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Thomas J. Lynaugh
Attorney, Cate, Lynaugh and Fitzgerald, Billings, Montana

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DEVELOPING THEORIES OF STATE JURISDICTION OVER INDIANS: THE DOMINANCE OF THE PREEMPTION ANALYSIS

Thomas J. Lynaugh*

I. INTRODUCTION

The United States Supreme Court and the Montana Supreme Court decided five cases in 1976 which bear directly on the nature and scope of state jurisdiction over the seven Indian reservations in Montana.

The United States Supreme Court decisions, Fisher v. District Court¹ and Moe v. Confederated Salish and Kootenai Tribes,² originally arose in Montana. They refine prior theories on Indian jurisdiction that were most characteristically described as "befuddled."³ The Court's decision in Bryan v. Itasca County⁴ complements these cases by providing rules of construction for interpreting congressional enactments purporting to confer state jurisdiction over Indian reservations.

At the state level, the Supreme Court of Montana, in State ex rel. Old Elk v. District Court⁵ and Little Horn State Bank v. Stops,⁶ formalized a novel approach to state jurisdiction over Indians which it had begun to develop in its previous cases. The theory, which is premised on the notion that state courts must fill any vacuum in jurisdiction arising because of tribal court inaction, may be best denominated as "Jurisdiction by Default."

This article will review the historical development of theories of Indian jurisdiction and then will examine the recent decisions of the United States Supreme Court to determine whether they provide a consistent theoretical approach to the question of state jurisdiction over Indian reservations. In this connection, particular attention will be directed to the continuing vitality of the doctrine of Williams v. Lee,⁷ which purported to establish a rule for determining whether states had jurisdiction over transactions involving Indi-

* Partner of the law firm of Cate, Lynaugh and Fitzgerald, Billings, Montana. General counsel for the Crow Tribe of Indians since April 1974. J.D. 1968, Boston College Law School. The author is indebted to Jeff Essman of the MONTANA LAW REVIEW for his valuable assistance in the preparation of this article.

ans and non-Indians. Finally, this article will critique the recent decisions of the Montana Supreme Court and the practical and theoretical base upon which the newly-developed concept of Jurisdiction by Default rests.

II. A Review of Theories Concerning State Jurisdiction over Indian Lands and People

A. Analytical Premises and Changing Congressional Policies in Indian Law.

Any analytical approach to Indian jurisdiction will be valueless unless it recognizes the different types of jurisdiction involved and the importance of the varying congressional attitudes toward the Indian through the years.

Cases arising in Montana have dealt with all three types of jurisdiction: personal jurisdiction over the Indian party, subject matter jurisdiction over the litigated controversy, and jurisdiction or power of the State to impose its general regulatory authority on lands and people within the exterior boundaries of an Indian reservation. In viewing the theories and the cases, it is important to distinguish the different questions of jurisdiction that arise. A particular case could require consideration of State-Indian jurisdiction of all three types.

For example, a reservation Indian incurs a loan with a non-Indian creditor off-reservation and defaults in payments on the loan. The creditor brings an action in state court, thereby raising a question of subject matter jurisdiction. Service of the summons and complaint takes place at the reservation home of the Indian debtor thereby raising a personal jurisdiction issue. Assuming a court decided those two issues adversely to the Indian debtor and rendered a judgment against him, the third jurisdictional question, the right of the State to impose its general regulatory authority on the Indian or his reservation property, would arise when the creditor attempts to enforce judgment by attachment, garnishment, or execution under state process within the boundaries of the reservation.

Changing congressional policies toward Indians have affected the development of State-Indian jurisdictional law. As an infant nation, the United States negotiated Indian treaties to secure peaceful borders. After the British left the continent following the War of 1812, however, the tribes lost much of their bargaining power and

the negotiations became increasingly one-sided.\textsuperscript{11} Congressional treatment of Indians then became not a systematic policy, but a series of ad hoc solutions to momentary problems with little thought to long-range consequences.\textsuperscript{12}

A policy of separation began in the 1830's with enactment of a law providing for the removal of Indians to lands west of the Mississippi.\textsuperscript{13} Later, after most of the tribes settled on reservations, Congress ended its treaty power with the Indians.\textsuperscript{14} Congressional enactment in 1887 of the General Allotment (Dawes) Act evidenced a shift from the policy of separation to a policy of assimilation.\textsuperscript{15}

The policy of assimilation favored the gradual dissolution of the unique trust status accorded Indians and Indian lands and the assumption of full jurisdiction by the states. The Dawes Act provided for individual allotments of reservation trust lands to tribal members. After a specified period of trust ended, the Indian allotee would receive a land patent and become a citizen subject to the State's jurisdiction. Land within reservation boundaries which exceeded that required for the allotments to Indians was opened for non-Indian settlement. The implementation of this Act led to loss of Indian control over land and resources within reservation boundaries. The resultant influx of non-Indians onto reservation land in large part created the complex social and legal problems of Indian reservations which the courts face today.\textsuperscript{16}

Congressional adoption in 1934 of the Wheeler-Howard Indian Reorganization Act\textsuperscript{17} reversed the trend toward assimilation. Intending to preserve Indian government and the Indian land base, the Act restored land to tribal ownership and provided for organization of tribal governments under written constitutions. Less than twenty years later, however, the pendulum swung again toward as-

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\textsuperscript{12} Comment, \textit{The Indian Battle for Self-Determination}, 58 \textit{CALIF. L. REV.} 445, 454 (1970). This article contains a full examination of the history of congressional regulations of Indian affairs, and the corresponding judicial response, from which this brief treatment is drawn.

\textsuperscript{13} Act of May 28, 1930, ch. 148, 4 Stat. 411.

\textsuperscript{14} Act of March 3, 1871, ch. 120, 16 Stat. 544.


\textsuperscript{16} The Dawes Act scheme of allotments also resulted in a checkerboard pattern of land status where tribal trust land, individual allotted Indian trust land, Indian owned fee-patent land, and non-Indian owned fee-patent land are intermingled within reservation boundaries. The Supreme Court has rejected attempts to base state jurisdiction on the status of land because of the inherent problems of "checkerboard jurisdiction" and contrary congressional policy. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 478 (1976); Seymour v. Superintendent, 368 U.S. 351 (1962).

similation. Enactment of Public Law 28018 extended the criminal and civil jurisdiction of certain States to Indian reservations. The Act also permitted any other States to assume jurisdiction over Indian country by complying with certain procedures. During the same period in the early 1950's, Congress furthered its policy of assimilation by terminating the special relationship between the federal government and the tribal Indians of certain reservations.

Because the termination of reservations met with a strong negative reaction, present congressional and executive policy has retreated from the totally assimilative policy of the Termination Acts. Recent legislation most directly affecting this issue is the Indian Civil Rights Act of 1968. Although the Act requires tribal governments to conform with many national standards of governmental behavior, it does reaffirm certain aspects of tribal sovereignty. Congress replaced section seven of Public Law 280 with provisions requiring tribal consent to any state assumption of civil or criminal jurisdiction in Indian country. Furthermore, Congress allowed any

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20. Section 7 of Public Law 280 provides: "The Consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of action or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the state, shall, by affirmative legislative action obligate and bind the state to the assumption thereof." Section 6 of the Act also provided federal consent to constitutional amendment or statutory repeal of restrictive provisions of enabling acts of the States so that civil and criminal jurisdiction could be assumed. In accordance with Section 7 of this Act, and pursuant to REVISED CODES OF MONTANA (1947), §§ 83-801 to 806, Montana assumed criminal jurisdiction over the Flathead Indian Reservation. See State ex rel. McDonald v. District Court, 159 Mont. 156, 496 P.2d 78 (1972). There has been no such statutory assumption of jurisdiction, either civil or criminal, over any of the remaining Montana reservations.
Special Election. State jurisdiction acquired pursuant to this title [25 U.S.C. §§ 1321-1326] with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of Interior shall call such special election under such rules and regulations.
State to return civil or criminal jurisdiction of an Indian reservation to the federal government. The Act specified that a State could amend its constitution to remove any legal impediment to the assumption of jurisdiction. The Indian Civil Rights Act and other recent enactments show a strong congressional commitment to tribal autonomy.

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as he may prescribe, when required to do so by the tribal council or other governing body or by 20 per centum of enrolled adults.

Retrocession of Jurisdiction by State. 5(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18 of the United States Code, section 1360 of Title 28 of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

Notwithstanding the provisions of any enabling act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this title. The provisions of this title shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

A legal impediment to the exercise of state jurisdiction over Indian reservations exists in Montana. The federal government’s exclusive jurisdiction over Indian lands was recognized as early as 1864 in the Organic Act of the Territory of Montana. The Act of May 26, 1864, 13 Stat. 676, authorizing formation of the state, specifically provides that the State of Montana lacks jurisdiction over Indian land within the State until the title of the Indian or Indian Tribe has been extinguished. Until such extinguishment of title, the lands involved are subject to absolute jurisdiction and control of the Congress of the United States. Act of February 22, 1889, 25 Stat. 676. Ordinance No. 1 Section II of the 1889 Montana Constitution expressly ratified and accepted the foregoing jurisdictional exclusion of Indian lands as provided in the Enabling Act.

