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INDIANS - CONSTITUTIONAL LAW - THE INTERPRETATION OF NORTH DAKOTA'S INDIAN CIVIL JURISDICTION ACT.

This case was reversed and remanded by the United States Supreme Court's decision in Three Affiliated Tribes v. Wold Engineering, P.C., 106 S.Ct. 2305 (1986). The United States Supreme Court determined that federal law prevented North Dakota's disclaimer of jurisdiction over the tribe's suit. Id. at 2310. The Court also stated that North Dakota's interest in requiring all citizens to bear equally the benefits and burdens of access to state courts unduly burdened the federal government's interest in tribal autonomy and self governance. Id. at 2312.

Three Affiliated Tribes of the Fort Berthold Indian Reservation brought an action against Wold Engineering, a non-Indian engineering firm, for negligence in the design of a water supply system that Wold Engineering had installed on the reservation.¹ The district court dismissed the complaint for lack of subject matter jurisdiction.² The district court determined that it could not entertain a civil action involving Indians that arose within the boundaries of the Fort Berthold Indian Reservation.³ Three Affiliated Tribes appealed, and the North Dakota Supreme Court affirmed the district court's decision.⁴ The United States

1. Three Affiliated Tribes v. Wold Eng'g, P.C., 321 N.W.2d 510, 511 (N.D. 1982). Wold designed and constructed a water supply system for Four Bears Village. Brief for Appellee at 2, Three Affiliated Tribes v. Wold Eng'g, P.C., 364 N.W.2d 98 (N.D. 1985). Work on the project occurred entirely within the exterior boundaries of the Fort Berthold Indian Reservation. *Id.* After the project was completed, Three Affiliated Tribes initiated a lawsuit in district court. *Id.* The suit alleged that Wold had negligently designed and constructed the water intake system. *Id.* In its answer, Wold counterclaimed alleging that Three Affiliated Tribes had not paid the full contract price of the project. *Id.* Thereafter, Wold moved to dismiss the action for lack of subject matter jurisdiction. *Id.*

2. Three Affiliated Tribes v. Wold Eng'g, P.C., 321 N.W.2d 510, 510 (N.D. 1982).

3. *Id.*

4. *Id.* On July 1, 1982, the North Dakota Supreme Court, in a unanimous opinion, held that the state court lacked jurisdiction to decide Three Affiliated Tribes' complaint. *Id.* The court determined

Supreme Court granted certiorari and thereafter, vacated the decision of the North Dakota Supreme Court.⁵ The Court then remanded the case to determine whether the North Dakota Supreme Court had based its decision on a misconception of federal law.⁶ On remand, the North Dakota Supreme Court *held* that an Indian tribe could bring a civil action in state court, provided it complied with North Dakota's Indian Civil Jurisdiction Act. *Three Affiliated Tribes v. Wold Engineering, P.C.*, 364 N.W.2d 98 (N.D. 1985).

As a general rule, Indian reservations are beyond the legislative and judicial jurisdiction of state governments.⁷ This principle was established before North Dakota was granted statehood in 1889.⁸ As a condition for admission to the union, North Dakota disclaimed all rights to govern Indian lands.⁹ As a

that state courts lacked jurisdiction because the enrolled Indian residents of the reservation had not consented, pursuant to the Indian Civil Rights Act of 1968 and chapter 27-19 of the North Dakota Century Code, to the state's assumption of jurisdiction. *Id.* at 511-12. For a discussion of the Indian Civil Rights Act of 1968, see *infra* notes 36-39 and accompanying text; for a discussion of chapter 27-19, see *infra* notes 16-21 and accompanying text.

5. *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 159 (1984).

6. *Id.* The United States Supreme Court stressed that it was not overruling the North Dakota Supreme Court, nor declaring the North Dakota Supreme Court's interpretation of chapter 27-19 erroneous. *Id.* at 159. The Court also stated that it had not invalidated the North Dakota statute and emphasized that it was merely remanding for further consideration in light of its explanation of federal law. *Id.*

7. See *Worcester v. Georgia*, 31 U.S. 515 (6 Pet.) (1832). In *Worcester* the United States Supreme Court held that state law had no force or effect in Indian country because tribes were considered separate and distinct nations. *Id.* at 561. In writing the opinion, Chief Justice Marshall stated that an Indian tribe comprises "a distinct community, occupying its own territory, . . . and the whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States." *Id.*

8. *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 142 (1984).

9. See *Enabling Act of 1889*, ch. 180, 25 Stat. 676 (1889). The enabling act of 1889, which granted North Dakota admittance to the Union, states as follows:

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

Id. at 677. North Dakota's original constitution echoed the enabling act's provisions in almost identical terms. See N.D. CONST. art. XVI, § 203 (1889, amended 1958). Section 203 of article XVI of the original North Dakota Constitution provided as follows:

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

Id.

result, these lands were left under the absolute jurisdiction and control of the federal government.¹⁰

The need for this jurisdictional disclaimer terminated in 1953 when Congress passed Public Law 280.¹¹ Public Law 280 allowed the federal government to transfer jurisdiction over Indians to the states.¹² It also permitted states to amend their constitutions and to enact affirmative legislation assuming both civil and criminal jurisdiction over Indians.¹³ Furthermore, the law allowed states to unilaterally assume jurisdiction over Indians without the tribes' consent.¹⁴

In 1958, the North Dakota Legislature amended the state constitution to authorize acceptance of state court jurisdiction over

10. *Three Affiliated Tribes*, 467 U.S. at 142.

11. Act of Aug. 15, 1953, ch. 505, Pub. L. 83-254, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (1982) and 28 U.S.C. § 1360 (1982 & Supp. III 1985)). Section 6 of Public Law 280 removed any legal impediment to state assumption of civil jurisdiction over Indians. *See id.* § 6. The section provides as follows:

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

Id.

Sections 2 and 4 of Public Law 280 give California, Minnesota, Nebraska, Oregon, and Wisconsin full jurisdiction over Indians. *Id.* §§ 2, 4. Section 7 allows all other states to assume jurisdiction upon the enactment of appropriate legislation. *Id.* § 7. Section 7 provides as follows:

The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Id.

