Implicit Divestiture, Judicial Activism and the Rehnquist Court: A Cautionary Tale for Tribal Advocates

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"None of the Supreme Court's theories within the field of Federal Indian Law have been more puzzling than the implicit divestiture doctrine, and its use in determining whether Indian tribes have inherent sovereign powers to regulate individuals who are not members of the tribe."

—Alex Tallchief Skibine (2000: 267)

Many tribal advocates have likened the legal corpus known as Federal Indian Law to a pendulum that swings back and forth under the forceful hand of the United States government and its political inclinations at any given moment. While this swinging pendulum has brought great uncertainty and volatility to the status, rights and powers of Indian tribes over the past two centuries, it has managed to maintain at least a basic degree of stability and coherence through its adherence to those fundamental legal principles articulated in the Marshall trilogy of U.S. Supreme Court cases in the 1830s and the subsequent enunciation of the inherent/reserved rights doctrine of Indian sovereignty. However, the Supreme Court's construction of the implicit divestiture doctrine over the past 25 years has essentially turned Federal Indian Law on its head, severing tribal sovereignty from its "historical moorings" (Getches 1996: 1573) and casting serious doubt on the viability of jurisdictional powers of Indian tribes. Born in 1978 with the Supreme Court's ruling in *Oliphant v. Suquamish Indian Tribe* (435 U.S. 191) (hereafter *Oliphant*) and cultivated through several cases in the interim, the implicit divestiture doctrine has effectively served to re-colonize Federal Indian Law by summarily abandoning those time-tested foundational principles upon which it traditionally has relied. In an ongoing effort to create a "bright-line" rule for the adjudication of relations between Indians and non-Indians that invariably gives deference to the rights of states, non-Indians and non-member Indians at the expense of tribal sovereignty, the Court (under the manipulating direction of Chief Justice William Rhenquist) has created a convoluted, vague and subjective test for questions of tribal jurisdiction that demonstrates judicial activism—and racial discrimination—in its most basic ideological form. The Court's rulings in *Oliphant* and a dozen or so contingent cases have combined to severely restrict the nature and scope of tribal criminal and civil jurisdiction, creating a local governmental nightmare in and around Indian country, confounding tribal, federal and state advocates, and "leaving lower courts without principled, comprehensible guidance" (Getches 1996: 1573). In dismissing nearly two hundred years of legal jurisprudence, the Court has reminded us all that Federal Indian Law has always been and continues to be, first and foremost, about colonial and political expediency.

Before 1978, the Cherokee cases (*Johnson v. McIntosh (21 U.S. (8 Wheat.) 543)*, *Cherokee Nation v. Georgia (30 U.S. (5 Pet.) 1)*, *Worcester v. Georgia (31 U.S. (6 Pet.) 515)*) reigned as the dominant analytical framework undergirding Federal Indian Law. Justice John Marshall, the architect of the Cherokee cases, codified a comprehensive legal paradigm articulating the inherent sovereign powers that Indian tribes retained upon "discovery" by the colonizing European nations. Developing what could now be viewed as the original legal doctrine of implicit divestiture of tribal sovereignty, Marshall categorized Indian tribes as "domestic, dependent nations" and delineated those sovereign powers that they necessarily relinquished through colonial subjugation.

The Indian treaty period of the nineteenth century further entrenched Marshall's inherent/reserved rights doctrine in Federal Indian Law. Recognized by both the United States and Indian tribes as nation-to-nation agreements, treaties normally involved cessions of aboriginal lands in exchange for, among other things, the federal government's legal

affirmation of tribal reservation of inherent sovereign powers not explicitly surrendered in the treaty language. In other words, "what has not been expressly taken away, remains." According to Felix S. Cohen, the acknowledged dean of Federal Indian Law, the inherent powers of Indian tribes "are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government" (1941: 123). Upholding these treaties was and is a set of legal constructs known as the Canons of Treaty Construction, which enforces a jurisprudential approach that interpret treaties "not as a grant of sovereignty from the United States to the tribes, but a reservation by the tribes of all powers not expressly given up in the treaty...[T]ribes did not have to expressly reserve a specific inherent power in a treaty in order for that inherent power to continue to exist" (Skibine 2000: 296). For nearly 150 years, the Supreme Court upheld Marshall's doctrine of the retained inherent sovereignty of Indian tribes, maintaining the legal principles set forth by Marshall's original findings of implicit divestiture in the Cherokee cases. With the development of the implicit divestiture doctrine, however, the Supreme Court turned the tables on the inherent/reserved rights paradigm, abandoning the jurisprudential approach of recognizing "a reservation of those rights not granted" in favor of one that seeks to find a "grant of rights to the Indians" (language from *United States v. Winans*, 198 U.S. 371, 1905). Rehnquist, the chief architect of the implicit divestiture doctrine, has never subscribed to the Marshallian legal principles regarding the retained inherent sovereignty of Indian tribes, a fact which motivates him and some of the other Justices to completely redefine them.

