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I. INTRODUCTION

Long before the European colonization of America, Native Americans employed traditional adjudicatory systems to resolve disputes and punish crimes.[1] With the invasion of the colonists and the eventual disruption of tribal cultures, historic methods of tribal dispute resolution irrevocably changed.[2] Because tribal mechanisms were not highly formalized, the colonists mistakenly viewed tribal societies as lawless, though in fact they were highly ordered, lawful communities where judges held a position of respect in the tribal hierarchy.[3]

Indian tribes are recognized by the United States as "distinct, independent political communities."[4] Their power to self-govern is not seen as the product of a grant from the federal government, but rather it "flows from a preexisting sovereignty."[5] That sovereignty, though limited, is recognized and protected by the federal government.[6] The existence of this protectorate relationship does not extinguish tribal sovereignty; "a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection."[7] It is this "essential claim of tribal Indians that distinguishes them from other groups . . . their claim of sovereignty—the inherent right to promulgate and be governed by their own laws."[8] The United States Supreme Court has recognized that tribal courts play a "vital role in tribal self-government."[9] The Ninth Circuit Court of Appeals' recent decision in *Wilson v. Marchington*,[10] however, presents a dramatic departure from established notions of tribal self-governance and poses a very real threat to the future

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1. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 230 (1982).

2. *Id.*

3. Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction Over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 MARQ. L. REV. 531 (Winter 1997).

4. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

5. COHEN, *supra* note 1, at 231.

6. *Id.*

7. *Worcester*, 31 U.S. (6 Pet.) at 560-61.

8. L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 815 (1996).

9. United States v. Wheeler, 435 U.S. 313, 332 (1978).

10. Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1516 (1998).

of tribal sovereignty itself.

The Ninth Circuit's decision in *Wilson* subverts a long line of judicial precedent supporting the exercise of tribal inherent and treaty confirmed judicial jurisdiction in tribal members' reservation based claims against non-Indian defendants. The *Wilson* court's jurisdictional analysis was misguided on at least two fronts. First, in its rigid adherence to the U. S. Supreme Court's holding in *Strate v. A-1 Contractors*,[11] the Ninth Circuit misapplied a factually specific holding that tribes lack civil adjudicatory jurisdiction in a tort action between non-Indian parties arising on a state highway within Indian country to a distinguishable action *brought by an enrolled tribal member*. Second, the *Wilson* court misapplied the two part test from *Montana v. United States*[12] in finding that the defendant's tortious conduct lacked a sufficient nexus to tribal welfare to justify the tribal court's exercise of jurisdiction over the wrongful act.

This article first looks to the established law governing the exercise of tribal civil adjudicatory jurisdiction in actions between tribal members and non-members which arise in Indian country. Part III examines the rule of *Strate v. A-1 Contractors*, the Ninth Circuit's authority for reversing the longstanding presumption of tribal civil jurisdiction over non-Indian parties, to an action arising in Indian country brought by a tribal member. Part IV recaps the facts of *Wilson v. Marchington*, traces its judicial history, and recounts the Ninth Circuit's flawed analysis. Part V critiques the Ninth Circuit's decision, distinguishing *Wilson* from *Strate*, first, by calling attention to the issue of whether the situs of the tort was actually on alienated tribal land, and second, by offering that Mary Jane Wilson's injuries did have a demonstrable tribal impact warranting tribal court jurisdiction under *Montana's* second exception. This article concludes by recounting the proper analysis to be undertaken by federal courts in reviewing jurisdictional challenges.

II. TRIBAL CIVIL JURISDICTION

While tribal courts have long been denied criminal jurisdiction over non-members,[13] tribal civil jurisdiction has historically been much less restricted.[14] In fact, the federal government has consistently encouraged the development of tribal courts to provide a forum for the resolution of

11. Strate v. A-1 Contractors, 520 U.S. 438 (1997).

12. Montana v. United States, 450 U.S. 544 (1981) (requiring either the existence of a consensual relationship between the parties, or conduct directly affecting the economic security, health or welfare of the tribe before tribal exercise of regulatory jurisdiction over non-Indians on alienated lands within the reservation is warranted).

13. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

14. COHEN, *supra* note 1, at 341-42.

civil disputes.[15]

Tribal courts consistently have been seen as the appropriate forum for the resolution of disputes "affecting important personal and property interests of both Indians and non-Indians" within the reservation.[16] In *Williams v. Lee*,[17] a milepost case addressing tribal civil jurisdiction, the United States Supreme Court held that in a civil dispute between an Indian and a non-Indian arising on a reservation, jurisdiction is properly placed in the tribal courts.[18] An exercise of state jurisdiction in such a matter "would undermine the authority of tribal courts over Reservation affairs and hence would infringe on the right of Indians to govern themselves."[19] The fact that one of the parties is not an Indian is "immaterial" to the question of determining a proper forum.[20]

Furthermore, "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" and "[c]ivil jurisdiction over such activities presumptively lies in tribal courts . . . ."[21] While there is a presumption that civil adjudicatory jurisdiction is initially vested in the tribal court, under the doctrine of exhaustion of tribal remedies, the tribal court's assertion of jurisdiction is ultimately subject to review in federal district court.[22]

Ironically, the erosion of this presumption of tribal retention of civil adjudicatory jurisdiction began with a dispute over tribal regulatory jurisdiction. In *Montana v. United States*, the U.S. Supreme Court established a rule limiting a tribe's regulatory jurisdiction over non-member activities within the boundaries of the reservation.[23] In *Montana*, the court ad-

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15. *See* Indian Reorganization (Wheeler-Howard) Act of 1934, 25 U.S.C. § 476 (1994) (allowing tribes to form governments, promulgate constitutions and codes, and establish tribal courts); *see also* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (noting that Congress "has never expressed any intent to limit the civil jurisdiction of the tribal courts.").

16. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 (1978) (providing federal forum for claims arising under the Indian Civil Rights Act would be at odds with the congressional goal of promoting tribal autonomy and self-government).

17. Williams v. Lee, 358 U.S. 217 (1959) (holding tribe had exclusive jurisdiction over debt collection action brought by non-Indian owner of reservation store against tribal members).

18. *Id.* at 223.

19. *Id.*

20. *Id.*

21. *Iowa Mutual*, 480 U.S. at 18; *See also* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).

22. *See National Farmer's Union*, 471 U.S. at 856-57; *Iowa Mutual*, 480 U.S. at 16-19. In essence, the exhaustion/abstention doctrine requires a federal court to "stay its hand until after the tribal court has had a full opportunity to determine its own jurisdiction." The federal court should further abstain from exercising jurisdiction, regardless of the basis for jurisdiction that might exist, to permit an exhaustion of tribal remedies as a matter of comity. At a minimum, the exhaustion doctrine requires appellate review of lower court decisions within the tribal court system before a party can challenge the tribe's exercise of jurisdiction in federal district court.

