



The Navajo Nation: A Three-Ingredient Mix

Dale Beck Furnish¹

Readers are reminded that this work is protected by copyright. While they are free to use the ideas expressed in it, they may not copy, distribute or publish the work or part of it, in any form, printed, electronic or otherwise, except for reasonable quoting, clearly indicating the source. Readers are permitted to make copies, electronically or printed, for personal and classroom use.

Introduction: Navajo Nation Law, a Mix of Consensual (Indigenous) and Adversary (Common Law) Systems

The Navajo Nation has a mixed judicial system. That is, the Navajo Nation courts follow general American models of practice, procedure and substantive rules while retaining traditional Navajo substantive law and procedure.

Reservation Business Services v. Albert, 7 NAVAJO RPTR.
123, 126 (1995)(Yazzie, C.J.).

¹ Professor Emeritus, Sandra Day O'Connor College of Law, Arizona State University. This paper is appearing in the Journal of Comparative Law (JCL, ISSN 1477-0814) and is published in the EJCL with the permission of the JCL Editorial Board. No one should be fooled into thinking that I am an Indian Law scholar, nor that I have pretensions in that direction. Nonetheless, there is a certain fascination. As a boy, I read everything that I could get my hands on by James Willard Schultz and, later, by Ross Santee. Today, I read everything that Tony Hillerman writes. I live in a state where Indians and Indian Law constantly make their presence felt, and for parts of four decades, have taught at the law school with the most active Indian Law program in the United States, where Indian law students are a significant part of the student body. I long ago incorporated a section in my Creditor-Debtor teaching materials on the impact of Indian Country on that area of the law. *See* Dale Beck Furnish, **CREDITOR/DEBTOR RELATIONS: CASES & MATERIALS** 354-416 (14th ed. 2003).

For the current effort, I have relied on true Indian scholars, specifically on the published scholarship of, among others, colleagues like Judge William C. Canby, Jr., Robert N. Clinton, Rebecca Tsosie and Kevin Gover, to a degree that will be obvious to anyone who knows their work. What may be less obvious is the debt that I owe to two research assistants, Deborah Ann Begay and Cherie Espinosa, both members of the Navajo Nation and law students at the Sandra Day O'Connor College of Law at Arizona State University. Their sure sense of their traditions and their Navajo inheritance, combined with their increasing knowledge of the law, have guided me to many revelations and insights.

My purpose here is to organize existing scholarship from a new perspective, perhaps most accurately characterized as viewing Navajo Law through a comparative lawyer's eyes, after long contacts in Latin America and a commitment to the possibilities of working economic and social change through the reform of commercial laws and free trade agreements. Commercial law reform often creates mixed jurisdictions, and free trade agreements raise intriguing questions of sovereignty.

The Navajo Nation, or *Diné*,² has contrived to combine in a single legal system a working mixture of indigenous consensual, or horizontal, and Common Law adversary, or vertical, legal systems. The Navajo Nation's mixed jurisdiction—ultimately answerable to traditional, pre-Columbian Navajo law—incorporates two other legal systems that define its limits and affect its tribal members. The other two systems are federal Indian Law and American Law.

Federal Indian Law consists of case decisions by the Supreme Court of the United States, legislation by the Congress and administrative actions by the Executive Branch. The federal Indian Law of the United States creates a top-down regime, a framework from which tribal law depends. It enables and defines tribal systems, while reserving plenary authority to supplant them. If Congress had so chosen, it might have completed the framework with a full structure, imposing on Indians an entire normative system and courts to apply it. In purest doctrine, it still has the power to do so. In practice and in fact, Congress has left much of tribal government and laws to tribal self-determination. At the beginning of the 21st century, that approach seems permanently stitched into the fabric of the United States federal system.

Federal Indian Law has not, however, gone out of its way to support the Navajo Nation's—or any other tribe's—emergence as an independent legal system. The Navajo Nation has achieved success in forging an autochthonous legal system not because it always was encouraged to do so by the federal government, but because it has been astute in exploiting the opportunities presented by federal Indian Law.

The second extraneous legal system that forms a part of the Navajo Nation's mixed jurisdiction is American Law, the general legal structure of procedural rules and substantive laws that have developed within the United States. The federal system divides the nation into 50 states, the District of Columbia, and various territories, all (with the exceptions of Louisiana and Puerto Rico, an island whose exact legal status remains an enigma) of which share a common legal heritage. The hallmark of the system—the basis for the term “American Law”—is its homogeneity, consummated in the first half of the 20th century³ by such events as the advent of the American Law Institute and its Restatements of American Law;⁴ the decision in *Erie v. Tompkins*, abolishing “federal general common law” in favor of that of the states;⁵ and the adoption of uniform rules of procedure and evidence in federal and state courts.⁶ Today, United States jurists routinely approach a legal topic by analyzing case law and statutes from all states as if they were one body of law, and a series of authoritative Restatements drafted by the American Law Institute sets out the “American Law” of Contracts, Property, Torts, Trusts, Conflicts and most other major fields of the law.

² The Navajo people's term for itself, *Diné* means simply “the people.” *Diné* does not mean the Navajo government, any more than “the public” means “the government.” Further, while the Navajo people constitute a tribe, their own term for their collective membership is the “Navajo Nation.”

³ See Lawrence Friedman, *HISTORY OF AMERICAN LAW* (1st ed. 1973; 3rd ed. 2005); *AMERICAN LAW IN THE 20TH CENTURY* (2002).

⁴ See Willis Reese, “Unification of Common Law Rules: the Role of the American Law Institute,” in Hazard & Wagner (eds.), *LEGAL THOUGHT IN THE UNITED STATES OF AMERICA UNDER CONTEMPORARY PRESSURES* 171 (1970).

⁵ 304 U.S. 64, 78 (1938).

⁶ Under authority of an act of Congress of June 19, 1934, today at 28 U.S.C. §§ 2072-2075. See Clark and Moore, “A New Federal Civil Procedure,” 44 *YALE L.J.* 387 (1935).

The Navajo Nation has assimilated American Law into its court procedures and into its substantive laws. An American lawyer attending a hearing in a Navajo trial or appellate court will feel at home, gratified to observe the application of familiar rules of procedure and evidence in pursuit of familiar substantive issues defined by familiar statutes and doctrines, giving rise to a system of reported case law, all in English. American Law provides the Navajo Nation a structural paradigm for its mixed jurisdiction, then. The Navajo Nation adds to that paradigm its own component of Navajo traditional sources, or Navajo Common Law, ultimately affecting both procedural and substantive law in ways quite surprising to any lawyer steeped in American Law ways. Pre-Columbian principles of Navajo Law have not disappeared. They form the vital, preemptive foundation of Navajo law today; the bottom-up source of its legal system.

The combination of all three elements—federal Indian Law, American Law and Navajo traditional law—in a single system under the aegis of the Navajo Nation makes a fascinating success story. Navajo law functions as an effective, functioning interface between cultures that manifest quite different attitudes, activities and organizations at the most fundamental level of their legal culture. The U.S. legal system today is characterized by its concern for the rights of the individual and its vindication of diversity at the expense of collective rights and responsibility to the community. Under American Law’s constitutional form, the individual makes a social contract with society: to exist within it, in exchange for society’s guaranty that s/he shall enjoy a high degree of autonomy from the state and any societal consensus regarding one’s own beliefs, attitudes and life style.⁷

In fact, the American approach—in which Europe, or at least parts of it, may join—stands as iconoclastic when viewed against the broader humanity and the sweep of history. In most of the world, an individual’s personal identity depends on clan, kinship, family and religion. That individual’s rights and responsibilities derive from, are defined by and exist only within that communal or social framework, not separate from it or counter to it. Ironically, the American legal culture, dedicated to tolerance and diversity, often has trouble finding points of reference within its system by which to apply societal and/or communal approaches to issues. The Navajo Nation and its laws have far less difficulty dealing with the group, or consensus, views. Within the Navajo context, any treatment of individual claims includes tribal concerns from the outset, with deference to the latter.⁸

The Navajo Nation and its legal system tend to perceive individual interests where the American legal culture perceives individual rights. The individual’s interests then exist within and as defined by group interests.⁹ Navajo law assumes as part of its fundamental task the

⁷ This insight is not new. *See, e.g.*, Mary Ann Glendon, **RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE** 11-17 (1991); Rebecca Tsosie, “*Separate Sovereigns, Civil Rights and the Scared Text: The Legacy of Justice Thurgood Marshall’s Indian Law Jurisprudence*,” 26 **ARIZ.ST.L.J.** 495, 531-32 (1994).

⁸ This is not to say that there is no friction between generations or that the blandishments of the modern world have made no inroads in the Navajo Nation. As in most societies today, the Navajo Nation has experienced a generational shift toward more overt assertion of individual rights and movement away from traditional life styles. In 1968, the Indian Civil Rights Act (“ICRA”) imposed most of the constitutional Bill of Rights guaranties, with concomitant emphasis on individual rights, into Navajo law. *See* ICRA, 25 U.S.C. § 1302(1)-(6), (8)-(10). The advent of ICRA and the rights discussions that it engenders, among other factors, have influenced this shift. The shift may manifest itself in younger Navajo members who prefer not to use tribal courts, with their Navajo language, traditional attitudes and law sources, nor to live on the Reservation.

⁹ One indication of this most basic distinction in perception may be the Navajo Nation’s repeated rejection of a Constitution, in 1937, in 1953 and in 1968. *See* David E. Wilkins, **DINÉ BIBEEHAZ’AANII: A HANDBOOK OF NAVAJO GOVERNMENT** 51-52, 58-59 (Navajo Community College Press, 1987). Despite the past efforts to create a

necessity to mediate between the individual and the tribe in ways that maintain harmony within the group, vindicating valid individual interests by resolving them within group consensus. One set of interests (individual) cannot exist without the other (communal). Thus communal interests provide the well-spring for those of the individual, who cannot stray too far from his or her obligations to the community in conduct and attitude. Tension exists between the individual and the community, but it is the law's task to reconcile the individual's interests and concerns to those of the community, and vice versa, so as to maintain harmony between them.

Summary

The Navajo Nation and its mixed jurisdiction provide a well-developed legal system, serving a vibrant community with a significant land base¹⁰ and a sophisticated system of tradition and belief. The Navajo Nation has never lost its sense of itself. It can and does assert a world view different from that held by the larger society with which it shares geography and the United States' federal system, and it affirms that world view at the most fundamental level of its legal culture.

The *Diné*'s legal system is not a prototype, although other tribes might well consider it worthy of imitation. There is no archetypical tribal system. There may well be other tribes possessing similar elements to their legal systems. There may well be other tribes whose legal systems deserve analysis. We focus on the Navajo Nation, because it lends itself especially well to setting out the essential elements of an unlikely mixed jurisdiction that blends indigenous, consensual traditions with Common Law, adversary traditions in a successful, functioning legal system.

constitution, it appears that the *Diné* have grown comfortable with a form of government in which "since [its] powers are *not defined*, they are also *not limited*." *Id.* at 57.

