CREATING BRIGHT-LINE RULES FOR TRIBAL COURT JURISDICTION OVER NON-INDIANS: THE CASE OF TRESPASS TO REAL PROPERTY

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CREATING BRIGHT-LINE RULES FOR TRIBAL COURT JURISDICTION OVER NON-INDIANS: THE CASE OF TRESPASS TO REAL PROPERTY

Grant Christensen[*]

Abstract

The 2010 passage of the Tribal Law and Order Act will invest significantly more resources in tribal courts. As tribal courts expand, conflicts between sovereignties – tribal, state, and federal – are likely to occur with much greater frequency. Tribal court civil jurisdiction over non-Indians will be among the issues most frequently appealed to federal courts. I offer this piece to propose a new and novel solution – that tribal courts, through a piecemeal process, be extended absolute civil jurisdiction over non-Indians for those civil offenses over which tribes have the greatest interest. This article takes one of the most common jurisdictional questions – tribal court jurisdiction over non-Indians in cases of trespass to land – and argues that a bright-line rule favoring tribal court civil jurisdiction in this instance is legally mandated, will pragmatically conserve judicial resources, and recognizes the broad tribal sovereignty recently reaffirmed by Congress.

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I. Introduction

As an increasing number of tribes assert their sovereign interests over a greater sphere of policymaking, assisted by the recent passage of the Tribal Law and Order Act,[1] the role and importance of tribal courts correspondingly are subject to even more exacting scrutiny.[2] While it has long been established that

1. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258. The bill was signed into law by the President on July 29, 2010. *See Remarks by the President Before Signing the Tribal Law and Order Act*, WHITE HOUSE (July 29, 2010, 4:58 P.M.), http://www.whitehouse.gov/the-press-office/remarks-president-signing-tribal-law-and-order-act.

2. *See* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB.

tribal courts lack criminal jurisdiction over non-Indians,[3] no such bright-line rule exists for civil jurisdiction,[4] making questions of tribal court civil jurisdiction over non-Indians one of the most litigated issues in Indian law over the last several decades.[5]

While the question of whether a tribal court has jurisdiction over a non-Indian is a federal question[6] that supports jurisdiction in federal court,[7] a non-

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L. REV. 121, 140-43, 168 (2006) (arguing that, in the modern age of Indian policymaking, tribes, rather than Congress or the President, are leading the way in carving out federal Indian policy, and noting that because tribes are moving faster than the regulatory and legislative branches, the courts will ultimately become more involved in reviewing the actions of tribal nations); Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 436-37 (2007-2008) (arguing that, over the decades, the Supreme Court has adopted a "formalistic" approach to determining the jurisdictional relationship with Indians).

3. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) ("[A]n examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.").

4. The current state of tribal court civil jurisdiction over non-Indians is discussed in Part III of this article, but begins with a rebuttable presumption against tribal jurisdiction found in *Montana v. United States*, 450 U.S. 544, 565 (1981). For an additional summary of tribal court civil jurisdiction over non-Indians, see Dale Beck Furnish, *Sorting Out Civil Jurisdiction in Indian Country After* Plains Commerce Bank*: State Courts and the Judicial Sovereignty of the Navajo Nation*, 33 AM. INDIAN L. REV. 385 (2008-2009); Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89 (2005); Thomas P. Schlosser, *Tribal Civil Jurisdiction Over Nonmembers*, 37 TULSA L. REV. 573 (2001).

5. The Supreme Court hears on average slightly more than two Indian law cases a year on topics ranging from water rights, to taxation, to usufructuary rights, to freedom of religion. Among this diverse set of cases, the Court has been asked directly to confront questions of tribal civil and regulatory jurisdiction more than thirty times since the Court first ruled that tribes have a right "to make their own laws and be ruled by them" in *Williams v. Lee*, 358 U.S. 217, 220, 223 (1959). Recent cases directed at the jurisdiction of tribal courts include *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316 (2008); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987); and *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

6. 28 U.S.C. § 1331 (2006) (conferring federal courts with jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States").

7. *See National Farmers*, 471 U.S. at 852-53 (holding that claims alleging that the tribal court impermissibly overextended its jurisdiction raise a federal question). For a critique of the decision permitting federal question jurisdiction in *National Farmers*, see Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal-Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 30 (2004) [hereinafter Clinton, *Comity & Colonialism*].

Indian defendant must exhaust his remedies in a tribal court before contesting jurisdiction.[8] Whether those remedies have been exhausted or whether tribal court civil jurisdiction is so patently inappropriate as not to require exhaustion[9] are questions that are increasingly appealed,[10] placing burdens on the very federal court dockets the exhaustion doctrine is designed to relieve.[11] Even after the question of exhaustion is settled, and a non-Indian party goes through the tribal court system and exhausts his final appeal, a federal district court reviews the tribal court's determination *de novo*, with no obligation to follow the tribal court's finding of proper jurisdiction.[12]

Because having stable and predictable forum rules encourages confidence among all parties and reduces costs associated with litigating such matters,[13] tribal court civil jurisdiction over non-Indians ought to be a default and bright-line rule for particular classes of cases.[14] Following the guidance of the Supreme Court from *Montana v. United States* and its progeny, the right to

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8. *See LaPlante*, 480 U.S. at 15-16 (holding that exhaustion is required before a federal court may exercise diversity jurisdiction); *National Farmers*, 471 U.S. at 856-57 (holding that exhaustion is required before a federal court may exercise jurisdiction pursuant to a federal question). For a discussion of the exhaustion requirement, see Phillip Allen White, Comment, *The Tribal Exhaustion Doctrine: "Just Stay on the Good Roads, and You've Got Nothing to Worry About*," 22 AM. INDIAN L. REV. 65 (1997).

9. *See Hicks*, 533 U.S. at 369 (quoting *National Farmers*, 471 U.S. at 856-57; Strate v. A-1 Contractors, 520 U.S. 438, 459-60, n.14 (1997)) (internal quotation marks omitted) (outlining four exceptions to the exhaustion rule: "where an assertion of tribal court jurisdiction is motivated by a desire to harass or is conducted in bad faith, . . . where the [tribal court] action is patently violative of express jurisdictional prohibitions, . . . where exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction, . . . [or where] it is plain" that tribal court jurisdiction is lacking "so that the exhaustion requirement would serve no purpose other than delay").

10. *See e.g.*, *Strate*, 520 U.S. at 448.

11. *National Farmers,* 471 U.S. at 856-57 ("[T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.... Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.").

12. *Id.* at 857.

13. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 n.19 (1978) ("The cost of civil litigation in federal district courts, in many instances located far from the reservations, doubtless exceeds that in most tribal forums.").

14. Tribal court civil jurisdiction over tribal members is not disputed. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 220 (5th ed. 2009) ("[T]he tribe has exclusive jurisdiction over disputes between tribal members arising on the reservation.").

exclude and the right to jurisdiction over tribal lands are powers part and parcel with the existence of the tribe itself.[15]

The Court continues to take a case-by-case approach to tribal court civil jurisdiction over non-Indians.[16] This results in uncertainty in the application of existing rules, encourages appeals on narrow grounds, and wastes judicial resources. Despite that its reasons for doing so are not necessarily well founded,[17] the Court, at present, seems reluctant to create a bright-line rule favoring default tribal court civil jurisdiction over non-Indians.[18]

While there is no current literature arguing for a piecemeal solution – whereby in certain areas of civil litigation tribal courts are extended full civil jurisdiction over non-Indians[19] – such a solution is a compromise that both tribes and governments could learn to accept.[20] As tribal courts exercise their

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15. Montana v. United States, 450 U.S. 544, 557 (1981) ("[T]he Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe. . . . [I]f the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry.") (citation omitted). Although *Hicks* appeared to undermine this principle by applying the *Montana* rule to Indian lands, the Court limited its holding "to the question of tribal-court jurisdiction over state officers enforcing state law [and left] open the question of tribal-court jurisdiction over nonmember defendants in general." Nevada v. Hicks, 533 U.S. 353, 358 n.2 (2001).

16. *E.g.*, *Hicks*, 533 U.S. at 374 (holding that the unique facts of the situation justified a finding that tribal courts lack civil jurisdiction over a civil rights claim by a tribal member against state police officers executing a warrant in Indian Country).

17. For a defense of tribal court civil jurisdiction over non-Indians, see Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 634 (2008).

18. *See Hicks*, 533 U.S. at 384-85 (Souter, J., concurring) ("Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts mirror American courts and are guided by written codes, rules, procedures, and guidelines, tribal law is still frequently unwritten, being based instead on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices, and is often handed down orally or by example from one generation to another. The resulting law applicable in tribal courts is a complex mix of tribal codes and federal, state, and traditional law, which would be unusually difficult for an outsider to sort out.") (citations omitted) (internal quotation marks omitted). For a discussion of the impact of these misperceptions of tribal law on the Supreme Court, see Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005).

19. For an argument in favor of judicial deference to federal-tribal agreements regarding questions including jurisdiction, see Clinton, *Comity & Colonialism*, *supra* note 7, at 30.

20. Certainly the ultimate goal is to extend tribal court civil jurisdiction over all persons and all matters arising within the bounds of the reservation, and to those appropriate and relevant matters that arise outside the reservation but where the tribe has a sufficient interest. Unfortunately, *Montana* and its progeny stand in the way of a spontaneous recognition of a

growing jurisdictional powers responsibly, Congress, the President, and federal courts will be more willing to defer to their opinions and further expand the proper use of tribal jurisdiction over non-Indians. Through incremental growth in jurisdictional powers, full, absolute, and meaningful tribal sovereignty for tribal courts gradually may be achieved where it otherwise would be impossible (politically) to bestow today. The creation of bright-line rules by Congress or the courts also would save significant costs and improve the efficiency and coordination of the interaction between federal, state, and tribal courts. With that in mind, I take the first step – I offer this article to define as absolute tribal court civil jurisdiction over non-Indians in all cases of trespass to real property.

II. The Need for a Bright-Line Rule Favoring Tribal Court Civil Jurisdiction in the Case of Trespass to Real Property

Without clear guidance from the Court or Congress regarding the appropriate bounds of tribal court civil jurisdiction over non-Indians, there are repeated appeals through the federal court system on increasingly narrow questions of jurisdiction.[21] Parties on both sides seek to carve out broad exceptions to tribal court jurisdiction using narrowly tailored lower court opinions that are often

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blanket jurisdictional rule in the tribe's favor. While some will argue that a piecemeal approach too easily allows the United States to draw lines in the sand to proclaim the boundaries of tribal court jurisdiction, thereby effectively limiting it, I disagree. Instead, by asserting in small steps the jurisdictional muscle of the tribal court, tribes can prove that their judiciaries are capable independently of handling increasingly complex cases. The line in the sand will move forward until, eventually, the United States will recognize with true parity the jurisdiction of state and tribal courts. The Tribal Law and Order Act is exceptional proof that all branches of the United States government can be persuaded to extend the jurisdictional powers of tribal courts. *See supra* note 1 and accompanying text.

21. A quick LEXIS search finds more than three hundred cases from the last decade dealing directly with the question of tribal court jurisdiction, including three rulings from the Supreme Court, none of which definitively articulate the jurisdictional boundaries of tribal courts. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co. Inc., 554 U.S. 316, 320 (2008) (deciding the issue of tribal court jurisdiction for the sale of land by a non-Indian located within the reservation); United States v. Lara, 541 U.S. 193, 196 (2004) (deciding the issue of tribal courts' criminal jurisdiction over a nonmember Indian); *Hicks*, 533 U.S. at 355 (2001) (deciding the issue of tribal court jurisdiction over a non-Indian sheriff executing a state-issued warrant). Since the beginning of the self-determination era of Indian policy, widely attributed to the Kennedy and Johnson administrations, THOMAS CLARKIN, FEDERAL INDIAN POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS 1961-1969, at xii (2001), or to the Supreme Court's decision in *Williams v. Lee*, 358 U.S. 217 (1959), the Supreme Court has granted certiorari in at least sixty-eight cases dealing with jurisdictional questions between tribal, state, and federal sovereignties.

fact-specific. While neither the Court nor Congress is likely to remedy the situation by giving either tribal or state courts absolute jurisdiction over non-Indians,[22] there are a narrow range of issues that conclusively could be decided in favor of exclusive tribal court civil jurisdiction to definitively settle some of this litigation. Trespass to real property is an expedient first step because it is significantly limited to the land the tribe controls, but also significantly will reduce litigation by eliminating the costly and time-consuming appeals to federal courts that then consider the jurisdictional questions *de novo*.

A. A Bright-Line Rule Is Needed to Prevent Trespassers from Severely Damaging the Reservation

The most recent tribal trespass case to be appealed up to the Supreme Court is *Elliott v. White Mountain Apache Tribal Court*.[23] In June of 2002, "Valinda Jo Elliott, a non-Indian, was riding in a private vehicle . . . in the high desert of Arizona, in an area located within the borders of the White Mountain Apache Tribe's reservation."[24] She "got lost and [subsequently] ran out of fuel."[25] Elliott proceeded to leave her vehicle and split up from her traveling companion, wandering alone in the Arizona desert for several days looking for assistance.[26] "On the third day, she spotted a news helicopter recording [a distant forest] fire," and "set a small signal fire" of her own "to attract the helicopter['s] [] attention."[27] Fortunately, the helicopter saw the signal fire and rescued Elliott.[28] Unfortunately, she failed to extinguish her signal fire and it "grew into a substantial forest fire," merging with the original.[29] "The

22. The Supreme Court's continued reliance on *Montana*'s default rule against tribal court jurisdiction, at least on non-Indian fee lands, is evidenced in the Court's most recent related case to reach the merits stage. *Plains Commerce*, 554 U.S. at 330 ("Given *Montana*'s general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid.") (citations omitted) (quoting Montana v. United States, 450 U.S. 544, 565 (1981)) (internal quotation marks omitted).

23. 566 F.3d 842 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009).

24. *Id.* at 844.

