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THE ROLE OF INDIAN TRIBAL COURTS IN THE COLLECTION OF BUSINESS DEBTS: TOOL OR BANE OF LOCAL BUSINESS ?

by
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ABSTRACT

Debt collection has long been a problem for business. Local merchants and lenders traditionally resort to state courts, particularly small claims court, for the recovery of moneys owed. In North Dakota and many other western states, however, there exist court systems separate and apart from state courts. These other court systems are Indian tribal courts.

Tribal courts are frequently the only tribunals able to hear collection actions involving Indian debtors. These courts also have authority over non-Indians. The existence of and jurisdiction granted to Indian courts in collection suits are genuine concerns of many businesses. More importantly, though, these same concerns may cause local merchants and financial institutions to deny credit to Native Americans.

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CHAPTER 1

INTRODUCTION

Objectives of the Study

Goods and services are provided but payment is refused. Accounts become overdue and delinquent. Checks are dishonored or returned for lack of funds. These are typical collection problems encountered by local businesses. State courts, particularly small claims court, have been the traditional forum for collecting business debts. Yet in many western states there exist court systems separate and apart from the state courts. These other courts are Indian tribal courts.

North Dakota is a western state with a significant Indian population. There are five tribal court systems in North Dakota and each functions as part of a separate reservation government. The existence of many diverse Indian legal systems made North Dakota an ideal place for this research on the interaction between local business and reservation courts.

The objective of this study was to determine the role, if any, Indian courts play in the collection practices of local businesses. In addition to compiling and analyzing data on the jurisdiction and use of these particular courts

for debt collection, this research also focused upon the potential tribal courts hold for the recovery of business debts.

It was not an objective of this project to evaluate tribal courts on fairness, procedure or results,[1] nor does this study purport to do so. Instead, the emphasis was on how tribal courts were perceived in terms of fair treatment, just results and overall procedures by those persons who either have used or would likely use Indian courts for collecting business debts. That a tribal court may be viewed as unfair by local business does not mean the opinion is either accurate or well founded; should such an attitude exist, however, it would be significant.

If tribal courts are seen as unfair, unjust or unreliable to a certain class of litigant, these people are not likely to use the reservation court system. Moreover, businessmen who distrust Indian courts are not going to freely extend credit if default will necessitate looking to a tribal legal system for collection. Therefore, additional goals of this

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[1]Several studies on Indian courts have been made but these have generally focused upon the needs of the tribal court system rather than fairness or judicial competence. See, e.g., American Indian Lawyer Training Program, Inc., Indian Self-Determination and The Role of Tribal Courts (1977); 2 National American Indian Court Judges Association, Justice and The American Indian: The Indian Judiciary and The Concept of Separation of Powers (1974). See generally National American Indian Court Judges Association, Indian Courts and the Future (1978). But see S. Brakel, American Indian Tribal Courts: The Cost of Separate Justice (1978) (a study highly critical of Indian courts including several North Dakota tribal courts).

research were to briefly explore the attitudes of local business people towards tribal courts, and to consider the possibility that a negative opinion would result in a denial of credit in those instances where nonpayment required suit in an Indian court.

Research Methodology

A trifurcated format was used to accomplish the research objectives of this study. First, the jurisdictional parameters of the various tribal courts were determined because a court which lacks the authority to hear collection actions cannot be of use to local businesses. This determination of tribal court jurisdiction was made for the four possible categories of litigants: (1) Indian creditor and Indian debtor; (2) Indian creditor and non-Indian debtor; (3) non-Indian creditor and Indian debtor; and (4) non-Indian creditor and non-Indian debtor. Identifying a tribal court's civil jurisdiction over these classes of litigants required a review and analysis of federal Indian policy, treaties, tribal codes and tribal constitutions, as well as federal and state constitutions and legislative acts.

Second, all North Dakota lawyers having office on or within fifty miles of an Indian reservation were surveyed about their experiences with and attitudes towards tribal court collection suits. The fifty mile survey radius was selected because only those attorneys practicing near a reservation are likely to represent local business in tribal

court. This survey was conducted by means of a written questionnaire.[2] The data from these questionnaires were separately compiled for each tribal court, and to insure candid answers the respondents were allowed to remain anonymous.

Third, in person and telephone interviews were conducted with tribal court personnel and local businessmen. These interviews had a twofold purpose: to obtain data on the use of tribal courts by banks, savings and loans, and merchants; and to discover the opinions these local businessmen held about tribal court.

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[2]Questionnaires were mailed to 372 attorneys.

CHAPTER 2

TRIBAL COURTS

Federal Indian Policy and the Development of Tribal Courts

Indian people have formed and are continuing to form their own reservation governments, and these governments are attempting to exercise authority over a broad range of social, political and economic activities.[3] A key appendage of this assertion of tribal power has been the emergence of an Indian court system.[4] This legal system, however, did not develop in a vacuum. It is a product of decades of changing and varied federal Indian policy commencing in the latter half of the nineteenth century.

Congress passed a law in 1871 stating that Indian tribes would no longer be recognized or acknowledged as independent

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[3]The scope and validity of these efforts to exercise tribal authority have been extensively litigated, see, e.g., Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (tribal mineral extraction tax); Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980) (tribal sales tax and automobile license); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (tribal criminal code); Cardin v. De La Cruz, 671 F. 2d 363 (9th Cir. 1982) (tribal building and safety code); Knight v. Shoshoe & Arapahoe Indian Tribes, etc., 670 F.2d 900 (10th Cir. 1982)(tribal zoning law).

[4]See American Indian Lawyer Training Program, Inc., supra note 1.

nations with whom the United States would contract by treaty.[5] This law marked a dramatic shift in federal Indian policy. The federal government had previously negotiated with tribes as though they were foreign nations, and many of the early Indian treaties were extemely conciliatory toward Indian tribes.[6] By 1871, though, the United States had expanded both geographically and militarily, several foreign wars and a civil war had been fought and won, and the decision to no longer deal with tribes as foreign nations undoubtedly reflected a determination on the part of Congress that Indians were at last a conquered and dependent people.

Congress passed a General Allotment Act in 1887.[7] Also known as the Dawes Act, this law initiated a policy of assimilation for the Indian. Individual Indians were allotted parcels of reservation land with title held in trust by the federal government. Throughout the trust or wardship period the land was restricted and could not be encumbered or sold by the Indian allottee, but after the expiration of twenty-five years the allottee was given fee simple title and United

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[5]This law specifically provided that treaties ratified prior to March 3, 1871, would not be invalidated or impaired. Act of March 3, 1871, ch. 120, 16 Stat. 566 (current version codified at 25 U.S.C. §71 (1982)).

[6]See, e.g., Treaty with Delaware Nation, 7 Stat. 13 (1778) (forgiving prior offenses by the Indians; requiring the Delaware to assist the United States in War; granting the tribe representation in Congress).

[7]Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.

States citizenship. Once unrestricted title was received, an Indian landowner could sell or mortgage his property. It was through exercise of this power of alienation by Indian allottees that non-Indians acquired title to reservation lands,[8] and came into increasing contact with tribal governments.

The 1920s and 1930s witnessed still another shift in federal Indian policy, this time away from assimilation and towards self-government. Indians were granted United States citizenship in 1924.[9] In 1934 the Indian Reorganization Act became law, and with its passage the foundation for modern tribal self-government was laid.[10]

Commonly known as the Wheeler-Howard Act, the 1934 Indian Reorganization Act is perhaps the single most important piece of Indian legislation ever enacted. This law prohibited further allotment of reservation lands and continued indefinitely the trust status on lands previously allotted but to which

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[8]The Dawes Act was not the only means by which non-Indians acquired reservation land. In concert with the General Allotment Act, the federal government entered into an extensive period of reducing Indian ownership of reservations and making this "surplus land" available to non-Indians. E.g., Act of Feb. 14, 1913, ch. 54, 37 Stat. 675 (sale of surplus land on Standing Rock Reservation); Act of June 1, 1910, ch. 264, 36 Stat. 455 (sale of surplus land on Fort Berthold Reservation); Act of April 27, 1904, 33 Stat. 319, 321 (providing for disposition of former Devils Lake Reservation land under general provisions of homestead and townsite laws).

[9]Act of June 2, 1924, ch. 233, 43 Stat. 253.

[10]Act of June 18, 1934, ch. 576, 48 Stat. 984 (current version codified at 25 U.S.C §§ 461 to 491 (1982)).

fee simple title had not issued. However, the real significance of the Wheeler-Howard Act was that it authorized tribes to organize, adopt tribal constitutions, and incorporate and function as local governments.[11]

Tribal termination was the legislative goal of the 1950s when,[12] in yet another change in policy, Congress attempted to transfer civil and criminal jurisdiction over Indians and Indian lands to the states.[13] Public Law 83-280 was a key instrument in this effort to terminate tribal governments,[14] and this law provided two means whereby states could acquire control over reservation lands and Indians. First, to Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin, Congress granted civil and criminal jurisdiction over some or all of the reservations located in these states and the Indians residing upon them.[15]

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[11] 25 U.S.C. §§476 and 477 (1982).

[12] See S. Tyler, A History of Indian Policy, 181 - 83 (1973) See generally Wilkinson & Briggs, The Evolution of Termination Policy, 5 Am. Indian L. Rev. 139 (1977).

[13] See Act of August 15, 1953, ch. 505, 67 Stat. 588 (partially codified at 18 U.S.C. §1162 (1982) and 28 U.S.C. §1360 (1982)).

[14] See id.

[15] 18 U.S.C. §1162 (1982) (criminal jurisdiction); 28 U.S.C. §1360 (1982) (civil jurisdiction). Congress directly vested these particular states with jurisdiction because both the respective tribes and practically all state officials were agreeable to such a transfer of authority. See S. Tyler, supra note 12, at 183.

The second method by which Public Law 83-280 proposed to transfer control was through state assumption of jurisdiction. Public Law 83-280 authorized the remaining states to amend their enabling acts and constitutions in order to assume such additional civil and criminal jurisdiction over Indians and Indian lands as their respective state legislatures deemed appropriate.[16]

North Dakota opted to assume such additional jurisdiction over Indians and Indian lands as the tribes or individual members delegated to the state.[17] Although state law provided a mechanism by which Indians could cede civil jurisdiction to the North Dakota courts,[18] this transfer of authority

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[16]Act of Aug. 15, 1953, ch. 505, §§6 and 7, 67 Stat. 588. Public Law 83-280 merely vested states with additional civil and criminal jurisdiction over Indians and their lands. Through a series of United States Supreme Court decisions it had already been established that states had jurisdiction over non-Indians and their property even when located within the confines of a tribal reservation, and Public Law 83-280 had little if any effect upon this state authority over non-Indians. See New York ex rel. Ray v. Martin, 326 U.S. 496, 499 (1946) ("in the absence of limiting treaty obligation or Congressional enactment each state has right to exercise jurisdiction over Indian reservations within its boundaries"); Utah &. Northern Ry. v. Fisher, 116 U.S. 28 (1885) (Territory of Idaho permitted to tax non-Indian owned property which passed through Fort Hall Reservation); United States v. McBratney, 104 U.S. 621 (1881) (Colorado had criminal jurisdiction over non-Indian who had killed another non-Indian within the boundaries of a reservation).

[17]N.D. Cent. Code §§27-19-01 to 27-19-13 (Supp. 1983).

[18]Id. §§27-19-02 and 27-19-05.

has apparently not taken place on any North Dakota reservation.[19]

The most recent Congressional declaration of federal Indian policy is the Indian Civil Rights Act of 1968.[20] This law prohibited further state assumption of jurisdiction under Public Law 83-280 without the consent of the tribes affected, and authorized those states already having acquired civil or criminal jurisdiction over Indians and their lands to retrocede this authority to the federal government.[21] The Indian Civil Rights Act likewise granted limited due process and other civil rights to all persons subject to the authority of tribal governments.[22]

If a person is subject to the authority of a tribal government, and this would include tribal courts as well, neither state nor federal constitutional protections generally apply.[23]

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[19] See White Eagle v. Dorgan, 209 N.W. 2d 621 (1973). Other states have assumed jurisdiction under Public Law 83-280, and this extension of state authority over Indians and their lands has been judicially approved. See, e.g., Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) (upholding Washington assumption of jurisdiction in areas of compulsory school attendance, domestic relations, public assistance, mental illness, juvenile delinquency, adoption, dependent children and motor vehicle regulation).

