Case No. DA 09-0214

IN THE SUPREME COURT
OF THE STATE OF MONTANA

DIANE MORIGEAU, personally
and as Personal Representative of the Estate
of Benjamin F. Morigeau, Sr.,

Plaintiff and Appellant,

-vs-

DAVID GORMAN, M.D., NORTHWEST
HEALTHCARE CORPORATION, a Montana
Corporation d/b/a POLSON FAMILY
MEDICAL CLINIC, ST. PATRICK HOSPITAL
AND HEALTH SCIENCES CENTER, a
Montana Corporation d/b/a INTERNATIONAL
HEART INSTITUTE OF MONTANA,

Defendants and Appellees.

APPELLEES ANSWER BRIEF

On Appeal from the District Court of the Eleventh Judicial District,
Department One, of the State of Montana,
In and For the County of Flathead, the Honorable Ted O. Lympus Presiding.

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TABLE OF CONTENTS

ISSUE PRESENTED 1

STATEMENT OF THE CASE 1

FACTUAL BACKGROUND 4

STANDARD OF REVIEW 4

DISCUSSION 6

A. The Montana Supreme Court Previously Held that Public Law 280 Must Be Narrowly Construed to Grant Concurrent Jurisdiction Only in the Limited Areas Specified 12

1. The state of Montana's courts never had jurisdiction over alleged malpractice actions arising on the Flathead Reservation.. 14

2. Ignoring the Tribes' own assertion that it retains exclusive jurisdiction over any matter not listed in Tribal Ordinance 40-A is offensive to Tribal autonomy.. 21

a. Three Affiliated Tribes is not applicable because in this case there is a specific statute with a tribal intent for the areas listed to be the exclusive areas where jurisdiction may be shared . 24

b. Cases involving non Public Law 280 reservations are not applicable. 27

B. Morigeau Received Both Substantive and Procedural Due Process In Front of the Tribal Court 28

CONCLUSION 31

CERTIFICATE OF COMPLIANCE 35

CERTIFICATE OF SERVICE 36

INDEX TO APPENDIX 37

APPENDIX 1 - Select CSKT Cause No. 07-568-CV Pleadings

APPENDIX 2 - Rorvik v. Evergreen

APPENDIX 3 - Dist. Court Order on Mot. to Dismiss

TABLE OF AUTHORITIES

MONTANA STATE CASES

Balyeat Law, PC v. Pettit,
1998 MT 252, ¶¶ 1, 5, 6, 15, 22, 25, 26,
291 Mont. 196, 967 P.2d 398. . . . . 5-6, 12-13, 22, 28, 32

Geiger v. Pierce
(1988), 233 Mont. 18, 20, 758 P.2d 279, 280 28

In re Marriage of Skillen,
1998 MT 43, ¶¶ 46 and 56, 287 Mont. 399, 956 P.2d 1 . . . . . 10, 29

In re McGurran,
1999 MT 192, ¶ 7, 295 Mont. 357, 983 P.2d 968 5

Larrivee v. Morigeau
(1979), 184 Mont. 187, 197 and 202, 602 P.2d 563, 569 and 571 14

Liberty v. Jones
(1989), 240 Mont. 16, 18, 782 P.2d 369, 371 . . . . . 6, 13, 20

Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund,
1998 MT 169, ¶ 7, 289 Mont. 475, 962 P.2d 1167 5

McCrea v. Busch.
(1974), 164 Mont. 442, 524 P.2d 781 27

Minuteman Aviation, Inc. v.. Swearingin
(1989), 237 Mont. 207, 212, 772 P.2d 305, 308-09 5

Security State Bank v. Pierre,
(1973) 162 Mont. 298, 302, 511 P.2d 325, 328 . . . . . 20, 25

State ex rel. Iron Bear v. District Court
(1973), 162 Mont. 335, 512 P.2d 1292. 9-10

MONTANA STATE STATUTES

Mont. Code Ann. § 1-2-101 22

Mont. Code Ann. §§ 2-1-301 through 2-1-306 7

Mont. Code Ann. §§ 2-1-302 7-8

The Enabling Act of February 22, 1889, ch. 180, 25 Stat. 676 (1889) 19-20

MONTANA RULES OF CIVIL PROCEDURE

Mont.R.Civ.P, Rule 12(b). 5

Mont.R.Civ.P, Rule 12(d). 5

TRIBAL COURT OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION ORDINANCE

Tribal Ordinance 40-A (Revised)
CSKT Laws Codified § 1-2-105(3) 8-11, 13-14, 20-24, 26-28, 31-33

TRIBAL COURT OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION CASE

Rorvik v. Evergreen Montana Healthcare L.L.C. et. al 2-3, 23, 26, 28, 31-33

UNITED STATES CONSTITUTION

Article I, § 8, cl. 3 15

Article II, § 2, cl. 2 15

Article VI, cl. 2 16

FEDERAL STATUTES

P.L. 280, 28 U.S.C. § 1360 ..... 1, 3, 6-8, 11-12, 20-21, 23, 27-28, 32, 35

25 U.S.C. §§ 1322, 1326 7

FEDERAL CASES

Boddie v. Connecticut,
401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) 25

Bryan v. Itasca County,
426 U.S. 373, 376 n. 2, 96 S.Ct. 2102, 2105 n. 2,
48 L.Ed.2d 710 (1976) 18

Cherokee Nation v. Georgia,
5 Pet. 1, 17, 8 L.Ed. 25 (1831) 16

Department of Taxation and Finance of New York v. Milhelm Attea & Bros.,
512 U.S. 61, 73, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994) 17

Fisher v. District Court of Sixteenth Jud. Dist.,
424 U.S. 382, 387-88, 96 S.Ct. 943, 947, 47 L.Ed.2d 106 (1976) 30

Goldberg v. Kelly,
397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) 25

Iowa Mutual Ins. Co. v. LaPlante,
480 U.S. 9, 18, 107 S.Ct. 971, 978, 94 L.Ed.2d 10, 16 (1987) 28

McClanahan v. Tax Commission of Arizona,
411 U.S. 164, 165 and 170-171, 93 S.Ct. 1257, 1261,
36 L.Ed.2d 129 (1973) 17-18