23. *Montana*, 450 U.S. at 544 (establishing presumption that tribes lack civil regulatory juris-

dressed the specific question of whether the Crow Tribe had the power to regulate non-Indian hunting and fishing on reservation lands along the Big Horn River held in fee simple by non-Indians.[24] The Crow Tribe based its claim of jurisdiction on two grounds. First, the Tribe asserted the power to regulate non-member conduct on the Big Horn under a claim of ownership to the bed of the river.[25] Second, the Tribe also claimed jurisdiction based on its inherent power as a sovereign.[26]

The Court, however, found that neither of the Tribe's arguments supported their claims for regulatory jurisdiction. First, the Court denied the Crow Tribe's claim of ownership,[27] and then rejected the claim for jurisdiction based on retained inherent sovereignty.[28] The Court effectively reversed the established rule that tribes retain powers not expressly relinquished when it found the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[29]

Despite creating a presumption that tribes lack regulatory jurisdiction over non-members on alienated lands, the *Montana* Court nonetheless recognized that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[30] Specifically, the Court stated two exceptions to the presumptive denial of tribal civil authority over non-members. First, "a tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members," and second, a "tribe may also . . . exercise civil authority . . . when [non-Indian] conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[31]

Although determinations of tribal civil adjudicatory jurisdiction continued to follow *Williams v. Lee* and its progeny for a decade and a half after *Montana*, the Supreme Court recently extended Montana's presumptive divestiture of regulatory jurisdiction to tribal exercise of adjudicatory

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diction over non-members on alienated lands within the reservation).

24. *Id.* at 547.

25. *Id.*; *See also id.* at 578-80 (Blackmun, J., dissenting) (noting treaty language setting reservation boundary at mid-channel of the river, thus creating understanding that tribal lands included river bed to mid-channel and all river beds within the reservation's outer boundaries).

26. *Id.* at 547.

27. *Montana*, 450 U.S. at 556-57 (excluding the river beds from Crow tribal lands despite clear treaty language to the contrary in this case began a judicial tradition of determining ownership and alienation of tribal lands to effectuate the divestiture of tribal civil jurisdiction).

28. *Id.* at 564-65.

29. *Id.* at 564.

30. *Id.* at 565.

31. *Id.* at 565-66.

jurisdiction.

III. THE JURISDICTIONAL RULE OF *STRATE V. A-1 CONTRACTORS*

In *Strate v. A-1 Contractors,*[32] the U.S. Supreme Court established a rule denying tribal jurisdiction over a reservation-based claim where neither party was Indian. This rule has since been misconstrued to diminish tribal civil jurisdiction over non-Indians in suits brought by tribal members.[33] The issue in *Strate* was whether the Tribal Court had jurisdiction to hear a tort suit between two non-tribal members involved in a car accident on a state highway within the boundaries of the Fort Berthold Indian reservation.[34] The *Strate* Court relied heavily on *Montana* in finding that "tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question."[35]

Still, the *Strate* decision, like *Montana* before it, recognized that a tribe retains the right to exercise civil jurisdiction over non-tribal members for acts committed on the reservation, even on alienated fee lands, under either of two exceptions.[36] First, such an exercise of civil authority over the conduct of non-Indians is justified to regulate "activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[37] Tribal jurisdiction is further warranted over nonmember conduct "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[38]

A unanimous Court found that neither of the *Montana* rule exceptions applied to the unique facts of *Strate.*[39] Even though A-1 was engaged in subcontract work for a corporation that was wholly owned by the Three Affiliated Tribes of Fort Berthold,[40] and was arguably involved in a consensual relationship with the Tribe,[41] the Court agreed with the Eighth Circuit that the underlying dispute was "distinctly non-tribal in nature."[42]

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32. *Strate*, 520 U.S. at 438. Thus far, *Strate* is the only post-exhaustion review of tribal civil jurisdiction case to reach the Supreme Court.

33. *See id.* at 459-60.

34. *Id.* at 442-44.

35. *Strate*, 520 U.S. at 442.

36. *Id.* at 456 (applying *Montana* test).

37. *Id.* at 456-57 (citing *Montana*, 450 U.S. at 565).

38. *Id.* at 457 (citing *Montana*, 450 U.S. at 566).

39. *Id.* at 459.

40. *Id.* at 443.

41. *Id.* at 457.

42. *Id.* (citing *Strate*, 76 F.3d at 940) (observing that the dispute "arose between two non-Indians in [a] run-of-the-mill [highway] accident").

The Court emphasized that A-1 did not fit *Montana's* first exception which provides that only those directly contracting with non-Indians will be afforded jurisdiction over their civil disputes in tribal court.[43] In a similarly formalistic reading, the Court found that Montana's second exception did not apply.[44] Still the *Strate* Court unabashedly conceded that "those who drive carelessly through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members."[45] Yet the Court refused to apply the exception to this dispute between non-Indians for fear that it "would severely shrink the rule" insulating non-Indians from tribal court jurisdiction.[46]

Thus, the *Strate* Court, in a narrow application of the *Montana* rule, denied tribal jurisdiction in a tort case where both parties were non-Indians and the cause of action arose on a state highway within the reservation.[47] Although the granting instrument conveyed a mere "easement for a right-of-way" to North Dakota, the Court nonetheless found this conveyance of a non-possessory interest transformed the right-of-way into the "equivalent . . . [of] alienated, non-Indian land"[48] within the boundaries of the reservation. Still, despite this strained construction of the concept of alienation, the *Strate* decision acknowledged tribal jurisdiction over such disputes when a statute or treaty authorizes the tribe to govern nonmember conduct.[49]

IV. THE *WILSON V. MARCHINGTON* DECISION

The Ninth Circuit Court of Appeals applied the restrictive rule of *Strate*, a factually specific holding, to a very different set of facts in *Wilson v. Marchington*.[50] The court immediately stated *Wilson's* principal distinguishing factual difference from *Strate*—that Mary Jane Wilson, the tribal court plaintiff, was an enrolled member of the Blackfeet Tribe.[51] While recognizing this fact, the court proceeded to apply an expansive reading of the *Strate* holding, interpreting *Strate* as governing jurisdiction over a tort claim between a non-Indian and an Indian.[52] The Ninth Circuit's decision in this case breaks with a long line of precedent holding that jurisdiction of such disputes is properly placed in the tribal courts.[53]

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 443.
48. *Id.* at 455-56.
49. *Id.*
50. *Wilson,* 127 F.3d at 805; facts are set forth *infra* at notes 55-63 and accompanying text.
51. *Id.* at 807.
52. *Id.* at 813.
53. The Ninth Circuit has regularly held that civil jurisdiction over an action between Indian