[20] Act of April 11, 1968 §§ 201 to 701, 82 Stat. 77 (current version codified at 25 U.S.C. §§1302 to 1326 (1982)).

[21] 25 U.S.C. §§1321 to 1323 (1982).

[22] 25 U.S.C. §1302 (1982).

[23] See, e.g., Talton v. Mays, 163 U.S. 376 (1896) (holding that constitutional due process guarantees did not apply to Indian defendant under death sentence from tribal court).

The only rights and safeguards available against abuses by tribal authorities are those contained in the 1968 Indian Civil Rights Act, and these do not include the full panoply of constitutional rights normally accorded United States citizens. The Indian Civil Rights Act does not, for example, prohibit the establishment of religion nor does it require a trial in civil cases or the appointment of counsel for indigent criminal defendants. While tribal courts can no longer impose the death sentence upon violators of tribal law, they can punish with a fine of $500 and six months imprisonment;[24] and it is due process and equal protection of tribal law which the 1968 Civil Rights Act guarantees, not the due process and equal protection of state or federal law.[25]

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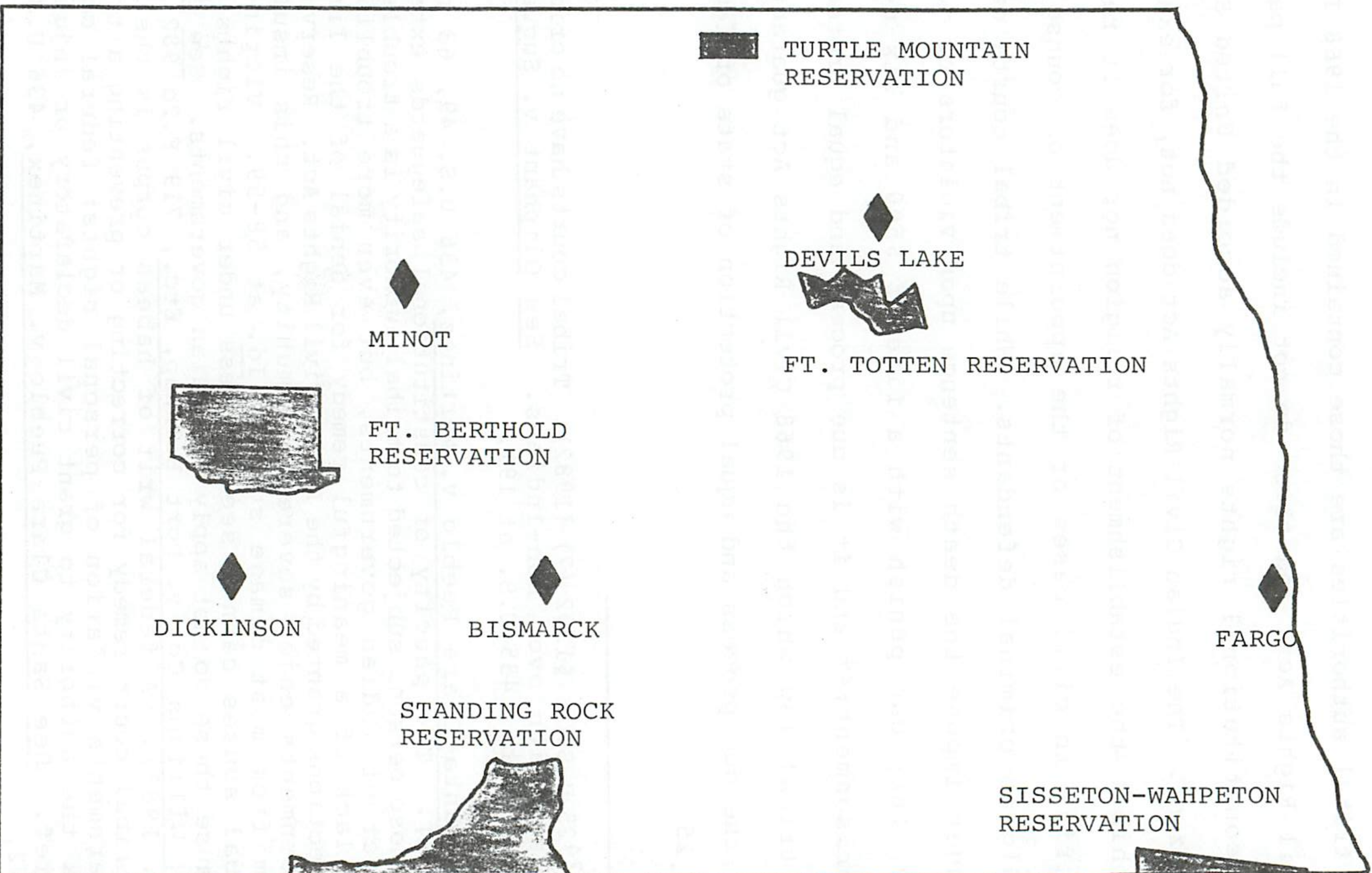
[24] 25 U.S.C. §1302 (7) (1982). Tribal courts have no criminal jurisdiction over non-Indians. See Oliphant v. Suquamish Indian Tribe, 435 U.S. at 191.

[25] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63 n. 14 (1978). The paucity of constitutional safeguards extended to those persons subjected to tribal authority is a troublesome aspect of Indian governments, but even more troubling is the lack of a meaningful remedy for denial of the limited protections granted by the Indian Civil Rights Act. Reservation governments enjoy sovereign immunity, and this insulates them from most damage suits. Id. at 58-59. Victims of tribal abuses cannot seek redress under civil rights laws because these do not apply to Indian governments. See e.g., R.J. Williams Co. v. Fort Belknap, Etc., 719 F.2d 982 (9th Cir. 1983). A federal writ of habeas corpus is the only nontribal court remedy for correcting or preventing a tribal governments violation of personal rights; federal courts lack the authority to grant civil declaratory or injuntive relief. See Santa Clara Pueblo v. Martinex, 436 U.S. at 59-72.

Figure 1

Location of North Dakota Indian Reservations*



* The location and relative dimensions of the North Dakota reservations are presented as approximations rather than to scale.

North Dakota Tribal Courts

Within the borders of North Dakota lie part or all of five Indian reservations,[26] and each has its own court system. These reservations are: Fort Berthold Reservation, Fort Totten Reservation, Sisseton - Wahpeton (Lake Traverse) Reservation, Standing Rock Reservation, and Turtle Mountain Reservation. Figure 1 shows the location of each reservation. Population figures for these reservations are given in Table 1.

TABLE 1

NORTH DAKOTA RESERVATION POPULATIONS

RESERVATION	INDIAN	NON-INDIAN*
Fort Berthold	3,081	209
Fort Totten	3,109	?
Sisseton-Wahpeton	299	11,309
Standing Rock	4,017	5,300
Turtle Mountain	9,583	347

* North Dakota Indian population figures were obtained from the Bureau of Indian Affairs. These figures represent the tribal members living on or adjacent to the respective reservations. See Bureau of Indian Affairs, Indian Service Population and Labor Force Estimates, (1983), U.S. Govt. Print. Off. The non-Indian population estimates, on the other

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[26] See U.S. Dept. of Commerce, Federal and State Indian Reservations and Indian Trust Areas, at 427 - 37, 502 - 04(1974), U.S. Govt. Print. Off. (containing location, acreage and Indian populations for all reservations).

hand, are neither current nor particularly accurate. Data on non-Indian reservation residents is apparently not kept with similar precision. The non-Indian population figures were obtained from a 1977 study of tribal courts conducted by the American Indian Lawyer Training Program, Inc. This study was not complete hence the absence of data on the Fort Totten Reservation. See American Indian Lawyer Training Program, Inc. supra note 1.

A. Fort Berthold Reservation

Located in west central North Dakota, Fort Berthold is home to the Three Affiliated Tribes: Arikara, Hidatsa and Mandan.[27] The reservation was established by executive orders of Presidents Grant and Hayes[28] and it now consists of approximately 980,500 acres of land. The Three Affiliated Tribes own 45,044 acres. Individual Indians have been allotted 327,259 acres and 174 acres belong to the federal government. Non-Indians own 563,023 acres.[29]

The Three Affiliated Tribes' tribal headquarters is located at New Town, North Dakota,[30] and it is organized under the Indian Reorganization Act of 1934.[31] An elected tribal business council is the governing body,[32] but only tribal

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[27] Id. at 427.

[28] 1 C. Kappler, Indian Affairs: Laws and Treaties, at 883 (1976).

[29] U.S. Dept. of Commerce, supra note 26, at 427.

[30] Id. at 427.

[31] Id. at 427.

[32] Three Affiliated Tribes Const. art. III.

members can hold office or vote in tribal elections.[33] The tribal court claims civil jurisdiction over any cause of action involving a tribal member if it arises within the reservation boundaries or affects property located within the reservation, and in all other cases where the litigants have consented to jurisdiction either in writing or through conduct.[34] At the discretion of the tribal judge a jury trial is provided in civil suits, but non-Indians cannot serve on the jury.[35]

B. Fort Totten Reservation

The Fort Totten Reservation is adjacent to Devils Lake, North Dakota. The reservation was created by treaty in

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[33]Id. at art, II and IV.

[34]Fort Berthold Tribal Code subchapter I, §2(d) (1980). At the conclusion of this research project, the Three Affiliated Tribes was attempting to amend its tribal code and constitution to assert greater authority over both non-Indians and their property; thus, this jurisdictional data may no longer be accurate. Similar inaccuracies may exist in the stated jurisdiction of the other tribal courts; it is also difficult to gain access to tribal codes and resolutions and this may likewise be a source of error. However, if such errors do exist the author bears full responsibility.

[35]The Fort Berthold Tribal Code does not provide for jury trials in civil suits, but the Tribal Prosecutor advises that juries could be permitted at the discretion of the tribal judge. The tribal code does allow jury trials in criminal cases but restricts jury participation to members only. See Fort Berthold Rules of Criminal Procedure, Rule 23.

1867,[36] and it is occupied by the Santee and Teton Sioux.[37] The tribe claims title to 473 acres. Individual members have been allotted a total of 47,640 acres. The federal government owns approximately 1,800 acres. Non-Indians own 192,794 acres of the original reservation lands.[38]

An elected tribal council governs the reservation, and it is an elected body.[39] Nonmembers cannot hold tribal office or vote in tribal elections.[40] Tribal headquarters are at Fort Totten, North Dakota.[41] The tribal court asserts civil jurisdiction over all persons and causes submitted to it.[42] Jury trials are allowed in civil suits, but non-Indians cannot serve on the jury.[43]

C. Sisseton - Wahpeton (Lake Traverse) Reservation

Established by treaty in 1867, the Sisseton - Wahpeton (Lake Traverse) Reservation was set aside for the Santee

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[36] Act of Feb. 19, 1867, art. IV, 15 Stat. 505.

[37] See U.S. Dept. of Commerce, supra note 26, at 430.

[38] Id. at 430.

[39] Devils Lake Sioux Tribe Const. art. IV.

[40] Id. at art. III and V.

[41] U.S. Dept. of Commerce, supra note 26, at 430.

[42] Devils Lake Sioux Tribe Law and Order Code ch. I, title A, §162 (3) and ch. I, title A, § 202(1).

[43] Id. at § 203 (1).

Sioux.[44] Although the tribal headquarters are in Sisseton, South Dakota, 2,592 acres of the reservation extend into North Dakota.[45]

An elected tribal council is the governing body,[46] but only tribal members can hold tribal office or vote in tribal elections.[47] The tribal court claims civil jurisdiction over all causes in which the defendant is an Indian and in cases where a non-Indian defendant consents to tribal court jurisdiction.[48] A jury trial is apparently permitted in civil suits, but non-Indians cannot be jurors.[49]

D. Standing Rock Reservation

Close to Bismarck, the Sioux Tribe's Standing Rock Reservation straddles the North Dakota and South Dakota border.[50] It was created by treaty and executive order of President Grant,[51] and consists of 847,799 acres of land. Tribal land holdings consist of 294,840 acres. Approximately 542,700 acres have

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[44]Act of Feb. 19, 1867, art. III, 15 Stat. 505.

[45]U.S. Dept. of Commerce, supra note 26, at 502.

[46]Sisseton - Wahpeton Sioux Const. art. III.

[47]Id. at art II, § 1; art. V, §§2 and 4.