The 1972 Montana Constitution reaffirmed the provisions of the Organic Act in Article I:

All provisions of the Enabling Act of Congress (Approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the State of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the Congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

Therefore under the Indian Civil Rights Act, Montana would have to take two steps to assume jurisdiction over other reservations. First, the provisions of the Organic Act must be amended to remove the impediment of the jurisdictional disclaimer. Second, a majority of the enrolled adult reservation Indians must vote to accept State jurisdiction.

B. Judicial Canons of Construction

To meet changing congressional policy, the Supreme Court, recognizing the federal trust responsibility to Indians\(^{28}\) and the unequal bargaining power of tribes, has developed canons of construction as analytical aids. In construing treaties,\(^ {29}\) the Court has developed three primary rules:\(^{30}\) (1) ambiguous expressions are resolved in favor of the Indian parties;\(^ {31}\) (2) Indian treaties must be interpreted as the Indians themselves would have understood them;\(^ {32}\) and (3) Indian treaties must be liberally construed in favor of the Indians.\(^ {33}\) A corollary to these canons is the doctrine that Indian treaties are not a grant of rights to tribes, but a grant of rights from them.\(^ {34}\)

The last of the three canons has been logically applied in the area of statutory construction as well. In that context, the rule of construction is that “statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor.”\(^ {35}\) The Supreme Court recently has been inclined to construe legislation affecting reservation Indians “in light of intervening legislative enactments.”\(^ {36}\) Although that may not be properly

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29. The trust relationship and reservation status can also be created by executive orders, agreements, statutes, and withdrawals by the Secretary of Interior. The same canons of construction used for treaties are applied to situations involving alternative methods of reservation recognition. Wilkinson & Volkman, Judicial Review of Treaty Abrogation, supra note 11, at 615-16. See also Francisco v. State, ___ Ariz. ___, 556 P.2d 1, 3-4 (1976).


34. Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation, supra note 11, at 619.

35. Northern Cheyenne Tribe v. Hollowbreast, 96 S.Ct. 1793, 1797 n. 7 (1976); Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); Carpenter v. Shaw, 280 U.S. 363, 366 (1930); Choate v. Trapp, 224 U.S. 665, 675 (1912). An outgrowth of this rule of statutory construction is the doctrine applied to claims that reservations or Indian rights were terminated: a congressional determination to terminate must be expressed on the face of the act, or be clear from the surrounding circumstances and legislative history. DeCoteau v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481, 505 (1973). See also Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1967).

termed a canon of construction, it may develop into a significant tool of interpretation in light of an apparent congressional propensity for changing federal Indian policy.

C. The Notion of Tribal Sovereignty

In the early cases involving questions of the scope and extent of state jurisdiction, courts described Indian tribes as sovereign nations, subject by conquest and later by treaties to the regulations of the federal government. 37

In the notable and often quoted decision of Worcester v. Georgia, 38 Chief Justice Marshall, speaking for the Court, held that state statutes which attempted to regulate activities within the reservation were unlawful under the supremacy clause. After carefully analyzing the treaties to refute the "conquered subjects" theory of Justices Johnson and Baldwin in the earlier Cherokee Nation case, Marshall construed the treaties and the Indian Trade and Intercourse Acts as defining the Indian status as: "[D]istinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." 39 However, the Indian Trade and Intercourse Acts, like the Royal Proclamation of 1763 and the statutes of the Continental Congress, only dealt with land ownership, not self-government. Marshall thus went behind the language of the statute to discern a congressional purpose to safeguard tribal self-government as well as land ownership. 40

Since the evolution of the Worcester principle is discussed at length in the major treatises 41 on Indian law there will be no attempt to fully re-examine that development here. Felix Cohen best summarized the state of law after Worcester, but before the 1959 decision of the Supreme Court in Williams v. Lee: 42

37. In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the case which first outlined the guardian-ward theory of federal Indian relationships, the Supreme Court held that it lacked original jurisdiction because a tribe was not a foreign state within the meaning of that term in Article III of the Constitution. The Court relied on the past practice and dealings between the tribes and the young nation in deciding that the tribes would best be called "domestic dependent nations."
38. 31 U.S. (6 Pet.) 515 (1832).
39. Id. at 557.
42. 358 U.S. 217 (1959).
The whole course on the natures of Indian tribal power is marked by adherence to three fundamental principles:

1. An Indian tribe possesses, in the first instance, all the powers of a sovereign state.

2. Conquest renders the tribes subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government.

3. These powers are subject to qualification by treaties, and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.⁴³

_Worcester_ additionally stood for two broad propositions: (1) States have no inherent power to impose their laws on matters involving only Indians on Indian reservations; and (2) States have no inherent power to impose their laws with respect to matters involving non-Indians on the reservation.⁴⁴

With the passage of time and the changes in congressional policy towards Indians and Indian tribes, however, the notion of tribal sovereignty within reservation boundaries changed. One change created an exception to the _Worcester_ doctrine by allowing state jurisdiction over non-Indians in Indian country if its exercise did not interfere with the federal duty to protect Indians.⁴⁵ The second _Worcester_ principle, regarding non-Indians, was also modified to allow an Indian to bring a civil action in state court for actions committed by a non-Indian within the boundaries of an Indian reservation.⁴⁶ Unfortunately, some Montana cases have erroneously relied on this concept of Indian access to state courts because of federal and state citizenship to impose state jurisdiction over Indian reservations.⁴⁷

Some states also attacked the first broad proposition derived from _Worcester_, that states have no power over actions involving only reservation Indians. These States reasoned that, absent spe-

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⁴³. COHEN, _supra_ note 41, at 123.

⁴⁴. See Sullivan, _State Civil Power over Reservation Indians_, 33 MONT. L. REV. 291, 295-97 (1972), for a discussion of these propositions and subsequent judicial modifications.


specific congressional legislation in an area, a State was permitted to exercise jurisdiction.\(^{48}\) Thus, the usefulness of the concept of tribal sovereignty as an absolute bar to state jurisdiction declined.

The Supreme Court has recently delineated the use of tribal sovereignty in resolving State-Indian jurisdiction.\(^{49}\) After reviewing the course of decisions which have adjusted "notions of Indian sovereignty to take account of the state's legitimate interests in regulating the affairs of non-Indians,"\(^{50}\) Justice Thurgood Marshall stated the current view of the Supreme Court toward tribal sovereignty:

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\text{The trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption [citing cases]. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power [citing cases].}
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The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.\(^{51}\)

The Court thus relegated the concept of tribal sovereignty to a background position on which the specific treaties and statutes affecting a particular tribe are considered to determine the extent of state jurisdiction, if any.\(^{52}\)

**D. The Williams Infringement Test**

After the passage of Public Law 280 and the termination acts, the Supreme Court decided *Williams v. Lee*,\(^{53}\) a case involving subject matter jurisdiction of a state court over a debt action brought by a non-Indian against a reservation Indian for a debt incurred within the reservation. The Court attempted to rationalize the earlier cases and to create a method of balancing Indian interests in self-government and the federal responsibility toward Indian tribes with the limited, but legitimate state interest involved.

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48. Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957); Tenorio v. Tenorio, 44 N.M. 89, 98 P.2d 838 (1940). The validity of the reasoning of these cases is doubtful in view of the recent Supreme Court decisions examined later in this article. See pp. 82-92 infra. Vermillion was specifically overruled by Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973).


50. *Id.* at 171.

51. *Id.* at 172.

52. For discussion of the effect of tribal sovereignty on the mineral development of Indian reservations, see articles to be published in 22 *ROCKY MOUNTAIN MIN. L. INST.* See Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), for a decision supporting the exercise of tribal sovereignty over non-Indians within the reservation.

The result was not only a strong rejection of state jurisdiction over a debt arising within the reservation, but also the establishment of a test for determining when the State would have jurisdiction of matters within the Indian reservation. That test was stated as follows: “absent governing acts of Congress the question has always been whether state action infringed on the right of reservation Indians to make their laws and be ruled by them.”

Although the rule is easily stated, it has proven difficult to apply consistently. The *Williams* test has produced significant decisions protecting Indian self-government from interference by state jurisdiction, but it has also created many problems for advocates of Indian autonomy. The most paradoxical use of the *Williams* test, in light of its purpose to limit the exercise of state jurisdiction, is the out-of-context application of the test, combined with cases involving non-Indian and off-reservation situations, to support broad arguments that a State has jurisdiction over Indians on their reservations.