A. Facts of the Case

Mary Jane Wilson's tort cause of action against Thomas David Marchington and Inland Empire Shows, Inc., had its genesis in an automobile/truck collision that occurred east of Browning, Montana, within the exterior boundaries of the Blackfeet Indian Reservation.[54] At the time of the accident, and at all times thereafter, Wilson was an enrolled member of the Blackfeet Tribe while Marchington was not.[55]

On July 17, 1989, Wilson was driving her car on U.S. Highway 2 through the Blackfeet Indian Reservation.[56] Marchington was driving an Inland Empire semi-tractor trailer close behind her.[57] Wilson, while still preceding Marchington on the highway, signaled to make a left turn on to a side road.[58] Marchington, either in ignorance or disregard of Wilson's intent to turn off the highway, attempted to pass her on the left and collided with her car as she exited the highway.[59]

These are the facts as stated by the district and appellate courts.[60] In fact, the only significant factual dispute rests in Wilson's contention that the accident did not occur on the highway right-of-way.[61] The U.S. District Court, however, found that the accident occurred on U.S. Highway 2.[62] The Ninth Circuit reviewed that finding for clear error and upheld the District Court, noting that the State's right-of-way does not end at the edge of the pavement and that the facts as found in the Tribal court further supported that finding.[63]

B. Prior Judicial History

The parties tried this case before a jury in the Blackfeet Tribal Court beginning on June 16, 1992.[64] At trial, Marchington and co-defendant Inland Empire specifically reserved the right to contest all jurisdictional

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and non-Indian parties arising within the boundaries of a reservation was within the tribal courts. *See, e.g.*, Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994); Crawford v. Genuine Parts, 947 F.2d 1405 (9th Cir. 1991); Wellman v. Chevron U.S.A., Inc., 815 F.2d 577 (9th Cir. 1987); A.&A. Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986).

54. *See* Wilson v. Marchington, 934 F. Supp. 1176, 1178 (D. Mont. 1995), *rev'd*, 127 F.3d 805, 807 (9th Cir. 1997).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Appellee's Opening Brief to 9th Cir. at 16-17, Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997) (No. 96-35145).

62. *Wilson*, 934 F. Supp. at 1184.

63. *Wilson*, 127 F.3d at 814.

64. Appellee's Opening Brief to 9th Cir. at 2, *Wilson* (No. 96-35145).

issues in federal court.[65] The jury entered judgment in favor of Wilson, finding Marchington liable for causing the collision and awarding damages of $246,100.[66]

Both parties appealed the Tribal court judgment to the Blackfeet Tribal Court of Appeals, and, on August 19, 1993, that court affirmed the Tribal court judgment on the issue of liability but reversed on damages and ordered a new trial on the issue of damages alone.[67] The Tribal appellate court declined to find the Blackfeet Tribal Court lacked subject matter jurisdiction over the appellants.[68]

Both parties then appealed to the Blackfeet Supreme Court.[69] On July 1, 1994, a panel of three justices reversed the Tribal court of appeals and reinstated the original judgment in its entirety.[70] Again, the Blackfeet Supreme Court dismissed arguments that the Tribal court lacked subject matter jurisdiction.[71]

Wilson then sought registration and recognition of the Tribal court judgment in the United States District Court for the District of Montana, Great Falls Division.[72] The district court concluded that the facts of *Wilson* fit neither of the Montana rule exceptions that would allow the Tribe to assert jurisdiction over the non-tribal member defendants.[73] Still, somewhat confusingly, the court adopted a test requiring that a valid tribal interest must be at stake before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.[74]

Thus, while expressly stating that neither the *Montana* rule's "consensual agreement" nor the "direct effect" exception applied to this case, and that a valid tribal interest was not at stake, the court mysteriously came to the contradictory conclusion that the Tribal court had jurisdiction.[75] The court then recognized the judgment of the Tribal court on November 8,

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65. Appellant's Opening Brief to 9th Cir. at 5, *Wilson* (No. 96-35145).
66. *Id.* at 6.
67. *Id.* at 9.
68. *Id.*
69. *Id.* at 10.
70. *Id.* at 11.
71. *Id.*
72. *Wilson*, 934 F. Supp. at 1178.
73. *Id.* at 1185.
74. *Id.* at 1184 (citing A-1 Contractors v. Strate, 1994 WL 666051, at *9 (8th Cir. Nov. 29, 1994) (Hansen, J., dissenting), *vacated*, 76 F.3d 930 (8th Cir. 1996), *aff'd*, 520 U.S. 438 (1997)).
75. *Id.* at 1185-87 (following the questionably reasoned Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994)).

1995.[76]

C. Issue Presented to the Ninth Circuit

On appeal, the Ninth Circuit Court of Appeals considered the "question of whether, and under what circumstances, a tribal court tort judgment is entitled to recognition in the United States Courts."[77]

D. The Ninth Circuit's Analysis

The Ninth Circuit's analysis began with a discussion of the proper basis for enforcing a tribal court judgment in federal court, devoting considerable attention to the whether a tribal court judgment should be honored on the basis of comity or full faith and credit.[78] Wilson argued that the Blackfeet Tribal Court's judgment deserved recognition under the implementing legislation of the United States Constitution's Full Faith and Credit Clause.[79] Marchington summarily challenged Wilson's argument.[80] The law is arguably clear that the Full Faith and Credit Clause does not apply to enforcement of tribal court judgments, but rather applies only to the states.[81] While it is true that Congress has expressly extended full faith and credit to tribal court decisions on a selective basis, the Ninth Circuit made it clear that Congress had not intended a blanket application of the doctrine.[82] While acknowledging that "there are policy reasons which could support an extension of full faith and credit to Indian tribes," the Ninth Circuit recognized such an extension was properly "within the province of Congress or the states, not this Court."[83]

After thus disposing of Wilson's full faith and credit argument, the court not surprisingly stated that "the recognition and enforcement of tribal judgments in federal court must rest on the principles of comity."[84] Comity is the recognition that one nation allows "to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its citizens, or of other persons who are under the protection of its laws."[85] While the court recognized

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76. *Id.* at 1187.
77. *Wilson*, 127 F.3d at 807.
78. *Id.* at 807-09.
79. *Id.* at 808; *See* U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1994).
80. *Id.* at 808; Counsel for Marchington and Inland Empire devoted less than ten lines of their 50 page opening brief to rebuff Wilson's full faith and credit argument. Appellant's Opening Brief to 9th Cir. at 43-44, *Wilson* (No. 96-35145).
81. *Id.* at 808; *See* U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1994).
82. *Wilson*, 127 F.3d at 808.
83. *Wilson*, 127 F.3d. at 809.
84. *Id.*
85. *Id.* at 810 (citing Hilton v. Guyot, 159 U.S. 113, 164 (1895)).