In developing the implicit divestiture doctrine, the Rehnquist Court has removed perhaps the most important failsafe protection shielding tribes from state intrusion. Whereas the Marshall trilogy and the inherent/reserved rights doctrine obligated the Supreme Court to favor tribes in questions of jurisdiction, the implicit divestiture doctrine excuses the Court's partiality toward state pre-emption of tribal jurisdiction. The doctrine also refutes the Court's long-established treatments of treaties as agreements between sovereigns, instead interpreting them as documents of tribal acquiescence and federal guardianship.

At the core of the implicit divestiture doctrine is the Court's complete and total reformulation of the scope of and degree to which tribal sovereign powers were extinguished upon incorporation into the United States. Under the Rehnquist model, adjudication of cases involving tribal jurisdiction hinges on a legal analysis that attempts to answer the following question: What tribal rights did Congress *intend* to survive incorporation? Although the Court does not bother to state exactly when this incorporation took place, it posits that this incorporation imposes inherent limitations on tribes and, over time, the Supreme Court discovers these limitations using its "overriding sovereignty" test (to be discussed later in detail).

The implicit divestiture doctrine is designed to allow the Supreme Court to read the withered tea leaves of past Congressional intent through the subjective lenses of its own ideological, racial and political agendas. According to Getches, in this

> emerging jurisprudence of Indian law, the Court arrogates to itself the role of reviewing and weighing non-Indian interests and, ultimately, of redesigning the sovereignty of Indian tribes...The new tendency in the Court's tests, rules and rhetoric is to define tribal power according to policies, values, and assumptions prevalent in non-Indian society (1996: 1575, 1594).

By overstepping its judicial bounds and essentially making new law, the Rehnquist Court endeavors to rid Federal Indian Law of a legal doctrine it dislikes and replace it with a doctrine that aligns itself with the Justices' own personal beliefs concerning what sovereign powers, if any, tribes should or should not possess. To accomplish this transformation, the Court relies on a host of contrived tests grounded in subjective analysis that assign motives/intentions to Congressional stances, attitudes and actions that Congress did not clearly demonstrate, with the aim being to divest tribes of authority "without invoking any federal interest justifying such divestiture" (Skibine 2000: 297).

This "rudderless exercise in judicial activism" (Getches 1996: 1576) is fueled by two major factors: anti-Indian sentiment (self-explanatory) and a comprehensive drive for federalism. The implicit divestiture doctrine reflects the Court's new, maximalist approach to the Doctrine of Discovery, an approach that seeks to insure territorial integrity and the personal liberty interest at the expense of tribal jurisdiction. The doctrine mandates a

minimalist notion of centralized government; i.e., it promotes the concentration of power away from the national government and into the hands of local (state and municipal) governments. Interestingly, the Rehnquist Court's drive for federalism does not include tribal governments among its beneficiaries.

This selective federalism is intended, in the end run, to absolve the federal government of its trust responsibility to Indian tribes by allowing states to prey on tribal jurisdiction. The doctrine places an extraordinary burden on tribes of "demonstrating why state jurisdiction over such nonmembers infringes on the right of reservation Indians to make their own laws and be ruled by them" (Skibine 2000: 267-268). In this subjective process, if the Court is not able to locate intent on the part of Congress sufficient to preempt state jurisdiction, then the tribe loses out. In essence, concludes Skibine, the Rehnquist Court, "in the last twenty-five years or so, has been engaged in a concerted effort to divest tribes of their inherent sovereign powers and indirectly transfer this power to the states" (2000: 269).

