10-1984

National Farmers Union Insurance Cos. v. Crow Tribe of Indians

Lewis F. Powell Jr.

ATTACHMENT TO POOL MEMO IN No. 84-320

Grimes

SUPREME COURT OF THE UNITED STATES

No. A-123 (84-320)

NATIONAL FARMERS UNION INSURANCE COMPANIES ET AL., PETITIONERS *v.* CROW TRIBE OF INDIANS ET AL.

ON APPLICATION FOR STAY

[September 10, 1984]

JUSTICE REHNQUIST, Circuit Justice.

Applicants National Farmers Union Insurance Companies and Lodge Grass School District No. 27 request that I stay the mandate of the United States Court of Appeals for the Ninth Circuit which reversed the judgment of the United States District Court for the District of Montana. The latter court had enjoined the Crow Tribe of Indians from executing against the applicants on a judgment rendered by the Crow Tribal Court. The Court of Appeals for the Ninth Circuit held, as I read its opinion, that litigants who seek to challenge the exercise of jurisdiction by an Indian Tribal Court in a civil action have no federal court remedy of any kind. I have concluded that four Members of this Court are likely to vote to grant the applicants' petition for certiorari, and that the applicants have a reasonable probability for at least partial success on the merits if this Court grants certiorari. I have therefore decided that the temporary stay I earlier granted on August 21, 1984, pending consideration of a response, should be continued until this Court disposes of the applicants' petition for certiorari which was filed on August 29th.

DC enjoined the Tribe from executing levy under its judg. CA9 reversed, holding DC had no juris

In May, 1981, Leroy Sage, a Crow Indian school child, was struck by an uninsured motorcyclist on the property owned by applicant School District. The school is located on land within the external boundaries of the Crow Indian Reserva-

tion, but the land is owned by the State of Montana in fee subject to a reserved mineral interest in the Tribe. Sage sustained a broken leg, and filed suit against the School District in Crow Tribal Court.

Dexter Falls Down served process for Sage upon Wesley Falls Down; Wesley was a member of the school board. Wesley did not notify anyone of the summons and a default judgment for $153,000 was entered against the school three weeks later in Tribal Court. Actual medical bills came to $3,000. Petitioners became aware of the suit when the Tribal Court mailed a copy of the judgment to the school. Instead of seeking review of the default judgment in Tribal Court, applicants filed suit in the United States District Court for the District of Montana, alleging that the Tribal Court's exercise of jurisdiction violated Due Process and the Indian Civil Rights Act, 25 U. S. C. § 1302, *et seq.* (1982). Petitioners sought a permanent injunction against the execution of the Tribal Court judgment.

The District Court held that petitioners' complaint, based on federal common law, stated a claim under 28 U. S. C. § 1331 (1982). *National Farmers Union Insurance Co.* v. *Crow Tribe of Indians*, 360 F. Supp. 213, 214–15 (D. Mont. 1983). The District Court held that the Tribal Court lacked subject matter jurisdiction over Sage's claim, because the land upon which the court had occurred was not Indian land, and the defendants were not tribal members. The District Court relied on our decision in *Montana* v. *United States*, 450 U. S. 544, 565–66 (1981) in reaching this conclusion.

The Tribe appealed to the Court of Appeals for the Ninth Circuit, and that court reversed over a partial dissent. *National Farmers Union Insurance Co.* v. *Crow Tribe of Indians*, 736 F. 2d 1320 (9th Cir. 1984). The Court of Appeals reasoned on the authority of one of its prior decisions that "Indian tribes are not constrained by the provisions of the Fourteenth Amendment." It went on to determine that tribes are bound by the provisions of the Indian Civil Rights

Act, 25 U. S. C. § 1301 *et seq.* and that § 1302(8) of this Act requires that tribal courts exercise their jurisdiction in a manner consistent with due process and equal protection. But the court then concluded that since Congress had expressly limited federal court review of a claimed violation of the ICRA to a single remedy—the writ of habeas corpus—there could be no federal court review of any tribal court exercise of jurisdiction in a civil case. The Court of Appeals for the Ninth Circuit relied in part on our decision in *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 66–70 (1977) to reach this conclusion. The Court of Appeals recognized that our decision in *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978) had relied on principles of federal common law to determine whether a tribal court had exceeded its jurisdiction, but decided that our opinion the same term in *Santa Clara Pueblo*, *supra*, suggested a restriction on federal court review of Indian tribal jurisdiction as a result of the Indian Civil Rights Act. The Court of Appeals observed in a footnote that "should Sage seek to enforce his default judgment in the courts of Montana, National may, of course, challenge the Tribal Court's jurisdiction in the collateral proceedings. See generally *Durfee* v. *Duke*, 375 U. S. 106 (1963)." 736 F. 2d 1320, 1324 n. 5.

It is clear from proceedings in this case subsequent to the handing down of the opinion of the Court of Appeals that the respondents in this case have no intention of resorting to any state court proceedings in order to enforce the judgment of the Crow Tribal Court. After the issuance of the mandate of the Court of Appeals, tribal officials, at the behest of respondent Sage, seized 12 computer terminals, other computer equipment, and a truck from the school district. The basis for this seizure was said to be the Tribal Court judgment, and no state process was invoked.

If the Court of Appeals is correct in the conclusions which it drew in its opinion, the state of the law respecting review of jurisdictional excesses on the part of Indian tribal courts is

indeed anomalous. The Court of Appeals may well be correct that tribal courts are not constrained by the Due Process or Equal Protection Clauses of the Fourteenth Amendment; long ago, this Court said in *United States* v. *Kagama*, 118 U. S. 375, 379 (1886), and repeated the statement as recently as *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 211 (1978):

> "Indians are within the geographical 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 exists in the broad domain of a sovereignty but these two."

But if because only the national and state governments exercise true sovereignty, and are therefore subject to the commands of the Fourteenth Amendment, I cannot believe that Indian tribal courts are nonetheless free to exercise their jurisdiction in a manner prohibited by the decisions of this Court, and that a litigant who is the subject of such an exercise of jurisdiction has nowhere at all to turn for relief from a conceded excess. Every final decision of the highest court of a state in which such a decision may be had is subject to review by this Court on either certiorari or appeal. 28 U. S. C. § 1257 (1982). Every decision of a United States District Court or of a court of appeals is reviewable by this Court either by way of appeal or by certiorari. *Id.*, §§ 1252–54; *cf.* § 1291. If the courts of the states, which in common with the national government exercise the only true sovereignty exercised within our Nation, *Kagama*, *supra*, are to have their judgments reviewed by this Court on a claim of erroneous decision of a federal question, it is anomalous that no federal court, to say nothing of a state court, may review a judgment of an Indian tribal court which likewise erroneously decides a federal question as to the extent of its jurisdiction. See *Montana* v. *United States*, *supra*. It may be that Congress could provide for such a result, but I have a good deal more doubt than did the Court of Appeals that it has done so.

