CHOICE of LAW

In *Nevada v. Hicks*, the United States Supreme Court has made clear that "an Indian Reservation is now considered part of the territory of the State."[1] And that "State sovereignty does not end at a Reservation's borders. Thus, when State interests outside the Reservation are implicated, States may regulate the activities of Tribal members on Tribal land . . ." and, with few exceptions, States have unfettered jurisdiction over the off-Reservation activities of tribal members.[2]

Thus, the question becomes what is the extent of State and County civil regulatory authority over on-reservation activities of non-Indians and Indians. With respect to non-Indians, they fall under the complete civil authority of State and County governments. The question of State and County civil regulatory authority over the on-reservation activities of tribal members, however, is not so clearly defined. That authority will be decided on a case by case basis under the *Doctrine of Tribal Preemption*.

There are actually two branches of the *Tribal Preemption Doctrine*. The first branch involves the exercise of Congress' plenary power over tribes and their lands pursuant to the *Indian Commerce Clause.*[3] This is a constitutionally mandated power and

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[1] *Nevada v. Hicks*, 533 U.S. 353, 360-61 (2001). *Accord, Shakopee Mdewakanto Sioux Community v. City of Prior Lake, Minninesota*, 771 F.2d 1153, 1156 (8th Cir. 1985)(Reservation communities are still part of the State in which they are located and a political subdivisions of the State).

[2] *Hicks*, 533 U.S. at 362.

[3] *U.S. Constitution* Art. 1, Clause 8.

allows Congress to act by specific legislation to terminate a State's jurisdiction over tribes, or to confer upon a State jurisdiction over tribes, their lands and members.[4]

The second branch of the *Tribal Preemption Doctrine* is a tribe's right to make its own laws and to be ruled by them.[5] Under this branch, State laws that impermissibly interfere with the right of tribal self-government are deemed to be preempted. Preemption, however, is not automatic. Tribal preemption of State activities and civil regulation is limited to what is needed to protect tribal self-government and to control the tribe's internal relations, such as the power to: punish tribal offenders, determine tribal membership, regulate domestic relations amongst members, and provide for rules of inheritance.[6] Furthermore, tribal law only preempts state law under very narrow circumstances: when it is "**on-reservation activity**" AND involves "**only Indians**."[7] This second branch of the *Tribal Preemption Doctrine* is founded on the notion of tribal

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[4] *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142(1980).

[5] *Id.*

[6] *Hicks*, 533 U.S. at 360-361.

[7] *Id.* at 361 (2001).(emphasis added). *Accord, Shakopee Mdewakanto Sioux Community v. City of Prior Lake, Minnesota*, 771 F.2d 1153, 1156 (8th Cir. 1985) (Reservation communities are still part of the state in which they are located and the political subdivisions of that state). A tribes power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation is similarly limited to those situations wherein non-Indians have entered into some sort of consensual relationship with the tribe or the conduct of non-Indians "threatens or has some **direct effect** on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1980)(emphasis added).

sovereignty being more or less on a par with State sovereignty.[8]

When it comes to resolving a conflict over whether a tribe or the State has the authority to regulate the on-Reservation activities of tribal members, tribes are immune from suit in State Courts.[9] Federal Courts, however, are specifically charged with the jurisdiction to review and determine the limits of a tribal government's authority. Hence, there is no tribal immunity applicable to such actions seeking declaratory and injunctive

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[8] *See id.* at 143.

[9] Of course, the State, Counties and their officials are likewise entitled to immunity from suit in tribal court:

> The immunity from court action by individuals is a critical constituent of sovereignty, both for the Tribes and the States. It is consistent with the recognition of sovereignty that both the Tribes and the States are immune from unconsented tort actions by individuals in each others courts.