Oliphant (1978) inaugurated the Supreme Court's doctrine of implicit divestiture. Reversing a lower court ruling that the tribe in question had—through Marshallian principles—the right of criminal jurisdiction over non-Indians, the Court ruled that tribes had been implicitly divested of all rights that fall outside of their status as "domestic, dependent nations." Instituting his wholly subjective overriding sovereignty test, Rehnquist wrote,

> Upon incorporation into the territory of the United States, the Indian tribes thereby came under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty...Indians do not have criminal jurisdiction over non-Indians absent *affirmative delegation* of such power by Congress (emphasis added by author).

Conducting a tortuous analysis of Congressional assumptions, Rehnquist does a one-eighty on the inherent/reserved rights doctrine, taking the view that what has not been expressly granted to tribes simply does not exist. Under this approach, Congress assumed tribal loss of powers upon incorporation, thus placing inherent limitations on tribes. In other words, if the sum of the Court's analysis of Congress' understanding reflects the attitude that the tribe no longer possesses a certain right, then that right has been implicitly divested.

Many legal scholars have openly criticized the *Oliphant* opinion as constituting a troublesome and wholly unwarranted departure from existing Federal Indian Law, as well as a legally untenable dismissal of the inherent/reserved rights doctrine (Barsh and Henderson 1979; Duthu 1994; Maxfield 1993; Meisner 1992). Energizing this new jurisprudence was the Rehnquist Court's vital interest in the American notion of personal liberty. According to Getches, in *Oliphant* the Court "found the national interest in protecting civil rights so great that tribes necessarily lost their criminal jurisdiction over non-Indians" (1996: 1599). Prior to the advent of the implicit divestiture doctrine, the Court had routinely forwarded Congressional plenary power to justify federal intervention in the internal affairs of tribes; now with *Oliphant*, the Court was applying plenary power to justify state intervention in tribal affairs—an ominous prospect for Indian peoples. Williams states that

> [i]n its own efficient and subtle ways, Rehnquist's text works to assure that tribal "self-government" will be carried out in a self-policing manner. Tribes must exercise their "rights" to self-determination so as not to conflict with the interests of the dominant sovereign. In effect, this form of discourse enforces a highly efficient process of legal auto-genocide, the ultimate hegemonic effect of which is to instruct the savage to self-extinguish all troublesome expressions of difference that diverge from the white man's own hierarchic, universalized world-view (1986: 219, 273-274).

With *Oliphant*, the Rehnquist Court laid the interpretive groundwork for lower court judges and Supreme Court Justices to fabricate the implicit divestiture of tribal rights through a selective historical analysis without stepping on Congress' toes. In *Montana v. United States* (1981, 450 U.S. 544) (hereafter, *Montana*), the Court expanded considerably the reach of the overriding sovereignty test first articulated in *Oliphant* to include the implicit divestiture of tribal civil jurisdiction over non-Indians. In a case involving a tribe's reserved treaty right to regulate the hunting and fishing practices of non-Indians on fee lands within reservation borders, the Court ruled that the inherent powers of Indian sovereignty do not cover the activities of "non-members

of the tribe." Written by Justice Stewart, the majority opinion essentially redefined the reach, nature and limitations of tribal government, stating that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation."

Ingrained in *Montana* is the Court's development of a general rule for implicit divestiture through its articulation of the "tribal needs" and "internal relations" tests.[1] Simply put, tribes retain only those jurisdictional powers that it needs to maintain internal relations. For the tribe involved in *Montana*, the Court presumed that the allotment policy implicitly abrogated the tribe's treaty-recognized right to exclude non-Indians from the reservation. Skibine states that *Montana* "seems to indicate that tribal authority is derived from the 'consent' of the non-Indians and not from the tribe's inherent authority over any commercial activity" (2000: 299). The majority opinion did provide two rather vague exceptions to this general rule. The first exception articulated by the Court permits a tribe "to regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" (450 U.S. 544). The second exception allows tribes to exercise inherent sovereign power over the conduct of non-Indians on their reservations when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" (ibid). In both its general rule of and exceptions to implicit divestiture, *Montana* is a poorly conceived and written opinion, which may explain why so many modifications have been made to the *Montana* paradigm in the dozen years since it was issued.