Our decision in *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49 (1978), which the Court of Appeals read to support its conclusion, raised the question of whether a federal court could pass on the validity of an Indian Tribe's ordinance denying membership to the children of certain female tribal members. We held that the Indian Civil Rights Act, *supra*, did not imply a private cause of action to redress violations of the statutory Bill of Rights contained in the Act, and that therefore the validity of the tribal ordinance regulating membership could not be reviewed in federal court. It seems to me that this holding, relating as it did to the relationship between the right of a Tribe to regulate its own membership and the claims of those who had been denied membership, is quite distinguishable from a claim on the part of a non-Indian that a tribal court has exceeded the bounds of tribal jurisdiction as enunciated in such decisions of this Court as *Montana* v. *United States*, *supra*. As JUSTICE WHITE pointed out in his dissent in that case, 436 U. S. 72–73, "the declared purpose of the Indian Civil Rights Act . . . is 'to ensure that the American Indian is afforded the broad constitutional rights secured to other Americans.' But as the Court also pointed out in its opinion, Congress entertained the additional purpose of promoting 'the well-established federal "policy" of furthering Indian self-Government.'" 436 U. S. 49, 62. The facts as well as the holding of *Santa Clara Pueblo*, *supra*, satisfy me that Congress' concern in enacting the Indian Civil Rights Act was to enlarge the rights of individual Indians as against the Tribe while not unduly infringing on the right of tribal self-government. The fact that no private civil cause of action is to be implied under the Indian Civil Rights Act, *Santa Clara Pueblo*, *supra*, does not to my mind foreclose the likelihood that federal jurisdiction may be invoked by one who claims to have suffered from an excess beyond federally prescribed jurisdictional limits of an Indian tribal court on the basis of federal common law. See, *e. g.*,

Illinois v. *City of Milwaukee*, 406 U. S. 91, 99–100 (1972). We said in *Oliphant* v. *Suquamish Indian Tribe*, *supra*:

> "'Indian law' draws principally on the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

I think a fair reading of all of our case law on this subject could lead to the conclusion that even though the Indian Civil Rights Act affords no private civil cause of action to one claiming a violation of its terms, "Indian law" as of the time that law was enacted afforded a basis for review of tribal court judgments claimed to be in excess of Tribal Court jurisdiction.

Respondents insist that under Rule 44.2 of this Court a supersedeas bond should have accompanied applicant's request for a stay. That rule provides:

> "If the stay is to act as a supersedeas, a supersedeas bond shall accompany the motion and shall have such surety or sureties as said judge, court or justice may require."

I do not think that the rule is by its terms applicable to this case. The term "supersedeas" to me suggests the order of an appellate court having authority to review on direct appeal the judgment which is superseded. All of the proceedings in the various federal courts in this case have, of course, sought no direct review of the Tribal Court judgment, which simply is not provided for by statute at all, but collateral relief. The District Court did not review the judgment of the Indian Tribal Court by way of appeal, but instead enjoined its enforcement.

It may well be that under the Federal Rules of Civil Procedure respondents would have a plausible argument to make

to the District Court that an injunction bond serving somewhat the same purposes as a supersedeas bond should be required by that court so long as its injunction remains in effect. Whether such a bond should be required of either party in this case, and whether in particular it should be required of applicant Lodge Grass School District No. 27 in view of the fact that apparently under Montana law a public body is not required to post a supersedeas bond in a state court proceeding, is an issue best left in the first instance to the District Court.

As to whether, if I am right in thinking that this Court may well decide that Tribal Court judgments are subject to federal court review for claims of jurisdictional excess, applicants would necessarily prevail, I express no opinion. The District Court held in their favor on this point, but the Court of Appeals for the Ninth Circuit found no necessity for reaching it since it held that there was no federal jurisdiction to consider it. The District Court in its opinion quoted F. Cohen, *Handbook of Federal Indian Law*, 253 (1982 Ed.), to the effect that "the extent of Tribal civil jurisdiction over the non-Indian is not fully determined." The District Court, in reaching the conclusion it did, relied on the following language from our opinion in *United States* v. *Montana*:

> "To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on the Reservations, even on non-Indian fee lands. A Tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the Tribe or its members, through commercial dealings, 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 the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, *supra*, 450 U. S., at 565–566.

The court concluded that exercise of tribal jurisdiction over an injury to a tribal member occurring on non-Indian owned fee land within the boundaries of the Reservation was not within the description of Indian tribal jurisdiction. I express no opinion as to what the correct answer to this inquiry may be. I do think its correct decision is of far less importance than the correct decision of the more fundamental question of whether there is any federal court review available to non-Indians for excesses of Tribal Court jurisdiction.

It is so ordered.

Straight lined with
83-1811 R. J. Williams Co
v. Fort Belknap Housing

Await WHR's
views - probably
a Grant

See WHR's Chambers Opinion
of Sept 10, 1984.
The Q is whether CA9 erred in
holding there is no federal court
review available to non-Indians
in cases where a Tribal Court has
abused its juris.

PRELIMINARY MEMORANDUM

November 21, 1984, Conference
List 3, Sheet 1

No. 84-320

Nat'l Farmers Un. Ins. Co. et al. (AR)

v.

Crow Tribe et al. (DR)

Cert to CA9 (Wright [conc.& dis.], Anderson, Fletcher)

Federal/Civil

Timely

1. SUMMARY: The CA9 held below that there is no federal court remedy for non-Indian litigants who seek to challenge the exercise of civil jurisdiction by an Indian tribal court. In an in-chambers opinion granting petrs' application for a stay of the CA9's mandate pending this Court's ruling on the petn for certio-

Grant - CA9 may have made a hash of tribal court jurisdictional principles.

Lynda

rari, Justice Rehnquist reviewed the facts and the legal basis for the CA9 opinion and concluded that four Justices would be likely to vote to grant this petn for certiorari. National Farmers Union Insurance Cos. v. Crow Tribe of Indians, No. A-123 (slip op. September 10, 1984)(copy attached).

This case is straight-lined with R.J. Williams Co. v. Fort Belknap Housing Authority, No. 83-1811. The Williams case, on which the CA9 relied in part in its decision in this case, is the subject of a previously circulated and thorough pool memo. A copy of that pool memo is also attached. The petrs in Williams have subsequently moved to consolidate consideration of their case with National Farmers Union; the motion for consolidation is the subject of a separate accompanying memo.

2. FACTS AND DECISIONS BELOW: Petr Lodge Grass School District No. 27, a Montana governmental unit, operates a school within the boundaries of the Crow Indian Reservation on land ceded to the state by resp Crow Tribe of Indians. Petr National Farmers Union Insurance Companies issued a liability insurance policy to the school district.