[48]Sisseton - Wahpeton Law and Order Code ch. II, §§2(c), (d) (1974).

[49]Id. at ch. XIII, §5 (2) (1).

[50]See U.S. Dept. of Commerce, supra note 26, at 433.

[51]Act of March 2, 1889, ch. 405, 25 Stat. 888; 1 C. Kappler, supra note 28, at 884.

been allotted to individual Indians. The federal government owns 10,258 acres. There were no figures on non-Indian land ownership.[52]

Tribal headquarters are located at Fort Yates, North Dakota,[53] and the tribal government consists of an elected council. Tribal members serve on the tribal council,[54] and again only tribal members are authorized to vote in tribal elections.[55] The tribal court asserts civil jurisdiction over cases in which all the parties are Indian. Jurisdiction is also claimed in suits by a non-Indian against a tribal member if the non-Indian is either a resident of or doing business upon the reservation and the amount in controversy does not exceed the sum of $300.[56] The plantiff in a civil suit is not entitled to a jury trial as a matter of right, but if a jury trial is permitted non-Indians can not serve on jury.[57]

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[52]See U.S. Dept. of Commerce, supra note 26, at 433.

[53]See id. at 433.

[54]Standing Rock Sioux Tribal Const. art. II, art. III, §§ 1 and 4.

[55]Id. at art V , §1.

[56]Standing Rock Sioux Tribal Code of Justice § 1.2(c) (1980)

[57]Id. at §§11.4 and 11.5(a).

E. Turtle Mountain Reservation

Established by treaty and executive order of President Arthur,[58] the Turtle Mountain Reservation is situated in north central North Dakota. The reservation is occupied by the Turtle Mountain Band of Chippewa.[59] Of the total reservation acreage, 35,579 is owned by the tribe, and 34,144 acres have been alloted. The federal government claims title to 517 acres. There was an absence of data on non-Indian land holdings.[60]

The tribal headquarters are located at Belcourt, North Dakota,[61] and the governing body is a tribal council.[62] Tribal members vote,[63] hold elected office[64] and serve on tribal juries.[65] Nonmembers are not permitted direct participation in tribal government.

A jury trial is possible in any civil action involving more than two hundred dollars.[66] Tribal court claims jurisdic-

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[58]Act of April 21, 1904, ch. 1402, 33 Stat. 189; 1 C. Kappler, supra note 28, at 885.

[59]U.S. Dept. of Commerce, supra note 26, at 435.

[60]See id. at 435.

[61]Id. at 435.

[62]Turtle Mountain Chippewa Tribal Const. art. IV.

[63]Id. at art. V.

[64]Id. at art. V.

[65]Turtle Mountain Tribal Code § 2.0903 (1976).

[66]Id. at § 2.0901.

tion over actions in which all the parties are Indians, and over suits involving non-Indians to the extent they submit to the court's authority by commencing suit or otherwise consenting to tribal court jurisdiction.[67]

[67]Id. at §2.0102.

CHAPTER 3

TRIBAL COURT JURISDICTION IN DEBTOR - CREDITOR CASES

Parameters of Tribal Authority

Subject matter jurisdiction is the court's right to exercise judicial power over a particular kind of case.[68] It is, in other words, the court's authority to hear and decide law suits of a specific type or character. Within the context of this study, subject matter jurisdiction would be the power of North Dakota tribal courts to hear and decide debtor-creditor cases.

When a tribe's constitution or tribal code limits a tribal court in the type of cases it may hear, these restrictions on subject matter jurisdiction are binding.[69] Yet a tribal court will not have subject matter jurisdiction over law suits merely because the tribal constitution or tribal code states it has such authority. Rather, the tribal court's power to hear cases of a specific character has its origins beyond the tribal code and constitution. If North Dakota tribal courts have subject matter jurisdiction over collection actions involving Indians and non-Indians, this authority

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[68]Kelly v. Nix, 329 N.W. 2d 287, 290 (Iowa 1983).

[69]See Three Affiliated Tribes v. Wold Engineering, ___ U.S. ____, 104 S. Ct. 2267, 2271 (1984).

will have three possible origins. These origins are: treaty, Congressional delegation, or inherent tribal sovereignty. These same origins are the sources for all tribal governmental power.

A. Treaty

Treaties are the cornerstone of Indian law. Moreover, because treaties are on an equal footing with other federal laws, the supremacy clause dictates that they are superior to all conflicting state law whether contained in state constitutions or statutes.[70] Thus, the proper place to begin any inquiry into the extent of a tribe's power is the treaty or treaties that tribe may have with the United States. If the authority claimed can be found in a valid (i.e., ratified) treaty, the tribe has the power in question, including the right to vest its tribal courts with subject matter jurisdiction.

None of the treaties negotiated between the United States and the North Dakota tribes specifically license tribal courts with subject matter jurisdiction over collection

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[70]See U.S. Congress, Final Report to Indian Policy Review Commission, vol. 1, at 109 (1977), U.S. Govt. Print. Off.; F. Cohen, Handbook of Federal Indian Law, ch. 2, §B 12 at 63 (1982), See also Edye v. Robertson, 112 U.S. 580, 598 (1884) (treaties are accorded equal dignity with federal statutory law); Havenstein v. Lynham, 100 U.S. 483, 490 (1880) (treaties are superior to state law including state constitutions); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (supremacy clause of the United States Constitution applies to Indian treaties).

suits, nor do these documents otherwise reference the judicial authority of the respective tribes.[71] But these treaties do set aside land for the use of the Indians, and it might be argued that because a reservation was established for them, Indians can impose upon anyone residing there the condition or conditions under which they will be permitted to remain; one particular condition being submission to the authority of the tribal courts.

Compelling as this argument may seem, it is not likely to constitute a source of tribal judicial authority over collection cases. Similar arguments have been made for the existence of other tribal powers and these have not been successful.[72] This argument has not been accepted because by enacting legislation which allowed and even encouraged non-Indians to settle upon reservation lands,[73] Congress effectively repealed many treaties insofar as the Indians' right to exclusive use is concerned.[74] Hence, as Indian lands became non-Indian lands through the transfer of ownership,

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[71]See Act of April 21, 1904, ch. 1402, 33 Stat. 189; Act of Mar. 2, 1889 ch. 405, 25 Stat. 888; Act of Feb. 19, 1867, art. III and IV, 15 Stat. 505.

[72]See Oliphant v. Suquamish Indian Tribe, 435 U.S. at 195 n. 6 (tribal criminal jurisdiction over non-Indians).

[73]See supra notes 7 and 8, and accompanying text.

[74]See Reid v. Covert 354 U.S. 1, 18 (1957) (to the extent that an earlier treaty conflicts with an act of Congress, the statute renders the treaty null).

tribal powers based upon a treaty right of exclusive use disappeared.[75]

B. Congressional Delegation

The Supreme Court has upheld Congressional delegation of governmental power to Indian tribes.[76] While Congress may be able to vest tribal courts with the authority to hear collection cases involving non-Indians or Indians,

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[75]See Montana v. United States, 450 U.S. 544 (1981) (when reservation lands were transferred to nonmembers, the absolute and undisturbed use provide by treaty no longer extended to this property and, therefore, the tribe had no treaty authority to regulate hunting and fishing by nonmembers on nonmember owned land); Puyallup Tribe v. Washington Game Dept., 433 U.S. 165 (1977) (Puyallup Tribe lost exclusive treaty right to fish in reservation waters when both tribe and United States transferred land in fee simple to non-Indians).

[76]See, e.g., 18 U.S.C. § 1161 (1982) (which exempts from federal criminal laws on reservation sale of alcoholic beverages in accordance with tribal ordinances). The effect of this statute has been to license tribal governments with the authority to control reservation liquor sales regardless of tribal membership. See United States v. Mazurie, 419 U.S. 544 (1975) (upholding federal criminal prosecution of non-Indian in violation of 11 U.S.C. 1161). Of course, in granting subject matter jurisdiction to tribal courts Congress could not give away or otherwise impinge upon the constitutional rights of non-Indians. Cf. Reid v. Covert, 354 U.S. at 1 (Congress could not, by treaty and statute, subject United States citizens to authority of military courts in violation of their constitutional rights).

it has not specifically done so.[77] Furthermore, the Indian Reorganization Act of 1934 has already been considered and rejected as a general source of tribal jurisdiction over both members and nonmembers.[78]

C. Tribal Sovereignty

Inherent tribal sovereignty is the theory that Indian tribes retain a fundamental governmental power over everything and everyone within their reservations. Supporters of Indian sovereignty assert that since tribes were once free and independent "nations," they still retain all vestiges of governmental power that have not been expressly taken from them by treaty or act of Congress.[79] Advocates of complete tribal sovereignty claim that unless specifically denied by treaty or federal law, Indian tribes retain the full range of governmental powers including the authority to raise revenue by taxation and licensing of business, property and persons; the power to condemn or take property by eminent

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[77]The Bureau of Indian Affairs has established a Court of Indian Offenses for those tribes which have not adopted their own law and order code. 25 C.F.R. §§11.1 to 11.37 (1984). These courts are given jurisdiction over all civil suits in which the defendant is a member of the tribe, and in all other actions if the parties stipulate to jurisdiction. 25 C.F.R. §§11.22 to 11.22C (1984). Courts of Indian offenses do not apply to North Dakota tribes because each reservation has enacted its own tribal code and has tribal court system.

[78]United States v. Wheeler, 435 U.S. 313, 328 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. at 195.

[79]See, e.g., U.S. Congress, supra note 70, at 101.

domain; the right to regulate health, safety and commercial activities; and all other powers of government be they legislative, executive or judicial.

Tribal sovereignty is not a recent concept. It was argued before the courts throughout the nineteenth century and received both recognition and recognized limitations.[80] Yet, it has only been in recent years that the full impact of tribal sovereignty claims have been felt.[81] Often wrapped in the trappings of government provided by the Wheeler-Howard Act, and with federal funding available for a variety of governmental functions,[82] Indian tribes have begun to actively assert and establish sovereign rights.[83]

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[80]See, e.g., Talton v. Mays, 163 U.S. 376 (1896) (upholding right of Cherokee Tribe to execute member for violation of tribal law); In re Mayfield, 141 U.S. 107 (1891) (denying Cherokee government criminal jurisdiction over nonmember charged with violation of tribal law).

[81]See F. Martone, American Indian Self-Government in the Federal System: Inherent Right of Congressional License?, 51 Notre Dame Law 600 (1976).

[82]Tribal governments are eligible to receive financial and technical assistance through a variety of federal programs. E.g., Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§450 - 59 (1982); Indian Financing Act of 1974, 25 U.S.C. §§1451 to 1543 (1982); Federal Water Pollution Prevention and Control Act, 33 U.S.C. §§1251 to 1376 (1982); Crime Control Act of 1976, 42 U.S.C. §§3701 to 3797 (1982).

[83]This increase in claims of sovereign rights has been termed a "new civil war," but unlike the last civil war it is not between the states. Rather, it is a challenge by American Indian tribes to the governmental structures of both state and United States, and the courts are the principal battleground. See Martone, supra note 81, at 600.

Tribal governments do have retained or residual governmental powers which courts readily acknowledge.[84] The full scope of this authority, however, has never been determined nor has there been much guidance from the courts in clearly defining the limits of tribal power. Instead, the tribal sovereign right to govern is being determined power by power and case by case according to the analytical framework established with four recent United States Supreme Court decisions. Thus, a tribal court's authority to hear and decide collection suits involving Indians and non-Indians will exist, if at all, on the basis of the legal principles articulated in Oliphant v. Suquamish Indian Tribes,[85] United States v. Wheeler,[86] Washington v. Confederated Tribes of Colville,[87] and Montana v. United States.[88]

Oliphant concerned the power of a tribal government to enact a criminal code and enforce that law against non-Indians.

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[84] A tribe may regulate the activities of nonmembers through taxation, licensing or other means when the nonmembers enter into a consensual relationship with the tribe or its members in the course of commercial dealings, contracts or leases. Williams v. Lee, 358 U.S. 217, 223 (1959). Tribal governments likewise have the retained sovereign power to punish tribal offenders, determine tribal membership, and prescribe rules of inheritance for members of the tribe. United States v. Wheeler, 435 U.S. at 322 n. 18. See also supra note 3 and accompanying text.

[85] 435 U.S. 191 (1978).

[86] 435 U.S. 313 (1978).

[87] 447 U.S. 134 (1980).

