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STATE AND TRIBAL COURTS IN MONTANA: THE JURISDICTIONAL RELATIONSHIP

by Alan R. Parker*

*INTRODUCTION***

A member of the Blackfeet Indian Tribe neglects to pay a grocery bill for goods procured on credit from a store located within the boundaries of the reservation. After the account is assigned to a collection agency, the agency files a civil complaint in the state district court and the Indian defendant moves to dismiss. In the motion to dismiss, he alleges that the state court lacks jurisdiction over the action because of his status as a resident tribal member and the fact that the situs of the debt-transaction was within the exterior boundaries of the reservation.

These are the factual circumstances involved in a recent decision of the U.S. Supreme Court, *Kennerly v. District Court*[1]. The Montana Supreme Court had upheld the decision of the district court refusing to dismiss the action and in reversing, the U.S. Supreme Court held that absent a governing act of Congress specifically authorizing the states to take such jurisdiction, they are without authority to adjudicate disputes arising within the boundaries of an Indian reservation involving tribal members.

In denying this attempted exercise of state power, the supreme court seems to imply that the appropriate forum for such litigation is the tribal court. As will be seen, the tribal courts are a unique institution occupying an equally peculiar status in relation to the state and federal systems. Logically, *Kennerly* further poses questions as to what this jurisdictional relationship as between state and tribal courts is or ought to be. That is, recognizing the limits of federal court jurisdiction, confined as it is to diversity suits or federally related issues, proper inquiry may be made into what becomes of that broad residue of justiciable controversies related to Indian persons or property not within the scope of the federal courts.[2] While an attempt will be made to arrive at some definition of state and tribal authority in this area in view of *Kennerly* and related cases, at the outset there are inherent limits to such a decisional analysis.

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** Much of the information upon which this article is based was obtained from work with the Montana Governor's Crime Control Commission during the spring and summer of 1971, and under the direction of Judge E. Gardner Brownlee, Montana 4th Judicial District.

[1] Kennerly v. District Court, 154 Mont. 488, 466 P.2d 85 (1970), reversed, 400 U.S. 423 (1971).

[2] *See* 28 U.S.C. §§ 1331, 1332 for the statutory limits of federal court jurisdiction.

Going beyond what the cases and statutes may reveal of this jurisdictional definition, guidelines comparable to those regulating the federal-state court relationship are virtually non-existent in the state-tribal context. For example, questions of reciprocity in the execution of civil judgments and criminal extradition procedures between the tribal and state authorities are key unresolved areas indicative of the urgent need for such guidelines. Of course, without an adequate resolution of such uncertainties, neither court system is able to extend a complete remedy to aggrieved parties in many situations nor carry out the policies of its respective government to the fullest extent.

This inquiry is an attempt to define what the jurisdictional relationship between state and tribal courts is now and what it should be in view of the determinable law and governing policy considerations.

GENERAL PRINCIPLES GOVERNING THE EXERCISE OF JURISDICTION OVER INDIAN RESERVATIONS

The determination of who has jurisdiction over an Indian reservation and tribal members in any given fact situation has long been an intriguing question for students of Indian law. However, this analysis will be confined to those jurisdictional principles relevant to a focus on the state-tribal relationship. A beginning may be found in the concise summary of tribal powers in Felix Cohen's *Handbook of Federal Indian Law:*

> The whole course of judicial decision on the nature of Indian Tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses in the first instance, all the powers of any sovereign state. (2) Conquest rendered the tribe subject to legislative power of the United States and in substance terminated the external powers of sovereignty of the tribe, *i.e.*, its powers of local self-government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress.[3]

As Cohen makes clear, in the absence of authorizing Congressional legislation, the state has no authority over an Indian in Indian territory, and that which Congress has not taken to be exercised by the federal government resides in the tribes by virtue of inherent sovereignty. As exercised by the tribal courts, this jurisdiction has been explicitly recognized and defined by federal decisional law.[4] However, the authority is seen as limited to the geographical boundaries of the reservation.[5]

It is clear then that the factors of situs and person determine which

[3]COHEN, HANDBOOK OF FEDERAL INDIAN LAW, p. 398 (1958 rev. ed.).

[4]Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (10 Cir. 1956); Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).