The *Williams* test has spawned some theories of Indian jurisdiction, including “residual jurisdiction” and “jurisdiction by default”, which, from the tribal viewpoint, are quite destructive to

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54. *Id.* at 223. Several statements made by the Court, often overlooked by proponents of state jurisdiction over Indian reservations, support the proposition that states, in general, have no such jurisdiction. For example: “Congress has also consistently acted upon the assumption that the states have no power to regulate the affairs of Indians on a reservation.” *Id.* at 211. Although the Court did not explicitly state that Congress had preempted state jurisdiction, it is possible that the concept of federal preemption underlay its reasoning and supported its result independently of its finding of infringement on tribal government. Note particularly the Court’s discussion of treaties and legislation, including Public Law 280. *Id.* at 220-23.

55. *Id.* at 221.

56. See, e.g., *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969); *Smith v. Temple*, 82 S.D. 650, 152 N.W.2d 547 (1967); *State ex rel. Adams v. Superior Court*, 57 Wash.2d 181, 356 P.2d 985 (1960). See also *Warren Trading Post v. Arizona Tax Comm’n*, 380 U.S. 685 (1965). While the Court found the application of an Arizona tax on a reservation trading post to be a burden and impliedly an infringement on Indian trading, the concept of federal preemption is clearly evident in the Court’s discussion of a comprehensive federal scheme: “These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.” *Id.* at 690.


tribal self-government. Another difficulty with the Williams test is that it provides no standard for measuring infringement on tribal self-government. Unfortunately, this has led to unsupported extensions of state jurisdiction over Indians and reservations.

In McClanahan v. Arizona State Tax Commission, the Supreme Court clarified "infringement", and limited the applicability of the Williams test. The Arizona court of appeals held that since the Arizona income tax applied only to individual Indians, there was no infringement with the collective right to tribal self-government. In rejecting that reasoning, the Supreme Court limited the Williams test to situations involving non-Indians.

Although the Court in Williams attempted to provide a useful guideline for determining the scope of state jurisdiction, time has shown that the test is largely unworkable because it cannot provide a consistent method for resolving Indian jurisdictional disputes. The infringement test has therefore been overshadowed by the clear emergence of the preemption analysis in more recent cases.

59. The use of the theory of "jurisdiction by default" discussed infra, pp. 79-81, infringes on tribal self-government because it is invoked by the Supreme Court of Montana when the tribe involved has not enacted a tribal code, consistent with state law, dealing with the particular problem that is the subject of the jurisdictional dispute.


63. The Court stated:

[We] are far from convinced that when a state imposes taxes upon reservation members without their consent, its action can be reconciled with Tribal self-determination. But even if the State's premise were accepted, we reject the suggestion that the Williams test was meant to apply in this situation. It must be remembered that cases applying the Williams test have dealt principally with situations involving non-Indians. See also Organized Village of Kake v. Egan, 369 U.S. at 75-76. In these situations, both the Tribe and the state could fairly claim an interest in asserting their respective jurisdictional claims. The Williams test was designed to resolve the conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

The problem posed by this case is completely different. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves. Appellee cites us to no cases holding that this legislation may be ignored simply because tribal self-government has not been infringed. (emphasis added).


Although McClanahan seemingly clarified application of the infringement test, the Supreme Court in Fisher again muddied the waters. See discussion infra, pp. 84-85.
E. Federal Preemption Analysis in Indian Law

The first significant break from the Williams infringement test came in Kennerly v. District Court. In 1967, the Blackfeet Tribal Council enacted a Tribal law providing that the Tribal court and the State should have concurrent jurisdiction over all actions where the defendant was a member of the Blackfeet Tribe. However, the state legislature thereafter did not take the actions required under Public Law 280 to enable the State to assume jurisdiction, nor was Tribal consent given to the State's assumption of jurisdiction under Title IV of the Civil Rights Act of 1968 which required a majority affirmative vote of the adult reservation Indians.

A non-Indian creditor commenced a suit in a Montana district court against Indian residents of the reservation on a debt incurred within the reservation. At issue was the subject matter jurisdiction of the state court over a transaction occurring on the reservation. Reasoning that the 1967 Tribal Council resolution demonstrated that tribal self-government was not infringed by state court jurisdiction, the Montana Supreme Court ruled the state court had jurisdiction. On appeal the United States Supreme Court determined the crucial issue was not whether infringement in fact occurred, but whether the procedures for cession of jurisdiction required by federal law had been completed. Because the action of the Blackfeet Tribal Council occurred prior to the 1968 passage of the Indian Civil Rights Act, the Supreme Court considered first whether the tribal council resolution was sufficient to transfer jurisdiction to Montana under Public Law 280, and then whether it was sufficient under the 1968 Indian Civil Rights Act provisions.

Stating that "[t]he unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction over Indian country under the 1953 Act," the Supreme Court ruled that the state court had no jurisdiction since the state legislature had taken no affirmative action under Public Law 280. The Supreme Court also ruled that the State did not acquire jurisdiction under the 1968 Indian Civil Rights Act because the tribe had not held a special election.

The holding in Kennerly looked strictly toward compliance with federal statutes and as a result conflicted with the Williams
infringement test. In *Williams*, the question was whether in the absence of a governing act of Congress, “the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” Thus, *Kennerly* looked solely to compliance with the procedural mechanics for the transfer of jurisdiction under Public Law 280 and the 1968 Indian Civil Rights Act, it provided clear guidelines to date for determination of state court subject matter jurisdiction conflicts. If the purported transfer occurred after 1953 but before the Indian Civil Rights Act of 1968, it is governed by the provisions of Public Law 280. If the state has taken no affirmative legislative action, no transfer can occur. If the purported transfer occurred after 1968, then the Indian Civil Rights Act applies. If a majority of adult reservation Indians do not vote in a special election to fully or partially accept state civil or criminal jurisdiction, the State is without subject matter jurisdiction even if the State affirmatively asserts jurisdiction. In establishing this apparently simple approach to state-Indian jurisdictional disputes, *Kennerly* signaled the changing attitude of the Supreme Court toward Indian jurisdiction and marked the beginning of the modern doctrine of federal preemption in Indian jurisdictional matters.

Generally, federal preemption of an area occurs when congressional treatment of the area is pervasive or otherwise shows a congressional intent to fully occupy the area. Under the supremacy clause, the State is then divested of any authority to exercise jurisdiction. While the concept of federal preemption is applied in a restricted fashion in other areas of federal supremacy, such as in regulation of interstate commerce, federal preemption is given broader meaning in the context of federal Indian policy.

This interpretation results from two considerations which are unique to the area of federal control of Indian affairs. First, since the traditional principle has been that States are without jurisdiction over Indian reservations unless expressly authorized, the Court is searching for a grant of state jurisdiction rather than a divestment of state jurisdiction. Second, congressional actions in the context of Indian affairs are analyzed with the aid of canons of construc-

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tion which vary greatly from principles which are applied in the ordinary context of federalism. As analysis of the most recent United States Supreme Court decisions treated later in this article will show, the Court does not require the federal or tribal action alleged to preempt state jurisdiction to meet the rigorous requirements imposed in the interstate commerce context in order to find a congressional intent to preempt.

Two Montana cases decided in the wake of Kennerly followed the black letter law of the emerging federal preemption analysis. In Crow Tribe v. Deernose, the Crow Tribe of Indians brought a foreclosure action in state court on trust property located within the boundaries of the Crow Indian Reservation pursuant to a mortgage between the Tribe and an enrolled tribal member. The Tribe argued that a federal statute relating to mortgages on allotted Indian trust lands was intended to terminate trust status and subject Indian foreclosure actions to state court jurisdiction. In rejecting this argument, the Montana Supreme Court followed the preemption analysis of Kennerly, finding a failure to meet the requirements of either Public Law 280 or the 1968 Indian Civil Rights Act. The court stated that the other federal statute in question was not a statute granting jurisdiction, but rather one authorizing the mortgaging of trust land.

In Blackwolf v. District Court, three Indian juveniles who were enrolled members of the Northern Cheyenne Indian Tribe had been found by a tribal court to be guilty of delinquency within the reservation. Pursuant to a tribal ordinance, the tribal court transferred the juveniles to the control of the state district court. In view of Kennerly, the court ruled the State had been granted no jurisdiction to entertain these juvenile matters.