that their status as "dependent domestic nations" places tribes in "unique circumstances," it nonetheless stated that comity still provided the "best general analytical framework for recognizing tribal judgments."[86] Thus, the court approached enforcement of the Blackfeet Tribal Court judgment as it would the legal judgment of any other nation. Relying on the law of foreign relations, the court concluded that "as a general principle, federal courts should recognize and enforce tribal judgments."[87]

After enunciating this pro-enforcement stance, the court proceeded to qualify its support of tribal court jurisprudence. The court enumerated two mandatory and four discretionary grounds for non-recognition of tribal court judgments.[88] Federal courts are prohibited from enforcing tribal judgments if:

> (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law. In addition, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances: (1) the judgment was obtained by fraud; (2) the judgment conflicts with another final judgment that is entitled to recognition; (3) the judgment is inconsistent with the parties' contractual choice of forum; or (4) recognition of the judgment . . . is against the public policy of the United States or the forum state in which recognition of the judgment is sought.[89]

After elaborating on these grounds for non-recognition,[90] the court dismissed Marchington's argument that reciprocity of recognition of judgments should be yet another mandatory prerequisite to recognition of tribal court judgments.[91]

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86. *Id.*

87. *Id.*

88. *Id.*; *See also*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1986) (cited by the Ninth Circuit as grounds for either barring or weighing against enforcement of a tribal court judgment).

89. *Wilson*, 127 F.3d at 810. Counsel for Marchington and Inland Empire contended that the tribal court clearly erred or abused its discretion on a number of evidentiary issues to the prejudice of defendants. Appellant's Opening Brief to 9th Cir. at 6-10 & 35-40, *Wilson* (No. 96-35145). Defendants also contended that a justice on the Blackfeet Supreme Court should have disqualified himself because he regularly practiced before the court and might benefit from a ruling counter to the jurisdictional arguments raised by the defendants. *Id.* at 10-11. Though defendants argued the court impaired their right to present a defense, they never specifically raised the issue of denial of due process. Though such arguments would no doubt have failed, one wonders if the cumulative effect of the alleged abuses of the tribal courts could have influenced the Ninth Circuit's decision.

90. *Wilson*, 127 F.3d at 811 (recognizing that due process does not require the tribe to use identical judicial procedures as U.S. courts so long as defendants are afforded "the basic tenets of due process").

91. *Id.* at 812. While the court again deferred to the executive and legislative branches to decide the reciprocity question, it is curious that Marchington would raise such an argument since Black-

Marchington's argument that recognition of tribal court judgments requires application of state rather than federal law[92] was similarly dismissed.[93] The court recognized that the "quintessentially federal character of Native American law, coupled with the imperative of consistency in federal recognition of tribal court judgments, by necessity require that the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States be founded on federal law."[94]

Having settled upon the applicable analysis based on comity, the court promptly stated that the judgment from the Blackfeet Courts was "not entitled to recognition or enforcement because the tribal court lacked subject matter jurisdiction."[95] Admittedly, the court's jurisdictional analysis was "commanded by *Strate v. A-1 Contractors*."[96] Rigidly applying the *Strate* rule, the *Wilson* court held that "tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question."[97]

As the *Strate* Court had previously found regarding the North Dakota highway of that case,[98] the *Wilson* court concluded that the right-of-way for U.S. Highway 2 on the Blackfeet Reservation was the equivalent of alienated non-Indian land.[99] The court further stated, in simplistic fashion, that U.S. Highway 2 on the Blackfeet Reservation was "similar in all relevant aspects to the highway in *Strate*."[100] The court began analogizing the *Strate* and *Wilson* highways by noting that both rights-of-way were granted pursuant to statutory authority.[101] In *Wilson*, the granting statute authorized the Secretary of the Interior "to grant permission . . . to the proper State or local authorities for the opening and establishment of public highways in accordance with the laws of the State . . . through any Indian reservation . . . ."[102] Thus the court found that, as in *Strate*, the right-of-way had been granted, and effectively alienated, "pur-

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feet Ordinance No. 81, Chapter 5, § 1 provides full faith and credit to other tribal and state court judgments in Blackfeet courts.

92. Appellant's Opening Brief to 9th Cir. at 44-45, *Wilson* (No. 96-35145) (comparing enforcement of judgment to actions arising under federal diversity jurisdiction where the court would apply the law of the forum state).

93. *Wilson*, 127 F.3d at 813.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* (quoting *Strate*, 520 U.S. at 442).

98. *See Strate*, 520 U.S. at 454.

99. *Wilson*, 127 F.3d at 813.

100. *Id.*

101. *Id.*

102. *Id.* (citing 25 U.S.C. § 311 (1994)).

suant to a federal statute."[103]

The court further analogized the highway in *Wilson* to the highway in *Strate* by claiming the Blackfeet Nation had similarly consented to the right-of-way grant by treaty.[104] To conclude the "alienated land" analogy, the court noted that the public had unrestricted access to both U.S. Highway 2 and the North Dakota highway in *Strate*.[105] The Ninth Circuit thus concluded the analogy by stating:

> [T]his case mirrors the case of *Strate* almost precisely: it was an automobile accident between two individuals on a United States highway designed, built, and maintained by the State of Montana, with no statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway. The tribe had consented to construction of the road to which the general public had unlimited access.[106]

The court then settled the major factual dispute in the case by upholding the U.S. District Court's finding that the accident had occurred on the right-of-way of the highway.[107]

Although *Strate* "commanded" the jurisdictional analysis, the court did grant cursory consideration to the applicability of the *Montana* rule exceptions whereby the tribal court might still have jurisdiction over the dispute.[108] Since the defendants had clearly not entered into any consensual relationship with the tribe, the court focused on the second *Montana* exception. The issue for the court thus became whether "a traffic accident injuring a tribal member sufficiently affects the economic security, political integrity, or health and welfare of the tribe, thus satisfying the second *Montana* exception."[109]

Here again, the court devoutly followed *Strate* in rendering a literal interpretation of what conduct "affects" the tribe. The court reiterated Justice Ginsburg's concession in *Strate* that a careless driver on a reservation "endanger[s] all in the vicinity, and surely jeopardize[s] the safety of tribal members," but found that this threat alone is insufficient tribal impact to warrant tribal civil jurisdiction under the exception.[110] The Ninth Circuit found the availability of "plain, speedy, and adequate remedies" in

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103. *Id.* at 814.

104. *Id.* (citing Treaty with the Blackfeet Nation, October 17, 1855, U.S.-Blackfeet Nation, art. 8, 11 Stat. 867, wherein the tribe did "consent and agree" that "the United States may . . . construct roads of every description" through tribal lands).

105. *Id.*

106. *Id.*

107. *Id.*, *see supra* notes 51-53 and accompanying text.

108. *Id.* at 814-15 (citing *Strate*, 520 U.S. at 456-59).

109. *Id.* at 814.