12. *See id.* The North Dakota Supreme Court reasoned that the purpose of Public Law 280 was to permit states to assume jurisdictional responsibility over Indians. *Three Affiliated Tribes*, 321 N.W.2d at 511. The court's reasoning was derived from a statement by the United States Supreme Court. *Id.*; *see* *Washington v. Confederated Bands & Tribes*, 439 U.S. 463, *reh'g denied*, 440 U.S. 940 (1979). In *Washington* the United States Supreme Court stated that Public Law 280 was enacted in part to deal with the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Id.* at 471 (quoting *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976)).

13. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (1982) and 28 U.S.C. § 1360 (1982 & Supp. III 1985)).

14. *See id.* As originally enacted, Public Law 280 did not require states to obtain the consent of the affected Indian tribes before assuming civil or criminal jurisdiction. *Id.* Five states were initially granted immediate, full jurisdiction by Public Law 280. *Id.* All other states, including North Dakota, became "option states" and were required to comply with §§ 6 and 7 of Public Law 280. *Id.* Sections 6 and 7 allowed states to amend their state constitutions and to pass affirmative state legislation to assume jurisdiction over Indians. *Id.* Thus, because tribal consent was not required, a state could unilaterally assume Indian civil jurisdiction. *Id.* For a discussion of Public Law 280, see *supra* note 11 and accompanying text.

Indians.¹⁵ In 1963, the North Dakota Legislature enacted chapter 27-19 of the North Dakota Century Code, entitled the Indian Civil Jurisdiction Act.¹⁶ The Chapter permits state courts to accept jurisdiction over civil claims that arise on an Indian reservation if either the enrolled tribal members¹⁷ or an individual Indian citizen¹⁸ consents to such jurisdiction.¹⁹ It also provides for

15. See N.D. CONST. art. XIII, § 1, cl. 2. Clause 2 of section 1 of article XIII of the North Dakota Constitution amended § 203 of article XVI of the original North Dakota Constitution. *Id.* The clause provides in part as follows:

The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, provided, however, that the legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress.

Id.

16. Indian Civil Jurisdiction Act, ch. 242, 1963 N.D. Laws 408 (codified in N.D. CENT. CODE ch. 27-19 (1974 & Supp. 1985)).

17. See N.D. CENT. CODE § 27-19-02 (1974). Section 27-19-02 of the North Dakota Century Code provides for tribal consent to state civil jurisdiction as follows:

Acceptance of jurisdiction may be by either of the following methods:

1. Upon petition of a majority of the enrolled residents of a reservation who are eighteen years of age or older; or
2. The affirmative vote of the majority of enrolled residents voting who are eighteen years of age or older, at an election called and supervised by the North Dakota Indian affairs commission upon petition of fifteen percent of those eligible to vote at such an election.

Id.

18. See *id.* § 27-19-05. Section 27-19-05 of the North Dakota Century Code provides for individual consent to civil jurisdiction as follows:

An individual Indian may accept state jurisdiction as to himself and his property by executing a statement consenting to and declaring himself and his property to be subject to state civil jurisdiction as herein provided. Such jurisdiction shall become effective on the date of execution of such statement. The statement accepting state jurisdiction shall be filed in the office of the county auditor of the county in which the person resides and when so filed shall be conclusive evidence of acceptance of state civil jurisdiction as provided herein.

Id.

19. See *id.* § 27-19-01 (Supp. 1985). Section 27-19-01 of the North Dakota Century Code provides as follows:

In accordance with the provisions of Public Law 83-280 and section 1 of article XI of the Constitution of North Dakota, jurisdiction of the state of North Dakota shall be extended over all civil claims for relief which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter. Upon acceptance the jurisdiction of the state is to the same extent that the state has jurisdiction over other civil claims for relief, and those civil laws of this state that are of general application to private property have the same force and effect within such Indian reservation or Indian country as they have elsewhere within this state.

Id.

subsequent withdrawal of both tribal and individual consent to state civil jurisdiction.²⁰ The Chapter limits jurisdiction by prohibiting the alienation, encumbrance, or taxation of real or personal property belonging to an Indian or Indian tribe that is held in trust by the United States.²¹

Prior to the constitutional amendment and the adoption of chapter 27-19, the North Dakota Supreme Court decided *Vermillion v. Spotted Elk*.²² *Vermillion* involved an automobile collision on the Standing Rock Indian Reservation.²³ The plaintiff and defendants were enrolled tribal members residing on that reservation.²⁴ The North Dakota Supreme Court determined that the jurisdictional disclaimers contained in the enabling act and the original North Dakota Constitution foreclosed civil jurisdiction over Indian country only in cases involving an interest in Indian land itself.²⁵ Because the plaintiff's claim did not involve an interest in land, the court concluded that it was free to exercise jurisdiction.²⁶

Chapter 27-19 of the North Dakota Century Code is the product of an interim study of the North Dakota Legislative Research Committee. *Three Affiliated Tribes*, 364 N.W.2d at 101. Senate bill 30 was drafted in response to the Committee's report. *Id.* at 102. For the text of the Committee's report, see REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE, INDIAN AFFAIRS, 31 (1963). Senate bill 30 originally provided for unilateral assumption by the state of exclusive jurisdiction over all civil causes of action that arose on Indian reservations. *Three Affiliated Tribes*, 364 N.W.2d at 102. However, numerous Indian leaders and their attorneys appeared at a public hearing to oppose the state's unilateral assumption of jurisdiction. *Id.* at 103 & n.7. As a result, Senate bill 30 was amended to provide for acceptance of state civil jurisdiction only upon acceptance by the Indian citizens as provided in chapter 27-19 of the North Dakota Century Code. *Id.* at 103.