The United States Supreme Court clarified and elaborated

75. 158 Mont. 25, 487 P.2d 1133 (1971).
78. Id. at 1136.
79. Id.
81. Revised Law and Order Code of Northern Cheyenne Reservation, Chapter IV, Section 4, Juvenile Delinquency, Paragraph 9(4):

If the court shall find that this child is delinquent within the provision of this ordinance, it may, by order duly enter and proceed as follows: (4) Order the child delivered into the appropriate juvenile department of the District Court for such disposition as it may make through use of its facilities and institutions provided by the State of Montana in the interests of the child and of the Tribe and of the State, provided that, upon the assumption of jurisdiction by the Juvenile Court of the Judicial District by means of this section, the jurisdiction of the Tribal court shall end.

upon the Kennerly federal preemption analysis in McClanahan v. Arizona State Tax Commission.\textsuperscript{83} The issue was whether Arizona could impose its state income tax on an enrolled member of the Navajo Tribe living and working within the exterior boundaries of the Navajo Indian reservation. The Arizona court of appeals ruled that the tax was valid because it did not infringe on the Navajo’s powers of self-government.\textsuperscript{84}

In reversing, the Supreme Court refined the preemption analysis by considering, against the backdrop of tribal sovereignty, whether the federal government had preempted state jurisdiction by treaties or statutes which enhanced, preserved, or otherwise recognized tribal self-government. The Court interpreted the language of the Navajo treaty as creating an exemption from state taxes.\textsuperscript{85} The Court also found that the language of the Arizona Enabling Act,\textsuperscript{86} disclaiming jurisdiction over Indian lands, indicated a federal intent to exempt Indians from state taxation.\textsuperscript{87}

The major effect of McClanahan was to focus the determination of state jurisdiction over Indians and reservations on an examination of the particular treaties and federal statutes affecting the tribe involved in the jurisdictional dispute. The Court’s approach in McClanahan clearly reaffirmed the preemption analysis as the primary method of resolving State-Indian jurisdictional disputes, diverting judicial attention from the infringement test formulated in Williams.

\textbf{F. The Theory of Residual Jurisdiction}

Shortly after McClanahan reaffirmed the Supreme Court’s use of the preemption analysis, the Supreme Court of Montana relied on a new theory to support state court jurisdiction over reservations. In State ex rel. Iron Bear v. District Court,\textsuperscript{88} the court ruled that a state district court had jurisdiction to entertain a divorce action between two enrolled members of the Assiniboine-Sioux Tribe who both resided on the Fort Peck Indian Reservation. At issue in the
case was the effect of a 1938 Tribal resolution which ostensibly transferred jurisdiction over marriages and divorces from the Tribe to the State. Since Kennerly limited its treatment to purported cessions of jurisdiction after the passage of Public Law 280, the Montana court in Iron Bear had to consider whether there was a valid cession of jurisdiction by the Tribe prior to 1953.

In its decision, the Montana court limited Kennerly to its facts by holding that, prior to the 1953 passage of Public Law 280, a tribe had complete authority to transfer jurisdiction to the State. Once this jurisdiction was transferred, it became "residual jurisdiction" which could not be wrested from the State absent explicit congressional or tribal action. It must be emphasized that the crux of the residual jurisdiction theory is that a tribe, prior to 1953, had the unrestricted authority to transfer jurisdiction. If a tribe transferred jurisdiction over an area, such as domestic relations, Public Law 280 would not therefore be a "governing act" as to jurisdictional transfers that occurred prior to its adoption. The Montana Supreme Court found no act of Congress governing divorces and no tribal mechanism for the granting of divorces. Thus, the court reasoned, the exercise of jurisdiction by the State could in no way interfere with tribal self-government. The court then formulated a three-prong test for determining when subject matter jurisdiction over certain matters remained in the State after the enactment of Public Law 280:

Before a district court can assume jurisdiction in any matter submitted to it, it must find subject matter jurisdiction by determining: (1) whether the federal treaties and statutes applicable have preempted state jurisdiction; (2) whether the exercise of state jurisdiction would interfere with reservation self-government and (3) whether the Tribal Court is currently exercising jurisdiction or has exercised jurisdiction in such a manner as to preempt state jurisdiction.

This rule was later applied by the Montana Supreme Court in

89. Id. at 1296-97.
90. Id. at 1297. The principle that explicit action is necessary to deny the State residual jurisdiction is predicated on the cases of Silas Mason Co. v. Tax Comm'n, 302 U.S. 186 (1937); United States ex rel. Kennedy v. Tyler, 269 U.S. 13 (1925); and Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885).
91. Although not cited in Iron Bear, precedent supporting the concept may exist. United States ex rel. Kennedy v. Tyler, 269 U.S. 13 (1925); See also 25 U.S.C. §231 (1970), which provides that a tribe with a governing body can consent to State jurisdiction regarding compulsory school attendance.
Security State Bank v. Pierre. In that case the court considered whether a state court had subject matter jurisdiction of an action on a debt incurred by an enrolled tribal member with a bank located on the reservation. The court determined that the district court did not have jurisdiction after an application of the Iron Bear test. Critical to the court's determination, however, was the fact that the tribal court had adopted a procedure whereby it could hear and determine limited debt actions.

Analysis of the rule in Iron Bear and Security State Bank shows that the court treated the presence or absence of tribal court procedures as the key issue, not whether a pre-1953 cession of jurisdiction had occurred. Although mentioning the concept of federal preemption, the Montana court did not engage in a serious examination of the applicable treaties and statutes and certainly did not follow the well-established canons in construing them.

The theory of residual jurisdiction has not withstood the test of time. A case on which the Montana court relied to support the theory has been reversed; another court facing this issue explicitly rejected the theory.

G. Emergence of the Theory of Jurisdiction by Default.

After the rapid demise of the theory of residual jurisdiction, the Montana Supreme Court formulated the theory of "jurisdiction by default." Iron Bear and Security State Bank foreshadowed this development by their emphasis on whether jurisdiction was actually being exercised by the tribal court.

The jurisdiction by default concept is primarily a socio-legal principle. It results from an apparent reluctance on the part of the Montana Supreme Court to recognize the operation of tribal courts. Some commentators have expressed similar reluctance. In formu-
lating the jurisdiction by default theory, the Montana Supreme Court has strongly relied on another misapplication of the *Williams* infringement test. The Montana court has refused to find an infringement upon tribal self-government unless the existing tribal court has adopted specific procedures dealing with the subject matter involved. 102

This approach totally ignores the mandates of *Kennerly* and *McClanahan* which require an examination of federal statutes and treaties to discern a congressional intent to strengthen and preserve tribal government. The requirement imposed by the Montana Supreme Court that specific tribal provisions corresponding to state law must exist before tribal jurisdiction can be exercised challenges the concept of autonomous tribal self-government by denying the tribal government the right to choose which laws it will enact. 103 It is doubtful that Congress intended to place such a straight-jacket on the development of Indian self-government practices and policies in its enactments providing for the strengthening of tribal self-government and tribal court systems.

The initial transformation from the theory of residual jurisdiction to the jurisdiction by default theory occurred in *Bad Horse v. Bad Horse*. 104 Although this case also involved the issue of subject matter jurisdiction of a Montana court over a divorce between enrolled members of Indian tribes residing on Indian reservations, the factual difference between it and the earlier *Iron Bear* case was that in *Bad Horse* a marriage license was issued and the marriage was entered into beyond the exterior boundaries of the reservation. At issue was both the subject matter and personal jurisdiction of the Montana district court. In addressing the subject matter jurisdiction issue, the Montana Supreme Court cited *Iron Bear* but emphasized that, in the instant case, there were significant events which occurred off the reservation. 105 The court stressed the importance of

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102. See discussion pp. 92-94 infra.

103. A definitive statement regarding the effect of tribal refusal to enact laws modeled after the States was made by Judge Pederson, concurring in Nelson v. Dubois, 232 N.W.2d 54, 59 (N.D. 1975), which used a federal preemption analysis to hold individual Indian consent to state jurisdiction ineffective:

Where there is no Indian law permitting damage for injury caused by negligence, no Indian law permitting divorce, and no Indian law levying an income tax, a proper assumption should be that Indian law prohibits actions for damages in negligence cases, prohibits divorce, and prohibits the levying of an income tax.


105. Williams v. North Carolina, 317 U.S. 287 (1942), not cited by *Bad Horse*, stands for the proposition that, given the transitory nature of the marital status, a court may acquire jurisdiction over the subject matter of a divorce action, if the status is before the court and there exists a nexus sufficient to give the state an interest in regulating it. Further support
access to state courts for all parties, including Indians, a theme also stressed in *Iron Bear*.

The court relied on the *Williams* infringement test in emphasizing that the tribal code provisions purportedly transferring jurisdiction over marriage and divorces to the State demonstrated that state jurisdiction would not interfere with tribal government.

The court then addressed the question of whether the state court had personal jurisdiction over the defendant, since she was served in Poplar, Montana, within the boundaries of the Fort Peck Indian Reservation. The court held that the district court had personal jurisdiction of the parties based on service of the parties under Rule 4 of the Montana Rules of Civil Procedure. Jurisdictions applying the federal preemption analysis have ruled otherwise, however, holding that, absent specific congressional consent, state service of process within an Indian reservation is void.