[5]U.S. v. Earl, 17 Fed. 75 (C.C.D. Ore. 1883).

jurisdiction applies, state, tribal or federal.[6] That is, the determination depends upon whether (1) the transaction or crime occurred on or off the reservation, (2) Indians only, non-Indians only, or individuals of both classes were involved. Thus, as the analysis to this point indicates, if the transaction takes place off the reservation there is no question but that the state courts have jurisdiction regardless of the individual involved.[7] In applying this principle, the courts have affirmed the rights of an Indian party to bring suit in state court as long as the situs of the action is off the reservation.[8] It is unclear, though, whether one can effectively waive the right to bring an action in one court in perference to another. For example, if two parties make a contract on the reservation, can they waive their right to try the dispute in the tribal court in preference to state court?[9]

There is also authority for the proposition that with respect to non-Indians on the reservation, the state properly exercises jurisdiction in both criminal and civil matters.[10] However, if the non-Indian is involved with an Indian in either a criminal offense or civil transaction, jurisdiction shifts to either the federal or tribal courts.[11] To gain a better perspective of this relationship it may be helpful to reveiw briefly the relevant historical and statutory background.

In response to an earlier decision of the U.S. Supreme Court which denied the jurisdiction of the federal government over any criminal offense committed on a reservation by Indian against Indian,[12] Congress enacted the Major Crimes Act which gave the federal government authority over certain major offenses taking place on an Indian reservation.[13] This act has been amended to include nearly all alleged felonies. Subsequently, Congress authorized federal courts to apply state criminal laws to territory under federal jurisdiction.[14] Section 1152 of Title 18, U.S. Code, specifies that the law applies to Indian country except when (1) both the offender and victim are Indian, (2) the offender has already been punished by tribal law, (3) an applicable treaty has reserved exclusive jurisdiction to the Indian tribe. Consequently, in the absence of a valid assumption of jurisdiction over Indian country by a state, the federal courts have jurisdiction to the

[6]State *ex rel.* Irvine v. Dist. Court, 125 Mont. 398, 239 P.2d 272 (1951). For comment on this case *see* note, *Indians—Jurisdiction—Federal or State Courts,* 26 TEMPLE L. QUART. 93 (1952). For general analysis of these factors *see also* Davis, *Criminal Jurisdiction on Indian Reservations,* 1 ARIZ. L. REV. 63 (1959); Kane, *Jurisdiction over Indians and Indian Reservations,* 6 ARIZ. L. REV. 237 (1965).

[7]State *ex rel.* Irvine v. Dist. Court, *supra* note 6.

[8]Bonnett v. Seekins, 126 Mont. 24, 243 P.2d 317 (1952).

[9]In *Mehlin v. Ice,* 56 Fed. 75 (8th Cir. 1893), the court held that a non-Indian could waive any jurisdictional defense to bring suit in the court of the Cherokee Nation.

[10]Williams v. U.S., 327 U.S. 711 (1946); Donnally v. U.S., 228 U.S. 243 (1912); State v. Philips, 93 Mont. 277, 19 P.2d 319 (1933)

[11]Williams v. U.S., *supra* note 10; *see also* Davis, *supra* note 6.

[12]*Ex parte* Crow Dog, 109 U.S. 558 (1883).

[13]23 Stat. 385, 18 U.S.C. § 1153 (1885).

[14]The ASSIMILATIVE CRIMES ACT, 62 Stat. 686, 18 U.S.C. § 13 (1948).

limited extent described above in the criminal area, and the tribal courts are responsible for all else.

Based on a line of decisions which regard the Major Crimes Act as confirming the exclusive nature of federal authority over Indian country, the jurisdiction of federal courts has been held to extend to offenses committed between Indians and non-Indians.[15] There is some argument that such jurisdiction is not exclusive and that state courts would have the authority to try non-Indian offenders where the victims are Indians.[16] However, the weight of authority is with the former position. Thus, under the Assimilative Crimes Act, extending the application of state laws to areas of federal jurisdiction, even minor infractions between the two classes of persons would be within the scope of the federal courts.[17] Of course, as to minor infractions between Indian parties exclusively the tribe assumes residuary jurisdiction.[18] Conceivably, a problem could arise should a non-Indian violate a tribal ordinance or interfere with the application of strictly tribal authority. The analysis thus far indicates that neither the state nor the federal government would be able to punish such an offender since this would require enforcing strictly tribal law. As contended in Cohen's *Handbook* and in a position taken by the Department of Interior, the tribe also lacks clear authority over non-Indians in such a situation.[19] Additionally, the codes of most tribes in Montana follow as a model the *Federal Regulations for Courts of Indian Offenses* which explicitily limits the jurisdiction of such courts to Indians under federal supervision.[20] The discussion of tribal courts in this article will further touch upon this apparent jurisdictional vacuum.