See MacArthur v. San Juan County, 391 F.Supp. 895, 1036 (D. Utah 2005). Tribal officials, however, do no always enjoy that same immunity. *See Burrell v. Armijo*, 456 F.3d 1159, 1174-75(10th Cir. 2006)(when tribal officials are alleged to have acted outside of and/or beyond the scope of their authority, they are not entitled to sovereign immunity). An Indian tribe's "sovereign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him." *Tenneco Oil Co. V. Sac & Fox Tribe of Indians*, 725 F.2d 572, 576 n.1 (10th Cir. 1984)(McKay, J. Concurring). "When a complaint alleges that the named officer defendants have acted outside the amount of authority the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." *Id* as 576. *See also Burlington N. R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 902 (9th Cir. 1991)(A tribe's immunity extends to officials "acting in their representative capacity and within the scope of their valid authority").

relief with respect to a tribe's unlawful and/or unconstitutional actions.[10] Sovereign immunity also does apply to suits filed against tribal governments or their officials seeking to enjoin the enforcement of unconstitutional tribal governmental acts.[11] "Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess."[12] A tribe's sovereign immunity does not apply in these situations because tribal courts do not have the jurisdiction to determine civil rights claims or constitutional issues, to interpret federal law or state law and/or to decide constitutional-jurisdictional issues.[13] Tribal courts do not have the jurisdiction to decide such issues because these are matters of federal and state law far beyond the tribe's internal affairs,[14] and if immunity were to be applied in this instance, then there would be no forum in which to vindicate a tribe's violation of the constitutional rights on non-tribal

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[10] *See National Farmers Union Ins. Cos. v. Crow Indian Tribe*, 471 U.S. 845, 853, (1985) (holding that "a federal court may determine . . . whether a tribal court has exceeded the lawful limits of its jurisdiction"); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Montana DOT v. King*, 191 F.3d 1108 (9th Cir. 1999); *Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1997); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

[11] *Dugan v. Rank*, 372 U.S. 609, 621-22(1983); *Kelley v. U.S.*, 69 F.3d 1503, 1507 (10th Cir. 1996); *Tenneco Oil Co. v. Sac and Fox Tribe*, 725 F.2d 572, 574 (10th Cir. 1984).

[12] *Tenneco,* 725 F.2d at 574.

[13] *Hicks*, 533 U.S. 353 (2001)(tribal courts lack subject matter jurisdiction over federal civil rights claims).

[14] *Dry Creek Lodge, Inc v. Arapahoe and Shoshone Tibes,* 623 F.2d 682, 685 (10th Cir. 1980). Tribal Courts are courts of limited jurisdiction, whose jurisdiction is no broader than that of the tribe to govern. *See Hicks*, 533 U.S. at 367.

members. In such cases, there must be a forum even if it otherwise requires overriding-disregarding tribal sovereign immunity to provide that forum, which is federal court.[15]

Moreover, in resolving conflicts between state and tribal authority, federal courts typically look to the historical relationships between the tribe, state and federal governments,[16] which is significant. It is significant because Utah's governmental history reveals a sovereignty and dominion over Indians and Indian lands that may not be enjoyed by other states or otherwise diminished by Utah's admission into the Union.

Utah has a unique history because it first existed as an independent country established beyond the territorial boundaries of the United States. Originally known as the State of Deseret, Utah was established in an area which was part of the Territory of Mexico. The land occupied by the State of Deseret did not become part of the United States until the *Treaty of Guadalupe Hidalgo* was signed, thereby ending the Mexican War. Furthermore, the dominion which the State of Deseret enjoyed over its lands and the people residing on those lands is very instructive on the issue of the State of Utah and its political subdivision's broad jurisdiction within a reservation's boundaries.

As a separate, independent nation, the State of Deseret had its own *Constitution*, and the following language from its *Preamble* reveals that the framers considered the State of Deseret to be not only a free and independent government, but to have dominion

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[15] *Dry Creek Lodge* also holds that when this exception applies, it even authorizes suits against the tribe itself. *Id.*

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

over a tremendous area of what would later become the Western United States:

> WE THE PEOPLE, Grateful to the SUPREME BEING for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of these blessings, DO ORDAIN, AND ESTABLISH A FREE AND INDEPENDENT GOVERNMENT, by the name of the STATE OF DESERET; including all the Territory of the United States, within the following boundaries, to wit: Commencing at 33°, North Latitude where it crosses the 108°, Longitude, west of Greenwich; thence running South and West to the Northern boundary of Mexico, thence West to, and down the Main Channel of the Gila River, (or the Northern line of Mexico,) and on the Northern boundary of the Lower California to the Pacific Ocean; thence along the Coast North Westerly to the 118°, 30' of west Longitude; Thence North to where said line intersects the dividing ridge of the Sierra Nevada Mountains to the dividing range of the Mountains, that separate the Waters flowing into the Columbia River, from the Waters running into the Great Basin; thence Easterly along the dividing range of Mountains that separate said waters flowing into the Columbia river on the North, from the waters flowing into the Great Basin on the South, to the summit of the Wind River chain of mountains; thence South East and South by the dividing range of Mountains that separate the waters flowing into the Gulf of Mexico, from the waters flowing into the Gulf of California, to the place of BEGINNING; as set forth in a map drawn by Charles Preuss, and published by order of the Senate of the United States, in 1848.[17]

The land area over which the State of Deseret claimed dominion included not only the entire States of Utah and Nevada, but one-third or more of the States of Arizona, Colorado and New Mexico, as well as all of what is now Southern California.[18]

It is also important to note that there is no reference in the *Constitution* of the State of Deseret to "**Indians**" or "**Indian lands**." But it is perhaps more important to note that

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[17] *Deseret Constitution Preamble*.

[18] *Deseret Constitution Preamble*.

the lands and people falling within the jurisdiction of the State of Deseret included Indian lands and their Indian residents and that the *Constitution* of the State of Deseret established legislative, executive and judicial branches to govern all lands and people within the State of Deseret, including Indians. In other words, the *Constitution* of the State of Deseret provided for its governance and dominion over all people and lands lying within its boundaries. Moreover, the State of Deseret's dominion over tribal governments did not change when it became a United States territory.

In 1850, Utah officially became a territory of the United States of America. The *Organic Act of the Territory of Utah* established the Utah Territory and, like the *Constitution* of the State of Deseret, does not reference either "Indians" or "Indian lands."[19] Instead, it established the boundaries of the Utah Territory, changed the name from State of Deseret to "Utah," created the Utah Territorial Government and vested it with jurisdiction over **all** people and lands within the Utah Territory. The land mass of the Utah Territory was much smaller than its former State of Deseret and included what would become the States of Utah and Nevada as well as the western half of Colorado. Within this territory were Indian lands and Indian people, including the Ute Tribe, over whom the Utah Territorial Government could exercise jurisdiction.

The Utah *Organic Acts*, with its recognition of the Utah Territorial Government's dominion and governance over all persons residing within the Utah Territory, is

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[19] *See* 9 *Stat.* 453, Ch. 51.

significant when compared with the *Organic Acts* for other western states. For example, the *Organic Act* creating the Montana Territory placed the following limitation upon that Territorial Government's jurisdiction over Indians and/or their lands:

> That nothing in this Act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians or to include any territory which by treaty within the Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be accepted out of the boundaries and constitute no part of the territory of Montana, until said tribes shall signify their assent to the president of the United States to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, or property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this Act had never passed.[20]

With the creation of the Montana Territory, Congress reserved to itself jurisdiction over Tribes and Tribal lands; whereas Utah's *Organic Act*, on the other hand, did not place such limitations/restrictions on the Utah Territorial Government's jurisdiction over Indians or Indian lands. The Utah Territory was vested with complete jurisdiction over tribes and tribal lands, and that did not change with Utah statehood.

Utah became part of the United States in 1896. In order to obtain admission to the Union, the Utah *Constitution* had to "disclaim all right and title . . . to all lands lying

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[20] 12 *Stat.* 85, Ch. 95, §1.(emphasis added).

within said limits owned or held by any Indian or Indian tribe, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."[21] But "absolute jurisdiction" is not the same as "exclusive jurisdiction and control."[22] This language was merely an acknowledgment by the State of Utah of Congress's plenary power over tribes and tribal lands, it was not a divestiture of the jurisdiction over tribes and tribal lands that had passed from the Utah Territorial Government to the State of Utah.[23]

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[21] *Utah Constitution, Art. III, Section 2*.

[22] *See Organized Village of Kake v. Eagan,* 369 U.S. 60, 67 (1962)(Construing identical language in the *Alaska Statehood Act*).

[23] *See id.*