20. See N.D. CENT. CODE §§ 27-19-11 to -13 (1974 & Supp. 1985). Section 27-19-11 allows for withdrawal of tribal acceptance from civil jurisdiction by petition of three-fourths of the enrolled Indians on the reservation who are eighteen years of age or older. *Id.* § 27-19-11 (1974). The petition must be filed with the North Dakota Indian Affairs Commission. *Id.* Section 27-19-12 provides that once the Commission certifies the petition to be in compliance with § 27-19-11, the Governor shall issue a withdrawal proclamation officially terminating jurisdiction previously established by tribal acceptance. *Id.* § 27-19-12 (Supp. 1985). Section 27-19-13 provides that an Indian may withdraw his or her individual acceptance of state civil jurisdiction by filing a statement with the county auditor. *Id.* § 27-19-13.

21. *Id.* § 27-19-08. Section 27-19-08 protects Indian property that is held in trust by the United States from attachment, even if that individual Indian or tribe consents to jurisdiction. *Id.*

22. 85 N.W.2d 432 (N.D. 1957), *overruled*, *Gourneau v. Smith*, 207 N.W.2d 256, 258 (N.D. 1973).

23. *Vermillion v. Spotted Elk*, 85 N.W.2d 432, 433 (N.D. 1957), *overruled*, *Gourneau v. Smith*, 207 N.W.2d 256, 258 (N.D. 1973). *Vermillion* involved a negligence action arising from an automobile accident between enrolled Indians residing on the Standing Rock Indian Reservation. 85 N.W.2d at 433. In *Vermillion* the North Dakota Supreme Court adopted an expansive approach toward jurisdiction over Indians by recognizing state court jurisdiction over all civil cases, not involving Indian lands, between Indians residing on reservations. See *id.* at 438.

24. *Id.* at 433.

25. *Id.* at 438. For the text of the enabling act and the jurisdictional disclaimer in the original North Dakota Constitution, see *supra* note 9. The court reasoned that, because Indians are citizens of the United States and courts are to be open to everyone, Indians should enjoy state court jurisdiction even though the state legislature had taken no action pursuant to Public Law 280. *Id.* The court also noted that it was not Congress' intent to prohibit state jurisdiction over Indians when the claim did not arise from, or have any relation to, the land on the Indian reservation itself. *Id.* at 437. Therefore, the court adopted an expansive jurisdictional basis that allowed state courts to hear civil cases involving Indians, provided that the subject of the claim was not the Indian land itself. *Id.* at 438.

26. *Id.* The North Dakota Supreme Court stated that, because enrolled Indians are citizens of the United States and residents of the State of North Dakota, they are subject to state civil jurisdiction, unless the claim involves Indian lands. *Id.* at 438.

Thereafter, the legislature amended the state constitution²⁷ and adopted chapter 27-19 of the North Dakota Century Code.²⁸ The North Dakota Supreme Court first interpreted the legislation in 1963 in *In Re Whiteshield*.²⁹ The court in *Whiteshield* held that the state constitutional amendment³⁰ and subsequent legislative action³¹ amounted to a complete disclaimer of state jurisdiction in all civil matters involving Indians unless the requirements of chapter 27-19 were fulfilled.³² The court determined that chapter 27-19 prohibited the state's exercise of jurisdiction unless either the tribe or an individual Indian consented.³³ In making this determination, the court questioned the previous inconsistent holding in *Vermillion*.³⁴ Subsequent to *Whiteshield*, the North Dakota Supreme Court has consistently disclaimed state civil jurisdiction over Indians in actions arising on reservations if the tribe or individual Indian involved has not consented, pursuant to chapter 27-19, to the state's exercise of jurisdiction.³⁵

27. See N.D. CONST. art. XIII, § 1, cl. 2. For the text of the constitutional amendment, see *supra* note 15.

28. See Indian Civil Jurisdiction Act, ch. 242, 1963 N.D. Laws 408 (codified in N.D. CENT. CODE ch. 27-19 (1974 & Supp. 1985)). For a discussion of chapter 27-19, see *supra* notes 16-21 and accompanying text.

29. 124 N.W.2d 694 (N.D. 1963). *Whiteshield* involved the termination of Indian parents' parental rights by a county juvenile commissioner. *In re Whiteshield*, 124 N.W.2d 694, 695 (N.D. 1963).

30. See N.D. CONST. art. XIII, § 1, cl. 2.

31. See Indian Civil Jurisdiction Act, ch. 242, 1963 N.D. Laws 408 (codified in N.D. CENT. CODE ch. 27-19 (1974 & Supp. 1985)).

32. *In re Whiteshield*, 124 N.W.2d 694, 698 (N.D. 1963). The court determined that the constitutional amendment and chapter 27-19 of the North Dakota Century Code, together created a complete disclaimer of any previous or future jurisdiction over civil claims that arise on an Indian reservation, except upon consent by the tribal members in a manner provided by chapter 27-19. *Id.*

33. *Id.* at 697-98. The court in *Whiteshield* noted that since § 27-19-02 of the North Dakota Century Code, which provides for tribal acceptance of state court civil jurisdiction, had not been complied with, there existed no state jurisdiction over the termination case. *Id.* at 698; see also N.D. CENT. CODE §§ 27-19-02, -05 (1974 & Supp. 1985).

34. 124 N.W.2d at 696. *Vermillion* denied state civil jurisdiction only in cases involving reservation land. 85 N.W.2d at 438. The court in *Whiteshield* stated that the decision in *Vermillion* contradicted the court's complete disclaimer approach, which denies any power of the state to exercise jurisdiction, except upon compliance with chapter 27-19 of the North Dakota Century Code. 124 N.W.2d at 696. For a discussion of *Vermillion*, see *supra* notes 22-26 and accompanying text.