Focusing attention once again upon the areas of civil jurisdiction, the discussion of applicable general principles can be summarized by noting the doctrines enunciated in *Kennerly* and *Williams v. Lee.*[21] These cases clearly establish that the tribe retains jurisdiction over all civil transactions taking place on the reservation except those (1) between non-Indian parties, and (2) in areas under exclusive federal supervision, *e.g.*, probating a will involving trust property, etc.[22] At least in a theoretical sense, then, the tribe retains considerable authority in the civil area.

THE STATE-TRIBAL JURISDICTIONAL RELATIONSHIP

In Montana, case law bearing directly on a definition of the state-tribal relationship is scarce. While major decisions of the state Supreme

[15]Williams v. U.S., *supra* note 10.
[16]Draper v. U.S., 164 U.S. 240 (1896); U.S. v. McBratney, 104 U.S. 621 (1881).
[17]The ASSIMILATIVE CRIMES ACT, *supra* note 14.
[18]Iron Crow v. Oglala Sioux, *supra* note 4.
[19]Cohen, *supra* note 3, at 323-324; Int. Dept. Sol. op. M-60616 (1939).
[20]25 C.F.R. § 11.2 *et seq.*
[21]Williams v. Lee, 358 U.S. 217 (1959).
[22]For an example of this type of federal supervision *see* 25 U.S.C. §§ 371-380, *Descent and Distribution: Heirs of Allottee.*

Court break down the areas of jurisdiction to be exercised by the respective governments into the same catagories just analyzed, there are no reported decisions treating the potential problems arising from an actual interaction between the state and tribal government.[23]

However, in the aftermath of the United States Supreme Court's reversal of *Kennerly,* state judges from areas bordering Indian reservations may be forced to re-evaluate the scope of their authority over Indian parties to determine the potential for interaction. Recently, a situation arose near the Fort Peck Indian Reservation in northeastern Montana which has succeeded in presenting the type of jurisdictional dilemma capable of serving as an illustration of the range of problems to be encountered. In this instance, an Indian child was found abandoned on a passenger train near the reservation. The child was turned over to county welfare authorities who then requested that the state district court conduct the dependency hearing required by state law. Before the hearing, the Indian parents appeared represented by Legal Services' attorneys and moved to dismiss the proceedings alleging that the court lacked jurisdiction to adjudicate their parental rights.[24] Both the child and parents are members of the Fort Peck Tribe and residents of the reservation. The court was then confronted with the dilemma of either releasing the child to them, or retaining jurisdiction over the child on the basis of his presence off the reservation, while having to concede its lack of authority to make any sort of permanent disposition of the case.[25]

Although the fact that the child was found off the reservation would seem to give the court authority to provide for the custody of the child, at least on a temporary expediency basis, considerable doubt remains as to the authority to do more. Faced with this consideration, a possible alternative would have been to transfer custody of the child to the Ft. Peck Tribal Court where a determination of dependency and neglect could be initiated anew. This would have the advantage of placing the case in a forum with the jurisdiction to adjudicate the rights of tribal members.[26] However, to pursue the example one step further, it may legitimately be asked what is the authority of the state court to accept a tribal court judgment should the case then be transferred back to them for placement of the child in a state child care institution. The objection that tribal courts are not courts of record is raised as

[23] *See Kennerly v. Dist. Court, supra* note 1, for cases cited in the state court's opinion.

[24] *In re* Merle Earlwin Cantrell, Montana 17th Judicial District.

[25] The implication would be that the state court is not able to terminate parental rights without personal jurisdiction over the parties. Where the parents make a special appearance to challenge the court's jurisdiction, the question would seem to be controlled by the *Kennerly* case.

[26] Although it would seem there is little doubt that a tribe potentially has authority over domestic relations of tribal members, one must look to the internal laws and ordinances of the particular tribal unit to determine if the tribal court has been given this authority by the tribal council.

grounds for refusal to accept this solution. Understandably, state courts hesitate to take action when traditionally all they have before them is a simple form of the tribal court without recourse to pleadings filed or written record of findings of law and fact.[27] In all probability, the state court would then be available for a collateral attack against the tribal court judgment and the jurisdictional dilemma would have come full circle.