The Navajo Nation Code (hereafter NNC) does include, as its Chapter 1, a Navajo Nation Bill of Rights which tracks—but does not duplicate—that of the first ten amendments to the U.S. Constitution. *See* 1 NNC §§1-9. These provisions complied with the Indian Civil Rights Act of 11 April 1968, 25 U.S.C. § 1302, providing "constitutional rights" that no Indian tribe might abrogate in its exercise of self government.

¹⁰ The *Diné* number about 300,000 in tribal membership, the better part of which occupies a reservation roughly the size of Ireland, comprising about 70,000 square kilometers of land upon which they have lived since before Columbus. The Navajo Nation's reservation sits on its traditional lands in northeastern Arizona, northwestern New Mexico and southeastern Utah, within the area bounded by the *Diné*'s original Four Sacred Mountains. For a time—from 1863 to 1868—the Navajos were forcefully removed, on the "Long Walk," east to lands near the Pecos River in Texas, at Bosque Redondo. They suffered greatly during that time. They were restored to their traditional lands by the Treaty they negotiated with General William T. Sherman at Fort Sumner, 1 June 1868, and have remained there since.

The First Ingredient: Federal Law

[Tribes] may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which [the United States] assert[s] a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupilage; their relationship to the United States resembles that of a ward to his guardian.

Cherokee Nation v. Georgia, 30 U.S. (5 Pet) 1, 17 (1831) (Marshall, C.J.).

Congress (rather than some other part of the government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity.

United States v. Lara, 541 U.S. 193, 214 (2003)(Thomas, J., concurring).

Once upon a time, during and after its successful revolution against England, the new American nation considered Indian tribes to be sovereign nations. Tribal laws and legal systems were their own devices, setting internal policies and external relationships with other nations, including the United States.¹¹ That policy broke down rapidly in the face of demand for Indian lands by European immigrants, and the attendant military domination of the Indian tribes by the United States. It fell to the new nation's Supreme Court to articulate the status of the tribes in the federal system.

The Court has fulfilled its charge. Despite shortcomings in logic and orderly development, and resulting tensions, the Indian Law¹² of the United States at the beginning of the 21st century seems reasonably settled. Early on, the Supreme Court defined the Indian tribes as "domestic dependent sovereigns" to whom the federal government owed fiduciary duties.¹³ While it decisively insulated the tribes from action by states,¹⁴ however, the Court invested Congress with plenary power to legislate regarding Indians.¹⁵ The threat of such untrammelled legislative power may not prove comforting to Indian tribes, but in fact and in practice—after two centuries of misadventure and tragic consequences—federal Indian policy has stabilized in a way that allows a tribe like the Navajo Nation a large degree of self-determination.

¹¹ See U.S. Const. Art. I, § 8, granting Congress the power to regulate commerce "with foreign Nations, and among the several States, and with the Indian tribes;" Art. 2, § 2, cl. 2., granting the President the power to make treaties with the advice and consent of the Senate, a power exercised to make treaties with Indian tribes.

¹² See Hon. William C. Canby, Jr., *AMERICAN INDIAN LAW* (4th ed. 2004) (hereafter referred to as *CANBY*). Judge Canby notes that, "The term 'Indian Law' is a catchall with various meanings, but it refers primarily to that body of law dealing with the status of the Indian tribes and their special relationship to the federal government, with all the attendant consequences for the tribes and their members, the states and their citizens, and the federal government. In this application, 'Indian Law' might better be termed 'Federal Law About Indians.' . . . Although [the term] legitimately might be thought to include the internal law that each tribe applies to its own affairs and members, that is not the common definition . . . Instead, that body of law is separately referred to as 'tribal law.'" *Id.* at 1, 3.

¹³ *Cherokee Nation v. Georgia*, 30 U. S. (5 Pet.) 1, 17 (1831).

¹⁴ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

¹⁵ *United States v. Kagama*, 118 U.S. 375, (1886). See also *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), which held that Congress had the power to overturn existing treaties with Indian tribes, in pursuit of its legislative will.

The federal powers of oversight and the trust responsibility did not spring up as settled doctrine with the advent of the new Constitution of the United States in 1787. No plain-meaning legal source exists for their exercise. They have developed over time, by accretive process. The riparian analogy is especially apt, for both the judicial development of Indian Law doctrine and Congress' Indian policies ebb and flow, and have been highly fluid concepts. Federal Indian policy has fluctuated over the last two centuries, carving one course and then shifting—sometimes wildly—to another, until it seems to have settled into a more stable streambed. Nonetheless, the proper federal attitude and practice toward Indians still seek a clearly-articulated doctrinal base.

Criminal law is a special case. Congress has never been shy about expanding the jurisdiction of federal courts over criminal matters involving Indians, in or out of Indian Country. An 1817 law,¹⁶ now become the General Crimes Act and much expanded in its effects,¹⁷ and the 1885 Major Crimes Act, expanded from its original seven to include thirteen felonies,¹⁸ still apply. Beginning in 1825, Congress passed a forerunner of what today is known as the Assimilative Crimes Act, making “a like offense and subject to a like punishment” in federal court of any act within United States territory (clearly including Indian Country¹⁹) defined as a crime by the laws of the State within which the territory is located.²⁰ Finally, Indian Law imposes low ceilings on criminal sentences available to tribal courts,²¹ limiting them effectively to no more than misdemeanor jurisdiction. When one adds up the cumulative effect of the federal statutes, they provide virtually unlimited federal criminal jurisdiction over events in Indian Country, involving Indians or non-Indians.²² Perhaps the only sort of criminal act that might totally escape federal jurisdiction is a misdemeanor found only in a tribal code committed by an Indian against an Indian.

Apart from criminal law, much of the federal law component does not intrude so much on the substance of tribal laws as it creates rules of oversight by the federal government, most of it in areas where the federal government exercises similar oversight of the states as well. It is classic federal public law, dealing with the general categories of land and other resource use;²³ health,

¹⁶ Act of 3 March 1817, 3 Stat. 383. See 18 U.S.C. §§ 1151-1170 for the current codification, in particular § 1152. If this seems quite natural today, consider how incongruent it would be for the United States Congress to attempt to vest criminal jurisdiction in the federal courts over Mexicans or Canadians who committed any crime *in Mexico or Canada* against U.S. citizens. The Congress may have tried to do so more recently, in contemplation of terrorist activity against U.S. citizens abroad. See, e.g., 18 U.S.C. §§ 7(7), 32(b), 111, 115, 1114, 1117, 1201, 1203, 2331. The major difference between the modern legislation and the 1817 legislation is the immediate ability of the federal government to assert the jurisdiction, and the will and ability of the foreign jurisdiction to resist.

The 1817 law further permitted prosecution in federal court of all crimes committed by non-Indians in Indian territory.

¹⁷ See 18 U.S.C. § 1152.

¹⁸ See 18 U.S.C. § 1153(a).

¹⁹ Because under 18 U.S.C. § 1152, “the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to Indian Country.” The provisions of 18 U.S.C. § 13 are just such a general law of the United States.

²⁰ 18 U.S.C. § 13.

²¹ ICRA, 25 U.S.C. § 1302(7) (limiting the maximum sentences that a tribal court may impose to a \$5,000 fine and one year in prison).

²² 18 U.S.C. § 1152, ¶ 2. See CANBY 153-170.

²³ See 25 U.S.C. §§ 311 to 416j, comprising Chapters 8 (Rights-of-Way Through Indian Land), 9 (Allotment of Indian Lands), 10 (Descent and Distribution; Heirs of Allottee), 11 (Irrigation of Allotted Lands), 12 (Lease, Sale or Surrender of Allotted or Unallotted Lands); 25 U.S.C. §§461 to 494 (Subchapter V—Protection of Indians and

education and welfare;²⁴ and some special concerns.²⁵ Congress, then, has generally focused its legislative energies on implementing federal Indian policy, protecting Indian resources, defining relations between Indians and non-Indians, and addressing special interests that have arisen over the course of United States history.

In still one other area of federal legislation, Indian Law also adds a singular dimension: those rules that set out the terms and practices for relations between the federal and Indian governments,²⁶ and the rules that may limit Indians' exercise of self-determination.²⁷ One should note that Indian tribes operate free of the constraints of the United States Constitution and its enumerated powers for governmental exercise, so that to the extent that Congress provides some restraints, it may fill in the constitutional void.

With exceptions left by the vestiges of unfortunate past,²⁸ Congress since about 1970 has chosen to fulfill its fiduciary relationship²⁹ to the tribes by providing for their greater autonomy and self-determination. While the exceptions may chafe sorely on the Navajo Nation and other tribes, federal Indian Law does provide a stable, top-down framework for tribal government, and the Navajo Nation has prospered within that framework.

Conservation of Resources); 25 U.S.C. §§ 2101 to 2221, comprising Chapters 23 (Development of Tribal Mineral Resources) and 24 (Indian Land Consolidation); 25 U.S.C. §§ 3101 to 3120 (Chapter 33—National Indian Forest Resources Management); and U.S.C. §§ 3701 to 3746 Chapter 39 (American Indian Agricultural Resource Management).

²⁴ See 25 U.S.C. §§ 174 to 202, Chapter 5 (Protection of Indians); 25 U.S.C. §§ 305 to 310, Chapter 7A (Promotion of Social and Economic Welfare); 25 U.S.C. §§ 450 to 458bbb-2, Subchapter II on Indian Self-Determination and Education Assistance (contract and grants funding and administration); 25 U.S.C. §§ 501 to 510, Subchapter VIII (Indians in Oklahoma; Promotion of Welfare); 25 U.S.C. §§ 1641 to 1683, Chapter 18 (Indian Health Care); 25 U.S.C. §§ 1901 to 1963, Chapter 21 (Indian Child Welfare).

²⁵ For example, Congress has passed special laws to protect Native American grave sites, 25 U.S.C. §§ 3001 to 3013; to control the custody and adoption of Indian children, reserving that jurisdiction to the child's tribe, 25 U.S.C. §§ 1911 to 1923; to regulate Indian gaming, as casinos have proliferated in Indian Country, 25 U.S.C. §§ 2701 to 2721; and to guaranty the operation of the Bill of Rights in Indian Country, 25 U.S.C. §§ 1301-1303.

²⁶ See 25 U.S.C. §§ 1 to 88, Chapters 1 (Bureau of Indian Affairs) and 3 (Agreements with Indians); 25 U.S.C. §§ 211 to 264, Chapter 6 (Government of Indian Country and Reservations); 25 U.S.C. §§ 450 to 458bbb-2, Subchapter II (Indian Self-Determination and Education Assistance); 25 U.S.C. §§ 4001 to 4046, Chapter 42 (American Indian Trust Fund Management Reform).

²⁷ These provisions come from parts of Title 25 on Indians of the U.S.C. already cited for other effects, but are interspersed therein. See 25 U.S.C. §§ 211 to 264, Chapter 6 (Government of Indian Country and Reservations); 25 U.S.C. §§ 1301 to 1341, Chapter 15 (Constitutional Rights of Indians);

²⁸ Principally, in the area of criminal law for Indians, which seems irretrievably federal. There are other major areas, however.