[88] 450 U.S. 544 (1981).

The non-Indian defendants in Oliphant were accused of assaulting tribal police officers, injuring tribal property and other violations of the Suquamish Tribal Law and Order Code. The incidents leading to the arrests and charges occurred on the Port Madison Reservation in western Washington. Non-Indians living on the Port Madison Reservation were not entitled to vote in tribal elections; they had no voice in the passage of the tribal law and order code; they could not hold tribal office including law enforcement; and nonmembers were prohibited from serving on tribal juries.

The non-Indian defendants applied to the federal court for a writ of habeas corpus, but the United States District Court for the Western District of Washington ruled in favor of the tribe. The defendants appealed and the United States Court of Appeals for the Ninth Circuit affirmed. The Court of Appeals upheld the lower court's decision because it believed that the Suquamish tribal government had the inherent power to enact a law and order code, and to try non-Indians and punish them for offenses under that code. The United States Supreme Court, however, reversed both the trial and appellate courts.

The Supreme Court reasoned that tribal sovereign powers included only those powers not expressly limited by specific treaty provisions and act of Congress, or otherwise inconsistent with the status of Indians as dependent people:

> [F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.[89]

Stated otherwise, not only can tribal sovereign powers be taken away by treaty or act of Congress, but tribal authority over non-Indians can also be lost by implication if the claimed governmental power is inconsistent with the status of Indians as a dependent people.

Finally, the Supreme Court quickly dismissed the Suquamish Tribe's contention that it could try non-Indians according to Indian law and in derogation of basic criminal due process rights guaranteed by the United States Constitution. Oliphant held that insofar as non-Indian criminal defendants are concerned, there are only state and federal laws to be complied with:

> Indians are within the geograhpical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or the States of the Union. There

[89] 435 U.S. at 210 (emphasis added).

> exists in the broad domain of sovereignty but these two. There may be cities, counties and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these.[90]

The second major Indian sovereignty case was United States v. Wheeler,[91] and it too involved a question of tribal criminal jurisdiction. The issue in Wheeler was the origin of a tribe's power to try and punish its own members for violation of tribal law. Was this a retained sovereign power, or one given to the tribal government by Congress?

Wheeler, a member of the Navajo Tribe, pled guilty in tribal court to a misdemeanor violation of the tribal criminal code, but was thereafter indicted by a federal grand jury on a felony charge arising out of the same incident. The federal trial judge reasoned that since the tribal court was merely an arm of the federal government, the subsequent federal prosecution was barred by the double jeopardy clause of the United States Constitution. The federal district court therefore dismissed the indictment.

The United States Court of Appeals for the Ninth Circuit affirmed the trial court's dismissal, but the Supreme Court reversed because in punishing its members a tribe acts as

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[90] Id. at 211 (quoting United States v. Kagama, 118 U.S. 375 (1886) (emphasis added).

[91] 435 U.S. 313 (1978).

an independent sovereign and not as an extension of the federal government. But more important than its ultimate holding in Wheeler was the Court's analysis in arriving at a decision respecting double jeopardy.

The Supreme Court first scrutinized federal law in an attempt to ascertain whether tribal jurisdiction over members was granted by act of Congress, and concluded that federal law did not create the Indians' power to govern themselves. Rather, the Wheeler Court determined that the ultimate source for tribal governmental powers over members was retained sovereignty.[92] Where nonmembers were concerned, though, the Court was careful to note that Indian tribes had lost many of their sovereign attributes:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe . . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.[93]

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[92] Id. at 323.

[93] Id. at 326 (emphasis added).

Washington v. Confederated Tribes of Colville[94] was decided two years after Wheeler and it addressed a multitude of state and tribal jurisdictional issues. Colville was a consolidated case in which several Indian tribes and the state of Washington were claiming the right to impose their respective taxes on cigarette sales by reservation tobacco outlets known as "smoke shops."

Washington had an excise tax on cigarettes as well as a retail sales tax, and both purported to cover certain reservation cigarette sales.[95] The state retail sales tax was not imposed upon purchases by tribal members, but it did apply to nonmember cigarette buyers. The excise tax was enforced through tax stamps affixed to packages of cigarettes, and with one exception, dealers were required to sell only stamped cigarettes.[96] The one exception related to Indians.

Washington law permitted Indian tribes to possess unstamped cigarettes for resale to tribal members. When sales were to non-Indians or Indians who were not members of the tribe, reservation tobacco dealers had to sell the stamped and therefore taxed cigarettes. To prevent fraudulent sales and tax avoidance, Washington law required reservation tobacco

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[94]447 U.S. 134 (1980).

[95]Wash. Rev. Code §82.24.020 (1976); Wash. Rev. Code §82.08.020 (1976).

[96]Wash. Rev. Code §82.24.030 (1976).

shop operators to keep detailed records of all cigarette sales, both taxable and nontaxable. The operators had to record and maintain for state inspection the number and dollar volume of all sales to nonmembers. Respecting sales to tribal members, not only did records have to be kept of the names of exempt purchasers, tribal affiliation, date, time, place and amount of each purchase, but unless actually known to the dealer, the Indian purchaser had to present a tribal identification card.[97]

The tribes also had their own tax, which was imposed on all cigarette sales. The sale of cigarettes and corresponding tax revenues were important to the tribes. Had the Washington retail and excise taxes been imposed in addition to the tribal tax, reservation outlets would no longer have been able to under-price cigarettes offered by off-reservation merchants. Since the majority of on reservation sales were to non-Indians, losing this price advantage would seriously impair the ability of reservation smoke shops to continue in business.[98]

The tribes refused to collect the state taxes. In order to force the tribes to comply with its laws, Washington seized unstamped cigarettes bound for the reservation. The Indians responded with a law suit, challenging not only

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[97]Wash. Rev. Code §82.24.260 (1976); Wash. Rev. Code §458 -20- 192 (1977).

[98]447 U.S. at 144-45.

the lawfulness of the seizures, but also the legality of all taxes imposed by the state.

The tribes were not successful in their attempt to oust state taxation. Washington did have the authority to tax cigarettes and sales of cigarettes to nonmembers; to seize contraband (unstamped cigarettes); and to require smoke shop operators to keep detailed records of cigarette purchases. Although the Colville Indians were not able to prevent the state from taxing sales to nonmembers, the tribes themselves still enjoyed taxing authority over all reservation sales, including those to nonmembers. The Colville Court reasoned that the sovereign power to tax nonmembers had not been lost through implications because there was no "overriding federal interest that would necessarily be frustrated by tribal taxation."[99]

In Montana v. United States,[100] the issue was the extent of tribal regulatory power over non-Indian lands. The Crow Tribe of Montana had enacted an ordinance (Tribal Resolution 74-05), which prohibited hunting and fishing within the reservation by any one who was not a member. The Crow contended that this law even applied to non-Indians hunting and fishing upon non-Indian owned lands. The state of Montana also claimed the right to regulate hunting and fishing by non-Indians

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[99] Id. at 154.

[100] 450 U.S. 544 (1981).

upon non-Indian owned lands within the reservation and the tribal government brought suit challenging the state's authority.

Dealing first with the assertion that the exclusive use granted the Crow Tribe under its treaty was a source of regulatory power over non-Indian lands, the Court concluded that if the 1868 treaty was a source of tribal power, that power could not be applied to lands owned in fee simple by non-Indians. The Crow no longer possessed a treaty right to regulate these alienated lands because they no longer enjoyed the exclusive use, occupation and control of them.[101]

Turning next to sovereignty as a source of the tribe's regulatory power, the Court declared:

> To be sure, Indian tribes retain inherent sovereign powers to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe of its members, through commercial dealing, contracts, leases or other arrangements . . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[102]

The Montana Court concluded, however, that the state could regulate hunting and fishing by non-Indians upon non-Indian

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[101] Id. at 557 - 63.

[102] Id. at 565 - 67 (emphasis added).

owned lands, but that the Crow Tribe could not. The Crow Tribe could not regulate nonmember hunting and fishing because, under the facts in that case, there was no showing that these non-Indian activities either threatened or otherwise had a direct effect on tribal political integrity, economic security, health, or welfare.[103]

What then can be gleaned from Oliphant, Wheeler, Colville, and Montana, regarding the general sovereign powers remaining to tribal governments? It is obvious from Wheeler and Colville that tribal governments have the broadest of sovereign powers over their own members, property belonging to tribal members, and commercial activities involving non-Indians and the tribe or tribal members. Members are subject to tribal authority because of their status and the unique nature of Indian governments, and if nonmembers are going to do business on the reservation, they will do business according to the rules and regulations established by the tribe.

Montana indicates that tribal sovereign powers may exist over both non-Indians and non-Indian owned property if the tribe can show the necessary nexus between the regulatory authority sought and a vital tribal interest. Whether there exists the requisite impact upon tribal integrity, economic security or welfare to create the sovereign right to regulate nonmembers is an issue of fact, and the tribe has the burden

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[103]Id. at 566 - 67.

of proof on this issue. Additionally, tribal governmental authority over non-Indians will be decided on the facts existing each time a particular power is claimed. Therefore, a judicial determination that the tribal government possesses regulatory authority over non-Indians in one instance may have no significance respecting subsequent efforts to exercise the same authority over other non-members, or to efforts by yet other tribal courts to exercise similar powers.[104]

Using the principles of law established by Oliphant, Wheeler, Colville and Montana, it is possible to analyze

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[104]Consider, for example, Knight v. Shoshone & Arapahoe Indian Tribes, Etc., 670 F.2d at 901, recognizing a tribal government's authority to zone and regulate non-Indian land use within the Wind River Reservation in Wyoming. The Shoshone and Arapahoe Tribes were able to apply their land use law to non-Indian developers because the federal court found the necessary connection with a valid tribal interest: conduct which threatened or had some direct impact on the political integrity, economic security or health and welfare of the tribe. The non-Indian land development consisted of several sub-divisions within an area where tribal ceremonies were held annually, and reasonably close to Indian cemeteries, an Indian activity hall and predominantly Indian schools.

The court found that the tribes had a "significant and substantial interest in the area" because of the Indian activities and this was sufficient to create the civil jurisdiction over the non-Indian land within the reservation. The Knight court did not hold that the tribe could regulate all non-Indian land lying within the reservation nor could it do so without the tribe first proving the significant and substantial interest necessary to create regulatory authority over non-Indian land owners. Thus efforts by the Arapahoe and Shoshone Tribes to regulate non-Indian land use elsewhere on the Wind River Reservation would not be sustained without a strong showing of the necessity to regulate in order to protect traditional Indian activities and culture. Similar proof and findings would be required in each instance a tribal court claimed subject matter jurisdictions over nonmember litigants.

the subject matter jurisdiction of the various North Dakota tribal courts over collection suits. This analysis will be undertaken for each potential combination of Indian and non-Indian litigants.

Indian Creditor and Indian Debtor

Indian tribes are unique aggregations possessing governmental power over both their members and their territory.[105] Subject only to the limitations contained in the Indian Civil Rights Act of 1968,[106] tribal governments have broad authority over tribal members.[107] All of the North Dakota tribal courts claim jurisdiction over actions involving members,[108] and they clearly have the authority to hear collection suits when all the litigants belong to the tribe.[109] Moreover, if the cause of action (debt) arose on the reservation or

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[105] United States v. Wheeler, 435 U.S. at 323.

[106] See supra notes 20 - 25 and accompanying text.

[107] See Santa Clara Pueblo v. Martinez, 436 U.S. at 49 (tribal membership and right of inheritance); United States v. Wheeler, 435 U.S. at 313 (general criminal jurisdiction); Talton v. Mays, 163 U.S. at 376 (death penalty). See also F. Cohen, supra note 70, ch. 6, §B3 at 342. See generally 55 Interior Dec. 14 (1934) (Powers of Indian Tribes). However, Indians who are not members of the tribe are treated the same as non-Indians for jurisdictional purposes. See Washington v. Confederated Tribes of Colville, 447 U.S. at 160-61 (treating non-member Indians as non-Indians for purpose of state taxation).

[108] See supra notes 34, 42, 48, 56 and 67.