Montana v. United States,
450 U.S. 544, 566, 101 S.Ct. 1245, 1258-59 (1981) 29-30

Nevada v. Hicks,
533 U.S. 353, 361, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) 17

New Mexico v. Mescalero Apache Tribe,
462 U.S. 324, 332, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) 17-18

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,
498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) 16

Santa Clara Pueblo v. Martinez,
436 U.S. 49, 65, 98 S.Ct. 1670, 1680-81 (1978) 29

Schneidewind v. ANR Pipeline Co.,
485 U.S. 293, 299-300, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988) 16

Standard Oil Co. v. Montecatini Edison S.p.A.
342 F.Supp. 125, 129-30 (D.C.Del.1972) 4

Stanley v. Illinois,
405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) 25

Three Affiliated Tribes of the Fort Berthold v. Wold Engineering,
476 U.S. 877, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986) 6, 24, 26-27

United States v. Mazurie,
419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975) 17

Weeks Construction, Inc. v. Oglala Sioux Housing Authority,
797 F.2d 668, 673 (8th Cir.1986) 30

White Mountain Apache Tribe v. Bracker,
448 U.S. 136, 142, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) .. 17, 21-22, 24

Williams v. Lee,
358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) 18, 20-21

Worcester v. Georgia,
31 U.S. (6 Pet.) 515, 561 (1932) 16-19

Yellowstone County v. Pease,
96 F.3d 1169, 1174 (9th Cir. 1996) 29-30

No. DA 09-0214

IN THE SUPREME COURT

OF THE STATE OF MONTANA

ISSUE PRESENTED

1. Was the district court correct when it determined that the Flathead Salish-Kootenai Reservation (a Public Law 280 reservation) has exclusive jurisdiction over this case?

STATEMENT OF THE CASE

The sole issue on appeal is whether the Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation has exclusive jurisdiction over a claim which arose on the reservation and which concerns an alleged tort against a tribal member.[1] The state district court correctly held that – because this particular reservation is a Public Law 280 reservation and neither the tribe nor the state has consented to concurrent jurisdiction in medical malpractice cases – the Tribal Court has exclusive jurisdiction. The Plaintiff ("Morigeau") is now appealing that decision.

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[1] The underlying case involves an allegation of medical malpractice. Dr. Gorman and Northwest Healthcare Corporation dispute the allegation that there was malpractice. For the purposes of the present appeal, however, the merits are not at issue. As a result, a detailed factual discussion relating to the specific allegation of medical malpractice is not necessary.

By way of procedural background, Morigeau filed two nearly identical suits, one in state district court and one in the Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation ("Tribal Court"). The Tribal Court suit was filed well after the state district court suit was filed. As a result, the suit filed in the Tribal Court was ultimately dismissed as time barred under Tribal law. In the Tribal Court suit, Morigeau alleged that the Tribal Court had subject matter jurisdiction over Defendants Northwest Healthcare Corporation and David Gorman, M.D. See CSKT Cause No. 07-568-CV Complaint, attached as Exhibit 1. Initially, Defendants Northwest Healthcare Corporation and David Gorman, M.D. assumed the state court had concurrent jurisdiction with the Tribal Court.[2] In their Tribal Court action, however, Plaintiff cited to Rorvik v. Evergreen Montana Healthcare L.L.C. et. al (a Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation case) to support Plaintiff's proposition that the Confederated Salish and Kootenai Tribes of the Flathead Reservation had jurisdiction over Defendants Northwest Healthcare Corporation and David Gorman, M.D. See Pl.'s Br. Resp. to NWHC's Mot. to Dismiss, p. 5,

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[2] Although Dr. Gorman and Northwest Healthcare initially requested that the Tribal Court defer to the state court, Defendants raised the possibility that the Rorvik decision precluded state court jurisdiction. See Reply in Supp. of Dr. Gorman's Mot. to Dismiss, § B, Exhibit 1. The Tribal Court was made aware, both by Plaintiff and Defendants, that the state court may not have jurisdiction.

attached as Exhibit 1. For the Court's convenience, a copy of Rorvik v. Evergreen is attached as Exhibit 2.

In her Tribal Court pleadings, Morigeau recognized that the Tribal Court refused to dismiss a Tribal Court case which had been first filed in state court, finding that "under Public Law 280, **there was no concurrent jurisdiction with State Court**" and Tribal Court had jurisdiction over the case. Pl.'s Br. Opposing David Gorman, M.D.'s Mot. to Dismiss (CSKT Cause No. 07-568-CV), pp. 5-6, *citing* Rorvik. Plaintiff acknowledged that Rorvik is analogous to the present case and even went so far as to state that Rorvik and the present case present an "identical situation." Id. at p. 6. After reviewing the applicable law, Defendants Northwest Healthcare Corporation and David Gorman, M.D. agreed with Morigeau; the Tribal Court did have exclusive jurisdiction over Morigeau's claims against Defendants Northwest Healthcare Corporation and David Gorman, M.D. Accordingly, Northwest Healthcare Corporation and David Gorman, M.D. moved the state court to dismiss the state district court action for lack of subject matter jurisdiction. After reviewing the applicable law, the state district court agreed that the Tribal Court held exclusive jurisdiction and dismissed the claims against Northwest Healthcare and David Gorman, M.D. Morigeau failed to serve the other named Defendants within the time allowed, so the claims against the other

named Defendants were also dismissed. After the judgment was certified as final, Morigeau appealed the district court's holding that the Tribal Court had exclusive jurisdiction.

FACTUAL BACKGROUND

The following facts – which Morigeau concedes – are the material jurisdictional facts relevant to determining whether the Tribal Court has exclusive subject matter jurisdiction:

1. The dispute, relative to Defendants Northwest Healthcare Corporation and David Gorman, M.D., resulted from transactions taking place within the exterior boundaries of the Flathead Reservation. Pl.'s Br. Resp to NWHC's Mot. to Dismiss, p. 2, attached as Exhibit '2';

2. Benjamin Morigeau was a tribal member; Id.

3. The underlying claim against Defendants Northwest Healthcare Corporation and David Gorman, M.D. is a tort claim which does not arise from the operation of a motor vehicle on the Flathead Indian Reservation. See Pl.'s Compl.