²⁹ One aspect of the trust relationship is the principle that interpretations of treaties and statutes (after they wholly replaced treaties for all transactions after 1871) begin from the premise that ambiguities should be resolved in favor of Indians. See, e.g., *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 247 (1985); *Choctaw Nation v. Oklahoma*, 379 U.S. 620, 631 (1970); *Winters v. United States*, 207 U.S. 564, 576-7 (1908); *United States v. Winans*, 98 U.S. 371, 380 (1905).

An important application of this approach states that with regard to disposition of lands, treaties do not constitute "a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 680 (1979); accord *United States v. Winans*, 198 U.S. 371, 381 (1905); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (Justice McLean concurring)

In 1968, Congress passed the Indian Civil Rights Act (“ICRA”),³⁰ applying to the tribes most of the United States Constitution’s fundamental guarantees,³¹ known as the Bill of Rights.³² In this respect, the ICRA was a back-handed prop to tribal sovereignty, since it assumed the continued existence of the tribes and their laws.³³ In 1970, President Richard Nixon reinforced that attitude when he released a landmark statement on federal Indian policy calling on Congress for legislative measures that would allow tribes maximum autonomy in the conduct of their own affairs, at the same time that the federal government maintained and strengthened its trust relationship with the tribes.

Since that time, Congress has responded with a steady flow of enabling legislation through subsequent presidential administrations.³⁴ Among the early initiatives, in 1975 Congress passed the Indian Self-Determination Act³⁵ and established an American Indian Policy Review Commission, including Indian representation.³⁶ The Commission reported in 1977, calling for “a firm rejection of assimilationist (sic) policies, reaffirmation of the status of tribes as permanent, self-governing institutions, and increased financial aide to the tribes.”³⁷ The federal government generally has maintained that approach since.³⁸

³⁰ 82 Stat. 77, 25 U.S.C. §§ 1301 *et seq.*

³¹ See 25 U.S.C. § 1302. In overall effect, then, ICRA utilized federal statutory powers to require that Indian tribes’ judicial regimes provide a good part of the constitutional Bill of Rights. The ICRA did not include the establishment clause, rights to appointed counsel, the necessity of grand jury indictments, nor the guaranty of civil jury trial. See **CANBY** at 354-363.

³² Contained in its first ten amendments.

³³ Indian tribes historically have no obligation to provide constitutional guaranties, since they are neither the federal government (limited by the Constitution proper) nor a state (to which its provisions and guaranties apply under the 14th Amendment). See *Talton v. Mayes*, 163 U.S. 376 (1896).

The effects of ICRA as a remedy in federal court against the actions of tribal courts have been notably curtailed by the Supreme Court decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). *Santa Clara* held that the writ of habeas corpus under § 1303 of ICRA, 25 U.S.C. §1303, available “to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe,” provided the only possible federal remedy under ICRA, overturning broadly-established lower court precedent. The *Santa Clara* decision reduced the ICRA remedy to one against actions by tribal courts in criminal cases, exclusively. Even further, the party aggrieved must first exhaust remedies in tribal courts before turning to ICRA remedies before a federal court. See, e.g., *Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948 (9th Cir. 1998); *McCurdy v. Steele*, 506 F.2d 653 (10th Cir. 1974); *O’Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973).

³⁴ See **CANBY**, 29-33. Early in the process, in 1975, Congress promulgated a “statement of findings” and a “Congressional declaration policy.” 25 U.S.C. §§ 450-450a. Congress specifically found and enacted into law the statement that, “the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and . . . the planning and implementation of programs . . . which are responsive to the true needs of Indian communities,” 25 U.S.C. § 450(a)(1), and that, “The Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons,” 25 U.S.C. § 450(a)(2).

³⁵ P.L. 93-368 of January 4, 1975, 88 Stat 203. Notably, that statute was amended in 1988 to add to 25 U.S.C. § 450a(b) a provision for the “development of strong and stable tribal governments capable of administering quality programs and developing the economies of their respective communities.” Prior to the amendment, the language of the statute did not recognize tribal governments as an objective for federal support.

³⁶ 88 Stat. 1910.

³⁷ **CANBY** at 31.

³⁸ In 1994, President William Clinton instructed all federal government agencies to maintain “a government-to-government relationship with federally recognized tribal governments.” 59 Fed. Reg. 22951 (1994). For a similar statement by President Clinton’s successor, President George W. Bush, see 67 Fed. Reg. 67773 (2002).

Summary of the Federal Indian Law Component

Federal Indian Law provides a significant component of Navajo Nation law, or the law that applies to Navajos and non-Indians within the Navajo Nation. It deals principally with the tension between three sources of governmental power within the United States—tribal, state and federal—created by federal controls over Indian tribes. Federal Indian Law exerts oversight of the Navajo and other tribal systems. The nature of that oversight—as developed by case law, laws of Congress and Executive Orders over more than two centuries—must be seen as a trust responsibility, with a fiduciary duty to preserve Indians’ domestic dependent sovereignty.³⁹ That oversight also must be seen as a source of great tension, attempting to reconcile plenary legislative power with fiduciary duty, and to mediate between competing jurisdictions in the tribes and states, while neither dominating them nor dictating to them.

Within that framework, imposed from the top down, most American Indian tribes retain a broad opportunity to pass their own laws and apply them through their own courts. As we shall see with the *Diné*, the effectiveness of a given tribe in taking advantage of that opportunity will vary with its degree of self-sufficiency, which in turn depends on its economic resources and viability, and the constituent will of its people to take control of their own destiny. Today, the Navajo Nation enjoys a unique form of government of its own invention and a highly developed legal system notable for its vigor and self-definition.⁴⁰

Viewed dispassionately, federal Indian Law affects the Navajo Nation and other American tribes in much the same way that federal law affects the states and their citizens. Beyond its stark assertion of criminal jurisdiction, federal Indian Law has become a relatively benign and innocuous element in Navajo law in particular and in the laws of Indian tribes in general. Generally, except for criminal law, the federal law component of the Navajo Nation and

Clinton issued several Executive Orders on Indian matters, including one toward the end of his time in the White House, Executive Order 13175 of 6 November 2000, laying out guidelines still valid. Executive Order 13175 of 6 November 2000 on Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (2000).

President Clinton’s Executive Order included three “Fundamental Principles” that federal agencies should follow in “formulating or implementing policies that have tribal implications,” including

(1) “a unique legal relationship with Indian tribal governments” based on an extensive body of federal laws “that establish and define a trust relationship with Indian tribes;”

(2) recognition that, “As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory,” and that the United States should respect that sovereignty by working with the tribes “on a government-to-government basis;” and

(3) “The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.”

Judge Canby, perhaps the Indian Law scholar with longest tenure, maintains skepticism. He comments, “It is perhaps possible that the contending forces in Indian affairs have reached some sort of final balance, and that no further major changes of direction will occur. Nothing in the history of federal Indian policy, however, justifies confidence in such a conclusion.” CANBY at 33.

³⁹ See Robert N. Clinton, Carole E. Goldberg, Rebecca Tsosie, **AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM, CASES AND MATERIALS** 497-525 (4th Ed. 2003); Nell Jessup Newton (ed.), **COHEN’S HANDBOOK OF FEDERAL INDIAN LAW** 418-42 (2005 ed.).

⁴⁰ I have had the good fortune to teach at a law faculty with one of the largest contingents of Native American law students in the United States. The special aspects of the Navajo system have come home to me in the light of remarks by law students from other tribes, and the respect—in some cases approaching awe—in which they hold the Navajo Nation. For example, once when I was advising a law student clerking for a tribal court and urging him that the court should exercise jurisdiction regarding a commercial matter that had contacts both on and off the reservation, noting that the Navajo Nation courts had done so in similar situations, he responded, “Sure, they would, but nobody else can be like the Navajos.”

other Indian legal systems empowers and enables rather than limits. As with the states of the federal union, it functions as a framework of preemptive laws and regulations upon which the states and tribes may construct their own systems, usually enjoying the broadest sort of latitude to do so as long as they respect federal limitations.⁴¹ That said, Indians probably feel less able to take a dispassionate view of the federal law component in their laws and more vulnerable because of it than do common citizens of the United States.

Indians feel special tensions based on a long history of unhappy circumstances and events visited on Indians through federal Indian Law.⁴² Indians are not simply citizens of a given state, which in fluid United States society is likely to be more an accident of opportunities to study, work or marry than of identification with a given region or society. Even when s/he identifies strongly with where s/he was born and/or grew up, a non-Indian may think of him or herself as “an American citizen who happens to live for the moment in Colorado” . . . or, perhaps, “Maryland,” or any other of the 50 states, until something better comes along. A Navajo more likely thinks of him or herself as a tribal member with primary ties to a specific land and tribe, and a desire—even an imperative—to live on those particular lands among those particular tribal members, though events may place them temporarily in some other venue.

The Second Ingredient: American Law/State Law

[T]he 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. . . . Today the Navajo [tribal courts] exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants. No Federal Act has given state courts jurisdiction over such controversies.

Williams v. Lee, 358 U.S. 217, 219-20, 222 (1959).

[T]he 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, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845, 855-56 (1985).

[The civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally does] not extend to the activities of nonmembers of the tribe.

State v. A-1 Contractors, 520 U.S. 438, 453 (1997).

⁴¹ Federal Indian Law provides the frame of reference for an eternal debate regarding when and how the federal government may encroach too far on tribes’/states’ rights; *i.e.*, the relative virtues of big central government versus local control.

⁴² “The strong and distinct Navajo identity is a result of enduring the swings in federal policy toward Indians.” Hon. Thomas Tso, then Chief Justice of the Navajo Supreme court, “*The Tribal Court Survives in America*,” JUDGES JOURNAL 22, 53 (Spring, 1986).

[T]he ultimate question is whether the exercise of state court jurisdiction in a given case will “frustrate federal policy or violate traditional notions of tribal sovereignty.”

Begay v. Roberts, 167 Ariz. 375, 379, 807 P.2d 1111 (App. 1990), *citing* Smith Plumbing Co. v. Aetna Cas. & Sur. Co., 149 Ariz. 524, 529, 720 P.2d 499 (1986).

[Where an Indian files suit in state court against a non-Indian] the Indian interests which the infringement test seeks to protect are not present.

State v. Zaman (Zaman I), 190 Ariz. 208, 210, 946 P.2d 459 (1997).

[T]he status of the defendant as an Indian or a non-Indian is the sine qua non of federal Indian law.

State v. Zaman (Zaman II), 194 Ariz. 442, 984 P.2d 528 (1999).

There are many non-Indian actors who impact the Navajo Nation in various and significant ways that may escape the authority of the Navajo Nation if our courts are required to apply the Montana[-Strate] exceptions to every civil case involving non-Indians. . . . Further, application of Montana[-Strate] to every civil case with a non-Indian defendant undermines the federal policy encouraging the development of tribal courts. . . . Finally, our responsibility to protect the sovereignty of the Navajo Nation counsels that we not surrender authority unnecessarily.