The theoretically murky waters of implicit divestiture were further muddied by the Supreme Court's ruling in *Brendale v. Confederated Tribes & Bands of Yakima* (1989, 492 U.S. 408) (hereafter, *Brendale*). In *Brendale*, the majority—although upholding the Yakima Nation's right of jurisdiction over reservation lands where there was "minimal non-Indian presence"—applied the intentions of the Allotment Act to implicitly divest tribes of their sovereign powers of tribal jurisdiction over non-members on alienated allotted lands, ruling that the tribe in question did not have the right to zone non-members on fee lands within reservation borders (Getches et al 1998: 254). Despite the Court's three diverging opinions, *Brendale* managed to narrow the scope of the two exceptions to implicit divestiture forwarded by *Montana*, expanding the types of lands covered by the *Montana* rule. The convoluted majority opinion left the implicit divestiture "mired in profound confusion" (Getches 1996), leaving lower courts with "little guidance on how to apply *Montana* after *Brendale* and specifically how to resolve future cases concerning taxation and regulation of non-Indian land" (Getches etal: 617).

Duro v. Reina (1990, 495 U.S. 676) (hereafter, *Duro*), decided in the wake of the jurisprudential disorder caused by *Brendale*, further constricted the reach of tribal sovereignty with regards to criminal jurisdiction, extending the implicit divestiture doctrine to include non-member Indians. Once again demonstrating its commitment to federalism to the detriment of tribal sovereignty, the Court argued that "the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their unique customs and social order." Moving the doctrine past the question of Indian vs. non-Indian to a debate over Indian vs. non-tribal member, the Court concluded that the imposition of criminal sanctions against non-member Indians was not essential to the tribe's ability to govern its own affairs. The Court classified non-member Indians as "embraced within our Nation's 'great solicitude that its citizens be protected... from unwarranted intrusions on their personal liberty'" (*Duro* at 692). Also disconcerting to tribes was the Court's commitment to invalidating tribal courts. In *Duro*, the Court, once again revealing its adherence to ideologically-based "Indian" stereotypes, characterized tribal common law as maintaining "strange, alien" forms and structures. The *Duro* opinion found that tribal courts were "influenced by the unique customs, languages and usages of the tribes they serve"; in addition, their legal methods depended on "unspoken practices and norms" (Getches et al 1998:554).

Duro did little to untangle the jurisdictional morass created by the implicit divestiture doctrine. In Frickey's estimation, "*Duro* does nothing to clarify either the source or the scope of the ongoing judicial power, first recognized in *Oliphant*, to truncate tribal sovereignty on a case-by-case basis at the behest of nonmembers" (1999: 42). Congress reacted swiftly to the suspect *Duro* ruling, enacting legislation (known as the "*Duro* Fix")

the following year. The *Duro* Fix, which affirmed the power of tribes to exercise criminal jurisdiction over all Indians as defined by the Major Crimes Act, aimed to reverse the problematic jurisprudential after-effects promulgated by the Court's ruling. Specifically, Congress declared that tribes possessed an inherent sovereignty that had never been extinguished under U.S. law to criminally prosecute non-member Indians for crimes committed on the tribes' reservation (25 U.S.C.A. sec 1301(4)).

South Dakota v. Bourland (1993, 508 U.S. 679) (hereafter, *Bourland*) further broadened the scope of *Montana* and *Brendale*, again expanding the categories of *Montana*-type lands (lands over which tribes do not retain gatekeeping powers) to include federal lands within reservation borders. The case also placed the viability of tribal jurisdiction over non-Indian activities on trust land in doubt. In deciding whether the tribe involved could assert civil jurisdiction over the hunting and fishing activities of non-members on federal lands within the reservation, the Court ruled that the tribe's relinquishment of its right to exclude on the lands in question implicitly divested the tribe of its powers of regulatory jurisdiction over said lands.[2] *Bourland's* majority opinion extended the implicit divestiture doctrine to consider not only the intent of Congress but also the effects of Congressional legislation as sources of evidence from which to glean implicit divestiture. According to Justice Clarence Thomas, author of the majority opinion,

> *Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of land by others.

The dissenting opinion in *Bourland* took a vociferous stance against what it viewed as the majority's irresponsible digression from established jurisprudence, arguing that even through the lens of implicit divestiture, there was no Congressional intent to diminish tribal powers in the two federal acts of legislation in question. In the words of Justice Blackmun,

> the majority's myopic focus on the treaty ignores the fact that this treaty merely confirmed the Tribe's pre-existing sovereignty over the reservation land. Even on the assumption that the Tribe's treaty-based right to regulate hunting and fishing by non-Indians was lost with the Tribe's power to exclude non-Indians, its inherent authority to regulate such hunting and fishing continued.