35. *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 321 N.W.2d 510, 512 (N.D. 1982). The North Dakota Supreme Court, in its initial decision regarding the issue presented in *Three Affiliated Tribes*, stated that state courts do not have jurisdiction over civil claims arising on an Indian reservation unless the tribal members of that reservation vote to accept jurisdiction. *Id.* This statement was consistent with previous cases decided by the court. See, e.g., *Gourneau v. Smith*, 207 N.W.2d 256 (N.D. 1973). In *Gourneau* an action was brought for personal injuries arising from an automobile accident between enrolled tribal members that occurred on their Indian reservation. *Id.* at 257. The North Dakota Supreme Court cited *Whiteshield* for the proposition that chapter 27-19 operated as a complete disclaimer of state jurisdiction over civil claims on an Indian reservation, in the absence of tribal acceptance of jurisdiction. *Id.* at 258. The court stated that, until the enrolled tribal members consent to state jurisdiction, jurisdiction may not be assumed by state courts over any claim involving tribal members arising within the boundaries of the Indian reservation. *Id.* at 259; see also *Schantz v. White Lightning*, 231 N.W.2d 812, 816 (N.D. 1975) (state court lacked jurisdiction to hear a claim by a non-Indian against enrolled Indians involving an automobile accident occurring on a reservation); *White Eagle v. Dorgan*, 209 N.W.2d 621, 623 (N.D. 1973)

In 1968, Public Law 280, which had allowed the federal government to unilaterally transfer jurisdiction over Indians to the state, was amended by Public Law 284.³⁶ The amendment requires tribal consent before state courts can assume criminal or civil jurisdiction over tribal members.³⁷ According to Public Law 284, tribal consent can be obtained only if a majority of the adult Indians in the tribe consent to state court jurisdiction.³⁸ The requirements of Public Law 284, however, are not retroactive.³⁹

Ultimately, a conflict arose between Public Law 284, which requires tribal consent by a majority vote of the tribe's members,⁴⁰ and chapter 27-19 of the North Dakota Century Code, which allows for consent to jurisdiction by individual Indians.⁴¹ The North Dakota Supreme Court first considered the conflict between Public Law 284 and chapter 27-19 in *Nelson v. Dubois*.⁴²

In *Nelson* the court determined that an individual Indian could no longer confer civil jurisdiction upon the state pursuant to section 27-19-05.⁴³ Instead, the court determined that Public Law 284 constituted a federal preemption of state jurisdiction and, therefore, tribal consent by a majority vote was the exclusive method of Indian consent.⁴⁴ The court also relied on federal

(absent Indian consent to state jurisdiction, neither income earned by Indians on the reservation nor purchases made by them are subject to taxation by state authorities).

36. Civil Rights Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 73, 79 (1968) (codified, in part, at 25 U.S.C. § 1322 (1982)).

37. *Id.*

38. *Id.* Public Law 284 was codified in part in § 1326 of title 25 of the United States Code. See 25 U.S.C. § 1326 (1982). Section 1326 provides that a majority of the enrolled Indians within the affected reservation must vote to consent to state jurisdiction at a special election held for that purpose. *Id.* The Secretary of the Interior is required to call this special election when requested by the tribal council or other governing body, or by 20% of the enrolled Indian adults. *Id.*

39. See Civil Rights Act of Apr. 11, 1968, Pub. L. No. 90-284, Title IV, § 403, 82 Stat. 73, 79 (1968) (codified, in part, at 25 U.S.C. § 1323 (1982)). Section 1323 provides that a state may return to the United States any or all measure of criminal or civil jurisdiction assumed prior to the passage of Public Law 284. 25 U.S.C. § 1323(a) (1982).

Section 1323 provided for the repeal of § 7 of Public Law 280, which had made it possible for states to assert jurisdiction unilaterally. *Id.* § 1323(b). However, because Public Law 284 was not retroactive, this repeal did not affect state jurisdiction assumed prior to the repeal of Public Law 280. See *id.*

40. Civil Rights Act of Apr. 11, 1968, Pub. L. No. 90-284, Title IV, § 402, 82 Stat. 73, 79 (1968) (codified, in part, at 25 U.S.C. § 1322 (1982)). For a discussion of Public Law 284, see *supra* notes 36-39 and accompanying text.

41. See N.D. CENT. CODE § 27-19-05 (1974). For a discussion of individual Indian consent to state civil jurisdiction, see *supra* note 18 and accompanying text.

42. 232 N.W.2d 54 (N.D. 1975). In *Nelson* an individual Indian had consented to state civil jurisdiction. *Nelson v. Dubois*, 232 N.W.2d 54, 55 (N.D. 1975). The case involved a civil action between an enrolled Indian and a non-Indian which arose from an automobile accident on a reservation. *Id.*

43. *Id.* at 56. For the text of § 27-19-05 of the North Dakota Century Code, see *supra* note 18.

44. *Id.* at 56-57. The court stated that state jurisdiction over claims arising on reservations could be obtained only by state and tribal compliance with Public Law 284. *Id.* at 57. The court also stated that since the enactment of Public Law 284, "[a]n individual [Indian] defendant [was] no more able to confer jurisdiction upon the state than [was] a tribal council or a State, acting unilaterally." *Id.* Therefore, the court concluded that § 27-19-05 of the North Dakota Century Code was invalid. *Id.* For the text of § 27-19-05 of the North Dakota Century Code, see *supra* note 18.

preemption to deny the existence of "residuary jurisdiction" in North Dakota.⁴⁵ The concept of "residuary jurisdiction" allows a state to unilaterally exercise jurisdiction on a reservation if such jurisdiction does not interfere with tribal self-government.⁴⁶ By refusing to recognize "residuary jurisdiction," the North Dakota Supreme Court followed the trend, established by states interpreting Public Law 284, to place more emphasis on applicable federal statutes, and less on traditional notions of tribal sovereignty or inherent state powers.⁴⁷ The precedential significance of *Nelson* is that tribal consent is necessary for state court civil jurisdiction, and that there is no "residuary jurisdiction" in North Dakota.⁴⁸

The foregoing discussion illustrates the legal background existing in 1982 when Three Affiliated Tribes initiated their action against Wold Engineering.⁴⁹ Following the North Dakota Supreme Court's affirmation of the district court's denial of jurisdiction, Three Affiliated Tribes petitioned the United States Supreme Court for writ of certiorari, and review was granted.⁵⁰

The United States Supreme Court concluded that Public Laws 280 and 284 do not prevent North Dakota from exercising jurisdiction over Indians.⁵¹ This conclusion was based upon two

45. *Id.* at 57-58. In reaching its conclusion, the North Dakota Supreme Court declined to follow the United States Supreme Court's "infringement test." *Id.* at 58; see *Williams v. Lee*, 358 U.S. 217 (1959). In *Williams* the Court stated that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. In *Nelson*, however, the North Dakota Supreme Court stated that Public Law 284 was a "governing Act of Congress." 232 N.W.2d at 58. Therefore, the "infringement test" was abandoned and the court focused its decision on federal preemption rather than on the degree to which Indians' sovereign rights may have been infringed. *Id.*

46. See 233 N.W.2d at 60 (Vogel, J., dissenting); see also *Malaterre v. Malaterre*, 293 N.W.2d 139, 143 (N.D. 1980) (discussing the concept of "residuary jurisdiction").