25. *Id.*

26. *Id.*

27. *Id.* The existing fire was named the Rodeo fire. The signal fire set by Elliott was named the Chediski fire. When the fires merged, the combined fire was appropriately named the Rodeo-Chediski fire.

28. *Id.*

29. *Id.*

combined fire burned more than 400,000 acres of land and caused millions of dollars in damage."[30]

The White Mountain Apache Tribe "brought a civil action against [Elliott] in tribal court" for violating eight tribal ordinances, including trespass.[31] Elliott "filed a motion to dismiss for lack of jurisdiction. The tribal court denied the motion, holding that it had jurisdiction under the relevant United States Supreme Court cases."[32] Elliott appealed the tribal court's ruling to the tribal appellate court. The appellate court dismissed the appeal because it lacked a procedure to hear interlocutory appeals.[33]

Elliott then filed an appeal in the Federal District Court of Arizona for dismissal based on lack of tribal jurisdiction.[34] The court dismissed for failure to exhaust tribal remedies because there was no tribal court decision on the merits.[35] Citing *LaPlante*, a unanimous panel in the Ninth Circuit upheld the ruling, stating that "[a]lthough the Blackfeet Tribal Code establishes a Court of Appeals, it does not allow interlocutory appeals from jurisdictional rulings. Accordingly, appellate review of the Tribal Court's jurisdiction can occur only after a decision on the merits."[36]

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30. *Id.*

31. *Id.* at 845. In addition to trespass, the other offenses included "violations of tribal executive orders, the tribal game and fish code, the tribal natural resources code, and common law negligence."

32. *Id.*

33. *Id.* This is not uncommon. The same set of circumstances existed in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), where the tribal appellate court concluded that it lacked jurisdiction to hear interlocutory appeals. *Id.* at 17. In that case, the Supreme Court eventually determined that exhaustion of tribal remedies was not complete, regardless of the appellate court's ability to hear the petition contesting jurisdiction. *Id.* at 19. Many tribal courts have since amended their tribal court appellate jurisdiction to cure the problem. For examples of tribal court rules amended explicitly to provide interlocutory jurisdiction of tribal appellate courts, see SOUTHWEST INTERTRIBAL COURT OF APPEALS: RULES OF APPELLATE PROCEDURE, at 10, *available at* http://www.ailc-inc.org/PDF%20files/SWITCA%20Appellate%20Rules.pdf (last visited Apr. 28, 2011); FORT PECK TRIBAL COURT, RULE OF PROCEDURE IN THE COURT OF APPEALS, at 1-2, *available at* http://www.fptc.org/appendix/appendix_3.pdf (last visited Apr. 28, 2011).

34. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2), (4), (5) and (6), at 1; Elliott v. White Mountain Apache Tribal Court, No. CIV 05-04240-PCT-MHM, 2006 WL 1182836 (D. Ariz. Mar. 16, 2006).

35. *Id.* at 7.

36. *Elliott*, 566 F.3d at 847 (citation omitted) (quoting *LaPlante*, 480 U.S. at 12). The *Elliott* court continues,

> The Court in [*LaPlante*] held that "[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system,

But damages to tribal natural resources and cultural centers are far from the only ways in which tribes have a significant interest in deterring trespassers from the reservation. The parade of horribles includes many real dangers that Indian Country confronts on a daily basis due to trespass upon tribal lands. The Tohono O'Odham Nation, sitting on the U.S.-Mexican border, faces a constant barrage of trespassers. These include human and drug traffickers, and the resultant increased presence of federal law enforcement officials who inadvertently detain and arrest tribal members they mistake for illegal immigrants. The tribe now seizes "up to 100,000 pounds of illegal drugs every year,"[37] up from 65,000 pounds just seven years ago, and just 10,000 pounds in 2001.[38] Likewise, more than 2,000 miles from the Mexican border, the Mohawk Nation in New York and the Blackfeet Nation in Montana have experienced a steady increase in drug trafficking,[39] in part due to a confusion over who has the jurisdiction to enforce drug laws in and around the reservation – the tribe, the state, or the federal government.[40]

Even worse than drug trafficking is the rapid increase in the cultivation or manufacture of illegal drugs in Indian Country.[41] Large tracts of land with almost no population base leave hundreds of square miles without adequate police patrols and enforcement.[42] Even when the tribe suspects individuals of illegal drug activity or active involvement in the drug trade, the jurisdiction of

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> including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. In this case, the Tribal Court has made an initial determination that it has jurisdiction over the insurance dispute, but Iowa Mutual has not yet obtained appellate review, as provided by the Tribal Code. . . . Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene."

Id. (quoting *LaPlante*, 480 U.S. at 16-17) (alteration in original).

37. LARRY K. GAINES & RODGER LEROY MILLER, CRIMINAL JUSTICE IN ACTION: THE CORE 104 (5th ed. 2008).

38. Kevin Johnson, *Drugs Invade Via Indian Land*, USA TODAY, Aug. 6, 2003, http://www.usatoday.com/news/nation/2003-08-06-indian-drugs-usat_x.htm.

39. Diego Marquez, *Challenges to Combating Drug Trafficking on Indian Reservations*, 20 GEO. IMMIGR. L.J. 549, 549-50 (2006).

40. *See id.* at 549 (noting this jurisdictional uncertainty as a problem because "without jurisdiction and access to the lands, local officials are powerless to stop drug trafficking and other criminal activity").

41. *See id.* at 550.

42. *See* Mac McClelland, *A Fistful of Dollars*, MOTHER JONES, Nov./Dec. 2010, http://motherjones.com/politics/2010/11/vigilante-justice-oklahoma-indian-reservations (providing the example of the "Standing Rock Sioux Reservation," which has nine police officers to cover "an area twice the size of Delaware," creating a significant loophole to enforcement).

tribal police officers and tribal courts complicates the arrest and prosecution of guilty parties.[43] Foreign drug cartels – and even some tribal members – take advantage of the lack of scrutiny by increasingly moving drug production to the reservation[44] – marijuana in the Pacific Northwest[45] and methamphetamines in the Great Plains and Mountain West are particularly common.[46]

The drug trade brings with it a marked increase in violence and a dramatic impact on the health and welfare of the tribe,[47] as drug use becomes one of the largest barriers to economic development.[48] But the influence of foreign drug operations threatens more than just the health of those tribal members who become addicts. Drug gangs are marrying into the tribes to give themselves a sense of political legitimacy that threatens to undermine tribal government directly.[49] Particularly among tribes with high levels of unemployment, the allure of drugs can penetrate the highest levels of tribal government, from elders and tribal leaders to tribal judges tasked with enforcement of tribal laws.[50]

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43. Marquez, *supra* note 39, at 549. Unless duly cross-deputized, local law enforcement officials cannot enforce federal drug laws. Tribes may or may not themselves have drug laws that would aid in the officers' authority to arrest and the tribes' ability to prosecute, but the status of the offender as a non-Indian significantly complicates matters. The ability to arrest, detain, and prosecute non-Indians for trespass on the reservation would give tribal law enforcement the time and authority necessary to alert federal officials, who could then investigate further and bring their own charges for violation of the drug laws of the United States.

44. Sarah Kershaw, *Drug Traffickers Find Haven in Shadows of Indian Country*, N.Y. TIMES, Feb. 19, 2006, *available at* http://www.nytimes.com/2006/02/19/national/19smuggle.html?_r=1 (describing how foreign drug traffickers and even American Indians focus their supply chains in Indian Country because they believe they are immune from drug laws, or think that those laws would not be enforced against them).

45. *Chapter 5: Disrupt Domestic Drug Trafficking and Production*, 2010 NATIONAL DRUG CONTROL STRATEGY, at 72, *available at* http://www.whitehousedrugpolicy.gov/publications/policy/ndcs10/chapter5.pdf (last visited Apr. 28, 2011).

46. Marquez, *supra* note 39, at 549.

47. *See generally* Lisa R. Pruitt, *The Forgotten Fifth: Rural Youth and Substance Abuse*, 20 STAN. L. & POL'Y REV. 359 (2009) (discussing the increasing abuse of illegal drugs by youth on reservations, and the impact of the comparatively higher rate of abuse has on rural communities, including many Indian reservations).

48. Marquez, *supra* note 39 at 550.

49. *Id.*; Kershaw, *supra* note 44.

50. Marquez, *supra* note 39, at 550 ("[A] tribal court judge was among those arrested in May 2005 as part of a drug ring accused of moving thirty pounds of methamphetamine over a seven-year period.").

B. A Bright-Line Rule Is Needed to Effectuate the Tribes' Right to Exclude

As damaging as the physical effects of trespassers are to tribal governments, the true sovereignty of a tribe itself is jeopardized when the tribe is unable to enforce its right to exclude. Tribes are recognized as sovereign governments,[51] and one of the most basic tenets of sovereignty is the right to exclude.[52]

There are no statutory or judicial barriers to a rule granting exclusive jurisdiction to tribal courts for on-reservation trespass to real property, regardless of whether the trespasser is an Indian or a non-Indian. In fact, there is a wealth of recent property literature that supports such a proposition.[53] Professor Henry E. Smith, one of the leading modern scholars on the law of property, articulately makes the case for property rules premised upon the right to exclude. He states that

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51. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 206 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN] (citing United States v. Lara, 541 U.S. 193, 204-05 (2004)) (affirming the Supreme Court's "traditional understanding" of each tribe as "a distinct political society, separated from others, capable of managing its own affairs and governing itself").

52. *Worcester*, 31 U.S. (6 Pet.) at 561 (noting that persons are permitted to enter the Cherokee Nation only "with the assent of the Cherokees themselves"). The United States signed and ratified the Treaty of Holston (1791), and then subsequently, the Treaty of Greenville (1795) reaffirmed the Indian right to control their own land and to take action to prevent others from trespassing upon it.

> If any citizen of the United States, or any other white person or persons, shall presume to settle upon the lands now relinquished by the United States, such citizen or other person shall be out of the protection of the United States; and the Indian tribe, on whose land the settlement shall be made, may drive off the settler, or punish him in such manner as they shall think fit.

Treaty of Greenville art. 6, Aug. 3, 1795, 7 Stat. 49. Professor Henry E. Smith wrote an article that includes a discussion of exclusion rules based in property rights. *See* Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1754 (2004) [hereinafter Smith, *Property Rules*] (noting that the law of property implies a border around the real property of an owner, and that great deference to the discretion of the use of that property is given to the lawful owner, including the right to exclude).

53. *E.g.*, Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360-61 (2001) (discussing the original understanding of real property as including above all else the inherent right to exclude, and noting that "William Blackstone, for example, famously defined property as 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'"). *See generally* Smith, *Property Rules*, *supra* note 52; Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002).

> [p]roperty gives the right to exclude from a "thing," good against everyone else. On the dutyholder side, the message is a simple one – to "keep out." In this way, the right to exclude simultaneously protects a reservoir of uses to the owner without officials needing to know what those might be.[54]

While not writing specifically about an Indian tribe's right to exclude others from its real property,[55] Professor Smith argues convincingly that by affording the landowner an absolute right to exclude and incentivizing the collection of information about the land's resources (upon which decisions regarding its use are premised), the law provides clearly established incentives to maximize the use of the property.[56] In this way, property rules encourage the protection of real property assets through bright-line rules, allowing the owner of real property to recover for even nominal damages that arise from a breach of the owner's absolute interest in the property.[57]

Professor Smith's preference for property rules based on the right to exclude applies directly to the construction of jurisdictional rules within reservation boundaries, particularly for actions that unmistakably implicate the right to exclude, such as trespass to land. In normative terms, trespass is simply the breach of an individual's right to exclude.

Trespass to real property is an intentional tort,[58] giving the owner of the land a right to seek redress whenever an individual commits an act of trespass upon land to which the owner holds title, "irrespective of whether he thereby causes harm to any legally protected interest of the other."[59] Because real property is by definition immobile, the action can only be brought in the court with

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54. Smith, *Property Rules*, *supra* note 52, at 1728.

55. Professors Smith and Merrill do discuss the right of a group to exclude from specific property. *See* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 791-92 (2001) [hereinafter Merrill & Smith, *Property/Contract*] ("One example of exclusion occurs where groups restrict access to resources, such as where a particular community restricts a fishing ground to members of the community.").

56. Smith, *Property Rules*, *supra* note 52, at 1729.

57. *See id.* at 1723 ("Property rules are prevalent in the law and are by no means exceptional. Basic actions like trespass protect entitlements by means of injunctions and punitive damages in the civil law and penalties in the criminal law. If *A* owns Blackacre and *B* enters without *A's* consent, *A* can get an injunction against *B* and can seek both compensatory and punitive damages.").

58. RESTATEMENT (SECOND) OF TORTS § 163 (1965). For a full discussion of the intentional nature of the civil tort of trespass, see *infra* Part IV.A.

59. RESTATEMENT (SECOND) OF TORTS § 158 (1965); Dougherty v. Stepp, 18 N.C. (1 Dev. & Bat.) 371, 371 (N.C. 1835).

jurisdiction over the situs,[60] and the only appropriate forum in which the owner ought to seek this redress is the court where the real property is located.[61]

The right of Indian tribes to exclude individuals from the reservation is not found solely in theories of property law, but has been ratified by the Supreme Court.[62] In *Merrion v. Jicarilla Apache*, the Supreme Court was asked to determine the source of a tribe's power to tax.[63] While the majority concluded that a tribe's power to tax even non-Indians derives from inherent tribal sovereignty,[64] the Court also concluded that one of the inherent powers of an Indian tribe is the power to exclude. The Court stated that

> [m]any tribes [] were granted a power unknown to any other sovereignty in this Nation: a power to exclude nonmembers entirely from territory reserved for the tribe. Incident to this basic power to exclude, the tribes exercise limited powers of governance over nonmembers, though those nonmembers have no voice in tribal government. Since a tribe may exclude nonmembers entirely from tribal territory, the tribe necessarily may impose conditions on a right of entry granted to a nonmember to do business on the reservation.[65]

If the tribe has the right to exclude even nonmembers from the reservation by virtue of its inherent sovereignty, as a corollary, it ought to have the right to regulate the rules for trespass within its borders and to adjudicate disputes arising under those rules.