Bourland revealed the Rehnquist Court's insidious effort to track the implicit divestiture doctrine away from debating the status of tribes as inherent sovereigns by focusing it entirely on an analysis of the right of self-government and the right to exclude. In *Bourland*, the Court sets a dangerous precedent by incorrectly treating the right to exclude and inherent sovereignty as separate concepts, while in actuality the first necessarily derives from the second. According to Skibine, "inherent sovereignty cannot legitimately be narrowed down to the right to exclude" (2000: 303).

In *Strate v. A-1 Contractors* (1997, 117 S.Ct. 1404) (hereafter, *Strate*), the Court took the implicit divestiture doctrine a major step further, ruling that inherent tribal jurisdiction can only exist if it does not conflict with state jurisdiction. In *Strate*, the Court held that the tribal court in question did not have jurisdiction to hear a case involving a traffic accident between two non-Indians on a state-maintained highway running through the reservation.[3] Focusing its analysis on whether the powers of tribal jurisdiction over non-Indians as articulated in the case was essential to the tribe's self-government, the Court place further restrictions on the *Montana* exceptions by expanding *Montana*-type lands to include highway easements. As in *Bourland*, the *Strate* Court hinged its analysis on the impact of Congressional action on implicit divestiture. According to Frickey, *Strate* "took a more abstract interpretive approach, under which general congressional purposes control if they have worked their way sufficiently into the adjudicatory context" (1999: 59).

Also inherent in Justice Ruth Bader Ginsburg's majority opinion is a stern warning to tribes and tribal advocates concerning the Court's readiness to expand the implicit divestiture doctrine in the future, thereby further limiting the jurisdictional powers of tribes. Coming to the general conclusion that "*Montana*-like" lands fall under the *Montana* rule, Ginsburg allows the Court to employ a broad interpretation of *Montana*, insinuating that the Court will not fully codify the scope

and reach of *Montana's* impact on tribal jurisdiction unless it is pushed to do so by tribal advocates. In other words, says Skibine, *Strate*

> implies that tribal authority will be stricken down as long as it is inconsistent or incompatible with the interests the states may have in regulating the activity... determining whether a tribe's assertion of jurisdiction over non-member activities on non-member fee land is necessary to self-government, by asking whether a state assumption of jurisdiction over the same activity will unduly infringe on tribal self-government, will almost always result in a finding that the tribal power is not necessary to self-government (2000: 275).

If a cursory review of the above cases involving the implicit divestiture doctrine doesn't cause tribal advocates great concern, it should. The *Strate* opinion demonstrates that the Court's implicit divestiture doctrine as it currently stands possesses little jurisprudential rhyme or reason. *Strate's* lack of elaboration should send a clear message to tribal advocates that tribes will surely regret the outcome if they purposefully bring any future cases involving jurisdiction in front of the Court. Two cases recently decided by Rehnquist and his ideological compatriots—*Atkinson Trading Co., Inc. v. Shirley* (2001, 121 S.Ct. 1825) (hereafter, *Atkinson*) and *Nevada v. Hicks* (2001, 121 S.Ct. 2304) (hereafter, *Hicks*)—confirm such an ominous prediction. *Atkinson* in particular was an extremely poor case to bring, as it fell directly in line with Ginsburg's analysis in *Strate*; predictably, the Court used *Atkinson* to further extend application of the *Montana* rule. Worse still is the unanimous decision in *Hicks*, which held that tribal courts lack jurisdiction over state officials on reservation land (for specifics about this case, see the speech by Williams in this issue). Meanwhile, a case currently working its way through the federal appeals process, *Means v. The District Court of the Chinle Judicial District* (Nav. Sup.Ct. 1999), promises to dare the Supreme Court to articulate an even broader scope to *Montana*, which would mean further infringement on the already tenuous criminal jurisdiction of tribes over non-member Indians.

