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# STATE CIVIL JURISDICTION OVER TRIBAL INDIANS— A RE-EXAMINATION

**Joel E. Guthals**

## *INTRODUCTION*

After the 1971 decision of the United States Supreme Court in *Kennerly v. District Court*[1], it appeared that the extent to which Montana could exercise civil jurisdiction over transactions involving Indians and their property had been definitively settled. Within a matter of months, however, what seems to have been clear has become more uncertain than ever. This note reviews the legislative and judicial pathway leading to *Kennerly,* a subsequent Supreme Court opinion attempting to clarify the meaning of that case, and recent Montana decisions which may have set the stage for another battle over the extent to and manner in which a state may extend its civil jurisdiction over tribal Indians.

## *BACKGROUND*

### Historical Foundations

Two clauses of the United States Constitution have provided the basis for virtually all litigation concerning the extent of state power over Indians. Article I, Section 8 provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . ."[2] Additionally, Article II, Section 2 by implication gives authority to the President to make treaties with Indian tribes.[3] The question of whether these grants of authority preclude the states from enacting statutes which regulate internal reservation affairs was first presented to the Supreme Court in 1832.

In the historic case of *Worcester v. Georgia,*[4] Chief Justice Marshall ruled that Indian tribes were distinct political communities and as such could be dealt with only by the federal government. The Chief Justice held that the Indian nations possessed rights of self-government within the reservation boundaries established by federal treaties and that no state could interfere with these rights. Even the federal government was excluded from interfering with the Indians' inherent right to self-government unless permitted to do so by treaty or legislation.[5] Thus,

[1]Kennerly v. District Court, 411 U.S. 423 (1971). An excellent and comprehensive analysis of the question of state jurisdiction over tribal Indians including the *Kennerly* decision can be found in Sullivan, *State Civil Power Over Reservation Indians,* 33 Mont. L. Rev. 291-306 (1972).

[2]This is the only provision in the Constitution which specifically grants authority over Indians to a governmental branch.

[3]This authority is inferred from the President's general treaty-making pawer. *See,* McClanahan v. State Tax Commissioner of Arizona, 93 S.Ct. 1257 (1973).

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

[5]*Id.* at 559, 560.

a Georgia statute punishing "white persons" for living in the Cherokee nation without a license was declared unconstitutional.[6]

The broad principles set forth in *Worcester* did not remain unvaried. In a number of cases decided by the Supreme Court during the latter part of the nineteenth century, it was held that states might have jurisdiction over affairs on Indian reservations if the exercise of power did not directly affect Indian rights.[7] The Court, however, remained fairly consistent in adhering to the *Worcester* philosophy that state governments could not extend their power over Indian reservations in such a way that Indian rights would be infringed.[8]

The *Worcester* doctrine that Indian tribes were separate political entities was also embodied by the disclaimers found in the statehood acts and constitutions of Montana and other western states. Typically each state, as a pre-requisite to admission to the Union, had to disclaim all right, title, and jurisdiction over lands lying within the boundaries of Indian reservations. Instead, such authority was to remain exclusively with the Congress.[9] While these disclaimers have received various interpretations,[10] the policy encompassed therein seems clear—that Congress was vested with the sole power to alter the basic relationship between the Indian tribes and the federal and state governments.

In exercising this constitutional grant of power, several Congressional enactments must be noted. Carving away at an 1884 Supreme Court ruling[11] that the Fourteenth Amendment did not grant state and federal citizenship to tribal Indians, the Dawes Act of 1887[12] conferred citizenship upon certain classes of Indians who had taken up "civilized" life. Such Indians were to come within the jurisdiction of the state governments. In 1906, the Burke Act[13] redefined the time at which an Indian was to become a citizen and subject to state laws as that date on which the Indian was granted a patent in fee simple to allotted lands. An important exclusion to this grant of citizenship was found in a final provision of the Burke Act:

> . . . Provided further, that until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States; . . .[14]

[6] *Id.* at 562.