Property rules encourage the construction of clear borders and boundaries. Because local courts are familiar with the geographical metes and bounds of land within their territory, and because local resources are often necessary to accurately adjudicate land disputes, the only forum with proper jurisdiction over the trespass claim is that which asserts jurisdiction over the county, state, or reservation in which the property is located.[66]

By natural extension, even a non-Indian landowner owning real property within the reservation should be required seek redress in tribal court for trespass

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60. The immobility of real property makes the trespass action "local" as opposed to "transitory," and therefore, only the court where the property is located can properly hear the claim. For a full discussion of the local/transitory distinction, see *infra* Part IV.B.

61. For a discussion of this principle supported by common law, see *infra* Part IV.B.

62. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982).

63. *Id.*

64. *Id.* at 137.

65. *Id.* at 160.

66. *See supra* note 60 and accompanying text.

by a non-Indian over his real property. Such a rule finds support in the policies of common law and legislative action. The situs principle – that cases dealing directly with trespass to real property can only be heard by the sovereign with jurisdiction over the land – has long found its place in English and American case law.[67] Congress specifically has delegated to tribal courts jurisdiction over non-Indians for trespass to real property in cases involving certain classes of resources,[68] and the Supreme Court has approved of jurisdiction over non-Indians more generally.[69]

From a policy perspective, a bright-line rule favoring tribal court civil jurisdiction over all trespassers is necessary to recognize and effectuate the full sovereignty of tribal governments. To hold that a sovereign lacks the right to prosecute a trespasser under its own existing laws designed to protect real property within its physical boundaries prevents that sovereign from the full exercise of its inherent rights. The Supreme Court has long recognized the basic principle that a tribe's inherent sovereignty includes power over not only its members, but also its territory.[70] When tens of thousands of acres of tribal land are destroyed in a fire; when hundreds of thousands of pounds of illegal drugs are transported across or illicitly grown within the outer bounds of the reservation; when trespass brings with it violence, disorder, and threats to the tribes' government and culture. These are times in which the court of the sovereign with jurisdiction over the land is the only proper venue, as it is the only authority with local knowledge of the land where the trespass occurred and the concomitant ability to measure the loss inflicted.[71]

Cases like *Elliott* demonstrate the need for courts and policymakers to extend the holdings that already inhere in federal statutory and judicial precedent regarding tribal court civil jurisdiction. The courts should announce a bright-line rule vesting tribal courts with the sole and exclusive authority over all persons committing acts of on-reservation trespass to real property.

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67. *E.g.*, Doulson v. Matthews, (1792) 100 Eng. Rep. 1143, 1144; 4 Term Rep. 503; Rafael v. Verelst, (1775) 96 Eng. Rep. 579 (W.B.) 581; Livingston v. Jefferson, 15 F. Cas. 660 (No. 8,411) (C.C.D. Va. 1811).

68. *E.g.*, American Indian Agricultural Resource Management Act of 1993, 25 U.S.C. § 3713 (2006); National Indian Forest Resources Management Act of 1990, 25 U.S.C. § 3101 (2006).

69. *E.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.").

70. United States v. Mazurie, 419 U.S. 544, 557 (1975).

71. *See infra* notes 130-43 and accompanying text (discussing local versus transitory trespass).

III. The Current State of Tribal Court Civil Jurisdiction

To understand the necessity of creating a bright-line rule in favor of tribal court civil jurisdiction over non-Indians for trespass to real property, while simultaneously recognizing its consonance with the current state of Indian law, it is first necessary to lay out the current tests for tribal court civil jurisdiction. The basic rules of civil procedure apply to tribal courts as they do to federal courts – a tribal court needs both personal jurisdiction over the defendant and subject matter jurisdiction over the civil action at issue.[72]

A. Tribal Courts Have Personal Jurisdiction

The Indian Civil Rights Act (ICRA)[73] incorporates a statutory version of most, but not all,[74] of the United States Constitution's Bill of Rights onto tribal courts, requiring the tribal courts to determine through the relevant due process provisions whether they have personal jurisdiction over the defendant.[75] The specific provisions of the ICRA thus require that tribes follow the same basic test for personal jurisdiction as is applied in federal forums and by federal courts.[76] The general rule is that the defendant must have "certain minimum contacts" with the tribe, "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[77]

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72. Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (reiterating this requirement from *Montana*).

73. 25 U.S.C. §§ 1301-1303 (2006).

74. Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 899 n.60 (2003) ("Notable omissions are the guarantee of a republican form of government, the prohibition against an established religion, the requirement of free counsel for an indigent accused, the right to a jury trial in civil cases, the provisions broadening the right to vote, and the prohibitions against denial of the privileges and immunities of citizens.").

75. 25 U.S.C. § 1302(a)(8) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.").

76. David A. Castleman, Comment, *Personal Jurisdiction in Tribal Courts*, 154 U. PA. L. REV. 1253, 1262 (2001) ("Staying within the four corners of the text of the ICRA itself and interpreting it using a reasonable subset of the canons of construction require that the Due Process Clauses of the ICRA and Fourteenth Amendment be read similarly."); *Id.* at 1255 ("Both the text and the legislative history of the ICRA indicate that the ICRA's due process clause should be interpreted similarly to the Fourteenth Amendment's and in accordance with the modern conception of personal jurisdiction first announced in *International Shoe Co. v. Washington*.") (citation omitted).

77. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

Specific personal jurisdiction occurs when there are contacts that give the tribe an interest and that ensure that the tribal court as a forum is not unduly inconvenient, and where the defendant "purposefully avails itself of the privilege of conducting activities within the forum."[78] Because of the unique nature of trespass to real property, a tribal court's exercise of personal jurisdiction over a non-Indian is proper because, by entering upon the land, the individual has purposefully availed himself to the jurisdiction of the court. By virtue of its undisputed right to exclude,[79] the tribe will always have an interest in prosecuting non-Indians who unlawfully trespass upon real property within its reservation because of its interest in protecting its property rights. Because the trespasser will have "purposefully availed" himself to the jurisdiction of the tribe by entering the reservation and trespassing upon real property, the tribal court, by definition, is not an unduly inconvenient forum.

The Supreme Court has never found a tribal court's assertion of *personal* jurisdiction to be improper.[80] The ICRA permits tribes to levy their own jurisdictional rules and to create self-imposed limitations on personal jurisdiction.[81] Certainly, if a tribe's legislative and executive branches decided that the tribe did not want to assert personal jurisdiction over non-Indian civil trespassers, personal jurisdiction in the tribal court would be improper and would instead vest in the federal courts through the General Crimes Act.[82]

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78. World-Wide Volkswagen Corp. v. Woodson, 344 U.S. 286, 297 (1980) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

79. *E.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) ("[Individuals] have no right to enter [tribal lands, except] with the assent of the Cherokees themselves.").

80. Cohen notes that "[i]t is conceivable, although unlikely, that a tribal court could have subject matter jurisdiction over a case but lack personal jurisdiction over the defendant." COHEN, *supra* note 51, at 605 (citation omitted). An example of such a circumstance could exist where "a non-Indian defendant's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe and thus fits within the second *Montana* exception establishing subject matter jurisdiction, while the tribal court lacks personal jurisdiction over the defendant because that conduct occurred outside the tribal territory such that the defendant lacks minimum contacts with the forum sufficient to establish personal jurisdiction over her." *Id.* (citations omitted) (internal quotation marks omitted). Specific personal jurisdiction exists where "the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (citation omitted) (internal quotation marks omitted). Because trespass is conduct "purposely directed" at the "residents of the forum," the tribal court could properly assert personal jurisdiction over a non-Indian trespasser.

81. *See* COHEN, *supra* note 51, at 604.

82. The General Crimes Act, also known as the Indian Country Crimes Act, permits the extension of federal enclave laws to the reservation to be enforced by the federal government.

Moreover, even in instances like *Plains Commerce*, where the Supreme Court found the assertion of tribal court subject matter jurisdiction improper when questions of fee title ownership were raised,[83] the issue of whether personal jurisdiction was proper was never litigated. But because the property at issue was located on the reservation, the tribe had personal jurisdiction over the non-Indian-owned bank located off the reservation.[84]

A bright-line rule establishing tribal court civil jurisdiction over non-Indians for trespass to real property does not extend tribal court personal jurisdiction any further than already exists by law. Under this rule, *de novo* review is replaced with absolute deference to tribal courts to determine their own jurisdiction in trespass cases. Dispensing with the time-consuming and costly appeals process will improve the efficiency of the judiciary and conserve valuable resources for both federal and tribal court systems.

B. Tribal Courts Have Subject Matter Jurisdiction

In 1981, the United States Supreme Court rewrote the rules regarding tribal court civil jurisdiction with its pronouncement in *Montana v. United States*.[85]

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18 U.S.C. § 1152 (2006) ("Except as otherwise expressly provided by law, 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, except the District of Columbia, shall extend to the Indian country."). Under the General Crimes Act, the federal government always has concurrent jurisdiction to bring charges in federal court for criminal trespass. It can also use the Assimilative Crimes Act, 18 U.S.C. § 13 (2006), to bring civil trespass charges against non-Indian trespassers so long as the state in which the reservation is located also permits recovery for civil trespass.

83. 554 U.S. 316, 341 (2008).

84. To extend jurisdiction over a party to litigation, the defendant must have "certain minimum contacts with [the forum jurisdiction] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotation marks omitted). Such contacts exist when an individual "has purposefully directed his activities at residents of the forum," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks omitted), or has intentionally harmed a resident therein, *Calder v. Jones*, 465 U.S. 783, 789-90 (1984). As a practical matter, an individual whose conduct "threatens or directly affects tribal interests within the meaning of *Montana*'s second exception, is very likely to have minimum contacts with the forum sufficient to justify the tribal court's personal jurisdiction." COHEN, *supra* note 51, at 605 (citation omitted).

85. *Montana* is one of the most important Indian law decisions issued by the Supreme Court. It dealt with a range of issues, from the ownership of the real property below a river, to the property interests given to a state upon entering the union, to the authority of tribal courts to pass and enforce laws or regulations affecting the activities of non-Indians on non-Indian fee land within the reservation. It is discussed in detail in Part III of this article. For other

The relevant provisions of *Montana* focused on whether the Crow Tribe of Montana could "regulate hunting and fishing" on land owned by non-Indians within its reservation.[86] The Court clarified that there are two factors relevant in determining whether a tribal court has subject matter jurisdiction – whether the defendant is an Indian, and the status of the land where the unlawful action occurs.[87]

If the defendant is an Indian and the action occurs within "Indian Country,"[88] then "[t]here is no general federal statute limiting tribal jurisdiction over tribal members."[89] The Supreme Court has recognized that subject matter jurisdiction over tribal members is first and foremost a matter for the tribe to determine.[90]

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discussions of *Montana*, see Judith V. Royster, Montana *at the Crossroads*, 38 CONN. L. REV. 631 (2006); Paul A. Banker & Christopher Grgurich, *The* Plains Commerce Bank *Decision and Its Further Narrowing of the Montana Exceptions as Applied to Tribal Court Jurisdiction Over Non-Member Defendants*, 36 WM. MITCHELL L. REV. 565 (2010).

86. Montana v. United States, 450 U.S. 544, 547 (1981). Contrary to the commonsense perspective that all land within a reservation is owned by the federal government for the benefit of tribes (held in trust), much of this land was parceled out and sold to non-Indians under the Dawes Act. This Act resulted in non-Indians owning land in fee on the reservation, further complicating the jurisdictional questions presented to tribal courts. For a discussion of the Dawes Act, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995); Richard A. Monette, *Governing Private Property in Indian Country: The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising Out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. REV. 35 (1995); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001).

87. *See Montana*, 450 U.S. at 566.

88. Title 18 U.S.C. § 1151 provides a federal definition for "Indian Country," defining it as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2006). It is located in the criminal chapter of the United States Code (Chapter 18) rather than in the chapter on Indians (Chapter 25) because it sets the jurisdictional boundaries for the Major Crimes Act, providing for federal criminal jurisdiction over certain crimes committed by Indians in Indian Country. *Id.* § 1153.

89. COHEN, *supra* note 51, at 599.

90. *See, e.g.*, Fisher v. District Court, 424 U.S. 382, 389 (1976) ("Since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, the jurisdiction of the Tribal Court is exclusive.").

Where the tribe provides for subject matter jurisdiction over its members and the conduct occurs between members on the reservation, there is no question as to the appropriateness of tribal jurisdiction.[91]

For non-Indians, the question of the tribal courts' subject matter jurisdiction is significantly more complicated and "must be read in light of the subsequent alienation of those lands."[92] Regarding most instances of on-reservation trespass, this presents no problem. When the conduct of a non-Indian occurs on Indian land (*i.e.* land that is held in trust by the federal government on behalf of the tribe, held in fee by the tribe itself, or held in fee by a tribal member), there is a presumption that the tribal court has subject matter jurisdiction.[93]

The Supreme Court has long recognized that tribes have an interest in asserting both regulatory and adjudicatory authority over the conduct of all persons who enter tribal land,[94] and has clarified that so long as the tribe has the ability to regulate the conduct, its tribal courts have exclusive adjudicatory authority over the nonmember.[95] That "[c]ivil jurisdiction over [non-Indians on

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91. There are instances where tribal court subject matter jurisdiction may extend to off-reservation conduct by tribal members, as when that conduct involves the exercise of off-reservation treaty rights like hunting and fishing. *See* United States v. Sohappy, 770 F.2d 816, 819 (9th Cir. 1985); Settler v. Lameer, 507 F.2d 231, 239 (9th Cir. 1974). But the very nature of trespass involves an action contemplated over territory specifically within the confines of the reservation.

92. *Montana*, 450 U.S. at 560.

93. *Id.* at 564-65.

94. This interest was at one time absolute. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) ("The 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, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress."). But the Court has recently found limited instances where public policy reasons preempt tribal jurisdiction. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353 (2001); Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001).