Having briefly examined the context of the jurisdictional relationship in Montana in a problem situation, it may be helpful to examine relevant experiences which have arisen in neighboring states. In Washington, a state court attempted to exercise jurisdiction in a juvenile proceeding similar to that described above.[28] In this instance, the juveniles before the court were residents of Indian reservations which had not submitted themselves to state jurisdiction. The Washington Supreme Court found that it had no basis to exercise jurisdiction because the parties were residents of the reservation. Whether or not the parties were physically on the reservation at the time they came to the attention of the court would appear to be irrelevant in view of the court's opinion that residency is the decisive factor.

Closely related to the question of control over children is the regulation of domestic relations. In Arizona, a Navajo filing a habeas corpus petition before the state Supreme Court contended that the lower court was without authority to prosecute him for contempt of court for failure to make alimony payments in accordance with the court's divorce decree.[29] As a defense he asserted that he had already been divorced by the Navajo Tribal Court and that the state court was bound to give recognition to the tribal court's judgment. In agreeing with the plaintiff that the lower state court lacked jurisdiction to award the divorce decree because of the prior judgment in tribal court, the Arizona Supreme Court said:

> So far as the federal government is concerned, the validity of such divorces [by the tribal court] is conceded and we see no constitutional basis for the courts of Arizona refusing to recognize the validity of such decrees. Such recognition obviously is not made under the full faith and credit clause of article 4, section 1 of the U. S. Constitution for clearly this clause applies only between states of the union. Neither is done under the commonly accepted meaning of the term comity which presupposes two independent sovereign nations because the Navajo Tribe is not now classed as such, but, we recognize it because of the general rule, call it by whatever name you will, that a divorce, valid by the law where it is granted, is recognized as valid everywhere.[30]

Ruling on a closely related question, the Colorado Supreme Court granted a plaintiff's request for a writ of prohibition directing the lower

[27]Record keeping procedures vary with each tribal court; *see* the section on Tribal Courts, *infra*.
[28]State *ex rel.* Adams v. Superior Court, 57 Wash.2d 181, 356 P.2d 985 (1960); *see also In Re* Colwash, 57 Wash.2d 196, 356 P.2d 994 (1960).
[29]Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950).
[30]*Id.* at 386-387.

state court to dismiss a divorce action filed by the plaintiff's wife.[31] The court considered that both parties to the marriage were enrolled members of the Ute Mountain Tribe and residents of the reservation, that the marriage had been performed before a tribal judge, and that therefore tribal law governed. The court relied heavily on the principles of internal tribal sovereignty enunciated in the *Williams v. Lee* decision.[32] Apparently the fact that in both instances the parties had secured a state marriage license was of little consequence to the jurisdictional determination since, as the Arizona court reasoned, securing a license does not signify that the parties have thereby unilaterally and permanently submitted themselves to state jurisdiction for all purposes. The court pointed out that other non-Indian parties seeking a divorce do not have to go back to the state where they were married but can obtain court action wherever they happen to reside at the time, assuming other requirements are met.[33]

In Minnesota the Supreme Court has ruled that the state's lower courts do not have jurisdiction to hear a tort claim for injuries arising out of an auto accident occurring on the Red Lake Indian Reservation and involving tribal members, even though the accident occurred on a highway which the state maintained.[34] In that case, the court cited similar decisions of the South Dakota and New Mexico Supreme Courts.[35] In a prior case, Minnesota had already concluded that the Red Lake Indian "cannot be reached by state process, nor can any order or judgment following a properly instituted action be enforced against any Indian or his estate who remains within the territory embraced by the reservation."[36]

A further definition of the territorial aspect of state jurisdiction is furnished by a recent decision of the New Mexico Supreme Court. Criminal jurisdiction over an Indian accused of a traffic violation on the reservation was denied even though the violation occurred on a state highway patrolled by state law enforcement officers under an agreement with the tribe and federal government.[37] Finally, the Washington Supreme Court has acknowledged its lack of authority to enforce zoning regulations over Indian trust property located within the boundaries of an Indian reservation.[38] Because of great similarities in the federally defined legal status of Indians in the above states to the status