The bottom line remains that the implicit divestiture doctrine—and its subsidiary tenet of preemption—is a devastating body of jurisprudence for tribes, as it presumes the rights of states to infringe upon tribal jurisdiction. Skibine warns that under the implicit divestiture doctrine, "tribal power will only prevail over a state's own assertion of power if it has some backing or support in positive federal law" (2000: 294). As long as the Court's analysis of tribal jurisdiction continues to be predicated on the right to exclude rather than inherent tribal sovereignty, on racial ideologies rather than legal precedents, tribes stand little chance of having their rights of jurisdiction affirmed by Rhenquist and his like-minded fellow Justices. Instead, they can bet on having those rights taken away by the Court. The kicker is that the implicit divestiture doctrine is so vaguely constructed, methodologically unsound and subjectively maintained that it could easily be applied by the Supreme Court to inherent sovereignty questions other than those dealing with tribal jurisdiction. The doctrine's serious and irreconcilable jurisprudential flaws forces tribal advocates to employ argumentative approaches that they shouldn't dare touch; future embellishment of the doctrine by the Court surely will wreak jurisdictional havoc in Indian Country of an unprecedented scale. Thus far, the *Montana* rule has been so subjectively interpreted and its exceptions so narrowly construed, it makes one wonder: why would tribes and tribal advocates want to provide the Supreme Court with future opportunities to take additional cheap shots at tribal jurisdiction?

So how should tribes and tribal advocates proceed if they are to achieve success in having their inherent sovereign powers of tribal jurisdiction affirmed? As the saying goes, there is more than one way to skin a cat. Similarly, tribes have at their disposal several alternatives for getting their rights of tribal jurisdiction affirmed other than the demonstrably anti-Indian and judicially active Supreme Court. Tribes must realize that, with the Court's complete embrace of the implicit divestiture doctrine and the ideologies that drive it, certain rights of jurisdiction are as good as gone within the federal judicial arena; consequently, they must pursue other avenues (see below) in order to get those rights legitimized. Tribal advocates must take a step back and remember that, in many ways, tribal sovereignty has survived in spite of Federal Indian Law and not because of it. Indians must take active, creative approaches to insuring rights and not be content with placing their faith in a federal judicial system that seems bent on methodically destroying their rights. Williams states: "It makes good cultural and political sense for tribes to bypass the federal judicial arena predisposed to destroy inherent sovereignty and tribal advocates to

abandon the mindset that without Federal Indian Law, 'the Indians would no longer be among us'" (1996: 985).[4]

Until the Marshall trilogy, the Canons of Treaty Construction, and the inherent/reserved rights doctrine return to their rightful place (relatively speaking) as the presiding analytical principles governing Supreme Court jurisprudence, tribal advocates should look elsewhere. First, tribes could lobby Congress to pass immediate, corrective measures designed to reign in the judicially active Court and effectively freeze the negative impacts caused by implicit divestiture.[5] Second, tribes could claim an exhaustion of domestic judicial remedies prior to submitting their jurisdictional grievances to the federal judicial system and instead bring those cases before international human rights commissions, which thus far have been willing to affirm the inherent sovereign right of tribal jurisdiction. Finally, tribes could opt to make a "deal with the devil" by negotiating cooperative agreements with the governing institutions of the states in which they reside, thus forestalling potential conflicts between the two sides in the future.[6] Skibine recommends that

> [a]lthough the next round of legal battles will be about the kind of congressional nod that is required before tribal jurisdiction over non-members can be activated from its state of suspended animation, the tribes should not wait that long. There are no reasons why the tribes and the states could not sit down at the negotiating table, iron out their jurisdictional problems, and together approach Congress for ratification of such agreements (2000: 304).

In short, considering the current jurisprudential stance of the anti-Indian Supreme Court, tribes, tribal members and their advocates would be well-advised to play "keep-away" from the Court when it comes to matters of jurisdiction and pursue other, more promising political, legal or reciprocal options in order to secure/insure their inherent rights of tribal jurisdiction.

Footnotes

1. Skibine states that in another example of judicial activism, this general rule "was not a general rule until the Court decided to make it so" (2000: 298).

2. The tribe in *Bourland* had been required by two pieces of federal legislation to relinquish lands for construction of a federal reservoir and had subsequently sought to regulate non-member fishing in the reservoir.

3. The state in question had received a right of way from the federal government for the highway.

4. Williams adds that history "teaches Indian peoples that in a federal system of government, the white racial power organized through state governments represents the gravest and most persistent threat to Indian rights and cultural survival on the continent" (1996: 987).

5. Congress openly demonstrated its disapproval of the Court's implicit divestiture doctrine with its passage of the Duro fix. Frickey warns, however, that tribes must adopt this approach with a tremendous sense of urgency, as the Court's "new common law of colonization...relieves Congress of its responsibility to visit these issues [of tribal jurisdiction]" (1999: 81).

6. See "Note: Resolving Jurisdictional Disputes by Cooperative Agreement" in Getches et al 1998 (619) for more information.

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