95. Strate v. A-1 Contractors, 520 U.S. 438, 440 (1997); *see also id.* at 452-53 (quoting Fisher v. Dist. Court, 424 U.S. 382, 386 (1976)) ("[S]tate courts may not exercise jurisdiction over disputes arising out of on-reservation conduct – even over matters involving non-Indians – if doing so would 'infring[e] on the right of reservation Indians to make their own laws and be ruled by them.'"); *id.* at 453 (alteration in original) (quoting Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987)) ("[W]here tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) (citing Fisher v. Dist. Court, 424 U.S. 382 (1976); Williams v. Lee, 358 U.S. 217 (1959); *Ex parte* Crow Dog, 109 U.S. 556 (1883)) (noting that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians" when those rights are connected directly to the land itself).

reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute" has been routinely reaffirmed by the federal courts.[96] The unique nature of trespass to real property ensures that almost all cases of non-Indian trespass where the tribe has an interest in prosecuting will occur on Indian land, and thus present no real problem to tribal court subject matter jurisdiction.

There remain a very small number of relevant cases where non-Indians could commit acts of civil trespass upon non-Indian fee land within the reservation.[97] When the conduct occurs on non-Indian fee land, the presumption in favor of tribal court subject matter jurisdiction is reversed.[98] But the presumption is rebuttable in two instances:

> 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. A tribe may also retain 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.[99]

These two exceptions, often referred to as the first and second *Montana* exceptions[100] or the consensual relations and direct effects tests,[101] identify the

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96. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987); *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982) ("Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.").

97. The likelihood of this occurring depends heavily upon the nature of the reservation itself. For tribes with reservations that were never subject to allotment and where the United States therefore holds title to the entirety of the reservation for the benefit of the tribe, the situation described is an absolute impossibility. The more land within the reservation that has been subject to allotment, the more likely the situation becomes. For a full discussion of allotment, see Royster, *supra* note 86; Monette, *supra* note 86; Bobroff, *supra* note 86.

98. *See* Montana v. United States, 450 U.S. 544, 564 (1981) ("[The] exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.").

99. *Id.* at 565-66 (citations omitted).

100. Nord v. Kelly, 474 F. Supp. 2d 1088, 1093 (D. Minn. 2007); *see also* Skibine, *supra* note 2, at 412; Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and*

outer bounds of tribal court subject matter jurisdiction over non-Indians. To overcome the presumption against tribal court subject matter jurisdiction, *Montana* requires only that one of its exceptions be met.[102]

Even with an initial presumption against tribal court jurisdiction for acts of trespass to real property by a non-Indian on non-Indian fee land, the presumption is rebutted by the second *Montana* exception. The second *Montana* exception rebuts the presumption against tribal court subject matter jurisdiction when "that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[103] The Supreme Court has recognized that the tribe "may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same."[104] A tribal trespass statute is a legitimate regulation to protect the tribe and its members from such "noxious" activity on non-Indian fee land within the reservation that could spread and impact the tribe and its members directly. Trespassers can set fires, grow drugs, or damage infrastructure[105] – all of which "directly [a]ffect [both] the political integrity [and] the economic security . . . of the tribe."[106] These specters are far from an improbable parade of horribles; some have already occurred.[107]

Although no case has yet contested whether the tribal courts have the ability to adjudicate civil trespass claims against non-Indians for trespass on non-Indian fee land within the reservation,[108] the tribes' interest in passing such a

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Debasement of Tribal Sovereignty, 18 BUFF. PUB. INTEREST L.J. 147, 160-62, 169 (2000).

101. Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123 *passim* (2002).

102. *See Montana*, 450 U.S. at 565-66.

103. *Montana*, 450 U.S. at 566.

104. *Plains Commerce Bank*, 554 U.S. at 336.

105. For a discussion of potential damage caused by trespassers upon the reservation and examples of such damage, see *supra* Part II.A.

106. *Montana*, 450 U.S. at 566. Discussion of these events is provided in much greater detail in Part II, including the case of Valinda Jo Elliott, who set a fire that destroyed significant forest resources of the White Mountain Apache Nation, as well as drug traffickers who transport, cultivate, and manufacture drugs in Indian Country. These parties pose threats to the reservation, to individual tribal members, and to the tribe as a political institution. *See generally* Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009); Kershaw, *supra* note 44; Marquez, *supra* note 39, at 549-50.

107. *See e.g.*, Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842 (9th Cir. 2009); Marquez, *supra* note 39; Kershaw, *supra* note 44.

108. *See supra* note 96 and accompanying text.

regulation relates to their "political integrity" and "economic security." While a tribal court may not have the inherent and exclusive jurisdiction to adjudicate other torts occurring between non-Indians on non-Indian fee land, such as assault or unlawful detention, the nature and importance of land to the tribes makes trespass fundamentally different, and the tribes' interest significantly more compelling.[109]

The second *Montana* exception clearly contemplates tribal court civil jurisdiction over non-Indians under any number of its allowable exceptions. The tribe's "welfare" is better served because tribal police need not concern themselves with whether the offending invader is on tribal land or non-Indian fee land. Instead, the officers can focus on enforcing the trespass ordinance. The "economic security" prong is easily satisfied, as trespassers can cause significant damage to the reservation. Fires or activities that pollute non-Indian fee land within the reservation threaten the "health" and "welfare" of the tribe. The inability of the tribal court to control trespassers from committing unlawful acts within the reservation threatens the "political integrity" of the tribe. Extending tribal civil jurisdiction to trespass claims touches upon every area of concern articulated in the second *Montana* exception, clearly rebutting the presumption against tribal court jurisdiction.

C. Tribal Courts Should Have Exclusive Jurisdiction Over On-Reservation Trespasses

Unless the tribe takes affirmative steps to limit its personal jurisdiction, a trespasser entering the reservation subjects herself to the tribal court's personal jurisdiction. Moreover, the unique nature of trespass to real property ensures that most claims are brought in tribal court when the trespass occurs on Indian-owned land or when the trespasser is herself a tribal member, presenting no barrier to tribal court subject matter jurisdiction.[110] In the rare case where a non-Indian brings a trespass action against another non-Indian, the tribal court still has subject matter jurisdiction. This is because, in every instance, the rebuttable presumption against tribal court subject matter jurisdiction over non-Indians for trespasses occurring on non-Indian fee land within the reservation will be rebutted by the second *Montana* exception. Accordingly, a bright-line rule that vests exclusive civil jurisdiction to the tribal courts over non-Indians

109. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982) (explaining that "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them . . . [which] includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct").

110. *See supra* notes 87-93 and accompanying text.

in the case of trespass to real property codifies the existing law while reducing the ultimately fruitless appeals that arise from challenges to tribal court jurisdiction over civil trespass actions.

IV. Justifications for Creating a Bright-Line Rule in Favor of Tribal Court Civil Jurisdiction

Having established that a bright-line rule favoring tribal court civil jurisdiction over non-Indians for trespass to real property saves time and resources without significantly changing the existing tests and presumptions, it is now only a matter of justifying the legal foundation for such a rule. This section first identifies what constitutes trespass to real property. It then demonstrates that the justification for the bright-line rule is supported by both common law and congressional intent.

A. Trespass Is an Intentional Tort

The common law tort of trespass to real property occurs "when a person, without authority or privilege, physically invades or unlawfully enters the private premises of another whereby damages directly ensue."[111] Under the common law, trespass to property or unlawful entry to land is an intentional tort – a mere unconsented entry is enough prevail on a claim.[112] The amount of damage is inconsequential, as damage is implied by the trespass itself under the common law.[113] For example, a surveyor who mistakenly enters land he does not know belongs to another is liable for nominal damages to the owner of the land even if no physical property is destroyed.[114] Damages for trespass are

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111. United States v. Operation Rescue, 112 F. Supp. 2d. 696, 701 (S.D. Ohio 1999) (quoting Apel v. Katz, 697 N.E.2d 600, 607 (Ohio 1998)); *see also In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 379 F. Supp. 2d 348, 401 (S.D.N.Y. 2005) ("The gist of a claim for trespass on land is the wrongful interference with one's possessory rights in property."); RESTATEMENT (SECOND) OF TORTS § 163 (1965) ("One who intentionally enters land in the possession of another is subject to liability to the possessor for a trespass, although his presence on the land causes no harm to the land, its possessor, or to any thing or person in whose security the possessor has a legally protected interest.").

112. RESTATEMENT (SECOND) OF TORTS § 158 (1965) ("One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.").

113. Dougherty v. Stepp, 18 N.C. (1 Dev. & Bat.) 371, 371 (N.C. 1835).

114. *Id.*; *see also* Smith, *Property Rules*, *supra* note 52, at 1719, 1754-74 (discussing "property rules and owners' rights to exclude others from their property").

similarly appropriate for invading the airspace over the property of another[115] or where the actions of an individual induce others to trespass upon another's real property.[116] The trespassing entity need not even be human.[117] For example, suppose "A intentionally drives a stray horse from his pasture into the pasture of his neighbor, B. A is a trespasser."[118] Similarly, suppose "A, on a public lake, intentionally discharges his shotgun over a point of land in B's possession, near the surface. The shot falls into the water on the other side. A is a trespasser."[119]

A successful civil trespass claim need not allege significant financial injury. Because trespass is an intentional tort, mere entry to the land is sufficient.[120] The amount of damages may depend upon the acts perpetrated by the trespasser to the land and the extent of injury therefrom, "[b]ut it is an elementary principle, that every unauthorised [sic], and therefore unlawful entry, into the close of another, is a trespass,"[121] and "[a]lthough proof of a negligent act may be sufficient to support a civil action for trespass, such proof is not a necessary element."[122]

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115. Hannabalson v. Sessions, 90 N.W. 93, 95 (Iowa 1902) (holding that a trespass occurs where a defendant reaches her arm across a boundary fence).

116. Guille v. Swan, 19 Johns. 381 (N.Y. 1822) (holding a balloonist liable in trespass for all damage to vegetables incurred by a crowd pursuing the balloon).

117. RESTATEMENT (SECOND) OF TORTS § 158 (1965).

118. *Id.* § 158 cmt. i, illus. 4.

119. *Id.* § 158 cmt. i, illus. 6; *see also* Whittaker v. Stangvick, 111 N.W. 295 (Minn. 1907) (holding that the shooting of guns over another's land is a wrong for which an injunction is available).

120. *In re* Bundick, 303 B.R. 90, 114 (Bankr. E.D. Va. 2003) ("Civil liability for trespass may be predicated upon unintentional trespass. Liability may also be imposed for actions done accidentally, inadvertently or by mistake. Although proof of a negligent act may be sufficient to support a civil action for trespass, such proof is not a necessary element.") (citations omitted).; Pembaur v. Cincinnati, 745 F. Supp. 446, 456 (S.D. Ohio 1990) ("[E]very unauthorized entry upon the land of another constitutes a trespass and regardless of whether the owner suffered substantial injury or not, he at least sustains a legal injury which entitles the owner to a verdict for some damages. The law of Ohio conclusively presumes damages in every case of trespass.") (citation omitted).

121. Dougherty v. Stepp, 18 N.C. (1 Dev. & Bat.) 371, 371 (N.C. 1835); RESTATEMENT (SECOND) OF TORTS § 163 (1965); *see also Dougherty*, 18 N.C. (1 Dev. & Bat.) at 371 ("From every such entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or the herbage."); Pembaur v. Cincinnati, 745 F. Supp. 446, 456 (S.D. Ohio 1990), *aff'd*, 947 F.2d 945 (6th Cir. 1991) ("The law . . . presumes damages in every case of trespass.").

122. *Bundick*, 303 B.R. at 114 ("Civil liability for trespass may be predicated upon unintentional trespass. Liability may also be imposed for actions done accidentally, inadvertently or by mistake. Although proof of a negligent act may be sufficient to support a

The tort of civil trespass to real property originated with the common law,[123] and from its common law roots emerged a consensus on where venue for civil trespass claims is proper.[124] Whether decided under federal common law,[125] statutes enacted by tribal councils,[126] or tribal customary law,[127] trespass to real property is a prosecutable offense. A federal court reviewing the assertion of tribal court civil jurisdiction for trespass to real property will note that, under the common law, the tribal court is the only venue that can properly assert jurisdiction,[128] and under federal Indian law, the tribe has the inherent power to exclude persons without a specific grant from the federal government or the landowner.[129]

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civil action for trespass, such proof is not a necessary element.") (citations omitted).

123. 75 AM. JUR. 2D *Trespass* § 18 (2010); *see also* Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021, 1022, 1025; 1 Cowp. 161, 161, 165.

124. Trespass claims under the common law were separated into those which were local and those which were transitory in nature. Doulson v. Matthews, (1792) 100 Eng. Rep. 1143, 1145; 4 Term Rep. 503, 504. Even after the distinction between local and transitory actions was muted by subsequent opinions, the distinction was maintained for trespass to real property claims. British S. Afr. Co. v. Companhia De Mocambique, [1893] A.C. 602, 631. For a discussion of the history of civil trespass to real property under the common law, see *Jurisdiction-Trespass to Real Property-Local Action*, 20 MICH. L. REV. 913, 913-14 (1921-1922).

125. RESTATEMENT (SECOND) OF TORTS § 163 (1965).

126. Many tribes have constitutions that vest legislative powers in a tribal council. These councils vary widely in size and delegated powers. Unless otherwise prohibited by constitutional limitations, tribal councils may specifically codify a civil code that includes trespass to real property and is applicable to all persons over whom they have legislative authority. *See generally* COHEN, *supra* note 51, at 260-62, 276-78 (citations omitted). A collection of tribal codes can be found at Tribal Law & Policy Inst., *Tribal Laws/Codes*, TRIBAL CT. CLEARINGHOUSE, http://www.tribal-institute.org/lists/codes.htm (last visited Apr. 28, 2011), and Native Am. Rights Fund, *Tribal Code & Constitution Directory - the A-Z List*, NATIVE AM. RTS. FUND, http://www.narf.org/nill/triballaw/az.htm (last visited Apr. 28, 2011).