STANDARD OF REVIEW

Subject matter jurisdiction is a court's power "to hear and determine" a certain type of controversy. Standard Oil Co. v. Montecatini Edison S.p.A. (D.C.Del.1972), 342 F.Supp. 125, 129-30 (citation omitted). A district court's determination that it lacks subject matter jurisdiction is a conclusion of law which

the Montana Supreme Court reviews to determine whether the district court's interpretation of the law is correct. In re McGurran, 1999 MT 192, ¶ 7, 295 Mont. 357, 983 P.2d 968 (citation omitted). As a rule, "a party cannot waive or consent to subject matter jurisdiction where there is no basis for the court to exercise jurisdiction." Balyeat Law, PC v. Pettit, 1998 MT 252, ¶ 15, 291 Mont. 196, 967 P.2d 398. Thus, neither the Plaintiff nor the Defendants can consent to state court jurisdiction if the tribal court has exclusive jurisdiction.

When deciding a motion to dismiss based on lack of subject matter jurisdiction, a trial court must determine whether the complaint states facts that, if true, would vest the court with subject matter jurisdiction. Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund, 1998 MT 169, ¶ 7, 289 Mont. 475, 962 P.2d 1167. Rule 12(b)'s provision for converting motions to dismiss into summary judgment motions only applies to Rule 12(b)(6) motions. See Rule 12(b), M.R.Civ.P. In the present case, the material "jurisdictional facts" are not in dispute, so no hearing on jurisdictional facts was required.[3]

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[3] A Rule 12(d), M.R.Civ.P. preliminary hearing by the District Court was not requested by either party nor ordered by the Court. See Rule 12(d), M.R.Civ.P, (providing that the defense of lack of subject matter jurisdiction pursuant to Rule 12(b)(1) "shall be heard and determined before trial on application of any party...."); and Minuteman Aviation, Inc. v.. Swearingin (1989), 237 Mont. 207, 212, 772 P.2d 305, 308-09 (addressing motion to dismiss for lack of personal jurisdiction). The parties also affirmatively waived oral arguments. See *Stipulation to Waive Oral Arguments*, dated 1/7/09.

DISCUSSION

The Confederated Salish Kootenai Tribes (the "Tribes") have exclusive subject matter jurisdiction over Plaintiff's tort claims against Defendants Northwest Healthcare Corporation and Dr. David Gorman. The United States Congress provided the exclusive means by which state courts may assert civil jurisdiction over certain actions arising in the Flathead Indian Reservation when it enacted Public Law 280. See P.L. 280, 28 U.S.C. § 1360; Three Affiliated Tribes of the Fort Berthold v. Wold Engineering, 476 U.S. 877, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986) (discussing state court jurisdiction in a state in which Public Law 280 had been adopted).

Passed in 1953, Public Law 280 allowed the states – under certain circumstances – to extend [the state's] civil authority into Indian country. Liberty v. Jones (1989), 240 Mont. 16, 18, 782 P.2d 369, 371. While six states (originally five) assumed jurisdiction under the statute's express terms, other states – including Montana – had the option to assume jurisdiction. Balyeat Law, PC v. Pettit 1998 MT 252, ¶22, 291 Mont. 196, 967 P.2d 398.

Although tribal consent was not required by federal law until 1968[4], Montana – through its own laws – established a consent procedure in 1963. See Mont.Sess.Laws, Ch. 81, 1963, now codified at Mont. Code Ann. §§ 2-1-301 through 2-1-306. In short, the state law was (and is) that: (a) Montana could not extend its civil adjudicatory authority onto the reservation without the tribe's consent and (b) any exercise of state jurisdiction over matters arising on the reservation was (and is) limited to the specific areas consented to by the tribes:

> (1) [w]henever the governor of this state receives from the tribal council or other governing body of the Confederated Salish and Kootenai Indian tribes...a resolution expressing its desire that its people be subject to the criminal or civil jurisdiction, or both, of the state to the extent authorized by federal law and regulation, the governor shall issue within 60 days a proclamation to the effect that the **specified jurisdiction** applies to those Indians and their territory or reservation in accordance with the provisions of this part.
> (2) [t]he governor may not issue the proclamation until the resolution has been approved in the manner provided for by the charter, constitution, or other fundamental law of the tribe...

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[4] Originally, Public Law 280 was criticized by both the states and the tribes. The mandatory state governments resented the fact that they were given the duty of law enforcement without the means to pay for it (Indian lands are not taxable and Congress did not appropriate funds). The tribes, on the other hand, resented the fact that state jurisdiction was thrust upon the tribes without the tribes' consent. As a result of the criticisms – through a group of amendments passed as part of the Indian Civil Rights Act of 1968 -- Congress amended Public Law 280 to provide that no state could assume jurisdiction without tribal consent. See 25 U.S.C. §§ 1322, 1326.

Mont. Code Ann. § 2-1-302 (2007)(emphasis added).

In 1965, by enacting Tribal Ordinance 40-A (Revised), the Confederated Salish and Kootenai Tribes consented to concurrent jurisdiction with Montana, *but only in limited areas*. The governor of Montana thereafter issued the proclamation required by Mont. Code Ann. § 2-1-302, agreeing to Montana's acceptance of jurisdiction in the areas specified.[5]

Reading Public Law 280 together with Tribal Ordinance 40-A (Revised) and Montana law, Montana asserted – and the Tribes consented to – concurrent jurisdiction over events on the Flathead Reservation involving enrolled members of the tribe in the following areas and the following areas *only*:

(a) Compulsory School Attendance

(b) Public Welfare

(c) Domestic Relations (except adoptions)

(d) Mental Health, Insanity, Care of the Infirm, Aged and Afflicted

(e) Juvenile Delinquency and Youth Rehabilitation

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[5] The Confederated Salish and Kootenai Tribes are the only tribal entity in Montana to confer authority to the state of Montana pursuant to Public Law 280. Accordingly, the precedential value of any decision in this case in Montana is limited to the Confederated Salish and Kootenai Tribes.

> (f) Adoption Proceedings (With consent of the Tribal Court)
>
> (g) Abandoned, Dependent, Neglected, Orphaned or Abused Children
>
> (h) Operation of Motor Vehicles upon the Public Streets, Alleys, Roads and Highways
>
> (i) All Criminal Laws of the State of Montana; and all Criminal Ordinances of Cities and Towns within the Flathead Indian Reservation.