Nelson v. Pfizer, Inc., No. SC-CV-01-02 1 (Navajo Supreme Court, 2003) at 2003.NANN.0000002 in www.versuslaw.com and www.navajocourts.org/suctopinions.

The above introductory sampling of snippets from U.S. Supreme Court, Arizona State Supreme Court, and Navajo Supreme Court opinions probably tried the reader’s patience and elicited the thought that it served no discernible purpose. Nonetheless, begging the reader’s indulgence, it is meant to provide sound bites that reveal the development of coherent—if fractious—judicial doctrine, beginning from about the time tribal courts began to function as viable tribunals and exercise significant civil jurisdiction. As the excerpts should demonstrate, geographical proximity of tribal and state courts, as policed by the U.S. Supreme Court, does not make for easy jurisdictional accommodation. This section should demonstrate that Navajo and state legal systems share a common recent ancestor, American Law, but the *Diné* system’s insistence on mixing American Law with its own Common, or Fundamental, Law creates tension with state systems and courts true only to the former. In the end, tribal courts have found ways to assert their civil jurisdiction and the sovereignty of their mixed legal system.

In those areas in which federal Indian Law permits the tribe to draft its own laws, the bulk of Navajo law is drawn from the body of “American Law.” At first exposure, an “American” lawyer may feel reassured that Navajo law is cut from the same legislative and judicial cloth as

the “American Law” found in the 50 states.⁴³ Judicial proceedings before Navajo tribunals look and feel like those before state and federal courts. The greatest portion of the substantive and procedural rules that constitute the Navajo Nation’s legal system consists of the “American” law found in uniform laws and procedural rules, state statutes, and the case law of state and federal courts. The Uniform Commercial Code is part of the Navajo Nation’s statutes.⁴⁴ The Federal Rules of Civil and Criminal Procedure and of Evidence may be found virtually intact in the Navajo Courts,⁴⁵ as they are in each of the state systems.

The Supreme Court of the Navajo Nation publishes its written opinions,⁴⁶ which bind lower tribal courts as precedent, thereby creating common law. Its opinions cite to the decisions of the Supreme Court of the United States and lower federal courts, and to state court appellate decisions, as well as to its own prior decisions. The opinions are written in English, in a style familiar to any American lawyer.

Once inside the Navajo system proper, however, the feeling of familiarity begins to wane. As the third section of this study will set out in greater detail, the Navajo legal system rests on a bedrock of indigenous Common Law which predates the American legal system. That source justifies the Navajo system. It tells one why in its version of the Uniform Commercial Code, for example, the Navajo legislature introduced various deviations and modifications,⁴⁷ and “Special Plain Language Comments” are included following the Official Comments for many articles.⁴⁸

Navajo Common Law, or Fundamental Law, provides a potential overriding rule for any case.⁴⁹ It may negate an apparently applicable rule of American law at the same time that it recognizes it, so that a lawsuit in a Navajo court—applying the “same” law as a state court—might reach a different result.⁵⁰

Perhaps most important to differentiate, the Navajo judicial system resolves its cases by consensual, rather than adversary, approach. The system has provision for an extensive system of Peacemaker Courts at the local, or chapter, level—reliant on wise mediators who are not lawyers—as an alternate venue.⁵¹ Even when the case is before a *Diné* judge sitting in a “typical” American courtroom and applying American rules of procedure and evidence, proceedings may involve some surprising turns and results.

⁴³ Indeed, the Navajo Supreme Court will admit to practice before the Navajo judiciary any lawyer who has graduated from a law school in the United States and passes the Navajo bar examination.

⁴⁴ Title 5A NNC.

⁴⁵ Adopted by the courts under authority of 5 NNC § 601.

⁴⁶ Bound volumes of the Navajo Reporter exist for cases through 1999. Since then the Navajo Nation opinions are available at www.versuslaw.com or at www.navajocourts.org/suctopinions.

⁴⁷ For example, the NNC adds 5A NNC §1-110 that renders the Navajo UCC inapplicable to “any exclusively barter transaction in which the aggregate market value of all the goods and services involved in the transaction does not exceed ten thousand dollars.” This exempts, e.g., any such barter transaction from the statute of frauds. 5A NNC § 2-201(D). Another exemplar deviation “does not permit a secured creditor to repossess personal property of Navajo Indians without judicial process.” 5A NNC § 9-503.

⁴⁸ For example, the Special Plain Language Comment for 5A NNC § 1-201 (General Definitions) states, “When reading any sections in this Code, it is very important to check to see if any of the terms are defined and to read the definitions of those terms. Unless one reads the definitions, the full meaning of a statute may not be understood.” *See also, e.g.*, the Special Plain Language Comments for 5A NNC § 1-102, §§ 2-204 to 2-206, § 2-305, §§ 2-312 to 2-316, § 2-403, § 9-103, §§ 9-107 to 9-110, § 9-203, § 9-208, § 9-307, § 9-312, § 9-315, etc.

⁴⁹ *See* notes 119-120, 127, 130-132 *infra* and accompanying text.

⁵⁰ *See* notes 137-139 *infra* and accompanying text

⁵¹ *See* 7 NNC §§ 409-412.

The special prism through which the Navajo system views and applies the American Law source within its own system contrasts with a second source of American Law that affects the Navajo Nation, from outside that tribal system proper. Federal Indian Law fixes jurisdiction of the tribal courts, defining those circumstances in which state courts must give way to or share jurisdiction with tribal courts, and also those in which tribal courts have no adjudicatory powers and the matter falls exclusively to state courts. State courts, innocent of any allegiance to the Navajo system, apply American Law to Navajo tribal members and to events occurring on or affecting Navajo Indian Country when federal Indian Law grants them exclusive or concurrent jurisdiction to do so. In such cases, the American Law applied will be that defined in the statutes, rules and case law of a given state.

Federal Indian Law prohibits state courts from taking jurisdiction over tribal members and events where they are preempted from doing so by congressional legislation or a treaty, or where to do so would infringe on Indian sovereignty. The Supreme Court of the United States' development of the preemption and infringement doctrines is a work in progress, and continues to generate a steady stream of decided cases. To date, it has achieved no rule that would curtail the race to the courthouse⁵² and parties do compete to have their controversies decided by state or by the tribal courts.

The Infringement Doctrine

The infringement doctrine provides the original standard for determining when tribal courts should have exclusive jurisdiction. *Williams v. Lee*,⁵³ handed down in 1959, articulates the doctrine. The case involved a merchant operating a general store on the Navajo Indian Reservation, who filed suit in Arizona state court to collect a debt for goods that he had sold to a Navajo tribal member and his wife, who lived on the Reservation. The state court entered judgment, and the Arizona Supreme Court affirmed. The Supreme Court of the United States reversed, casting the question as "one of state power over Indian affairs," and stating that, "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. . . .* Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since."⁵⁴

Note that *Williams*' infringement test cannot determine concurrent jurisdiction; it functions only to determine exclusive subject matter jurisdiction. If infringement occurs, the state must stand aside. Therefore, *Williams* may not apply to a case in which an Indian plaintiff were to sue a non-Indian defendant, even if it arose in Indian County.⁵⁵ That set of facts might give rise to concurrent jurisdiction in both the state court and the tribal court.⁵⁶ On the other hand, the

⁵² As *Erie v. Tompkins*, 304 U.S. 34 (1938), did for the disparity between state and federal courts. Before the decision in *Erie* courthouses on opposite sides of the street might predictably reach different resolutions, applying different law (federal common law often was different from state common law) and giving rise to races to file in one court or the other, since the place of filing determined the outcome. This sort of jurisdictional determinism exists today between state and tribal courts, and parties know it.

⁵³ 358 U.S. 217 (1959). The relatively late date for *Williams* may be explained by the fact that only in the mid-20th century, after the Indian Reorganization Act of 1934 and more especially with the advent of Indian self-determination in the 1960's, did tribal courts applying tribal laws become a viable factor. There were jurisdictional decisions before *Williams*, but the 1959 case sets the benchmark for modern analysis of the issue.

⁵⁴ *Id.* at 219-20, 222, 223 (citations omitted)(emphasis added).

⁵⁵ See *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 148 (1984).

⁵⁶ Some tribal courts would hesitate to exercise such jurisdiction by their own tribal laws. Judge Canby notes that "a number of tribal codes provide for civil jurisdiction over non-Indian defendants only when they stipulate to it."

Supreme Court has held that a state court could not entertain a lawsuit between two tribal members.⁵⁷

A more recent case whittled away at tribal courts' subject matter jurisdiction, without changing the essential infringement doctrine. *Strate v. A-1 Contractors*⁵⁸ involved an automobile accident between non-Indians⁵⁹ on a state highway through the reservation. When the tribal court retained jurisdiction despite the defendants' objection, defendants took the question to federal district court. Ultimately, the Supreme Court granted certiorari, and held that tribal courts had no jurisdiction over a dispute between nonmembers growing out of events on a right-of-way (lands ceded to the state for the highway) through the reservation.⁶⁰

Strate walks an interesting line. The high court applied analysis of tribal *legislative* jurisdiction it had set out sixteen years earlier in *Montana v. United States*,⁶¹ finding a common issue in the "forms of [tribes'] civil jurisdiction" that also defined their judicial power over civil matters, and held that a tribe's "adjudicative jurisdiction" could not surpass its legislative jurisdiction. To create its neo-infringement test the *Strate* case addressed the concept of "inherent sovereignty" and stated:

Montana delineated—in a main rule and exceptions—the bounds of the power tribes retain to exercise “forms of civil jurisdiction over non-Indians.” . . . Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding [that] the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally “do[es] not extend to the activities of nonmembers of the tribe.”⁶²

CANBY at 189. But the fact that they could exercise such jurisdiction upon defendant's consent indicates that the subject matter is appropriate to the tribal court.

⁵⁷ *Fisher v. District Court*, 424 U.S. 382, 386 (1976). There may be a question regarding nonmember Indians from another tribe or reservation, however. See *Duro v. Reina*, 495 U.S. 676 (1990). The *Duro* case held that a tribal court did not have criminal jurisdiction over a nonmember Indian, but Congress reversed that result by a statute that did not pertain to civil jurisdiction. 25 U.S.C. §1301(2).

⁵⁸ 520 U.S. 438 (1997).

⁵⁹ Although the court characterized the parties as “nonmembers,” apparently making the decision valid as to cases including Indians of a tribe different than the tribal court.

⁶⁰ In other words, the accident occurred in Indian Country, as defined at 18 U.S.C. § 1151. In *Strate*, the Supreme Court created a special category of Indian Country, less subject to Indian jurisdiction.

⁶¹ 450 U.S. 544 (1981) (6-3 vote).

⁶² *Id.* at 453(citations omitted).

Montana had limited legislative jurisdiction by stating a general rule that activities of nonmembers are not subject to tribal regulation.⁶³ Then *Montana* set out two exceptions to its rule: 1) where the nonmembers had entered into “consensual relationships with the tribe or its members,” or 2) “the conduct of non-Indians on fee lands within [a] reservation . . . threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁶⁴ The exceptions borrow the criteria from *Williams*, expressed descriptively in the first exception and doctrinally in the second. *Strate* showed the Supreme Court less inclined to find infringement, but any test so subjective as *Montana-Strate* leaves great discretion in the court applying it. As we shall see, the Navajo Nation’s Supreme Court has used that test aggressively to countervail any limitations on infringement of its tribal court jurisdiction.