127. Even if there is not a codified civil code that includes trespass, tribal courts may rely on tribal customary law or tribal common law to prosecute the offense. *See* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 509, 529-530 (1998). For a general discussion on the use of tribal customary law, see RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE (2009); Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57 (2007).

128. *See infra* note 168 (discussing Doulson v. Matthews, (1792) 100 Eng. Rep. 1143; 4 Term Rep. 503).

129. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (permitting persons to enter the Cherokee reservation only "with the assent of the Cherokees themselves"); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982).

B. The Common Law Supports Exclusive Tribal Court Jurisdiction

Under the common law, trespass actions involving real property were divided into two categories: "transitory" and "local."[130] Following common law principles of evidence and civil procedure, the nature of the trespass determined where venue was properly laid.[131] The United States Supreme Court has ratified the distinction between "transitory" and "local" trespass as binding on modern American courts,[132] and thus has given effect or sanctioned these rules as guiding civil trespass jurisdiction today.[133]

A transitory trespass involves a personal injury (trespass to the person)[134] or the destruction of goods (trespass to chattel).[135] Under established common law, in a transitory trespass, "it is only necessary to lay a venue for a place of trial, and . . . such venue is good without stating where the trespass was in fact committed."[136] The named venue need only be "with[in] a scilicet of the county in which the action is brought."[137] The justification for the rule of transitory

130. Ellenwood v. Marietta Chair Co., 158 U.S. 105, 107 (1895), *superseded by statute*, Judicial Improvement Act of 1990, Pub. L. 101-650, 104 Stat. 5089; Casey v. Adams, 102 U.S. 66, 67 (1880), *superseded by statute*, Judicial Improvement Act of 1990, Pub. L. 101-650, 104 Stat. 5089; McKenna v. Fisk, 42 U.S. (1 How.) 241, 248 (1843), *superseded by statute*, Judicial Improvement Act of 1990, Pub. L. 101-650, 104 Stat. 5089; *Doulson*, 100 Eng. Rep. at 1145; 4 Term Rep. at 504.

131. *Ellenwood*, 158 U.S. at 107-08; *Casey*, 102 U.S. at 67-68; *McKenna*, 42 U.S. at 247-48; *Doulson*, 100 Eng. Rep. at 1144; 4 Term Rep. at 503.

132. *Ellenwood*, 158 U.S. at 107-08 ("An action for trespass upon land, like an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the state in which the land lies."); *McKenna*, 42 U.S. at 248 ("In transitory actions a venue is only necessary to be laid to give a place for trial. Such a venue is indispensable, for without it would not appear in what county the trial was to take place, nor could a jury be summoned to try the issue.").

133. Hayes v. Gulf Oil Corp., 821 F.2d 285, 287 (5th Cir. 1987) (holding that civil suits deemed local in nature must "be brought within the territorial boundaries of the state where the land is located"); Gen. Elec. Capital Corp. v. E. Coast Yacht Sales, Inc., 757 F. Supp. 19, 20 (E.D. Pa. 1991); Minichiello Realty Assocs. v. Britt, 460 F. Supp. 896, 898 (D.N.J. 1978), *aff'd*, 605 F.2d 1196 (3d Cir. 1979).

134. *See* Dennick v. R.R. Co., 103 U.S. 11, 11, 18 (1881) (holding that, where the derailing of a railroad car killed a man, his widow may bring an action for trespass to the person against the railroad in any venue because trespass to the person is a transitory offense).

135. *See McKenna*, 42 U.S. at 242-43, 249 (holding that trespass to chattel, including liquors, coffee, tea, and clothing, was a transitory offense and venue for the trespass could be fixed anywhere within "a scilicet of the county").

136. *Id.* at 249.

137. *Id.*; *see also id.* at 248 ("[A]s to transitory actions, there is not a colour [sic] of doubt but that any action which is transitory may be laid in any county in England, though the matter

trespass is simple. Because any court is capable of adjudicating the elements of an offense involving personal injury or injury to chattel, venue is only necessary to give all parties notice that the trial for the offense has been vested in a court, thus effectuating orderly justice.[138]

Unlike a transitory trespass, a local trespass involves a trespass to real property. The trespass is the unlawful entry itself and damages to the land sustained as a result.[139] Venue for a local trespass "cannot be changed into any other county than where the trespass to the realty was done, and never can be carried out of the sovereignty in which the land is."[140] The common law justification restricts the proper venue for trespass to land to the sovereign that controls the land.[141]

A different justification is used here than in cases of transitory trespass because the injured thing (in this case the land) is not portable. While any judge or juror may be presented with physical evidence of bodily injury and damaged chattel, real property can never enter the courtroom.[142] The rule relies upon the logical premise that trespass to real property properly can be adjudicated only by the sovereign and by the court in the best position to know the nature and character of the land itself.[143] The familiarity of the court and its jurors with the land in question places it in the best position properly to assess injury and award damages.

1. Application of English Common Law of Trespass in the United States

"The distinction between local actions and transitory actions finds its American roots in *Livingston v. Jefferson*."[144] *Livingston* "arose during the presidency of Thomas Jefferson, when United States marshals, acting on President Jefferson's instructions, forcibly ejected Edward Livingston, a

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arises beyond the seas.").

138. *See id.* at 247-48 (discussing venue in transitory trespass cases as a legal fiction merely providing a place for trial).

139. Ellenwood v. Marietta Chair Co., 158 U.S. 105, 108 (1895), *superseded by statute*, Judicial Improvement Act of 1990, Pub. L. 101-650, 104 Stat. 5089; 75 AM. JUR. 2D *Trespass* § 18 (2010).

140. *McKenna*, 42 U.S. at 247-48.

141. *See* Huntington v. Attrill, 146 U.S. 657, 669 (1892); *McKenna*, 42 U.S. at 249 (dismissing the jurisdiction of the District Court for the District of Colombia over a local trespass claim because the alleged trespass occurred in Maryland); Trust Co. Bank v. U.S. Gypsum Co., 950 F.2d 1144, 1148-49 (5th Cir. 1992) (holding that the transitory/local distinction is well ingrained in the legal rules of the United States).

142. *McKenna*, 42 U.S. at 248.

143. *See id.*

144. Box v. Ameritrust Texas, N.A., 810 F. Supp. 776, 778 (E.D. Tex. 1992).

Louisiana landowner, from land along the Mississippi River in New Orleans."[145] Alleging trespass to land, "Livingston sued the by-then former president in a federal court in Virginia."[146] A distinguished panel, including Chief Justice John Marshall and John Tyler, dismissed the action.[147] Chief Justice Marshall wrote that "actions are deemed transitory, where transactions on which they are founded, might have taken place anywhere; but are local where their cause is in its nature necessarily local."[148] Accordingly, Marshall found that an action for trespass to land in Louisiana was local, and could not be heard in a Virginia court, as venue was appropriate only in Louisiana.[149] By adopting the legal distinction between actions that are local and actions that are transitory in nature, the court reaffirmed the principles of property and trespass law from Great Britain, and adopted them firmly as solid legal principles upon which the courts of the United States would rely.[150]

Three decades later, the issue of jurisdiction for a local trespass action was decided by the United States Supreme Court.[151] In *McKenna v. Fisk*, the defendant broke into an owner's store in Maryland and stole or destroyed merchandise valued at $2,000.[152] The plaintiff brought suit in the District Court for the District of Columbia on three counts, two of which dealt with damages to property deemed "transitory," and one for an unlawful entry deemed

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145. *Id.*

146. *Id.*

147. Chief Justice Marshall participated in *Livingston* as part of his circuit-riding responsibility with the Supreme Court. For more information on circuit riding in general and Chief Justice Marshall's circuit responsibilities in particular, see generally HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801-1835, at 112-37 (1997). John Tyler is the father of future tenth President of the United States John Tyler. *Tyler, John, in* 10 DICTIONARY OF AMERICAN BIOGRAPHY 87-88 (Dumas Malone ed., 1936). He was appointed to his seat on the District Court for the District of Virginia on January 2, 1811, by President Madison. *Biographical Directory of Federal Judges: Tyler, John,* FED. JUD. CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=:2429&cid=:999&ctype==na&instate==na (last visited May 1, 2011).

148. *Livingston*, 15 F. Cas. at 664.

149. *Id.* at 661, 665. The importance of the local/transitory distinction for trespass is so strong that it is given deference even when the alleged trespasser may never again be found within the borders of the jurisdiction of a court that may be able to try him for the offense. *See id.* at 665.

150. *Id.* at 662 ("[T]he action for trespass, *quare clausum fregit*, still remained local, and is so held to this day. . . . [I]t being a local action, it ought to have been instituted in the district where the trespass was committed.").

151. McKenna v. Fisk, 42 U.S. (1 How.) 241 (1843), *superseded by statute*, Judicial Improvement Act of 1990, Pub. L. 101-650, 104 Stat. 5089.

152. *Id.* at 242-44.

"local."[153] The District Court of the District of Columbia refused to admit evidence from witnesses who were citizens of Maryland because it considered them outside the jurisdiction of the court.[154] The Supreme Court reversed the district court and remanded to permit the owner to present evidence on the counts that were transitory in nature because venue over transitory matters need not rest exclusively with the county where the property was injured.[155] The District Court for the District of Columbia thus had proper jurisdiction over the transitory claims.[156] The Supreme Court, however, affirmed the district court's decision with regard to the local trespass count because suit was vested in an improper venue.[157] Venue was proper only for the local trespass action only in the District Court of Maryland.[158]

Since the *Livingston* and *McKenna* decisions, "the common law local action doctrine has become ingrained in American jurisprudence, with state and federal courts alike recognizing and applying the rule."[159] As recently as 1997, the United States Supreme Court affirmed the local/transitory distinction as good law.[160] Today, it stands that an "action involving real property, as

153. *Id.* at 246.

154. *Id.* at 244.

155. *See id.* at 247-49. The witnesses could come from any place. So long as they could testify to the amount and quality of the goods, their testimony was admissible in any court. The court could then make a determination whether the value of the goods was indeed worth the amount claimed in the suit. Because persons everywhere are familiar with the kinds of chattels destroyed, there was no reason to limit the jurisdiction of the court or proscribe the citizenship of eligible witnesses in a transitory claim. *See id.* at 248.

156. *Id.* at 249. Any court that could obtain personal jurisdiction over the defendant would have jurisdiction over the transitory claims because, by its very nature, it was only necessary that all parties agree that there be one place, time, judge, etc. to hear the matter and issue a final decision that would be afforded full faith and credit in all other U.S. courts. *Id.* at 248.

157. *Id.* at 247.

158. *See id.*

159. Box v. Ameritrust Texas, N.A., 810 F. Supp. 776, 778 (E.D. Tex. 1992); *see also, e.g.*, Louisville & Nashville R.R. Co. v. W. Union Tel. Co., 234 U.S. 369, 372-73 (1914); *In re* New York Trap Rock Corp., 158 B.R. 574, 575 (S.D.N.Y. 1993) (permitting venue "in a judicial district in which a substantial part of the events of omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated").

160. Printz v. United States, 521 U.S. 898, 907 (1997) (holding that common law announced by the courts in the United States often stems from the decisions of foreign courts and citing with approval *McKenna* local-transitory distinction as an example of American law taken from abroad); Tafflin v. Levitt, 493 U.S. 454, 469 (1990) (Scalia, J., concurring) (citing *McKenna* for the proposition that the jurisdictional rules for transitory actions apply in diversity cases in federal courts the same way they apply in state courts between citizens).

opposed to a transitory action, must be brought within the territorial boundaries of the state in which the land is located."[161]

What was true in the time of President Jefferson is still the law in the United States today.[162] Although some states have questioned the local/transitory distinction,[163] it remains the undisputed principle for resolving jurisdictional conflicts for civil trespass cases in federal courts.[164]

In the United States, trespass actions filed under *in personam* jurisdiction also follow this rule.[165] For example, in 2000, the district court in *Hallaba* found that Worldcom's laying of fiber-optic cable across defendant landowner's real property without permission was a trespass to land.[166] The defendant's three other claims also derived from the alleged unlawful use of the land.[167] In reiterating the local/transitory distinction and reinforcing *Livingston*'s principle that civil trespass cases must be brought in a court with jurisdiction over the land, the district court confirmed that the local/transitory rule for trespass to real property cases is alive and well.

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161. Trust Co. Bank v. U.S. Gypsum Co., 950 F.2d 1144, 1148 (5th Cir. 1992); Hayes v. Gulf Oil Corp., 821 F.2d 285, 287 (5th Cir. 1987) ("A local action involving real property can only be brought within the territorial boundaries of the state where the land is located."); *see also supra* note 150 and accompanying text.

162. *See, e.g.*, Kingsborough v. Sprint Commc'ns Co., 673 F. Supp. 2d 24, 31-32 (D. Mass 2009) ("[T]he local action doctrine 'now is established firmly in federal jurisprudence and the case law makes it as clear as anything can be that this distinction exists and that local actions can be brought only where the property involved in the action is located.'") (citations omitted); Bigio v. Coca-Cola Co., 239 F.3d 440, 449-50 (2d Cir. 2000); *Trust Co. Bank*, 950 F.2d at 1148; Raphael J. Musicus, Inc. v. Safeway Stores, Inc., 743 F.2d 503, 506-07 (7th Cir. 1984); Van Beek v. Ninkov, 265 F. Supp. 2d 1037, 1043 (N.D. Iowa 2003); Hallaba v. Worldcom Network Servs., 196 F.R.D. 630, 647 (N.D. Okla. 2000).

163. For a list of states that have questioned the transitory/local distintion, including Louisiana, Arkansas, Minnesota, Missouri, and New Hampshire, see *Raphael J. Musicus, Inc.*, 743 F.2d at 510.