[31]Whyte v. District Court, 140 Colo. 334, 346 P.2d 1012 (1959); cert. denied 363 U.S. 829 (1960).
[32]Williams v. Lee, *supra* note 21.
[33]Begay v. Miller, *supra* note 29, at 387.
[34]Sigana v. Bailey, 282 Minn. 367, 164 N.W.2d 886 (1969).
[35]Smith v. Temple, 82 S.D. 560, 152 N.W.2d 547 (1967); Valdez v. Johnson, 68 N.M. 476, 362 P.2d 1004 (1951).
[36]County of Beltrami v. County of Hennepin, 264 Minn. 300, 119 N.W.2d 25 (1963). *See also State v. Bush*, 195 Minn. 413, 263 N.W. 300 (1935), denying state authority to make arrests of Indians on reservation land even on the basis of valid warrant.
[37]State v. Begay, 63 N.M. 409, 320 P.2d 1017 (1958).
[38]Snohomish County v. Seattle Disposal Company, 70 Wash.2d 668, 425 P.2d 22 (1967), cert. denied 389 U.S. 1016 (1967).

they occupy in Montana, the doctrines enunciated might be persuasive if argued in Montana courts. At the least, they may aid in hypothesizing future developments in Montana needed for a clearer definition of the jurisdictional relationship.

As this brief review of the decisional law in neighboring states has shown, however, acknowledgement of any relationship between state and tribal courts apparently exists only in the distinctive areas of marriage and divorce. Since there is little if any involvement in this area by tribal authorities in Montana, it does not appear that extensive analysis along these lines would be very helpful. In the context of the discussion so far, though, it does seem that one might legitimately ask what substantive objections stand in the way of extending the state recognition of tribal judgments that exists in this area to other types of civil judgments. That is, if this analogy could lead to a description of the grounds upon which that recognition is based it would be a step in the direction of full mutuality in the state-tribal relationship.

THE TRIBAL COURTS IN MONTANA: BACKGROUND AND ANALYSIS

At this point in the discussion a more detailed examination of the tribal courts is warranted. In *Kennerly* and the line of cases following *Williams v. Lee,* the federal courts, in denying the jurisdiction of the state over Indian matters, have directly and indirectly referred such cases back to the respective tribal courts as the appropriate forums.

Perhaps the most extensive definition of a tribal court's authority is found in *Iron Crow v. Oglala Sioux Tribe.*[39] The decision in this case relied heavily upon Cohen's *Handbook of Federal Indian Law* where the following analysis is found under the heading "Tribal Powers in the Administration of Justice":

> The powers of an Indian tribe in the administration of justice derive from the substantive powers of self-government which are legally recognized to fall within the domain of tribal sovereignty. If an Indian tribe has power to regulate the marriage relationships of its members, it necessarily has power to adjudicate, through tribunals established by itself, controversies involving such relationships. So, too, with other fields of local government in which our analysis has shown that tribal authority endures. In all these fields, the judicial powers of the tribe are co-extensive with its legislative or executive powers.
>
> The decisions of Indian tribal courts, rendered within their jurisdiction and according to the forms of law or custom recognized by the tribe, are entitled to full faith and credit in the courts of the several states.[40]

Tribal courts of the seven Indian reservations in Montana vary in quality of facilities and scope of authority exercised in accordance with the varying resources made available to them by their tribal govern-

[39]Iron Crow v. Oglala Sioux, *supra* note 4.

[40]Cohen, *supra* note 3 at 145.

ments. For example, the Flathead Tribal Court, which presently operates under concurrent state jurisdiction, is relatively inactive since most criminal and civil actions are now handled by neighboring state courts. In comparison, the Blackfeet Tribal Court carries a much heavier case load and employs three judges. Montana tribal courts are closely patterned after the organizational plan described in Title 25 of the *Code of Federal Regulations,* chapter 1, subchapter B, "Courts of Indian Offenses". Courts of Indian Offenses were established by the Interior Department pursuant to a 1915 federal statute "to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided."[41] The federal regulations go on to provide that where a tribal council establishes their own tribal court and/or code of ordinances, their actions will be controlling and will supercede the applicable federal regulations.[42] For the most part, this is what has occurred in Montana where, as tribal courts were established, the tribal councils adopted the federal regulations as a guideline and made their own modifications dictated by local needs.[43]

Tribal court judges are chosen and appointed by the tribal council with the requirements that they be resident tribal members without a criminal record. Generally, the judges are highly respected members of the tribal community but with little or no legal background. On the whole this writer has also found that they possess a deep understanding of their own people and an appreciation of their distinctive needs in the administration of a judicial system within the tribal society.