[7] *See,* Sullivan, *supra* note 1 at 296; *see also,* Langforth v. Montieth, 102 U.S. 145 (1880); Draper v. United States, 164 U.S. 240 (1896); Utah and Northern Railway v. Fisher, 116 U.S. 28 (1885).

[8] *See,* United States v. Kayama, 118 U.S. 375, 381-382 (1886).

[9] *See,* Act of February 22, 1889, ch. 180, 25 Stat. 676, 677, which concerned the admission of the northwestern states of Montana, Washington, North and South Dakota.

[10] *See,* Sullivan, *supra* note 1 at 292-294. The Montana diclaimer was given a broad interpretation in *State ex rel. McDonald v. District Court,* 159 Mont. 156, 496 P.2d 78, 81 (1972).

[11] Elk v. Wilkins, 112 U.S. 94 (1884).

[12] Act of February 8, 1887, ch. 119, § 6, 24 Stat. 388, 390.

[13] Act of May 8, 1906, ch. 2348, 34 Stat. 182, 25 U.S.C. § 349 (1964).

[14] *Id.*

In 1924, Congress granted citizenship to Indians who had not been made citizens by prior enactment.[15] But the 1924 Act contained an important proviso which appeared to carry the philosophy of *Worcester* into the twentieth century:

> . . . Provided, that the granting of citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property. . .[16]

In interpreting the affect of this series of Congressional enactments as well as the decisions of the federal courts, the Montana supreme court noted in 1926 that state jurisdiction over reservation Indians had not been significantly altered since *Worcester*:

> . . . it would be more exact to say that the United States courts have always asserted federal jurisdiction and denied state jurisdiction over Indians who are wards of the government residing within Indian reservations.[17]

### Williams, Kennerly and McClanahan

By 1953, the Congressional attitude toward exclusive federal jurisdiction over Indian tribes had changed.[18] Thus, Congress spelled out a procedure[19] whereby a state might acquire civil jurisdiction over tribal Indians who were not subject to state authority by virtue of the citizenship acts passed earlier. The Act provided that the state could assume jurisdiction by amending its statutes and/or constitution through affirmative legislative action thus indicating its intent to assume such responsbility.[20]

Five years later the State of Arizona in *Williams v. Lee*[21] attempted to assume such jurisdiction through judicial reasoning rather than by legislative fiat. The Arizona court argued that because no Act of Congress forbade them to do so, the Arizona courts could exercise jurisdiction over suits by non-Indians against tribal Indians even though the action might arise on a reservation.[22] The U.S. Supreme Court, in a unanimous opinion reversed the state decision.[23] Justice Black stated:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.[24]

[15]Act of June 2, 1924, ch. 233, 43 Stat. 253, 8 U.S.C. § 1401 (3) (1970).

[16]*Id.*

[17]State v. Big Sheep, 75 Mont. 219, 243 P. 1067, 1071 (1926).

[18]Taylor, The States and Their Indian Citizens 60-62 (1972), citing House Concurrent Resolution 108 (Aug. 1953).

[19]Act of Aug. 15, 1953, ch. 503, §§ 6, 7, 67 Stat. 590. The Act is commonly known as Public Law 280.

[20]*Id.*

[21]Williams v. Lee, 81 Ariz. 241, 319 P.2d 998 (1958).

[22]*Id.* at 1001.

[23]Williams v. Lee, 358 U.S. 217 (1959).

[24]*Id.* at 220.

The exercise of jurisdiction by the state court was held to undermine and impair the right of Indian self government recognized in the federal decisions beginning with *Worcester*. While the substantive test of "infringement" was not concrete, the Supreme Court's message seemed firm indeed: the state could exercise jurisdiction, unilaterally without Congressional approval, only to the extent that the Indian tribes' inherent rights of self government were not diminished.

