wardens permission to

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7. *Hicks*, 533 U.S. at 355-356.

enter the Reservation and execute the search warrant. Like the first search, the second search yielded no evidence of illegal activity.<sup>8</sup>

Hicks claimed that his property had been damaged during the second search of his home. He filed suit in the Fallon Paiute-Shoshone Tribal Court against the game wardens, both individually, and in their official capacities as law enforcement authorities for Nevada. The action also named the Tribal court judge who authorized the search and the Tribal officers who participated in the search.<sup>9</sup> Hicks' suit alleged denial of equal protection, violation of due process and unreasonable search and seizure.<sup>10</sup> Ultimately, Hicks dismissed the claims against all defendants except the State of Nevada and the game wardens. The Tribal court then asserted jurisdiction, and after an appeal by the wardens, the Tribal appellate court affirmed.<sup>11</sup>

In order to challenge the personal jurisdiction of the Tribal court over non-members of the Tribe, the State of Nevada and the wardens filed suit in federal district court without first raising an initial jurisdictional challenge in Tribal court. The district court affirmed tribal jurisdiction over the matter and held that Nevada and the wardens had to exhaust all tribal remedies before pursuing an action in federal court. The Ninth Circuit Court of Appeals affirmed tribal jurisdiction, focusing on the fact that Hicks' home was located on tribally owned land.<sup>12</sup> Nevada and the wardens then appealed to the U.S. Supreme Court, which granted certiorari<sup>13</sup> and wrote the opinion discussed in this note.<sup>14</sup> The Supreme Court addressed the following questions: (1) whether the Tribal court had jurisdiction over state officials executing search warrants against tribal members for alleged violations of state law committed off the Reservation; and (2) whether the Tribal court could assert jurisdiction over claims brought under 42 U.S.C. § 1983.<sup>15</sup>

### III. THE MAJORITY HOLDING

Justice Scalia wrote the majority holding in *Nevada v. Hicks*, which reversed and remanded to the Ninth Circuit Court of Appeals for further proceedings.<sup>16</sup> In deciding the first issue, whether the Tribal court had jurisdiction over the Nevada game wardens, the Supreme Court relied upon the rule established in *Montana v. U.S.*<sup>17</sup> The *Montana* rule asserts that a tribal court does not have jurisdiction over non-members, unless one of the following

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8. *Id.* at 356.

9. *Id.* at 356.

10. *Id.* at 356-57.

11. *Id.* at 357.

12. *See Nevada v. Hicks*, 196 F.3d 1020 (9<sup>th</sup> Cir. 1999).

13. *Nevada v. Hicks*, 531 U.S. 923 (2000).

14. *Id.* at 357.

15. *Hicks*, 533 U.S. at 357. 42 U.S.C. § 1983 provides that any person who acts "under color of any statute" to deprive a U.S. citizen of any "rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law."

16. *Id.* at 376.

17. *Id.* at 358.

exceptions apply: (1) the tribe entered into a contractual relationship or "other arrangement" with non-members for commercial purposes; or (2) the non-member conduct presents a danger to the economic, health or political welfare of the tribe.<sup>18</sup> The Court rejected applicability of the first exception, holding there was no consensual commercial relationship or "other arrangement" at issue, and then rejected the second exception, reasoning that the state's interest in the execution of the search warrant did not interfere with the health or political welfare of the tribe.<sup>19</sup> Regarding the second issue, tribal court jurisdiction over federal questions (i.e. 42 U.S.C. § 1983), the Court held that the Tribe did not have proper jurisdiction because it had not been congressionally authorized.<sup>20</sup> After quickly dismissing the issue, the Court asserted that further discussion was unnecessary, and neglected to adequately discuss tribal court subject matter jurisdiction over federal questions.

#### IV. DISCUSSION OF PRIOR LAW

##### A. *The Marshall Trilogy & Implied Divestiture*

The genesis of federal Indian law lies with the Marshall trilogy, which defined the relationship between the newly formed American government and the native Indian tribes. Justice John Marshall was the first member of the U.S. Supreme Court to interpret this new relationship, and his opinions have formed the foundation of Indian law as it is practiced today. The Marshall trilogy consists of three cases: *Johnson v. M'Intosh*,<sup>21</sup> *Cherokee Nation v. Georgia*,<sup>22</sup> and *Worcester v. Georgia*.<sup>23</sup> Together, they formed the implied divestiture doctrine, which illustrated the policy of the new American government toward native tribes.

The implied divestiture doctrine states that tribes surrendered all authority and ownership over their native lands, and granted it to the federal government by the act of cession during the Treaty years of 1789-1871.<sup>24</sup> The creation of the implied divestiture doctrine occurred piecemeal, beginning with a property dispute decided in *Johnson v. M'Intosh* in 1823.

##### 1. *The Discovery Doctrine*

Inherent tribal right to tribal lands began to erode in *M'Intosh*, under the auspices of the discovery doctrine. The discovery doctrine asserted the

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18. *Id.* at 359 n.3.

19. *Id.* at 359 n. 3, 364.

20. *Id.* at 369.

21. 21 U.S. 543 (1823).

22. 30 U.S. 1 (1831).

23. 31 U.S. 515 (1832).

24. David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., *Federal Indian Law*, 73 (4<sup>th</sup> ed., West 1998).

colonists had the right to extinguish aboriginal title by purchase or agreement, merely because they wanted to settle Indian lands.<sup>25</sup> Justice Marshall's application of the doctrine of discovery introduced the first canon of the implied divestiture doctrine, the loss of tribal power to bargain away their ancient lands to American settlers.<sup>26</sup> Marshall's decision has had devastating ramifications. The decision embedded in American jurisprudence the idea that tribes had never, neither before colonization, nor after, possessed outright ownership over land that they had occupied for millennia. Therefore, any treaties made with the Indians were inherently suspect in the eyes of many Americans, who believed the Indians never held title to the lands in the first place.

