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NOTE

THE NEXT CHAPTER IN THE TAKING OF JUDICIAL POWER FROM THE TRIBES:
BURLINGTON NORTHERN RAILROAD COMPANY V. RED WOLF

Alanah Griffith

I. INTRODUCTION

Many legal scholars describe the present United States American Indian Policy as reflecting a time of self determination.¹ They believe the court's rulings further tribal sovereignty by promoting tribal self-determination. However, a closer look at the holdings of the major cases in the area of Indian Law show self determination is no longer, or may never have been, the trend. Instead, the federal courts have returned to the age-old concept of tribal assimilation. This trend is evidenced by a long line of court decisions which remove tribal plaintiffs from the tribal court system and place their cases into the federal court system.² The most recent case in this line of

² These cases will be explained in great detail infra Part III.
decisions is *Burlington Northern Railroad v. Red Wolf* decided by the Ninth Circuit.

This case note will examine how the Supreme Court's holdings on tribal civil jurisdiction in the last twenty years inevitably led to the Ninth Circuit's holding in *Red Wolf*. Specifically, this note addresses how the decision in *Red Wolf* has improperly broadened the scope of federal jurisdiction over civil claims arising on tribal lands at the expense of tribal sovereignty. In effect, *Red Wolf* severely limits a tribe's ability to adjudicate actions that arise within the boundaries of its reservation.

Part II of this note gives an overview of the history of United State's federal Indian policies, including legislation which has significantly affected the Native American population, as well as the major United States Supreme Court decisions on Indian Law issues. Part III discusses the evolution of tribal civil jurisdiction over the last twenty years. The cases analyzed in this part are crucial to the development of an understanding of the Ninth Circuit's holding in *Red Wolf*. Part IV discusses *Red Wolf*'s facts and procedural history. As the procedural history is discussed, it will become clear how this case is not only a continuation of past Supreme Court decisions, but a huge leap of logic, resulting in diminished tribal sovereignty.

Part V addresses the various issues raised by the Ninth Circuit's decision in *Red Wolf*. The analysis focuses on how the Ninth Circuit could have easily distinguished *Red Wolf* from the cited Supreme Court cases in order to protect Indian sovereignty and further the goal of self-determination. This includes an analysis of how the Ninth Circuit substantially broadened the test set forth by the United States Supreme Court in *Strate v. A-1 Contractors*. *Strate v. A-1 Contractors*.

Part VI discusses the Ninth Circuit's problematic decision with an eye to social policy. The fact that the legal analysis is based on law and procedure from the late 1800's opposes society's view on promoting Indian sovereignty. In the past, the Court has used society's view as a basis for interpreting Indian law. They are failing to do this today. Part VII looks at the effect *Red Wolf* is already having on Montana courts. The conclusion summarizes how the Ninth Circuit could have distinguished *Red Wolf* from the cited Supreme Court

3. 196 F.3d 1059 (9th Cir. 1999).
II. HISTORY OF INDIAN POLICY

An understanding of tribal civil jurisdiction must be gained within its historical context. There are a few distinct reasons for this. First, much of the legislation and case law surrounding tribal civil jurisdiction is based upon the specific treaties governing the tribal land. Whenever a treaty is in question, it must be interpreted. Evidence of the tribe's historical understanding of a treaty, as well as the historical understanding of that treaty by the United States, the tribe's bargaining strength, the intent of a treaty, possible language difficulties, and the authority of the negotiators all affect efforts to interpret that treaty. Without an understanding of such factors, it would be impossible for a court today to interpret the treaty in its appropriate context.

Second, understanding this historical context is central to understanding the doctrinal development of tribal civil jurisdiction. Six major periods in the United States' development in tribal policy have been identified: Pre-Revolution; The Formative Years; Allotments and Assimilation; Reorganization; Termination; and, Self Determination. Most writers within the tribal policy field follow these six categories in some way. Each of the six categories identifies major trends

5. The history of Indian Policy is an extensive and important field of study. This Section is meant only to give the reader a brief introduction into the policies. For further study see generally COHEN'S HANDBOOK, supra note 1; OREN LYONS, et. al., EXILED IN THE LAND OF THE FREE (Chief Oren Lyons & John Mohawk eds. 1992); FREDRICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984); DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY: 1945-1960 (1986); BERNARD W. SHEEHAN, SEEDS OF EXTINCTION: JEFFERSONIAN PHILANTHROPY AND THE AMERICAN (1973).

6. COHEN'S HANDBOOK, supra note 1, at 48.

7. Id.

8. Id.; See also Choctaw Nation v. United States, 318 U.S. 423, 432 (1943) which states when court construe Indian treaties, they should "look beyond the written words to the history of the treaty." The fact that this type of evidence is no longer taken into consideration by today's Supreme Court will be shown infra Part III.

9. COHEN'S HANDBOOK, supra note 1, at 49. To see how a court uses these factors, see United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975).

10. COHEN'S HANDBOOK, supra note 1, at 48-49.

11. See generally id. at 47-206. There are many writers that disagree with the assessment that we are still in a time of self-determination. A few of those writers will be introduced in the preceding pages. Others include those who contributed to LYONS, supra note 5.
in Indian Policy.

A. Pre-Revolution (1532-1789)

In the beginning of European settlement, the colonists arrived to face the hardships of carving out a new life. They were far outnumbered by the Indian population that already existed in the “New World.” Many of the tribes had homes, farmlands and intricate systems of government. These colonists learned to fear and respect the numbers and warlike nature of the Indian tribes. The European settler's fear and respect lead to a desire to have smooth relations with their neighbors. Therefore, each tribe was treated as a sovereign nation. The various agreements made between the settlers and the tribes before the Revolutionary War reflected this belief.

For example, in 1660, the head of the United Netherlands directed the Dutch West India Company to obtain all settlement land only with tribal consent. English colonists followed comparable purchase practices. Soon, most of the colonies adopted similar laws for the purchase of Indian lands.

When the colonists formed a new nation, The United States of America, the Founding Fathers did not forget the American Indian tribes that supported them in their bid for freedom. In 1787, Congress enacted the Northwest Ordinance. This Ordinance promised “the utmost good faith... toward the Indians, their lands and property,” in the exercising of the

12. COHEN’S HANDBOOK, supra note 1, at 55.
13. LYONS, supra note 5, at 33-39. This discusses the origins of the very intricate political and cultural beginning of the Iroquois Nations. This political alliance based on peace was in place long before the first Europeans set foot in “America.”
14. COHEN’S HANDBOOK, supra note 1, at 56.
15. Id.
16. Id. at 55.
18. COHEN’S HANDBOOK, supra note 1, at 53.
19. Id.
20. Id. at 53-54.
21. HAROLD E. FEY & DARCY MCNICKLE, INDIANS AND OTHER AMERICANS, 55 (1970). As one of its first acts, the Continental Congress appointed a committee to negotiate with the Indians and on July 12, 1775, resolved “That the securing and preserving the friendship of Indian nations, appears to be a subject of the utmost moment to these Colonies...” Id.
22. GETCHES, supra note 1, at 62.
United States sovereign right to buy Indian lands. This was ratified in Article I, § 8 of the Constitution, commonly known as the Indian Commerce Clause. Unfortunately, Congress would not heed its promise to treat the Indian tribes with the utmost good faith.

B. Formative Years (1789-1871)

The formative years were a time of treaty making and treaty breaking. The United States government used treaties as the primary tool for managing the Indian tribes. The United States used treaties to negotiate with the Indian tribes that supported the British during the Revolutionary War. These tribes were deemed sovereign nations only up to a certain point. However, they were also seen as under the protection of the United States. Thus, an accommodative balance was struck between Indian sovereignty and the United States' protection of the Indian peoples. This balance would be extended to all the tribes in the United States.

One of the most famous examples of this balance is the Treaty of Hopewell between the Cherokee and the United States. The treaty embodied fundamental principles. The Cherokees acknowledged they were "under the protection of the United States of America, and of no other sovereign whatsoever." The treaty guaranteed that only tribal members were to settle on the reservation. Congress was granted the sole right to regulate commerce with the Cherokees. In return, the United States agreed to punish any of its citizens who

23. Id.
24. U. S. CONST. art. I, § 8, cl. 3. "Congress shall have power...to regulate Commerce with foreign Nations, among the several States and with the Indian Tribes."
25. See generally COHEN'S HANDBOOK, supra note 1, at 62-70.
26. Id. at 62.
27. DOCUMENTS OF UNITED STATES INDIAN POLICY, 1-2 (Francis Paul Prucha ed., 2d ed. 1990); Letter from George Washington to James Duane (September 7, 1783).
28. Id.
29. Id. Washington's recommendations in this letter were quickly adopted with very few changes by the Congress's Select Committee on Indian Affairs (1783). These policies established the framework for the U.S. Indian treaties and Trade and Intercourse Acts. FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834, 2 (1932).
30. Treaty of Hopewell, November 28, 1785 (reprinted DOCUMENTS OF UNITED STATES INDIAN POLICY, 6-8 (Francis Paul Prucha ed., 2d ed. 1990)).
32. Id. at Art. V.
33. Id. at Art. IX.
committed a capital crime against any Indian, as if the aggressor had harmed a citizen of the United States.\footnote{34} By signing the treaty, the Cherokees gave up many of its sovereign rights in order to live in peace with the United States.

The treaties made with the Indian Nations granted them vast portions of land. However, the non-Indians hungered for the rich and fertile land reserved to the Indian tribes.\footnote{35} The non-Indian's attitude of cultural superiority justified their plans to dispossess the Indians.\footnote{36} Because many were violating treaties and invading Indian territory, Congress decided that a federal regulation was needed in order to manage Indian affairs.\footnote{37}

To accomplish this end, Congress passed the Indian Trade and Intercourse Acts in an attempt to enforce its Indian treaties and stop non-Indian encroachments upon tribal lands.\footnote{38} These acts included a number of fundamental elements. They forbade the transfer of Indian lands to individuals or states except by treaty under the authority of the United States.\footnote{39} The statutes restricted non-Indians from entering Indian Country without permission from the United States government.\footnote{40} The Acts controlled trade with the Indians,\footnote{41} including controlling all liquor traffic into Indian county.\footnote{42} They provided for the punishment of crimes committed by members of one race against another.\footnote{43} Finally, the Act embraced a philosophy of promoting "civilization" and "education" of Indians, in the hope

\footnote{34. Id. at Art. VII.}  
\footnote{35. GETCHES, supra note 1, at 87.}  
\footnote{36. Id.}  
\footnote{37. Id.}  
\footnote{38. The Trade and Intercourse Acts are various statutes that were passed over the course of a number of years. The first was passed into law as Indian Trade and Intercourse Act of July 22, 1790, ch. 33, 1 Stat. 137. This act was only temporary Act. It was expanded, refined in later statutes. These statutes are: Trade and Intercourse Act of March 1, 1793, ch. 19, 1 Stat. 329, Trade and Intercourse Act of May 19, 1796, ch. 30, 1 Stat. 469, and Trade and Intercourse Act of March 3, 1799, ch. 46, 1 Stat. 743. The Trade and Intercourse Act of March 30, 1802, ch. 13 2 Stat. 139 was the official Trade and Intercourse Act. It was mainly a restatement of the past laws, but it was no longer temporary. GETCHES, supra note 1, at 90-91.}  
\footnote{39. 1 Stat. 329 §8 (1793), 1 Stat. 469 §§8, 12 (1796), 1 Stat. 743 §§5, 12 (1799), 2 Stat. 139 §12 (1802).}  
\footnote{40. 1 Stat. 469 §§2, 3 (1796), 1 Stat. 743 §§2, 3 (1799), 2 Stat. 139 §3 (1802).}  
\footnote{41. 1 Stat. 137 §§1, 4 (1790), 1 Stat. 329 §§1, 6 (1793), 1 Stat. 469 §§7, 8, 9, 10 (1796), 1 Stat. 743 §§7, 8, 10 (1799), 2 Stat. 139 §§7, 8, 10, 11, 21 (1802).}  
\footnote{42. 2 Stat. 139 §21 (1802).}  
\footnote{43. 1 Stat. 137 §5 (1790), 1 Stat. 329 §5 (1793), 1 Stat. 469 §§5, 6 (1796), 1 Stat. 743 §§4, 6 (1799), 2 Stat. 139 §4 (1802).}
that they would be absorbed into the existing American public. 44

Besides treaties and federal Indian statutes, the federal court system was the other major player that shaped Indian policy in the formative years. The federal court began its major involvement shortly after the last of the Trade and Intercourse Acts was passed. Three major Indian cases were decided during the Formative years. 45 Chief Justice Marshall presided over all three. These cases have come to be known as the Marshall Indian Trilogy.