In May, 1981, resp Leroy Sage, a student at the school, was struck by a motorcycle in the school parking lot. Through his guardian, Resp Flora Not Afraid, Sage brought a negligence suit against the school district in resp Crow Tribal Court. Process was served on the chairman of the school board, who failed to notify the other members. The Crow Tribal Court subsequently entered a default judgment for Sage in the amount of $153,000. The Tribal Court mailed a notice of the judgment to the school.

Rather than filing a motion to set aside the default judgment in Crow Tribal Court pursuant to the Crow Rules of Civil Procedure, petrs sought injunctive relief in U.S. District Court on the grounds that the tribal court's exercise of jurisidiction violated due process and the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §1302.

The DC (Battin, C.J., D. Mont.) ruled for the petrs, and on December 29, 1982, entered a permanent injunction precluding enforcement of the Tribal Court judgment. Petn at 14a, 360 F.Supp. at 213. Judge Battin reasoned that he had jurisdiction under 28 U.S.C. §1331 to determine whether the Tribal Court had exceeded the lawful limits of its jurisdiction in entering a default judgment against the petrs. Citing Montana v. United States, 450 U.S. 544 (1981), the DC concluded that federal authority to determine the extent of tribal sovereignity is a matter of federal common law. And citing Illinois v. City of Milwaukee, 406 U.S. 91 (1972), the DC concluded that federal question jurisdiction under §1331 can be based on questions of federal common law. Petn at 17a. On the merits, the DC concluded that the tribal court lacked subject matter jurisdiction because the defendants were non-Indians and the accident took place on non-Indian land. Judge Battin concluded that the proper forum for this tort claim was Montana state court. Petn at 24a. In light of these holdings, the DC found it unnecessary to reach petrs claims under the ICRA. Petn at 18a.

On July 3, 1984, the CA9 reversed the DC in a brief opinion by Judge Fletcher. Petn at 1a; 736 F.2d at 1320. Judge Fletch-

er's opinion noted that the Circuit's previous decision in R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (CA9 1983), "held that a complaint challenging a tribal court's assertion of jurisdiction over a non-Indian defendant in a civil suit stated no federal claim for relief." Petn at 4a. Finding Williams controlling, the panel reversed Judge Battin. A subsequent portion of Judge Fletcher's opinion, labelled "Discussion", noted that (1) due process and equal protection claims against Indian tribal courts do not arise under the Constitution because Indian tribes are not constrained by the provisions of the Fourth Amendment (citing Williams); (2) although Indian tribes are required by ICRA to exercise their powers in a manner consistent with due process and equal protection, federal court review of alleged ICRA violations is limited to the remedy of a writ of habeas corpus (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)). The CA9 refused to recognize a civil cause of action at federal common law to review alleged improprieties in the exercise of jurisdiction by tribal courts. Judge Fletcher noted that this holding made it unnecessary to reach the question of whether petrs had exhausted their available remedies in Crow Tribal Court. Petn at 7a n.4.

Judge Wright dissented in part and concurred in the result. Petn at 8a. He would hold that the petrs stated a federal common law cause of action, but would dismiss their case because they had failed to exhaust tribal court remedies. First, Judge Wright noted that Santa Clara Pueblo and other cases cited by the majority did not necessarily require that courts preclude federal com-

mon law jurisdiction to review a tribal court's exercise of jurisdiction in a civil case. He noted that cases permitting review of tribal regulatory decisions on that grounds, see, e.g., Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), should logically extend to review of the exercise of jurisdiction by a tribal court. Second, Judge Wright noted that the Williams decision did not control in this case because petr there did not assert federal common law as a basis for jurisdiction. Third, Judge Wright noted that the effect of the majority's ruling would be to make the Crow Tribal Court the final arbiter of its civil jurisdiction. Finally, he concluded that the case should nevertheless be dismissed because petrs had failed to exhaust available tribal remedies under the Crow Rules of Civil Procedure. Because petrs attempted to circumvent the tribal court system by suing immediately in federal court, Judge Wright would deny them relief.

After the CA9 opinion was issued, resp Sage seized various assets of the resp school district, including a truck and some computer terminals, pursuant to tribal court process. A judicial sale of the property was authorized by the tribal court for August 23, 1984. On August 22, 1984, petrs for the first time entered an appearance in tribal court and moved to set aside the default judgment. Crow Tribe Resp Brief at 1a. Pursuant to Crow Rules of Civil Procedure, the tribal court then stayed the sale and ordered petrs to post a surety bond pending a decision on the motion. A hearing on the motion was scheduled for September 19, 1984. In the interim, Justice Rehnquist stayed the issuance of

the CA9 mandate. National Farmers Union Insurance Cos. v. Crow Tribe of Indians, No. A-123 (slip op. September 10, 1984)(copy attached). The tribal court accordingly stayed the sale indefinitely, Crow Tribe Resp Brief at 8a. The tribal court went ahead with the hearing on the motion to set aside the default judgment, but petrs refused to attend. Crow Tribe Resp Brief at 13a.

3. CONTENTIONS: In addition to the petn, resp briefs have been filed by the Crow Tribe of Indians and by resps Sage and Not Afraid. Three amicus briefs have been filed on behalf of ten states and Glacier County, Montana, supporting the petn. Petrs also filed a reply brief on November 8, 1984.

Petrs contend that the CA9 opinion has far-reaching consequences in denying federal courts any power to protect non-Indians from abuse of tribal court jurisdiction. United States v. Montana, supra, 450 U.S. at 564-66, suggested that tribal court civil jurisdiction over non-Indians would be limited to those cases involving non-Indians who enter into consensual relations with the tribe and to protection of the political integrity, economic security, or health or welfare of the tribe. The CA9 opinion forecloses any contraint on tribal jurisidiction despite the Montana suggestion that such jurisdiction is limited. The CA9 opinion should be promptly reviewed because of the pervasive involvement of non-Indians -- and particularly non-Indian governmental units like petr -- on Indian reservations. Montana alone operates 47 school districts on Indian reservations, and all may be subject to unreviewable assertions of civil jurisdiction in numerous tribal courts. Finally, petr notes that Santa

Clara Pueblo, supra, 436 U.S. at 51-52, addressed only the role of federal causes of action to enforce the ICRA in the context of an inter-tribal dispute, and not the existence of a federal common law cause of action to challenge tribal court civil jurisdiction over a non-Indian.