## *2. Tribes as Domestic Dependant Nations and Establishment of the Trust Status Relationship*

The judicial policy of treating tribes as domestic dependant nations originates in *Cherokee Nation v. Georgia*.<sup>27</sup> In this second case of the Marshall trilogy, the U.S. Supreme Court considered whether Indian tribes were foreign nations and thus, warranted treatment as such. Here, Justice Marshall acknowledged tribal rights to the land they occupied, but refused to acknowledge outright tribal ownership. Marshall stated, "until that right shall be extinguished by a voluntary cession to our government ... [t]hey may, more correctly, perhaps, be denominated domestic dependent nations."<sup>28</sup> Refusal to acknowledge tribal ownership led to the policy that Indian tribes are not sovereign foreign nations. The question then became how to categorize the unique status of Indian tribes.

The Court's *Cherokee Nation* holding produced the second canon of the Marshall trilogy: treating tribes as domestic dependent nations rather than foreign nations. The holding defined the relationship between tribes and the federal government as a trust status relationship. The trust status relationship between tribes and the government is paternalistic and reflects the view that tribes and tribal members are incompetent to run their own affairs. One consequence of the trust relationship today is that some tribal land is still held in trust by the federal government for the respective tribe, and the proceeds from rents are also held in trust for individual tribal members. The trust status relationship between the federal government and tribes is antiquated, but continues today.

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25. *Johnson*, 21 U.S. at 595.

26. *Id.*

27. 30 U.S. at 17.

28. *Id.* at 17.

### 3. *Manifestation Of The Trust Status Relationship: Tribes are not Protected from Federal Action*

The third case in the Marshall trilogy, *Worcester v. Georgia*, confirmed federal dominion over Indian affairs. In *Worcester*, the Supreme Court considered whether the State of Georgia had the authority to abolish the Cherokee government, and absorb tribal lands located within state boundaries.<sup>29</sup> The Court held that federal legislation prohibiting state interference with Indian tribes meant that the states could not impose their laws on a tribe.<sup>30</sup> The case stands for the proposition that states have no authority over tribes unless it is congressionally conferred. In one respect, *Worcester* resulted in a positive outcome for tribes by acknowledging tribal protection from state action. However, the ruling has not stopped states from attempting to encroach upon the inherent sovereignty of tribal governments. Further, although *Worcester* acknowledged tribal protection from state action, the holding did not assert protection from the federal government. Thus, *Worcester* negatively impacted tribes, because it affirmed the federal government's control over them.

#### B. *The Marshall Trilogy & Tribal Court Jurisdiction*

The canons of the Marshall trilogy have endured throughout the twentieth century. Consequently, antiquated judicial policies, holding that tribes do not have ownership rights to their traditional lands, that tribes are domestic dependant nations, and that restrict tribal authority continue to shape contemporary case law. The trilogy has influenced many areas of Indian law, particularly tribal jurisdiction.

Tribal jurisdiction on reservation land developed into a pivotal and controversial Indian law issue as tribes became more organized during the twentieth century. As more tribes organized central governments and court systems, jurisdictional conflicts between the tribes, the states, and the federal government became inevitable. Today, tribal courts still struggle to retain inherent sovereignty. Federal courts have acted adversely toward tribal authority by systematically reducing tribal court jurisdiction in a one-step forward, two-step back manner. The deeply embedded canons of the Marshall trilogy have strongly influenced Indian case law, and continue to restrict the scope of tribal authority and jurisdiction. The following is a brief overview of significant case law affecting tribal court civil and regulatory jurisdiction.

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29. *Worcester*, 31 U.S. at 539-540.

30. *Id.* at 561.

1. *The Development of Tribal Court Civil Jurisdiction: One Step Forward, Two Steps Back*

a. *Tribal Court Jurisdiction Over Non-Members*

The U.S. Supreme Court affirmed tribal court jurisdiction over a non-member in *Williams v. Lee*.<sup>31</sup> In *Williams*, a non-Indian trader operating a store on the Navajo Reservation tried to collect on an account held by a Navajo couple.<sup>32</sup> The Court found that the Navajo Tribal court, rather than the Arizona state court, had proper jurisdiction over a claim brought by a non-member. The Court reasoned that to allow state court jurisdiction would “infringe on the right of the Indians to govern themselves.”<sup>33</sup> The acknowledgment of tribal court jurisdiction over a non-member doing business on a reservation was a landmark event. The Court recognized inherent tribal sovereignty and tribal right to self-governance. *Williams* was a step forward for tribal court jurisdiction. It appeared that tribes were on a path to complete control over the actions of individuals on reservation land.<sup>34</sup>

b. *The Exhaustion Doctrine*

The U.S. Supreme Court took another step forward for tribal jurisdiction by developing the exhaustion doctrine in *National Farmers Union v. Crow Tribe of Indians*.<sup>35</sup> The issue in *National Farmers Union* was whether a tribal court had jurisdiction when a Crow child was struck by a motorcycle driven by a non-Indian, in a school parking lot on Montana State property within the Reservation boundaries.<sup>36</sup> The Court asserted that non-Indians (and non-members) who had civil claims brought against them in tribal court must exhaust all tribal remedies before removing the suit to federal court.<sup>37</sup> The rule is known as the exhaustion doctrine, and applies to the jurisdiction of all tribal courts. The Court outlined two exceptions to the exhaustion doctrine in *National Farmers Union*. Tribal court jurisdiction over non-Indians is improper where: (1) it is futile due to lack of opportunity to challenge the court’s jurisdiction; or (2) jurisdiction by the tribe is conducted in bad faith or in a harassing manner.<sup>38</sup> Application of an exception prompts federal jurisdiction, and permits immediate removal.<sup>39</sup> Because neither of the exceptions applied, the Court asserted that the case could not be entertained in federal court until the defendant insurance com-

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31. 358 U.S. at 223.

32. *Id.* at 218, 269.

33. *Id.* at 223.

34. However, the Court would subsequently interpret *Williams* with an emphasis on its effect on the interests of the federal government.

35. 471 U.S. 845 (1985).