In Johnson v. McIntosh, 46 the tribal chiefs had granted land to private individuals before the Revolution. 47 The issue before the Court concerned whether the tribes had the power to transfer land, or if this power was solely in the hands of the federal government. 48 To decide this complicated issue, Marshall relied upon the European Doctrine of Discovery. 49 This international law doctrine provides that the British Crown's discovery of lands in a new world gave it the sole right to purchase land from the native tribes. 50 By ousting the British, the United States became the sole preemptive right holder of Indian lands. 51 Although the tribes held a right of occupancy, they lost the right to freely alienate the land. 52 They could convey their land to no one but the United States. 53

Cherokee Nation v. Georgia 54 was the second decision in the Marshall trilogy. Gold was discovered within the Cherokee's lands in Georgia. 55 Georgia increased its demands to remove the Cherokees west of the Mississippi. 56 However, the Cherokee were not easily moved from their lands. They had an established society, as opposed to a nomadic society. They relied

44. 1 Stat. 137 §§1, 4 (1790), 1 Stat. 329 §§1, 6 (1793), 1 Stat. 469 §§7, 8, 9, 10 (1796), 1 Stat. 743 §§7-8, 10 (1799), 2 Stat. 139 §§7-8, 10-11, 21 (1802).
46. 21 U.S. (8 Wheat) 543 (1823).
47. Id. at 572-73.
48. Id. at 572.
49. Id. at 573.
50. Id. at 573, 584.
52. Id. at 592.
53. Id. at 592-93.
55. GETCHES, supra note 1, at 96.
56. Id.
on their agricultural lands.\textsuperscript{57} They had their own written language and a strong government.\textsuperscript{58} In fact, at the time of this case, the tribes literacy rate was 90\%.\textsuperscript{59} In 1827, Georgia passed laws attempted to abolish Cherokee government and annex the tribe's lands to Georgia.\textsuperscript{60} The Cherokees sued Georgia in an original proceeding in the United States Supreme Court.\textsuperscript{61}

The United States Supreme Court split in a 2-2-2 decision on whether they could hear the case.\textsuperscript{62} The issue was whether the Cherokee Nation had standing to sue as a foreign state.\textsuperscript{63} Justices Thompson and Story stated they believed the Cherokee Nation was a foreign nation, therefore the court had original jurisdiction under the Constitution.\textsuperscript{64} Justices Johnson and Baldwin argued that the tribe was not a nation at all, but a collection of conquered people.\textsuperscript{65} Thus, they had no sovereignty. Justices Marshall and McLean, who wrote the majority opinion,\textsuperscript{66} sided with Justices Johnson and Baldwin.\textsuperscript{67} Marshall held the tribes were sovereign nations, but they were also domestic, dependent nations.\textsuperscript{68} The tribes were, in effect, wards of the United States.\textsuperscript{69} Because of this duty of protection, the tribes could not be sovereign nations. Therefore, the Cherokees were not a "foreign nation" within the meaning of Article III and did not have standing to sue as a foreign state. This protection that the court discussed was a very limited protection. The tribes were only protected from the state government, not the federal government.\textsuperscript{70}

In 1830, Congress enacted The Removal Act of 1830.\textsuperscript{71} This

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\textsuperscript{58} Id. at 3.
\textsuperscript{59} Id. The tribes were literate in both English and Cherokee.
\textsuperscript{60} Cherokee Nation, 30 U.S. (5 Pet.) at 7-8.
\textsuperscript{61} Id. at 15.
\textsuperscript{62} Id. at 16.
\textsuperscript{63} Id.
\textsuperscript{64} Id. at 69.
\textsuperscript{65} Id. at 22, 34.
\textsuperscript{66} Id. at 15.
\textsuperscript{67} Id. at 20.
\textsuperscript{68} Id. at 17.
\textsuperscript{69} Id. at 17-18.
\textsuperscript{71} Removal Act of May 28, 1830, ch. 148, 4 Stat. 411; see also Getches, supra note 1, at 98. As a result of the Removal Act, Georgia was awarded the land that they had sought in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
act was signed into law by Andrew Jackson in 1830.\textsuperscript{72} President Jackson was the primary force behind the Removal Act.\textsuperscript{73} He had personally supported Georgia's claim of sovereignty over Cherokee lands.\textsuperscript{74} He realized, after \textit{Cherokee Nation v. Georgia}, that the only way to avoid a federal and state battle was to extinguish Indian land holdings in the eastern United States.\textsuperscript{75} By this time, the Louisiana Purchase had made possible the idea of a Indian territory west of the Mississippi River. In the year of the Louisiana Purchase, President Thomas Jefferson wrote to William Harrison stating:

our settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States, or be removed beyond the Mississippi. .As to their fear, we presume that our strength and their weakness is now so visible that they must see we have only to shut our hand to crush them, and that all our liberalities to the process form motives of pure humanity only. Should any tribe be foolhardy enough to take up the hatchet at any time, the seizing of the whole country of that tribe, and driving them across the Mississippi, as the only condition of peace, would be an example to other , and a furtherance of our consolidation.\textsuperscript{76}

This sentiment was to govern the Removal Act. Its purpose was to do just as Jefferson had suggested, remove the Eastern tribes to the West, opening their former lands to "American" settlement.\textsuperscript{77} The reason was simple. Americans were land hungry.\textsuperscript{78}

However, before Jackson could implement the actual removal of the Cherokee tribe, the United States Supreme Court heard the last case in the Marshall Trilogy, \textit{Worcester v. Georgia}.\textsuperscript{79} In that case, Georgia had passed a law which required any non-Indian resident of the Cherokee territory to obtain a license from the Governor.\textsuperscript{80} Samuel Worcester and

\begin{itemize}
\item \textsuperscript{72} The Removal Act, 4 Stat. 411 (1830).
\item \textsuperscript{73} \textsc{Getches}, supra note 1, at 123.
\item \textsuperscript{74} \textit{Id}.
\item \textsuperscript{75} \textit{Id}.
\item \textsuperscript{76} Letter from President Johnson to William Henry Harrison (February 27, 1803), (reprinted in , DOCUMENTS OF UNITED STATES INDIAN POLICY, 22, (Francis Paul Prucha ed., 1975)).
\item \textsuperscript{77} The Removal Act, 4 Stat. 411-12.
\item \textsuperscript{78} \textsc{Getches}, supra note 1, at 148-49.
\item \textsuperscript{79} 31 U.S. (6 Pet.) 515 (1832).
\item \textsuperscript{80} \textit{Id} at 521 (citing December 22, 1830 Act of Georgia Legislature § 1, 7) ("An act to prevent the exercise of assumed and arbitrary power, by all persons, under pretext of authority form the Cherokee Indians and their laws, and to prevent white person from residing within that part of the chartered limits of Georgia...all white persons residing
\end{itemize}
several other missionaries were arrested for violating this law. All were granted pardons. However, Worcester and Elizur Butler refused to accept the pardons. They wanted to challenge the Georgia law in court.

Chief Justice Marshall was faced with the question of whether Georgia could assert its power over tribal lands. Marshall wrote for the majority stating that Georgia did not have such power over Indian Country. Federal law had preempted state law as it affects Indian affairs. The Cherokee Nation's sovereign and semi-independent status was limited only in its right to convey land. Marshall reasserted the notion that the federal government had the duty of protection and regulatory power over Indian affairs.

At the end of his term, Jackson finally succeeded in the removal of the Five Civilized Tribes. This removal occasioned the famous "Trail of Tears". Many Cherokees, Choctaws and Chickasaws lost their lives during their enforced march to their "new" land. The removals and treaty breaking caused many tribes across the nation to rebel. Battles were fought, massacres occurred, and many Indian lives were lost. Finally, after years of bloodshed, the Indians were forced to recognize that they would never be able to win against the sheer number of Americans and the United States' military power. The tribes uncomfortably settled in on their reservations.

within the limits of the Cherokee Nation...without a licence [sic] or permit from his excellency the governor...shall be guilty of high misdemeanor.

81. GETCHES, supra note 1, at 113.
82. Id.
84. Id. at 561.
85. Id. at 557, 559.
86. Id. at 561.
88. COHEN'S HANDBOOK, supra note 1, at 92; see also FOREMAN, supra note 87.
90. See generally COHEN'S HANDBOOK, supra note 1, at 62-70. These battles and massacres include the Battle at Little Big Horn, the Sand Creek Massacre, and the Massacre at Wounded Knee. See generally DAVID SAVLDI, SAND CREEK AND THE RHETORIC OF EXTERMINATION: A CASE STUDY IN INDIAN-WHITE RELATIONS (1989). This is an incredible in depth study into the reasons why the Sand Creek Massacre, one of the most horrible examples of its kind, occurred. See generally NABOKOV, supra note 89. This is a collections of the testimonies of different American Indians interspersed with historical background from the author. It has very powerful personal accounts of the battles and massacres.
C. Allotment and Assimilation (1871-1928)

The allotment policy was born of a perceived non-Indian need for Indian land.91 If only the government could make Indians live as white settlers, the Indians would need far less land to survive.92 It was thought that allotment would be good for Indian welfare as it would erase the "savagery" represented by tribal autonomy.93 These philosophy led to the passage of the 1887 General Allotment Act, commonly referred to as the "Dawes Act".94 The Dawes Act did several different things. Reservation land was surveyed, divided up and allotted to individual Indian families.95 These Indian allotments were as follows: 160 acres to each family head; 80 acres to each single person over 18 years of age and to each orphan under 18; married women received no separate rights to land.96 These allotments were held in trust by the United States government for 25 years, after which, they would be transferred to the allottee in fee simple.97 Allotments were not subject to a state or local tax while held in trust.98 Any surplus lands were opened to non-Indian settlement, with proceeds from the sale of the these lands to be held in trust by the Bureau of Indian Affairs (BIA) for the tribe.99

In 1903, the Allotment Act was challenged by the Kiowa, Comanche and Apache tribes in Lone Wolf v. Hitchcock.100 The Allotment Act created 13,000 non-Indian homesteads on these tribes' reservations.101 The tribes asserted that any allotment, or other alteration of their territorial holdings, was a violation of their treaty rights.102 Under the treaties, Congress' power was limited to only the care and protection of the tribes. In cases of

91. COHEN'S HANDBOOK, supra note 1, at 128, 131-32.
92. Id. at 128-29.
93. Id. at 129.
95. COHEN'S HANDBOOK, supra note 1, at 133, 135. See also GETCHES, supra note 1, at 166.
96. GETCHES, supra note 1, at 166 (citing Delos Sacket Otis, History of the Allotment Policy, Hearings on H.R. 7902 Before the House Committee on Indian Affairs 73rd Cong., 428-85 (2d Sess. 1934)).
97. GETCHES, supra note 1, at 166.
98. Id. at 174.
99. COHEN'S HANDBOOK, supra note 1, at 134-35.
100. 187 U.S. 553, 560 (1903).
101. GETCHES, supra note 1, at 182.
102. Lone Wolf, 187 U.S. at 564.
emergency, the power to divide tribal land was allowed only if the assent of the tribes could not be obtained. The tribes argued this allotment was not an emergency and the United States violated its duty to protect the tribe. Justice White of the United State Supreme Court disagreed.