The Amici contend that the CA9 opinion is incorrect and threatens the relationships between Indian tribes and state governments and private businesses. An amicus brief filed on behalf of nine states[1] notes that each of the states and their subdivisions provide a variety of governmental services within Indian reservations. They are concerned that, without a federal common law cause of action to challenge a tribe's improper assertion of civil jurisdiction over state agencies, state property and services on reservations will be endangered. The states further note that the federally developed doctrine of tribal sovereignity cannot be construed to authorize unreviewable assertions of civil jurisdiction over non-Indians. In a separate amicus brief, the State of Washington notes that 16,000 non-Indian Washington citizens reside on Indian reservations in that state, and are provided state services by a variety of governmental entities, including 40 school districts. These persons have no voice in tribal affairs, yet under the CA9 holding they will have no way to challenge the tribe's assertion of civil jurisdiction over them. In a third amicus brief, Glacier County, Montana argues that the

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[1]Montana, Arizona, Minnesota, North Dakota, North Carolina, Oklahoma, South Dakota, Wisconsin, and Wyoming.

Blackfeet Tribal Court has recently enjoined the County Water and Sewer District from terminating water or sewage service to non-paying members of the tribe. Under the CA9 decision below, the County argues, this sort of injunction will be unreviewable in any other court. The County provides sewer service and a variety of other services on the reservation by state mandate rather than by choice.

Resp Crow Tribe contends that the CA9 opinion is correct as a matter of law and that review is particularly unwarranted because the petrs have failed to exhaust the significant remedies available to them in the tribal court. Petr cites Santa Clara Pueblo, supra, 436 U.S. at 63, for the proposition that federal review of tribal court assertions of civil jurisdiction must be precluded in order to protect tribal sovereignity from undue interference. Crow Tribe Resp at 6, 13-16. The bulk of this resp brief argues that petrs intentionally circumvented the tribal court in seeking an injunction in federal court prior to attempting to have the default judgment set aside in Crow Tribal Court. Sensible notions of comity and respect for tribal sovereignity suggest that, even if there is a federal common law cause of action to review tribal exercise of jurisdiction, non-Indians be required to exhaust tribal court remedies before appealing to a federal court. Crow Tribe Resp at 7-13. The tribe finally suggests that, in the event the petn is granted, the Court should not reach the merits of whether the tribal court has jurisdiction in this case, but should only decide whether a a federal cause of action exists.

Resps Sage and Not Afraid repeat arguments made by resp Crow Tribe concerning the Santa Clara Pueblo case and petrs' failure to exhaust tribal court remedies. They emphasize that petrs' resort to federal court without any appearance in tribal court has caused Sage and Not Afraid to incur three years of delay in obtaining relief on their claim and more than $45,000 in legal fees. Sage and Not Afraid seek leave to proceed in forma pauperis, and they have filed an appropriate affidavit indicating they have no assets and are unemployed.

Petrs Reply Brief argues that this Court should review both the question of whether there exists a federal cause of action to review tribal court exercise of jurisdiction and the question of whether tribal court jurisdiction was proper in this case. Petrs note that the CA9 opinion held that failure to exhaust tribal court remedies was irrelevant, since petrs could not have obtained federal review even if they had exhausted tribal court remedies. Resps' "exhaustion" argument accordingly does not lessen the merit of the petn.

4. DISCUSSION: The Court should grant the petn on both questions presented. The CA9 ruling -- that federal courts can never review the exercise of civil jurisdiction by a tribal court over a non-Indian -- is unfortunate and was clearly unnecessary to decide the case. The CA9 reading of Santa Clara Pueblo extends that case far beyond reason or the Court's apparent intent. Judge Wright's partial dissent is eminently reasonable and suggests an appropriate accommodation of the need to protect the integrity of tribal court proceedings and the need to protect

non-Indians against assertions of civil jurisdiction by tribal courts. By resorting to federal court prior to seeking to vacate the default judgment in tribal court, petrs circumvented established procedures in that court and successfully delayed resolution of the merits of their claims for more than two years. Had the CA9 merely rejected petrs suit on the grounds of non-exhaustion, this case would probably not be certworthy.

But because the CA9 instead announced that tribal courts can define their own jurisdiction over non-Indians without any federal court review, this Court will have to straighten out the mess. The case lends itself to elucidation of both a federal common law action challenging tribal court jurisdiction and a requirement that litigants exhaust tribal remedies before resort to federal court. As noted in the accompanying memo, I further recommend that the Williams case, which is straight-lined with this one, be held pending resolution of this case. The CA9 reasoning and result in Williams are less outrageous than in this case, and can be distinguished since petrs there failed to invoke federal common law. Nevertheless, any opinion in this case may require the CA9 to reevaluate Williams.

I recommend a GRANT.

There are two responses, three amicus briefs, and a reply.

November 13, 1984 Syverud opn in petn

November 21, 1984

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*...

Submitted ....., *19*... *Announced* ....., *19*...

84-320

No.

NATL. FARMERS INS. CO.

vs.

CROW TRIBE

Also motion of Leroy Sage to proceed ifp.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.				Join 3									
Brennan, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.	✓												
Stevens, J.		✓											
O'Connor, J.		✓											

File
(no need to correct)

April 1, 1985

FARMERS GINA-POW

84-320 National Farmers Union Insurance Companies and Lodge Grass School District 27 v. Crow Tribe of Indians et al.

MEMO TO FILE

This case presents the following question:

> "Whether the Tribal Court of the Crow Indian reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on State-owned land, and that occur in connection with activities that are compelled or encouraged by State and Federal law or policy."

The facts in this case are unusal. Leroy Sage, a member of the Crow Tribe and a minor, was injured on the parking lot of Lodge Grass Elementary School, a public school located on land owned by the state, but within the exterior boundaries of the Crow Reservation. Through a guardian, Sage brought suit against the school district in a Crow Tribal Court, claiming substantial damages. Process was served on the School Board Chairman who, for unknown reasons, failed to notify anyone that a suit had been brought. Neither the school authorities nor its

insurer, National Farmers Union Insurance Company, had notice and therefore a default judgment of $153,000 was taken 21 days after service of process.

This suit was instituted in federal court to obtain an injunction against the execution of the default judgment. Following a hearing on defendant's motion to dismiss, the DC granted a permanent injunction against any execution of the Tribal Court judgment, holding that it court lacked "subject matter jurisdiction over the tort that was the basis of the default judgment".

The Court of Appeals for the 9th Circuit reversed the DC, and held that since a Tribal Court was the first and last arbiter of its own jurisdiction, a federal court had no jurisdiction under 28 U.S.C. §1331 to intrude upon the "ajudicatory jurisdiction asserted by Tribal Courts even in a civil tort action involving non-Indians, and arising upon on-Indian lands located within the boundaries of an Indian Reservation."