With one exception (Rocky Boys, the smallest in size and resources of all the Montana Indian tribes), tribal courts are also staffed with a clerk of the court responsible for maintaining court records and filling the role of bailiff. Normally proceedings are conducted without the presence of a licensed attorney on either side. The court's file on any given case will not include elaborate pleadings but simply a complaint written on a standard court form, possibly a written answer, and the court's own brief record of findings and judgment.[44] From interviews with various tribal judges it is clear that such an unsophisticated system

[41] 38 Stat. 586.
[42] 25 C.F.R. § 11.1 (e).
[43] Information as to the historical development and present practices and procedures of the tribal courts in Montana is available through contact with the Bureau of Indian Affairs, Washington, D.C. or the Bureau's area office located in Billings, Montana. The author also gained much information from personal study and observation in the course of a five month project involving all of the tribes in Montana. Thus, many of the observations which follow in this section are made on the basis of personal experience. Since tribal court powers and procedures are not uniform among the tribes in the state, it is difficult to make valid generalizations. Unfortunately, as this author found, even the B.I.A. does not always have adequate and up-to-date information in this area. In the absence of the publication of an authoritative and a thorough study detailing this information, verification of much of this information can only be accomplished by personal visit with the tribal officials.
[44] For example, the Flathead Tribal Court proceedings are recorded in a bound minute book with each action described in one short paragraph.

adequately serves the needs of the reservation community, with a few notable exceptions.

The 1968 Civil Rights Act requires tribal courts to observe due process and equal protection standards.[45] Included is the right to be represented by an attorney at one's own expense. For most tribal courts, the appearance of licensed attorneys has been a mixed blessing. Because the judges are not themselves attorneys and tribal court procedures are not geared to function on a level comparable with state or federal district courts, there have been inherent difficulties in accomodating attorneys. By and large, the lawyer will be unfamiliar with tribal courts and at a loss on how to proceed. Although some tribal codes incorporate federal and state law by reference where tribal law is not applicable, this is not particularly helpful since the judges are not familiar with the state and federal law the lawyer thinks applicable and the judge is naturally hesitant to rely on it.

In a very practical sense, the tribal courts are facing real difficulties in coping with the scope of issues the federal courts have recently defined as being within their jurisdiction. That is, while they have been accustomed to operating with procedures and practices comparable to a justice of the peace court on the state level, they have the responsibility to exercise authority comparable in many ways to a state or federal district court. Undefined areas in the jurisdictional relationship between state and tribal courts include: criminal extradition practices, recognition of state coourt judgments by tribal courts (and vice versa), regulation of licensed attorneys appearing before tribal courts, civil judgment limitations in tribal courts, tribal court appellate procedures, rules for juvenile proceedings in tribal courts, and determinations of applicable law in civil tort and contract actions before tribal courts.

Tribal law and order codes usually contain a jurisdictional clause slightly modified or identical to that found in the *Code of Federal Regulations (C.F.R.)*, section 11.2:

> (a) A Court of Indian Offenses shall have jurisdiction over all offenses enumerated in sections 11.38-11.87NH, when committed by any Indian, within the reservation or reservations for which the court is established . . . (b) With respect to any of the offenses enumerated in sections 11.38-11.87NH, over which Federal or State courts may have lawful jurisdiction, the jurisdiction of the Court of Indian Offenses shall be concurrent and not exclusive. It shall b the duty of the said Court of Indian Offenses to order delivery to the proper authorities of the State or Federal Government or of any other tribe or reservation, for prosecution, any offender, there to be dealt with according to law, where such authorities consent to exercise jurisdiction lawfully vested in them over the sand offender.[46]

Interviews revealed that in practice the interpretation of this clause has come to mean a perfunctory handing over of offenders to state law en-

[45] INDIAN CIVIL RIGHTS ACT, 82 Stat. 77, 25 U.S.C. §§ 1301-1341.
[46] 25 C.F.R. § 11.2.

forcement officers whenever a warrant is presented to the tribal police. Some tribes require that the state officers present the warrant to the tribal judge who then signs a release order on the individual.