The Court held that Congress had plenary power over the tribes. Congress may abrogate the provisions of an Indian treaty when circumstances arise that justify such abrogation. Justice White presumed that Congress would only abrogate treaties in good faith, and because of this presumption refused to review whether Congress did in fact act in good faith.

President Theodore Roosevelt described the allotment process as "a mighty pulverizing engine to break up the tribal mass." A member of the Oklahoma Creek tribe fumed, "Egypt had it locusts, Asiatic countries their cholera, France had its Jacobins, England its black plague, Memphis had the yellow fever... but it was left for the unfortunate Indian Territory to be afflicted with the worst scourge of the nineteenth century, the Dawes Commission." Upon implementation of the Dawes Act, the tribes lost 85% of their land. This loss of land base fragmented the Indian community. Farming efforts ultimately failed because most of the allotted land was unsuitable for farming. In addition, Indian families were unable to cultivate the land due to a lack of tools suitable for farming. They also lacked the knowledge necessary to become successful at farming. When much of the land became subject to state and local taxation, many Indian families could not afford to pay the

103. Id.
104. Id.
105. Id. at 568 (full administrative power was possessed by Congress over Indian tribal property).
106. Id.
107. Id.
108. 35 CONG. REC. 90 (1906).
109. NABOKOV, supra note 89, at 256.
110. The Purposes and Operation of the Wheeler-Howard Rights Bill, Hearing on H.R. 7902 Before the Senate and House Comms. on Indian Affairs, 73d Cong. 16 (1934) (memorandum of John Collier).
111. Id. at 17.
112. GETCHES, supra note 1, at 169-70, (citing Delos Sacket Otis, History of the Allotment Policy, Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong. 428-85 (1934)).
113. GETCHES, supra note 1, at 170.
114. Id.
taxes. Their lands were ultimately sold at auction. If the Indian family was able to hold onto its land, at death the land passed intestate to the heirs of the deceased. Within three generations, the land had been divided into so many small plots, the allotted land could not be practically used. Ultimately, around 90 million acres of allotted Indian lands were sold to non-Indians.

D. Reorganization (1928-1942)

The late 1920's and early 1930's marked a massive policy change. In 1928, the Meriam Report was released. This non-governmental two-year study of the Indian Bureau documented the failures of the Indian Allotment policy. This report stimulated a re-examination of the Nation's Indian policy. This change was characterized by a move for tolerance, and sometimes respect, for the traditional aspects of Indian culture. This move culminated in the Indian Reorganization Act of 1934 (hereinafter, "IRA").

The purpose of the IRA was to encourage "economic development, self-determination, cultural plurality and the revival of tribalism." It also ended the allotment policy of the federal government. Thereafter, existing Indian allotments were to be held in federal trust indefinitely. The so-called surplus Indian lands that had not been sold were to be given back to the tribes. The IRA also established a tribal loan program which would allow the tribes to set up trade and

116. NABOKOV, supra note 89, at 259.
117. Id.; GETCHES, supra note 1, at 174.
118. GETCHES, supra note 1, at 152.
120. COHEN'S HANDBOOK, supra note 1, at 144.
121. Id.
122. Id. at 145.
124. COHEN'S HANDBOOK, supra note 1, at 147.
125. 48 Stat. 984 §1 (1934).
126. 48 Stat. 984 §2 (1934).
vocational schools. In addition, the IRA sponsored a constitutional and representative system of tribal government. This would allow the tribes to adopt tribal constitutions, subject to the approval of the Secretary of the Interior. By allowing the Indians to take a hand in self-government, it was thought that Indians would adapt to modern society. The IRA did not apply to those tribes where a majority of the adults voted against adopting the provisions of the Act. Those tribes which failed to vote on the Act became subject to the IRA by default.

E. Termination (1945-1961)

The Indian Reorganization Act was criticized by many. For years Congress fought the Act and ultimately all but destroyed it. In 1953, Congress adopted a resolution to "terminate" Indian tribes and sever the Indian status as a special ward of the government. The BIA was instructed to begin a survey to determine which tribes were suitable for termination. This period is noted as "the most concerted drive against Indian property and Indian survival since the removals following the acts of 1830 and the liquidation of tribes and reservations following 1887." As a result, a small number of tribes were completely terminated. This meant that these tribes no longer received

128. 48 Stat. 984 §16 (1934).
129. 48 Stat. 984 §16 (1934).
130. COHEN'S HANDBOOK, supra note 1, at 149.
131. Id. at 147.
132. Id. at 149.
133. See generally id. at 152-59.
135. The test used was the Zimmerman Test. The criteria for termination were: (1) the degree of culture; (2) the evidence of businessability; (3) literacy level; and (4) the Indians ability to accept non-Indian ways. It is interesting to note that the head of the BIA during most of the termination time was Dillon S. Myer, former director of the Japanese-American detention camp program. COHEN'S HANDBOOK, supra note 1, at 157-58.
137. Only 3% of all recognized Indian people were effected, yet 109 tribes were terminated and over 1 million acres of land were transferred out of tribal status. GETCHES, supra note 1, at 209 (citing Charles F. Wilkerson & Eric R. Biggs, The Evolution of the Termination Policy, 5 AM. INDIAN L. REV. 139, 151-4 (1977)). Three of the largest terminations occurred to the Klamath and Menominee and the Mixed Blood Utes. Act of June 17, 1954, ch 303, 68 Stat. 250, and Act of August 27, 1954, Ch. 1009, 68 Stat. 868.
any money for federal social programs. The tribes' lands were sold off and the proceeds held in trust for the tribe. States were then given authority over these terminated tribes. "[T]he state legislatures and county boards had broad authority over basic matters like education, adoptions, alcoholism, land use and other fundamental areas of social and economic concern." Those tribes not terminated found themselves subject to new federal laws that led to the loss of much Indian land, the closing of federally-funded schools, and a loss of federally-funded hospitals.

The most important of these new laws was Public Law 280. Public Law 280 extended state civil and criminal jurisdiction into Indian Country in five states. It granted jurisdiction "over offenses committed by or against Indians in the areas of Indian Country." All other states could assume the same type of jurisdiction by statute or state constitutional amendment. Montana adopted Public Law 280.

Public Law 280 provides: "Nothing in the section...shall deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control of licensing, or regulation thereof." This portion of Public Law 280 seemed to conflict with the

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138. COHEN'S HANDBOOK, supra note 1, at 175.
139. Id. Before termination, only the federal government and federally recognized tribal counsels could pass law over the reservations. Worcester v. Georgia 3 U.S. (6 Pet.) 515 (1832).
140. GETCHES, supra note 1, at 210-11 (citing Delos Sacket Otis, History of the Allotment Policy, Hearings on H.R. 7902 Before the House Committee on Indian Affairs 73d Cong. 428-85 (1934)).
141. COHEN'S HANDBOOK, supra note 1, at 168-69.
142. Id. at 177 (referencing [1952] SEC. INT. ANN. REP. 400).
143. S. REP. NO. 2664, 84th Cong. 3. (reprinted in 1956).
147. The states that adopted PL 280 are Arizona, Florida, Montana, Idaho, Nevada, North Dakota, Utah, Washington and Iowa.
Termination Act of 1954\textsuperscript{150} which took away hunting and fishing rights.\textsuperscript{151}

This issue was resolved in \textit{Menominee v. United States}.\textsuperscript{152} In that case, the Menominee tribe sued the United States for recognition of their hunting and fishing rights under the Wolf River Treaty of 1854.\textsuperscript{153} This treaty granted the Menominee tribe special hunting and fishing rights on their land.\textsuperscript{154} The tribe argued the termination of their tribe did not extinguish their treaty rights.\textsuperscript{155} The Supreme Court agreed. In coming to this decision, the Court analyzed both Public Law 280 and the Termination Act of 1954 and determined that unless Congress explicitly states in the termination legislation that these rights are abrogated, the tribe retains its treaty rights unless Congress specifically states otherwise.\textsuperscript{156} Thus, the Menominee tribe retained their hunting and fishing rights.\textsuperscript{157}

The tribes recognized that termination was destroying tribalism.\textsuperscript{158} The only way to stop this destruction was for the tribes to effectively influence federal Indian policy.\textsuperscript{159} The National Congress of American Indians (NCAI), a "supratribal" entity, was organized in the mid-1940's with this in mind.\textsuperscript{160} In 1954, during the congressional hearing on the termination issue, the NCAI declared an emergency meeting to protest termination.\textsuperscript{161}

Although this protest ultimately failed, "[t]he result was like a shot in the supratribal arm."\textsuperscript{162} The tribes rallied together
in a concerted effort to stop termination. Five hundred Indians from seventy tribes met at the American Indian Chicago Conference. At the conclusion of the conference they "rejected termination and asserted the right of Indian communities to choose their own ways of life." It was the largest gathering of different Indian communities in decades. Its voice became a beacon of change. After a long and slow struggle, the opposition to termination finally won.

F. Self-Determination (1961-Present)

After the era of termination ended, the federal government returned to the policies that surrounded the Indian Reorganization Act. One major show of federal support for tribal self-determination was the Indian Civil Rights Act of 1968. This legislation imposed most of the requirements of the Bill of Rights on the reservations. It also amended Public Law 280. This amendment stated that states could no longer assume civil or criminal jurisdiction over tribes unless the tribes consented to an assertion of jurisdiction. This halted the extension of Public Law 280, but did not apply retroactively.

In 1970, President Nixon issued a landmark address calling for a new federal policy of "self-determination" for the Indian tribes. He noted that termination was "morally and legally unacceptable, because...the mere threat of termination tends to discourage greater self-sufficiency." President Nixon stressed the importance of the trust relationship between the federal government and the Indian Nations. He urged Congress to adopt a program to permit the tribes to manage their affairs


163. Id.  
164. Id.  
165. Id.  
167. Indian Civil Rights Act, Title 1. This includes the language of the equal protection and due process clauses, but excludes the establishment clause and right to a grand jury indictment or counsel.  
168. Indian Civil Rights Act, Title IV.  
169. Id.  
170. Id.  
172. Id.  
173. Id.
with autonomy. 174 This included control over Indian schools and economic development. 175

President Nixon's speech jumpstarted Congress into passing a number of laws aimed at promoting Indian self-determination. This legislation seemed to follow the suggestions in Nixon's message very closely. 176 First Congress passed the Indian Education Act of 1972 and other similar education reforms. These Acts addressed the need for Indian control over their schools. 177 These series of laws provided for grants to educational programs that were created to meet the special needs of Indian children. 178 Broad discretion was given to the Commissioner of Education to award these grants. 179

Next, Congress passed that Indian Financing Act of 1974. 180 This legislation required the federal government "to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to appoint where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." 181

In addition, the Self-Determination and Education Assistance Act of 1975 182 gave express authority to the Secretaries of the Interior and Health and Human Services to contract with and make grants to Indian tribes and other Indian organizations for the delivery of federal services. 183

A majority of the legislation reflected a major internal policy change within the federal government. Although the tribes were funded by the federal government, they were to retain control over the detail of program decisions and money expenditures.