36. *Id.* at 847.

37. *Id.* at 855-857.

38. *Id.* at 856 n. 21.

39. *Id.* at 857.

pany exhausted all avenues in tribal court.<sup>40</sup> Thus, the exhaustion doctrine was a step forward for tribal jurisdiction.

c. *Further Exception to the Exhaustion Doctrine*

After expanding tribal jurisdiction in *Williams* and *National Farmers Union*, the Supreme Court began to backtrack in *Iowa Mutual Insurance v. LaPlante*, by creating another exception to the exhaustion doctrine.<sup>41</sup> In *Iowa Mutual*, the Court examined whether a Tribal member, injured while working for a company on the Blackfeet Reservation, had to allow the Blackfeet Tribal court to assume jurisdiction before removal to a federal court.<sup>42</sup> The Court found that the exhaustion doctrine is mandatory for civil claims involving non-members brought in tribal court, before removal to state court, but not mandatory before removal to federal court. Rather, the Court asserted that removal to a federal court is discretionary as a matter of comity, and exhaustion is not a "jurisdictional prerequisite."<sup>43</sup>

The Court's holding in *Iowa Mutual* compromised the integrity of the tribal court system. Mandatory exhaustion of tribal court remedies spurred development of tribal court case law and policy. Without the exhaustion doctrine, development of tribal case law will be severely stunted, causing tribal court case law to lag behind the evolution of tribal development, both legal and governmental. This frustrates the purpose of the tribal court system because tribal case law will not reflect the culture and values of the community it was designed to serve.

d. *Further Restriction of Tribal Court Jurisdiction over Matters Occurring within Reservation Boundaries*

The Supreme Court further restricted tribal control over matters occurring within reservation boundaries in *Strate v. A-1 Contractors*.<sup>44</sup> In *Strate*, the Court examined whether the tribal court had jurisdiction over an accident involving two non-Indian drivers on a North Dakota state highway running through the Fort Berthold Indian Reservation.<sup>45</sup> The Court looked to congressional intent to determine tribal civil jurisdiction, and found that Congress authorized the state to have the right of way on the highway where the accident occurred.<sup>46</sup> The Court held that in an accident occurring on state land running through a reservation, the tribal court had no jurisdiction over the parties, regardless of tribal membership or Indian status.<sup>47</sup>

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40. *Id.*

41. 480 U.S. 9 (1987).

42. *Id.* at 11.

43. *Id.* at 19.

44. 520 U.S. 438 (1997).

45. *Id.* at 442-443.

46. *Id.* at 454-455.

47. *Id.* at 458.

Denying tribal court jurisdiction over accidents (or other matters) occurring on state highways within reservation boundaries further limits a tribe's ability to resolve conflicts involving tribal members, and thus undermines tribal sovereignty. Tribal members travel daily on state highways within reservation boundaries and deserve the protection of their government. However, because of the policy established in *Cherokee Nation*,<sup>48</sup> the tribe is to be treated as a domestic dependant nation and the federal government may limit tribal authority. The ability to limit tribal authority over tribally possessed lands directly contravenes tribal inherent sovereignty and self-government.

## 2. Tribal Regulatory Jurisdiction over Natural Resources

The Supreme Court has also applied the *Cherokee Nation*<sup>49</sup> canon of the Marshall trilogy to determine the regulatory authority of tribes. The current status of tribal regulatory jurisdiction was defined in *Montana v. U.S.*<sup>50</sup> In *Montana*, the Supreme Court addressed the ability of the Crow Tribe to regulate hunting and fishing on Indian fee lands located within the Reservation boundaries.<sup>51</sup> The Court held that tribal courts generally lack civil regulatory jurisdiction over non-members on reservation land regardless of ownership, subject to the following exceptions: (1) the non-member enters into a consensual agreement with a tribe for commercial dealings, or (2) the conduct of a non-member on reservation land affects the economic, health or political welfare of the tribe.<sup>52</sup> The *Montana* rule provides an appropriate context for tribes to exert regulatory jurisdiction over non-members within reservation boundaries. However, the Supreme Court has taken back what it has given. Overly narrow interpretations of the *Montana* rule exceptions, as illustrated by *Hicks*, have caused courts to apply the *Montana* rule broadly, and has significantly restricted tribal regulatory jurisdiction.

In summary, the Marshall trilogy has influenced U.S. Supreme Court decisions regarding civil and regulatory jurisdiction to the detriment of inherent tribal sovereignty and self-government. However, Congress has demonstrated a clear intent to confer ever-increasing authority to tribal governments for regulation of natural resources and federal question cases. Contradiction between the Court's application of the antiquated Marshall trilogy and Congress' intent to expand tribal court jurisdiction prompts a plea for consistency between the two branches of government.

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48. *Cherokee Nation*, 30 U.S. 1.

49. *Id.*

50. 450 U.S. 544 (1981).

51. *Id.* at 547.

52. *Id.* at 555-556.

## V. A CRITIQUE OF THE MAJORITY HOLDING

In *Nevada v. Hicks*, the Supreme Court analyzed precedent from *Montana* and *Strate* and held that the Fallon Paiute-Shoshone Tribal court could not assert jurisdiction over Nevada state officials executing a search warrant.<sup>53</sup> The Court also held that tribal jurisdiction does not extend to violations of federal statute because tribal courts are not courts of general jurisdiction.<sup>54</sup> The following discussion criticizes the majority's reasoning, and highlights counter arguments presented by Justices O'Connor and Stevens.