47. 232 N.W.2d at 58; see also *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). In *McClanahan* the United States Supreme Court stated that the trend toward reliance on federal preemption renders questions regarding the existence of residual tribal sovereignty moot. *Id.* at 172 n.8. The North Dakota Supreme Court determined that Public Law 284 is a clear congressional statement of federal preemption because it applies to the assumption of any subject matter jurisdiction by any state over any Indian reservation. 232 N.W.2d at 58. The court concluded that there is no "residuary state jurisdiction" and that state jurisdiction can be obtained only by strict compliance with Public Law 284. *Id.* at 57-58.

48. See *Malaterre v. Malaterre*, 293 N.W.2d 139 (N.D. 1980). In *Malaterre* the North Dakota Supreme Court determined that a district court lacks jurisdiction to modify a divorce decree when one party to the decree is a resident of an Indian reservation. *Id.* at 143. The court recognized the general rule that a court having jurisdiction to hear a divorce action continues to have jurisdiction to modify the decree. *Id.* at 142. The court concluded this general rule is inapplicable, however, when one of the parties to the divorce is a resident of an Indian reservation. *Id.* In such a case, jurisdiction is lost unless the Indian tribe has complied with Public Law 284 and chapter 27-19 of the North Dakota Century Code. *Id.* at 142-43; see also *United States ex rel. Hall v. Hansen*, 303 N.W.2d 349, 350 (N.D. 1981) (individual Indian litigant cannot confer jurisdiction upon a state court).

49. *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 321 N.W.2d 510 (N.D. 1982). In the original decision of *Three Affiliated Tribes*, the North Dakota Supreme Court continued to disclaim state assumption of jurisdiction absent tribal consent. See *id.* at 512.

50. *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138 (1984).

51. *Id.* at 149-51.

factors. First, the Court reasoned that the tribe's sovereignty would not be undermined if the tribe was required to seek relief in state courts rather than tribal courts.⁵² Second, the Court stated that no federal law required North Dakota to displace jurisdiction lawfully assumed prior to the enactment of Public Laws 280 and 284.⁵³ Therefore, the United States Supreme Court determined that if the North Dakota Supreme Court denied civil jurisdiction over Indians, its decision must be based on state, rather than federal law.⁵⁴

However, the Court was unsure whether the North Dakota Supreme Court's interpretation of section 27-19-05 of the North Dakota Century Code was based on a misconception of federal law.⁵⁵ Therefore, the Court vacated the judgment of the North Dakota Supreme Court and remanded the case.⁵⁶ The issues to be determined on remand were whether state law precluded

52. *Id.* at 148-49. The Court recognized the importance of preserving tribal sovereignty. *Id.* at 148. The Court stated, however, that tribal self-government would not be impeded if an individual Indian was allowed to enter state courts to seek relief on equal terms with other persons for claims against non-Indians arising on reservations. *Id.* at 148-49. In reaching this decision, the Court declared that neither Public Law 280 nor Public Law 284 required or authorized North Dakota to abandon the jurisdiction recognized in *Vermillion*. *Id.* at 150. The Court recognized that the expansive civil jurisdiction over all claims not involving an interest in Indian land, as recognized in *Vermillion*, could not be squared with principles of tribal autonomy. *Id.* at 148. Therefore, the Court stated that, to the extent *Vermillion* permitted North Dakota state courts to exercise jurisdiction over claims between Indians or non-Indians against Indians, it intruded impermissibly on tribal self-governance. *Id.* However, the Court approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians. *Id.* (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973)). The Court emphasized that the exercise of state jurisdiction was especially compatible with tribal autonomy in cases such as *Three Affiliated Tribes*, in which the suit was brought by the tribe itself and the tribal court lacked jurisdiction. *Id.* at 149.

53. *Id.* at 149-51. The Court reasoned that the exercise of state jurisdiction would not be inconsistent with federal or tribal interests reflected in North Dakota's enabling act or Public Law 280. *Id.* at 149. The Court noted that Public Law 280 did not authorize states to disclaim jurisdiction lawfully assumed prior to its enactment. *Id.* at 150. The Court also stated that Public Law 284, which amended Public Law 280 by requiring tribal consent to jurisdiction, was not retroactive. *Id.* Therefore, Public Law 284 did not displace jurisdiction assumed by the states prior to its enactment. *Id.* at 150-51. Thus, the Court stated that the jurisdiction previously recognized by the North Dakota Supreme Court in *Vermillion* continued to exist, provided the jurisdiction was lawfully assumed at the time that case was decided. *Id.* at 151.

54. *Id.* Because federal law did not bar North Dakota's assumption of jurisdiction, the United States Supreme Court considered whether the North Dakota Supreme Court's denial of jurisdiction was dictated by state law. *Id.* However, the United States Supreme Court concluded that it was necessary to remand the case because it was unclear whether the North Dakota Supreme Court had relied on a misconception of federal law when it interpreted the relevant North Dakota statutes. *Id.* at 152-54.

55. *Id.* at 153. The United States Supreme Court declared erroneous any assumption that Public Law 280 and Public Law 284 either authorized North Dakota to disclaim preexisting jurisdiction or affirmatively forbade the exercise of preexisting jurisdiction absent tribal consent. *Id.* at 154. The Court was unsure whether the North Dakota Supreme Court's holding in *Nelson* was based on an erroneous assumption. *Id.* at 156-57. Specifically, the Court questioned whether the North Dakota Supreme Court in *Nelson* incorrectly assumed that Public Law 284 required them to interpret § 27-19-05 of the North Dakota Century Code restrictively. *Id.* at 157. Because the United States Supreme Court was unsure whether the North Dakota Supreme Court's interpretation of chapter 27-19 was based on a misconception of federal law, it remanded the case for reconsideration. *Id.* at 159.