174. Id.
175. Id.
However, this change did not extend into practical matters. While Congress expounded how tribes would be given self-determination to implement programs and spend monies in order to become self sufficient, the BIA did not implement any programs to assist with the change. The BIA failed to assist the tribes in setting up revenue codes. Not once did the BIA help the tribes set up any sort of tax system, which could have included many different programs that would produce revenue for the tribes. "In fact, the BIA did not, and does not now, view tribal governments as bonafide governments but rather as a type of local extension of federal government (very similar to a Soil Conservation District)."

BIA's failure to implement programs to carry out the previous legislation did not stop Congress from enacting additional legislation. The Indian Child Welfare Act of 1978 may be one of the most important and meaningful pieces of legislation addressing Indian tribes' human rights concerns. This act created a comprehensive adjudication process for child custody cases which defers heavily to the tribal governments.

There has been a distinct lack of major Indian legislation since the 1970's. Much legislation has been adopted, but most of the legislation merely adds to or amends the 1970's legislation. This means that the Supreme Court has been free to interpret the policies and intent of the 1970's legislation for almost 30 years. As we shall see, the Court's decisions in the last twenty years have encroached upon the tribe's ownership of land, the ability of the tribes to govern, and most recently, decimated important economic bases for tribal programs. It is no longer a time of "self-determination."

III. TRIBAL CIVIL JURISDICTION HISTORY

The decision in Burlington Northern R.R. Co. v. Red Wolf is not an anomaly of the court system. It is the product of

185. Id.
186. Id.
187. Id.
189. It could be said that because this Act was so comprehensive, and the assistance to the tribes was built into the Act, it had a chance of succeeding, unlike the different economic and education legislation.
190. GETCHES, supra note 1, at 230-33.
191. 106 F.3d 868 (9th Cir. 1997).
twenty years of steady, unchecked encroachment by the courts upon tribal sovereignty. To truly comprehend the impact of Red Wolf, it is important to understand the United States Supreme Court’s major tribal civil jurisdiction decisions. It is also important to take a closer look at the various cases in order to piece together the reality that few have observed, but becomes evident when looked at as a whole—this may no longer be a time of self-determination for Indian tribes.

A. Montana v. United States: The First Step Upon the Path of Encroaching Tribal Civil Jurisdiction.

In Montana v. United States, the Crow tribe sought a declaratory judgment to retain regulatory authority over hunting and fishing within the reservation boundaries. The parcel of land in contention was the Big Horn River's bed and banks, which lay within the Crow Reservation's boundaries. The Crow tribe had passed a resolution prohibiting hunting and fishing within the reservation boundaries by anyone who was not a member of the tribe. However, the State of Montana contended it had the authority to regulate hunting and fishing within the reservation and continued to issue licenses to hunt and fish on the Crow Reservation. This led to a confrontation.

The Crow tribe argued that it had authority to regulate hunting and fishing based on the following factors. First, the land was within the Crow reservation boundaries. Logically, the tribe had the right to regulate hunting and fishing within the borders of its reservation, just as a state has the authority within its borders. Second, the tribe argued that according to the treaties of 1851 and 1868, the tribe retained the ability to regulate use of the reservation. The treaty of 1851 stated that the tribes did not “surrender the privilege of hunting, fishing, haying, and trapping.”

193. Id. at 550.
194. Resolution No. 74-05 (1974). This proscription covered land held in fee simple by non-tribal members. Montana, 450 U.S. at 547. According to the court, this was roughly twenty eight (28) percent of the reservation. Id. at 548.
195. Montana, 450 U.S. at 548.
196. Id.
197. Id. at 550.
200. Montana, 450 U.S. at 564.
The treaty of 1868 was more specific. The United States agreed the reservation "shall be set apart for the absolute and undisturbed use and occupation" of the Crow tribe, and that no non-Indians except agents of the Government "shall ever be permitted to pass over, settle upon, or reside in" the reservation.

Disregarding the treaty, the Supreme Court held the Crow tribe did not own the banks and beds of the river. Instead of interpreting the treaties by the accepted doctrine of deference to the understanding of the tribe at the time of signing the treaty, the Court held the treaty should by interpreted by English common law.

Based upon navigable waters law at the time of the treaty, the bank and beds were held in trust by the United States federal government for the future state of Montana. This right to navigable waters supersedes the right of tribal sovereignty, unless the tribe specifically retained the property rights to the Big Horn River. The Court found that neither of the Treaties of Fort Laramie had language in it that was strong enough to overcome this presumption. Because Montana was now a state, the land the United States held in trust transferred to Montana which then held the land in fee simple.

As a basis for the Montana Rule, the Court relied upon Oliphant v. Squamish Tribe, which held that tribal courts lacked criminal jurisdiction over non-Indians within reservation boundaries. The Court stated that "the principles upon which
[the Oliphant decision] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of a nonmember of the tribe.\textsuperscript{212} The Supreme Court held that the Crow tribe did not have the authority to regulate hunting and fishing activities of non-Indians on reservation land, when the land is owned in fee simple by a nonmember of the tribe.\textsuperscript{213} The Montana Rule effectively reduced tribal sovereignty within the reservation's boundaries. Instead of regulating all activity within reservation boundaries, tribes are limited to regulating only land held in trust for the tribes, or land held in fee simple by a tribal member. The Montana Rule states that unless Congress gives express permission, Indian tribes do not have civil jurisdiction over a nonmember for disputes arising on non-Indian land within the reservation.\textsuperscript{214}

Although the Court established the Montana Rule, it additionally established two exceptions. First, if the nonmember has entered into a consensual relationship with the tribe, such as a contractual or business agreement, the tribe has jurisdiction over the nonmember.\textsuperscript{215} Second, if the activity affects the tribes' "political integrity, economic security, health or welfare," the tribe retains jurisdiction over the nonmember.\textsuperscript{216} Applying the first exception to the case, the court found no consensual relationship between the tribe and Montana.\textsuperscript{217} In analyzing the second exception, the Court was unable to fathom the effect of non-tribal hunting and fishing along the Big Horn River within the reservation boundaries, especially since the tribe mainly relied on buffalo meat to survive, not fish.\textsuperscript{218}

\textsuperscript{212} Montana, 450 U.S. at 565. It has been suggested that the courts use of "member" instead of the word "citizen" is very meaningful. Member refers to an association or society while citizen refers to a political entity. This means that the courts are treating Indian nations as a social organization, instead of as a political government. The laws are very different for an organization when compared to a government. Allison M. Dussias, Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision, 55 U.PITT. L. REV. 93 (1996).

\textsuperscript{213} Montana, 450 U.S. at 564.

\textsuperscript{214} Id. at 565.

\textsuperscript{215} Id. at 565-66.

\textsuperscript{216} Id. at 566.

\textsuperscript{217} Id. at 567. The Court did not explain this decision. Instead, the court assumed there was no consensual relationship.

\textsuperscript{218} Montana, 450 U.S. at 556. The Court found the diet of the Crow tribe as relevant to the English Common Law foundation of property rights. However, see Justice Blackmun's dissent which states that the majority's conclusion that the mainstay
A major effect of Montana is a substantial limitation on tribal sovereignty. Prior to this case, regulatory authority was geographically based. This meant that the tribes had authority to regulate land located within the boundaries of the reservation. The Montana Rule changed this. Now, sovereignty in a regulatory scheme is based upon a mixture of membership and geography. The land has to be owned by a member of the tribe for the tribe to have regulatory authority over the land. This rule “limiting tribal authority to tribal members renders the tribe unable to exercise control over individuals, including members of the reservation community, whose actions on the reservation may have a profound effect on the tribe and its members.” This vastly changed the shape of tribal regulatory authority, and affects future tribal civil jurisdiction over non-members.

B. National Farmers Union Insurance Company v. Crow Tribe of Indians: The Supreme Court’s Next Step in Eradicating Tribal Jurisdiction Under the Guise of Giving Great Deference to Tribes

Four years after Montana, the United States Supreme Court granted certiorari to National Farmers Union Insurance Company v. Crow Tribe of Indians. The plaintiff was the guardian of a Crow child who was injured by a person driving a motorcycle. The accident occurred in the school parking lot which was within the boundaries of the Crow reservation. However, the school grounds were owned by the state of tribal diet is buffalo is open to serious question. Id. The Court revisited the Montana Rule in Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). In this case, the Court drastically limited the second exception to the Montana rule by stating the “impact must be demonstrably serious and must imperil the political integrity, the economic security or the health and welfare of the tribe.” Id. at 431 (emphasis added).


220. Dussias, supra note 212, at 86.

221. Id. at 96, sets out the basis of an analogy for this situation. For example, if a California man wanted to hunt or fish in Montana, there would be no question that within the boundaries of Montana, the state would have the right to regulate the California man’s activities. The question she posits is very simple. Why is there a difference? The author finds that the reason rests in the “bigotry” of the Court.

222. Id. at 86.


225. Id. at 847.

226. Id.
Montana. The guardian filed suit against the School District in Crow Tribal Court for the medical bills and pain and suffering allegedly caused by the injuries. Consequently, the school district's insurer, National Farmers Union, was joined as a defendant, although it was not originally named in the complaint. The school district failed to reply to the complaint. Therefore, the Crow tribal court issued a default judgment in favor of the child for all damages alleged.

Instead of appealing to the Crow Court of Appeals, National Farmers Union filed for a temporary restraining order in the federal district court for the State of Montana claiming the tribal court lacked jurisdiction to hear the case. It claimed the question of jurisdiction arose from a treaty, and was therefore a federal question based upon 28 U.S.C. § 1331. This law grants the federal court "original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States." National Farmers Union argued that jurisdiction to hear the case lay with the federal district court of Montana. The district court agreed. It granted a temporary restraining order against the tribe's enforcement of the judgment and subsequently granted a permanent injunction. The plaintiff appealed the district court's ruling to the Ninth Circuit.

The Ninth Circuit reversed the decision of the district court, holding that the district court did not have jurisdiction to grant the injunction. The court held the district court could not support its holding on any constitutional, statutory or common-law ground. Additionally, the dissent stated that the district

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227. Id.
228. Id.
229. Id. at 847.
230. Id. at 847-48.
231. Id. at 848.
232. Id.
233. Id. at 850 (emphasis added).
234. Id. at 848.
235. Id. at 849.
236. Id.
237. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 736 F.2d 1320, 1322-23 (9th 1984). The majority first held that the tribe was not bound by the Fourteenth Amendment. Thus, National Farmers equal protection and due process claim failed. However, the court concluded that the tribe is bound by the Indian Civil Rights Act, 25 U.S.C. §1301. This does require the tribes to act in a manner consistent with due process and equal protection. However, when Congress created this Act, they intended to specifically restrict federal court interference with tribal court proceeding to a review on petition for habeas corpus. Because this was a civil suit, not a writ of habeas
court would not have jurisdiction until all remedies at the tribal court were exhausted. This decision was appealed to the United States Supreme Court.

The United States Supreme Court reversed the Ninth Circuit. The majority found that the district court had the right to determine if the tribal court was exceeding the lawful limits of its jurisdiction. However, the Court adopted the rationale of the dissent from the Ninth Circuit and held that the district court must wait until all available remedies were exhausted in the tribal court system before review. This is now known as the "Tribal Exhaustion Rule."

The Court stated that the policy of tribal exhaustion was based on Congress' commitment "to a policy of supporting tribal self-government and self-determination." The Court found the tribal court should have the first opportunity to evaluate the factual and legal bases for the challenge. Also, the tribal courts should develop a full record to aid the federal court in making its own determination. The Court created one exception to this exhaustion rule. If the determination of jurisdiction is motivated by harassment or is conducted in bad faith, then exhaustion is not required.