This was the status of Montana Indian jurisdiction law prior to the three recent cases decided by the United States Supreme Court. The Montana court decisions discussed above heavily rely on the *Williams* infringement test, broadly applying that test when tribal governments have not risen to the occasion and passed expansive tribal legislation dealing with the subject of the jurisdictional dispute. There was an overriding concern with allowing access to state courts and not depriving Indian persons of civil rights by limiting such access. The Montana cases also cited the extension of state services to reservations, and expressed apprehension about a considerable body of law that seemingly relieved Indians of carrying their share of the burden of financing these services by exempting them from state taxation.

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108. *Id.* at 896.

109. *Id.* at 897.


111. Francisco v. State, ___ Ariz. ___, 556 P.2d 1 (1976); Martin v. Denver Juvenile Court, 177 Colo. 261, 493 P.2d 1093 (1972). See also Annis v. Dewey County Bank, 335 F.Supp. 133, 136 (D.S.D. 1971); Commissioner of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120, 126 (1970). It has been argued that an independent legal basis may exist to validate state service of process on an Indian reservation. If the purpose of service is to grant the party notice and an opportunity to be heard, service under a long arm statute may be sufficient. See Williams v. North Carolina, 317 U.S. 287 (1942).

112. See also Judge Smith's dissent in the lower court decision of Confederated Salish
III. THE 1976 UNITED STATES SUPREME COURT CASES

A. Fisher v. District Court

In August 1974, Leroy and Josephine Runsabove, enrolled members of the Northern Cheyenne Tribe, filed a petition in the Montana District Court for the Sixteenth Judicial District for the adoption of Ivan Firecrow, a minor. The adoption was contested by the natural mother of the child, Alva Fisher, also an enrolled member of the Northern Cheyenne Tribe. All parties to the action lived on the Northern Cheyenne Reservation. Various aspects of the custody of the minor child previously had been litigated in tribal court.

After the Runsaboves filed their petition in state court, the district court judge certified to the appellate court of the Northern Cheyenne Tribe the question of whether an ordinance of the Northern Cheyenne Tribe conferred jurisdiction upon the district court. The tribal appellate court held that tribal ordinances gave the Northern Cheyenne Tribal Court exclusive jurisdiction over adoptions if all parties are members of the Tribe and reside on the reservation. As a result of this ruling, the state district court dismissed the petition for adoption holding that the state court lacked jurisdiction over the subject matter of the action.

On appeal, the Montana Supreme Court reversed the district court. Prior to the Tribe’s adoption of the Indian Reorganization Act, the Northern Cheyenne Tribe was a federally recognized Indian Tribe incorporated pursuant to the Indian Reorganization Act. Under the Tribal Constitution approved by the Secretary of Interior pursuant to this Act, the Tribal Council has the right to regulate the domestic relations of members of the Tribe and of non-members married into the Tribe and also to provide for the appointment of guardians for minors and mentally incompetent members. The Tribe has since been superseded by the Amended Constitution and By-laws of the Northern Cheyenne Tribe, July 8, 1960. Pursuant to the Tribal Constitution, the Revised Law and Order Ordinances of the Northern Cheyenne Tribe specifically detailed the adoption procedure in the Tribal Court, as follows:

Adoptions. The Tribal Court of the Northern Cheyenne Reservation shall have jurisdiction to hear, pass upon and approve applications of adoptions among members of the Northern Cheyenne Tribe. Upon proper showing and decision by the Court, such adoption shall be binding upon all concerned and hereafter only, adoptions so approved by the Tribal Court shall be recognized. On all adoptions involving non-members of the Northern Cheyenne Tribe or non-Indians or both who wish to adopt a member of the Northern Cheyenne Tribe, the tribal court of the Northern Cheyenne Reservation shall have concurrent jurisdiction to hear, pass upon and approve applications for adoption and upon written consent of the court, adoption proceedings affecting members of the Northern Cheyenne Tribe of the Northern Cheyenne Reservation may be taken up and consummated by the state courts.

Act in 1935, Montana's state courts possessed subject-matter jurisdiction over adoptions by enrolled members of the Northern Cheyenne Tribe. The Montana Supreme Court held that the Tribe could not unilaterally deprive the state court of jurisdiction by passing a Tribal ordinance to the contrary. The court also stated that Congress, in passing certain legislation defining heirs by adoption, implicitly recognized state court jurisdiction over adoptions by tribal Indians. The court said that to deny the Runsaboves access to state courts because they were tribal members would deprive them of equal protection under the laws.

Appealed as Fisher v. District Court, this case presented the United States Supreme Court with a case of first impression in deciding whether a tribe could effectively transfer subject matter jurisdiction to a State prior to the enactment of Public Law 280. In reviewing the Montana Supreme Court's decision, the United States Supreme Court traced the history of the self-government concept as applied to the Northern Cheyenne Tribe. In 1877, Congress ratified an agreement between the Tribe and the United States in which the government promised to secure an orderly government for the Tribe. This agreement was enhanced by the language of Montana's Enabling Act in which Montana agreed that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . ." The Court enumerated the Congressional statutes relating to the Northern Cheyenne Tribe and stated that Congress specifically intended the Indian Reorganization Act to revitalize Indian self-government. It concluded that federal statutes had preempted subject matter jurisdiction and that exercise of state jurisdiction interfered with the powers of tribal self-government. The Court said:

The Tribal ordinance conferring jurisdiction on the Tribal Court was authorized by § 16 of the Indian Reorganization Act, 25 U.S.C. § 476. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians.

The Supreme Court reserved ruling on whether a tribal council enactment prior to the effective date of Public Law 280 is sufficient

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117. Id. at 193.
to confer residual jurisdiction to a state court. After finding in the Indian Reorganization Act a federal policy to defeat state jurisdiction, the Court held that by implementing that Act in 1935, the Northern Cheyenne Tribe preempted state jurisdiction. In essence, the Court defined the Indian Reorganization Act as a governing act of Congress in much the same manner as Kennerly had defined Public Law 280.

Conceivably, a tribe that did not incorporate under the Indian Reorganization Act would not have been faced with a federal act preempting state jurisdiction until Public Law 280 was enacted in 1953. During that time, tribal councils arguably could have unilaterally transferred jurisdiction to state courts. The effect of such transfers of jurisdiction remains unanswered by Fisher, although the congressional intent to preserve tribal self-government and forbid unilateral transfers of jurisdiction, an intent the Supreme Court found in the Indian Reorganization Act and other federal statutes and treaties, indicates what the court may hold in the future.

Fisher is a clearer and broader expansion of the preemption analysis approach begun in Kennerly and developed in McClanahan. Fisher requires jurisdiction to be determined by examining treaties involving the particular Indian tribe and by examining federal legislation to determine if Congress intended the state to assume jurisdiction.

One troublesome point relating to the treatment of the preemption analysis as an emerging jurisdictional doctrine and the continu-

122. Id. at 390. Fisher's treatment of the "overriding federal policy" to preempt state jurisdiction may, when viewed together with Public Law 280 and the Indian Civil Rights Act of 1968, support the argument that the later enactments divested the state courts of jurisdiction they previously exercised, correctly or incorrectly, by providing a formal procedure for assumption of jurisdiction which, absent such formal assumption, results in the loss of all jurisdiction.

123. Id.

123.1. Under the Fisher preemption analysis, however, the federal intent to preempt state jurisdiction could be derived from the treaties or other statutes establishing the particular reservation regardless of whether the tribe adopted the Indian Reorganization Act. See 25 U.S.C. § 478b (1970).

124. For example, Crow Tribal Resolution dated February 18, 1946, as modified by Crow Tribal Resolution dated February 15, 1953, states that all marriages and divorces between tribal members shall be performed according to state law. It is noteworthy that, under the Fisher analysis, the transfer of marriage and divorce jurisdiction by the Northern Cheyenne Tribal Council in 1937 was ineffective because the federal government preempted the area in 1935 by virtue of that Tribe's acceptance of the Indian Reorganization Act. This 1937 transfer was the subject of the Bad Horse decision. See discussion pp. 80-81, supra.

125. The preemption analysis draws its support from the backdrop of Indian sovereignty as outlined in McClanahan which requires an analysis of all applicable treaties and statutes relating to the Tribe or Tribes involved in the jurisdictional transfer. The preemption test finds its source in the plenary and exclusive power of the federal government to deal with Indian tribes. See United States v. Mazurie, 419 U.S. 544, 554 n. 11 (1975).
ing use of the *Williams* infringement test arose in *Fisher* when the Court applied the infringement test to litigation involving only Indians. “Since this litigation involves only Indians, at best the same standard, [the infringement test] must be met before state courts can exercise jurisdiction.”

Although the *Williams* test continues to be used, the Supreme Court in *Fisher* clearly emphasized the dominance of the preemption analysis. First, applicable federal treaties and legislation must be analyzed. If from analyzing such legislation, one gleans a congressional intent to preempt the field, state exercise of jurisdiction would, by definition, interfere with tribal self-government. Because *Fisher* does not exclude the *Williams* test when an examination of treaties and statutes fails to reveal federal preemption but does reveal infringement with tribal self-government, it does not definitely establish when, where, and how the *Williams* test is to be applied in such situations.