This writer was able to learn of no instance where the tribe refused extradition to state authorities even though the recent Ninth Circuit case of *Merril v. Turtle* would seem to indicate that a tribe has the authority to refuse extradition if it desires.[47] Perhaps because tribal judges invariably conceive of their authority as bound by the outer limits of the reservation, there has been no attempt to establish reciprocity in extradition between the state and the tribe. If a tribal offender leaves the reservation before he is apprehended, and the offense is not one federal authorities will take cognizance of, he can be secure in the knowledge that he will not be sought by tribal authorities. Additionally, if an offender sought by state authorities wishes to question the state's jurisdiction, he is unable to do so in tribal court before extradition.[48] This is true even though there would not seem to be any authority prohibiting the tribe from allowing a habeas corpus petition or similar remedy before releasing the offender to state authorities. One difficulty is that there is no explicit provision for such a remedy in the tribal codes, and tribal judges, not unlike their state counterparts, are naturally reluctant to take such authority upon themselves.

The *CFR's* law and order code fails to set out what procedure, if any, is to be followed by the tribal courts if requested to honor a state civil judgment against a resident tribal member. Tribal law and order codes are also silent on this point and, as reported to this writer, one procedure practiced is for the county sheriffs to simply by-pass the tribal courts and serve the Indian parties with notice of the proceedings. Where a judgment is obtained, the sheriff may attempt to carry it out, or, if it is a problem of simple repossession, the collection agency may attempt to do so. The legal basis for such practices appears to be nonexistent. Nevertheless, since the Indian party usually has not thought to question this authority, and, since the jurisdiction of the state court to render judgment cannot be questioned given the fact that the basis for the action arose off the reservation, the practice continues. Even where a state court has lawful jurisdiction to hear a case and renders a valid judgment, there would still appear to be no clear authority for state agencies (or private parties, for that matter) to enter the reservation to physically carry out such a judgment against a resident tribal member.[49] Here, a logical recourse would be for the party seeking to execute the judgment to approach the tribal court requesting execution. If the tribal court satisfies itself that the party has a valid judgment, it would have authority to order execution.[50]

[47]Arizona *ex rel,* Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969).
[48]*See* discussion, *supra* note 43.
[49]*See* discussion, *supra* note 36.
[50]Cohen, *supra* note 3 at 371.

The problem is not a new one. It has been faced by the different states on the basis of the full faith and credit doctrine since courts in this country were established. The fact that the tribal court is not a state court should not necessarily operate to destroy the effect of an analogy to this relationship. If the tribal governments consider giving their courts specific authority to honor state court judgments (if this is the way the problem is approached) they would do well to request a reciprocal agreement from the state. That is, in return for agreeing to recognize judgments of the state courts, it would not seem an unreasonable condition to ask that tribal court judgments (as infrequent as they are) be, in turn, accorded recognition by the state courts. Some of the implications of this issue will be developed in the conclusion of this article.

A difficulty that has arisen since the *Kennerly* decision is the refusal of state courts to commit juveniles, judged to be delinquent by tribal courts, to the state correctional institutions in Montana.[51] Prior to *Kennerly,* even though the delinquency occurred on the reservation, state courts had been informally recognizing the authority and judgments of tribal courts in this area. Although not articulated, the logic behind such recognition seemed to be that since the tribal courts exercise a sort of custody over the juveniles, they also have authority to transfer this custody to the state court for commitment to the state facilities. In the present situation, since the tribes do not have correctional facilities of their own nor access to federal institutions (unless the offense is within a federally defined category) they are at a loss as to how to proceed. In most cases, they are attempting makeshift solutions such as increased use of probation and work release sentences for juveniles.

CONCLUSION

In an interview, a former judge of the Flathead Tribal Court expressed the view that concurrent jurisdiction, such as is presently in effect on that reservation, is really a misnomer. Because the tribal court does not have authority to try non-Indians, and its judgments are not recognized by state courts, "concurrent" is not an accurate description of the jurisdictional relationship. The Flathead Tribal Council has since discontinued the practice of executing the state court civil judgments against tribal members. Non-Indian parties, recognizing that the tribal court alone had authority to attach the "Indian monies" of tribal members, had been deluging the court with default judgments to such an extent that, as reported by the tribal judge, they felt they were merely being used as a collection agency.