The most important result of the Court's decision was not the establishment of the Exhaustion Rule, but the granting to federal district courts the right to review tribal court jurisdiction in civil matters. This is the first time the right of civil jurisdictional review based on a federal question has been granted. The result is that the tribe can fully adjudicate a case

corpus, the court held it did not have the authority to hear the issues applying under the Indian Civil Rights Act. The court held it could hear an issue applying under federal common law for the same reason.

238. Id. at 1324-26. The dissent (in part), written by J. Wright, forwarded a tribal exhaustion rule for three different reasons. First, meaningful tribal remedies exist. The Tribal Code allows plaintiffs to challenge jurisdiction by appeal. Second, J. Wright felt the tribal system would be strengthened by an exhaustion requirement. This would stop Plaintiffs from by-passing the tribal court system. "Such disrespect for tribal institutions should be discouraged." Id. at 1326. Last, there is no immediate need for the Federal Courts to step into such a case. In the interest of respect and upholding the authority of the tribe, plaintiffs should be forced to exhaust all the remedies available to them in the tribal courts. Id.

240. Id. at 857.
241. Id. at 856.
242. Id.
243. Id.
244. Id. at 857 n.21.
in which a treaty is at issue, but the district court is not legally required to give any deference to the tribal court’s holdings of law and finding of fact when it reviews the case.\textsuperscript{245}

\textbf{C. Iowa Mutual Insurance Company v. LaPlante: The Court Develops Another Way for Non-Indians to Move Jurisdiction Into Federal Court}

Two years after \textit{National Farmers}, the Court heard a similar case, \textit{Iowa Mutual Insurance Company v. LaPlante}\.\textsuperscript{246} The plaintiff, a member of the Blackfeet tribe, was employed by Wellman ranch, located on the Blackfeet reservation.\textsuperscript{247} While driving a company truck on reservation lands, he was injured. He subsequently filed suit in Blackfeet tribal court.\textsuperscript{248} The tribal court held that it had subject matter jurisdiction to hear the case.\textsuperscript{249}

\t\textit{Iowa Mutual Insurance Company} filed suit in federal district court to remove the case to the district court claiming that the tribal court lacked jurisdiction based on diversity jurisdiction, as opposed to a federal question.\textsuperscript{250} The district court held that \textit{Iowa Mutual} did not have a right to exercise diversity jurisdiction.\textsuperscript{251} The Blackfeet tribe must be given a chance to determine its own jurisdiction. In dicta, the court stated that based on similar cases, the Blackfeet tribe had exclusive jurisdiction in this case.\textsuperscript{252} "\textit{[O]nly if the Blackfeet Tribe decides not to exercise its exclusive jurisdiction. . .would this court be free to entertain}" the case under diversity jurisdiction.\textsuperscript{253} In an unpublished opinion, the Ninth Circuit affirmed the district court's decision.\textsuperscript{254} The court relied on the

\begin{thebibliography}
\item \textsuperscript{245} Big Horn Elec. Coop., Inc. v. Adams, 219 F.3d 944, 949 (9th Cir. 2000) (The standard of review for an Indian tribal court decision deciding jurisdictional issues is de novo on questions of federal law and clearly erroneous for factual questions. Questions about tribal jurisdiction over non-Indians is an issue of federal law reviewed de novo.)
\item \textsuperscript{246} 480 U.S. 9 (1986).
\item \textsuperscript{247} \textit{Id.} at 11.
\item \textsuperscript{248} \textit{Id.}
\item \textsuperscript{249} \textit{Id.} at 12. It is interesting to note that although Blackfeet Tribal Code allows for an appeal of a jurisdictional ruling, it only allows such a review after a decision on the merits. Blackfeet Tribal Code, Ch 11, §1 (1986).
\item \textsuperscript{250} \textit{Iowa Mutual}, 480 U.S. at 12-13.
\item \textsuperscript{251} \textit{Id.} at 13.
\item \textsuperscript{252} \textit{Id.} The district court relied on Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949) to reach this conclusion.
\item \textsuperscript{253} \textit{Iowa Mutual}, 480 U.S. at 13 (quotting the district court.)
\item \textsuperscript{254} \textit{Iowa Mutual}, 774 F.2d 1174 (9th Cir. 1985) (unpublished table decision).
\end{thebibliography}
holding in National Farmers, deducing that the policy was to extend self-governance regardless of why the case may not fall within the tribes jurisdiction. Because the defendant had failed to appeal in the tribal court system, there was no exhaustion of the tribal remedies.

The United States Supreme Court agreed and held that diversity, as well as federal questions, fall within the Tribal Exhaustion Rule. Therefore, the district court must put any litigation brought to them on hold until the tribal court determines its own jurisdiction, after which the District Court has a right to review tribal jurisdiction.

The decision in Iowa Mutual expands the federal encroachment into tribal court jurisdiction by adding diversity jurisdiction as a grounds for federal review, as well as the federal question basis for review established in National Farmers. Now the District Court has de novo review over all diversity and federal question cases.

D. Strate v. A-1 Contractors: Significant Broadening of the Montana Rule

The next case of significance is Strate v. A-1 Contractors. In this case, a small car driven by the plaintiff, Gisela Fredricks, collided with a gravel truck driven by an A-1 employee. The collision occurred within the Fort Berthold Reservation on a North Dakota state highway. Fredricks filed suit in tribal court for the alleged personal injuries, medical expenses and pain and suffering caused by the collision. She was not an enrolled member of the tribe although her husband and children were. A-1 had a contractual relationship with a tribal member who owned a construction company at the time of the collision. The tribal court held that it had personal

255. Iowa Mutual, 480 U.S. at 13-14.
256. Id. at 13.
257. Id. at 17.
258. Id.
260. Id. at 442-43.
261. Id. at 442.
262. Id. at 442-43.
263. Id. 443-44.
264. Id. at 443.
265. Id.
jurisdiction since Fredricks was a resident of the reservation and A-1 had a consensual relationship with the tribe. A-1 appealed the jurisdictional ruling to the Northern Plains Intertribal Court of Appeals. The Tribal Court of Appeals affirmed jurisdiction.

Thereafter, A-1 filed a motion in federal district court for declaratory and injunctive relief from the exercise of tribal court jurisdiction. The court found it had jurisdiction to hear the motions since A-1 had satisfied the tribal exhaustion rule by exhausting all remedies in tribal court. The district court then held that the tribal court had been correct in its determination of personal and subject matter jurisdiction.

Initially, the Eight Circuit Court of Appeals affirmed and distinguished the district court's ruling from Montana. The court stated that Montana was meant to apply to limiting tribal jurisdiction over non-Indians for regulatory purposes only on fee lands. Because this was not a regulatory case, Montana was not applicable. The dissent disagreed, stating that Montana was applicable. The dissent emphasized the requirement that an overriding tribal interest must be asserted before the tribal court could establish jurisdiction over non-Indians, on fee land, within the boundaries of the reservation.

The Eighth Circuit Court of Appeals then granted a rehearing en banc. This time, the court held that the Montana Rule was the controlling law in a tribal civil jurisdiction case involving non-Indian defendants. For the tribal court to exercise jurisdiction, one of the two exceptions to the Montana Rule had to apply to both A-1 and Fredricks. The court found that the tribe lacked jurisdiction over Fredricks because she was a nonmember, and there was no overriding tribal interest because the car accident did not affect the tribe to a significant extent.

266. Id. at 444.
267. Id.
268. Id.
269. Id. at 444.
270. Id.
272. Id. at 3
273. Id. at 4.
274. Id. at 6. (Hanson, J. dissenting)
276. Id.
degree.\textsuperscript{277}

The dissent attacked the narrow reading of the second exception of the \textit{Montana} Rule by saying the threat posed by non-Indians "who happen to wreak havoc on tribal land" should be within the power of the tribe to adjudicate because it is one of the "most basic and indispensable manifestations of sovereign power."\textsuperscript{278}

On April 28, 1997, the United States Supreme Court sided with the Eighth Circuit's majority and found that \textit{Montana v. United States}\textsuperscript{279} should be considered "the pathmarking case concerning civil authority over nonmembers."\textsuperscript{280} Although in the past, the \textit{Montana} Rule was applied to regulatory authority, the Court felt that its language should be broadly interpreted to include all forms of "civil jurisdiction over non-Indians."\textsuperscript{281}

The Court's first step in applying the \textit{Montana} Rule was to determine the legal status of the highway easement.\textsuperscript{282} The Court found that just compensation had been paid for the easement pursuant to legislation\textsuperscript{283} empowering Congress to grant right-of-ways through tribal land.\textsuperscript{284} In addition, the Court stated that because the tribes had not specifically reserved an interest in the easement, the tribes lost all landowners' rights to the easement.\textsuperscript{285} Because the tribe did not

\begin{itemize}
  \item \textsuperscript{277} Id. at 940.
  \item \textsuperscript{278} Id. at 944. (Gibson, J. dissenting)
  \item \textsuperscript{279} 450 U.S. 544 (1981).
  \item \textsuperscript{280} Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997).
  \item \textsuperscript{281} Id. at 453 (citing Montana, 450 U.S. at 565).
  \item \textsuperscript{282} Montana, 450 U.S. at 565. The rule states that a Tribe may exercise some civil jurisdiction over non-Indian fee land if certain activities occur. For the rule to be satisfied the land must be non-Indian fee land.
  \item \textsuperscript{283} Strate, 520 U.S. at 454; See also, Act of February 5, 1948, ch. 45, 62 Stat. 17, 25 U.S.C. §§323-328 (1948).
  \item \textsuperscript{284} Strate, 520 U.S. at 454-55.
  \item \textsuperscript{285} Id. It is unclear when the Court believed the tribe should have specifically retained an interest in the easement. At the time treaties were being signed, the tribes had no education in law. There was no way for them to know that to retain rights over land, you must reserve that right. It would have been impossible for the tribes to have made a reservation at that time. However, this easement was bought in 1970. The Court may have intended that the tribe should have retained an interest in the land at this time. The tribe argued that they had done just that in the granting instrument. The granting instrument stated:
  The right reserved to the Indian land owners, their lessees, successors, and assigns to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupation of the premises affected by the right-of-way; such crossing to be constructed and maintained by the owners or lawful occupants and users of said lands at their own risk and said occupants and users to assume full responsibility for avoiding, or repairing any

\end{itemize}
produce any documentation, such as a treaty, giving express authorization from Congress for jurisdictional rights to the land, the tribe did not have such a right. The Court held that this easement, acquired for the State's purposes, was non-Indian land held in fee simple by the State. Under the Montana Rule, the tribe would not have authority to hear the case unless one of two exceptions applied.

The first exception states if a nonmember has entered into a consensual relationship with the tribe, such as a contractual or business agreement, the tribe has jurisdiction over the nonmember. The first exception was found not to apply because it was determined Fredricks did not have a consensual relationship with the tribe within the meaning of the exception. The Court found that the meaning of consensual relationship had to do with business relationships with tribal members, not family or residential relationships. Therefore, because both parties were not sufficiently connected with the tribe, the exception did not apply.