In 1968, Congress provided a new procedure whereby a state might assume authority over reservation Indians.[25] Rather than continuing to allow unilateral state action, the new provision required consent by the Indian tribe over whom jurisdiction was to be exercised.[26]

The 1971 case of *Kennerly v. District Court*[27] required the Supreme Court to interpret both the 1953 and 1968 statutes. *Kennerly* involved an attempt to transfer jurisdiction by the Blackfeet Tribal Council to the State of Montana in 1967. There had been, however, no assumption of jurisdiction by the state over the tribe through affirmative legislative action. The Montana Supreme Court had ruled that the action by the tribe was sufficient.[28] But the U.S. Supreme Court disagreed. In reversing, the Court held that strict compliance with Congressional Acts was required to assume jurisdiction. Since the transaction in question[29] had occurred prior to the enactment of the 1968 law permitting transfer of jurisdiction by tribal consent, legislative action was required under the 1953 Act—and none had been taken.[30] Furthermore, the Court noted that the action by the Tribal Council was ineffective, since a tribal vote would be the only form of consent which would comply with the 1968 law.[31]

When taken together, the *Williams* and *Kennerly* decisions have been the subject of understandable confusion. It is clear from *Kennerly* that if a state wishes to acquire jurisdiction over tribal Indians in compliance with a Congressional enactment, all statutory requirements must be met. If, however, *Williams* remained viable after *Kennerly*, it could be argued that a state might assume Indian jurisdiction unilaterally without Congressional permission if the state's action did not infringe or impair the tribe's rights to govern itself. It could also be argued that the substantive test set forth in *Williams* was the underlying consideration for the assumption of jurisdiction over reservation Indians even if Congressional formulae are followed. Additionally, it was unclear whether it was of any significance that the case involved Indians solely or

[25]Civil Rights Act of 1968, § 402(a), 82 Stat. 79, 25 U.S.C. § 1322(a) (1970).
[26]*Id.*
[27]Kennerly v. District Court, *supra* note 1.
[28]Kennely v. District Court, 154 Mont. 488, 466 P.2d 85 (1970).
[29]The suit concerned the payment of a debt incurred by an Indian on the reservation to a non-Indian doing business thereon.
[30]Kennerly v. District Court, *supra* note 1 at 427
[31]*Id.* at 429.

Indians versus non-Indians. A March, 1973, decision of the U.S. Supreme Court attempted to answer some of these questions.

In *McClanahan v. State Tax Commissioner of Arizona*,[32] the Court was confronted with the issue of whether a state could tax the income of a reservation Indian. The Court unanimously held that the tax was unlawful as applied to tribal Indians because the state had no authority to impose such a tax.[33] In his review of the problem of Indian jurisdiction, Mr. Justice Marshall, speaking for the Court, wrote:

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.[34]

Discussing the applicability of *Williams*, he noted:

> . . . It must be remembered that cases applying the Williams test have dealt principally with situations involving non-Indians . . . In these situations, both the Tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The Williams test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected. [Emphasis added.][35]

Distinguishing *Kennerly* from *Williams*, Mr. Justice Marshall concluded by noting that *Kennerly* expressly rejected the notion that the state may ignore Congressional Acts and impose jurisdiction over *reservation Indians* on the grounds that its action did not infringe upon tribal rights. In attempting to secure jurisdiction over Indians on reservations, the state must follow the dictates of federal legislation and treaties. The state has no authority over matters solely involving tribal Indians unless the Congressional formulae are followed.[36]

It is in the light of this background that the most recent decisions of the Montana supreme court concerning the issue of civil jurisdiction over reservation Indians must be viewed.

## *MONTANA'S POST-McCLANAHAN DECISIONS*

### THE CASES

Three recent decisions of the Montana supreme court indicate that the question of state authority over tribal Indians remains unsettled even after the efforts of Mr. Justice Marshall in *McClanahan* to provide clarification.