A. *Improper Application of the Montana Rule*

The Supreme Court's decision in *Nevada v. Hicks* affirmed the canons of the Marshall Trilogy and further diminished inherent tribal sovereignty. The majority began its analysis of the first issue by dismissing the need to determine whether the Tribal court's jurisdiction exceeded its congressionally conferred authority over non-members. The majority inquired "whether the Fallon Paiute-Shoshone Tribes—either as an exercise of their inherent sovereignty, or under grant of federal authority—[could] regulate state wardens executing a search warrant for evidence of an off-reservation crime."<sup>55</sup> The Court recognized application of the rules given in *Montana* and *Strate*, which generally disallow tribal civil jurisdiction over non-members.<sup>56</sup>

1. *Faulty Reasoning Led to a Narrow Interpretation of the Montana Rule*

The Court applied the *Montana* rule to determine whether the Tribal court had jurisdiction over the game wardens, and mistakenly found the *Montana* exceptions inapplicable. In considering the first exception to the *Montana* rule—that tribal courts have proper jurisdiction over non-members on tribal land where the non-member has entered into a consensual relationship with the tribe for commercial purposes or other arrangements—the majority narrowly interpreted the term "other arrangements" to include only private relationships. Therefore, because the Nevada search warrant and tribal court consent to enter the reservation were between two governments, the Court found the exception inapplicable for lack of a private relationship.

The Court relied upon a passage in *Montana* to support their interpretation of "other arrangements" to mean only private relationships.<sup>57</sup> The *Montana* passage states:

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53. *Hicks*, 533 U.S. at 364.

54. *Id.* at 369.

55. *Id.* at 358.

56. *Id.* at 357-358.

57. *Id.* at 359 n. 3.

“[I]ndian tribes retain inherent sovereign power 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 non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”<sup>58</sup>

The term “other arrangements” can hardly be interpreted to mean only private relationships. Within the context of the sentence, “other arrangements” could be read to mean other dealings of a commercial nature not falling under the definitions of contracts or leases.

In support of this point it is important to note the reality of tribal operations. Tribes do enter into frequent consensual, commercial relationships with non-Indians and non-members. As a governing body, however, tribes cannot enter into private agreements because the tribe is a public entity representing a group of people in a governmental capacity. It follows then, that nothing a tribe embarks upon is private. Every action a tribe takes is in a government capacity. An example of an official tribal action would be an agreement with a private construction firm to build a tribal hospital.

Tribes also enter into contracts with states, which are commercial and official dealings. An example of tribal/state commercial and official dealing are the agreements frequently entered into where the tribe contracts for ambulance service on the reservation in exchange for payment. Most dealings between a state and a tribe are of a commercial and official nature. Because this is the case, it can be said that between states and tribes, commercial and official dealings are essentially the same. Therefore, where the tribe has established a consensual relationship by giving permission to the State of Nevada to execute a state warrant on tribal land, that dealing between the state and the tribe is official in nature. Because the tribe, as a governmental entity, cannot enter into private agreements, and because the execution of the warrant was the result of an official agreement with the state, the first exception to the *Montana* rule should apply.

## *2. The Court Failed to Give Appropriate Weight to the Fact That Hicks' Property was Located on Tribal Land*

The Court contradicted itself when it acknowledged its holdings in *Montana* and *Strate* were limited to non-member's dealings on non-tribe owned land within Reservation boundaries, but then disregarded the fact that Hicks' residence is located upon tribally owned land.<sup>59</sup> Moreover, the Court neglected to offer an adequate explanation for downplaying the location of

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58. *Montana*, 430 U.S. at 565.

59. *Hicks*, 533 U.S. at 359.

Hicks' property. In her concurring opinion, Justice O'Connor pointed out this deficiency. Justice O'Connor argued that *Nevada v. Hicks* gives the Supreme Court an opportunity to evaluate the holdings of *Montana* and *Strate* under a new circumstance (i.e. jurisdiction over non-members on tribally owned land). Justice O'Connor criticized the majority view for undermining the inherent tribal sovereignty that the Supreme Court has a duty to protect.<sup>60</sup> To support her views, Justice O'Connor distinguished *Montana*'s facts from those of *Hicks*. She recounted that in *Montana*, the Tribe sought to regulate non-members fishing on Indian fee land within the reservation by licensing.<sup>61</sup> The difference was that in *Montana*, the fee land was not owned by the Tribe, whereas in *Hicks*, the warrant was executed on tribally owned land.

Justice O'Connor's view on the applicability of the first exception—that an important factor for consideration is whether the land on which the warrant was executed was tribally owned or not—is valid. The general rule of *Montana* is that "[I]ndian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations."<sup>62</sup> Because Hicks' residence was on tribally owned property,<sup>63</sup> the question left to the Court is whether tribal jurisdiction over state wardens executing warrants on tribally owned land is consistent with maintaining tribal inherent sovereign power. Although the Nevada wardens acted in an official capacity when executing their search warrant, the search occurred on tribal property.<sup>64</sup> Therefore, the Nevada wardens were required to comply with the laws mandated by the Tribe. The allegations against the Nevada wardens included tortious actions involving Hicks' property.<sup>65</sup> To prohibit tribal jurisdiction over the tortious actions of state officials would undermine the Tribe's inherent sovereignty and right to self-government by not allowing the Tribe to oversee all activity on its Reservation land.

The majority however, held that although Hicks' residence was on tribal land, it was not a dispositive issue. Therefore, the location of the Hicks' residence was quickly disregarded.<sup>66</sup> In essence, the Court states that state officers have the right to disregard the rights Tribal members to execute a state warrant on tribal land.

### 3. *The Second Exception to the Montana Rule Should have been Applied*

After discarding the first exception to the *Montana* rule, the Supreme Court ruled that the second exception did not apply, reasoning that the in-

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60. *Id.* at 401 (Justice O'Connor concurring).

61. *Id.* at 389.

62. *Montana*, 450 U.S. at 565.

63. *Hicks*, 533 U.S. at 355-56.

64. *Id.* at 356.

65. *Id.* at 357.

66. *Id.* at 360.

herent sovereignty of the Tribe does not exclude the right of the state to regulate its own authority and laws on the Reservation.<sup>67</sup> The second exception allows tribal jurisdiction over non-members where the activity of the non-members directly affects the tribe's political integrity, economic security, health or welfare.<sup>68</sup> The majority evaluates the second exception in relation to the policy of retaining inherent tribal sovereignty and congressional acknowledgment of jurisdiction: "Tribal assertion of regulatory authority over non-members must be connected to the right of the Indians to make their own laws and be governed by them."<sup>69</sup> Attempting to reconcile the right of tribal sovereignty with the interest of the state to execute a search warrant on tribal land, the majority reasoned that the inherent sovereignty of the tribe does not exclude the right of the state to regulate its own authority and laws on the Reservation.