Tribal Ordinance 40-A (Revised), CSKT Laws Codified § 1-2-105(3).

In addition, in 1973 the Montana Supreme Court established an additional three-part test to determine a state district court's subject matter jurisdiction in a matter involving an Indian, enrolled in a tribe, and residing on a reservation. State ex rel. Iron Bear v. District Court (1973), 162 Mont. 335, 512 P.2d 1292. In Iron Bear, the Montana Supreme Court held that before a state district court can assume jurisdiction, it must first determine:

> (1) whether the federal treaties and statutes applicable have preempted state jurisdiction;
>
> (2) whether the exercise of state jurisdiction would interfere with reservation self-government; and
>
> (3) whether the Tribal Court is currently exercising jurisdiction or has exercised jurisdiction in such a manner as to preempt state jurisdiction.

Iron Bear, 162 Mont. at 346, 512 P.2d at 1299; and see also In re Marriage of Skillen, 1998 MT 43, ¶ 46, 287 Mont. 399, 956 P.2d 1 (holding that the Iron Bear test applies in a jurisdictional analysis with the tribe if the context is adjudicatory – as opposed to regulatory). If the answer to any of the questions above is "yes," then the state cannot exercise jurisdiction. Id.

The net result is, if the Confederated Salish and Kootenai Tribes have jurisdiction over a matter, then Montana cannot assert concurrent jurisdiction unless the matter falls within one of the areas specified in Tribal Ordinance 40-A (Revised). Moreover, even if concurrent jurisdiction is allowed by Tribal Ordinance 40-A, the state District Court must also satisfy the Iron Bear test by finding that exercising jurisdiction would not interfere with reservation self-government and that the Tribal Court has not exercised jurisdiction in such a manner as to pre-empt state jurisdiction.

In this case, Morigeau argued that the Confederated Salish and Kootenai Tribes has jurisdiction over this case and the Tribal Court agreed. Alleged medical malpractice does not fall within the concurrent jurisdiction items listed in Tribal Ordinance 40-A (Revised). In addition, the Tribal Court has exercised jurisdiction over Defendants Northwest Healthcare Corporation and David Gorman, M.D., and indicated that it is willing to accept exclusive jurisdiction in an

analogous case. Accordingly, the state exercising jurisdiction relative to Plaintiff's Complaint against Defendants Northwest Healthcare Corporation and David Gorman, M.D. would be in violation of both state and federal law. The state district court simply had no subject matter jurisdiction. Thus, the district court correctly dismissed Morigeau's state district court Complaint against Defendants Northwest Healthcare Corporation and David Gorman, M.D.

On appeal, Morigeau responds that "the district court erred by concluding that Public Law 280 provides the exclusive means by which the state courts may assert civil jurisdiction." Br. of Appellant, p. 23. Morigeau contends that, rather than the exclusive means for obtaining concurrent jurisdiction, Public Law 280 "permitted the other states to acquire **additional jurisdiction, beyond that which they normally possess**, at their option with the consent of the affected tribe." Id. p. 23 (emphasis in original). Both the Tribal Court and the Montana Supreme Court, however, have previously held that concurrent jurisdiction exists only in the limited areas specified by Tribal Ordinance 40-A. Accordingly, the district court was correct when it held that Public Law 280 provided the exclusive means for the state to obtain jurisdiction. The district court's decision should be affirmed.

//

A. The Montana Supreme Court Previously Held that Public Law 280 Must Be Narrowly Construed to Grant Concurrent Jurisdiction Only in the Limited Areas Specified.

The Montana Supreme Court has previously recognized that, relative to the Flathead Reservation, Public Law 280 provides the exclusive means for concurrent state and tribal jurisdiction. In Balyeat Law, P.C. v. Pettit, the Montana Supreme Court rejected Morigeau's argument that jurisdiction exists in areas other than those specified pursuant to Public Law 280. Balyeat Law, PC, 1998 MT 252, ¶ 25, 291 Mont. 196, 967 P.2d 398. In Balyeat, suit was brought to collect medical debts. 1998 MT 252, ¶ 5, 291 Mont. 196, 967 P.2d 398. Balyeat brough suit against a tribal member in a state justice court. Id., ¶ 6. The tribal member moved to have the suit dismissed for lack of subject matter jurisdiction. Id. The justice court declined to dismiss the suit and the tribal member appealed to the district court. Just as the Defendants in this case asked the district court to dismiss this suit for lack of jurisdiction, the district court dismissed Balyeat's suit for lack of subject matter jurisdiction. On appeal, the Montana Supreme Court affirmed the district court's decision, holding that there was no concurrent jurisdiction. Id., ¶ 1.

When discussing how to interpret Tribal Ordinance 40-A (Revised), the Montana Supreme Court has made it clear that state courts must "afford every deference to the Tribes" and that it was "imperative" that Montana Courts "resolve all ambiguities in [the Tribes'] favor." Balyeat Law, PC, at ¶ 25. Applying Montana's rules of statutory construction, the Montana Supreme Court admonished that the list in Tribal Ordinance 40-A must be read as narrowly as possible:

> **Tribal Ordinance 40-A (Revised) must be strictly construed so as not to extend state court jurisdiction beyond that *expressly* directed by the Tribes.**

Balyeat Law, PC v. Pettit, at ¶ 26 (emphasis added) *citing* Liberty v. Jones (1989), 240 Mont. 16, 19, 782 P.2d 369, 371 (holding that "public welfare" in the ordinance does not mean cases that affect general happiness, well-being and welfare of citizens, but rather was limited to "practical issues of economic assistance to the needy"). The Montana Supreme Court made it clear that, "[a]bsent the clearest evidence of the Tribes' intent to consent to the assertion of authority by state courts onto their sovereign land, **the Tribes retain their exclusive jurisdiction**." Balyeat Law, PC, at ¶ 25 (emphasis added).