110. *Id.*

state or federal courts obviated the need for tribal remedies for the acts of non-member tortfeasors.[111]

V. CRITIQUE OF THE NINTH CIRCUIT'S DECISION

Although the Ninth Circuit's decision in *Wilson v. Marchington* strictly adhered to the Supreme Court's *Strate* holding, it is nonetheless a highly questionable application of that rule. At the very least, the court should have confined the *Strate* holding to its unique facts—a tort claim arising on a highway between non-Indian parties. However, by expanding the *Strate* rule to the facts of *Wilson*, the Ninth Circuit has struck a blow at tribal self-governance and sovereignty by denying tribal court jurisdiction over a reservation-based action brought by a tribal member.

This section begins with a brief examination of the comity-based analysis for enforcing tribal court judgments and a summation of the reconcilable jurisdictional rules of *Strate v. A-1 Contractors, Williams v. Lee,* and their progeny. More importantly, this section proceeds to question the application of the *Strate* and *Montana* rules to *Wilson's* distinguishable set of facts. It then questions the Ninth Circuit's finding that U.S. Highway 2 on the Blackfeet Reservation was "similar in all relevant aspects to the highway in *Strate*." Next, the Ninth Circuit's finding that Wilson's injury lacked sufficient impact on tribal health and welfare to warrant jurisdiction under *Montana*'s second exception is challenged. Finally, this section looks to *Strate's* first basis for the exercise of tribal jurisdiction over a non-Indian, i.e., whether Wilson could have claimed there were statutory grounds for the Blackfeet Tribal Court's retention of jurisdiction over this dispute.

A. The Framework for Enforcing Tribal Judgments

Although many see the extension of full faith and credit as the solution to the debate over tribal jurisdiction,[112] the court's rejection of Wilson's argument is not without support.[113] While the policy arguments for such an extension are strong, the *Wilson* court properly deferred to Congress on this matter.[114] Furthermore, placing tribal courts in the same

111. *Id.* at 815.

112. *See, e.g.*, Diana B. Garoznik, *Full Reciprocity for Tribal Courts From a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 EMORY L.J. 723 (1996); *but see* Gordon K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1414 (1985) (providing a good discussion of opposition to full faith and credit enforcement; noting perceptions of tribal courts' lack of competence, inadequate appellate procedure, and procedural irregularities).

113. *See Wilson*, 127 F.3d at 808-09; *see also* 28 U.S.C. § 1738 (1994) (providing full faith and credit should be applied to the acts of "states, territories and possessions").

114. *See* COHEN, *supra* note 1, at 384-85; Garoznik, *supra* note 112, at 741-44 (noting congres-

position as state or territorial courts seems to lend itself to a further erosion of tribal sovereignty and judicial independence. So despite its many weaknesses,[115] comity remains the federal courts' accepted analysis for granting recognition and enforcement of tribal court judgments.[116] That the tribal court had personal and subject matter jurisdiction is a mandatory prerequisite to enforcement.[117]

The specific rule that emerges from *Strate* is that a tribe presumptively lacks jurisdiction over suits brought by non-members against non-members for torts committed on alienated lands, unless: 1) there is statutory authorization for tribal jurisdiction, or 2) the non-member had entered a consensual relationship with the wronged party, or 3) the non-member's acts had a demonstrably serious impact on the political integrity, economic security, or health and welfare of the collective tribe.[118] If, however, the *Strate* rule is confined to application on similar facts, as its narrow framing of the issue would dictate,[119] there is no conflict with the established rule that a tribe can exercise jurisdiction over a non-member for a tort committed upon a tribal member within Indian country.[120]

The Ninth Circuit, therefore, could have easily distinguished *Wilson* from *Strate* on the basis of Mary Jane Wilson's status as an enrolled member of the Blackfeet Tribe,[121] thus upholding the established jurisdictional rule of *Williams v. Lee* and confining the *Strate* rule to disputes between non-Indians. Instead, the court ignored the fact that Wilson's tribal membership distinguished her from Gisela Fredericks, the plaintiff in *Strate*,[122] and endowed her with the something "more"[123] which the

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sional extension of full faith and credit on ad hoc basis as evidencing Congress's intent to limit broader application).

115. *See* Wright, *supra* note 112, at 1410-11 (noting that comity is discretionary, inconsistent in application, and is not available as a matter of right).

116. *Wilson*, 127 F.3d at 809.

117. *Id.* at 810; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1986).

118. *See Wilson*, 127 F.3d at 813-15.

119. *See Strate*, 520 U.S. at 443 (revealing a fact specific framing of the issue which emphasized that neither party was a member of the tribe).

120. *See Williams*, 358 U.S. at 223; *Iowa Mutual*, 480 U.S. at 18; *National Farmers Union*, 471 U.S. at 856-57.

121. *Compare Strate*, 520 U.S. at 443 (establishing plaintiff Fredericks, a widow of a tribal member and mother of five adult children who were tribal members, was not herself a member).

122. *Compare Wilson* with Montana v. Bremner, 971 F. Supp. 436, 438 (D. Mont. 1997) (finding injury to a tribal member directly affected tribal welfare in a way it could not have in *Strate*, where the injured party was a nonmember, thus bringing the action under *Montana's* second exception); *but see* Austin's Express, Inc. v. Arneson, 996 F. Supp. 1269, 1272 (D. Mont. 1998) (following *Wilson's* reading of *Montana* and *Strate* in denying Crow Tribal Court jurisdiction over tort action arising from death of tribal member struck by nonmember's truck on the right of way to Interstate 90 within reservation boundaries).

123. *Wilson*, 127 F.3d at 814 (Justice Ginsburg observed that "those who drive carelessly . . .

court suggested that she needed–a demonstrable tribal impact–to warrant jurisdiction under *Montana's* second exception.

B. The Indian Lands Question

Despite the Ninth Circuit's pronouncement that U.S. Highway 2 was "similar in all relevant aspects to the highway in *Strate*,"[124] the highways are arguably distinguishable. In fact, Wilson's claim that the tribal court had jurisdiction was largely based either on the premise that the accident occurred off of the highway on Indian land, or in the alternative, that the highway on the Blackfeet Reservation was not alienated land.[125] The question is critical to the jurisdictional analysis, yet because the tribal courts reasonably presumed Wilson's tribal membership sufficient to warrant jurisdiction, the courts below conducted only a superficial analysis of the question.

Historically, Indian judicial and substantive law exclusively applied on all land, whether alienated or not, within a reservation's boundaries.[126] In fact the statutory definition of "Indian country" does not distinguish land by ownership or use, but rather includes "all land within the limits of any reservation . . . including rights-of-way running through the reservation."[127] Congress's purpose in so broadly defining Indian country was to create one jurisdictional unit, thus avoiding "an impractical pattern of checkerboard jurisdiction" requiring a "search of tract books in order to determine jurisdiction."[128] Yet despite the clear statutory language that rights-of-way remain a part of Indian country, the Ninth Circuit has treated a statutory taking of a highway easement in *Wilson*[129] the same as a voluntary alienation of the land for just compensation, as was the case in

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jeopardize the safety of all tribal members" while cautioning that "if Montana's second exception requires no more, the exception would severely shrink the rule.") (quoting *Strate*, 520 U.S. at 457-58).