The majority failed to recognize that denial of tribal jurisdiction over civil rights violations would adversely affect the political integrity and welfare of a tribe. A member of a tribe who lives on reservation land expects that tribal laws and officers will protect her. Here, the state asked permission to execute their search warrants, and the Tribe acquiesced.<sup>70</sup> However, the state's courtesy in asking permission to execute the warrants was found to be only that—courtesy. Justice Scalia explained that although it may be unclear, several Supreme Court opinions illustrate that states have at least some power to exercise regulatory authority on tribally owned land.<sup>71</sup> Thus, states need not seek permission to execute search warrants because the inherent sovereignty of the Tribe does not exclude the rights of the state to regulate its own authority and laws on the Reservation. Consequently, tribal members are likely to feel apathy for the political integrity of the tribe. If tribal members perceive that their tribe's inherent rights are not respected by the federal government, they will have little faith in the tribal court system and will not trust tribal governance for their protection. This would certainly have an adverse effect on the tribe's political integrity and welfare. Therefore, the second exception to the *Montana* rule should have applied.

Had the majority applied either of the exceptions to the *Montana* rule, the central issue would have been whether the Tribal court could assert jurisdiction over federal civil liberties claims pursuant to 42 U.S.C. § 1983. Resolution of this issue would have required the Court to give deference to Congressional acts showing intent for tribes to retain inherent sovereignty and self-government. However, because of the majority's too hasty rejec-

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67. *Id.*

68. *Montana*, 450 U.S. at 566.

69. *Hicks*, 533 U.S. at 361.

70. *Id.* at 355-56.

71. *Id.* at 362-363.

tion of the *Montana* rule exceptions, congressional intent was not given due consideration.

*B. Faulty Reasoning Led to the Rejection of Tribal Court Jurisdiction Over Federal Questions*

After disposition of the first issue (holding that the tribal court did not have jurisdiction over state game wardens executing search warrants on tribal land), the Court analyzed the possibility of tribal court federal question jurisdiction (i.e. 42 U.S.C. § 1983).<sup>72</sup> The majority focused on whether tribal courts are courts of general jurisdiction or limited jurisdiction. The Court noted that Congress authorized states to operate as courts of general jurisdiction in Article III of the Constitution, and that removal of a claim to a different forum is given only to state courts as a result of 28 U.S.C. § 1441.<sup>73</sup> The Court then asserted that a tribal court's jurisdiction only arises from congressional authority. Thus, unless there is legislation to the contrary, tribal courts are not courts of general jurisdiction.<sup>74</sup> The Court's assertion reflects the trust status relationship between the federal government and tribes as established in the Marshall trilogy.

The majority also asserts that tribal jurisdiction over removal authorized under federal questions such as 42 U.S.C. § 1983 would be problematic because tribal jurisdiction would not allow defendants the right to remove the case to federal court as they could under state jurisdiction.<sup>75</sup> Under 28 U.S.C. § 1441, parties are not specifically given the right to remove a case from tribal court to federal court. Rather, the statute only authorizes removal from state to federal court where the federal court has original jurisdiction.<sup>76</sup> Also, the current state of Indian law does not allow removal from tribal court until all tribal court remedies are exhausted.<sup>77</sup> In order to decide whether tribal courts could assert jurisdiction over federal questions, the Court would first have to determine whether removal from tribal court to federal court was anticipated under the federal removal statute. But rather than tackle this analysis, the majority avoided resolving the removal issue, stating "[s]urely the simpler way to avoid the removal problem is to conclude (as other indications suggest anyway) that tribal courts cannot entertain § 1983 suits."<sup>78</sup>

In his concurrence, Justice Stevens joined by Justice Breyer, endorsed tribal subject matter jurisdiction over federal civil liberties claims. Justice

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72. *Id.* at 366.

73. 42 U.S.C. § 1441 allows removal of an action from state to federal court where the federal court would have original jurisdiction over the matter at bar.

74. *Hicks*, 533 U.S. at 367.

75. *Id.* at 368.

76. 42 U.S.C. § 1441 (2001).

77. *National Farmers Union*, 471 U.S. at 856-57.

78. *Hicks*, 533 U.S. at 369.

Stevens saw no reason to deny tribal courts jurisdiction over § 1983 claims so long as they have jurisdiction over the parties.<sup>79</sup> The concurring opinion highlights the fact that the majority avoided an important issue of Indian law that was ripe for resolution. Moreover, the majority's decision on the first issue (whether tribal courts have jurisdiction over non-Indians on tribal land) pre-empts discussion of the second (whether tribal courts have subject matter jurisdiction over civil liberties claims).

The Court's premature decision on tribal court subject matter jurisdiction over civil liberties claims could have a devastating effect on tribal court systems. The issue of tribal court jurisdiction over civil liberties claims will inevitably resurface, and the Court will have to clearly define the scope of tribal court jurisdiction recognized by federal law. When the time comes, the Court surely will look to the precedent established in *Hicks*. The Court's hasty decision in *Hicks* will serve to justify further erosion of tribal jurisdiction.