Petitioners argue that the "ability of states to conduct their governmental functions in an orderly fashion is at stake" in this case. The Court of Appeals erred in holding that Santa Clara Pueblo v. Martinez, 436 U.S. 49, makes a Tribal Court the first and last arbiter of its own

jurisdiction in tort cases - even those arising on state-owned land and involving state operated activities such as the school district. Petitioners say that the question at issue is "not governed by any single federal statute, but is based on federal common law. A claim based on federal common law is included in 'laws' of the United States for purpose of federal jurisdiction under §1331. Illinois v. City of Milwaukee, 406 U.S. 91. Petitioners briefs cites CA9 cases (apparently in conflict with its present decision) that recognized the right of federal courts to decide questions whether a Tribe has exceeded its jurisdiction over non-Indians. Even though there is no federal statute defining the extent of Tribal jurisdiction over non-Indians, federal court jurisdiction exists under §1333, based on principles ~~and questions~~ of federal common law.

Respondents argue that the "power to decide federal common law questions is limited" generally by the intent of Congress with respect to Indian affairs. "Congress intends to foster Indian self-government" by forbidding a district court, in effect, to become a appellate court over the Tribal Court. A federal district court has no authority to use the injunction power to cripple and

nulify the orderly functions of the Tribal Court system. In any event, respondent say that federal court review is not available until Tribal remedies are exhausted. All of these principles, it is said, were violated by the district court in this case.

Respa say

The entire history of the "Crow Nation" makes clear that the Tribe held and properly exercised jurisdiction over torts of non-Indians against Crows from the earliest times until the commencement of this case. The tort in this case was committed by a non-Indian riding a motorcycle that hit the plaintiff.

As Annmarie knows from our work on Oneida, I am no authority on Indian law. If there is no federal statute directly conferring jurisdiction on the federal court, I would think that federal common law includes - or should include - the authority of a federal court to enjoin enforcement of a judgment by the Tribal Court against a local subdivision of the State of Montana. Putting it differently, I would doubt that a Tribal Court has jurisdiction to impose a judgment on the state or one of its political subdivisions ~~of~~ on a tort against an Indian committed by a non-Indian on state-owned property. Bill Rehnquist, in granting a stay in this case, apparently

said that the decision of CA9 appears to leave the state and its insurer with "no federal court remedy of any kind".

It seems to me that the question is somewhat clearer if viewed in terms of the jursidiction of the Tribal Court, rather than that of the federal district court. My thoughts are entirely tentative, and I will be intersted in the views of my law clerk.

LFP, JR.

File

aml 04/05/85 Reviewed 4/7 Well reasoned & persuasive
Annmarie's suggested answers are set forth below after the Questions

BENCH MEMORANDUM

To: Justice Powell April 5, 1985

From: Annmarie

Re: No. 84-320

Nat'l Farmers Union Ins. Co. et al v. Crow Tribe et al

Questions Presented

(1) Does a federal court have jurisdiction to enjoin Indian tribal court proceedings against a non-Indian on the ground that the tribal court has exceeded its jurisdiction? Yes - Fed Common Law

(2) Should a non-Indian plaintiff be required to exhaust tribal court remedies before challenging the jurisdiction of the tribal court in federal court? Yes.

(3) Did the tribal court exceed its authority by exercising civil jurisdiction over non-Indians in an action to

redress personal injuries to a member of the tribe whose injuries allegedly were caused by the negligence of school district officials on State-owned land within the tribe's reservation?

Need not reach this Q, but if we do, Tribal Ct had juris.

Background

In May 1982, Leroy Sage, a minor and member of the Crow Tribe, was injured by a motorcycle on the grounds of a school operated by School District No. 27, a political subdivision of the State of Montana. Although the land on which the school was located is owned by the State, it is within a reservation held by the Crows. Sage's guardian sued the school district in the Crow tribal court seeking $3,000 in actual damages and $150,000 for pain and suffering. The complaint alleged that the school district was negligent in that the condition of the school parking lot was unsafe and that it was inadequately supervised during school hours. Process was served properly upon the chairman of the school district, who inexplicably failed to notify anyone else of the suit. As a result, in October, 1982, a default judgment in the amount of $153,000 was entered against the school district in the tribal court.

Suit in D C

On November 2, 1982, having received notice of this judgment, the school district and its insurance company filed suit in federal district court alleging that the tribal court did not have subject matter jurisdiction over the controversy. The DC agreed and permanently enjoined enforcement of the tribal court's judgment. On appeal, CA9 reversed, holding that a federal court cannot enjoin tribal court proceedings. Judge Wright concurred in the result on the ground that petrs should

no juris

DC

CA9

have exhausted their tribal court remedies before seeking intervention by the DC.

On August 1, 1984, shortly after CA9's decision, the tribal court issued a writ of execution for the seizure of certain property of the school district. Sale of the property was scheduled for August 23. On August 22, the school district appeared in "tribal court" seeking to enjoin the sale and set aside the default judgment. On the same day, the tribal court postponed the sale and set a hearing to consider the motion to vacate the default judgment. At about the same time as its appearance in tribal court, the school district applied to Justice Rehnquist for an emergency stay of the sale. Justice Rehnquist granted a temporary stay on August 21. On September 10, he continued the stay until the disposition of the school district's proceedings before this Court. Nine days later, the tribal court postponed ruling on the motion to vacate the default judgment until final disposition by this Court.

Discussion

I. Jurisdiction of the Federal DC.

The DC held that it had jurisdiction to entertain petrs' action for injunctive relief under 28 U.S.C. §1331. In the DC's view, petrs raised a question of federal common law and this question was cognizable under §1331 under Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972). In particular, the DC believed that petrs placed in issue "the extent of tribal court civil jurisdiction over non-Indians as developed by the Supreme Court in Montana v. United States, 450 U.S. 544 (1981) --

developments that are not drawn from any specific statute or treaty, but raise the overriding federal interest in determining the extent of tribal sovereignty and therefore form a part of federal common law." Pet. App. at 17a.

I think this theory of jurisdiction is persuasive. As you noted in Oneida, regulation of, and relations with, Indian tribes are matters exclusively within the power of the federal government. Indian tribes relinquished the absolute sovereignty they enjoyed as independent nations upon their incorporation into the United States. Accordingly, whatever judicial, legislative, or other authority Indian tribes retain is a matter of determined by federal law. This Court's decision in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), indicated that these retained powers are not limited only by the specific restrictions in treaties or congressional enactments. Indian tribes are prohibited as well from exercising those powers "inconsistent with their status." Id., at 208. Thus, I conclude that a challenge to the jurisdiction of a tribal court raises a question of federal common law. As the DC correctly noted, the Court held in Illinois v. City of Milwaukee, supra, that causes of action based on federal common law arise under the laws of the United States for purposes of §1331 jurisdiction.