124. *Id.* at 813.

125. Appellee's Opening Brief to 9th Cir. at 16-18, *Wilson* (No. 96-35145); Appellee's Supplemental Brief Regarding Strate v. A-1 Contractors at 3-11, *Wilson* (No. 96-35145). The Supreme Court issued the *Strate* opinion while Wilson's case was on appeal to the Ninth Circuit. Despite the presence of the *Strate* holding, counsel for Wilson reiterated the non-alienated land arguments mentioned above, rather than addressing the requirements of the *Strate* rule. While Wilson argued effectively to distinguish her factual case from *Strate*, that argument failed.

126. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 11.19 (Lawyer's ed. 1984).

127. 18 U.S.C. § 1151 (1994). Though a criminal statute, 18 U.S.C. § 1151 also applies to civil actions. *See* DeCoteau v. District County Ct., 420 U.S. 425, n.2 (1975); *see generally* COHEN, *supra* note 1, at 27-47; *but see* 18 U.S.C. §§ 1154(c) & 1156 (1994) (excluding rights of way from Indian country in sections governing dispensation and possession of alcohol).

128. *See* SCOLES, *supra* note 126, n.2 (citing Seymour v. Superintendent of Wash. Penitentiary, 368 U.S. 351, 358 (1962)).

129. *Wilson*, 127 F.3d at 813-14 (citing 25 U.S.C. § 311 which authorized the Secretary of the Interior to grant permission to state authorities for the opening and establishment of public highways through any Indian reservation).

Strate.[130] Neither the *Strate* nor *Wilson* courts even considered whether the tribes in either case had conveyed, or surrendered, a possessory interest in their lands or merely a right of passage. Instead, these courts have relied on an unusual construction of property law aligning the right-of-way with "land alienated to non-indians"[131] to divest tribes of their traditional geography-based jurisdiction over Indian country.[132] Without the convenience of this strained construction of alienation, the courts' *Montana* analyses simply would not apply.

Although the land beneath U.S. Highway 2 had been taken for a right-of-way, it was still arguably tribal land.[133] Even the *Strate* Court recognized "that tribes retain considerable control over nonmember conduct on tribal land."[134] Thus, if the U.S. Highway 2 right-of-way is merely an easement on tribal land, as Wilson argued, jurisdiction of a tort suit between an Indian and a non-Indian arising thereon presumptively remains with the tribal court.[135]

The Ninth Circuit, however, has chosen to view a statutory taking of a right-of-way as it would a consensual alienation of a possessory interest in the land. The court's conception of alienation makes for reckless property law. By emphasizing the restraint on the Tribe's ability to exclude travelers from the right-of-way,[136] the court was able to equate a grant of a right-of-way to an alienation in fee. Thus, if the Secretary of the Interior takes a right-of-way for a highway in Indian country, the tribe cannot restrict public access; and if the tribe cannot restrict public access, they cannot exercise jurisdiction over non-members, even for acts on tribal land. This rationale is not only circular and self-serving, it is an overt assault on tribal sovereignty.

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130. *Strate*, 520 U.S. at 454-57 (compare the consensual statutory grant with compensation pursuant to 25 U.S.C. § 323-28 to the taking of a right of way pursuant to 25 U.S.C. § 311 in *Wilson* which does not require tribal consent nor compensation).

131. *Strate*, 520 U.S. at 454.

132. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

133. Under generally established rules of property law governing highway rights of way, the public merely acquires an easement of passage with the fee title to the land beneath the right of way remaining in the landowner. *See, e.g.*, Harris v. Elliot, 35 U.S. (10 Pet.) 25 (1836); Bailey v. Ravalli County, 653 P.2d 139 (Mont. 1982).

134. *Strate*, 520 U.S. at 454.

135. *See* COHEN, *supra* note 1, at 257; *see also Montana*, 450 U.S. at 557 (upholding tribal regulatory jurisdiction over non-members on tribal land).

136. *See* COHEN, *supra* note 1, at 252; *see also* South Dakota v. Bourland, 508 U.S. 679, 688-89 (1993) (emphasizing tribe's ability to exclude non-members is a pivotal factor in exercise of regulatory jurisdiction over alienated lands).

C. Applicability of the Second *Montana* Exception

By ruling that U.S. Highway 2 lay on the equivalent of alienated land, the court left Wilson but two options to validate the tribal court's jurisdiction over her claim. Since no consensual relationship existed, there either had to be statutory grounds for jurisdiction or a demonstrably serious impact on the political integrity, economic security, or health and welfare of the tribe.

Yet from the rules laid down in *Strate* and *Wilson*, we can surmise that nothing short of a cataclysmic event will satisfy the second Montana exception. Justice Ginsburg's pronouncement in *Strate* that "those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members,"[137] but do not have a significant impact on tribal health and welfare, is at best incongruous. At worst, it is a statement of extraordinary cultural myopia and insensitivity.

Justice Ginsburg's failure to detect a direct effect on tribal health and welfare ignores the unique nature of reservation social structures, and instead imposes a main-stream American perception of what effects the community. Tribal cultures are rooted in communal values where "family denotes extensive kinship networks that reach far beyond the Western nuclear family. It is a multi-generational complex of people and clan and kinship responsibilities [internal punctuation omitted]."[138] The function of tribal society as a whole relies upon this extended family structure of the clan and the interrelationships and mutual obligations which it fosters.[139] In such a culture, injury to one arguably affects the welfare of the whole by disrupting the social structure at a fundamental level. The fabric of a close-knit reservation community can be torn apart by an injury to one member with extensive kinship ties.

Justice Ginsburg's comments further overlook the dramatic impact that an accident involving one tribal member can have on the availability of health services for others in the community. The Indian Health Service (IHS), the primary source of health care in most reservation communities, is notoriously under-funded, and precious health care resources expended to care for tortious injuries compromise care for other tribal members.[140]

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137. *Strate*, 520 U.S. at 457-58.

138. Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 5 (1998-99) (citing VINE DELORIA, INDIAN EDUCATION IN AMERICA 22 (1991)).

139. *Id.* at 6.

140. *See, e.g.*, William Boyum, *Health Care: An Overview of the Indian Health Service*, 14 AM. INDIAN L. REV. 241, 253-63 (1990) (observing that fixed funding for reservation health care often results in shortages and the inability of IHS to offer a full range of services which provide needed care

Since IHS funds are disbursed to reservations in fixed annual allocations, a severe injury to one tribal member can have far-reaching consequences on availability of health care for the rest of the tribe.[141] Quite simply, if one tribal member suffers injuries that drain a Tribe's IHS budget, other tribal members are rationed care, or forced to go without.