[109] See F. Cohen, supra note 70, ch. 6, §B3 at 342. Cf. Fisher v. District Court, 424 U.S. 382 (1976) (adoption proceeding); Whyte v. District Court, 140 Colo. 334, 346 P.2d 1012 (1959), cert. denied, 363 U.S. 829 (1960) (divorce action).

the collateral is located within the reservation boundaries, state courts cannot hear the case.[110]

<u>Indian Creditor and Non-Indian Debtor</u>

Both the Fort Berthold and Fort Totten Tribal Codes provide for claim subject matter jurisdiction over collection suits between members and non-Indian debtors.[111] The Sisseton-Wahpeton and Turtle Mountain courts will apparently hear such cases with the consent of the nonmember defendant,[112] but the

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[110]When the debtor is a tribal member and the debt arose on the reservation, a collection suit cannot be brought in state court. Kennerly v. District Court, 400 U.S. 423 (1971); Williams v. Lee, 358 U.S. 217 (1959); Hot Oil Service, Inc. v. Hall, 366 F.2d 295 (9th Cir. 1966). Likewise, should the collateral for the debt be personal property located on the reservation, state courts are without the authority to compel its return. Cf. R.J. Williams Co. v. Fort Belknap, Etc., 509 F. Supp. 933 (D.C. Mt. 1981) rev'd on other grounds, 719 F. 2d 979 (9th. Cir. 1983) (because tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indian and non-Indians, federal court was without jurisdiction to order return of non-Indian property seized by order of the tribal court). If land is pledged as security for the debt and this is Indian owned and lying within a reservation's boundaries, North Dakota court's have no jurisdiction over the property. See Act of Feb. 22, 1889, 25 Stat. 676 (Enabling Act in which North Dakota required to disclaim title to Indian lands); N.D. Const. art III, §1(2) (disclaiming jurisdiction over Indian lands).

[111]See supra text accompanying notes 34, 42 and 48.

[112]See supra note 67 and accompanying text. The voluntary relinquishment of jurisdiction over non-Indians is binding upon the tribal court. See Three Affiliated Tribes v. Wold Engineering, ______ U.S. ______, 104 S.Ct. at 2271. But see R.J. Williams Co. v. Fort Belknap, Etc., 509 F. Supp. at 933 rev'd on other grounds, 719 F. 2d 979 (9th Cir. 1983) (although the tribal court may have lacked civil jurisdiction to seize non-Indian property with a tribal court writ, federal courts had no power to prevent the attachment).

Standing Rock Tribal Code precludes actions against non-Indians.[113]

Assuming the debt was incurred on the reservation and tribal law does not otherwise prohibit suits against nonmembers, there would seemingly exist sufficient tribal interest to justify a tribal court's authority to hear the case.[114] However, if the debt was incurred off the reservation and the non-Indian objects to the exercise of tribal court jurisdiction, then the Indian court will not likely have the right to try the matter.[115] Yet, even if the tribal court should have jurisdiction over a non-Indian debtor, it would

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[113] See supra text accompanying note 56.

[114] See Babbit Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), cert. denied, 104 S.Ct. 1707 (1984) (upholding Navajo Tribal Court's jurisdiction over non-Indain automobile dealers attempting to repossess collateral located within reservations boundaries). Cf. Cardin v. De La Cruz, 671 F.2d at 363 (recognizing tribal right to enforce health and safety code against non-Indian business); Knight v. Arapahoe Indian Tribes, Etc., 670 F.2d at 900 (enforcing tribal zoning law against non-Indian developers).

[115] Cf. Swift Transportation, Inc. v. John, 546 F. Supp. 1185 (D.C. Ariz. 1982), vacated as moot, 574 F. Supp. 1046 (D.C. Ariz. 1981) (tribal court had no jurisdiction to hear a personal injury case against a non-Indian when accident occurred on non-Indian owned land located within reservation boundaries).

have little power to enforce its decision beyond the reservation boundaries.[116]

Non-Indian Creditor and Indian Debtor

North Dakota tribal courts are unanimous in asserting the authority to try cases brought by a non-Indian creditor against a tribal member.[117] The Standing Rock Tribal Code, however, restricts its tribal court to actions involving less than $300 and further requires that the non-Indian either be a resident of or doing business upon the reservation.[118]

Collection suits against tribal members certainly meets the Montana sufficient and substantial tribal interest test

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[116] Cf. Brown v. Babbit Ford, Inc., 117 Ariz. 192, 571 P.2d 689 (Ct. App. 1977) (Arizona courts were not required to give full faith and credit to Navajo tribal resolution under either 28 U.S.C. 1738 (1982) or U.S. Const. art. 4, 1). But cf. Jim v. CIT Financial Services Corp. 87 N.M. 362, 533 P.2d 751 (1975) (28 U.S.C. 1738 (1982) (requiring New Mexico courts to give full faith and credit to Navajo tribal law). A tribal member, however, may still be able to sue in another forum. Cf. Poitra v. Demarrias, 502 F.2d 23 (8th Cir. 1974) (federal jurisdiction over Indian litigants).

[117] See supra text accompanying notes 34, 42, 48, 56 and 67.

[118] See supra note 56. The Standing Rock Tribal Code seems to create a jurisdictional void. The tribal court can only hear collection suits involving less than $300 dollars and state and federal courts have no jurisdiction if the debt arose on the reservation or involves collateral located within the reservation boundaries. Many non-Indian creditors would, therefore, be left without a forum in which to collect debts owed by tribal members. Cf. R.J. Williams Co. v Fort Belknap, Etc., 509 F. Supp. at 933 (discussing similar jurisdictional void on Crow Reservation in Montana).

for exercise of jurisdiction.[119] Not only has the use of tribal courts in such cases received the highest judicial approval,[120] but there is no other forum in which the non-Indian creditor can have the matter tried.[121]

Non-Indian Creditor and Non-Indian Debtor

Notwithstanding their claims to the contrary, it is not likely that tribal courts possess nonconsensual jurisdiction over civil suits involving only nonmembers. Tribal courts are unable to obtain jurisdiction in cases involving only non-Indians because of the difficulty in establishing the direct impact on Indians or their property required by Montana.[122]

Although tribal courts cannot exercise jurisdiction over nonmember collection suits, they may nonetheless still play a role in non-Indian debt collection practices. All of the North Dakota tribes prohibit self-help repossession, and this requires a creditor to seek the aid of the tribal

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[119]See supra notes 101-104 and accompanying text.

[120]E.g., Kennerly v. District Court, 400 U.S. at 423; Williams v. Lee, 358 U.S. at 217; Hot Oil Service, Inc. v. Hall, 366 F.2d at 295.

[121]See supra note 114. Tribal courts have a monopoly on jurisdiction in such cases because reservation Indians have the right to make their own laws and be governed by them. See Williams v. Lee, 358 U.S. at 217.

[122]See infra note 125 and text. See also F. Cohen, supra note 69, ch. 6, §B3 at 343.

court in seizing collateral.[123] These laws are enforced irrespective of the nonmember status of the parties, and jurisdiction exists because of a vital tribal interest in avoiding breaches of the peace which might result from a creditor's self-help repossession.[124]

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[123]Either by tribal code or Indian common law, North Dakota reservations prohibit self-help repossession. If the debtor surrenders the collateral tribal laws will not bar the repossession, but absent this voluntary relinquishment a creditor has no right to take the collateral without a tribal court order. However, a secured creditor can obtain immediate delivery of collateral on the Turtle Mountain Reservation without a court order if he brings a replevin action and posts security in an amount equal to twice the value of the personal property pledged. Turtle Mountain Tribal Code ch 4.03 (1976).

[124]*E.g.*, Babbit Ford, Inc. v. Navajo Indian Tribe, 710 F.2d at 587 (upholding tribal proscription of self-help repossession against non-Indian automobile dealer).

CHAPTER 4

SURVEY OF NORTH DAKOTA ATTORNEYS

Format of Survey

Part of the research methodology for this project consisted of surveying attorneys about their experiences with and opinions on use of tribal courts for collecting business debts. This survey was accomplished through a written questionnaire mailed to licensed North Dakota lawyers having offices on or within fifty miles of a reservation.[125] The fifty mile radius was selected because these are the attorneys most likely to have experience with a North Dakota tribal court. These lawyers are most likely to have tribal court experience because it is cost prohibitive in most instances to employ legal counsel and have them travel great distances to attend a session of court, nor would businesses many miles from a reservation be apt to resort to an Indian court system on collection matters.

Questionnaires were sent to 372 lawyers and 186 (50%) responded by answering some or all of the relevant inquiries. The respondents were permitted to remain anonymous in an attempt to obtain candid answers to rather sensitive questions,

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[125]Appendix A *infra* contains a copy of the questionnaire.

but the questionnaires were color coded so that they could be identified with a particular tribal court. Table 2 shows the distribution by reservation of attorneys contacted and the number who responded.

TABLE 2

NUMBER OF ATTORNEY RESPONDENTS
FOR EACH RESERVATION

RESERVATION	TOTAL ATTORNEYS CONTACTED	NUMBER OF RESPONDENTS*
Fort Berthold	26	11
Fort Totten	34	16
Sisseton - Wahpeton	19	9
Standing Rock	284	145
Turtle Mountain	9	5

*Summary questionnaires encapsulating basic data obtained are shown in Appendices A through G. Information derived from an analysis of the surveys is set forth in the body of this report.

The questionnaire contained eight questions, some with subparts, and it was designed to obtain information in four areas. Questions one through four provided the following data: (1) The volume of collection suits involving North Dakota attorneys which were brought during the past year. (2) How frequently these lawyers appeared for a creditor as opposed to the debtor. (3) The number of Indian clients

represented in collection cases. (4) The total number of attorney directed collection suits taking place in tribal courts.

Question five, consisting of six subparts, was posed to lawyers who had appeared in tribal court on collection cases. These attorneys with tribal court experience were asked: (1) Their opinion respecting the competence of the judge and tribal court personnel. (2) Whether they believed the tribal court system was fair to both Indian and non-Indian. (3) If the tribal court rules and procedures were similar to those of North Dakota state courts. (4) How they felt about appearing in tribal court. (5) If the results in their particular cases were comparable to what would have been achieved had suit been brought in the state court system. (6) Whether they would recommend tribal court to a non-Indian creditor.

Attorneys with no experience in tribal court collection actions were requested to answer question six. There were three subparts to this question, and they focused upon the attitudes of these lawyers regarding use of an Indian court system for collecting business debts. Attorneys responding to this question were asked: (1) Whether they believed a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian. (2) If they expected the tribal court rules and procedures to be substantially different from those in use in the state courts. (3) Would

they recommend tribal court to a non-Indian creditor when the debtor is a member of the tribe.

The opinions lawyers held on these questions could be important for a variety of reasons. If a significant number of attorneys believed that tribal courts operated under rules and procedures with which they had little familarity, these lawyers would not be inclined to bring collection actions in the Indian court system. When attorneys are of the opinion tribal courts are unfair or otherwise unjust, it is possible for them to infuse their business clients with these same attitudes and prejudices. If the client holds the tribal court system in low esteem he is not likely to resort to Indian courts on collection matters, nor will credit be as freely extended when tribal court is the only recourse in the event of default.

Attorneys were asked in questions seven and eight whether they would be interested in learning about tribal court practice and procedure either through a seminar, or an issue of the North Dakota Law Review devoted to the subject. These questions were a supplement to question six. The purpose of questions seven and eight was to determine if it would be possible to educate lawyers on the Indian court system and thereby alleviate any unfounded prejudices or apprehensions concerning the use of tribal courts to collect business debts.

Comprehensive Summary

The overall results from this survey indicated that the responding attorneys had been involved in 1,950 collection suits within the preceding year,[126] and ninety-two (4.7%) of the cases were in a tribal court. In 1,695 (86.9%) actions attorneys appeared on behalf of creditors,[127] but only ninety-three (4.7%) clients were Indians.

Twenty-five lawyers (13.4%) were experienced in tribal court collection actions, and their responses were generally favorable to the Indian court system as a whole. Fifteen (60%) felt tribal judges and court personnel were competent and thirteen (52%) believed tribal courts to be fair to both non-Indian and Indian alike. Thirteen attorneys (54.2%) stated that tribal court rules and procedures are similar to those used in state court and a majority (68%) were comfortable practicing in Indian courts. Slightly more than half (54%) of the lawyers with tribal court experience believed that a different result would have been attained had their case been tried in state court, and they would not recommend tribal court to non-Indian creditors.

Those attorneys who had no experience with tribal courts were not as favorably disposed towards the tribal court

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[126]See infra Appendix B for complete results of the survey.