164. *See e.g.*, *id.* at 506 ("Proper venue is determined by the characterization of the action as either local or transitory."); Bailey v. Shell W. E&P, Inc., 609 F.3d 710, 721 (5th Cir. 2010); Carty v. Beech Aircraft Corp., 679 F.2d 1051, 1058 (3d. Cir. 1982); Voda v. Cordis Corp., 476 F.3d 887, 901 (Fed. Cir. 2007); 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 110.20[2] (Matthew Bender ed., 3d ed. 2002) ("[T]o provide *in rem* relief, the court must have jurisdiction over the real property at issue, and a local action must therefore be brought in the jurisdiction in which that real property is located.").

165. *See, e.g.*, *Hallaba*, 196 F.R.D. at 646-47.

166. *Id.* at 647.

167. *Id.*

2. The Common Law as Applied to Federal Indian Law

McKenna cites with approval *Doulson v. Matthews*,[168] in which the English courts concluded that they lacked jurisdiction over a claim of trespass in Canada (then a colony) because *quare clausum fregit* (trespass) is a local and not a transitory matter.[169] In *McKenna*, Justice Wayne cited *Rafael v. Verelst* for the proposition that "the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable."[170] The language of *McKenna* contemplates that jurisdiction over a trespass claim rests solely with the "sovereignty in which the land" lies.[171]

Other British rulings reinforce the proposition that jurisdiction properly could be found only in the courts of the country where the land is situated.[172] In *British South Africa Co. v. Companhia De Mocambique*, the Queen's Bench division determined that, for purposes of jurisdiction over land, "[n]o nation can execute its judgments . . . against . . . real property in the country of another."[173] Finding that "the laws of the country where [the land] is situated" should govern,[174] the court deferred to the law of South Africa, held its own jurisdiction

168. In *Doulson*, Matthews allegedly entered the house of the plaintiff in Canada, "expell[ed] him" from his home, and commandeered his possessions. Doulson v. Matthews, (1792) 100 Eng. Rep. 1143, 1144; 4 Term Rep. 503. Doulson brought suit in the courts of England. At trial, Lord Kenyon concluded that, because there was no proof offered in England that Doulson's tangible personal property was taken, the transitory action was without a well-pled cause. *Id.* The local action, dealing with trespass and commandeering of a personal residence, was a question left up to courts of Canada. *See id.* at 1144-45.

169. McKenna v. Fisk, 42 U.S. (1 How.) 241, 248 (1843), *superseded by statute*, Judicial Improvement Act of 1990, Pub. L. 101-650, 104 Stat. 5089.

170. *Id.* (citing Rafael v. Verelst, 2 W. Black 1055).

171. *Id.* at 247-48. The use of the term sovereignty was important during the eighteenth and nineteenth centuries because it contemplated the major European powers' colonial possessions. Today, the application of the term is fittingly applied to federally recognized Indian tribes that are classed "domestic dependent nations" and have rights and privileges similar to those European powers extended to their colonies during the period of colonial rule. *See generally* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (discussing the ways in which tribal sovereignty is similar to that extended to enclaves, territories, and other American possessions).

172. British S. Afr. Co. v. Companhia De Mocambique, [1893] A.C. 602, 623-24.

173. *Id.* at 624.

174. *Id.* at 623.

insufficient, and dismissed the case.[175] Lord Halsbury added that deference to local courts is necessary for questions that arise that directly involve the land.[176]

These cases stand for the proposition that an individual who trespasses on land under the jurisdiction of one sovereign has no legitimate expectation that another sovereign will have jurisdiction over the trespass.[177] For example, a citizen of Maine who trespasses on personal property in West Virginia presumably has no expectation that the case will be adjudicated in Maine or under Maine's laws. English cases holding that English courts lack jurisdiction over trespass claims in English colonies further strengthen the argument that the common law reserves exclusively to tribal courts civil jurisdiction for trespass to real property.[178]

Mother England is to Colony Canada what the United States is to the 565 federally recognized Indian tribes.[179] While the Supreme Court has determined that tribes are "domestic dependent nations,"[180] in principle and in practice this status favorably compares with the status of colonies or commonwealths during the height of the British Empire. During British imperialism, English colonies were wards of the colonizing superpower with limited self-government and sovereignty stemming from their status as nations within the British Empire.[181] An English citizen committing a trespass in Canada is denied adjudication in England because only the Canadian colony has proper venue.[182] South Africa is subject to English law, but jurisdiction for a crime committed involving real property located in South Africa rests in South Africa due to the local nature of the action.[183]

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175. *See id.* at 630; DeLashmutt v. Teetor, 169 S.W. 34, 38 (Mo. 1914).

176. *British S. Afr. Co.*, [1893] A.C. at 631.

177. *See id.* at 624; *DeLashmutt*, 169 S.W. at 38.

178. While English cases may not be binding authority against the courts of the United States, they are certainly persuasive authority in determining the common law. Livingston v. Jefferson, 15 F. Cas. 600, 664 (C.C.D. Va. 1811) (noting that the decisions of British and Colonial courts "are entitled to that respect which is due to the opinions of wise men, who have maturely studied the subject they decide"). Because the local/transitory distinction – and the rules of the British courts dealing with its application to colonies – do not run counter to the decisions made by the courts of the United States, nor its law, they are very persuasive authority when it comes to determining the common law of the United States.

179. 75 Fed. Reg. 60,810 (Oct. 1, 2010); 75 Fed. Reg. 66,124 (Oct. 27, 2010) (adding the Shinnecock Indian Nation to the list of federally recognized tribes, bringing the total number to 565).

180. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 10 (1831).

181. Ronald J. Daniels et al., *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 AM. J. COMP. L. 111, 137 (2011).

182. Doulson v. Matthews, [1792] 4 Eng. Rep. 1143, (P.C.) [1144].

183. Companhia de Mocabique v. British South Africa Company, [1892] 1 A.C. 358 (Q.D.)

There is a clear parallel: a non-Indian who trespasses in Indian Country must expect that the laws and courts of the sovereign tribe are the only place where jurisdiction properly rests for a local trespass. States and the federal government may have an interest in regulating or adjudicating other activities within the reservation. But when the activity concerns the land itself, only the tribal court can appropriately assert jurisdiction.

This argument is subject to a few logical limits. If a tribe does not have a functioning tribal court,[184] then venue should rest in the federal court with jurisdiction over the tribe for all trespass claims that arise within the reservation. Any tribe with a functioning court system, however, should be entitled to the deference that English courts show their colonies. Where tribal courts exist, other courts should defer to their jurisdiction. The tribal courts know the land better than "foreign" courts and are responsible for maintaining order on the reservation.

C. Congressional Intent Supports Exclusive Tribal Court Civil Jurisdiction

Congress has long regulated the internal workings of tribes.[185] The Supreme Court has ratified this exercise, recognizing that Congress has "plenary and exclusive"[186] authority over Indian affairs, stemming from the Indian Commerce Clause.[187]

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[362].

184. This is hardly ever a problem. Tribes too small to have a functioning court of their own often pool their resources with other tribes to create a regional tribal court system. *See Northwest Inter-Tribal Court System*, NICS, http://www.nics.ws (last visited Mar. 25, 2011); *Inter-Tribal Court of Southern California*, ICSC, http://www.icsc.us/Welcome.html (last visited Mar. 25, 2011). Other tribes have no reservation land over which to exert jurisdiction. An Indian tribe is a political entity, and as such, exists even if it does not hold title to land or have land held in trust by the United States on its behalf. *See generally* Frank W. Porter III, *In Search of Recognition: Federal Indian Policy and the Landless Tribes of Western Washington*, 14 AM. INDIAN Q. 113 (1990). For these tribes, it is unfortunately impossible to commit a trespass to real property that their court systems would need to adjudicate.

185. The Supreme Court in *United States v. Kagama*, 118 U.S. 375 (1886), upheld the constitutionality of the Indian Major Crimes Act of 1885, the first statute directly to regulate the internal affairs of tribes by permitting the federal government to prosecute Indians for certain crimes committed within Indian Country. *Id.* at 385. While states are often denied the ability to regulate federally recognized tribes by both the Court and Congress, the Supreme Court long has held that Congress retains plenary power over Indians. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

186. United States v. Lara, 541 U.S. 193, 200 (2004); Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463, 470 (1979).

187. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). For further discussion of the Indian Commerce Clause, see Robert G. Natelson, *The Original*

Neither Congress nor the Court has ever limited the power of tribal courts to prosecute any individual, regardless of Indian status, for trespass. While the Court has limited tribal court jurisdiction over nonmembers in cases of criminal acts,[188] regulation of hunting and fishing on non-Indian fee land,[189] injuries sustained on a state highway,[190] and for state officials exercising a warrant on tribal land,[191] it has often upheld the inherent power of tribes to assert civil jurisdiction over non-Indians in areas where no overriding federal interest is frustrated by that assertion.[192]

When Congress, under the guise of its absolute plenary power over Indian affairs, specifically grants tribal courts jurisdiction through either affirmation of existing tribal powers[193] or delegation of new tribal court jurisdiction,[194] the courts are apt to defer to the elected branch.[195] The courts show the same deference to congressional delegations of tribal regulation over all persons within the reservation, permitting tribes to set their own environmental standards through the tribe-as-state provisions in federal statutes, such as the Clean Air Act[196] and Clean Water Act.[197] While the common law, stemming

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Understanding of the Indian Commerce Clause, 85 DENV. U. L. REV. 201 (2007); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055 (1995); Nathan Speed, Note, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. REV. 467 (2007).

188. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

189. Montana v. United States, 450 U.S. 544, 564-65 (1981).

190. Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997).

191. Nevada v. Hicks, 533 U.S. 353, 382 (2001).

192. *E.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153-54 (1980) ("[W]e can see no overriding federal interest that would necessarily be frustrated by tribal taxation."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."). For an excellent discussion of tribal court civil jurisdiction over non-Indians, see Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705 (1997). Melissa L. Koehn is now Professor Melissa Tatum, director of the Indigenous Peoples Law and Policy Program at the University of Arizona.

193. *E.g.*, United States v. Lara, 541 U.S. 193, 196 (2004) (reaffirming tribal court criminal jurisdiction over nonmember Indians); United States v. Long, 324 F.3d 475, 482 (7th Cir. 2003) (reaffirming the Menominee Tribe's status as a federal Indian tribe).

194. *E.g.*, 18 U.S.C. § 1161 (2006).

195. United States v. Lara, 541 U.S. 193, 197-200 (2004) (upholding a congressional act passed in response to *Duro v. Reina*, 495 U.S. 676 (1990), that extended tribal court criminal jurisdiction to nonmember Indians); United States v. Mazurie, 419 U.S. 544, 553 (1975) (upholding a congressional delegation of tribal court civil jurisdiction over non-Indians who sell liquor on the reservation without tribal permission).

196. Clean Air Act, 42 U.S.C. § 7601(d)(1)(A) (2006) ("The Administrator is authorized to

from the situs rule, argues sufficiently well that tribal courts have subject matter and personal civil jurisdiction over all persons committing acts of trespass within Indian Country,[198] congressional approval for such a policy eliminates any remaining uncertainties regarding the advisability of such a bright-line rule.

1. Indian Trespassers

Congress and the courts have long recognized the right of Indian nations to make their own laws and be governed by them.[199] Tribes regularly utilize their full sovereign powers through the extension of their regulatory authority. Some of the ways they exercise their autonomy over the regulation of their members on the reservation include the modification of IRA constitutions to give tribal councils greater authority,[200] the enactment of comprehensive tribal codes that govern both criminal and civil actions,[201] and the creation of tribal courts.[202] The creation of tribal courts often includes appellate review and an expansion of the areas subject to civil litigation.[203] With the growth of tribal courts comes questions of conflicting jurisdiction, particularly over the activities of nonmembers within the reservations.

There is no federal statute removing tribal court civil jurisdiction over Indians for civil trespass,[204] and such jurisdiction has never been judicially

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treat Indian tribes as States under this act.").

197. Clean Water Act, 33 U.S.C. § 1362(4) (2006); *see also* 40 C.F.R. § 123.1(h) (1983). For a discussion of civil regulatory authority granted by Congress to tribes, see Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State*, 36 WM. MITCHELL L. REV. 533 (2010).

198. *See* Montana v. United States, 450 U.S. 544, 565 (1981).

199. Williams v. Lee, 358 U.S. 217, 220 (1959); Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 335 (2008); Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005); Inyo County v. Paiute-Shoshone Indians of the Bishop Colony, 538 U.S. 701, 701 (2003).

200. *See* Kristina L. McCulley, Comment, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs?*, 30 AM. INDIAN L. REV. 401, 409 (2005-2006).

201. For examples tribal codes, see *Codes*, NATIVE AMERICAN CONSTITUTION AND LAW DIGITIZATION PROJECT, http://thorpe.ou.edu/codes.html (last visited Apr. 28, 2011).

202. *See* Kirsten Matoy Carlson, Note, *Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies*, 101 MICH. L. REV. 569, 593 (2002) (noting that the exhaustion doctrine requiring exhaustion of tribal court remedies before allowing access to other courts "promote[s] Congress' policy of tribal self-determination" and "facilitate[s] the expertise of tribal courts").

203. United States v. Lara, 541 U.S. 193, 202 (2004).

204. *Montana*, 450 U.S. at 560-62 (noting that there is no congressional law denying tribal courts jurisdiction over acts of trespass, but neither is there such a law confirming their

divested. By implication, tribal courts presumably have the exclusive jurisdiction to adjudicate tribal civil trespass actions against Indian trespassers in Indian Country.[205] Reservation land, including land held in trust for Indians, is at the core of Indian Country, and states thus lack all jurisdiction to regulate the conduct of Indians in Indian Country.[206] Even when Congress passed the federal trespass statute, specifically expanding the ability of the federal government to prosecute trespassers on the reservation,[207] its application to tribal members was significantly limited.[208] The courts have interpreted the federal trespass statute not to apply to Indians for trespass on tribal lands, recognizing that the inherent sovereignty of the tribe over its trust lands prevents prosecution of an Indian by the federal government.[209]

2. Non-Indian Trespassers

A tribal court, under its inherent power as a sovereign government entity, has both personal and subject matter jurisdiction over any Indian who commits a criminal or civil offense on the reservation.[210] This bright-line rule makes finding the assertion of tribal court jurisdiction over the accused individual Indian in cases of trespass to real property fairly simple. While the common law provides for tribal court civil jurisdiction over non-Indians for trespass to real property, explicit congressional delegation in favor of tribal jurisdiction

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jurisdiction); *Williams*, 358 U.S. at 221-22.