The Preemption Doctrine

Federal treaties and statutes may preempt state courts from exercising jurisdiction by consigning matters to tribal sovereignty. That proposition springs from the well-established premise—dating from the early 19th century and the *Worcester* decision⁶⁵—that relations with Indian tribes exclusively belong to the federal government and that states can exercise no unilateral authority over Indians or Indian Country. *I.e.*, Congress may intervene whenever and to whatever extent it finds warranted, mindful of the trust relationship it serves through its legislation, to set tribal courts’ jurisdiction, but state courts and legislatures have no independent authority to affect that jurisdiction.

In *McClanahan v. Arizona State Tax Comm’n*,⁶⁶ decided fourteen years after *Williams*, the Supreme Court of the United States read the applicable treaties and statutes with the “tradition of sovereignty in mind”⁶⁷ to decide that the State of Arizona was preempted from taxing the income earned by an Navajo Indian on the Navajo Reservation. In reaching its decision, the Supreme Court turned away from the possibility that the tribe might possess any inherent

⁶³ The *Montana* rule might be seen, in its own right, as an exception to the broader traditional rule that tribes have authority to regulate activity within their territory, *i.e.*, within Indian Country. By 1997, however, the Supreme Court stated in *Strate v. A-1 Contractors*, 520 U.S. 538, 446 (1997), “*Montana* thus described a general rule that, absent different congressional direction, Indian tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation,” and expressed a concern that the exceptions to the “*Montana* rule” should not be applied in a way that “would severely shrink” it. *Id.* at 458. With that formulation, *Montana* should best be seen as a new rule, replacing the old rule in favor of general tribal authority over their territory. *But see Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987), which stated,

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. . . . Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by specific treaty provisions or federal statute.

Judge Canby notes,

Although *Montana* announced an exception to the general rule that a tribe has governmental power over its territory unless some statute or treaty takes it away, subsequent Supreme Court opinions have tended to refer to the “*Montana* rule,” not the “*Montana* exception.” As a “rule” limiting inherent tribal sovereignty, it continues to gain strength; indeed, it appears to have become the foundation case for contemporary Indian law in the Supreme Court.” CANBY at 78.

⁶⁴ *Id.* at 565-66.

⁶⁵ See note 14 *supra* and accompanying text.

⁶⁶ 411 U.S. 164 (1973).

⁶⁷ 411 U.S. at 173.

sovereignty,⁶⁸ since all of the tribes' inherent sovereignty had been delivered up in trust to the federal government, implicitly, by the events of the 19th century.

McClanahan shifted the focus to the concept of federal preemption, turning to treaties and statutes to see what areas might be foreclosed to state exercise.⁶⁹ In Judge Canby's phrase, "By reducing sovereignty to a backdrop and relying on the preemptive effect of federal law to exclude state power, *McClanahan*'s analysis appears to alter the presumption that the tribe has governmental power over all matters affecting the tribe on the reservation, and that the state does not. It seems instead to assume that the state has power unless federal law (including federal Indian policy) has preempted it."⁷⁰

Searching written sources for preemption usually takes on an historical cast. Congress cut off the possibility of treaties with tribes in 1871, but not before many had been executed. The Navajo Treaty of Fort Sumner of 1868 contains an Article that states that the reservation shall be set apart for the "use and occupation of the Navajo tribe of Indians,"⁷¹ retaining criminal and civil jurisdiction by inherent sovereignty.⁷² The acts by which states were admitted to the union typically contained provisions by which the new states disclaimed all right and title to jurisdiction over land and property held by Indians.⁷³

At the end of the day, then, laws and treaties provide a rich trove of Indian sovereignty—be it residual inherent sovereignty or sovereignty created by federal grant—that persists under the preemption doctrine.⁷⁴ The infringement doctrine preserves that sovereignty from incursion by state courts or legislatures. Preemption defines sovereignty; freedom from infringement preserves it. There may be deeper, more venerable sources of Indian sovereignty, inherent in the history and status of the tribes, but at the end of the day it does not matter. Federal Indian policy today supports tribal autonomy, having laid a sturdy preemptive basis for such autonomy in 19th century treaties and a series of 20th century laws. Preemptive sovereignty provides a sufficient base from which to mount effective defenses against infringement, even if there were no other.

The Navajo Nation's Case Law on Civil Jurisdiction of Tribal Courts

While state courts apply preemption-infringement doctrine to decide when they may take subject matter or personal jurisdiction of events and persons implicating Indian Country,⁷⁵ the Supreme Court of the Navajo Nation also applies the same doctrines to the same ends. The major difference may be that any non-Indian defendant who finds himself in tribal court typically objects to its jurisdiction as a first defense, so that there are a great many Navajo court decisions discussing the issue and the tribal judges have become adept at the craft of resolving it, to a

⁶⁸ The Navajo Supreme Court seems less prepared to define its tribal sovereignty by federal preemption doctrine, however. See *Means v. District Court of Chinle*, No. SC-CV-61-98, 1999 NANN.0000013 in www.versuslaw.com. The *Means* opinion states, "A treaty is not a grant of rights to Indian nations but a grant of rights from them, with reservations of all rights which are not granted." *Id.* at p. 6.

⁶⁹ 411 U.S. at 172.

⁷⁰ CANBY at 89.

⁷¹ Treaty of Fort Sumner, Article II.

⁷² *Williams v. Lee*, 358 U.S. 217, 221-223 (1959).

⁷³ See, e.g., Act of June 20, 1910, c. 310, 36 U.S. Stat. 557-579 (Enabling Act for Admission of Arizona and New Mexico into Union) § 20, ¶2; Ariz. Const., Art. 20 ¶4; Real. Vol. I, 168, 170, N.M.S.A.1953.

⁷⁴ E.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195-97 (1978); *Duro v. Reina*, 495 U.S.676, 684 (1990).

⁷⁵ See, e.g., *State v. Zaman (Zaman II)*, 194 Ariz. 442, 984 P.2d 528 (1999); *State v. Zaman (Zaman I)*, 190 Ariz. 208, 946 P.2d 459 (1997); *Astorga v. Wing*, 211 Ariz. 139, 118 P.3d 1103 (App. 2005); *Begay v. Roberts*, 167 Ariz. 375, 807 P.2d 1111 (App. 1990); *Tempest Recovery Services, Inc. v. Belone*, 134 N.M. 133, 74 P.3d 67 (2003); *Maryboy v. Utah State Tax Comm'n*, 904 P.2d 662 (Utah, 1995).

greater degree than most state courts. Stoking this process, the United States Supreme Court has imposed an exhaustion requirement, by which no federal court shall consider the question of tribal court jurisdiction until after the tribal forum has had “the first opportunity to evaluate the factual and legal bases for the challenge.”⁷⁶

The Navajo Tribal Council has set down a solid statutory base from which to derive jurisdiction. The NNC provides for the broadest possible civil jurisdiction, modeling its statute on state long-arm statutes.⁷⁷ In 2001, the legislature added an article that includes a provision specifically titled, “Long-Arm Civil Jurisdiction and Service of Process Act.”⁷⁸ Finally, the territorial reach of the tribal courts also is defined as broadly as possible.⁷⁹ The legislative purpose of the Navajo Nation—in common with most states—is to take its civil jurisdiction to the furthest extension permissible, aware that its expansive language will be checked by the federal Indian Law pertaining to its jurisdiction to adjudicate civil claims.

One must also bear in mind the difference in judicial perspective when a tribal court looks at jurisdiction. Plaintiff has already filed the case in tribal court when the defendant objects to tribal jurisdiction.⁸⁰ The question is not whether the connections to the tribe are so powerful as to create exclusive jurisdiction in its court, but rather whether there are enough contacts to sustain jurisdiction in that court, regardless of concurrent jurisdiction in a state court. There is at play no concept of infringement on state sovereignty; the only sovereignty in the balance is that of the tribe. Not surprisingly, the Navajo Nation courts show a tendency to find proper subject matter jurisdiction and retain cases, rather than to surrender them to exclusive state court jurisdiction by finding that the tribal court has no connection that would allow it to keep the case.

A definitive body of Navajo case law dealing with the jurisdiction question began to emerge in 2003.⁸¹ Four cases decided by the Supreme Court of the Navajo Nation in the three years thereafter seem quite complete in their discussion of the issue. They form a full doctrine of civil jurisdiction from the Navajo Nation perspective, taking full account of the United States Supreme Court doctrine to date.

⁷⁶ *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985). See *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

⁷⁷ 7 NNC § 253(A)(2), which states,

- A. The District Courts of the Navajo Nation shall have original jurisdiction over: . . .
2. Civil Causes of Action. All civil actions in which the defendant: (1) is a resident of Navajo Indian Country; or (2) has caused an action or injury to occur within the territorial jurisdiction of the Navajo Nation.

⁷⁸ 7 NNC §253a(C) adds a provision detailing the circumstances that may create personal jurisdiction based on conduct, § 253a(E) provides for forum non conveniens practice by Navajo courts, and §253a(F) provides that, “A Court of the Navajo Nation may exercise jurisdiction on any other basis authorized by law, including the inherent and treaty jurisdiction of the Navajo Nation.”

⁷⁹ 7 NNC §254 extends territorial jurisdiction to “Navajo Indian Country,” which the same provision defines in the broadest possible terms, making no exception for non-Indian fee lands or rights of way so long as they fall within the exterior boundaries of the reservation or the Eastern Navajo Agency, largely composed of allotment and fee lands.

⁸⁰ The NNC allows no special appearance to contest jurisdiction; any appearance is a general appearance and submission to the tribal court’s jurisdiction. In any case, the effect is the same. The party that makes a special appearance to contest jurisdiction and loses is thereafter bound by the substantive proceedings in the case. The party who wins an objection to jurisdiction before a court that does not permit special appearances achieves the goal: the case terminates at that point.

⁸¹ My selection of the four cases discussed here may be somewhat arbitrary. There are certainly other Navajo Supreme Court cases that discuss the jurisdictional question. The four cases treated here include extensive analysis of the earlier cases.

The Benchmark: *Nelson v. Pfizer, Inc.*, and the Responsibility to Protect Inherent Tribal Sovereignty

The Supreme Court of the Navajo Nation decided its benchmark case on jurisdiction, *Nelson v. Pfizer, Inc.*,⁸² in 2003, after the relevant decisions of the United Supreme Court, and was able to assimilate them to the Navajo Nation reservation. *Pfizer* was a products liability case brought by a group of Navajo reservation residents⁸³ against the manufacturer of Redulin, a medication for diabetes.⁸⁴ The Navajo trial court applied the *Montana-Strate* test, found neither of the exceptions present, and dismissed for lack of jurisdiction. On appeal, the Navajo Supreme Court reversed, in an opinion that seems calculated to establish guidelines.