The Supreme Court also rejected the argument that denial of state court subject matter jurisdiction constituted racial discrimination without justification. “The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.”

In holding that the absence of state court subject matter jurisdiction is part of the federal government’s policy to recognize tribal self-government, the Supreme Court put to rest the argument that the denial of state jurisdiction is discrimination based on race.

The Supreme Court also dealt with the argument raised by proponents of state court subject matter jurisdiction that certain facts in the case occurred off-reservation. The Court distinguished “incidents of marginal relevance” which would not affect jurisdiction over the adoption from those facts which, if off-reservation would substantially affect jurisdiction. Also, one of the main

126. *Fisher v. District Court*, 424 U.S. 382, 386 (1976). This wording conflicts with the treatment accorded the infringement test in *McClanahan* which limited that test to situations involving non-Indians. See discussion p. 73 supra. The broadening of the principle by *Fisher* has caused a rebirth of the *Williams* test in the “jurisdiction by default” theory of *Old Elk* and *Stops* discussed below.


128. *Id.* at 391.

129. The state court’s argument that denial of access to state courts because of lack of subject matter jurisdiction constituted racial discrimination is at *State ex rel. Firecrow v. District Court*, ___ Mont. ___, 536 P.2d 190, 193 (1975).

130. *Fisher v. District Court*, 424 U.S. 382, 389 n. 14 (1975). Along these lines, one of the least cited cases in Montana Indian law is the case of *In re Cantrell*, 159 Mont. 66, 495 P.2d 179 (1972). In this case both the mother and the illegitimate minor child in question were members of the Assiniboine-Sioux Tribes and resided on the Fort Peck Indian Reserva-
reasons for the finding of state jurisdiction by the Montana Supreme Court in *Bad Horse* was the existence of off-reservation facts such as the issuance of the marriage license and the marriage itself, both occurring in Forsyth, Montana. Therefore, it is possible that the *Bad Horse* ruling could be justified on a newly emerging theory predicated on the existence of substantial off-reservation facts. It is also conceivable that the presence of off-reservation facts such as in off-reservation adoptions of Indian children by non-Indians might lead to a judicial rationale recognizing concurrent jurisdiction.

The mother placed her child at a babysitter's home on the reservation on May 15, 1970. Prior to the mother's return, the putative father of the child took the child from the babysitter's home and, three days later, left the reservation with the child en route by train to Glasgow, Montana, which is located beyond the exterior boundaries of the Fort Peck Indian Reservation. During the train ride, the father became intoxicated. At the stop in Glasgow, the welfare department took the child from its father and placed him in a foster home. The mother argued that there was no evidence of neglect attributable to her which took place beyond the boundaries of the reservation, and therefore the state court had no jurisdiction to declare the child dependent and neglected. While there were other facts of neglect attributable to the mother committed while on the reservation which may in part have been the basis for the child's disposition, the court responded to the mother's contention in the following language:

> [T]he 'fact' of neglect, that of abandonment of a helpless infant, occurred off the reservation and continued for over a year off the reservation. The mother's only effort, to all practical purposes, was to remain in the sanctuary of the reservation, oblivious to the needs of her child. This fact alone removes the case from the heretofore cited Indian jurisdiction cases.

*Id.* at 182.

131. This theory, if indeed it is one, is difficult to maintain in view of the case law that recognizes tribal self-government, particularly in the field of domestic relations. United States v. Quiver, 241 U.S. 602 (1916). Felix Cohen stated in *FEDERAL INDIAN LAW*, supra note 41, at 138:

> The fact that Indians may obtain marriage licenses from state officials does not deprive the tribe of jurisdiction to issue a divorce where the parties are properly before the tribal court. In this respect Indians are in the same position as persons who, after marrying under the law of one state, may be divorced under the law of another state or a foreign nation.

See also White v. District Court, 140 Colo. 334, 346 P.2d 1012 (1959), cert. denied, 363 U.S. 829 (1959), which denied state jurisdiction over a divorce action between two enrolled tribal members where the marriage was entered into on a reservation.

132. United States *ex rel.* Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974), was an appeal from a Montana case involving facts from both state and tribal jurisdictions. There, a state court granted a divorce between two members of the Blackfeet Tribe, both of whom lived off the reservation. The custody of the minor children, who also lived off the reservation, was originally awarded to the father but the court later modified the decree to award custody to the mother. While appeal of that decision was pending in the Montana Supreme Court, the mother and the children moved back to the Blackfeet reservation, and the Tribal court awarded temporary custody of the children to the grandmother, also a tribal member residing on the reservation.

The Montana Supreme Court reversed the state district court and awarded custody to the father. The Ninth Circuit Court of Appeals ruled that the state court's jurisdiction over custody matters was continuing, and that the father was entitled to custody. In so ruling, the court made some comments that are inconsistent with jurisdictional theories derived from *Kennerly* and *McClanahan*. The court remarked that the couple submitted themselves to the
Whatever the final outcome, the Supreme Court has left the door open for a test that would examine off-reservation facts as a basis for determining whether a state court has subject matter jurisdiction. In sum, Fisher refined the preemption theory of Kennerly and McClanahan and answered some of the questions raised in prior state court decisions.

B. Moe v. Confederated Salish and Kootenai Tribes

Moe v. Confederated Salish and Kootenai Tribes considered two actions brought by the Tribes against the State of Montana. The first action arose from an incident in which Joseph Wheeler, an enrolled tribal member, leased two tracts of tribal trust land to operate smoke shops. Wheeler did not obtain a state cigarette retail license nor did he pay the state tax which allowed cigarette packages to bear the state revenue stamp. The State, through its county sheriff, arrested Wheeler for these two misdemeanor offenses. Wheeler and the tribes then instituted an action for declaratory and injunctive relief in a three judge federal district court against the application of the state cigarette tax and the vendor licensing statutes as applied to tribal members who sold cigarettes within the reservation. In the second related matter, the Tribes and some of their members brought an action against the State to have the state personal property tax on motor vehicles declared invalid with respect to the Tribes. It is impossible, in view of Kennerly, that this disclaimer was a proper tribal transfer of jurisdiction.

These situations are not easily resolved. The issue of concurrent jurisdiction is one that will likely confuse the resolution of jurisdiction issues even in light of the emergence of the preemption doctrine.

It is interesting that the case relied on in the Fisher footnote, DeCoteau v. District County Court, 420 U.S. 1082 (1975), involved a question of interpretation of a cession act, and therefore involved a part of the reservation that arguably may have been on the reservation. The case itself does not deal with a clear situation of off-reservation facts. This off-reservation facts theory is inconsistent with decisions regarding custody of Indian children in which lower courts have insisted that the fact of domicile or residence on the reservation precludes state jurisdiction to determine custody even if the child is found off-reservation. Wakefield v. Littlelight, 276 Md. 333, 347 A.2d 228 (1975); Wisconsin Potowatomies v. Houston, 393 F.Supp. 719 (W.D. Mich. 1973). These decisions would therefore conflict with the holdings of Bad Horse and Cantrell.

However, in the wake of Fisher, a practical problem arises in Montana in that the state agencies charged with recording vital human statistics refuse to record tribal decrees including such statistics. Other jurisdictions have given full faith and credit to tribal decrees. See, e.g., Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950). The failure to do so in Montana actually reduces the practical effect of Fisher, and may require further litigation to clarify.

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spect to motor vehicles owned by tribal members residing within the reservation boundaries.

The three judge court invalidated both taxes as applied to Indians but allowed the State of Montana to impose its tax on sales of cigarettes to non-Indian purchasers. The State appealed the decision invalidating the taxes to the United States Supreme Court, and the Tribe cross-appealed the district court’s ruling applying the state tax to sales of cigarettes to non-Indians.

In its decision, the Supreme Court initially responded to the State's procedural argument, holding that the suits brought by the Tribe were not barred by a federal statute which prohibited federal courts from enjoining assessment of state taxes where a speedy remedy was offered in state court.

On the merits of the case, the State attempted to distinguish the facts in Moe from the Court's decision in McClanahan by arguing that the manner in which the Flathead Reservation developed to its present state distinguished it from the factual setting of the Navajo Reservation. The State also argued that there was a specific federal statutory basis permitting Montana to impose its tax laws, including both cigarette and personal property taxes, on the Flathead Reservation. The State argued that as a result of the General Allotment Act, the State continued to possess taxing jurisdiction over Indians living on fee patented lands.

In responding to the first argument, the Supreme Court accepted the findings of the District Court and held that since the Salish and Kootenai Tribes had not abandoned their tribal organization, the state of reservation development was not a basis for distinguishing McClanahan. The Court thus laid to rest many of the social arguments relied on by lower courts to justify the extension of state jurisdiction over Indian reservations.

141. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 476 (1976). The Court ruled that the legislative history of 28 U.S.C. § 1362 (1970), which gave district courts original jurisdiction of all civil actions brought by any Indian Tribe for matters and controversies arising under the Constitution, laws or treaties of United States indicates that, in certain respects, Indian Tribes suing under this section were to be accorded treatment similar to that of the United States suing on behalf of the Tribe as its trustee. Therefore, since the United States was not barred under § 1341, neither would the Tribe be barred. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 472-75 (1976). See also Moses v. Kinnear, 490 F.2d 21 (9th Cir. 1973), where the Ninth Circuit extended the federal instrumentality theory a step further to allow individual Indians an exception to 28 U.S.C. § 1341 where the government could technically be a co-plaintiff in the suit.
143. Id. at 476.
After noting that the relevant treaties and statutes were essentially the same as in *McClanahan*, the Court responded to the State’s second argument. The Court indicated that the creation of checkerboard jurisdiction which would necessitate a title search on each parcel of land before determining jurisdiction was contrary to the intent of the federal statutory law of Indian jurisdiction. The Court also pointed out that the apparent congressional purpose in the General Allotment Act of 1887 of gradually abolishing reservations was repudiated in 1934 by the Indian Reorganization Act.

The State argued that the practice of exempting Indians living within the reservation but not exempting non-Indians living within the reservation from taxes is discrimination without justification. The Supreme Court dismissed that argument holding that there was a rational basis for such a distinction. The test which the Court applied to determine whether unjustifiable discrimination exists was taken from its decision in *Morton v. Mancari* wherein it was stated: “As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.” This ruling supports *Fisher* and should finally eliminate the discrimination argument as a basis for asserting state jurisdiction. The Court reaffirmed the ruling in *McClanahan* that, in the absence of federal legislation authorizing such jurisdiction, the State is without general civil regulatory authority over Indians and their property located within the reservation. More importantly, *Moe* holds that in addition to determining congressional intent regarding jurisdictional matters by reference to treaties and statutes, it is necessary to examine all federal legislation to determine whether Congress has changed its earlier policies with regard to Indians and Indian Tribes. Federal legislation is to be read in its totality to determine the present congressional policy toward Indians.

Because the State did not challenge it on appeal, the Supreme Court did not disturb the three judge court’s ruling that the exemption from the cigarette tax applied to all Indians living on the Flathead Reservation regardless of whether they were enrolled members of the plaintiff Tribe. The Court allowed the state to collect the

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146. *Id.* at 477.
147. *Id.* at 478, citing *Seymour v. Superintendent* 368 U.S. 351, 358 (1962).
151. *Id.* at 555.
tax on sales of cigarettes from an Indian seller to a non-Indian buyer. The Court indicated it was not a burden sufficient enough to be deemed an infringement under the test enunciated in *Williams v. Lee.* While disagreement may abound as to the degree of infringement involved, perhaps this situation, involving relations between Indians and non-Indians and the exercise of a legitimate state power over its non-Indian citizens, comes closest of all the cases discussed herein to the proper situation in which the *Williams* infringement test applies.

In essence, *Moe* strengthened the preemption theory and emphasized its priority over the *Williams* infringement test for determining state jurisdiction in matters involving Indians on Indian reservations.

C. *Bryan v. Itasca County*

In *Bryan v. Itasca County* the United States Supreme Court again considered whether a State had the general civil regulatory authority to levy a tax within the confines of an Indian reservation. In this instance, the tax was a personal property tax assessed against a mobile home located on the Leech Lake Indian Reservation in Minnesota and owned by an enrolled tribal member who resided on the reservation. *Bryan* differed from *Moe* and *McClanahan* in that Minnesota was one of the States granted jurisdiction over Indians by virtue of Public Law 280. The Minnesota Supreme Court had ruled that while there was no express grant of taxation authority to the State, the provisions of Public Law 280 were nonetheless an implied grant of the power to tax.

In considering whether the State of Minnesota had such a power to tax reservation Indians, the Supreme Court looked to the legislative history of Public Law 280, discerning that the primary

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154. *See* Eastern Band of Cherokee Indians *v.* North Carolina Dep’t of Natural and Economic Resources, No. BC-CS 76-65 (W.D.N.C., filed Aug. 27, 1976), *which held that the collection of a state fishing license fee from a non-Indian fisherman within the exterior boundaries of the reservation was a direct infringement on the tribe’s right to govern and regulate fishing by a tribal permit system. The district court went into great detail in examining the application of the state license fee and the tribal license fee to make its determination under the *Williams* infringement test. This case may provide further guidelines for proper application of the *Williams* test.*
155. *For a law review article dealing with the lower court’s decision in Moe as well as other taxation cases pending in federal courts at that time, see Comment, Must the Paleface Pay to Puff? *Confederated Salish & Kootenai v. Moe*, 35 Mont. L. Rev. 83 (1975).*
156. 96 S.Ct. 2102 (1976).
158. *Bryan v. Itasca County, ___ Minn. ___, 228 N.W.2d 249, 253 (1975), rev’d, 96 S.Ct. 2102 (1976).*
159. *For an extensive analysis of Public Law 280, see Goldberg, Public Law 280: The*
purpose of Public Law 280 was to apply state criminal laws to crimes occurring on Indian reservations, and particularly, to tribes without adequate institutions for law enforcement. There was an absence of express congressional policy or intent on the issue of what civil jurisdiction was granted to the states. After viewing other sections of Public Law 280 that dealt with civil jurisdiction, the Court concluded the main intent of Congress was to provide state courts as a forum to resolve such disputes when there was no tribal court. The Court therefore held Public Law 280 inadequate to grant taxation power to the states. This interpretation applies to most state attempts to exercise general civil regulatory powers on the reservation.

In Bryan, the Court summarized its earlier rulings on preemption and formulated in footnote 2 of the opinion a "general preemption analysis", citing Moe and McClanahan but not limiting the preemption analysis to the taxation area. This statement, along with the Court's treatment of Fisher, implies that the Court is ready to adopt such a preemption analysis for the determination of all state-tribal jurisdictional problems.

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161. Id.
162. Id. at 2110.
163. Id. at 2112.
164. See also Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). The Mescalero case, cited in footnote 2 in Bryan, is often cited by advocates of state jurisdiction. However, Mescalero goes a long way toward setting some specific guidelines for defining the scope and limits on the exercise of state jurisdiction.

At issue in Mescalero were two taxes that the State of New Mexico was attempting to impose on a ski lodge owned by the Navajo Tribe but operated off-reservation. The first tax was a gross receipts tax on income earned from the lodge. The second tax was a use tax on two ski lifts that were purchased out of State for use on the off-reservation property. The court held the gross receipts tax valid since the activity was conducted off-reservation, but invalidated the use tax on the grounds that the use of permanent improvements on tax-exempt land was protected under the Indian Reorganization Act. The decree states:

"[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority in taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation and McClanahan v. State Tax Commission of Arizona . . . lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent."

Id. at 148.

Therefore, Mescalero is a stronger case for lack of state jurisdiction over reservation activities than is generally credited.

166. A federal preemption analysis was applied by the Arizona Supreme Court in Francisco v. State, -- Ariz. --, 556 P.2d 1 (1976), in determining that a state court had no personal jurisdiction over a Papago Indian served within the reservation by a state officer. The Arizona court found that under Kennerly and McClanahan, Public Law 280 and the Indian Civil Rights Act of 1968 were "governing acts of Congress" which preempted the
By enumerating some guidelines for statutory construction in this area, Bryan contains hints about the attitude of the United States Supreme Court toward the jurisdiction by default concept. The recent Supreme Court cases stand for the proposition that federal legislation is to be examined to ascertain the congressional intent to preserve tribal self-government and that state jurisdiction is therefore precluded unless expressly authorized.

IV. THE RECENT MONTANA CASES

A. State ex rel. Old Elk v. District Court

State ex rel. Old Elk v. District Court\(^\text{167}\) involved an enrolled member of the Crow Tribe who was charged with deliberate homicide for the death of a non-Indian which occurred beyond the exterior boundaries of the Crow Indian Reservation. The Sheriff of Big Horn County served the complaint and warrant on the accused within the reservation boundaries and then transported him to the Big Horn County Jail. The Crow Tribal Court Judge refused to recognize the sheriff's warrant. The Montana Supreme Court upheld the validity of the arrest, holding that because the Crow Tribe had established no procedure for extradition with the State, the on-reservation arrest by state peace officers did not interfere with tribal self-government.\(^\text{168}\)

The Court distinguished State ex rel. Merrill v. Turtle\(^\text{169}\) which was relied on by the accused. The court noted that the Crow Tribe in Old Elk unlike the Navajo Tribe in Merrill had not enacted a tribal code provision dealing with extradition. Therefore, it was held that Montana could exercise jurisdiction by virtue of the failure or default of the tribal court.\(^\text{170}\) It is arguable that the result in Old Elk could be justified on principles of criminal law rather than Indian law.\(^\text{171}\) However, the validity of such an approach, as well as the exercise of state jurisdiction over Indian lands. Id. at 3. After examining the executive orders, and statutes relevant to the Papago Tribe, the court concluded that the state had no power to make service of process to Indians on Indian lands because the State had failed to take the necessary steps to acquire jurisdiction under either of the governing acts. Id. at 5. The court noted specifically that the state court had valid subject matter jurisdiction, but that valid service could only be obtained through Papago Indian authorities. Id. at 2 n.1.