1. *The Majority Holding Contradicts Congressional Authorization of Tribal Regulatory Jurisdiction*

Congress has shown clear intent to expand recognition of tribal court jurisdiction. Recent legislation provides tribal regulatory and subject matter jurisdiction over matters that were traditionally retained by the state or federal judicial system. Congressional recognition of tribal court jurisdiction over civil liberties claims is not the impossibility the Supreme Court believes it to be. Regulatory jurisdiction authorized by Congress during the last thirty years shows Congress intends to preserve inherent tribal sovereignty and tribal right to self-governance. For example, statutes like the Clean Water Act (CWA)<sup>80</sup> and the Clean Air Act (CAA),<sup>81</sup> which confer Tribes with State (TAS) status. The CAA specifies that TAS status may only be authorized if a tribe meets the following criteria: (1) the tribe has a central governing body; (2) regulation of air quality is only within the tribe's jurisdiction (within reservation boundaries and the area surrounding reservation boundaries over which the tribe may have jurisdiction); and (3) the tribe has the capacity to carry out the functions consistent with applicable regulations.<sup>82</sup> TAS status gives tribes the authority to regulate water and air quality on their reservations, possibly above and beyond the minimum federal standards, without interference by states. Conferring TAS status demonstrates Congress' intent to protect and promote tribal sovereignty.

U.S. district and appellate courts have upheld tribal regulatory authority over non-members. For example, in *City of Albuquerque v. Browner*,<sup>83</sup> Al-

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79. *Id.* at 403.

80. 33 U.S.C. § 1377(a) (2001).

81. 42 U.S.C. § 7601(d) (2001).

82. 42 U.S.C. § 7601(d)(2) (2001).

83. *City of Albuquerque v. Browner*, 97 F.3d 415 (10<sup>th</sup> Cir. 1996).

buquerque sought to prevent the Environmental Protection Agency (EPA) from authorizing the Isleta Pueblo Tribe to regulate waste water originating from the city and flowing through the Isleta Reservation. Tribal water quality standards on the Reservation exceed both New Mexico and federal standards.<sup>84</sup> The Tenth Circuit Court of Appeals held that higher standards imposed by the Tribe were consistent with the congressional policy of inherent tribal sovereignty and right to self-government.<sup>85</sup> The holding confirmed the prohibition of state interference with the Tribe's regulation of water quality on the reservation.

In *Montana v. EPA*,<sup>86</sup> the Ninth Circuit Court of Appeals confirmed tribal court regulatory jurisdiction over non-members by rejecting another challenge to TAS. The court focused on whether the Tribe fulfilled the third requirement for TAS status, and deferred to Congressional intent to protect tribes' inherent sovereignty, holding "[t]he third requirement, with which we are principally concerned, is intended to reflect the scope of a tribe's 'inherent power,' a concept developed by the Supreme Court to define when tribes may engage in nonconsensual regulation of activities of non-members."<sup>87</sup> The court applied the *Montana* rule and its exceptions to help interpret the CWA and TAS provisions, and determine whether regulation over non-member water polluters was appropriate. The court noted that the second exception to the *Montana* rule would apply, because failing to authorize tribes to regulate non-member polluters within their reservations would pose a serious threat to tribes' economic health, political health, and general welfare.<sup>88</sup> Applicability of the first *Montana* rule exception bolstered the court's decision that the third TAS requirement was met; it also bolstered the court's finding that Congress intended to authorize regulatory jurisdiction over non-members to protect tribes' inherent sovereignty. The test described in *Montana v. EPA* exemplifies a balance between congressional authority and judicial interpretation, and can be used to determine both regulatory and subject matter jurisdiction of tribal courts.

Other appellate courts have also denied state challenges to CAA provisions granting TAS status and the ensuing regulatory authority of the tribe to issue permits. For example, in *Arizona Public Service Company v. EPA*,<sup>89</sup> the petitioner's challenged the 1990 amendments to the CAA claiming that the EPA had granted tribes too much authority to regulate air quality on reservations, including non-Indian fee land.<sup>90</sup> The appellate court analyzed congressional intent behind the amendments, and found that Congress intended to authorize tribal regulation of all air quality within the

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84. *Id.* at 419.

85. *Id.* at 423.

86. *Mont. v. EPA*, 137 F.3d 1135 (9<sup>th</sup> Cir. 1998).

87. *Id.* at 1139.

88. *Mont. v. EPA*, at 1141.

89. *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2001).

90. *Id.* at 1284.

boundaries of a reservation.<sup>91</sup> In particular, the court ruled that tribal regulatory authority extended to non-Indian fee lands.<sup>92</sup>

*State of Michigan v. EPA* illustrates a second unsuccessful challenge to tribal regulatory authority (as provided by the CAA).<sup>93</sup> In *Michigan*, the court analyzed tribal regulatory authority over land where tribal jurisdiction is in question due to unclear Indian country status.<sup>94</sup> In deciding whether the EPA, and consequently a tribe, has jurisdictional authority, the court concluded, “[w]here a valid state program exists, EPA may implement a federal program *only for* Indian country itself, not for lands the status of which EPA deems ‘in question’.”<sup>95</sup> In summary, the CWA and CAA demonstrate Congress’ intent to allow tribal regulatory authority where jurisdiction can be exercised.

## 2. *The Indian Child Welfare Act and Indian Civil Rights Act Exemplify Congress’ Express Authorization of Tribal Court Jurisdiction over Federal Questions*

Congress has authorized tribal court jurisdiction in certain circumstances such as the Indian Child Welfare Act of 1978 (ICWA),<sup>96</sup> and the Indian Civil Rights Act of 1968 (ICRA).<sup>97</sup> These statutes are joined by the growing body of regulatory jurisdiction that illustrates congressional intent to promote inherent sovereignty and self-government of tribes through decision-making processes, which use a non-Indian court system while accounting for the values and traditions of a particular tribe.

The ICWA<sup>98</sup> addresses adoption or removal of an Indian child from her home by a state protective agency. The statute assumes tribal jurisdiction over the child when the child is domiciled within the reservation boundaries. Where a child has not been domiciled on her reservation, the tribe will have jurisdiction absent a determination of good cause.<sup>99</sup> The assumption of tribal court jurisdiction over a member child gives the tribe a chance to determine what is in the best interests of the child and establishes a hierarchy of preferred individuals with whom to place the child. Arguably, the tribal court, staffed with tribal members, possess cultural experiences similar to the child’s, are best suited to determine the child’s best interests.

Another example of congressional authorization of tribal court jurisdiction over federal questions is found in ICRA.<sup>100</sup> The Act was passed in or-

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91. *Id.*

92. *Id.* at 1288.