The *Pfizer* opinion rejects the proposition that *Montana* might create a rule applicable to non-Indian activities that occurred on tribal land.⁸⁵ The opinion sets out a checklist of “several sources” for tribal court jurisdiction over non-Indians: 1) “its broad inherent sovereignty over non-Indian conduct anywhere within its territory;” 2) “federal and state statutes, regulations and intergovernmental agreements” delegating such authority; 3) treaties that recognize such authority; and 4) “a tribe’s authority as landowner.”⁸⁶

Pfizer held that the tribal court had jurisdiction because of inherent sovereignty, thereby finding it unnecessary to consider the alternative proposition argued by the plaintiff, delegation by treaty.⁸⁷ The opinion lists any number of aspects of the case that have significance for the Navajo Nation, but never identifies precisely what specific factors ultimately triggered inherent sovereignty.⁸⁸ Instead, oracle-like, the court states, “our subject matter jurisdiction over matters occurring on tribal land is broad.”⁸⁹ It is not a finding of exclusive jurisdiction, excluding all possibility that a state might have heard the case, but of sufficient jurisdiction.⁹⁰

⁸² *Nelson v. Pfizer, Inc.*, No. SC-CV-01-02 1 (Navajo Supreme Court, 2003) at 2003.NANN.0000002 in www.versuslaw.com and www.navajocourts.org/suctopinions.

⁸³ Including only one person who was not an enrolled member of the Navajo Nation.

⁸⁴ *Nelson v. Pfizer, Inc.*, No. SC-CV-01-02 1,1 (Navajo Supreme Court, 2003) at 2003.NANN.0000002 in www.versuslaw.com.

⁸⁵ *Pfizer* barely cites *Strate*, and does not discuss it, presumably because that case applied *Montana* to events which did not occur on tribal lands. Instead, the opinion provides a Navajo view of federal Indian Law dealing with jurisdiction:

The implications of *Montana* for the Navajo Nation’s power over its territory are clear. . . . There are many non-Indian actors who impact the Navajo Nation in various and significant ways that may escape the authority of the Navajo Nation if our courts are required to apply the *Montana* exceptions to every civil case involving non-Indians. . . . Further, application of *Montana* to every civil case with a non-Indian defendant undermines the federal policy encouraging the development of tribal courts. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) (“Tribal courts play a vital role in tribal self-government . . . and the federal government has consistently encouraged their development.”) . . . Finally, our responsibility to protect the sovereignty of the Navajo Nation [found in Canon One of the Navajo Nation Code of Judicial Conduct, adopted November 1, 1991, by the Navajo Nation Courts] counsels that we not surrender authority unnecessarily. . . .

Based on these considerations, and the explicit restrictions in *Montana* and later cases . . . we decline to extend *Montana* to activity on tribal land . . . *Id.* at 5.

⁸⁶ *Id.* at 2 (citations omitted).

⁸⁷ *Id.* at 3.

⁸⁸ *Id.*

⁸⁹ *Id.* at 6.

⁹⁰ *Pfizer* takes pains to instruct tribal trial courts in the use of the *Montana* exceptions. It states that it “does not want to discourage” lower courts from evaluating for the *Montana* exceptions, since “fulfillment of either one will satisfy the lower threshold we hold applies today.” *Id.* at 5. In other words, if one of the *Montana* exceptions were present in

Further Refinement: Dale Nicholson Trust v. Chavez, and Treaty-Based Jurisdiction

Within a year, the Navajo Supreme Court refined its jurisdictional analysis further in *Dale Nicholson Trust v. Chavez*.⁹¹ The case raised the issue of whether the tribal court could “restrain state officials from seizing property located within the Navajo Nation.”⁹² Noting that the *Pfizer* opinion had not considered the treaty basis for tribal jurisdiction, since it based that decision on inherent sovereignty, the court held that the 1868 Treaty of Fort Sumner, interpreted “as our ancestors understood it,” specifically recognized the Navajo Nation’s “authority to regulate all non-members, including non-Indians, other than certain federal employees on its lands.”⁹³ The treaty preempted the *Montana-Strate* test for jurisdiction. Therefore, so long as a civil claim arises on Navajo tribal land, the 1868 Treaty of Fort Sumner preempts the *Montana-Strate* test.⁹⁴

When *Nicholson Trust* is read with *Pfizer*, the Supreme Court for the Navajo Nation has established that its courts will exercise civil jurisdiction over events and parties on tribal land, without any need to demonstrate infringement or a *Montana-Strate* exception. Inherent sovereignty, or—more potently—the Treaty of 1868 that preemptively grants sovereignty over its lands to the Navajo Nation, provides the basis for such territorial jurisdiction.⁹⁵

Final Touches: Montana-Strate Exceptions Applied

By the *Pfizer-Nicholson Trust* doctrine, the only time that *Montana-Strate* exceptions become relevant is when events involving nonmember parties occur on non-Indian land. The Supreme Court of the Navajo Nation took up that question in 2005, in *Allstate Indemnity Co. v. Blackgoat*,⁹⁶ dealing with a traffic accident on U.S. Highway 160 within the Reservation, in which two Navajo children died. Their guardians, Larrison and Suzy Holly Blackgoat, a Navajo couple, claimed compensation from the insurer of the Navajo driver. After fruitless negotiation among several claimants to limited insurance funds, the insurer filed an interpleader with the

a given case, that would clearly justify tribal civil jurisdiction, but the jurisdictional threshold is lower than that. Failing the exceptions, the analysis must continue against the lower threshold and the various sorts of factors indicated in *Pfizer*, or, one surmises, any other aspects of the case that might bear on the Navajo Nation’s interest.

⁹¹ No. A-CV-69-00 (Supreme Court of the Navajo Nation, 2004) at 2004.NANN.0000004 in www.versuslaw.com and www.navajocourts.org/suctopinions.

⁹² *Id.* at p. 2. There is special concern for actions by state officials in light of *Nevada v. Hicks*, 533 U.S. 353 (2001), where the Supreme Court approved a search on Indian Land of an Indian’s home by state officials looking for evidence of illegal hunting.

⁹³ *Id.* at p. 5. The court noted that *Montana* itself recognized such language in the 1868 Treaty of Fort Laramie with the Crow Tribe, 450 U.S. at 558, and the *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. at 650, reiterated that power from the same treaty. Also in 1868 the Cheyenne River Sioux Tribe signed a treaty with the federal government, containing a similar power, recognized in *South Dakota v. Bourland*, 508 U.S. 679, 687-88 (1993). The Navajo Treaty of Fort Sumner of the same year “contains almost identical language.” *Id.* at p. 6.

⁹⁴ The court did note that inherent sovereignty would have failed as a jurisdictional base in *Nicholson Trust*, because of the presence of state agents as parties. *Montana-Strate* exceptions might have been required, but the preemption in the Treaty of 1868 overrode them; it would not do so, “If the cause of action arises on non-Indian owned fee land within the Navajo Nation.” *Id.* at 5-6.

⁹⁵ Both Arizona and New Mexico were required to respect that sovereignty as a condition to their admission as states of the Union. See note 73 *supra* and accompanying text.

While such preemption makes jurisdiction clear, it does not mandate its exercise. A Navajo court may abstain in favor of proceedings in another court with concurrent jurisdiction. *PacifiCorp v. Mobil Oil Corp.*, SC-CV-27-01 www.navajocourts.org/suctopinions (2003)(two off-Reservation corporations operating on Reservation were parties to pending suit in federal district court).

⁹⁶ No. SC-CV-15-01(Supreme Court of the Navajo Nation, 2005) at 2005.NANN.0000017 in www.versuslaw.com and www.navajocourts.org/suctopinions (2005).

tribal court, tendering the maximum liability under the policy, \$30,000. The claimants requested pre-judgment interest beyond the cap amount, and the insurer objected that the court had no jurisdiction to award it.

Allstate argued that *Montana-Strate* applied. Perhaps the *Blackgoat* court could have ruled that the place of the accident had nothing to do with jurisdiction to distribute insurance proceeds paid into tribal court under interpleader instigated by the insurer, or it might have based jurisdiction on the fact that all involved in the accident were tribal members. Instead, it accommodated Allstate's argument by assuming that "U.S. Highway 160 is the type of right-of-way that requires a *Montana* analysis."⁹⁷ That assumption allowed the court to confront *Montana-Strate* directly and to find the first exception, a consensual relationship by Allstate in its contract with a Navajo tribal member.

The *Blackgoat* opinion then went further, and held that the tribal court's jurisdiction went beyond the simple distribution of the interpleaded funds, which Allstate urged should be the limit of its consensual relationship and the court's jurisdiction.⁹⁸ The court reasoned that "the actual U.S. Supreme Court test allows jurisdiction if the asserted jurisdiction has a 'nexus' to a consensual relationship," citing *Atkinson*,⁹⁹ and held that "the question whether the cap provision precludes an award of pre-judgment interest clearly has a nexus to the contract itself."¹⁰⁰ The Navajo court then applied the "Navajo public policy" of *nalyééh*, under which "injured parties should be compensated fully so that there are no hard feelings,"¹⁰¹ to support an award of pre-judgment interest against the insurer.

In 2006, the Supreme Court of the Navajo Nation completed its development of jurisdiction doctrine to date when it decided a preliminary procedural matter in *Green Tree Servicing, L.L.C. v. Duncan*.¹⁰² Plaintiff, a national lender specializing in mobile homes, asked for enforcement of an arbitration clause in its financing contract with defendant. State courts generally defer to arbitration clauses, but the tribal court required the parties to submit supplemental briefs to address the issue of whether the arbitration clause violated Navajo public policy, specifically in light of the "test for the validity of contract provisions announced" in the

⁹⁷ It complains in a footnote that, under questions from the bench, "both sides demonstrated a lack of understanding of [*Nicholson Trust*] and its identification of the exclusion provision of the Treaty of 1868 as the source of absolute jurisdiction over non-Indians on tribal lands within the Navajo Nation. . . . We state again that the *Montana* test is only relevant within the Navajo Nation on non-Indian owned fee land or on certain types of rights-of-way. It is only the fact that the accident occurred on a federal right-of-way that makes the *Montana* test relevant to our jurisdiction over this case." *Id.* at 3-4, n. 2.

⁹⁸ Allstate supported its argument by citing *Ford Motor Co. v. Todecheene*, 394 F.3d 1170 (9th Cir., 2005) and *Wilson v. Marchington*, 127 F.3d 805 (9th Cir., 1997), which had rejected tribal jurisdiction over a products liability claim against a vehicle manufacturer based on a finance agreement by the manufacturer's subsidiary and a simple car accident between a tribal member and a non-Indian driving through the Reservation. The court distinguished the two cases on their "unique circumstances . . . under the fact-intensive *Montana* test." No. SC-CV-15-01 (Supreme Court of the Navajo Nation, 2005) at 2005.NANN.0000017 in www.versuslaw.com; www.navajocourts.org/suctopinions (2005) at p. 3-4.

⁹⁹ *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001) for that proposition.