The second exception, which would give the tribe jurisdiction when the activities of a nonmember "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," was held not to apply. While the Court acknowledged that reckless driving threatened the health or welfare of the tribe, it foreclosed the idea that the threat to public safety could be used to establish jurisdiction over nonmembers. The Court asserted that the second exception would only be available when the state interfered with a tribe's exercise of jurisdiction over conduct which would endanger internal tribal relations or tribal self-government. Since tribal relations were not threatened, and a regular highway automobile accident does not affect the political integrity, economic security, or the health or welfare of the tribe,
the Court held that the tribal court did not have jurisdiction to hear the case.\textsuperscript{295}

Lastly, the Court inserted a footnote that added an exception to the Tribal Exhaustion Rule. When it is clear that no federal grant authorizes the tribal jurisdiction over nonmember conduct on land covered by the \textit{Montana} Rule, then the exhaustion requirement must give way.\textsuperscript{296} The reason is that comity would not be served by continuing a case over which the tribe has no jurisdiction.\textsuperscript{297} To aid in future cases, the court outlined situations in which the second exception would apply: 1) an adoption proceeding where all of the parties were tribal members; and 2) a merchant seeking payment for goods against tribal members.\textsuperscript{298}

The \textit{Strate} decision did three things. First, it broadened the language of the \textit{Montana} Rule to include cases which dealt with adjudicatory authority.\textsuperscript{299} In the past, the \textit{Montana} Rule was only applied to issues of regulatory or legislative authority.\textsuperscript{300} Second, it narrowed the language of the second exception to the \textit{Montana} Rule. Now, the Rule does not apply to actions that threaten public safety. Instead, the exception only applies to internal tribal relations and a narrow sense of tribal self-government.\textsuperscript{301} Third, the Court created another exception to the Exhaustion Rule, thereby limiting the full adjudication of a claim in tribal courts to a further extent.\textsuperscript{302} Now, anytime a case might fall under the \textit{Montana} Rule, the party can take it directly to the federal district courts.

\textsuperscript{295} \textit{Id.} at 589.
\textsuperscript{296} \textit{Id.} at 459-60 n.14.
\textsuperscript{297} \textit{Id.}
\textsuperscript{298} \textit{Id.} at 458.
\textsuperscript{299} \textit{Id.} at 453.
\textsuperscript{300} Arron Duck, Note, \textit{Indians: Modern Tribal Jurisdiction over Non-Indian Parties: The Supreme Court Takes Another Bite Out of Tribal Sovereignty in Strate v. A-1 Contractors}, 51 OKLA. L. REV. 727, 740 (1998). Adjudicatory authority is described as the power of the court to hear the type of case that is then before it. Regulatory or legislative authority is the power to apply tribal laws to conduct occurring in tribal lands.
\textsuperscript{301} \textit{Strate}, 520 U.S. at 459.
\textsuperscript{302} \textit{Id.} at 459-60, n.14.
IV. Burlington Northern Railroad Company v. Red Wolf

A. Factual Background and Allegations of the Complaint

On November 22, 1993, Beverly Nadine Red Wolf and Chantina Reney Red Horse were passengers in an automobile being driven by Regina Ann Bull Tail on Big Horn County Road No. 59 within the Crow Indian Reservation. All were members of the Crow Tribe. The road was owned and maintained by the Crow Tribe and crossed Burlington Northern’s railroad tracks.

As the car was driven across the tracks, it became stuck on the tracks. While the women tried to free the car, a train rushed toward them. The train did not stop for the car. All persons in the car died as a result of the collision.

The heirs of Beverly Red Wolf and Regina Bull Tail brought an action for wrongful death in the Crow Tribal Court. The complaint alleged the women’s deaths were caused by Burlington Northern’s negligent act of leaving the crossing in an unsafe and defective condition. They alleged the train conductor failed to signal or slow the train in any way before the collision, although the car was in plain view for at least 1200 feet. On January 25, 1996, the Crow court found Burlington Northern liable for the wrongful death of both women and awarded each of the five estates (hereinafter, “Estates”) $50 million dollars in compensatory damages, totaling $250 million dollars.

B. Procedural History

Burlington Northern was required to post a bond for a stay of execution while it appealed the tribal court’s judgment. Burlington Northern filed a motion with Crow tribal court to
stay execution of the tribal court’s judgment without the necessity of posting the bond.\textsuperscript{312} The tribal court denied the motion.\textsuperscript{313} Burlington Northern appealed this decision to the Crow Court of Appeals who affirmed the decision of the tribal court.\textsuperscript{314}

Before the Crow Court of Appeals ruled, Burlington Northern filed a request for a temporary restraining order (TRO) in federal district court to enjoin the Estates from executing upon or attempting to enforce the judgment entered by the tribal court.\textsuperscript{315} On February 15, 1996, the federal district court granted the TRO and ordered the Crow court to enjoin the Estates from executing the Crow court’s judgment.\textsuperscript{316} The district court then remanded the case back to the tribal court holding that the district court proceedings were to be stayed until the exhaustion of tribal remedies.\textsuperscript{317} Instead of appealing to the Crow Court of Appeals, Burlington Northern appealed to the Ninth Circuit.\textsuperscript{318}

On January 29, 1997, the Ninth Circuit held that the district court erred in granting the TRO stating that “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.”\textsuperscript{319} In this case, the Crow Court of Appeals was not given an opportunity to review the Tribal court’s judgment.\textsuperscript{320} Therefore, under National Farmers, the district court erred in exercising jurisdiction over the Crow court.\textsuperscript{321} Burlington Northern appealed this decision to the United States Supreme Court.\textsuperscript{322}

The Supreme Court granted certiorari and in one paragraph, vacated the judgment of the Ninth Circuit and remanded the case for further consideration in light of the Strate ruling.\textsuperscript{323} The Ninth Circuit, in turn, remanded the case back to

\begin{footnotesize}
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\item \textsuperscript{312} Burlington N. R.R. Co. v. Red Wolf, 106 F.3d 868 (9th Cir. 1997).
\item \textsuperscript{313} \textit{Id.}
\item \textsuperscript{314} \textit{Id.}
\item \textsuperscript{315} \textit{Id.}
\item \textsuperscript{316} Red Wolf N. R.R. Co. v. Red Wolf, No 96-17, slip op. at 1 (D. Mont. Feb. 15, 1996).
\item \textsuperscript{317} \textit{Red Wolf}, 106 F.3d. at 869.
\item \textsuperscript{318} \textit{Id.} at 868.
\item \textsuperscript{319} \textit{Id.} at 870 (quoting, Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987)).
\item \textsuperscript{320} \textit{Red Wolf}, 106 F.3d. at 870.
\item \textsuperscript{321} \textit{Id.}
\item \textsuperscript{322} Burlington N. R.R. Co. v. Red Wolf, 522 U.S. 801 (1997).
\item \textsuperscript{323} \textit{Id.}
\end{itemize}
\end{footnotesize}
the federal district court.\textsuperscript{324} The federal district court held that exhaustion was not required under \textit{Strate}.\textsuperscript{325} Burlington Northern then filed a permanent injunction to enjoin the Estates from enforcing the Crow court's ruling.\textsuperscript{326} The injunction was granted by the district court, holding that exhaustion was unnecessary and enjoined any further proceedings in the tribal court.\textsuperscript{327} The Estates appealed the federal district court's decision to the Ninth Circuit.\textsuperscript{328}

\textbf{C. Analysis of the Ninth Circuit's Decision}

On November 17, 1999, the Ninth Circuit held that the Tribal Exhaustion Rule did not apply in this case.\textsuperscript{329} The court listed four exceptions to the tribal exhaustion rule: 1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; 2) the action is patently violative of express jurisdictional prohibitions; 3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; or 4) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by the \textit{Montana} Rule.\textsuperscript{330} The court held that the last exception applied to this case, therefore, there was no need for Burlington Northern to appeal within the tribal courts.\textsuperscript{331}

The court used the United States Supreme Court's reasoning to determine whether the tribal court had jurisdiction in this case when the railroad crossing was land ceded to the railroad.\textsuperscript{332} In \textit{Strate}, the Supreme Court distinguished between state highways and tribal roads saying that they did not intend to express any opinion of the governing law.\textsuperscript{333} In \textit{Red Wolf}, the Ninth Circuit held that, for the same reasons the highway in \textit{Strate} was viewed as non-Indian fee land, the railroad in question here is non-Indian fee land.\textsuperscript{334}

The court explained that a 1889 Congressional right-of-way

\begin{itemize}
\item \textsuperscript{324} Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1062 (9th Cir. 2000).
\item \textsuperscript{325} Id.
\item \textsuperscript{326} Id.
\item \textsuperscript{327} Id.
\item \textsuperscript{328} Id.
\item \textsuperscript{329} Red Wolf, 196 F.3d at 1065.
\item \textsuperscript{330} Id. at 1062.
\item \textsuperscript{331} Id. at 1065-66.
\item \textsuperscript{332} Id. at 1062-63.
\item \textsuperscript{333} Id. at 1063 (citing \textit{Strate} v. A-1 Contractors, 520 U.S. 438, 456 (1997)).
\item \textsuperscript{334} Red Wolf, 196 F.3d at 1063.
\end{itemize}
granted to Burlington Northern's predecessor gave the railroad an absolute interest in "the construction, operation and maintenance of its railroad, telegraph, and telephone line through the lands set apart for the use of the Crow Indians."\textsuperscript{335} As in \textit{Strate}, Congress acted within its plenary power\textsuperscript{336} to bestow rights to a parcel of land upon a non-Indian party, thereby limiting the tribe's rights to the same land.\textsuperscript{337}

The Estates argued that since the tribal road crossed the easement, the crossing is tribal land under the \textit{Montana} Rule.\textsuperscript{338} The court disagreed, stating that the fact that the railroad crossed a tribal road did not mean that the easement became tribal land at the crossing.\textsuperscript{339} Under the Congressionally granted right-of-way, the Tribe did not reserve the power to exercise jurisdiction over the right-of-way.\textsuperscript{340} Therefore, the Crow Tribe has no jurisdictional power.\textsuperscript{341}

Additionally, the Estates argued that the tribe's power to tax the crossing gives the tribe the power to adjudicate civil matters arising from the crossing.\textsuperscript{342} The court disagreed stating the power to tax is broader than the power to adjudicate a matter, therefore, the right to tax is not dispositive to the issue of jurisdiction.\textsuperscript{343} The true threshold test to determine if the tribe has the right to adjudicate is whether Congress has given express authorization to the tribes.\textsuperscript{344} Since there is no sign of \textit{express} congressional authorization granting the tribes the right to obtain civil jurisdiction over the crossing, the railroad crossing is non-Indian fee land.\textsuperscript{345}

Next, the court examined whether the exceptions of the \textit{Montana} Rule applied to the case at hand.\textsuperscript{346} The first exception, that there must be a consensual relationship, was

\begin{itemize}
  \item \textsuperscript{335} \textit{Id.} at 1063 (\textit{quoting} Pub. L. No. 50-134 § 1, 25 Stat. 660 (1889)).
  \item \textsuperscript{336} \textit{LYONS}, supra note 5, at 334 (1992). Plenary power is described as the evolution, through case law and Acts of Congress, of the idea that an Act of Congress supercedes any Indian treaty provision. It was created in the late 1880's after Congress passed an act terminating their ability to make treaties with tribes. \textit{Id.}
  \item \textsuperscript{337} \textit{Red Wolf}, 196 F.3d at 1063.
  \item \textsuperscript{338} \textit{Id.}
  \item \textsuperscript{339} \textit{Id.}
  \item \textsuperscript{340} \textit{Id.}
  \item \textsuperscript{341} \textit{Id.}
  \item \textsuperscript{342} \textit{Id.}
  \item \textsuperscript{343} \textit{Id.} at 1063-64.
  \item \textsuperscript{344} \textit{Id.} at 1063.
  \item \textsuperscript{345} \textit{Id.}
  \item \textsuperscript{346} \textit{Id.} at 1064.
\end{itemize}
deemed not to apply. The rule states that a tribe retains some forms of civil jurisdiction if "a Tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements."  

The Estates argued that a consensual relationship existed because Congress did not have the power to grant the right-of-way without tribal consent. The court stated that this is correct, but only because Congress allowed the President to require tribal consent at his discretion as a condition for granting the right-of-way. In Strate, the court found this was simply Congressional policy, and did not limit Congressional power in any way. Therefore, Congress had a right to transfer ownership of the Crow land without the consent of the Crow tribe. Thus, the court argued, there was no consensual relationship.