[127]It is possible to attribute the obvious under representation of debtors to a lack of funds. If the debtor is not financially capable of paying the underlying obligation, then he is not likely to retain counsel in his defense.

system. Fifty-five (43%) of the respondents did not believe a non-Indian creditor would be fairly treated when the debtor was a tribal member. Only nineteen (14.8%) would advise a non-Indian creditor to use tribal court when state court was available as an alternative forum. Sixty (46.9%) expected the tribal court rules and procedures to differ markedly from those used in state court.

There were 164 responses to questions seven and eight. Ninety-two attorneys (52%) favored having tribal court rules, procedures, and jurisdiction the subject of a law review issue, but the majority of respondents were against seminars.

Data from these questionnaires was separately compiled for each reservation. These results, however, did not vary significantly from those stated above. A summary of the data from this survey is provided in Table 3.

TABLE 3

SUMMARY OF ATTORNEYS' SURVEY

Number of Collection Suits	1,950
Creditor Cases	1,695
Tribal Court Cases	92
Indian Clients Represented	93
Number of Responding Attorneys	186
Counsel with Tribal Court Experience	25
Attorneys with Tribal Court Experience Who Would Recommend that Court System to a Non-Indian Creditor	11
Attorneys without Experience in a Tribal Court Who Believed that a Non-Indian Creditor Would be Fairly Treated in the Indian Court System	21

Fort Berthold Summary

Questionnaires were sent to twenty-six attorneys practicing within or near the Fort Berthold Reservation boundaries, and eleven (42.3%) were returned.[128] There were 217 collection suits and in almost eighty percent of the cases attorneys were representing the creditor. Fourteen collection actions involved Indian clients and thirty-eight (17.5%) of the suits were in tribal court.

Four attorneys had appeared before the Fort Berthold Tribal Court, and they all felt comfortable practicing in

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[128]See *infra* Appendix C for complete results of the Fort Berthold Survey.

that forum. The answers were evenly divided for the remainder of question five. Two respondents had favorable experiences with tribal court, and two did not.

Sixty-six percent of the attorneys who had not been to tribal court did not believe non-Indians would be fairly treated nor would they recommend use of tribal court to a non-Indian creditor if the matter could be brought in state court. Fort Berthold attorneys generally expected tribal rules of practice and procedure to be similar to those in use in state courts. Table 4 presents a summary of the Fort Berthold survey data.

TABLE 4

SUMMARY OF FORT BERTHOLD SURVEY

Number of Collection Suits	217
Creditor Cases	154
Tribal Court Cases	38
Indian Clients Represented	14
Number of Responding Attorneys	11
Counsel with Tribal Court Experience	5
Attorneys with Tribal Court Experience Who Would Recommend that Court System to a Non-Indian Creditor	2
Attorneys without Experience in a Tribal Court Who Believed that a Non-Indian Creditor Woud be Fairly Treated in the Indian Court System	0

The questionnaire did not seek written comments or other unsolicited opinions on the tribal court system and no space was provided for such personal expressions. Nevertheless, the concept of tribal sovereignty is apparently a highly charged subject, one capable of generating strong emotions and many attorneys gave vent to their feelings through handwritten or typed comments. These comments ran the gamut from those sympathetic to the needs of Indians and the role of tribal courts, to many which were openly hostile towards both Indians and their governments. There was also a good measure of humor. The following statements are a representative sample of those received in the Fort Berthold survey:

* * *

> Prior to 1981 I had several opportunities to appear in tribal courts, both at Fort Totten and at Belcourt [Turtle Mountain Reservation]. It was my experience that the tribal courts were run on a very political basis. The results depended in a major part on who was in power on the reservation and who the plantiff was. Race did not seem to be a major factor in the judge's decisions. The written rules for the courts are almost identical to the state's, however, in most instances the rules are not followed, anyway.

* * *

> You must realize that there are four tribal courts in North Dakota, each is unique and separate from the others.

* * *

> Rather than being compared with the white man's district court, one might better compare

> tribal court to our city court. . . . [W]e select a farmer's son (who has never seen a university) as and for our city judge, and no doubt he does the best he can.

Fort Totten Summary

Thirty-four attorneys were questioned in the Fort Totten portion of this research project and sixteen (47.1%) responses were received.[129] There were 211 collection cases involving these lawyers and they represented creditors eighty-seven percent of the time. Indians were clients in only ten (4.7%) of the cases, and eight (3.8%) actions were tried in tribal court.

Six attorneys had appeared in tribal court. Two practioners were satisfied with their tribal court experience, while the remaining four were not. The attorneys with no practical experience in tribal court expected the rules and procedures to be similar to state practice. Five respondents (55.6%) did not believe non-Indians would be fairly treated, and six (75%) would not recommend tribal court to a non-Indian creditor. The majority (57.1%) of the Fort Totten lawyers were not interested in a seminar on tribal court practice, but ten (71.4%) said they would like to see an issue of the North Dakota Law Review dealing with the subject. Table 5 summarizes the Fort Totten data.

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[129]See *infra* Appendix D for complete results of Fort Totten survey.

The following are typical of the comments received on the Fort Totten questionnaire:

* * *

I refuse to appear in tribal court.

* * *

I don't feel the tribal court provides justice to the Indian or non-Indian. Unfortunately, the result would depend more upon who the people involved are rather than the case.

* * *

Tribal court is not used because of a lack of results.

TABLE 5

SUMMARY OF FORT TOTTEN SURVEY

Number of Collection Suits	211
Creditor Cases	184
Tribal Court Cases	8
Indian Clients Represented	10
Number of Responding Attorneys	16
Counsel with Tribal Court Experience	6
Attorneys with Tribal Court Experience Who Would Recommend that Court System to a Non-Indian Creditor	2
Attorneys without Experience in a Tribal Court Who Believed that a Non-Indian Creditor Would be Fairly Treated in the Indian Court System	0

Sisseton - Wahpeton (Lake Traverse) Summary

Nine (47.4%) of the nineteen attorneys contacted in the Sisseton-Wahpeton survey participated by returning their questionnaires.[130] These members of the North Dakota Bar had appeared in seventy-one collection suits but represented only two Indians. Eighty-three percent of the time Sisseton - Wahpeton lawyers had the creditor as a client, and no action was brought in tribal court.

The responses were generally noncommital (i.e., "No Opinion") when it came to using tribal courts in collection suits, and there was little interest in learning about tribal court practice. In fact, the only comment on the Sisseton-Wahpeton questionnaire concerned the inquiry about having a law review treatment of tribal court practice and procedure and the response: "Definitely Not!" Table 6 capsulized the Sisseton - Wahpeton results.

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[130] See infra Appendix E for complete results of the Sisseton - Wahpeton survey.

TABLE 6

SUMMARY OF SISSETON - WAHPETON SURVEY

Number of Collection Suits	71
Creditor Cases	59
Tribal Court Cases	0
Indian Clients Represented	2
Number of Responding Attorneys	9
Counsel with Tribal Court Experience	0
Attorneys with Tribal Court Experience Who Would Recommend that Court System to a Non-Indian Creditor	N/A
Attorneys without Experience in a Tribal Court Who Believed that a Non-Indian Creditor Would be Fairly Treated in the Indian Court System	1

Standing Rock Summary

The Standing Rock sampling area included Bismarck, North Dakota which accounts for the greater number of respondents. A total of 284 attorneys were mailed the questionnaire and 145 (51.1%) were returned.[131] There were 1,408 collection suits brought. In 1,245 (88.4%) of the cases the attorney represented the creditor, eighteen suits (1%) were in tribal court, and four percent of the clients were Indian.

Eleven respondents had either brought or defended collection cases in tribal court. These lawyers were generally evenly

[131]See *infra* Appendix F for complete results of Standing Rock survey.

divided in their opinions of tribal court practice except seven (70%) would not recommend that a non-Indian creditor use tribal court.

The majority of the attorneys without a history of practice before tribal court did not believe a non-Indian creditor would be fairly treated in that forum, nor would they advise a non-Indian client to use tribal court when suit could be brought in state court. Approximately thirty-eight percent of those responding were amenable to classes on the tribal court system, while sixty-three percent were receptive to dealing with the subject in an issue of the North Dakota Law Review.

Fifty (47.2%) expected tribal practice and procedure to differ substantially from state court. Thirty (28.3%) did not believe there would be a significant difference between practicing in tribal rather than state court. Twenty-six (24.5%) had no opinion on the matter. The data from Standing Rock is shown in Table 7.

TABLE 7

SUMMARY OF STANDING ROCK SURVEY

Number of Collection Suits	1,408
Creditor Cases	1,245
Tribal Court Cases	18
Indian Clients Represented	62
Number of Responding Attorneys	145
Counsel with Tribal Court Experience	11
Attorneys with Tribal Court Experience Who Would Recommend that Court System to a Non-Indian Creditor	3
Attorneys without Experience in a Tribal Court Who Believed that a Non-Indian Creditor Would be Fairly Treated in the Indian Court System	18

The comments from Standing Rock were the most vitriolic of all those received. The following opinions were expressed by attorneys answering the Standing Rock survey:

* * *

> My experience with native Americans has not been such that I can comment favorably. I have been informed that tribal courts are not comparable, some being biased and some fair to the extreme. Native American debtors in this area have not been easy to deal with.

* * *

> I am sure every white creditor would rather sue in county court where he or she can

take advantage of a jurisdiction which has been unfair to Indians.

* * *

My experience in the past has left a bad taste for tribal courts.

* * *

The defendant on the [witness] stand admitted he owed the debt. The court refused to direct a verdict and the jury returned a verdict of dismissal.

* * *

Tribal courts face two basic problems: [1] Funding is often uncertain even if the tribal council wants to provide adequate funds. [2] [The] Tribal court is not sufficiently removed from tribal politics.

* * *

I can't get paid after I win in state court either.

* * *

The idea of special sovereign status for native Americans is not consistent with the Constitution. If a history of persecution of a minority by the majority . . . means sovereignty and special rights, then we have other such minority blocs in our population. I am partly of Irish descent. Their record of discrimination and persecution extends back 800 years, not 200 or so as in the case with native Americans.

Turtle Mountain Summary

There were nine attorneys contacted in the Turtle Mountain segment of this research project and five (55.6%) returned

questionnaires.[132] These respondents appeared in forty-three collection suits during the year and represented creditors in forty-two (97.6%) of the cases. More than one-half (65.1%) of these actions were in tribal court, but there were only five (11.6%) Indian clients.

Four of the answering attorneys had practiced in the tribal court, and the Turtle Mountain court system received a good rating. These lawyers believed the court personnel were competent and were unanimous in recommending tribal court to non-Indian creditors.

The one lawyer with no tribal court experience expected the rules of practice and procedure to be markedly different from the state court standards. This lawyer did not think a non-Indian creditor would be fairly treated in tribal court nor would he recommend the Indian court system to a non-Indian creditor if state court was an optional forum.

Respecting the education questions, the law review article was favored over attending a seminar. There was only one attorney interested in the seminar. Table 8 summarizes the Turtle Mountain data.

One written comment was received, and it was directed to a specific question. The question asked if the respondent would recommend tribal court to a non-Indian creditor, and the comment was: "What choice do I have?"

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[132]See infra Appendix G for complete results of Turtle Mountain survey.

TABLE 8

TURTLE MOUNTAIN SURVEY

Number of Collection Suits	43
Creditor Cases	42
Tribal Court Cases	28
Indian Clients Represented	5
Number of Responding Attorneys	5
Counsel with Tribal Court Experience	5
Attorneys with Tribal Court Experience Who Would Recommend that Court System to a Non-Indian Creditor	4
Attorneys without Experience in a Tribal Court Who Believed that a Non-Indian Creditor Would be Farily Treated in the Indian Court System	0

CHAPTER 5

PERSONAL INTERVIEWS

Tribal Informants

North Dakota tribal courts were contacted and data gathered on the number and type of collection suits being brought. Fort Berthold, Sisseton-Wahpeton, Standing Rock and Turtle Mountain data were collected through telephone interviews with tribal judges, clerks of court and other court personnel. Fort Totten was visited and the information obtained directly from the tribal judges, clerk of court and various Bureau of Indian Affairs employees. The data acquired from these tribal sources indicated a much greater use of tribal courts for business collections than one might have suspected from the results of the survey of North Dakota attorneys.