The one nagging question I have about the jurisdiction of the DC in this case is whether petrs really raised a question of federal common law in the DC. Their original complaint asserted jurisdiction only on the basis of §1343 and 25 U.S.C. §1302 (the Indian Civil Rights Act or "ICRA"), although it was amended to

allege jurisdiction under §1331 as well. Petrs' substantive claims read as follows:

> 14. The defendants lack jurisdiction over non-Indian fee land premises conducting business with substantial contracts [sic] outside the exterior boundaries of the Crow Indian Reservation. . . .
>
> 15. The attempted assertion of the jurisdiction over plaintiffs under the circumstances hereinabove described and by the procedures invoked by the defendants violate the provisions of 25 U.S.C. §1302 and of the equal protection and due process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States.

DC read ~~14~~ 14 & 15 as asserting federal common law claim

The DC took paragraph 14 to assert a federal common law claim. I think it is more plausible to read paragraphs 14 and 15 together so that petrs actually assert only constitutional and ICRA claims. If petrs did raise only statutory and constitutional claims, the question of the DC's jurisdiction would require a different analysis. In particular, the Court would have to take account of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Martinez reaffirmed that Indian tribes are "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority," citing as examples the Fifth and Fourteenth Amendments. Id., at 56. Martinez also held that the only relief federal courts may offer for violations of the ICRA's guarantees of equal protection and due process is that provided by the statute, namely the writ of habeas corpus. While Martinez could be distinguished because it involved a suit by an Indian against the Tribe, the case was not analyzed from this perspective below. Thus I'm not sure what the proper disposition would be at this point if the Court

Both DC & CA9 found fed. common law

decided that the common law basis for jurisdiction was not presented.

Since the litigation has come this far, however, it probably makes sense simply to accept the DC's characterization of paragraph 14 as raising a question of federal common law. Yes This interpretation is not unreasonable and CA9 reached the question of jurisdiction over a common law cause of action. Thus I think the Court probably should do so as well.

Finally, I should address the CA9 majority's theory for why the DC does not have jurisdiction over a common law challenge to the extent of tribal court jurisdiction. The majority reasoned that federal common law is an unusual course, to be invoked sparingly. Since this Court held that Congress' "manifest purpose" in adopting the ICRA was to limit intrusions by the federal courts on tribal adjudication, Martinez, 436 U.S., at 67-70, it would violate federal policy to recognize a common CA9 law cause of action to enjoin tribal court proceedings. The court believed that federal courts should decline to recognize "causes of action" in addition to the limited remedies provided in the ICRA.[1]

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[1]The majority unpersuasively attempts to distinguish its own prior decisions recognizing the right of federal courts to rule on claims that tribal courts exceeded their jurisdiction. According to the majority, those cases involved challenges to the civil "regulatory" jurisdiction of the tribes and not their "adjudicatory" jurisdiction. Not only do the cases fail to make this distinction, but I don't think the distinction makes any sense. In the previous cases, there was an lawsuit pending in tribal court. The policy of not intruding on tribal courts was implicated as much in these challenges as "regulatory" authority as

Footnote continued on next page.

CA9 misread its own precedents

This reasoning is not persuasive, I believe, for a number of reasons. The ICRA does not purport to define the civil jurisdiction of the tribal courts. As a result, I don't think there is any plausible way to read the ICRA to preempt the common law of tribal court jurisdiction. The Court's decision in Oliphant makes clear that the extent of the tribal court's civil jurisdiction is at least in part a question of federal common law, and nothing in the ICRA changes that.

not applicable The question of appropriate relief is a separate matter. The habeas remedy provided by the statute is available "to test the legality of [a person's] detention by order of an Indian tribe." I think it is clear that this remedy is not intended to apply to civil proceedings. There is no reason to limit relief for common law wrongs to statutory remedies addressed to a different problem. Thus even if the habeas remedy of the ICRA is the exclusive remedy for statutory violations, this doesn't mean that petrs raising a common law cause of action are limited to this remedy.

In sum, I would find that the DC had jurisdiction under §1331 to consider petrs' federal common law claim that the tribal court exceeded its jurisdiction. yes

II. Exhaustion

Although I believe that the federal court has jurisdiction

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in this challenge to adjudicatory authority. More significantly, as Judge Wright notes in concurrence, there is no reason for federal court jurisdiction to turn on the source of the tribal rule being adjudicated in tribal court.

DC should have abstained until

in this case, I think there is a very strong argument that the DC should have abstained from exercising its jurisdiction until petrs exhausted their tribal court remedies. As this Court recognized, Congress has sought to strengthen tribal institutions and intended tribal courts to promote tribal self-government. Martinez, 436 U.S. 49. It is hard to think of an action more likely to insult and undermine tribal courts than a federal court injunction against its proceedings, granted to plaintiffs who never gave the tribal court the opportunity to rule on its own jurisdiction. As a matter of federal policy and comity, then, federal courts should hesitate to intervene in circumstances like these.

As Judge Wright reasoned in his concurrence, exhaustion need not be an inflexible requirement in this area of the law, but should be applied when there are meaningful tribal remedies available and exhaustion serves to promote comity and strengthen tribal institutions. In this case, such remedies are available. Indeed, the tribal court was willing to entertain petrs' late motion to vacate the default judgment after CA9's decision until the petrs sought Justice Rehnquist's intervention. On balance, then, I think requiring petrs to exhaust tribal court remedies well serves federal policy.

III. Extent of Tribal Jurisdiction Need not reach

CA9 did not reach the question whether the tribal court had jurisdiction over the underlying tort case. Because I think exhaustion should be required in this case, I don't think the

Court need reach the question. I will offer some thoughts on the issue in case the Court does wish to address it.

It is well established that tribal courts have some civil regulatory and judicial jurisdiction over non-Indians on their reservations, even on non-Indian lands. Montana v. United States, 450 U.S. 544, 565 (1981); Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980); Williams v. Lee, 358 U.S. 217, 223 (1959). This jurisdiction is "attributable in no way to any delegation of federal authority," United States v. Wheeler, 435 U.S. 313, 328 (1978), but rather represents authority retained by tribes despite their dependent status. In Montana v. United States, the Court laid out this description of the extent of tribal jurisdiction over non-Indians on non-Indian lands within a reservation:

> "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . .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." 450 U.S., at 566 (citations omitted).

The DC decided that a single tort did not involve the kind of tribal interests that are within the jurisdiction of the tribe to protect. Neither the DC nor petrs provide authority for this view. The SG argues strenuously that the tribal court does have jurisdiction. Since the allegation in the underlying suit is that the school district was negligent in that it maintained dangerous conditions in the school parking lot, in the SG's view,

the case implicates tribal health and welfare interests directly enough to warrant the exercise of its adjudicatory jurisdiction.

I agree with the SG's conclusion. After all, I think that the tribe's interests are probably significant enough that it could regulate, at least to some extent, the school district's operation of the parking lot. For example, the tribe probably could require the presence of a school crossing guard or special bus stops, just as it can require non-Indians to meet health and safety standards in the operation of their businesses on non-Indian land within the reservation. Montana v. United States.[2] Thus, if the Court reaches the question whether the tribal court had jurisdiction over the dispute, I would hold that it did.