Strictly construing Tribal Ordinance 40-A, the Tribes did not consent to concurrent jurisdiction in medical malpractice cases. Negligence actions are not

among the items specifically enumerated in Tribal Ordinance 40-A. The Montana Supreme Court has previously indicated that the only tort cases where concurrent jurisdiction is shared are those "arising from the operation of motor vehicles upon the public streets, alleys, roads and highways." Larrivee v. Morigeau (1979), 184 Mont. 187, 197 and 202, 602 P.2d 563, 569 and 571 (in the context of a tort claim arising from an auto accident on the reservation and one issue was whether "the tribes agreed only to limited concurrent state civil jurisdiction not including tort claims of the kind here in question" and stating "[a]s a matter of fact, it appears that the Council of the Confederated Salish and Kootenai Tribes voluntarily found it in their interest to consent to such jurisdiction by the adoption of Tribal Ordinance 40-A (Revised)"). The alleged malpractice in the present case was on the Tribes' land. The Tribes' have not shown an intent to consent to the state's authority in this matter. Thus, the Tribes retain their exclusive jurisdiction.

1. The state of Montana's courts never had jurisdiction over alleged malpractice actions arising on the Flathead Reservation.

Morigeau's entire premise – that Montana has jurisdiction over every claim brought by an Indian plaintiff – is fundamentally flawed. Montana never had jurisdiction over medical malpractice claims on the Flathead Reservation. The authority to deal with and regulate activity occurring on tribal land is wholly

federal – unless Congress delegates its power to the states. Absent a delegation of power from the federal government, the states cannot assert jurisdiction. No state law (including a state constitution) can allow the state to assume jurisdiction where none has been delegated from the federal government. Under our system of government, the state simply lacks the authority. Thus, any argument premised on state law or a state constitution as a basis for concurrent jurisdiction need not even be considered, (unless the state law was passed pursuant to power delegated from the United States Congress).

At its most fundamental, the Federal Government's authority over Indians is derived from the United States Constitution. Article I concerns the Legislative Branch. Section 8 delineates the powers of Congress. Clause 3 of Section 8, in turn, provides that "The Congress shall have the power...To regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes*;". See U.S. Const., Art. I, § 8, cl. 3 (emphasis added). This is known as the Indian Commerce Clause. Similarly, the President of the United States was empowered to make treaties, necessarily including Indian treaties, with the consent of the United States Congress. See U.S. Const., Art. II, § 2, cl. 2.

Federal law preempts contrary state laws. The supremacy clause of the United States Constitution provides that "[t]his constitution, and the laws of the

United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. The courts have interpreted this clause to mean that the U.S. Congress can preempt state laws. Federal preemption of state law can occur in three situations: (1) where Congress explicitly preempts state law; (2) where preemption is implied because Congress has occupied the entire field; and (3) where preemption is implied because there is an actual conflict between federal and state law. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988). The supremacy clause of the United States Constitution precludes the state of Montana – whether it be the Montana Supreme Court or the Montana Legislature – from creating concurrent jurisdiction where none has been delegated by Congress.

The United States Supreme Court has recognized that "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (quoting Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). In the 1932 case of Worcester v. Georgia, the United States Supreme Court interpreted the United

States Constitution and held that tribal sovereignty was absolute. (1932), 31 U.S. (6 Pet.) 515, 561. In Worcester, the state of Georgia arrested several missionaries for violating a state law requiring non-Indians residing in Cherokee territory to obtain a license from the state governor. (1932), 31 U.S. (6 Pet.) 515, 561. Justice Marshall concluded that "[t]he Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force." Id.[6] "Indian tribes are unique aggregations possessing 'attributes of sovereignty over both their members and their territory.' " New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (*quoting* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980)) (*quoting* United States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975)).

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[6] Relative to regulatory actions (such as regulating hunting and fishing for example), the United States Supreme Court later recognized that tribal sovereignty is not absolute. White Mountain Apache Tribe v. Bracker, 448 U.S. at 141, 100 S.Ct. 2578 (citations omitted). The United States Supreme Court's current position is that "the Indians' right to make their own laws and be governed by them does not exclude all state *regulatory* authority on the reservation." Nevada v. Hicks, 533 U.S. 353, 361, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001)(emphasis added). Relative to regulatory authority, when tribal sovereignty and state regulatory authority collide, courts must seek to "reconcile the plenary power of the States over residents within their borders with the semiautonomous status of Indians living on tribal reservations." Department of Taxation and Finance of New York v. Milhelm Attea & Bros., 512 U.S. 61, 73, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994) (*quoting* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 165, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)). There is a distinction, however, between regulatory action and *legal* authority over actions relating to tribal members.

The United States Supreme Court has said that "[b]ecause of their sovereign status, tribes and their reservation lands are insulated in some respects by an 'historic immunity from state and local control.' " Mescalero, 462 U.S. at 332, 103 S.Ct. 2378 (citation omitted). Further, "tribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government.' " Id. (citation omitted).

As a result, state courts are precluded from exercising jurisdiction over Indians for causes of action arising in Indian country unless there is an express grant of authority from Congress to exercise jurisdiction. Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); Bryan v. Itasca County, 426 U.S. 373, 376 n. 2, 96 S.Ct. 2102, 2105 n. 2, 48 L.Ed.2d 710 (1976); McClanahan v. Tax Commission of Arizona, 411 U.S. 164, 170-171, 93 S.Ct. 1257, 1261, 36 L.Ed.2d 129 (1973). In Williams, the United States Supreme Court explained that:

> [t]he cases in this court have consistently guarded the authority of Indian governments over their reservations ... [and] [i]f this power is to be taken away from them, it is for Congress to do it.

Williams, 358 U.S. at 223, 79 S.Ct. at 272. Put another way, absent Congressional acts, state courts simply do not have jurisdiction over events occurring on a reservation involving an enrolled member of the Tribe. See also, Worcester v.

Georgia (1932), 31 U.S. (6 Pet.) 515, 561 (where Georgia arrested several missionaries for violating a state law requiring non-Indians residing in Cherokee territory to obtain a license from the state governor and Justice Marshall concluded that "[t]he Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force").

Moreover, Montana consented to the absolute control of the United States Congress over Indian lands as a condition of being accepted as a state. Under the Act of February 22, 1889 (hereafter, the Enabling Act), ch. 180, 25 Stat. 676 (1889), Congress allowed Montana to join the Union (and also permitted the admittance of North Dakota, South Dakota, and Washington). See Enabling Act, ch. 180, 25 Stat. 676 (1889). As a condition of statehood, the federal government required the people inhabiting the State of Montana to:

> ...agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, *the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States*;

Enabling Act, ch. 180, 25 Stat. 676, § 4 (1889) (emphasis added). As such, there

is no doubt that the authority to deal with activity occurring on tribal land is wholly federal, unless Congress delegates its power. Absent a delegation of authority, the Tribal Court has exclusive jurisdiction.