205. *See Montana*, 450 U.S. at 564; *Williams*, 358 U.S. at 210.

206. Montana v. United States, 450 U.S. 544, 564 (1981) (noting that tribes have the ultimate authority to regulate the activities of tribal members on the reservation); Antoine v. Washington, 420 U.S. 194, 197 (1975) (holding that the state could not regulate hunting and fishing by tribal members on the reservation); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 165 (1973) (holding that states cannot tax resources located on and derived from the reservation); Seymour v. Superintendent of Wash. State Penitentiary, 363 U.S. 351, 359 (1962) (holding that states do not have criminal jurisdiction over Indians in Indian Country); State v. Jackson, 16 N.W.2d 752, 757 (Minn. 1944) (holding that state hunting and fishing laws cannot be enforced on an Indian in Indian Country).

207. 18 U.S.C. § 1165 (2006) (known colloquially as the federal trespass statute).

208. *E.g.*, United States v. Jackson, 600 F.2d 1283, 1287 (9th Cir. 1979); United States v. Greyfox, 727 F. Supp. 576, 578 (D. Or. 1989) (holding that, even when the tribal court dismissed charges, the district court lacks jurisdiction to try an Indian for trespass under 18 U.S.C. § 1165, because tribal courts exerts exclusive jurisdiction over Indian conduct on Indian trust land).

209. *Jackson*, 600 F.2d at 1287; *Greyfox*, 727 F. Supp. at 578.

210. *E.g.*, United States v. Lara, 541 U.S. 193, 196 (2004) (criminal); Fisher v. Dist. Court, 424 U.S. 382, 387-88 (1976) (civil).

already exists in some instances of trespass,[211] strengthening the argument for a bright-line rule favoring jurisdiction in all instances.[212]

a) Federal Trespass Statute

Congress enacted a federal trespass statute, enabling the United States to bring suit against non-Indians who trespass on tribal lands for the purpose of hunting or fishing in contravention of tribal law.[213] The Act states, in relevant part, that "[w]hoever, without lawful authority or permission, willfully and knowingly goes upon any . . . lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon . . . shall be fined under this title or imprisoned not more than ninety days, or both."[214] The Supreme Court has interpreted the federal trespass statute as a clear congressional expression that state jurisdiction over on-reservation trespass to real property for purposes of hunting or fishing is explicitly prohibited,[215] and that the Secretary of Interior may make arrangements with tribes for the express purpose of enforcing such laws.[216]

The United States twice has successfully brought suit against a non-Indian under the federal trespass statute.[217] In *United States v. Pollmann*, the District Court of Montana held that the word "land" in the statute was broadly construed to include things of a permanent nature affixed to the land, such as the Flathead River,[218] and convicted Pollmann of trespass.[219] In *United States v. Finch*, the Ninth Circuit held that it was the intent of Congress in passing the federal

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211. *See, e.g.*, 18 U.S.C. § 1165.

212. Note, however, that even absent congressional delegation, the tribal court could have jurisdiction over the Indian in question. A tribal court's jurisdiction is not limited by what Congress delegates to it, but instead extends to all matters that implicate their sovereign rights, except those which Congress has expressly abrogated. *See* Williams v. Lee, 358 U.S. 217, 220-21 (1959) ("[A]bsent 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.").

213. 18 U.S.C. § 1165.

214. *Id.*

215. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 342 n.27 (1983) ("The Tribe clearly can exclude or expel those who violate Tribal ordinances. Trespassers may be referred for prosecution under 18 U.S.C. § 1165.").

216. COHEN, *supra* note 51, at 239 n.274.

217. United States v. Finch, 548 F.2d 822, 835 (9th Cir. 1976); United States v. Pollmann, 364 F. Supp. 995, 1002 (D. Mont. 1973).

218. *Pollmann*, 364 F. Supp. at 999. The court found the tribe's right to exclude was a basic right stemming from its sovereignty. *Id.* at 1000.

219. *Id.* at 1004.

trespass statute "that Indian property owners should have the same protection as any other individual property owners," enabling a tribe properly to refuse entry for fishing on its lands.[220] Finch was convicted of trespass.[221]

It is important to note that the federal trespass statute pertains only to non-Indians who trespass upon land reserved for Indians for the purpose of hunting, trapping, or fishing.[222] It cannot be used to fine non-Indians who enter tribal trust land in contravention of tribal law for any other purpose. Additionally, while the federal trespass statute empowers the U.S. Attorney to bring suit on behalf of the United States,[223] tribal prosecutors are not extended the same right. Moreover, the land covered is limited to land held in trust by the United States for the benefit and use of tribes.[224] It does not include other adjoining lands owned in fee by Indians or non-Indians.

The intent of Congress in passing the federal trespass statute was to protect tribes from the unlawful incursion of all persons onto the reservation without the permission of the property owner.[225] Extrapolated to the complex land ownership scheme that exists in Indian Country today, it is clear that tribal court civil jurisdiction over trespass claims is in accordance with the expressed intent of Congress. The Court needs to turn this extrapolation into black letter law by announcing a bright-line rule in favor of exclusive tribal court jurisdiction for trespass to real property within the reservations. Without proper enforcement mechanisms available to the tribes, they are effectively denied one of the basic rights of sovereignty – the right to exclude.[226]

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220. United States v. Finch, 548 F.2d 822, 834 (9th Cir. 1976), *vacated on other grounds by* Finch v. United States, 433 U.S. 676 (1977) ("[T]he authority to withhold permission to enter fishing, hunting, or trapping has been expressly conferred on the tribe by the promulgation of 18 U.S.C. § 1165, an enactment clearly within the national power.").

221. *Id.* at 835.

222. 18 U.S.C. § 1165 (2006).

223. Unless explicitly permitted by federal law, the United States has the exclusive authority to bring suit in federal court for violation of a federal criminal law. *See* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 420 (1995). The federal trespass statute provides for federal prosecution of a criminal rather than a civil trespass. 18 U.S.C. § 1165. Accordingly, relief sought under it can only be made when a tribe successfully engages a U.S. Attorney, or when that U.S. Attorney takes initiative on their own to bring suit.

224. 18 U.S.C. § 1165.

225. *Finch*, 548 F.2d at 834.

226. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 522 (1832); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 185 (1985).

b) Specific Congressional Delegation of Civil Jurisdiction Over Non-Indians to Tribal Courts

While the federal trespass statute permits the United States to bring nonmembers in front of federal courts for trespasses that occur in Indian Country for the explicit purposes of "hunting, trapping, or fishing,"[227] there have only been two such actions since the law's enactment.[228] Where the stakes and damage to property are small, U.S. Attorneys often lack the time and resources to bring civil trespass actions in federal courts,[229] essentially permitting by impunity trespass by non-Indians on the reservation. This leaves tribes without the structural ability to defend their right to exclude.[230]

Congress often encourages the tribes' exercise of self-government over land within Indian Country,[231] and reaffirms that the relationship between the federal government and the Indian tribes is a government-to-government relationship.[232] Accordingly, Congress has recognized that trespassers who illegally enter the land for purposes other than hunting, trapping, or fishing do not always do so with noble purpose. They often pose a threat to the land through the illegal procurement of timber or mineral resources, amounting to virtual theft from the tribe and irreparable harm to the land itself.[233] To that end, Congress on two occasions has reaffirmed tribal court jurisdiction over

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227. 18 U.S.C. § 1165.

228. *See* United States v. Finch, 548 F.2d 822, 834 (9th Cir. 1976); United States v. Pollman, 364 F. Supp. 995, 1002 (D. Mont. 1973).

229. *See* Stephen D. Easton, *Native American Crime Victims Deserve Justice: A Response to Jensen and Rosenquist*, 69 N.D. L. REV. 939, 958 n.105 (1993).

230. To give the federal trespass statute more teeth, it could be amended to allow tribal attorneys, in addition to U.S. Attorneys, to bring suit in federal court under the Act. While such an amendment would be a positive step, it is not an acceptable alternative to giving the power to the tribes themselves. Both the backload of cases in federal court and the considerably higher costs involved in litigating in federal court are prohibitive. Moreover, allowing only the tribal attorneys to bring suit creates a discretionary process whereby the attorney picks and chooses whether to bring suit on behalf of the proper owner. While an expansion of the federal trespass statute would set a good precedent for the expansion of tribal powers generally, and would greatly aid tribal sovereigns with a land base but without a tribal court system, it is ultimately a second-class solution to the preferred alternative of clear, unambiguous tribal court jurisdiction.

231. *See* Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 179.

232. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (2006); Santa Clara Pueblo v. Martinez 436 U.S. 49, 62 (1978).

233. 25 U.S.C. § 3101(6) (2006).

non-Indians for civil trespass to real property through the passage of the National Indian Forest Resources Management Act[234] and the American Indian Agricultural Resource Management Act.[235] Both statutes specifically reaffirm a tribal court's concurrent jurisdiction with federal courts over civil trespass to real property committed by non-Indians,[236] provided that the tribe notifies the Department of the Interior of its intention to assume such jurisdiction,[237] and the tribal court complies with the due process and equal protection requirements in the ICRA.[238] Once the tribe communicates its intention to assume jurisdiction under the statutes, the regulations mandate that "[t]he Secretary defer prosecution of . . . trespasses to the tribe."[239]

While Congress is manifestly concerned with the procedural rights afforded to non-Indians by tribal courts,[240] all tribal courts are already subject to the ICRA.[241] Regardless of whether the tribe specifically communicates to the Department of the Interior its intention to prosecute non-Indians for trespass to real property, Congress did not abrogate an existing right to try non-Indians provided by the common law.[242] It only added provisions specifically to clarify that, within the areas of forest and agricultural resources management, jurisdiction for trespass to real property by non-Indians properly vests in the tribal court.

The lack of related challenges suggests that tribal court civil jurisdiction for trespass to real property is uncontroversial. Since the enactment of the statutes, only one challenge was brought against tribal court jurisdiction under either the

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234. 25 U.S.C. §§ 3101-3120 (2006).

235. 25 U.S.C. §§ 3701-3746 (2006).

236. 25 U.S.C. § 3106(c); 25 U.S.C. § 3713(c) ("The Bureau and other agencies of the Federal Government shall, at the request of the tribal government, defer to tribal prosecutions of Indian agricultural land trespass cases. Tribal court judgments regarding agricultural trespass shall be entitled to full faith and credit in Federal and State courts.").

237. *See* 25 C.F.R. §§ 163.29(j)(1)-(2) (2011).

238. *Id.* § 163.29(j)(3).

239. 25 C.F.R. § 163.29(j)(2).

240. Congress has repeatedly discussed the civil rights of nonmembers appearing before tribal courts. They passed legislation explicitly to overturn the Supreme Court's decision in *Duro v. Reina*, 495 U.S. 676 (1990), recognizing the inherent power of tribal governments to assert criminal jurisdiction over nonmember Indians, even though these nonmembers would be subject to the ICRA and not the full benefits of the Constitution's due process rights upon appearance. 25 U.S.C. § 1301(2) (2006). The Supreme Court affirmed the "*Duro* fix" in *United States v. Lara*, 541 U.S. 193 (2004), which found that tribal court criminal jurisdiction is proper not just against member-Indians, but against all Indians. *Id.* at 196.

241. *See* 25 U.S.C. § 1302.

242. 25 U.S.C. § 3713(c) (2006).

National Indian Forest Resources Management Act or the American Indian Agricultural Resources Management Act. In *Moore v. Nelson*,[243] a Yurok tribal member whose residence was on the Hoopa Valley Indian Reservation was arrested after "tribal officers found Moore's logging truck loaded with timber and other logging equipment. . . . Moore was then cited for trespass and for logging without a permit, in violation of" the National Indian Forest Resource Management Act.[244] "After a hearing in which Moore represented himself, the Hoopa Valley Tribal Court entered an order imposing treble damages against Moore in the total amount of $ 18,508.50."[245] Moore appealed the jurisdiction and the district court dismissed. Judge Canby, writing for a unanimous panel of the Ninth Circuit, affirmed the dismissal.[246]

The lack of litigation over the assumption of tribal court jurisdiction is indicative that a more expansive rule governing questions of jurisdiction is a natural extension of current events. Given the relatively uncontroversial nature of the assertion of tribal court civil jurisdiction for civil trespass and with Congress speaking unambiguously in its favor, a bright-line rule favoring tribal court civil jurisdiction for all instances of on-reservation trespass is an effective and efficient clarification of existing common law supported by congressional affirmation.

c) Congressional Approval of a Bright-Line Rule

Both common law and congressional intent justify a rule vesting tribes with exclusive jurisdiction over non-Indians for trespass actions within the boundaries of the reservation.[247] The federal trespass statute clearly contemplates that state courts are an improper venue for trespasses that occur within the reservation.[248] But the statute's limited language, permitting prosecution only for those who trespass with the intent to hunt, trap, or fish, clearly requires significant revision to adequately protect tribes. The first steps in that revision occurred in the early 1990s, with Congress deferring prosecution of non-Indians for certain trespass actions from federal district court to tribal court.[249]

243. 270 F.3d 789 (9th Cir. 2001).
244. *Id.* at 790.
245. *Id.*
246. *Id.* at 792.
247. *See* 25 U.S.C. §§ 3101-3120 (2006); 25 U.S.C. § 3713(c).
248. *See* 18 U.S.C. § 1165 (2006).
249. 25 U.S.C. § 3106(c); 25 U.S.C. § 3713(c).