In *Security State Bank v. Pierre*[37] the court faced an issue quite similar to that in *Kennerly*. The defendant, an enrolled tribal Indian,

[32]McClanahan v. State Tax Commissioner, *supra* note 3.
[33]*Id.* at 1259.
[34]*Id.* at 1261, citing UNITED STATES DEPARTMENT OF INTERIOR, FEDERAL INDIAN LAW 845 (1958).
[35]*Id.* at 1266.
[36]*Id.*
[37]Security State Bank v. Pierre, ..... Mont. ....., ..... P.2d ....., 30 St. Rep. 482 (1973).

borrowed money from a bank in an incorporated city located within the boundaries of a reservation. The bank brought suit to collect the debt. The Montana supreme court, noting the complexity of the Indian jurisdictional question, held that *Kennerly* controlled:

> . . . the State cannot exercise civil jurisdiction where it interferes with the self-government of the Flathead tribe, or impairs a right granted, reserved, or pre-empted by Congress.[38]

The court felt compelled to reject an appeal that by denying jurisdiction in such a case Indians were thus granted a right to avoid their legal responsibilities—a right not granted to non-Indians.[39] Citing *Worcester,* the court held that until the concept of tribes as separate nations is changed, it had no choice but to disallow jurisdiction.[40]

In *State ex Rel. Mary Iron Bear,*[41] however, the court appeared to initiate a slight of hand. Here the court found that the state had jurisdiction over a divorce action brought by an Indian plaintiff against an Indian defendant. The court noted in reaching its decision that the Assiniboine-Sioux Tribe had transferred jurisdiction over divorce actions to the State of Montana in 1938.[42] By construing the Montana disclaimer clause[43] to apply only to Indian rights over property, the court held that the transfer of jurisdiction was valid. The court noted that *Kennerly* was not controlling since that case had failed to consider "residual" jurisdiction left in the state over Indians after the tribe assumed self government.[44]

*McClanahan* was distinguished by relying on *McClanahan's* sister case *Mescalero Apache Tribe v. Jones.*[45] There the Court had said that in determining the application of state *revenue* laws to Indian tribes each state-tribal relationship had to be examined in detail.[46] Additionally, the Montana court noted that Indians had the right to use state courts especially when tribal courts were not exercising jurisdiction over the action in question.[47] Citing *Williams,* the court concluded that there was no interference with tribal rights and no federal law was applicable to divorce actions with which the state had to comply.[48]

[38] *Id.* at 653. Note that this is actually the *Williams* test.

[39] *Id.*

[40] *Id.*

[41] State ex rel. Mary Iron Bear v. District Court of the Fifteenth Judicial District of the State of Montana, ..... Mont. ....., ..... P.2d ....., 30 St. Rep. 482 (1973).

[42] *Id.* at 483. According to the *Kennerly* criteria, this transfer of jurisdiction is highly questionable.

[43] This construction is much narrower than the interpretation which the Montana supreme court gave the disclaimer clause in *State ex rel. McDonald v. District Court, supra,* note 10 at 81.

[44] State ex rel. Mary Iron Bear, *supra* note 41 at 487.

[45] Mescalero Apache Tribe v. Jones, 93 S.Ct. 1267 (1973).

[46] *Id.* at 1270.

[47] State ex rel. Mary Iron Bear, *supra* note 41 at 485, citing *Poafbybitty v. Skelly Oil Co.,* 390 U.S. 365 (1968).

[48] *Id.* at 488.

The court solidified its position in *Bad Horse v. Bad Horse*,[49] another case involving an Indian divorce action. In *Bad Horse* the court ruled that to deny Indians who had been married under Montana law the right to use Montana courts to dissolve such a marriage would violate the Equal Protection Clause of the United States Constitution.[50] The court held that the *Williams* infringement test was not applicable since that test by virtue of *McClanahan* applied to non-Indian questions rather than to cases involving Indian plaintiffs and defendants.[51] The court ended by stating:

> Only by throwing off the structures of Indian sovereignty can state courts enter the arena and meet the problems of the modern Indian. If Congress and the federal appellate courts have a better solution, let them come forward.[52]

A. CRITIQUE

The *Pierre* decision seems to be a consistent if not grudging application of the *Williams* interference test as restated by the U.S. Supreme Court in *McClanahan*. The case involved non-Indian and Indian rights in which both the state and the tribe had interests. Since exercise of state jurisdiction would have infringed upon the role of the tribal courts, the *Williams* test was applicable.