In this case, the only delegation of power by the United States Congress is Public Law 280. It naturally follows that Public Law 280 is the exclusive means for the state to exercise concurrent jurisdiction. Morigeau's argument – that some form of jurisdiction existed prior to Public Law 280 based on state law and that the jurisdiction somehow survived Public Law 280 – is contrary to the holding in Williams v. Lee. 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

The state had (and continues to have) no authority to assume jurisdiction absent a congressional act. "State law precludes Montana from assuming jurisdiction over Indians on the reservation not tendered by the tribes by formal resolution." Security State Bank v. Pierre (1973), 162 Mont. 298, 302, 511 P.2d 325, 328. That holds true whether the plaintiff is an Indian or non-Indian. See Liberty v. Jones (1989), 240 Mont. 16, 19, 782 P.2d 369, 371. For example, in Liberty, the plaintiff was an Indian and the Montana Supreme Court stated that, in the absence of an "express directive" giving the state jurisdiction, Montana cannot extend its authority over a controversy not provided for in Tribal Ordinance 40-A. Id.

Other than Public Law 280, there was (and is) no congressional act granting the state concurrent jurisdiction over Indians concerning acts on the reservation. Any jurisdiction assumed by the state outside of Public Law 280 was (and is) unlawful. There was (and is) no legal jurisdiction beyond that granted in Public Law 280. It naturally follows that Public Law 280 is the exclusive means by which the state may share concurrent jurisdiction on Public Law 280 reservations. Accordingly, the district court was correct when it held that Public Law 280 forms the exclusive basis for the state to assert jurisdiction over matters concerning a tribal member for acts which allegedly occurred within the boundaries of the reservation. The state never had jurisdiction over alleged medical malpractice acts relating to an enrolled member of the tribe which occurred on tribal land.

2. Ignoring the Tribes' own assertion that it retains exclusive jurisdiction over any matter not listed in Tribal Ordinance 40-A is offensive to Tribal autonomy.

Moreover, if the state asserted jurisdiction in areas outside of Tribal Ordinance 40-A, it would be offensive to tribal sovereignty. As a rule, a particular exercise of state authority may be foreclosed because it would undermine " 'the right of reservation Indians to make their own laws and be ruled by them.' " White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980) *quoting* Williams v. Lee, 358 U.S., at 220, 79 S.Ct.,

at 270. State authority may also be preempted by incompatible federal law. White Mountain, 448 U.S., at 142, 100 S.Ct., at 2583. As discussed above, the Tribes made their own law when the Tribes passed Tribal Ordinance 40-A.

The language the Tribes used in Tribal Ordinance 40-A indicates that the Tribes did not intend to relinquish exclusive jurisdiction over medical malpractice actions. Specifically, the Tribes explicitly referred to "mental" health in Tribal Ordinance 40-A, but did not add "physical" health to the list. This Court warned in Balyeat that Tribal Ordinance 40-A must be read in the strictest terms. Considering the rule that, "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted," the Tribes retained their exclusive jurisdiction over the medical malpractice claims against Defendants Northwest Healthcare Corporation and David Gorman, M.D. There is no clear evidence of the Tribes' intent to consent to the assertion of Montana's authority onto the Tribe's sovereign land in the present case. See Mont. Code Ann. § 1-2-101 (2007) ("...the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted..."). Thus, there is no concurrent jurisdiction.

In Rorvik v. Evergreen Montana Healthcare L.L.C. et. al., the Tribal Court interpreted Tribal Ordinance 40-A and clearly set forth the Tribes' position that there is no concurrent jurisdiction in any area outside of those specific areas listed in Tribal Ordinance 40-A. See, Rorvik, pp. 5-6, Exhibit 2, (listing the Tribal Ordinance 40-A items and stating, in part, that "[t]his Court finds that none of the above subject areas form the basis of any of the counts contained in the Complaint. Therefore, the Court finds that there is no concurrent jurisdiction over the subject matter of this case"). In accord, Morigeau previously argued that the Tribal Court held that "under Public Law 280, **there was no concurrent jurisdiction with State Court**" and Tribal Court had jurisdiction over the case. Pl.'s Br. Opposing David Gorman, M.D.'s Mot. to Dismiss (CSKT Cause No. 07-568-CV), pp. 5-6, Exhibit 1, *citing to* Rorvik. In Rorvik, just as in the present case, the enrolled member of the Tribes was the plaintiff. Clearly, the Tribes interpret Tribal Ordinance 40-A as providing the exclusive areas of concurrent jurisdiction between the state and tribal court, irrespective of whether the plaintiff is an Indian or not.

Because the Tribes' government has made a law sharing concurrent jurisdiction in only the limited areas specified by Tribal Ordinance 40-A, it would be offensive to tribal autonomy to exercise concurrent jurisdiction in any

circumstances outside of Tribal Ordinance 40-A. See also, Dist. Court Order on Mot. to Dismiss, p. 6, Exhibit 3 ("[t]he wish of an individual tribal member to litigate a matter in state court would interfere with Tribal Sovereignty just as much as a State Court exercising jurisdiction where concurrent jurisdiction does not exist"). The Tribes have asserted exclusive jurisdiction in all areas not listed in Tribal Ordinance 40-A. Ignoring Tribal Ordinance 40-A and the Tribes' own interpretation of that law would undermine " 'the right of reservation Indians to make their own laws and be ruled by them' ." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980). As a result, asserting jurisdiction in areas outside of those consented to by the Tribes would be offensive to tribal autonomy. For that reason alone, the state cannot assert concurrent jurisdiction in the present case.

a. Three Affiliated Tribes is not applicable because in this case there is a specific statute with a tribal intent for the areas listed to be the exclusive areas where jurisdiction may be shared.