Justice Ginsburg also neglected a Tribe's interest in hearing claims arising from automobile accidents within the reservation. Indians have historically experienced a death rate from accidents over three times that of the nation as a whole.[142] With such an alarmingly high mortality rate from accidents, a tribe certainly has a valid interest in governing the conduct of non-members that might further add to that toll.

Yet if the court defines tribal impact from a detached Western perspective, it can find that conduct which endangers and injures tribal members does not affect the tribe. The absurdity is all too apparent. Cultural ignorance is not a prerequisite of comity, and in fact is antithetical to a doctrine based on respect for another's culture.

The court's fears that applying *Montana's* second exception to the facts of the Wilson and Marchington accident "would severely shrink the rule"[143] has effectively eliminated the exception. The result *is* a "shrinking" of the rule—the rule that a tribe can provide its members a remedy against tortious conduct by a non-member. The rule that emerges is that a tribe can no longer govern the conduct of non-Indian tortfeasors when their torts are committed on public highways.[144] Tribes are thus denied the deterrent effect which enforcement of tort judgments has on threats to the health and safety of members. This obviously infringes on the interest tribes have in protecting its members by extending its laws to non-members and thus diminishes the Tribe's sovereignty itself.[145]

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to many members).

141. *See, e.g.*, Judith Nygren, *Council to Address Issues Facing Indians Health Care Among Priorities at National Meeting of Governors' Interstate Indian Council Conference*, OMAHA WORLD HERALD, Aug. 17, 1997, at 1b (noting a forced rationing of health services on the Santee Sioux Reservation where health care funding for the reservation of 1,100 members totaled $190,000 for Contract Health Services from off-reservation care providers, and one member's medical bills amounted to $73,000).

142. Boyum, *supra* note 140, at 247 (documenting an Indian mortality rate from accidents over three times the national average during the 1970's).

143. *Wilson*, 127 F.3d at 814-15 (*citing Strate*, 520 U.S. at 458).

144. *See* Phillip Allen White, Comment, *The Tribal Exhaustion Doctrine: "Just Stay on the Good Roads, and You've Got Nothing to Worry About,"* 22 AM. INDIAN L. REV. 65 (1997).

145. *Compare with* DAVID F. CAVERS, THE CHOICE OF LAW PROCESS 139-40 (1965) (recognizing that "[o]ur territorially organized governments undertake by means of laws and regulations governing conduct . . . to safeguard the health and safety of people and property within their bounds." Cavers warns that "[t]his system of physical and financial protection would be impaired if a person who enters the territory of a state were not subject to its laws. . ..").

D. Absent a Statute or Treaty?

In its blind adherence to the Supreme Court's articulation of the *Strate* holding,[146] the Ninth Circuit followed the Court's analysis of tribal jurisdiction as established in *Montana v. United States*.[147] Even if we ignore Wilson's tribal membership and concede that the accident in *Wilson* did not sufficiently impact tribal interests, we have to question whether *Strate's* provision for tribal jurisdiction over a non-member by "statute or treaty" applies.[148]

The Ninth Circuit did not address this question for one reason; it was never raised. After the Supreme Court issued the *Strate* opinion, the parties in *Wilson* were directed to submit supplemental briefs addressing *Strate*.[149] While the *Strate* Court made plain that jurisdiction over a non-member could be retained by a provision in a treaty or statute, Wilson never presented an argument on this point.[150] Such an argument could have been raised,[151] and Wilson might have prevailed by presenting statutory grounds for tribal retention of jurisdiction.

The *Strate* Court noted that the North Dakota state court should have jurisdiction over that action because neither party was Indian and the accident occurred on a state highway. Although the Ninth Circuit used the *Strate* rule to deny Wilson a forum in the Blackfeet tribal court, A-1 Contractors conceded the propriety of tribal adjudication of disputes like Wilson's in their principal argument "that tribal jurisdiction is only present if at least one of the parties is a member of the tribe."[152] Ironically, A-1 Contractors' argument to exclude that case from tribal jurisdiction supports Wilson's case for Blackfeet tribal court jurisdiction over her tort claim. Nonetheless, the Ninth Circuit stated that tribal interests in the political integrity, economic security, or health and welfare of the tribe are not diminished if Wilson were forced to bring her claim in state or federal court.[153]

The Ninth Circuit echoed Justice Ginsburg's observation in *Strate* that "neither regulatory nor adjudicatory jurisdiction over the state highway accident is needed to preserve the right of reservation Indians to

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146. *Strate*, 520 U.S. at 442.

147. *Montana*, 450 U.S. at 544.

148. *Wilson*, 127 F.3d at 813-14 (citing *Strate*, 520 U.S. at 443); *see also Montana*, 450 U.S. at 565.

149. The parties submitted supplemental briefs on May 20, 1997.

150. *See* Appellee's Supplemental Brief Regarding Strate v. A-1 Contractors, *Wilson* (No. 96-35145) (failing to raise statutory grounds for jurisdiction).

151. *See* 25 U.S.C. § 1322 (1994) (requiring tribal consent to a state's assumption of jurisdiction over civil causes of actions to which Indians are parties).

152. A-1 Contractors v. Strate, 1992 WL 696330, at *2 (D.N.D. Sept. 17, 1992).

153. *Wilson*, 127 F.3d at 815.

make their own laws and be ruled by them . . . . Opening the Tribal Court for [the plaintiff's] optional use is not necessary to protect tribal self-government."[154] In this unquestioning adherence to *Strate*, the Ninth Circuit erred. Although in *Strate*, the North Dakota court had concurrent jurisdiction over that action, Montana courts are not similarly situated. In fact, Montana courts lack jurisdiction over civil actions involving a tribal member, like Wilson, that arise within the Blackfeet Reservation because neither the state nor the tribe have taken the necessary steps to vest jurisdiction over reservation-based tort claims in the state courts.[155]

In *Kennerly v. District Court*, the U.S. Supreme Court found that the Blackfeet Nation has not effectively consented to state assumption of concurrent civil adjudicatory jurisdiction.[156] Like *Williams v. Lee*, *Kennerly* originated as an action by a merchant to collect payment for a debt which arose on private land within the exterior boundaries of a reservation. The merchant brought the action in the Montana state district court, and the debtors, who were members of the Blackfeet tribe, moved to dismiss, claiming the state court lacked jurisdiction because the defendants were tribal members and the transactions took place on the reservation.[157] After failing on this motion in the state court, the U.S. Supreme Court accepted the Blackfeet defendants' petition for certiorari.