56. *Id.*

jurisdiction, and if so, whether such preclusion violated either the state or federal constitution.⁵⁷

On remand, the North Dakota Supreme Court again declared that section 27-19-05 of the North Dakota Century Code was valid.⁵⁸ The court determined that Three Affiliated Tribes, acting as an individual "entity," could consent to the civil jurisdiction of state courts, provided the tribe complied with section 27-19-05 of the North Dakota Century Code.⁵⁹ The court also concluded that any "residuary jurisdiction," if it had ever existed, was terminated by the enactment of chapter 27-19.⁶⁰ Therefore, because Three Affiliated Tribes had not consented to state court jurisdiction, the court concluded that North Dakota's state courts lacked jurisdiction to hear the controversy.⁶¹

Three Affiliated Tribes argued that chapter 27-19 of the North

57. *Id.*; see also *Three Affiliated Tribes*, 364 N.W.2d at 104 (determining that chapter 27-19 does not violate either the state or federal constitutions). In *Vermillion*, the North Dakota Supreme Court upheld the exercise of state jurisdiction in all cases except those involving reservation land itself. *Vermillion v. Spotted Elk*, 85 N.W.2d 432, 437 (N.D. 1957), *overruled*, *Gourneau v. Smith*, 207 N.W.2d 256, 258 (N.D. 1973). For a discussion of *Vermillion*, see *supra* notes 22-26 and accompanying text.

Justice Rehnquist, in a strong dissent, stated that the jurisdiction claimed in *Vermillion* had been discredited by the United States Supreme Court's decision in *Williams v. Lee*. *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 160 (1984) (Rehnquist, J., dissenting); see also *Williams v. Lee*, 358 U.S. 217 (1959). Justice Rehnquist noted that the principles of tribal autonomy recognized in *Williams v. Lee* clearly prevented intrusion into tribal affairs without affirmative legislative action pursuant to Public Law 280. 467 U.S. at 160-61. Since the jurisdiction claimed in *Vermillion* was not "lawfully assumed," it did not survive the enactment of Public Law 280. *Id.* at 161. Justice Rehnquist accused the majority of glossing over this problem by recasting *Vermillion* to fit its own needs. *Id.* Justice Rehnquist noted that the majority had treated *Vermillion* as claiming jurisdiction only over suits by Indians against non-Indians. *Id.* at 162. Only by doing so, Justice Rehnquist stated, was the majority able to conclude that *Vermillion* involved "lawfully assumed jurisdiction." *Id.* Justice Rehnquist stated that he was "nonplussed" by the majority's reading of *Vermillion*. *Id.*

Justice Rehnquist continued by stating that without *Vermillion*, the majority's reasoning simply crumbled. *Id.* at 163. After Public Law, 280, state courts could assume jurisdiction only by affirmative legislation. *Id.* North Dakota did take affirmative legislative action when it enacted chapter 27-19, but it conditioned its assumption of jurisdiction on tribal consent. *Id.* at 164. Justice Rehnquist noted that since Three Affiliated Tribes had not consented, North Dakota had no jurisdiction over the case. *Id.*

58. *Three Affiliated Tribes*, 364 N.W.2d at 104. On remand the North Dakota Supreme Court extensively analyzed the legislative history of chapter 27-19 to determine the legislature's intent in enacting the Chapter. *Id.* at 101-03. The court determined that the legislative purpose was to "accommodate the will" of the Indian people by providing for both tribal and individual acceptance and individual withdrawal of state jurisdiction. *Id.* at 103. In light of this intent, the court disavowed language in *Nelson* that had declared § 27-19-05 invalid. *Id.* at 104.

59. *Id.* at 103-04; see also N.D. CENT. CODE § 27-19-05 (1974) (authorizing individual consent to state court jurisdiction). The North Dakota Supreme Court noted that if Three Affiliated Tribes acted as an "entity" and "individually" consented to state civil jurisdiction then the nonexempt property of the tribe, as distinguished from the property of individual Indians, would be subject to levy and execution pursuant to the state court judgment. *Three Affiliated Tribes*, 364 N.W.2d at 104; see N.D. CENT. CODE §§ 28-21-06, -08 (Supp. 1985) (authorizing the levy and execution of the judgment debtor's nonexempt property).

60. *Three Affiliated Tribes*, 364 N.W.2d at 104. The court determined that neither the legislative history of chapter 27-19, nor the text of the Chapter itself recognized any type of "residuary jurisdiction." *Id.* Thus, the court implied that it could not recognize any jurisdiction, residuary or otherwise, that may have been valid in light of the holding in *Vermillion*. See *id.*

61. *Id.* at 104.

Dakota Century Code violated its state and federal constitutional rights.⁶² First, the tribe argued that its federal constitutional right to due process⁶³ was violated by the state's refusal to assume jurisdiction.⁶⁴ The North Dakota Supreme Court reasoned that Indians are neither deprived of a protected interest nor denied access to state courts because of legislative or judicial action by the state.⁶⁵ Instead, the court declared that the state, by enacting chapter 27-19, offered Indians access to state courts.⁶⁶ Therefore, the court concluded that the Indian people deprived themselves of the due process afforded non-Indians by refusing to seek the access to courts offered by chapter 27-19.⁶⁷

Second, Three Affiliated Tribes argued that its constitutional right of equal protection⁶⁸ was violated by the state's refusal to accept jurisdiction.⁶⁹ Three Affiliated Tribes alleged that chapter 27-19 employed a constitutionally suspect classification scheme that singled out Indians for disadvantaged treatment.⁷⁰

Initially, the North Dakota Supreme Court stated that the

62. *Id.* at 104-07.