Although the issue is subject matter jurisdiction, Morigeau ignores the subject matter of the underlying litigation. Rather, Morigeau focuses on the ethnicity of the parties. Morigeau cites to Three Affiliated Tribes of Ft. Berthod Reservation v. Wold Eng'g for the proposition that Indian Plaintiffs have "special

rights" and, as a result of their ethnicity, may sue in state court even when they could not be sued as defendants in state court. See Br. of Appellant, p. 6 ("[t]he trust of the law is that Indians have all the rights of every other citizen of this state, plus certain additional *special rights* through federal law that are for their benefit as tribal members"). The Montana Supreme Court, however, previously rejected giving Indians "special rights" not afforded other citizens as a result of their ethnicity. See Security State Bank v. Pierre, 162 Mont. 298, 302, 511 P.2d 325, 328 (Mont. 1973) ("Plaintiff argues that the effect of *Kennerly*, *Deernose* and *Blackwolf* is to create among reservation Indians a special class of citizens having 'rights' not afforded other citizens of the state while at the same time denying basic constitutional rights to those with whom the Indians create obligations otherwise enforceable in the courts"). This Court found that "such anomaly founded solely upon ethnic considerations is wholly out of step with enlightened constitutional principles." See Pierre 162 Mont. at 302, 511 P.2d at 328, *citing* Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). This Court correctly rejected the attempt to give one class of people greater rights based on their ethnicity.

Discrimination is not permitted under the law. For that reason alone, the district court should be affirmed.

At any rate, the district court was correct when it held that Three Affiliated Tribes "does not deal with the specific jurisdictional situation" found in this case. See Order on Mot. to Dismiss, p. 6, ll. 15-17. Tribal Ordinance 40-A, and the subsequent Tribal Court holding in Rorvik that there is no concurrent jurisdiction outside of Tribal Ordinance 40-A, indicate that the Tribes intend to self-govern and decide their non-Tribal Ordinance 40-A cases with autonomy. As a result, this case presents a different situation than that found in Three Affiliated Tribes. In, Three Affiliated Tribes of Ft. Berthod Reservation v. Wold Eng'g, (Wold I), the United States Supreme Court was very careful to point out that the state court's exercise of jurisdiction was held to not be offensive to tribal autonomy *in that specific case because the tribal court lacked jurisdiction over the claim.* See 467 U.S. 138, 148,49, 104 S.Ct. 2267, 2274, 81 L.Ed. 2d 113, 122 (1984) ("[t]he exercise of state jurisdiction is particularly compatible with tribal autonomy when, as here, the suit is brought by the tribe itself and the tribal court lacked jurisdiction over the claim at the time the suit was initiated"). In the present case, the Tribes not only have jurisdiction over the claim, the Tribes have held that the Tribes' jurisdiction is exclusive. Exercising concurrent jurisdiction when the Tribes have

held that jurisdiction is exclusive would be offensive to tribal autonomy. Thus, Three Affiliated Tribes is distinguishable and offers no value. The district court reached the correct decision and it should be affirmed.

b. Cases involving non Public Law 280 reservations are not applicable.

To the extent that Morigeau is relying on cases concerning non-Public Law 280 reservations, the cases have no bearing. Morigeau states that the issue on appeal as follows: "the district court erred by concluding that Public Law 280 provides the exclusive means by which the state courts may assert civil jurisdiction." Br. of Appellant, p. 23. To the extent that Morigeau relies on non-Public Law 280 cases, Morigeau is going beyond the issue on appeal. The only Montana case Morigeau cites to involving a Public Law 280 reservation is McCrea v. Busch. (1974), 164 Mont. 442, 524 P.2d 781. In McCrea, however, the tort arose from the operation of a motor vehicle on the Flathead Reservation, which was one of the areas where the Tribes specifically consented to concurrent jurisdiction in Tribal Ordinance 40-A. Id. Exercising concurrent jurisdiction in an area specifically agreed to by the Tribes does not offend tribal autonomy because the Tribes agreed to that specific concurrent jurisdiction. Accordingly, the McCrea case supports the district court's conclusion in the present case. To the

extent that the other cases Morigeau is relying on do not concern Public Law 280 reservations and/or do not present the specific situation found on the Flathead Reservation, the cases have no value. In Rorvik, the Tribes held that the Tribes intended to retain exclusive jurisdiction in all matters not consented to in Tribal Ordinance 40-A. Rorvik v. Evergreen, Exhibit 2. To go against the Tribes' intent and law necessarily impedes the Tribes' self-governance. Thus, the fact remains that the Tribes' self-government is impeded by allowing concurrent jurisdiction outside of the specific areas consented to by the Tribes.

B. Morigeau Received Both Substantive and Procedural Due Process In Front of the Tribal Court.

The district court was also correct when it recognized that Morigeau had due process. The Montana Supreme Court has repeatedly recognized that tribes have "inherent tribal sovereignty and jurisdiction over the activities of both Indians and non-Indians on reservation lands." Balyeat Law, PC v. Pettit, 1998 MT 252, ¶ 18, 291 Mont. 196, 967 P.2d 398. *citing* Geiger v. Pierce (1988), 233 Mont. 18, 20, 758 P.2d 279, 280 ("[g]enerally civil jurisdiction over commercial activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty, provision or federal statute.") (citing Iowa Mutual Ins. Co. v. LaPlante (1987), 480 U.S. 9, 18, 107 S.Ct. 971, 978, 94 L.Ed.2d 10, 16); In re

Marriage of Skillen, 1998 MT 43, ¶ 56, 287 Mont. 399, 956 P.2d 1 ("[a]s a matter of sovereignty, tribes are presumed to have jurisdiction over the activity of members *and non-members alike* within the exterior boundaries of the reservation") (emphasis added). Similarly, the United States Supreme Court has repeatedly recognized that tribal courts have inherent authority to adjudicate civil disputes affecting the interests of Indians and non-Indians which are based upon events occurring on a reservation. See e.g., Montana v. United States (1981), 450 U.S. 544, 566, 101 S.Ct. 1245, 1258-59; and Santa Clara Pueblo v. Martinez (1978), 436 U.S. 49, 65, 98 S.Ct. 1670, 1680-81[7].