Recommendation

I recommend (F) reversing CA9's holding that the DC was without jurisdiction to entertain petrs' complaint. I would hold that the (2) DC should have abstained from exercising its jurisdiction, however, until petrs exhausted their tribal remedies. Likewise, I think (3) this Court should refrain from passing on the question of the tribal court's jurisdiction until the tribal court has the opportunity to do so.

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[2]The regulatory authority of the tribe in this case is a little more complicated because the school is operated by "a political subdivision of the State of Montana." I don't think this affects the question of adjudicatory authority, however, because of the broad waiver of sovereign immunity adopted by statute in Montana.

Sorry, I left with my Docket Sheet in Bench Bk.

4/7 2 P. Full

(WHR stayed the judgment of CA9 – see his 8 page op.)

84-320 Nat. Farmers Union Insurance Co.

-Crow Tribe et ux

Summary
- Inclined to Reverse CA9.
- The DC had juris under Fed common law.
- But DC should have abstained

The case. School Dist. 27, a political subdivision of Montana, is located on tribal land. A minor (Leroy Sage), member of Tribe, was injured by motorcycle on school grounds.

Sage (minor by guardian) brought tort suit vs School District seeking damages. Petr. insured School Dist. & is real party in interest.

Due to neglect by School officials default judg for $53,000 was obtained from Tribal Ct. — + Petr sought to levy on School prop.

SC thinks Tribal Court have juris & that we should so Hold.

This suit to enjoin levy was filed by School & Ins. Co in DC.

(1.) DC had juris – under Fed Common law – to enjoin Tribal Court. All Indian auth. is derived from Fed law.

CA9 erred in holding no juris.

(2) But DC should have abstained until Sage (a minor) Petrs had exhausted available remedies in Tribal Court. It had & indicated ct. would hear Petrs

Judge Wright of CA9 would dispose of case on this ground.

(3.) Tribal Court probably did not

member of Tribe, was injured by motorcycle on school grounds.

Sage (minor by guardian) brought tort suit vs School District seeking damages. Petr. insured School Dist. & in real party in interest.

Due to neglect by School offical, default judg for $53,000 was obtained from Tribal Ct. — & Π sought to levy on School prop.

This suit to enjoin levy was filed by School & Ins. Co in DC.

SG thinks Tribal Court has jurisdiction & that we should so Hold.

(1.) DC had juris — under Fed Common law — to enjoin Tribal Court. All Indian auth. is derived from Fed law.

CA9 erred in holding no juris

(2) But DC should have abstained until Sage (Indians) Petrs had exhausted available remedies in Tribal Court. It had & indicated ct would hear Petrs

Judge Wright of CA9 would dispose of case on this ground

(3.) Tribal Court probably did not exceed its juris. in considering a tort committed vs an Indian w/in Reservation. But need not reach this Q

Summary

84-320 NATIONAL FARMERS UNION V. CROW

Argued 4/16/85

Smith (ass't AG Mont) (10 minutes for Pet'r)

~~Tribe~~ State intervened only in first case.

CA9 rev. DC & held there was no federal ~~law~~ common law juris in DC

Argues there was error. Juris under

Answering 5th C Q, Smith responded that Tribal Ct did not have juris to try a tort claim vs an agency of State for accident on State owned land w/in Tribal boundaries. ~~Smith said irrespective of how this 2nd Q may be decided~~

Effect of CA9's decision is to make Tribal Cts the final arbiter of suits like this.

Hartman (20 min. for Pet'r)

Addresses 2nd Q

The School Dist. is a creation of Montana. School is on fee land - not Tribal land - w/in the Tribal boundaries

WJB noted that there was Fed Ct juris, but it could not have been exercised until exhaustion of Tribal remedies.

(See discussion bet. 5th C & Hartman as to motion he made before Tribal Court)

Hartman (cont).

Subsequent developments make clear that Tribal Ct ~~[illegible]~~ claims exclusive jurisdiction - i.e. no fed ct jurisdiction.

Relies on Mont. v. U.S. 450 U.S. ~~[illegible]~~ 544.

Belue (appointed by us - to represent the 5 age-ingrained Indians)

School is in heart of Tribe & its community

Rule 17 of Tribal Code affords a Δ in any action & move to set aside a default judg. But judg. still could be executed - subj.

? Petn obtained relief ~~[illegible]~~ from execution from Tribal Ct - stayed execution upon ~~[illegible]~~ posting of bond.

Exhaustion

Tribal Ct still has not had an opportunity to decide whether it would vacate ~~[illegible]~~ the default judg? Thus, ~~[illegible]~~ there still should be exhaustion as suggested by Judge Wright.

Sec 32 of Indian Civil Rts Act controls this case. Thus Mont. has no jurisdiction

Belue said he agrees basically with SG. But I believe SG agrees that DC has jurisdiction, but ~~[illegible]~~ Indian Ct. remedies should be exhausted

Clarborne (SG) (Generally supports Indians)

. Tribal Ct had juris over this case,
+ Fed Ct should defer until Tribal
Ct. has acted. Fed Ct then has juris

State delayed appearing before
Tribal Ct to request
that default judg be set aside.

The fact that D is a State
agency makes this case different

The Chief Justice Rev. & Remand

Fed DC had juris. ⇒ Fed Q under 1331.

D.C. should have abstained - as J. Wright said.

Justice Brennan Affirm on exhaustion ground

There was Fed Ct juris. at proper time.

Agree with J. Wright - exhaust Tribal Ct. remedies

Need not reach juris issue.

Justice White Rev. on juris; agree on exhaustion

No juris - none.

Agree Tribal Ct remedies should be exhausted

Need not decide whether Tribal Ct has juris. This Q may come out when remedies are exhausted

OK to do as Sandra suggests - i.e. Remand to DC to determine whether exhaustion is appropriate

Justice Marshall Aff in

Agree with WJB.

Justice Blackmun Rev

Should decide as little as possible.

Limitations on Tribal rights are matter of fed law.

Agree with J. Wright.

Need not reach Q of juris of Tribal Ct.

Justice Powell Rev + ~~Rev~~ Remand

See my notes

See Sandra view.

As BRW said, I could agree with 5th Cir as to remand

Justice Rehnquist Rev & Affirm

Agree with what I said

There is Fed Ct juris - but

Bill emphasized we should write the carefully - it is tricky.

Agree as to exhaustion

Do not reach juris of ~~Fed~~ Tribal Ct. It ~~will~~ may decide its own ~~exhaustion~~ juris when remedies are exhausted.