The second exception examined by the court allows tribal jurisdiction over nonmembers when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." The Estates claimed that the women's deaths deprived the tribe of potential council members, teachers and babysitters. However, in Strate, the Court found that an interest in public safety, and the life of a tribal member, is not enough to satisfy the second exception. The court rejected the Estates argument that the special force of the interconnected tribal culture results in tribal harm if even one member is lost. Since the Estates failed to

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347. *Id.*
348. *Id.* (citing Montana v. United States, 450 U.S. 544, 565-66.).
350. *Id.* (citing § 3, 25 Stat. 660 (Emphasis added)).
352. *Red Wolf*, 196 F.3d at 1064. It seems the Court is saying that it is OK that Congress did not get the consent of the tribes before taking away their land. In fact, the court states it will uphold the United States act of taking the land without payment.
353. *Id.* at 1064 (quoting Montana, 450 U.S. at 566.).
355. *Id.* at 1065 (citing Strate, 520 U.S. at 458-9.). This goes to the importance of such people in a tribal community. By failing to recognize the importance of the roles of tribal members, the court failed to recognize the value of tradition tribal roles. Instead, the court held the tribe accountable to the test of what are important social values in the United States. This fails to promote the social policy of advancing the tribal community.
plead any other damages, the second exception was not satisfied.\textsuperscript{357} Therefore, the court ruled that the district court was correct in ruling that the Crow court did not have jurisdiction to hear this case.\textsuperscript{358}

V. HOW THE COURT FAILED TO DISTINGUISH \textit{RED WOLF},
THOUGH IT COULD HAVE EASILY DONE SO

The Ninth Circuit failed to distinguish \textit{Red Wolf} from \textit{Strate}. In doing so, the court has effectively altered the factors of the \textit{Strate} Test, refusing to distinguish between an easement purchased with a contract in 1970 and an easement taken by treaty in 1889. It also failed to recognize that the tribe was protected by a statute and failed to interpret the two exceptions to the \textit{Montana} Rule in ways that would promote tribal sovereignty.

The Ninth Circuit has held that the \textit{Strate} decision set up a five part test: 1) there was legislation creating the right-of-way; 2) whether the right-of-way was acquired with the consent of the tribe; 3) whether the tribe had reserved the right to exercise dominion and control over the right-of-way; 4) whether the land was open to the public; and 5) whether the right-of-way was under state control.\textsuperscript{359} The Ninth Circuit did away with the last two of the five factors. The railroad easement was not open to public use, only use by the railroad, and the right-of-way was not under state control.

First, the highway in \textit{Strate} was used for public transportation.\textsuperscript{360} In contrast, the railroad crossing in \textit{Red Wolf} was an easement not used by the state, but by a private company, Burlington Northern.\textsuperscript{361} The train tracks were not being used for public transportation since Burlington Northern does not have passenger service.\textsuperscript{362} This is important because the policy behind the ruling in \textit{Strate} was that unsuspecting nonresidents of the reservation driving along the highway would

\textsuperscript{357} Id.
\textsuperscript{358} Id.
\textsuperscript{359} Big Horn Elec. Coop. Inc. v. Adam, 219 F.3d 944, 950, (\textit{citing} Montana Dep't of Transp. v. King, 191 F.3d 1108 (9th Cir. 1999)).
\textsuperscript{360} \textit{Strate}, 520 U.S. at 442-43.
\textsuperscript{361} \textit{Red Wolf}, 196 F.3d at 1062.
\textsuperscript{362} BNSF \textit{Company Profile} (visited July 7, 2001) <http::/www.bnsf'commedia/html/company_profile.html> This is a profile of the Burlington Northern and where it obtains its general revenues. Passenger service is not listed.
not realize they could be brought to tribal court for driving on a state road within the reservation. This policy was to protect such people. In Red Wolf, there were not any unsuspecting non-Indians to protect. Based on the amount of cases between the railroad and the tribes, it is fair to say that the railroad is well aware of the possibility of being taken to tribal court.363

The second part of the test that was not applied by the court was the requirement that an easement be state maintained. In Red Wolf, the easement was not state maintained, but maintained by Burlington Northern for Burlington Northern's purposes.364 In Strate, the fact that the highway was state owned and maintained went to the same policy of protecting an unsuspecting nonmember from tribal court. The court could have easily distinguished Red Wolf by maintaining the factors in Strate. It is troubling that the Ninth Circuit is not following the United States Supreme Court.

Aside from not altering Strate, the court could have distinguished Red Wolf on other grounds. First, unlike the highway in Strate, there was a statute that protected the rights of Indians when a railroad easement is granted on the land.365 The court should have held that in cases in which the rights of the tribe are protected by a statute the relevant tribal court maintains jurisdiction to hear the case. This holding would have allowed the tribes the power to enforce rulings against private defendants such as railroad companies. As a matter of policy, the tribe should be able to force private defendants such as railroad companies to maintain the crossings or other easements on their reservations.

Second, the Ninth Circuit held that neither of the exceptions to the Montana Rule applied to Red Wolf. With a slightly broader reading, either one of the exceptions could have easily been satisfied. The first exception states that a consensual relationship is established through contract and business

363. Westlaw search conducted on June 18, 2001 found 400 documents where Burlington Northern had been a party to a law suit. Four hundred (400) is Westlaw's automatic shut off point. There are probably many more cases with Burlington Northern as a party. This search was conducted under party name “Burlington Northern Railroad Company” in the federal court database (ALLFEDS).

364. Red Wolf, 196 F.3d at 1062-63. The court believed this argument did not hold because the tribes failed to reserve dominion or control over the right-of-way when the right-of-way was created, in 1889.

365. Id. at 1063. (citing §3, 25 Stat. 660) (operation of such railroad shall be conducted with due regard for the right of the Indians).
agreements.\textsuperscript{366} The Ninth Circuit held that because the Crow tribe did not consent to the land being taken away, there was no consensual relationship.\textsuperscript{367} This is illogical. The Supreme Court has stated that the purposes of creating jurisdictional rules are to preserve and protect Indian sovereignty.\textsuperscript{368} However, to interpret the rule, the Ninth Circuit used the concept of plenary power, which allowed Congress to destroy Indian sovereignty.\textsuperscript{369} If the court is supposed to follow the language of the United State Supreme Court, and retain and protect sovereignty, then why did it use plenary power?

The only logical answer is that the court is saying one thing and doing another. The Ninth Circuit should have advanced the purpose of the \textit{Montana} Rule to promote Indian sovereignty by adding a third exception to the \textit{Montana} Rule, encompassing land that was taken without the consent of the tribes and given to non-Indians. The court could have also used the rule found in many tribal cases, and given deference to the understanding of the tribes at the time the right-of-way was created.\textsuperscript{370}

The court's narrow reading of the second exception is even more illogical. This exception was created for the purpose of allowing tribes to protect their tribal interests - the political integrity, economic security and the health and welfare of the tribal members on the reservation - from non-Indian actions.\textsuperscript{371} In \textit{Red Wolf}, the Congressional statute that granted the railroad company the easement stated that it was the railroad's responsibility to maintain all of the crossings and stations within the easement.\textsuperscript{372} Because of the railroad's alleged failure to do this, the crossing on the Crow reservation became unsafe and three Crow women died. The Estates claimed that the women's deaths deprived the tribe of potential council members,

\begin{itemize}
\item \textsuperscript{366.} Montana v. United States, 450 U.S. 544, 564 (1981).
\item \textsuperscript{367.} \textit{Red Wolf}, 196 F.3d at 1063.
\item \textsuperscript{368.} National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845. 856 (1985).
\item \textsuperscript{369.} \textit{Red Wolf}, 196 F.3d at 1064.
\item \textsuperscript{371.} \textit{Montana}, 450 U.S. at 566.
\item \textsuperscript{372.} Pub. L. No. 50-134 \S 1, 25 Stat. 660 (1889).
\end{itemize}
teachers and babysitters. Because of the particularly close nature of the Crow tribe, such a loss struck to the heart of their community. There is little question, from the view of the tribe's concept of tribal welfare, that the unsafe condition of the railroad posed an imminent threat to the health and welfare of the tribe.

However, the Ninth Circuit held that this case did not satisfy the second exception. The Supreme Court found that the exception would be too broad if courts allowed for the threat to public safety to satisfy the exception. This analysis of public safety was established in Strate, in which there was a normal collision of two cars on the highway. There was no evidence that the state was negligent in maintaining the road, thereby creating an additional danger. The Court said that Strate was just a simple case of an everyday threat to public welfare, a typical car accident. In its dicta, the Court suggested that it was this type of threat to public welfare that would not satisfy the exception. Red Wolf is not the normal case.

In Red Wolf, Burlington Northern's negligence created an uncommon threat to public safety. It is not often that a car will become hung up on the railroad tracks because the tracks are poorly maintained. Nor is it normal that a train will not slow down when a car, stopped on the tracks, is in plain view for a great distance. This is not the type of public safety threat the Supreme Court was addressing in Strate. The Ninth Circuit should have taken a closer look at Strate and distinguished Red Wolf on the basis that this was an uncommon threat to public safety and tribal welfare.

The Ninth Circuit held that an easement granting highway rights is exactly the same as an easement granting railroad rights because plenary power to grant the land exists in both situations. The reality is that there is an important distinguishing feature between the two. The easement in Strate was bought in 1970. The easement in Red Wolf was taken by treaty in 1889. The two are vastly different from each other.

373. Red Wolf, 196 F.3d at 1065.
374. Id. (interpreting Strate v. A-1 Contractors, 520 U.S. 438, 447 (1997)).
375. Strate, 520 U.S. at 457.
377. Id.
378. Id.
The last thing the court did was fail to enforce the Tribal Exhaustion Rule. The rule states that the federal district court must wait until all available remedies have been exhausted in the tribal court system before review. This policy was based on Congress' commitment "to a policy of supporting tribal self-government and self-determination." Instead of following the Tribal Exhaustion Rule, the court created another exception to the rule. Now tribal exhaustion is not required when "tribal court jurisdiction does not exist under Montana and Strate." By refusing to enforce the tribal exhaustion rule, the court failed to support tribal self-government. By creating another exception, the court eroded self-government.

VI. IS THE REASON BEHIND THE NINTH CIRCUIT DECISION A PROBLEM OF ADHERING TO ANTIQUATED PUBLIC POLICY?

The Ninth Circuit's legal analysis of the federal government's power is technically correct under common law. Congress does have the right to grant land without consent based upon the Plenary power granted to Congress in the late 1800's. The courts have the right to interpret Montana and the Exhaustion Rule as narrowly or broadly as they wish. There are no checks, as there are in the Constitution or current legislation, that expressly state how to interpret rules of tribal jurisdiction. Although current legislation speaks broadly of "a policy of supporting tribal self-government and self-determination," the courts and Congress are free to create rules that they see as supporting this policy.

The Supreme Court has unequivocally stated that limiting the jurisdiction of Indians over non-Indians does not conflict with the government's policy of protecting Indian sovereignty, since the policy only has to do with protecting the right of the tribe to try tribal matters (e.g. tribe adoptions). However, in past cases, the Court has stated that tribal sovereignty is a much broader theory, covering safety, welfare, contractual relations and even tribal self-government. A closer look at

382. Id. at 856.
384. Id. at 1064.
387. National Farmers, 471 U.S. at 856; Montana v. United States, 450 U.S. 544,
Red Wolf shows that the narrow reading of the Montana Rule established by the Supreme Court has tied the hands of the tribes so tightly, they can no longer protect the welfare and safety of the tribe. This result does not reflect the social policy to which the majority of people in Montana adhere.