The *Iron Bear* and *Bad Horse* divorce cases, however, appear to depart significantly from the precedent established by the federal decisions. Both *Iron Bear* and *Bad Horse* involve Indian parties exclusively. While *McClanahan* pointed out that the *Williams* interference test was not to apply in such cases, that decision does not stand for the proposition that the state has a free hand to exercise jurisdiction. Rather, it would seem that the Supreme Court in *McClanahan* indicated that in cases which involve the rights of Indians exclusively, the state has no authority to impose its laws unless such power has been granted by Congress:

> Since appellant is an Indian and since her income is derived wholly from reservation sources her activity is totally within the sphere which relevant treaties and statutes leave for the federal government and for the Indians themselves. Appellee cites us no cases holding that this legislation may be ignored simply because tribal government has not been infringed. On the contrary, this Court expressly rejected such a position only two years ago. [Citing Kennerly.][53] [Brackets added.]

This language from *McClanahan* may be viewed narrowly as pertaining only to taxation questions. But Mr. Justice Marshall's reliance on the *Kennerly* decision, which had nothing to do with taxation, indicates that the Court was making a broader policy statement. The entire

[49] Bad Horse v. Bad Horse, ..... Mont. ....., ..... P.2d ....., 31 St. Rep. 22 (1974).
[50] *Id.* at 25, citing U. S. CONST. amend. XIV, § 1.
[51] *Id.* at 26.
[52] *Id.* at 28. A recent decision in the Tenth Circuit has leveled criticism at the doctrine of Indian sovereignty. *United States v. Mazure*, 487 F.2d 14, 19 (10th Cir. 1973).
[53] McClanahan v. State Tax Commissioner, *supra* note 3 at 1266.

line of federal law beginning with *Worcester* and including the disclaimer provisions in Montana's enabling act and the discussions in *Williams, Kennerly,* and *McClanahan* seem to be centered on the notion that where Indian rights only are involved, the state has no jurisdiction.

The jurisdictional problem presented in these cases is not one of personal jurisdiction but one of subject matter jurisdiction.[54] Tribes and their enrolled members have been treated as separate and independent from the states. Unless federal law has changed this relationship, the state has no authority to unilaterally impose its jurisdiction over the tribe or its members. If the federal law is so viewed, there is no "residual" jurisdiction in the state nor is it possible for the individual tribal member to confer jurisdiction on the state without complying with federal legislation.[55]

The Montana decisions point out that the federal cases and statutes do not say the same thing to every reader. Indeed, the decisions of the Supreme Court with regard to Indian jurisdiction are not crystalline in their clarity. If one desires, it is possible to distinguish almost every case from its forerunner or successor on the basis of factual differences as well as by real or imagined legal distinctions.

The Montana decisions raise difficult issues that deserve resolution. Where are Indians to turn if the tribal courts do not exercise jurisdiction over certain actions that involve Indian rights? Does the argument of infringement have vitality when the reservation Indian walks into the state court granting personal jurisdiction? In *Bad Horse,* the Montana supreme court has issued a challenge to the Congress or the federal courts to provide answers to these questions. In light of the issues raised and the variance which seems to exist between the rulings of the Montana courts and the Supreme Court with regard to the tests to be applied in determining when a state may have authority over reservation Indians, it is imperative that the gauntlet be taken up.

[54]In *Gourneau v. Smith,* 207 N.W.2d 256, 259 (N.D. 1973), the North Dakota supreme course has taken the position that unless the state and Indian tribes follow Congressional statutory directions, the state has no subject matter jurisdiction over tribal Indians. The court held that this lack of jurisdiction was not a denial of equal protection.

[55]*Id.*, *accord*, White Eagle v. Dorgan, 209 N.W.2d 621 (N.D. 1973).