The Court's examination of the law governing state assumption of civil jurisdiction over disputes arising in Indian country revealed that the Blackfeet have retained this important sovereign power. The Court was faced with an unusual situation in *Kennerly*, however, because the Blackfeet Tribal Council had adopted a resolution submitting the tribal court to concurrent jurisdiction with state courts in all suits wherein the defendant is a tribal member.[158] The Montana Supreme Court relied heavily on this resolution for the assertion of state civil jurisdiction over the action.[159] The U.S. Supreme Court, however, found the resolution insufficient to divest the tribe of jurisdiction because it failed to meet the requirements for tribal consent prescribed by federal law.[160]

The federal statute governing state assumption of civil jurisdiction states:

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154. *Id.*

155. *See* Kennerly v. District Ct. of Mont., 400 U.S. 423 (1971) (holding Montana had not met the statutory requirements for state assumption of civil jurisdiction over an action arising within Indian country where an Indian is a party).

156. *Id.* at 429 (holding resolution of tribal council insufficient to vest state with jurisdiction within the Blackfeet Indian Nation).

157. *Id.* at 424.

158. *Id.* at 425 (citing Chapter 2, Civil Action, § 1 of the Blackfeet Tribal Law and Order Code, (1967)).

159. *Id.*

160. *Id.* at 429.

> The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe . . ., such measure of jurisdiction over any or all such civil causes of action arising within such Indian country . . ..[161]

The code also prescribes that tribal consent based on a majority vote of enrolled members is a prerequisite for state assumption of jurisdiction over civil actions described in this statute.[162] The *Kennerly* Court went on to find that the resolution of the tribal council conferring concurrent jurisdiction on the state court did "not comport with the explicit requirements of the Act" because the council acted unilaterally without submitting the resolution to a vote of tribal members.[163] Thus, the Court found the resolution of the Blackfeet Tribal Council was not sufficient to vest jurisdiction over a civil action to which an Indian was a party in the state courts.

Similarly, Montana has not assumed civil or criminal jurisdiction over the Blackfeet reservation by "affirmative legislative action."[164] Although Montana exercised its option under this act to acquire civil jurisdiction over Indians of the Flathead Reservation, it never took such action regarding the Blackfeet People.[165] Montana simply has not extended the state's civil jurisdiction on to the Blackfeet Reservation by legislative act, nor has the Blackfeet Tribe consented to state assumption of jurisdiction. Correspondingly, federal district courts cannot assume diversity jurisdiction if the state court lacks jurisdiction, because "federal courts sitting in diversity operate solely as adjuncts to the state court system."[166] As a result, Wilson did not have the optional forum in state court available to the petitioner in *Strate*, and, as a result, jurisdiction of her claim lies exclusively in the tribal court.

Thus, Wilson's tort claim in the tribal court system was not an "optional use" of that system as Gisela Fredericks' was in *Strate*. The Blackfeet Nation has retained civil jurisdiction over actions such as Wilson's—actions arising on the reservation with a tribal member as a party—through both the state's and tribe's failure to take the necessary

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161. 25 U.S.C. § 1322(a) (1994).

162. 25 U.S.C. § 1326 (1994) (prescribing the means by which a tribe may consent to a voluntary divestiture of its jurisdiction raises interesting questions regarding the federal government's right to thus interfere with a tribe's exercise of its sovereignty, even in an act in which the tribe would relinquish a degree of that sovereignty) .

163. *Kennerly*, 400 U.S. at 429.

164. *Id.*

165. *Id.* at 425.

166. *Iowa Mutual*, 480 U.S. at 13.

steps to extend its jurisdiction onto the Blackfeet Reservation. Although the issue was not raised,[167] there was, in fact a statutory basis for the tribe to hear this dispute in the absence of assumption of jurisdiction by the state. With this statutory authorization, the court's *Strate* analysis would have been unnecessary, and Wilson could have satisfied *Strate's* first requirement for tribal jurisdiction over this matter.[168] Unfortunately, it appears that neither the parties, nor the court, knew the applicable law.

VI. CONCLUSION

The Ninth Circuit's opinion in *Wilson v. Marchington* does not create good law. In its adherence to *Strate v. A-1 Contractors*, a case which applied *Montana v. United States'* civil regulatory jurisdiction analysis to determine civil adjudicatory jurisdiction in a suit between two non-tribal members, the Ninth Circuit wrongly extended *Strate's* fact-specific holding to deny tribal jurisdiction over civil suits arising in Indian country where an Indian is a party. The court easily could have distinguished this case from *Strate* either on the basis of Mary Jane Wilson's tribal membership or on the basis of the highway remaining a part of Indian country. Furthermore, a careful reading of the relevant law would have allowed the court to determine that the state of Montana does not have jurisdiction over the Blackfeet Reservation. Instead the Ninth Circuit has created a rule that divests tribal courts of civil jurisdiction over non-tribal members for torts committed on highways or public access lands.

In addition, the Supreme Court's ruling in *Strate* should not be further applied without carefully considering whether: 1) either of the litigants are Indian, 2) the situs of the claim is actually alienated non-Indian land, and 3) the state has assumed jurisdiction over civil actions to which Indians are parties. In the future, courts should realize that determinations of "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished [citations omitted], as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."[169]

Claimants in tribal courts, and the tribal courts themselves, should be prepared to defend the tribal court's exercise of jurisdiction over non-

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167. *See* Addendum to Appellant's Opening Brief, *Wilson* (No. 96-35145). Curiously, 25 U.S.C. § 1322 was before the court from the beginning of the appeal, although neither party asserted the statute as controlling the determination of jurisdiction in the text of their arguments.

168. *See Wilson*, 127 F.3d at 813-15 (noting absence of jurisdictional authorization by statute or treaty); *see also Strate*, 520 U.S. at 442.

169. *National Farmers Union*, 471 U.S. at 855-56.

members in federal court as a result of the *Strate* and *Wilson* decisions. No longer will the courts assume that jurisdiction over such matters presumptively lies in the tribal court forum. Tribal court claimants thus face the additional burden of establishing a record which supports the propriety of their choice of forum. Claimants can avoid the result of *Wilson* by clearly establishing that their cause of action arose on non-alienated land, or by establishing a direct effect on the tribe. Most importantly, parties in the tribal court system should familiarize themselves with the applicable federal law and be prepared to raise a statutory basis for tribal retention of jurisdiction.

The *Wilson* opinion indicates the danger of making law when neither the parties nor the court conduct the kind of "careful examination" which it demands. The kind of simplification, or disregard, of the law that denied Mary Jane Wilson her chosen forum benefits nobody. It serves only to further diminish tribal sovereignty and burden the already strained resources of state and federal court systems. The sad result of this lengthy jurisdictional battle has been to leave Mary Jane Wilson without a remedy for her injuries for over eight years. Surely, tribal members pursuing a lawful remedy within the tribal courts deserve better from the federal courts.