Such an example may perhaps serve as an illustration of other

[51]This problem was explored in an unofficial judicial conference April 14, 1971 in Havre, Montana attended by several state district court judges, tribal judges, county attorneys, tribal attorneys, and representatives of Montana Legal Services.

than purely legal considerations which must be taken into account if meaningful development of the state and tribal court jurisdictional relationship is to take place. Not surprisingly, there is considerable resistance to such development on both sides. Generally, tribal councils lack the legal background to appreciate the fact that tribal courts must be continually supported and allowed to upgrade themselves if they are to meet their growing responsibilities. Decisions like the *Kennerly* case and statutory requirements as are found in the 1968 Indian Civil Rights Act impose a heavy burden of legal competency on the tribal courts, institutions orignally fashioned to meet different demands of different times.

The state judiciary and, conceivably, the legislature have an essential role to play if the state is to do its part in finding a place for the tribal court system in the state scheme. As the analysis of the effects of the Indian Civil Rights Act has shown, part of the initiative has shifted to the tribes in this relationship. Without a request from a tribe validated by referendum approval of all members, the state is powerless to unilaterally extend its authority over Indian territory in Montana.[52] Since none of the tribes has shown any inclination to move in this direction, it can be assumed (barring further federal intervention) that the status quo will be preserved for an appreciable period of time. The burden then would seem to rest equally on both parties to consider what alternatives exist in resolving the impasse in the state-tribal jurisdictional relationship.

One alternative may take the form of an expression of comity between the state and tribal judiciaries. Assuming there are no statutory inhibitions, the respective court systems could take the initiative of adopting judicial rules of comity mutually agreed upon, perhaps at a joint judicial conference called for this purpose. At the conference representatives could specify the types of judgments to be accorded reciprocity, the procedures required and pleadings to be employed. By use of such a device, current injustices might be remedied where parties with valid judgments are denied access to a comparable state or tribal court execution. The term "comity" is not used here in precisely the same sense as when it is applied to the relations between sovereign entities. Rather, it is by analogy to the traditional concept of comity that one would hope the lines of mutual agreement could be drawn.

If representatives of the judiciary should conclude that a more specific authorization is desirable, the comity agreement may be submitted to each government's legislative branch for ratification. Such a state-tribal statutory definition of the jurisdictional relationship need not conflict with the federal government's authority in this area. For example, should such an agreement be reached on the part of the state to honor tribal judgments which meet substantially the same require-

[52] INDIAN CIVIL RIGHTS ACT, *supra* note 45, 25 U.S.C. § 1321.

ments imposed on state courts, this would not constitute an attempt to exercise any authority over Indian territory not authorized by federal statute. Conversely, a reciprocal authorization by the tribal governments would not be an unauthorized granting of authority to the state within the scope of *Kennerly,* but rather a definition of policy well within the scope of the tribal council's authority.

A major objection to reciprocity in recognition of tribal court judgments by the state courts has been that the tribal courts are not courts of record. The implication is that this deficiency constitutes grounds for a collateral attack on such judgments once they reach the state courts. Several arguments are available to rebut this contention. Initially, one might argue that the court of record requirement is a general restriction going to the adequacy of the records kept in the tribal courts, i.e., that transcripts are not kept of all official proceedings nor pleadings filed specifying the legal basis for the complaint and answer. Presumably, the general requirement could be met over a period of time by the tribal courts initiating a record keeping procedure adequate to meet the standard. Such an effort by the tribes would in any event be an invaluable accomplishment and one that may eventually prove necessary. Alternatively, the state court could protect itself from attack on these grounds by requiring parties to make their own record in the tribal court proceedings.

In the event of reciprocity in the execution of judgments, direct appeals would, of course, remain within the appellate system of each court structure. Questions as to the adequacy of appellate procedures in the tribal court systems may be legitimately raised but are a separate issue in relation to the structure of the state-tribal scheme. Hopefully the tribes contemplate their own innovative solutions in this area. For example, one approach that has been suggested is the establishment of an independent appellate authority to function on a statewide level and to be composed of attorneys who are familiar with all applicable tribal laws and customs.

It is conceded that the considerations touched upon only skim the surface of what has been an intractable problem. It is hoped, however, that within the broad limits of the problem defined here, some steps may be taken to break the jurisdictional impasse. Perhaps in the aftermath of the *Kennerly* decision's affirmation of tribal autonomy and definition of the state's jurisdictional limits, the impetus to seek an equitable resolution will be found. For its part, Montana has the opportunity to serve as a pioneer and leader in the field of state-tribal relationships. Those tribes who respond to the needs and challenges posed also stand to benefit greatly. Inevitably their own judicial systems would be improved in the exercise of their tribal authority to its fullest potential.