\(^\text{167}\) __ Mont. __, 552 P.2d 1394 (1976).

\(^\text{168}\) Id. at 1397.

\(^\text{169}\) 413 F.2d 683 (9th Cir. 1969). In this case the Navajo Tribe had enacted an extradition procedure but did not have an agreement with the State (Oklahoma) which was attempting to extradite from the Navajo reservation. Also, the state's custody in Turtle depended on extradition, whereas in Old Elk it was based on personal custody as there was probable cause to believe he committed the crime.

\(^\text{170}\) State ex rel. Old Elk v. District Court, __ Mont. __, 552 P.2d 1394, 1397 (1976).

\(^\text{171}\) The United States Supreme Court has ruled that the power of a court to try and convict a person of a crime is not impaired by the fact that he was forcibly abducted across...
jurisdictional position of the Montana court in *Old Elk*, has been challenged by a recent New Mexico Supreme Court decision\(^\text{172}\) which involved an issue similar to that in *Old Elk*. The New Mexico court based its decision on consideration of Indian law and carefully examined the existing criminal law precedent in the area. The court held that arrest was illegal as a violation of tribal sovereignty, thereby requiring the defendant’s release because of principles of due process.\(^\text{173}\)


In *Littlehorn State Bank v. Stops*,\(^\text{174}\) enrolled members of the Crow Tribe obtained a loan from a bank located in Hardin, Montana, a town located beyond the exterior boundaries of the Crow Indian reservation. Upon a default in the loan payments, the bank sued in state district court. Process was served on the respondents within the exterior boundaries of the Crow Indian Reservation. The bank obtained a judgment and proceeded to execute on the wages of one of the Indian respondents which were earned on the reservation. The respondent obtained an injunction against the execution in the state district court, but the Montana Supreme Court vacated it on appeal.

Although the Montana court was concerned with the presence of off-reservation facts and the apparent inability to enforce a judgment legally obtained, it reversed the district court relying on the *Williams* infringement test. In the absence of a tribal code provision for enforcement of state court judgments, the court reasoned there could be no interference with tribal self-government.\(^\text{175}\) The court reaffirmed its holding in *Old Elk* that once a court properly has subject matter jurisdiction over a controversy, its process may ex-

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\(^{172}\) Bennally v. Marcum, __ N.M. ___, 553 P.2d 1270 (1976). This case involved an enrolled member of the Navajo Tribe who was arrested on the Navajo reservation for violations of city ordinances of Farmington, New Mexico, located beyond the boundaries of the Navajo Reservation. There are factual differences between this case and *Old Elk*: the Navajo Tribe did have an extradition procedure, whereas the Crow Tribe did not; the offense in *Old Elk* was murder whereas the offenses in *Bennally* were DWI and reckless driving resulting in property damage. In the author’s view, these distinctions do not justify a different result in *Old Elk*.

\(^{173}\) *Id.* at 1271, 1274.

\(^{174}\) __ Mont. ___, 555 P.2d 211 (1976).

\(^{175}\) *Id.* at 214.
tend within the boundaries of the reservation. Finally, the court emphasized that the Williams test was the proper test to apply because of the off-reservation facts: the litigation involved a member of the Tribe living on the reservation, and a non-member located off the reservation; the transaction arose off the reservation. The Stops decision is in direct conflict with the holdings of other jurisdictions.

C. The Continuing Misapplication of Williams v. Lee

Both Old Elk and Stops were decided after the Fisher, Moe and Bryan decisions. In neither case did the Montana court follow a preemption analysis nor did it deal with the question of transfer of jurisdiction prior to Public Law 280 or the 1968 Indian Civil Rights Act as it did in the Iron Bear and Bad Horse cases. Indeed, the Montana Supreme Court’s reasoning in Old Elk and Stops is in direct conflict with the court’s holdings in Deernose and Blackhorse, cases which, in the aftermath of Kennerly, basically espoused a preemption analysis. The court did not, however, overrule either of these latter two cases. Furthermore, the theory of Old Elk and Stops, which predicates state jurisdiction upon the failure of tribal courts to specifically assume jurisdiction over a given subject matter is in conflict with the rationale of the decisions of Kennerly and McClanahan as well as of Fisher, Moe and Bryan. The “jurisdiction by default” theory of Old Elk and Stops ignores the congressional policy of strengthening tribal government. Taking the theory to its logical conclusion, the State must divest itself of jurisdiction once the tribe, through its tribal court, enacts appropriate laws to handle a given situation. That result would likely not be welcomed by proponents of the theory. Although the rationale for this theory is the expressed concern over a lack of remedy, such a situation is not unique to Indian law; often people are left without a remedy because of procedural limitations based on public policy (such as the Statute of Frauds, and Statutes of Limitations). Ulti-

176. Id.
177. Id. at 213. The court relied on the statement in Fisher applying the Williams test to situations involving only Indians within reservation boundaries thus compounding the confusion created by the Supreme Court’s apparent inconsistency in the McClanahan and Fisher decisions.
mately, the creation of remedies in Indian law, however, is for the tribes and Congress, not for the courts.

V. CONCLUSION

With the most recent decisions by the United States Supreme Court, Indian jurisdictional law is developing concrete standards upon which one can determine whether state jurisdiction exists. Although some problems remain unresolved, the rationale of Fisher, Moe and Bryan shows that, in the absence of special congressional authority, a State is without jurisdiction to impose its courts or its general regulatory authority over Indians or Indian tribes within the exterior boundaries of their reservations. The preemption theory defined in those cases is the primary test for determining the existence of state jurisdiction.

The socio-legal arguments upon which many a state court has based its extension of state jurisdiction have been expressly repudiated by the Fisher-Moe-Bryan rationale. At least implicitly, the more subtle rationales of residual jurisdiction and jurisdiction by default have likewise been rejected.

Some confusion remains as to the application of the Williams infringement test. This test was thought to have provided a rule of thumb to determine the existence of state jurisdiction. The recent decisions by the United States Supreme Court, however, undermine the general applicability of this standard. The Williams test may be superfluous in those instances in which Congress has preempted state jurisdiction. Nevertheless, recent decisions have caused confusion by continuing to apply the rule in an inconsistent manner. While McClanahan limited the test to transactions involving non-Indians, Fisher applied the rule to situations in which all parties were Indians residing within the confines of an Indian reservation.

This inconsistency among the United States Supreme Court cases has resulted in the development of Montana Indian law case precedent built upon an extension of the Williams test, allowing state courts to assume jurisdiction even where tribal courts exist, if the tribe has not specifically provided a tribal court procedure to treat the problem raised in the jurisdictional dispute. Although this theory of "jurisdiction by default" pinpoints the small discrepancies in the decisions of the United States Supreme Court, it is doubtful whether such a rule will withstand the test of time under the broad preemption analysis of Fisher, Moe and Bryan.

Perhaps the best comments addressing the application of the Williams test and the potential for its abuse are found in Justice Haswell's concurring opinion in Iron Bear:
I concur in the result, but in my view the rationale of the majority opinion is flawed. In my opinion this will lead to no end of difficulties in future Indian jurisdictional cases that may come before this court.

The majority opinion is predicated on the jurisdictional test set forth in *Williams v. Lee* [citation omitted]. . . In one of the latest cases discussing the *Williams* test, the U.S. Supreme Court pointed out that this test was useful in situations involving the rights of Indians and non-Indians where both the Tribe and the state court fairly claim jurisdiction. *McClanahan v. Arizona State Tax Commission* [citation omitted].

. . . In the instant case, the situation is entirely different. This case involves the respective rights of two reservation Indians in a divorce case in a mutually acceptable forum with no assertion of antagonistic jurisdictional interests between the tribe, the state, the two Indians, or the federal government. The *Williams* test simply has no application to this situation and its continued indiscriminate application to all Indian jurisdictional questions in this Court is a mistake. Continued adherence to the *Williams* test has previously resulted in reversals in the judgments of this court. See *Kennerly v. District Court*, 400 U.S. 423, 91 S. Ct. 480, 27 L.Ed.2d 507.183

By its recent holdings in *Old Elk* and *Stops* the Montana court has definitely made the *Williams* test the crucial basis of its decisions. The potential for resolving the issue of the proper application of the *Williams* test is increasing by virtue of the Montana rulings and the lack of clarity in the decisions of the United States Supreme Court on this point.