63. See U.S. CONST. amend. XIV, § 1. Section one of the fourteenth amendment to the United States Constitution provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

64. 364 N.W.2d at 104-05. Three Affiliated Tribes asserted that chapter 27-19 deprived tribal Indians of their property rights and their civil liberties, which include the right "to sue." *Id.* at 105. The tribe contended that a "cause of action is a species of property protected by the due process clause." *Id.* at 106; see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (a "cause of action" is protected by the due process clause). Thus, the tribe argued that the North Dakota Supreme Court should follow a two prong due process test: "whether [the tribe] was deprived of a protected interest, and, if so, what process was . . . due." *Three Affiliated Tribes*, 364 N.W.2d at 105-06; see *Logan v. Zimmerman*, 455 U.S. 422, 428 (1982) (applying the two prong test to determine that the plaintiff had been denied due process).

65. 364 N.W.2d at 106.

66. *Id.* The North Dakota Supreme Court stressed that Three Affiliated Tribes was not deprived of, but rather, was offered due process by § 27-19-05. *Id.*

67. *Id.*

68. See U.S. CONST. amend. XIV, § 1. For the text of the equal protection clause of the fourteenth amendment to the United States Constitution, see *supra* note 63.

69. See 364 N.W.2d at 106-07.

70. *Id.* Three Affiliated Tribes contended that chapter 27-19 singled out a discrete, insular minority for disadvantaged legislative treatment, and hence, was constitutionally suspect. See *id.* Wold asserted that Three Affiliated Tribes, in effect, classified itself by refusing to consent to the jurisdiction offered by chapter 27-19. See Brief for Appellee at 37, *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 364 N.W.2d 98 (N.D. 1985). Wold also argued that Indians reside in a unique political environment which they enjoy and attempt to perpetuate. *Id.* at 41. Wold stated that, because Indians reside in this unique environment, they are not similarly situated to non-Indians. *Id.* Therefore, Wold concluded that Indians, being different in fact, need not be treated in law as though they were the same as non-Indians. *Id.*

unique legal status of Indian tribes under federal laws authorized the federal government to classify Indians in a manner that might otherwise be constitutionally offensive.⁷¹ The court concluded that differential treatment of Indians by states acting under federal law did not result in a suspect classification.⁷² Thus, the North Dakota Supreme Court found no violation of the fourteenth amendment.⁷³

Three Affiliated Tribes also contended that chapter 27-19 of the North Dakota Century Code violated three sections of the North Dakota Constitution.⁷⁴ Initially, Three Affiliated Tribes argued that the Chapter violated article I, section 9 of the North Dakota Constitution, which guarantees all people equal access to state courts.⁷⁵ The North Dakota Supreme Court determined that this section was not violated because, if the tribe complied with section 27-19-05 of the North Dakota Century Code, the courts

71. 364 N.W.2d at 106 (citing *Morton v. Mancari*, 417 U.S. 535 (1974)). In *Morton v. Mancari*, the United States Supreme Court recognized Congress' plenary power over Indians. 417 U.S. at 551. The Court noted that this power is drawn from the United States Constitution. *Id.* at 551-52. Clause 3 of section 8 of article I of the Constitution gives Congress the power to "regulate Commerce . . . with Indian tribes." *Id.* at 552; see U.S. Const. art. I, § 8, cl. 3. The Court stated that this provision authorized separate legislation for Indians. 417 U.S. at 552.

The North Dakota Supreme Court had previously recognized the futility of an equal protection claim by Indians seeking state jurisdiction. See *Gourneau v. Smith*, 207 N.W.2d 256 (N.D. 1973). In *Gourneau* the court determined that an Indian plaintiff was not denied her right to bring an action in state court because of her status as an Indian. *Id.* at 259. Instead, the court stated, she was denied that right because the alleged tort was committed by an Indian on an Indian reservation, and because the Indians of that reservation had not accepted state jurisdiction. *Id.*

72. 364 N.W.2d at 106-07 (citing *Washington v. Confederated Bands & Tribes*, 439 U.S. 463 (1979), *reh'g denied*, 440 U.S. 940 (1979)). In *Confederated Bands* the Court stated that "'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." *Confederated Bands*, 439 U.S. at 500-01 (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

The dispute in *Confederated Bands* involved chapter 37.12 of the Revised Code of Washington which is analogous to chapter 27-19 of the North Dakota Century Code. Compare WASH. REV. CODE ANN. ch. 37.12 (1964) (assumption of state jurisdiction over Indian claims by tribal compliance with statute) with N.D. CENT. CODE ch. 27-19 (1974 & Supp. 1985) (procedures for assumption of state jurisdiction over Indian claims). Both chapters were enacted in response to Public Law 280. See 364 N.W.2d at 106-07. In *Confederated Bands* the United States Supreme Court emphasized that the federal government's plenary power over Indians allows it to classify Indians in a manner that would normally be considered "suspect." 439 U.S. at 500-01. Although states do not share this plenary power, the Court determined that states may make what amounts to a suspect classification of Indians when enacting legislation in response to a federal law specifically designed to readjust the allocation of jurisdiction over Indians. *Id.* at 501. Thus, the North Dakota Supreme Court concluded that no suspect classification resulted from chapter 27-19. 364 N.W.2d at 107.

73. *Id.*

74. *Id.* at 104.

75. *Id.*; see also N.D. CONST. art. I, § 9. Section 9 of article I of the North Dakota Constitution provides as follows:

All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

would be open to the tribe.⁷⁶

The tribe also argued that the Chapter violated article I, section 22 of the North Dakota Constitution, which requires all laws of general nature to have a uniform operation.⁷⁷ The North Dakota Supreme Court treated this as an equal protection argument, and determined that no equal protection violation existed because North Dakota had enacted chapter 27-19 in response to federal authority.⁷⁸

Finally, the tribe argued that the Chapter violated article VI, section 8 of the North Dakota Constitution, which provides that district courts have original jurisdiction over all claims.⁷⁹ The court determined that this section was not violated since the district court would have original jurisdiction if the tribe complied with the statutory requirements of jurisdictional consent.⁸⁰ Thus, the court determined that chapter 27-19 of the North Dakota Century Code did not violate the North Dakota Constitution.⁸¹

The court proceeded to state that chapter 27-19 does not preclude Indian tribes or individual Indians from accepting state civil jurisdiction.⁸² Rather, the court stated, it restricts the state judicial system by preventing the imposition of arbitrary and unilateral jurisdiction over Indians against their will and without their consent.⁸³ The court also stated that the Chapter does not treat Indians less than equal, but treats them "more than equal."⁸⁴ Therefore, the North Dakota Supreme Court concluded that chapter 27-19 was the most fair and least restrictive alternative available for the protection of the Indians' unique status.⁸⁵

76. 364 N.W.2d at 104. For a discussion of chapter 27-19, see *supra* notes 16-21 and accompanying text.