As a result, there is no question that tribal courts have the inherent power to adjudicate civil disputes affecting important personal and property interests of both Indians and non-Indians which are based upon events occurring on the Reservation. Montana v. United States, 450 U.S. 544, 565-66, 101 S.Ct. 1245,

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[7] In Montana v. U.S., the United States Supreme court delineated two exceptions to the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of a tribe. (1981), 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493. The first exception recognizes that a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. The second exception acknowledges a tribe's inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See generally Yellowstone County v. Pease (9th Cir.1996), 96 F.3d 1169, 1174 (citing and quoting Montana v. U.S. (1981), 450 U.S. 544, 565-66, 101 S.Ct. 1245, 1258, 67 L.Ed.2d 493).

1258, 67 L.Ed.2d 493 (1981); Santa Clara Pueblo, 436 U.S. at 65, 98 S.Ct. at 1680; see also Fisher v. District Court of Sixteenth Jud. Dist., 424 U.S. 382, 387-88, 96 S.Ct. 943, 947, 47 L.Ed.2d 106 (1976); Yellowstone County v. Pease, 96 F.3d 1169, 1174 (9th Cir. 1996) (a tribe may regulate consensual relationships between non-Indians and the tribe or its members; and tribe has inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct directly affects the political integrity of the tribe). "The power to hear and adjudicate disputes arising on Indian land is an essential attribute of [tribal] sovereignty." Weeks Construction, Inc. v. Oglala Sioux Housing Authority, 797 F.2d 668, 673 (8th Cir.1986).

Morigeau had a forum to be heard in: Tribal Court. Morigeau's contention that her due process rights were violated by not giving her a forum to be heard in is without merit. Morigeau was heard in Tribal Court. Morigeau was given the opportunity to argue and brief her position there. Ultimately, however, Morigeau's claim was dismissed on valid grounds based on tribal law. The Tribal Court uniformly and fairly enforced tribal law, as any Court would enforce the law of its jurisdiction. Morigeau's contention that her due process rights were violated is nothing more than an attempt to obtain a second bite at the apple. Morigeau,

however, had both substantive and procedural due process. The district court was correct in dismissing her state court complaint.

CONCLUSION

The rule is simple when the action arises on the Flathead Reservation and involves an enrolled member of the Tribe. If the subject matter is one of the items listed in Tribal Ordinance 40-A, there is concurrent subject matter jurisdiction between the district court and the Tribal Court. If the subject matter is not listed in Tribal Ordinance 40-A, there is no concurrent jurisdiction and the Tribal Court retains exclusive jurisdiction. It does not matter whether the enrolled member of the tribe is a plaintiff or a defendant. The plaintiff in Rorvik was also an enrolled member of the Tribes. The Tribes, however, appropriately looked at the subject matter to determine if there was subject matter jurisdiction, not the ethnicity of the plaintiff. Under the Confederated Salish and Kootenai Tribes of the Flathead Reservation law, whether the enrolled tribal member happened to be the one that sued (i.e. the plaintiff) or the one that was being sued (i.e. the defendant) is not a part of the consideration. Put another way, the ethnicity of the plaintiff does not determine whether there is subject matter jurisdiction, the subject matter of the litigation determines whether there is subject matter jurisdiction.

This case differs from many of the Indian law jurisdiction cases because the Flathead Indian Reservation is a Public Law 280 reservation and because the Tribes have created laws that are unique to this reservation. Public Law 280 is the means by which Congress delegated its power relative to this particular reservation. As a natural result, Public Law 280 provides the exclusive means by which state courts may assert civil jurisdiction over actions arising in the Flathead Indian Reservation. In accord, in Balyeat v. Pettit, the Montana Supreme Court held that Tribal Ordinance 40-A must be strictly construed and that no concurrent jurisdiction existed beyond the items listed. The Tribal Court in Rorvik has similarly agreed that Public Law 280 is the exclusive means of asserting concurrent jurisdiction. This case does not fit within the items listed in Tribal Ordinance 40-A. Accordingly, the state district court simply did not have concurrent jurisdiction. For that reason alone, the state district court should be affirmed.

If this Court grants Morigeau's request to reverse the district court, it will not only be acting contrary to prior holdings by both this Court and the Tribal Court, it will necessarily harm the Tribes' ability to self-govern. The Rorvik holding is a holding by the Tribes that – as a part of their own self-governance – the Tribes have exclusive jurisdiction over any matter not listed in Tribal

Ordinance 40-A. Put another way, on the Flathead Indian Reservation, the Tribes' government has expressed an intent that the state court share concurrent jurisdiction in only the areas identified in Tribal Ordinance 40-A. The Tribal government has expressed an intent to govern itself and retain exclusive jurisdiction in all matters not listed in Tribal Ordinance 40-A. The Rorvik case created tribal common law. Any holding contrary to tribal law necessarily impedes the Tribes' ability to self-govern.

Granting Morigeau's request and reversing the district court's holding that the Tribes had exclusive jurisdiction would be contrary to the law set forth by the government of the Confederated Salish and Kootenai Tribes of the Flathead Reservation and the Tribal Court. Granting Morigeau's request and reversing the district court's holding would necessarily erode the Tribes' self-governance and harm the autonomy of the Tribes. On the other hand, affirming the district court would be consistent with this Court's prior decisions, affirm the Tribes' autonomy, and treat plaintiffs and defendants equally no matter their ethnicity. Accordingly, the district court's holding that the state of Montana does not have subject matter jurisdiction and that the Tribal Court retained exclusive jurisdiction should be affirmed.

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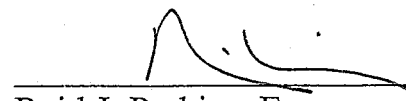
Respectfully submitted this 15th day of September, 2009.



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 11.0 for Windows, is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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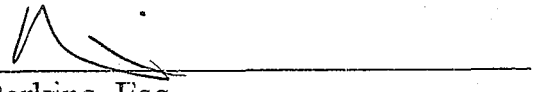

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CERTIFICATE OF SERVICE

I certify that on September 15th, 2009, I served a true and correct copy of the preceding document, by prepaid mail, on the following parties:

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INDEX TO APPENDIX

APPENDIX 1 - Select CSKT Cause No. 07-568-CV Pleadings

APPENDIX 2 - Rorvik v. Evergreen

APPENDIX 3 - Dist. Court Order on Mot. to Dismiss