One of the duties that most courts always apply to their rulings is to make the interpretation of the law reflect the realities of societal thought. This is even more apparent with Indian Law. Looking back on the history, it is readily apparent that the laws passed by Congress, and the cases decided by the court, directly reflected the societal needs of the time. When the Constitution was created, the tribes were treated as sovereign nations. The societal policy was two fold: 1) there was no need for the land at the time because the population of the United States was small; and 2) the United States wanted to remain at peace with the tribes, and even procure their aid, since the United States was already in the middle of a war with England.

This policy changed when the United States population began to grow. The societal policy toward the Indians shifted to the removal of Indians from the lands that “non-savages” needed to raise god-fearing families, and assimilating those savages into God-fearing people. From assimilation, there have been many societal shifts, including the 1960’s and 70’s in which Indian sovereignty became an important part of the Civil Rights Movement. People were ashamed of how they had treated the American Indian population.

It is obvious that courts are still interpreting tribal jurisdiction based on society’s view of Native American relations in the 1800’s rather than today. The Ninth Circuit’s ruling in Red Wolf was based on the ability of Congress, in the late 1800’s, to take Indian land without the permission of the Indians. Society, specifically Montanans, does not stand for this today.

At a recent Senate hearing held in Montana on tribal jurisdiction, there was an outcry by the people of Montana, Indians and non-Indians, against a bill that would have

388. See discussion supra Part II.
389. COHEN’S HANDBOOK, supra note 1, at 58-59.
390. Id. at 58.
391. Id. at 128-29.
392. See generally COHEN’S HANDBOOK, supra note 1, at 180-88.
eliminated tribal civil jurisdiction.\textsuperscript{394} Many non-Indians who owned property in fee simple on the reservation were baffled as to why the government had already taken away the right of the tribe to adjudicate civil matters over them.\textsuperscript{395} They were horrified at the proposed bill that would have eliminated all civil jurisdiction in the tribe. One family wrote, "We have found the [Confederated Salish and Kootenai] tribe to be trustworthy [and] sympathetic to our plea."\textsuperscript{396} Another wrote, "there are many non-Indians here who regard the presence of the tribes not as a problem, but a great richness, not as something to hate, but to love. We believe jurisdiction can be worked out in a far less acrimonious manner."\textsuperscript{397} All of the newspaper editorials were unequivocally against this bill.\textsuperscript{398} One was titled, "We need Sovereignty, not Racism."\textsuperscript{399} Out of the thousands of speeches, letters, and e-mails submitted to the hearing committee, some supported the bill, while thousands were against it.\textsuperscript{400} Most of the people who supported United States Senator Conrad Burns (R-MT) only supported his attempt to end the jurisdictional problems that courts have created, not the actual bill.\textsuperscript{401}

The Ninth Circuit's holding in \textit{Red Wolf} failed to reflect the societal changes of the last 50 years when it further encroached upon tribal jurisdiction by holding that a railroad crossing falls within the \textit{Montana} Rule.\textsuperscript{402} The court also failed in its analysis when it held that neither of the two exceptions to the rule applied to the \textit{Red Wolf} case.\textsuperscript{403} Not only was this decision antiquated, but it was illogical as well.

\textbf{VII. THE EFFECTS OF RED WOLF ON THE COURTS}

Already, the effects of \textit{Red Wolf} can be seen. A Montana case, \textit{Big Horn County Electric Cooperative, Incorporated v.}
Adams, using the court’s logic in Red Wolf, held the Crow tribe does not have the right to tax property within the reservation if it is held in fee simple by a non-member.

In that case, Big Horn Electric held property in fee simple within the Crow reservation boundaries. The property was used as a right-of-way to wire all of the Crow customers and supply them with electricity. The Crow tribal counsel adopted a resolution that assessed a 3% tax on the full fair market value of all “utility property” within the boundaries of the reservation. Section 219 of the resolution prohibited the utility from passing the amount of the tax onto its Crow customers. Instead, the tax payer is required to “treat the tax as ‘an imbedded cost or revenue requirement.’”

In December 1993, the tribe sent Big Horn the first bill for the tax. In April 1994, Big Horn began charging its Crow customers in order to pay the tax. The charge was listed as the “Crow utility tax” on the bill. It charged each customer the pro rata share of the utility tax.

The tribe filed an action in tribal court to enjoin Big Horn from passing the tax to its Crow customers. Big Horn counterclaimed, challenging the legality of the prohibition and alleging that the tribe had surpassed its regulatory jurisdiction when it taxed land held in fee simple by nonmembers. The tribal court granted summary judgment for the tribe and issued a permanent injunction that prohibited the utility from passing the tax onto the Crow customers. Big Horn appealed to the Crow Court of Appeals, which affirmed the trial court’s holding.

Big Horn filed a complaint in federal district court, seeking injunctive and declaratory relief. The Defendants were composed of tribal members—including the tax commissioner,
the members of the Crow Public Utility Commission, and the judges of the Crow tribal court.417 Big Horn also sought to recover all of the unlawfully paid taxes. The district court granted summary judgment in favor of Big Horn, holding that the tribe could not assess a tax on a federally granted right of way.418 The district court ordered a permanent injunction, enjoining the tribe from any future assessment of the tax.419 They also ordered the tribe to refund all of the utility tax collected thus far.420

The tribe appealed to the Ninth Circuit. The major issue in this case was whether the land held by the utility was the equivalent to land held in fee simple.421 The court looked at five factors, established in Strate v. A-1 Contractors and clarified in Burlington Northern v. Red Wolf:

1) the legislation creating the right-of-way; 2) whether the right-of-way was acquired with the consent of the tribe; 3) whether the tribe had reserved the right to exercise dominion and control over the right-of-way; 4) whether the land was open to the public; and 5) whether the right-of-way was under state control.422

These five factors are used to test whether the congressionally granted right of way is the equivalent of land held in fee simple. This test is referred to as the Strate Analysis.423

The court found that the first three factors easily applied to the land. Big Horn's easements were created by the same legislation that created the easements in Strate, therefore, the legislation was fine.424 The tribe gave its consent, and it failed to reserve the right to exercise dominion and control over the right-of-way.425

The defendants argued that the utility's land was not open to the public, nor was it under state control.426 The court agreed. However, the court determined that the two factors did not have to be applied to this case based on Red Wolf.427 In Red

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417. Id. at 949 (citing Strate v. A-1 Contractors, 520 U.S. 438 (1997)).
418. Id.
419. Big Horn, 219 F.3d at 949.
420. Id.
421. Id.
422. Id. at 950 (citing Montana Dep't of Transp v. King, 191 F.3d 1108 (9th Cir. 1999)).
423. Big Horn, 219 F.3d at 950.
424. Id.
425. Id.
426. Id.
427. Id.
Wolf, the land held by the railroad was not public, nor was it held by the state, but it was still the equivalent of a fee simple. The court found that the facts in this case were indistinguishable from the facts in Red Wolf. Therefore, the court found that, like Red Wolf, the last two factors in Strate do not apply in this case. If the court in Red Wolf had ruled to distinguish the case on one or both of these two factors, Big Horn would have been decided differently. This is the crux of the court's decision in Red Wolf.

The defendants argued that unlike Red Wolf, this case deals with a tribe's legislative and regulatory authority. Therefore, the Strate analysis should not even apply to this case. The court found the difference meaningless. According to Strate, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." The court read this to imply that the Strate Analysis is equally applicable to cases dealing with a tribe's regulatory and legislative authority, as well as adjudicative jurisdictional authority.

The court held that the land was held in fee simple by Big Horn. It went on to conclude that according to the Montana Rule, the tribal courts do not have the regulatory and legislative authority to tax the property held by Big Horn. To come to this conclusion, the court held that neither exception to the Montana Rule applied.

Regarding the first exception, the court held that Big Horn obviously created a consensual relationship with the tribe by entering into contractual relationships with tribal members in order to supply electricity. However, the court held the exception only allowed the tribe to tax the activities of the entity, not the property of the entity. Therefore, the tax did not fall within the exception.

In regards to the second exception, the tribe argued that the welfare and security of the tribe are directly affected by the

428. Id.
429. Id.
430. Id.
431. Id. (citing Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997)).
432. Big Horn, 219 F.3d at 950.
433. Id.
434. Id. at 951-52.
435. Id. at 951.
436. Id.
437. Id.
The tax goes to provide necessary services for the tribe, therefore, the tribes' welfare relies upon the tax. The court found that the defendants reading of the exception was far too broad. In the other cases, the court has held that the exception should be construed only very narrowly. If the court allowed the tax to fall under the second exception then "Montana's second exception would effectively swallow Montana's main rule, because virtually any tribal tax would fall under the second exception." This would conflict with the Supreme Court's statement that tribal jurisdiction is limited. Therefore, under the Montana Rule and the Strate Analysis, the tribe does not have the authority to tax the property of Big Horn.

The court did one small favor for the tribe. It reversed the district courts decision that the tribe had to reimburse Big Horn for all of the taxes collected. However, the overall affect this case may have on all of the tribes in Montana is overwhelming. The tribes rely on this money for a fair amount of income. Many social programs throughout the Ninth Circuit are funded by such taxes on utility lines. This does not hold with the policies of self-determination.

VIII. CONCLUSION

The Ninth Circuit should have distinguished Red Wolf from other United States Supreme Court cases. By not distinguishing Red Wolf, the Ninth Circuit changed the precedent set forth by the Court. The results are unacceptable. Only by keeping to tenets which allow tribes jurisdiction over important tribal matters can the courts truly say they are promoting self determination.

Tribal self-determination can be achieved, but only by looking at our nation as a whole, not just through the eyes of middle-upper class America. This would require the courts to take a closer look at what it means to be a member of a tribe. Only by obtaining an understanding of the tribal community will the courts get a sense of what really might affect the

438. Id.
439. Id.
440. Id. (citing Strate v. A-1 Contractors, 520 U.S. 438, 448-49 (1997); County of Lewis v. Allen, 163 F.3d 509, 515 (9th Cir. 1998)).
441. Big Horn, 219 F.3d at 951.
442. Id. at 951-52.
443. Id. at 954.
"political integrity, economic security, health or welfare," of a tribe. Until each judge takes this look, any ruling they make is made on the basis of his/her own knowledge or experience. Thus, the ruling will promote each judge's idea of what a tribe should be, not what a tribe really is. This is assimilation; making the tribe fit the judge's own experience of community.

The members of the Ninth Circuit are no different from the others. This is shown by the many different options the court had to distinguish Red Wolf from other tribal jurisdiction cases. First, an easement purchased by contract in the 1970's was significantly different from an easement taken by treaty in 1889. Second, unlike the highway in Strate, the railroad easement was not under state control. Third, the Crow tribe was protected by a statute. Fourth, the first or second exceptions of the Montana Rule could have been read in slightly broader terms. For the first exception, there was an implicit consensual relationship between the tribe and government when the land was taken by treaty. Another option was to create a third exception to the Montana Rule in cases where a tribe was not given the option to consent to the taking. Under the second exception, it is easy to see that the tracks posed an imminent threat to the health or welfare of the tribe since three tribal members died because of the failure to maintain the tracks. Last, a car becoming stuck on the railroad tracks is distinguishable from a common public welfare risk of a collision on a highway.

Although the court could have done any one of the number of things mentioned above, it chose not to. Instead, it broadened the Montana Rule, and allowed a case which heavily involved the Crow tribe to be removed outside their jurisdiction. Therefore, in Red Wolf, the Ninth Circuit continued the downward slide of tribal self-determination in the United States. It is apparent from Big Horn that the trend is going to continue unless drastic measures are taken by the federal court system or by Congress. The various members of the courts should awake to the true effects of their decisions, and take steps to stop their newest form of assimilating tribes into their idea of community.