¹⁰⁰ No. SC-CV-15-01 (Supreme Court of the Navajo Nation, 2005) at 2005.NANN.0000017 in www.versuslaw.com at p. 3.

¹⁰¹ *Id.* at p.5. The court noted that "some [state] jurisdictions have awarded pre-judgment interest beyond contractual liability caps by ruling such contractual caps may be overridden by public policy considerations." (citations to three state court decisions omitted.)

¹⁰² No. SC-CV-46-05 (Supreme Court of the Navajo Nation, 2006) at 2006.NANN.0000011 in www.versuslaw.com

Blackgoat decision¹⁰³ and “the Court’s emphasis on the importance of homes in Navajo thinking.”¹⁰⁴

Summary of the Navajo Nation’s Case Law on Civil Jurisdiction of Its Tribal Courts

The Supreme Court of the Navajo Nation has demonstrated a sure grasp of United States Supreme Court case law and no inhibitions about applying it in ways that take Navajo civil jurisdiction out to permissible limits, consistent with declared tribal policy. When one traces the doctrine from *Pfizer* to *Nicholson Trust* to *Blackgoat* to *Greentree*, it becomes clear that the *Montana-Strate* test cannot—at least in the vision of the Supreme Court of the Navajo Nation—control the civil jurisdiction of Navajo tribal courts save in the limited circumstance of a non-Indian defendant for activities arising on non-Indian lands. Even then, when one of the two *Montana-Strate* exceptions must be present to create jurisdiction, the Navajo court reads those exceptions expansively.

At the further extension of developing Navajo doctrine, the *Greentree* and *Blackgoat* cases demonstrate the possible special aspects and different law that may control when Navajo civil jurisdiction does apply. Both cases utilize concepts of public policy drawn from Navajo common law and raise the possibility that Navajo tribal courts well may resolve a case involving the same parties and circumstances differently than might be expected in state court. Even so, the Navajo legal system acknowledges the sources from American Law—along with Navajo sources—as part of the mix that resolves the controversy.

The Third Ingredient: Navajo Common (Fundamental) Law

From here growth began and the journey proceeds.

Different thinking, planning, life ways, languages, beliefs, and laws appear among us,

But the fundamental laws placed by the Holy People remain unchanged.

Hence, as we were created and with living soul, we remain Diné forever.

Fundamental Law, 1 Navajo Nation Code §201.

The Structure of our courts is based on Anglo court systems, but the law we apply is our own. Our law is a combination of federal, Navajo and some state law.

Hon. Thomas Tso, C.J., Navajo Supreme Court, “The Tribal Court Survives in America,” *JUDGES JOURNAL* 22, 54 (Spring, 1986).

The Navajo courts apply Navajo customs and traditions, or Navajo common law, before they apply any other form of law.

Ben v. Burbank, 7 Navajo Rep. 222, 224 (1996).

¹⁰³ Apparently, that part of the *Blackgoat* opinion that tested the validity of a policy provision to cap recovery against Navajo public policy—specifically, the concept of *nalyééh*—which might reject such a limitation on recovery by the claimants against the insurer.

¹⁰⁴ *Id.* at p. 2.

On 27 March 2007, in the Great Hall at the Sandra Day O'Connor College of Law at Arizona State University in Tempe, Arizona, the Navajo Supreme Court heard oral argument in *Tso v. Navajo Housing Authority*.¹⁰⁵ Lawyers for the two sides sat at counsel tables on either side of a podium, dressed in suits and ties and shuffling through their briefs and notes. They looked up at an elevated bench. Behind them rose an amphitheater seating 350, with perhaps 150-200 people in attendance. The bailiff called, "The Navajo Supreme Court is now in session. All rise." The lawyers and the audience rose, as Chief Justice Herb Yazzie, Associate Justice Lorene Ferguson, and District Judge T.J. Holgate, sitting by designation, entered from a door behind the bench. When the court sat down, so did opposing counsel and the audience. The Chief Justice called the case, and asked counsel if they were prepared to proceed.

Oral argument began in a fashion familiar to appellate courts throughout the United States. Appellant's counsel started his argument by identifying two central issues: Navajo Law and Federal Law, which he said left his client "between a rock and a hard place." The bench soon interrupted with questions, and dialogue between bench and counsel continued during Appellant's allotted time. Appellee Tso had a \$36,000 judgment from tribal court against the Navajo Housing Authority (NHA) for his wrongful termination in violation of the Navajo Employment Preference Act, but the NHA pleaded federal law¹⁰⁶ to block Tso's enforcement of his judgment.

Alternatively, the NHA alleged that provisions of Navajo law¹⁰⁷ blocked execution of Tso's judgment against the NHA. Although the Navajo Supreme Court earlier had rejected that argument in a written opinion,¹⁰⁸ the immediate appeal argued that subsequent amendments to the statute should have retroactive effect and change that result.¹⁰⁹ The possibility of returning to the Supreme Court with new arguments after the case had been decided, unavailable in American Law systems, presents an important aspect of Navajo law's consensual nature. The court will continue to entertain arguments until the parties are satisfied that they have exhausted all possibilities, so that repeat opinions on the same appeal are common.¹¹⁰

The laws treating NHA's alleged immunity from execution are complicated, and the statutory landscape is cluttered.¹¹¹ While it might be fascinating to sort out all of the nuances, more germane to our discussion here, the oral argument went well beyond the applicable statutory sources in its inquiry as to the controlling law.

¹⁰⁵ The author attended the oral argument and took notes, which form the basis for the description and analysis included here.

¹⁰⁶ The Appellant argued that the Secretary of Housing and Urban Development may revoke the NHA's funding if it pays the judgment. *See* 25 CFR § 905, Circular 887.

¹⁰⁷ 6 NNC §§ 616, 623.

¹⁰⁸ *Tso v. Navajo Housing Authority*, SC-CV-10-02 (2004) at www.navajocourts.org/suctopinions.

¹⁰⁹ *See* author's notes of the argument, as referred to in note 105 *supra*.

¹¹⁰ For example, there also are two opinions in the *Blackgoat* case, one of which is referred to at notes 96-101 *supra*. *See* www.navajocourts.org/suctopinions for 2006.

¹¹¹ *See id.*

Accepting for purposes of argument that tribal and/or federal law might bar execution against the NHA, the justices immediately raised the issue of *nalyééh*, the Navajo common law concept invoked in the *Blackgoat* case.¹¹² *Nalyééh* compels compensation in forms and amounts sufficient to salve feelings on all sides of any controversy, leaving no hard feelings and “returning people to good relations with each other in a community,” thereby working “restorative justice” in which “the community must arrive at a consensus about the problem” and “helping a victim is more important than determining fault.”¹¹³ Stated another way, *nalyééh* serves as a gift and an apology, as well as compensation, to make people whole, restore harmony to the community and end all dispute.¹¹⁴ But does *nalyééh*—Navajo Common Law—override the federal law barring execution of a judgment against the NHA?

The oral argument of the *Tso* appeal made an excellent forum for discussion of precisely that issue, and the larger issue of how Navajo common law relates to federal law. Chief Justice Yazzie asked Appellant’s counsel at one point, “Can the NHA exist in a bubble on Navajo land free of the application of Navajo Law?” Counsel replied, not meeting the question head on, that it was the tribal Council’s policy to limit NHA funds exclusively to residential uses.¹¹⁵ Perhaps the larger question, contained in the Chief Justice’s question, is, “Does the employee who complains about the NHA do so under Navajo Law or federal law?” Presuming the answer to that question is, “Navajo Law,” then, “What is Navajo Law, as defined by its proper sources?” The NNC provides that the courts of the Navajo Nation “shall apply any laws of the United States that may be applicable and any laws or customs of the Navajo Nation not prohibited by applicable federal laws.”¹¹⁶

Concentrating on the issue of *nalyééh* focuses the debate. The Appellee, who wished to enforce his judgment, argued that the NHA had at its disposition many funds not directly traceable to the federal government, which might properly be tapped consistent with the Navajo Common Law concept of paying debts by the debtor’s clan through a collective effort recognizing joint liability.¹¹⁷ The Appellant countered¹¹⁸ that while that perception of *nalyééh* might work well where an individual owed a debt, the ancient principle must be filtered through modern business practices and modern business structures. Where a corporate structure—specifically, a public entity funded by the federal government, which has a policy that the entity should not pay judgments on peril of losing its federal funding—owes the debt the ancient Navajo Common Law may have to give way to modern concerns.

¹¹² See notes 96-101 *supra* and accompanying text.

¹¹³ Hon. Robert Yazzie, “*Life Comes From It: Navajo Justice Concepts*,” 24 *N.M.L.REV.* 175, 184-85 (1994); also found in Marianne O. Nielsen and James W. Zion (eds.), *NAVAJO NATION PEACEMAKING* 42, 50 (2005).

¹¹⁴ As defined in the oral argument of counsel for the Appellee in *Tso*. See author’s notes of the argument, as referred to in note 105 *supra*.

¹¹⁵ *Id.*

¹¹⁶ 7 NNC § 204(a). The provision became part of the NNC recently, by Tribal Council Resolution CO-72-03 of October 24, 2003, which implemented Tribal Council Resolution CO-69-02 of November 13, 2002, which added the Fundamental Law provisions in 1 NNC §§ 201-206.

Interestingly, 7 NNC § 204(c) recognizes the “laws of the state in which the matter in dispute may lie” as a residual source of Navajo Law, applicable for “[a]ny matters not covered by the traditional customs and uses or laws or regulations of the Navajo Nation or by applicable Federal law and regulations.”

¹¹⁷ See author’s notes of the argument, as referred to in note 105 *supra*.

¹¹⁸ *Id.*

While the Navajo Supreme Court has not rendered its decision in the *Tso* case as this article goes to press in September 2007, the ultimate decision is not necessary to discern the nature of the mixed jurisdiction in which it arises. In a public session following the oral argument, the question of the accommodation of Navajo Common Law within the sources of law applied by Navajo courts came up again, and Chief Justice Yazzie answered as follows:

Our laws derive from two systems, and there will be conflicts. Our traditional customs, acknowledged by our Common Law, define who we are. Those customs exist and must be used in everything that we do. Our courts are obligated to interpret all law, not just legislative provisions and case law. Those sources must be applied in the light of traditional law, consisting of those concepts and principles that must exist absolutely if we are to remain Navajo. It is our job to conform the new law to traditional law. Traditional law comes from time immemorial. Traditional law meets new laws as mere laws enacted by human beings, and therefore inferior to laws established by our ancestors and holy people. We must always consider the source of the law.¹¹⁹

In fact, as we have seen herein, the federal Indian Law has left a good deal of leeway to the Navajo courts to apply their own law, from their own indigenous sources. The Supreme Court of the United States recognized some time ago that “[t]ribal laws and procedures are often influenced by tribal custom and can differ greatly from our own. Thus, tribal courts are important mechanisms for protecting significant tribal interests.”¹²⁰ Do those tribal interests include application of the concept of *nalyééh* to overcome a federal prohibition against execution? We have no answer from the Navajo Supreme Court (and perhaps, subsequently, a federal court) yet, but merely asking the question makes a statement about the mixed nature of the Navajo legal system.