77. 364 N.W.2d at 104; see also N.D. CONST. art. I, § 22. Section 22 of article I of the North Dakota Constitution provides that "[a]ll laws of a general nature shall have a uniform operation." *Id.*

78. 364 N.W.2d at 104. For a discussion of the North Dakota Supreme Court's rejection of Three Affiliated Tribes' equal protection argument, see *supra* notes 68-73 and accompanying text.

79. 364 N.W.2d at 104; see also N.D. CONST. art. VI, § 8. Section 8 of article VI of the North Dakota Constitution provides as follows:

The district court shall have original jurisdiction of all causes, except as otherwise provided by law, and such appellate jurisdiction as may be provided by law or by rule of the supreme court. The district court shall have authority to issue such writs as are necessary to the proper exercise of its jurisdiction.

Id.

80. 364 N.W.2d at 104.

81. *Id.*

82. *Id.* at 107.

83. *Id.*

84. *Id.* The court determined that Indians were offered additional rights because they could accept and later withdraw from state civil jurisdiction. *Id.* The court determined that Indians had demanded the unique treatment that the Chapter offers. *Id.* Therefore, the court stated that it was unreasonable for Indians to subsequently complain of such treatment and protection. *Id.*

85. *Id.* The North Dakota Supreme Court recognized that the result of cases like *Three Affiliated Tribes* was that state courts lack jurisdiction to decide issues that "cry out" for an answer. *Id.* at 108;

The North Dakota Supreme Court noted that the current status of Indian civil jurisdiction presents potential problems.⁸⁶ For example, if Indians were allowed to sue but not be sued then they would be immune from counterclaims by non-Indians in the same action.⁸⁷ Furthermore, satisfaction of a state court judgment in a tribal court would be difficult because tribal courts are not bound by the full faith and credit clause of the United States Constitution.⁸⁸ Another potential problem is that, even if Indians do consent to state civil jurisdiction, settlement of a judgment would be difficult because attachment of certain real or personal property owned by Indians is prohibited by statute.⁸⁹

The court suggested three alternatives to resolve the jurisdictional controversy regarding claims arising on Indian reservations.⁹⁰ First, the court stated that the simplest solution would be for tribes to vote to accept state jurisdiction in all cases.⁹¹ Second, the court suggested that the United States Congress require Indian tribes to accept state court jurisdiction.⁹² Finally, the court suggested that the United States Congress create a federal court with jurisdiction to decide all civil cases arising on Indian reservations.⁹³ The court also proposed that the North Dakota Legislature create an interim Indian jurisdiction committee to

see also Kennerly v. District Court, 400 U.S. 423 (1971) (per curiam) (consent of both the state and the Indian tribe is required before the state court may assert jurisdiction over an Indian); Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974) (diversity jurisdiction cannot be based solely on the fact that one party is an Indian and the other non-Indian); Nelson v. Dubois, 232 N.W.2d 54 (N.D. 1975) (tribal court jurisdiction limited to cases involving less than \$300).

86. 364 N.W.2d at 107-08.

87. *See* Erickstad, State of the Judiciary Address (located in Bench and Bar, *reprinted in* 62 N.D.L. REV. 117, 119 (1986)) [hereinafter State of the Judiciary Address]. Chief Justice Erickstad stated that the nub of the problem regarding Indian civil jurisdiction may be the tribes' desire to have access to state court without submitting to counterclaims in state court. *Id.*

88. *See* Malaterre v. Malaterre, 293 N.W.2d 139 (N.D. 1980). In *Malaterre* the court stated that the full faith and credit clause does not require a tribal court to enforce a child custody modification order by a state court, because the clause applies only to states. *Id.* at 144.

89. *See* N.D. CENT. CODE § 27-19-08 (Supp. 1985). Section 27-19-08 prohibits the alienation or encumbrance of real or personal Indian property that is held in trust by the United States. *Id.* A judgment requiring attachment of Indian property could arguably fall within this prohibition. *Id.* For a brief discussion of § 27-19-08 of the North Dakota Century Code, *see supra* note 21.

90. 364 N.W.2d at 107.

91. *Id.*; *see also* State of the Judiciary Address, *supra* note 87. In his 1985 State of the Judiciary Message, Chief Justice Erickstad summed up the Indian controversy as follows:

The Indian people will not receive justice on a par with other citizens of this state until they realize that their rights are best preserved in the state courts and they vote to accept state jurisdiction in all civil cases. Similarly, non-Indian people will not receive justice on a par with other citizens of this state in disputes arising within the exterior boundaries of Indian reservations until Indian people vote to accept state jurisdiction in all civil cases. This initiative by Indian people is essential to future justice for both the Indian people and North Dakota.

Id. at 119.

92. 364 N.W.2d at 107.

93. *Id.*

study the problems resulting from Indians' unique status.⁹⁴ Until some action is taken to address these problems, the courts of North Dakota will continue to confront the conflict between the state and federal statutes.

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94. *Id.* at 108. The court recognized the Indian civil jurisdictional controversy as a continuing complex and emotional problem for both Indians and non-Indians. *Id.* at 107-08. The court stated as follows:

Indians are now full citizens of this state, they have the franchise and they could receive the fruits of justice in our state courts if they would but accept jurisdiction for all civil purposes, submit their problems to those courts, and have faith in the judicial system which all other citizens, irrespective of their ancestry, must and do rely upon.