93. *Mich. v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001).

94. *Id.* at 1077-78.

95. *Id.* at 1088-89.

96. 25 U.S.C. §§ 1901-1963 (2002).

97. 25 U.S.C. §§ 1301-1341 (2002).

98. 25 U.S.C. §§ 1901-1963.

99. *Id.* at §1911(a)(b).

100. 25 U.S.C. §§ 1301-1341.

der to give Native Americans protection against the actions of their tribes in the same way the Bill of Rights affords civil rights protection to citizens from their state.<sup>101</sup> Like the ICWA, the ICRA authorizes tribal courts to protect the rights of members in a manner consistent with their culture and tradition.

One positive court interpretation has held that an express jurisdictional prohibition is required within the applicable federal statute before tribal court jurisdiction can be limited.<sup>102</sup> In *El Paso Natural Gas*, the City of El Paso sought an exception to the exhaustion doctrine based upon an "express jurisdictional prohibition."<sup>103</sup> The Ninth Circuit held that without an express prohibition against tribal court jurisdiction in a pertinent federal statute, tribal jurisdiction should be assumed automatically.<sup>104</sup> The Ninth Circuit's interpretation of tribal jurisdiction over federal questions is an important step in retaining tribal sovereignty and self-government and should be followed by the Supreme Court.

### *C. Tribal Court Jurisdiction over Federal Civil Liberties Claims would not Cause Removal and Recognition Problems*

Had the Supreme Court ruled that Tribal court jurisdiction over the Nevada state game wardens was proper in *Hicks*, the removal and recognition problems predicted by the majority would not be fatal if analyzed under common law.

#### *1. Post-Exhaustion Removal to Federal Court Would Eliminate the Threat of Inappropriate Tribal Adjudication*

Justice Scalia, on behalf of the majority, mistakenly predicts that tribal court jurisdiction over civil liberties claims would be fatally problematic: "[t]ribal-court jurisdiction would create serious anomalies...because the general federal-question removal statute refers only to removal from state court."<sup>105</sup> Here, the Court makes a sweeping statement while ignoring well-established principles of federal Indian common law. The majority mistakenly assumes that the federal government's relation to tribes is the same as their relation to the states. This assumption is incorrect. Principles of federal Indian law have developed with a constant emphasis on the inherent differences between the two types of sovereigns.

For cases brought with concurrent tribal and federal court jurisdiction, exhaustion of tribal remedies is not a rigid mandate. In *National Farmers Union v. Crow Tribe of Indians*, the Court held that where an action could

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101. *Id.* § 1302.

102. *El Paso Nat. Gas Co. v. Neztosie*, 136 F.3d 610 (9<sup>th</sup> Cir. 1998).

103. *Id.*

104. *Id.* at 617.

105. *Hicks*, 533 U.S. at 368.

be brought to either federal or tribal court under a federal statute, the petitioners must exhaust all tribal remedies before removing the case to federal court.<sup>106</sup> Subsequently, in *Iowa Mutual*, the Court limited the exhaustion doctrine by asserting that exhaustion of tribal remedies is merely “prudential.”<sup>107</sup> This means that exhaustion of tribal court remedies is preferred, but that in reality, it is not necessary before removing a suit to the federal court. Thus, a finding of concurrent jurisdiction over federal civil liberties claims is not as problematic as the majority in *Hicks* fears. A case can always be removed to federal court subsequent to exhaustion, and under *Iowa Mutual*, removal to federal court prior to exhaustion is appropriate in certain circumstances.

Removing civil liberty claims after exhausting tribal remedies would spur development of tribal law in a risk free manner, because federal courts can always review tribal court decisions. One author explains that a federal court hearing a matter regarding exhaustion on appeal will review federal questions de novo.<sup>108</sup> This translates into a danger free situation for the federal government while allowing tribal courts to exercise jurisdiction, protect the interests of their members, and establish case law. Although a de novo review of every federal question decided by a tribal court might result in a two-step forward, one-step back situation, it would stimulate further development of tribal case law.

The recent trend toward state court jurisdiction over federal civil liberties claims bolsters an argument for tribal court jurisdiction over civil liberties claims. The reasoning for the recent state court § 1983 activity has been eloquently summarized:

[T]he state judiciary, which has played a subordinate role in protecting civil rights and civil liberties during the past half century, has recently become a significant force in protecting those individual rights. Largely in response to Supreme Court decisions narrowing federal safeguards, many state courts have begun to develop independent interpretations of state law, and have begun to play a new and important role in protecting individual rights.<sup>109</sup>

Tribal courts are equipped to play a similar role for their members as states do for their citizens. Congress has authorized regulatory jurisdiction with the belief that tribal courts are best suited to hear matters regarding such issues as clean water and air within reservation boundaries. Also, limited

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106. 471 U.S. at 856-57.

107. See generally *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

108. Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. Kan. L. Rev. 241, 277 (1998).

109. Steven H. Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. Miami L. Rev. 381, 398 (1984).

regulatory jurisdiction has been conferred for situations where Indian children and individuals need protection under the ICWA and the ICRA. These acts are clear manifestations of congressional intent to protect tribal inherent sovereignty and self-government by conferring increasing authority.

Justice Stevens' opinion that tribal courts are competent to hear federal questions arising under § 1983 promotes growth of tribal court systems and empowers tribal courts to protect their members in a manner consistent with Indian tradition and culture. In the case at hand, authorizing tribal court jurisdiction over Floyd Hicks' civil liberties claim would give the Fallon-Paiute Shoshone the chance to protect its members from the actions of state officials.