There may have been over 1,300 collection suits brought in North Dakota tribal courts during the past year.[133] Fort Berthold reported approximately 300 cases. Fort Totten and Standing Rock each had eighty suits filed. Forty cases were brought at Sisseton - Wahpeton, and 811 actions were

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[133]The figures on tribal court collection cases were estimates from the persons interviewed. Tribal court records did not categorize civil actions by type of case and race of litigants.

commenced in the Turtle Mountain Tribal Court. Tribal informants were also unanimous in stating that the majority of these collection actions were brought by non-Indians against Indian debtors;[134] that attorneys rarely represented either party; and that the amounts in controversy were usually less than $500. Table 9 compares the litigation data received from the attorneys' survey with that obtained from tribal informants.

TABLE 9

COMPARISON OF LITIGATION DATA

RESERVATION	TRIBAL COURT COLLECTION SUITS	TRIBAL COURT COLLECTION SUITS INVOLVING NORTH DAKOTA ATTORNEYS	TOTAL NUMBER OF COLLECTION SUITS INVOLVING NORTH DAKOTA ATTORNEYS
Fort Berthold	300	38	217
Fort Totten	80	8	211
Sisseton-Wahpeton	40	0	71
Standing Rock	80	18	1,408
Turtle Mountain	811	28	43

[134] E.g., all the cases at Fort Totten were filed by non-Indian creditors and the same was true at the Sisseton - Wahpeton tribal court.

Business Informants

Collecting information from non-Indian businessmen concerning the granting of credit to Indians was the most difficult segment of this research project. The information could not be acquired with a questionnaire because it is illegal to discriminate in the granting of credit on the basis of the applicant's national origin, race, religion, color or age.[135] Banks, merchants and other persons who extend credit on a regular basis would not admit in writing that they refuse credit to native Americans because of a distrust of the tribal court system.

It is, however, sometimes possible to obtain candid and forthright answers to sensitive questions during a personal interview, especially when the interrogator does not use written notes, carries no recording device and presses for a truthful response. A face to face interview without paper, pencil or tape recorder was the method used to acquire data from non-Indian business people. Employees of five lending institutions, two car dealers and the President of the North

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[135] 15 U.S.C. 1591 to 1691(f) (1982). Known as the Equal Credit Opportunity Act this law requires those extending credit on a regular basis to make it available to all credit worthy customers without regard to race, sex, religion, color, age or national origin. The law applys to department stores, banks, savings and loan associations, realtors, automobile dealers and even dentists if they regularly extend credit. Violation of the law exposes one to civil damages, plus costs and attorney's fees. <u>See</u> 15 U.S.C. 1691(e) (1982).

Dakota Collectors' Association were interviewed in this manner.[136]

All the informants expressed some concern over the exclusive jurisdiction granted tribal courts when the debtor is an Indian and the contract either arose within reservation borders or involved collateral located on the reservation. One lender had no history of making consumer loans to Indians. The loan officer indicated, however, that once a history was developed and it became apparent that resorting to tribal court was going to be a problem in collecting defaulted loans, this fact would certainly be taken into consideration in deciding future credit extensions to native Americans.

Another lender acknowledged that extending credit to Indians was a troublesome problem because of what was preceived as a lack of recourse in the event of default. This financial officer emphasized that while native Americans were obtaining loans, the loans were made on the basis of the applicant's personal character rather than assets or other collateral located within the reservation boundaries. If the applicant was known and believed to be trustworthy from a repayment standpoint, the loan was made, but without this personal knowledge and evaluation of the would be borrower's character, credit would not be extended.

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[136]Due to the serious legal implications related to the Equal Credit Opportunity Act and a denial of credit contrary to the provisions of that law, the informants will remain anonymous in all but one instance.

Three informants openly admitted having great reluctance in making loans to Indians living upon a reservation, and stressed that because of the discretion involved it was always possible to deny a credit request on grounds other than race. Yet, one institution went further than the rest by giving written instructions to loan officers on how to treat credit applications from reservation Indians:

> [I]f the banker has reason to believe that removal of the collateral to a particular reservation will impair his access in the event of default, he may be justified either in refusing the credit request outright or in imposing more stringent terms such as a larger down payment or shorter terms.
> . . .
> [W]e recommend even more strongly than before that you exercise extreme caution in granting secured credit to Indian applicants living on reservations. If you are presented with such an application for secured credit where the collateral will be physically located on a reservation you should probably treat the request as a 'character loan' *i.e.* one where your credit decision is based principally on your evaluation of the applicant's character. In other words, if, in your opinion, there is a strong and compelling reason to believe that your access to the collateral might be impaired, you should probably treat such requests as though they were for unsecured credit and evaluate the request accordingly.[137]

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[137](Emphasis in original). This policy might very well be a violation of the Equal Credit Opportunity Act because the effect is to clearly treat Native Americans differently from similarly situated non-Indians, and it certainly violates the spirit of that law.

Of the two automobile dealers interviewed, one was evasive and noncommittal respecting tribal courts and credit sales to reservation Indians; whereas the other spoke frankly about what he believed was a very real and serious problem. This merchant related past difficulties in repossessing cars on the reservation in support of his decision not to extend credit to Indians, and he insisted that this practice was economically rather than racially motivated.[138]

Finally, Mr. David G. Knudsen, President of the North Dakota Collectors' Association was interviewed and he seemed quite knowledgeable about collection problems associated with the tribal court system. He felt that it was often easier to collect an account located in Canada than one from a reservation. It was also Mr. Knudsen's opinion that the exclusive jurisdiction granted tribal courts over Indian debtors was a serious problem for all concerned:

> Certainly many millions of dollars in debts are going uncollected, and Indians are not getting the credit they might otherwise.[139]

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[138]To illustrate this point, the informant stated: "Anytime I receive a credit application by someone from West Virginia, I treat it in much the same way as one from a Native American." The author, being a native of West Virginia, fully appreciated this analogy and was not in the least offended.

[139]Quoting David G. Knudsen, President of the North Dakota Collectors' Association.

CHAPTER 6

ANALYSIS AND CONCLUSION

This project was undertaken with limited funds, and for that reason as well as the difficulty in obtaining information and the breadth of the subject matter, it does not claim to be either a definitive treatment of tribal courts or their role in the collection of business debts. Yet the results from this research are certainly suggestive of very real problems for Indians and non-Indians alike. Problems rooted both in the exclusive jurisdiction granted tribal courts over Indian debtors, and how Indian courts are perceived by non-Indian businesses and their attorneys.

Although those attorneys who have practiced before a tribal court do not express overwhelming dissatisfaction with the Indian court system, a vast majority of the attorneys surveyed had a low opinion of tribal courts. Most, if not all, of these lawyers had no apparent basis for their attitude about the tribal court system, but the negative opinion nevertheless exists and it is undoubtedly transmitted to banks, savings and loans, and other business clients these counsel represent. The idea that these prejudices are being communicated to non-Indian lending institutions and merchants appears supported by the lack of attorney participation

in tribal court collection suits, and the relatively small amounts in controversy involved in tribal court cases.

Whenever the debt is incurred on the reservation or the collateral is located within the reservation's boundaries, tribal court is the only forum with authority to hear and decide the case. Indians are indeed being sued in tribal court for business debts. There are a substantial number of such actions brought each year in the North Dakota tribal courts. Yet, these cases are usually brought by a non-Indian creditor and they involve insignificant amounts of money. These are small accounts where it is cost prohibitive to employ an attorney to represent the merchant or lender's interest.

Tribal courts are obviously functioning much along the lines of a small claims court in which creditors appear without counsel because the debt is so small. Tribal courts are not seeing the large credit cases because Indians are apparently not being extended large loans or lines of credit. Indians are not being given the credit they might otherwise obtain because non-Indian merchants and lenders do not have confidence in the tribal court system.

How, if ever, the problem will be resolved was not a subject of this project, nor were there sufficient data collected to suggest a comprehensive solution. Whatever the eventual solution, though, a vital element will undoubtedly be educating attorneys and businessmen about the tribal

court system, and instilling in these people a faith in that court process which does not seem to exist at this time. Tribal courts will also have to take a hand in solving this problem, and it will be difficult if not impossible to instill confidence in a judicial system that does not comport with traditional notions of Anglo-American jurisprudence.

Indian courts are designed to respect the cultural heritage, rules and beliefs of Native Americans, but Indian people must interact with nonmembers of the tribe and nowhere is this truer than in the obtaining of credit. Indian people have their own governments including a system of tribal courts. These governments certainly are vested with authority, but the individual members and perhaps the tribes as a whole are paying a price for their separate system. This price would seem to include not only a reduction in consumer credit to tribal members, but a corresponding denial of private sector development moneys as well.

APPENDICES

APPENDIX A

ATTORNEY QUESTIONNAIRE

ATTORNEY QUESTIONNAIRE

Please take a moment to complete and return this questionnaire, which has been pre-addressed with postage affixed as a convenience to you. This survey of North Dakota attorneys is being conducted in conjunction with the University of North Dakota Bureau of Business and Economic Research and the College of Business. The purpose of this survey is to gather information on the use of Indian tribal courts for collection actions. As used herein, a collection action would be any law suit commenced for the recovery of money owed pursuant to a contract for the sale of goods, a delinquent account, or a dishonored check.

1. Have you appeared as counsel of record in any collection action during the past year and, if so, how many cases?

   Number of Cases ________

2. Were you plaintiff's counsel in any of these suits and, if so, please state the percentage of cases in which you represented a creditor?

   ________% Creditor Cases

3. Were any of these actions before an Indian tribal court and, if so, how many?

   ____

4. What percentage of your clients were Indian and what percentage were non-Indians?

   Indian ________% Non-Indian ________%

5. If you have had occasion to appear in tribal court on a collection matter, please answer the following questions. However, if you have never been in tribal court on a collection case, please answer question 6.

   Were the tribal judge and court personnel competent?
   Yes ____ No ____

   Was the tribal court system fair to both Indian and non-Indian alike?
   Yes ____ No ____

   Were the tribal court rules of practice and procedure similar to those in use in the state court system?
   Yes ____ No ____

Did you feel comfortable practicing before the tribal court?

Yes ____ No ____

Were the results in tribal court comparable to what would have been achieved had the suit been brought in state court?

Yes ____ No ____

Based upon your experience, would you recommend use of tribal court to a non-Indian creditor?

Yes ____ No ____

6. If you have never had an opportunity to appear in tribal court on a collection matter, please answer the following questions?

Do you believe that a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian?

Yes ____ No ____ No Opinion ____

Would you expect the tribal court rules of practice and procedure to be markedly different from those used in state court?

Yes ____ No ____ No Opinion ____

Given the choice between proceeding on behalf of a non-Indian creditor in either state or tribal court, would you recommend use of tribal court if debtor is an Indian?

Yes ____ No ____ No Opinion ____

7. Would you be interested in a continuing legal education seminar on tribal court practice and jurisdiction?

Yes ____ No ____ No Opinion ____

8. Would you like to see an issue of the North Dakota Law Review devoted to tribal court practice and jurisdiction?

Yes ____ No ____ No Opinion ____

APPENDIX B

COMPREHENSIVE RESULTS OF ATTORNEY SURVEY

APPENDIX C

RESULTS OF FORT BERTHOLD SURVEY

RESULTS OF FORT BERTHOLD SURVEY

Please take a moment to complete and return this questionnaire, which has been pre-addressed with postage affixed as a convenience to you. This survey of North Dakota attorneys is being conducted in conjunction with the University of North Dakota Bureau of Business and Economic Research and the College of Business. The purpose of this survey is to gather information on the use of Indian tribal courts for collection actions. As used herein, a collection action would be any law suit commenced for the recovery of money owed pursuant to a contract for the sale of goods, a delinquent account, or a dishonored check.

1. Have you appeared as counsel of record in any collection action during the past year and, if so, how many cases?

   Number of Cases 217

2. Were you plaintiff's counsel in any of these suits and, if so, please state the percentages of cases in which you represented a creditor?

   Creditor Cases 154 (78.9%)

3. Were any of these actions before an Indian tribal court and, if so, how many?

   38 (17.5%)

4. What percentage of your clients were Indian and what percentage were non-Indians?

   Indian 14 (6.45%) Non-Indian 203 (97%)

5. If you have had occasion to appear in tribal court on a collection matter, please answer the following questions. However, if you have never been in tribal court on a collection case, please answer question 6.

   Were the tribal judge and court personnel competent?

   Yes 3 (60%) No 2 (40%)

   Was the tribal court system fair to both Indian and non-Indian alike?