The Navajo Nation has developed its current legal system—indeed, its whole government structure—within the last half century, beginning from the creation of a Tribal Council in 1923 to approve oil and gas leases on the Reservation. Thereafter, when the Indian Reorganization Act of 1934 presented the Navajo Nation with an opportunity to organize tribal government under a constitution,¹²¹ the Nation referendum vote rejected that possibility, but the incident gave impetus to the true development of Navajo tribal government thereafter. The Navajo Tribal Council became a de facto governing body (with a Chairman, and recognizing a Chapter System of local government), slowly wresting control of Navajo internal affairs from the federal government and steadily adding sophistication to its own structure and rules.

¹¹⁹ Reconstructed from the author’s notes of the argument, *id.*

¹²⁰ *United States v. Wheeler*, 435 U.S. 313, 332 n. 34 (1978). Chief Justice Thomas Tso, after he had retired from the Navajo Supreme Court, noted that the “fundamental moral principles, traditions and feelings of the Navajo people” give rise to Navajo Common Law in the same way that Justice Felix Frankfurter memorably invoked the concept of due process as embodying “a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history.” *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (dissent). Hon. Thomas Tso, “*Moral Principles, Traditions and Fairness in the Navajo Nation Code of Judicial Conduct*,” 76 **JUDICATURE** 15, 16 (1992).

¹²¹ Among a welter of other changes in rights and obligations.

The creation of a tribal court system played a significant part in that process. Into the 1950's, the only "Navajo Courts" were the Courts of Indian Offenses established in 1883 by the Bureau of Indian Affairs to apply criminal law on Indian reservations, known as "CFR Courts" because they operate under the Code of Federal Regulations.¹²² Staffed by tribal elders appointed by federal authorities, three Navajo CFR courts began operating in 1903.¹²³ In 1958, however, the Tribal Council created a Judicial Branch of the Navajo Nation, with seven professional trial court judges and a three-judge Court of Appeals, consisting of one full time judge and two trial judges sitting by assignment.¹²⁴ In 1985, the Court of Appeals became the Navajo Supreme Court, with three permanent justices.¹²⁵ Since 1982, Navajo Peacemaker Courts have offered an alternative form of dispute resolution, under a headman in each local Chapter.¹²⁶

Perhaps most significant of all, in their short existence the Navajo Nation Courts have assimilated forms, procedures and substance from the American legal system into the tribal system. The American legal system does not predominate, but coordinates with Navajo values and traditions. "Navajo common law is not about rules that are enforced by authority; it deals with correcting self to restore life to solidarity. Navajo justice is a product of the Navajo way of thinking."¹²⁷

The United States Supreme Court has referred to tribal courts as courts of limited jurisdiction,¹²⁸ and we have seen that they may lack jurisdiction even when the circumstances of a given case or controversy arise on the reservation or otherwise have significant contacts with it. Nonetheless, from their viewpoint, the Navajo Nation's tribal courts start from the same general jurisdictional base as state courts.¹²⁹

The special Navajo character of Navajo justice and courts shows up in many places. One of the most visible is in the Navajo Nation Code of Judicial Conduct, adopted by the tribal courts on November 1, 1991. An earlier version, in 1978, had adopted word-for-word the American Bar Association's 1972 Code of Judicial Conduct. The second effort by the Navajo courts again worked from the ABA's 1990 Model Code of Judicial Conduct, and adopted most of its language and principles. This time, however, the Navajo Code added a uniquely Navajo principle in its

¹²² 25 C.F.R. §§ 11.100-11.104.

¹²³ See Hon. Thomas Tso, "The Tribal Court Survives in America," *THE JUDGES' JOURNAL* 22, 25 (Spring, 1986).

¹²⁴ *Id.* at 53. The original act of the Tribal Council issued on October 16, 1958, and its provisions now appear in 7 NNC §§ 201 *at seq.*, much amended since.

¹²⁵ Hon. Thomas Tso, "The Tribal Court Survives in America," *THE JUDGES' JOURNAL* 22, 53 (Spring, 1986). That act issued on December 4, 1985, and its provisions now appear in 7 NNC §§ 301 *at seq.*, also much amended since.

¹²⁶ See note 52 *supra*.

¹²⁷ Hon Robert Yazzie, "Life Comes From It': Navajo Justice Concepts," 24 *N.M.L.REV.* 175, 187 (1994).

¹²⁸ See *Nevada v. Hicks*, 533 U.S. 353, 367 (2001).

¹²⁹ See *Nelson v. Pfizer, Inc.*, No. SC-CV-01-02 (Navajo Supreme Court, 2003) at 2003.NANN.0000002 in www.versuslaw.com. As the *Nelson* case states, "Our district courts are courts of general jurisdiction under the Navajo Nation Code, 7 N.N.C. §253, but their jurisdiction is limited by federal statutes and by United States Supreme Court case law." *Id.* at 2. We must distinguish tribal courts whose jurisdiction springs from the inherent sovereignty of their constituent tribe and lands. These courts have appeared in the latter half of the 20th century. The Navajo Nation courts are general jurisdiction courts, limited by outside preemption, much as state courts must give way to certain federal preemptory exercise. Federal courts are courts of limited jurisdiction, exercising only those adjudicatory powers allocated to them by Congress, but have the power to override state and tribal courts' "general" jurisdiction whenever Congress gives it to them.

Canon One: The Obligation to Promote Navajo Justice.¹³⁰ The opening Canon takes as its Principle that, “A Navajo judge should decide and rule between the Four Sacred Mountains. That means that judges, as Navajos, should apply Navajo concepts and procedures of justice, including the principles of maintaining harmony, respecting freedom, and talking things out in free discussion.”

More specifically, Canon One of the Code of Judicial Conduct obligates a Navajo judge to understand and apply four primary values that would be foreign to any Anglo judge: “clan relationships, harmony, traditional leadership and taking care of victims.”¹³¹ If those terms appear foreign, however, they invoke Navajo concepts weighted with history, tradition and sense of place and identity, at the very heart of everything Navajo: *k'é*, *dooneeike'*, *hózhó*, the personal qualities that make a leader a *naat'áanii*, and *nalyééh*.¹³² No simple definition can suffice for any of the terms, and they are all essential to Navajo identity. Let us finish by working through the implications of *k'é*, apparently preeminent among the traditional concepts,¹³³ as it was applied in a case that should be startling to Anglo legal sensitivities.

K'é has been described as a “wide range of deeply felt emotions that create solidarity of the individual with his or her clan.”¹³⁴ These emotions dictate how Navajos greet each (by clan reference back to grandparents), give rise to folk sayings or maxims that impose duties and define relationships, set the ways of resolving conflict, and generate group empathy extending even to “mountains, plants, animals, Mother Earth and all of creation.”¹³⁵ The same emotions explain how Navajos might adopt at the same time a non-judgmental attitude (“It’s up to him”) regarding most personal behavior and yet condemn wrongdoing by the maximum expression of disapproval, “He acts as if he had no relatives.”¹³⁶

How does the concept of *k'é* affect the law and decision of individual cases? Rather dramatically, it can turn out. In *Ben v. Burbank*¹³⁷ Lucy Ben orally instructed Tom Burbank, her cousin, to make additions on a house he was building for her. Burbank agreed and completed the work, but Ben did not pay him. After four and a half years had passed, Burbank sued Ben in tribal court and secured a judgment for \$403.50. Ben appealed, alleging that the statute of limitations had run and barred the claim. In fact, the time for bringing suit on the contract had

¹³⁰ Alluded to in the opinion for *Nelson v. Pfizer*, *supra* note 85. Note that Canon One predated the amendments to add Fundamental Law to 1 NNC § 201 and specify its application as a first source of applicable law, in 7 NNC § 204. See note 115 *supra*.

¹³¹ Thomas Tso, “Moral Principles, Traditions and Fairness in the Navajo Nation Code of Judicial Conduct,” 76 **JUDICATURE** 15, 17 (1992).

¹³² These spellings seem to be phonetic renderings, and alternate spellings may be encountered—e.g., “hózhóójí” for “hózhó.”

¹³³ See 7 NNC § 354(A)(5), entitled “Knowledge of Navajo Language, Culture and Tradition,” which requires all judicial applicants to speak Navajo and English, “and have some practical knowledge of the fundamental laws of the Diné.” In addition, however, the statute specifies that the applicant must be able to demonstrate (a), “an understanding of *K'é*, including the Diné clan system.” No other traditional concept is specified.

¹³⁴ Hon Robert Yazzie, “*Life Comes From It: Navajo Justice Concepts*,” 24 **N.M.L.REV.** 175, 182 (1994). Even as he tries to define it, however, Chief Justice Yazzie cautions, “it is difficult to translate into English because of its strong connotations.” *Id.*, note 40. Undaunted, an English-speaking student of the Navajo translated it as “solidarity.” Witherpsoon, **NAVAJO KINSHIP AND MARRIAGE** 37 (1975).

¹³⁵ Thomas Tso, “Moral Principles, Traditions and Fairness in the Navajo Nation Code of Judicial Conduct,” 76 **JUDICATURE** 15, 17 (1992).

¹³⁶ *Id.*

¹³⁷ 7 Navajo Rep. 222 (1996).

run.¹³⁸ In state court, the case would have terminated there, the Plaintiff out of luck and out of court, with no further remedy. The Navajo Supreme Court, however, dismissed the appeal without even waiting for a reply brief from Appellee, stating

The Navajo courts apply Navajo customs and traditions, or Navajo common law, before they apply any other form of law. . . . the Navajo way of *k'é* is the prevailing law to be applied. *K'é* recognizes “your relations to everything in the universe,” in the sense that Navajos have respect for others and for a decision made by the group. It is a deep feeling for responsibilities to others and the duty to live in harmony with them. It has to do with the importance of relationships to foster consensus and healing. It is a deeply –felt emotion which is learned from childhood. . . . Appellant admits there was an oral agreement [and] when people make promises between one another, oral or written, they should honor those promises. . . . These parties are related by clan and Appellee trusted Appellant to pay for the work because of this relationship[;] one must respect his or her relatives in order to maintain social order. . . . It appeared that Appellant was hiding behind her statute of limitations claim in order to avoid paying for the work. This is not the Navajo way.¹³⁹

Final Word: A Dynamic Mixed Jurisdiction

The Navajo Nation’s mixed jurisdiction manifests vitality and a balance, combining older ingredients in a new mix, to build an autonomous legal system in about half a century. The Navajo legal system appears to serve and preserve the traditional values of the *Diné* at the same time that it moves with that people into a larger society. It strives to maintain *Diné*’s identity as a special community unto itself, not hostile to the larger community in which it lives, but insistently assertive of its own distinctive character at the same time it embraces elements of the society all around it.

Cite as: Dale Beck Furnish, *The Navajo Nation: A Three-Ingredient Mix*, vol. 12.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW (May 2008), <<http://www.ejcl.org/121/art121-8.pdf>>.

¹³⁸ 7 NNC § 602(B)(1)(three years).

¹³⁹ *Id.* at 224.