## 2. *The Doctrine of Comity Does not Mandate Enforcement and Recognition by State and Federal Courts*

The doctrine of comity would also provide a safe way to allow tribal court systems to exercise jurisdiction over federal civil liberties claims. Under the current scheme, most state and federal courts afford comity to tribal court judgments, rather than full faith and credit.<sup>110</sup> Currently, only two states give full faith and credit to tribal court judgments.<sup>111</sup> Recent case law defines "comity" as a discretionary courtesy in the context of federal Indian law. In *Iowa Mutual*, the Court reiterated that exhaustion of tribal remedies is required only as a matter of comity, and is not a jurisdictional requirement.<sup>112</sup> Thus, as applied in the context of Indian law, the doctrine of comity prevents a rigid mandate that state and federal courts adopt tribal court judgments.

The Ninth Circuit Court of Appeals has defined when a state or federal court must give full faith and credit to tribal court judgments and when mere comity is permissible. In *Wilson v. Marchington*,<sup>113</sup> the petitioner sought recognition of her Tribal court judgment in Montana district court under 28 U.S.C. § 1738<sup>114</sup> (the Full Faith and Credit statute). The court asserted that full faith and credit must be given to Tribal court judgments when a pertinent federal statute evidences congressional intent that full faith

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110. Comity is defined as "courtesy among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts." *Black's Law Dictionary* 261 (Bryan A. Garner ed., 7 ed., West 1999). Full Faith and Credit is defined as "a state's enforcement of another jurisdiction's laws or judicial decisions." *Black's Law Dictionary* 681 (Bryan A. Garner ed., 7th ed., West 1999).

111. These states are Idaho and New Mexico. Stacy L. Leeds, *Cross-Jurisdictional and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. Rev. 311, 345 (2000).

112. 480 U.S. at 16.

113. 127 F.3d 805, 806 (9th Cir. 1997).

114. ...[S]uch Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. 28 U.S.C. § 1738 (2001).

and credit be conferred.<sup>115</sup> The court then specified situations where a federal court may recognize a tribal court judgment, although not legislatively mandated. In short, comity is permissible if both the following requirements are met: (1) the tribal court had both personal and subject matter jurisdiction, and (2) the defendant was afforded due process of law.<sup>116</sup>

Had the U.S. Supreme Court affirmed Tribal jurisdiction over Hicks' claim, exhaustion of tribal remedies would have been required before removal to state or federal court because none of the exceptions to the doctrine of exhaustion were invoked.<sup>117</sup> Under *National Farmers Union*, exhaustion is not required in either of the following situations: where (1) it is futile to challenge the court's jurisdiction due to lack of opportunity; or (2) the tribal court exercises jurisdiction in bad faith or in a harassing manner.<sup>118</sup> Neither exception applies to the facts in *Hicks*. First, nothing in the record shows that the Tribal court failed to offer substantial opportunity to challenge the Tribal court's jurisdiction. Nevada did not bother to challenge the Tribal court's jurisdiction at the tribal court level; instead, it sought immediate removal. Second, tribal court jurisdiction was not exercised in bad faith or in a harassing manner. Hicks is a member of the Tribe, and his Tribe has an interest in protecting his rights against state activity within reservation boundaries. Further, the record is devoid of any evidence that the tribe asserted jurisdiction in a harassing manner. Thus, had the Court affirmed tribal jurisdiction, the Nevada wardens would have been required to exhaust tribal remedies.

Although exhaustion would have been required had the Court affirmed tribal court jurisdiction in *Hicks*, the doctrine of comity (as applied in the context of Indian law) would permit a state or federal court to recognize and enforce the tribal court's decision. As discussed above, a state or federal court may extend comity to a tribal court when the following criteria are met: (1) the tribal court had both personal and subject matter jurisdiction; and (2) the defendant was afforded due process of law. Because the hypothetical supposes a positive jurisdictional result from the Supreme Court, the first requirement would be satisfied. For the second requirement to fail, the Nevada game wardens would have to assert they were denied due process at some point during the litigation. However, the Nevada wardens made no assertion of a denial of due process at any point during the litigation. Thus, if the Tribal court had decided in Hicks' favor, the doctrine of comity would have permitted a state or federal court to recognize and enforce the decision.

The doctrines of exhaustion and comity provide a safety mechanism for allowing tribal court jurisdiction over civil liberties claims. The doctrine of

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115. 127 F.3d at 808.

116. *Id.* at 812.

117. *Hicks*, 533 U.S. at 357.

118. *Natl. Farmers*, 471 U.S. at 856 n. 21.

exhaustion empowers tribal courts to fully adjudicate cases, while the doctrine of comity (as applied in the context of Indian law) provides a check on tribal court jurisdiction by giving state and federal courts discretion as to whether to extend comity. While the opportunity for tribal courts is immense, risks of removal and recognition problems in the federal courts are minimal.

## VI. CONCLUSION

The U.S. Supreme Court's decision in *Nevada v. Hicks* is inconsistent with the intent of Congress to preserve tribal sovereignty and self-government. During the last half-century, the Court has increasingly limited tribal court jurisdiction over tribal members, non-members, Indians, and non-Indians within reservation boundaries. During the same period, Congress has expanded tribal court jurisdiction. Congress' amendments to the CAA and CWA expressly expand tribal court regulatory jurisdiction, while the ICWA and ICRA authorize tribal court jurisdiction under federal statute. These acts evidence Congress' intent to expand tribal court jurisdiction. Nevertheless, despite Congress' intent and recent trends toward expanding tribal court jurisdiction, the U.S. Supreme Court continues to rely upon the antiquated canons of the Marshall trilogy to limit tribal court jurisdiction.

Consistency between Congress and the Supreme Court is necessary for the integrity of the tribal court system. Tribal courts currently exist in a state of jurisdictional limbo, and development of tribal law is stunted as a result. Tribal courts are competent, and are in an early but pivotal stage of developing statutory and case law reflecting their unique traditions and cultures. Authorizing jurisdiction in *Hicks* would have facilitated a test run at tribal court jurisdiction over a federal statute (i.e. 42 U.S.C. § 1983). In addition, this would have given tribal court systems the opportunity to protect their members in the same manner that state courts protect state citizens. Ultimately, tribal members like Floyd Hicks deserve the same protection in tribal courts that non-Indians are afforded in state and federal courts.