   Yes 2 (50%) No 2 (50%)
   No Bais for Comparison -0-

   Were the tribal court rules of practice and procedure similar to those in use in the state court system?

   Yes 2 (50%) No 2 (50%)

Did you feel comfortable practicing before the tribal court?

Yes 2 (50%) No -0-

Were the results in tribal court comparable to what would have been achieved had the suit been brought in state court?

Yes 2 (50%) No 2 (50%)

Based upon your experience, would you recommend use of tribal court to a non-Indian creditor?

Yes 2 (50%) No 2 (50%)

6. If you have never had an opportunity to appear in tribal court on a collection matter, please answer the following questions?

Do you believe that a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian?

Yes 1 (16.7%) No 4 (66.6%)

No Opinion 1 (16.7%)

Would you expect the tribal court rules of practice and procedure to be markedly different from those used in state court?

Yes 2 (33.3%) No 3 (50%)

No Opinion 1 (16.7%)

Given the choice between proceeding on behalf of a non-Indian creditor in either state or tribal court, would you recommend use of tribal court if debtor is an Indian?

Yes -0- No 4 (66.6%)

No Opinion 2 (33.3%)

7. Would you be interested in a continuing legal education seminar on tribal court practice and jurisdiction?

Yes 4 (40%) No 3 (30%)

No Opinion 3 (30.4%)

8. Would you like to see an issue of the North Dakota Law Review devoted to tribal court practce and jurisdiction?

Yes 4 (40%) No 4 (40%)

No Opinion 2 (2%)

APPENDIX D

RESULTS OF FORT TOTTEN SURVEY

RESULTS OF FORT TOTTEN SURVEY

Please take a moment to complete and return this questionnaire, which has been pre-addressed with postage affixed as a convenience to you. This survey of North Dakota attorneys is being conducted in conjunction with the University of North Dakota Bureau of Business and Economic Research and the College of Business. The purpose of this survey is to gather information on the use of Indian tribal courts for collection actions. As used herein, a collection action would be any law suit commenced for the recovery of money owed pursuant to a contract for the sale of goods, a delinquent account, or a dishonored check.

1. Have you appeared as counsel of record in any collection action during the past year and, if so, how many cases?

   Number of Cases 211

2. Were you plaintiff's counsel in any of these suits and, if so, please state the percentage of cases in which you represented a creditor?

   184 (87.2%)

3. Were any of these actions before an Indian tribal court and, if so, how many?

   8 (3.8%)

4. What percentage of your clients were Indian and what percentage were non-Indians?

   Indian 10 (4.7%) Non-Indian 201 (95.3%)

5. If you have had occasion to appear in tribal court on a collection matter, please answer the following questions. However, if you have never been in tribal court on a collection case, please answer question 6.

   Were the tribal judge and court personnel competent?

   Yes 2 (33.3%) No 4 (66.7)

   Was the tribal court system fair to both Indian and non-Indian alike?

   Yes 2 (33.3%) No 4 (66.7%)

   Were the tribal court rules of practice and procedure similar to those in use in the state court system?

   Yes 3 (50%) No 3 (50%)

Did you feel comfortable practing before the tribal court?

Yes 2 (33.3%) No 4 (66.7%)

Were the results in tribal court comparable to what would have been achieved had the suit been brought in state court?

Yes 2 (33.3%) No 4 (66.7%)

Based upon your experience, would you recommend use of tribal court to a non-Indian creditor?

Yes 2 (33.3%) No 4 (66,7%)

6. If you have never had an opportunity to appear in tribal court on a collection matter, please answer the following question?

Do you believe that a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian?

Yes -0- No 5 (55.6%)
No Opinion 4 (44.4%)

Would you expect the tribal court rules of practice and procedure to be markedly different from those used in state court?

Yes 4 (44.4%) No 2 (22.2%)
No Opinion 3 (33.3%)

Given the choice between procedding on behalf of a non-Indian creditor in either state or tribal court, would you recommend use of tribal court if debtor is an Indian?

Yes -0- No 6 (75%)
No Opinion 2 (25%)

7. Would you be interested in a continuing legal education seminar on tribal court practice and jurisidiction?

Yes 5 (35.7%) No 8 (57.1%)
No Opinion 1 (7.1%)

8. Would you like to see an issue of the North Dakota Law Review devoted to tribal court practice and jurisdiction?

Yes 10 (71.4%) No 2 (14.3%)
No Opinion 2 (14.3%)

APPENDIX E

RESULTS OF SISSETON - WAHPETON (Lake Traverse) SURVEY

RESULTS OF SISSETON - WAHPETON (Lake Traverse) SURVEY

Please take a moment to complete and return this questionnaire, which has been pre-addressed with postage affixed as a convenience to you. This survey of North Dakota attorneys is being conducted in conjunction with the University of North Dakota Bureau of Business and Economic Research and the College of Business. The purpose of this survey is to gather information on the use of Indian tribal courts for collection actions. As used herein, a collection action would be any law suit commenced for the recovery of money owed pursuant to a contract for the sale of goods, a delinquent account, or a dishonored check.

1. Have you appeared as counsel of record in any collection action during the past year and, if so, how many cases?

   Number of Cases? 71

2. Were you plaintiff's counsel in amy of these suits and, if so, please state the percentage of cases in which you represented a creditor?

   59 (83%)

3. Were any of these actions before an Indian tribal court and, if so, how many?

   -0-

4. What percentage of your clients were Indian and what percentage were non-Indian?

   Indian 2 (2.8%) Non-Indian 69 (97.2%)

5. If you have had occasion to appear in tribal court on a collection matter, please answer the following questions. However, if you have never been in tribal court on a collection case, please answer question 6.

   Were the tribal judge and court personnel competent?

   Yes -0- No -0-

   Was the tribal court system fair to both Indain and non-Indian alike?

   Yes -0- No -0-

   Were the tribal court rules of practice and procedure similar to those in use in the state court system?

   Yes -0- No -0-

Did you feel comfortable practicing before the tribal court?

Yes -0- No -0-

Were the results in tribal court comparable to what would have been achieved had the suit been brought in state court?

Yes -0- No -0-

Based upon your experience, would you recommend use of tribal court to non-Indian creditor?

Yes -0- No -0-

6. If you have never had an opportunity to appear in tribal court on a collection matter, please answer the following question?

Do you believe that a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian?

Yes -0- No 2 No Opinion 4

Would you expect the tribal court rules of practice and procedure to be markedly different from those used in state court?

Yes 3 No 1 No Opinion 2

Given the choice between proceeding on behalf of a non-Indian creditor in either state or tribal court, would you recommend use of tribal court if debtor is an Indian?

Yes 1 No 2 No Opinion 4

7. Would you be interested in a continuing legal education seminar on tribal court practice and jurisdiction?

Yes 3 No 5 No Opinion -0-

8. Would you like to see an issue of the North Dakota Law Review devoted to tribal court practice and jurisdiction?

Yes 3 No 4 No Opinion 1

APPENDIX F

RESULTS OF STANDING ROCK SURVEY

RESULTS OF STANDING ROCK SURVEY

Please take a moment to complete and return this questionnaire, which has been pre-addressed with postage affixed as a convenience to you. This survey of North Dakota attorneys is being conducted in conjunction with the University of North Dakota Bureau of Business and Economic Research and the College of Business. The purpose of this survey is to gather information on the use of Indian tribal courts for collection actions. As used herein, a collection action would be any law suit commenced for the recovery of money owed pursuant to a contract fior the sale of goods, a delinquent account, or a dishonored check.

1. Have you appeared as counsel of record in any collection action during the past year and, if so, how many cases?

   Number of cases 1,408

2. Were you plaintiff's counsel in any of these suits and, if so, please state the percentage of cases in which you represented a creditor?

   1,245 (88.4%)

3. Were any of these actions before an Indian tribal court and, if so, how many?

   18 (1%)

4. What percentage of your clients were Indian and what percentage were non-Indians?

   Indian 62 (4.4%) Non-Indian 1,346 (95.6%)

5. If you have had occasion to appear in tribal court on a collection matter, please answer the following questions. However, if you have never been in tribal court on a collection case, please answer question 6.

   Were the tribal judge and court personnel competent?

   Yes 7 (63.6%) No 4 (36.4%)

   Was the tribal court system fair to both Indian and non-Indian alike?

   Yes 6 (54.5%) No 4 (36.4%)
   No Basis for Comparison 1 (9%)

   Were the tribal court rules of practice and procedure similar to those in use in the state court system?

   Yes 5 (45.5%) No 6 (54.5%)

Did you feel comfortable practicing before the tribal court?

Yes 7 (63.6%) No 4 (36.4%)

Were the results in tribal court comparable to what would have been achieved had the suit been brought in state court?

Yes 4 (36.4%) No 6 (54.5%)

Based upon your experience, would you recommend use of tribal court to a non-Indian creditor?

Yes 3 (30%) No 7 (70%)

6. If you have never had an opportunity to appear in tribal court on a collection matter, please answer the following questions?

Do you believe that a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian?

Yes 20 (18.9%) No 43 (40.6%)
No Opinion 43 (40.6%)

Would you expect the tribal court rules of practice and procedure to be markedly different from those used in state court?

Yes 50 (47.2%) No 30 (28.3%)
No Opinion 26 (24.5%)

Given the choice between proceeding on behalf of a non-Indian creditor in either state of tribal court, would you recommend use of tribal court if debtor is an Indian?

Yes 18 (17%) No 61 (57.5%)
No Opinion 27 (25.5%)

7. Would you be interested in a continuing legal education seminar on tribal court practice and jurisdiction?

Yes 49 (38.6%) No 56 (40.1%)
No Opinion 22 (17.3%)

8. Would you like to see an issue of the North Dakota Law Review devoted to tribal court practice and jurisdiction?

Yes 73 (63.5%) No 26 (22.6%)
No Opinion 16 (13.9%)

APPENDIX G

RESULTS OF TURTLE MOUNTAIN SURVEY

RESULTS OF TURTLE MOUNTAIN SURVEY

Please take a moment to complete and return this questionnaire, which has been pre-addressed with postage affixed as a convenience to you. This survey of North Dakota attorneys is being conducted in conjunction with the University of North Dakota Bureau of Business and Economic Research and the College of Business. The purpose of this survey is to gather information on the use of Indian tribal courts for collection actions. As used herein, a collection action would be any law suit commenced for the recovery of money owed pursuant to a contract for the sale of goods, a delinquent account, or a dishonored check.

1. Have you appeared as counsel of record in any collection action during the past year, if so, how many cases?
   Number of Cases 43

2. Were you plaintiff's counsel in any of these suits and, if so, please state the percentage of cases in which you represented a creditor?
   42 (97.6%)

3. Were any of these actions before an Indian tribal court and, if so, how many?
   28 (65.1%)

4. What percentage of your clients were Indian and what percentage were non-Indians?
   Indian 5 (11.6%) Non-Indian 38 (88.7%)

5. If you have had occasion to appear in tribal court on a collection matter, please answer the following questions. However, if you have never been in tribal court on a collection case, please answer question 6.

   Were the tribal judge and court personnel competent?
   Yes 4 No -0-

   Was the tribal court system fair to both Indian and non-Indian alike?
   Yes 3 No -0-

   Did you feel comfortable practicing before the tribal court?
   Yes 4 No 1

   Were the tribal court rules of practice and procedure similar to those in use in the state court system?
   Yes 3 No 1

Were the results in tribal court comparable to what would have been achieved had the suit been brought in state court?
Yes 3 No 1

Based upon your experience, would you recommend use of tribal court to a non-Indian creditor?
Yes 4 No -0-

6. If you have never had an opportunity to appear in tribal court on a collection matter, please answer the following questions?

Do you believe that a non-Indian creditor would be fairly treated in tribal court when the debtor is an Indian?
Yes -0- No 1 No opinion -0-

Would you expect the tribal court rules of practice and procedure to be markedly different from those used in state court?
Yes 1 No -0- No Opinion -0-

Given the choice between proceeding on behalf of a non-Indian creditor in either state or tribal court, would you recommend use of tribal court if debtor is an Indian?
Yes -0- No 1 No Opinion -0-

7. Would you be interested in a continuing legal education seminar on tribal court practice and jurisdiction?
Yes 1 No 2 No Opinion 2

8. Would you like to see an issue of the North Dakota Law Review devoted to tribal court practice and jurisdiction?
Yes 2 No 1 No Opinion 1