Congress twice has reaffirmed a tribal court's civil jurisdiction over non-Indians for trespass to real property.[250] While this reaffirmation is specific in scope to forest and agricultural resources, the broad language used in both the statute and its implementing regulations contemplate approval of a general bright-line rule favoring tribal court civil jurisdiction over non-Indians in all instances of trespass to real property. The benefit of a bright-line rule focused on the offense rather than the status of the land is that it removes confusion over whether tribal court jurisdiction is proper by replacing the status of the land with the intent of the trespasser. *Elliott* is a perfect example of a non-Indian trespasser slipping through the cracks. Because Elliott's fire was directed at rescue and not hunting, fishing, trapping, or taking tribal forest or agricultural resources, there remained an open question regarding the appropriateness of tribal jurisdiction that resulted in four courts passing judgment on the question of jurisdiction.[251]

The statutes themselves contain an express congressional preference for tribal court jurisdiction when the tribe wants to assert it. Congress has spoken plainly that "[t]he Bureau of Indian Affairs and other agencies of the Federal Government shall, at the request of the tribe, defer to tribal prosecutions of forest trespass cases."[252] Of even clearer intent is the congressional decision to extend the full faith and credit of tribal forest trespass judgments to all other state and federal courts.[253]

The implementing regulations promulgated by the Department of the Interior have recognized the congressional affirmation of inherent tribal court civil jurisdiction over non-Indians, and accordingly, are careful not to discount that tribes already have jurisdiction over non-Indians in cases of forest trespass to real property.[254] Moreover, another federal regulation states that "[n]othing shall be construed to prohibit or in any way diminish the authority of a tribe to prosecute individuals under its criminal or civil trespass laws where it has jurisdiction over those individuals."[255]

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250. 25 U.S.C. §§ 3101-3120; 25 U.S.C. §§ 3701-3746.

251. Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842, 844-45 (9th Cir. 2009). The four courts ruling on the jurisdictional issue were the White Mountain Apache Tribal Court, White Mountain Apache Appellate Court, Federal District Court of Arizona, and the Ninth Circuit Court of Appeals. The final decision was remanded to the tribal court for a decision on the merits, whereby Elliott will have the opportunity to appeal a second time through all appellate bodies, not the merits decision, but the jurisdictional question.

252. 25 U.S.C. § 3106(c).

253. *Id.*

254. *Id.*

255. 25 C.F.R. 163.29(j)(4) (2011).

The legislative history of the final rule promulgation regarding tribal court jurisdiction clearly indicates that the Interior considered and intended to strengthen the inherent jurisdiction of tribal courts over trespass claims occurring within the reservation.[256] In response to comment 104, the Interior altered the final regulations to reaffirm the sovereignty of tribal courts to hear trespass claims, stating that "[t]ribal officials [responsible for prosecuting trespass claims] would not be acting on behalf of the United States, but on behalf of their separate jurisdiction."[257] Congressional silence regarding the appropriateness of the Interior's interpretation of the statutes, which permit broad tribal court jurisdiction over nonmembers for on-reservation trespasses, is indicative of congressional approval for a bright-line rule covering all on-reservation trespass to real property.

Those subject to tribal court jurisdiction after committing an act of trespass doubtless will argue that the very nature of tribal property ownership makes tribal court enforcement improper. Some reservations are highly fractionated such that Indian and non-Indian lands abut one another often and without clear notice.[258] Persons who do not intend to trespass or who in good faith believe they have permission to enter the land may contest a tribal court's jurisdiction over both their person and the offense. This problem is precisely why a bright-line rule in favor of tribal court civil jurisdiction over trespass to real property is much needed. Trespass is an intentional tort,[259] and as such, that one mistakes the land for his own or wrongly believes he has permission to enter is no defense.[260] By giving the tribal court jurisdiction over trespass to all land within the reservation, the bright-line rule would simplify the law and improve its enforcement. While checkerboarding is a unique aspect of reservation land,[261] it is conceptually no different than any two landowners, Indian or not, owning adjoining lands without a clearly demarcated border. An individual trespassing – even inadvertently – on these lands is still ultimately liable to the

256. General Forestry Regulations, 60 Fed. Reg. 52260, 52257 (Oct. 5, 1995) (to be codified at 25 C.F.R. pt. 163.29) (response to comment 104).

257. *Id.*

258. For a discussion of the history that caused Indian land fractionation and an explanation for why it occurs on some reservations and not others, see Royster, *supra* note 86.

259. For a complete discussion of the intentional nature of a civil trespass claim, see *supra* Part IV.A.

260. RESTATEMENT (SECOND) OF TORTS § 158 (1965).

261. Allotment resulted in allotted reservations having Indian and non-Indian parcels of land spaced in an alternating pattern that both scholars and courts now commonly refer to as checkerboarding. While checkerboarding may confuse land ownership, it should not prevent the standard application of jurisdictional rules. For a discussion of checkerboarding of land as it relates to jurisdiction, see Royster, *supra* note 86.

landowner for trespass in tribal court.

For those tribes subject to diminishment,[262] or where the reservation is oddly shaped or fairly small,[263] the bright-line rule in favor of tribal jurisdiction might be more difficult to enforce. But difficulty is no justification for rejecting the rule. Some counties have enclaves and irregularly drawn borders. States – and even nations – often abut one another without a clear demarcation of boundaries. Even in these instances, ignorance of one's location is no excuse or defense to a trespass action. By virtue of entering the land, the individual should be deemed to have availed himself to the jurisdiction of the governing sovereign, and thus subject to suit in tribal court.

V. States Lack Jurisdiction Over Non-Indian Trespassers in Indian Country

A bright-line rule favoring tribal court civil jurisdiction over non-Indians is not only justified through common law and congressional intent, but also by the principle that state courts are inappropriate forums to try non-Indians who trespass in Indian Country. The Supreme Court asserts that two barriers exist to state courts asserting jurisdiction over non-Indians for actions in Indian Country. "First, [where] the exercise of such authority may be pre-empted by federal law,"[264] and "second, [where] it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'"[265] These

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262. Diminishment is a judicially imposed doctrine that limits the power of a tribe over its land when the reservation is subject to allotment. To determine whether a reservation has been diminished, courts consider three factors: "the statutory language used to open the Indian lands, . . . the historical context surrounding the passage of the surplus land Acts, and . . . the subsequent treatment of the area in question and the pattern of settlement there." South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 344 (1998).

263. For example, there are more than two hundred Alaska Native Villages recognized by the Interior and subject to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 (2006), which permits regional and village corporations to select land to be titled in fee. The land selected need not be contiguous, and often the portion allocated from the corporations to the actual tribal governments is small and solely at the corporation's discretion. *See, e.g.*, Kathleen Korr, Comment, *A Doctrinal Traffic Jam: The Role of Federal Preemption Analysis in Conflicts Between State and Tribal Vehicle Codes*, 74 U. COLO. L. REV. 715, 729 n.96 (2003). *See generally* Eric C. Chaffee, *Business Organizations and Tribal Self-Determination: A Critical Reexamination of the Alaska Native Claims Settlement Act*, 25 ALASKA L. REV. 107 (2008). Many of New Mexico's Pueblo and California's Rancheria's are similarly constrained, with land bases as small as forty acres. *See* Caprice L. Roberts, *"A Desert Grows Between Us" – The Sovereignty Paradox at the Intersection of Tribal and Federal Courts*, 65 WASH. & LEE L. REV. 347, 349 (2008).

264. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

265. *Id.* (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

tests are known colloquially as the tests of "pre-emption" and of "infringement," and require a state attempting to assert its jurisdiction in Indian Country to demonstrate that state jurisdiction is neither preempted by federal action nor infringes on the rights of reservation Indians.

The Supreme Court in *Bracker* instructs lower courts that when a state wishes to assert regulatory authority over conduct occurring on the reservation, the appropriate test is to balance the relevant interests.[266] The state's interest in asserting regulatory and adjudicatory authority over trespass conduct occurring within the outer bounds of the reservation is minimal. Conversely, federal policies promoting tribal sovereignty and self-determination are strong, and are manifest in congressional intent.[267] Accordingly, even when non-Indians trespass on non-Indian fee land within the reservation, the state's assertion of jurisdiction is improvident and improper, for it has been preempted by federal policy and would "infringe on the right of reservation Indians to make their own laws and be ruled by them."[268]

A. State Jurisdiction Over Non-Indians for Trespass in Indian Country Has Been Preempted by Federal Law

While courts have found preemption to deny states jurisdiction over the activities of non-Indians in Indian Country most often in the instance of taxation,[269] the use of preemption is not limited only to tax cases,[270] and is perfectly appropriate here.[271] The basic test for preemption originates with

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266. *Bracker*, 448 U.S. at 144-45.

267. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987).

268. *Bracker*, 448 U.S. at 142 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)) (internal quotation marks omitted).

269. *See, e.g.*, Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973); Warren Trading Post v. Ariz. State Tax Comm'n, 380 U.S. 685 (1965).

270. *See* Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877 (1986); *Bracker*, 448 U.S. 136. *See generally* Danielle Audette, *American Indians and Reimportation: In the Wake of Tribal Sovereignty and Federal Pre-Emption, It's Not Just About "Cheap Drugs"*, 15 KAN. J.L. & PUB. POL'Y 317 (2006); Laurie Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C. L. REV. 743 (1984).

271. The local nature of the civil offense and the paramount importance of the status of the land make the tribal court the only judicial body with an interest sufficiently great to vest jurisdiction. The outermost boundary of the reservation is similarly recognized by federal law and judicial precedent as being the boundary within which the tribe has the greatest interest over land vis-à-vis the state. *See e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 47 (1831) ("[A]ny citizens of the United States, who shall settle upon any of the Cherokee lands, shall forfeit the protection of the United States; and the Cherokees may punish them or not as they shall please.").

Williams v. Lee's clear determination 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."[272] Courts have concluded that there are two basic barriers to asserting state authority over trespass actions on the reservation, and the first of those is where a federal scheme preempts the interest of the state in imposing its jurisdiction over the proposed offense.[273]

The standard for federal preemption is less stringent in the area of Indian law than the general doctrine, requiring only an intention to preempt rather than an explicit congressional statement of preemption.[274] The Court bases its preference for finding congressional intent rather than express congressional pronouncement on of the unique nature of tribal sovereignty.[275]

In the case of state jurisdiction over non-Indians for on-reservation trespass to real property, there is more than mere congressional intent to preempt state prosecution; there is an express congressional statement.[276] The federal trespass statute, the National Indian Forest Resources Management Act, and the American Indian Agricultural Resources Management Act each explicitly provide congressional direction for the acquisition of tribal court civil jurisdiction over non-Indians for civil trespass prosecution.[277] Together, they adequately represent a congressional expression of preemption, and that Congress intends that state courts lack jurisdiction over non-Indians for civil trespass prosecution.

B. State Jurisdiction Over Non-Indians for Trespass in Indian Country Unlawfully Infringes on the Right of Reservation Indians to Make Their Own Laws and Be Governed by Them

Even if state authority is not preempted by the intent of Congress, the state can still be denied jurisdiction if state jurisdiction would interfere with the right of Indian tribes "to make their own laws and be ruled by them."[278] Because sovereignty is inherently related to the land over which the sovereign can

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272. Williams v. Lee, 258 U.S. 217, 220 (1959).
273. *Bracker*, 448 U.S. at 142.
274. *Id.* at 143.
275. *Id.*; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978); Mescalero Apache Tribe v. Jones 411 U.S. 145, 148 (1973).
276. State *ex. rel* Nepstad v. Danielson, 427 P.2d 689, 691-92 (Mont. 1967); *see also* 25 U.S.C. §§ 3101-3120 (2006); 25 U.S.C. §§ 3701-3746 (2006).
277. 18 U.S.C. § 1165 (2006), 25 U.S.C. §§ 3101-3120, 25 U.S.C. §§ 3701-3746.
278. *Williams*, 358 U.S. at 220.

extend its authority and jurisdiction,[279] trespass to real property is one of the strongest and most sacred areas of tribal court jurisdiction. Removing the authority of tribal courts to hear cases against anyone who trespasses on land in Indian Country undercuts the sovereignty that the Supreme Court has recognized in *Bracker*,[280] *Wold Engineering*,[281] and *McClanahan*,[282] among others, as being extended by Congress to tribal courts and governments.

A state's assertion of jurisdiction over an on-reservation civil trespass is a claim for jurisdiction where the state's interest is weakest and the tribe's interest is strongest. Because of the comparative importance of land, the local nature of a trespass claim, and the necessity of a tribe to control what goes on in relation to the land within its borders to promote tribal interests, the tribe's regulatory and adjudicatory authority to make its own laws and enforce them is clearly implicated. As the Supreme Court reaffirmed in *Rice v. Olson*,[283] "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."[284] Accordingly, a state's interest must be clearly articulated and overwhelming to justify a reversal of the policy favoring tribal sovereignty.[285]

VI. Conclusion

The federal government is not ready to create a blanket rule vesting jurisdiction over non-Indians in tribal courts for all civil offenses. But given the amount of resources and time the federal courts spend reviewing tribal court civil jurisdiction, new rules that clearly vest exclusive jurisdiction in the tribal courts represent a step toward fully effectuating tribal sovereignty, conserving the time and resources of federal and tribal courts, and speeding up the process of arriving at final decisions.

Trespass is perhaps the most practical of the civil offenses over which to grant exclusive jurisdiction to tribal courts. And because it deals with the status of land itself, it is also the most important. The case law is clear that for both Indian and non-Indian defendants committing on-reservation acts of trespass, tribal courts have personal and subject matter jurisdiction. Congress has

279. *Bracker*, 448 U.S. at 151.
280. *Id.*
281. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 885 (1986).
282. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 181 (1973).
283. 324 U.S. 786 (1945).
284. *Id.* at 789.
285. *See Bracker*, 448 U.S. at 143-45.

already opened the door by reaffirming tribal and federal jurisdiction – exclusive of the states – for on-reservation trespasses and by giving its explicit approval to defer to tribal court jurisdiction for trespasses occurring within Indian Country that involve certain classes of resources. Announcing a bright-line rule officially vesting exclusive jurisdiction over all on-reservation civil trespass actions in tribal courts is the next logical affirmation of the sovereignty of tribal courts.