Justice Stevens Rev on Fed. juris Q - do not agree as to exhaustion

~~If~~ If there is a Fed Rule that Tribal Ct has no juris, then exhaustion is futile.

Then we must hold Tribal Ct. at least has juris in a case like this. Write narrowly.

We don't require exhaustion before state cts. #

I'm not sure I understand J.P.S.

Justice O'Connor Rev & Remand

Fed Ct has juris - fed common law

Remand to DC to determine whether ~~E~~ exhaustion would be appropriate.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

L.F.P.

From: **Justice Stevens**

Circulated: MAY 23 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Renewed

Join 5/24

No. 84–320

NATIONAL FARMERS UNION INSURANCE COMPANIES AND LODGE GRASS SCHOOL DISTRICT NO. 27, PETITIONERS *v.* CROW TRIBE OF INDIANS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May ——, 1985]

JUSTICE STEVENS delivered the opinion for the Court.

A member of the Crow Tribe of Indians filed suit against the Lodge Grass School District No. 27 (School District) in the Crow Tribal Court and obtained a default judgment. Thereafter, the School District and its insurer, National Farmers Union Insurance Companies (National), commenced this litigation in the District Court for the District of Montana; that court was persuaded that the Crow Tribal Court had no jurisdiction over a civil action against a non-Indian and entered an injunction against further proceedings in the Tribal Court. The Court of Appeals reversed, holding that the District Court had no jurisdiction to enter such an injunction. We granted certiorari to consider whether the District Court properly entertained petitioners' request for an injunction under 28 U. S. C. § 1331.

The facts as found by the District Court are not substantially disputed. On May 27, 1982, Leroy Sage, a Crow Indian minor, was struck by a motorcycle in the Lodge Grass Elementary School parking lot while returning from a school activity. The school has a student body that is 85% Crow Indian and is located within the boundaries of the Crow Indian Reservation. However, the land on which the school is located is owned by the State, with a mineral reservation held by the Crow Tribe. Through his guardian, Flora Not

Afraid, Sage initiated a lawsuit in the Crow Tribal Court against the School District, a political subdivision of the State, alleging damages of $153,000, including medical expenses of $3,000 and pain and suffering of $150,000.

On September 28, 1982, process was served by Dexter Falls Down on Wesley Falls Down, the Chairman of the School Board. For reasons that have not been explained, Wesley Falls Down failed to notify anyone that a suit had been filed. On October 19, 1982, a default judgment was entered pursuant to the rules of the Tribal Court, and on October 25, 1982, Judge Roundface entered findings of fact, conclusions of law and a judgment for $153,000 against the School District. *Sage* v. *Lodge Grass School District*, 10 Indian L. Rep. 6019 (1982). A copy of that judgment was hand-delivered by Wesley Falls Down to the school principal who, in turn, forwarded it to National on October 29, 1982.

On November 3, 1982, National and the School District (petitioners) filed a verified complaint and a motion for a temporary restraining order in the District Court for the District of Montana. The complaint named as defendants the Crow Tribe of Indians, the Tribal Council, the Tribal Court, Judges of the Court and the Chairman of the Tribal Council. It described the entry of the default judgment, alleged that a writ of execution might issue on the following day, and asserted that a seizure of school property would cause irreparable injury to the School District and would violate the petitioners' constitutional and statutory rights. The District Court entered an order restraining all the defendants "from attempting to assert jurisdiction over plaintiffs or issuing writs of execution out of Cause No. Civ. 82–287 of the Crow Tribal Court until this court orders otherwise."[1]

In subsequent proceedings, the petitioners filed an amendment to their complaint, invoking 28 U. S. C. § 1331 as a

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[1] Certified Record, Document No. 6.

basis for federal jurisdiction,[2] and added Flora Not Afraid and Leroy Sage as parties defendant. After the temporary restraining order expired, a hearing was held on the defendants' motion to dismiss the complaint and on the plaintiffs' motion for a preliminary injunction. On December 29, 1982, the District Court granted the plaintiffs a permanent injunction against any execution of the Tribal Court judgment. *National Farmers Union Insurance Companies* v. *Crow Tribe of Indians of Montana*, 560 F. Supp. 213, 218 (D. Mont. 1983). The basis "for the injunction was that the Crow Tribal Court lacked subject-matter jurisdiction over the tort that was the basis of the default judgment." *Id.*, at 214.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. 736 F. 2d 1320 (1984). Without reaching the merits of petitioners' challenge to the jurisdiction of the Tribal Court, the majority concluded that the District Court's exercise of jurisdiction could not be supported on any constitutional, statutory or common-law ground. *Id.*, at 1322–1323.[3] One judge dissented in part and concurred in the result, expressing the opinion that petitioners stated a federal common-law cause of action involving a substantial federal

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[2] *Id.*, Document No. 14. In their original complaint, petitioners relied on 25 U. S. C. § 1302 and on 28 U. S. C. § 1343 as bases for federal jurisdiction.

[3] The Court of Appeals believed that the petitioners' due process and equal protection claims had no merit because Indian tribes are not constrained by the provisions of the Fourteenth Amendment. Further, although recognizing that the Tribe is bound by the Indian Civil Rights Act, 25 U. S. C. §§ 1301–1341, the Court of Appeals held that a federal court has no jurisdiction to enjoin violations of that Act. See *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49 (1978). Finally, although the majority assumed that a complaint alleging that a Tribe had abused its regulatory jurisdiction would state a claim arising under federal common-law, it concluded that a claim that a Tribe had abused its adjudicatory jurisdiction could not be recognized because Congress, by enacting the Indian Civil Rights Act, had specifically restricted federal court interference with Tribal Court proceedings to review on petition for habeas corpus.

question over which subject-matter jurisdiction was conferred by 28 U. S. C. § 1331. He concluded, however, that the petitioners had a duty to exhaust their tribal court remedies before invoking the jurisdiction of a federal court, and therefore concurred in the judgment directing that the complaint be dismissed. *Id.*, at 1324–1326.[4]

I

Section 1331 of the Judicial Code provides that a federal district court "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[5] It is well settled that this statutory grant of "jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."[6] Federal common law as articulated in rules that are fashioned by court decisions are "laws" as that term is used in § 1331.[7]

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[4] After the District Court's injunction was vacated, tribal officials issued a writ of execution on August 1, 1984, and seized computer terminals, other computer equipment, and a truck from the School District. A sale of the property was scheduled for August 22, 1984. On that date, the School District appeared in the Tribal Court, attempting to enjoin the sale and to set aside the default judgment. Br. in Opp. App. 1a–9a. The Tribal Court stated that it could not address the default-judgment issue "without a full hearing, research, and briefs by counsel," *id.*, at 4a; that it would consider a proper motion to set aside the default judgment; and that the sale should be postponed. Petitioners also proceeded before the Court of Appeals, which denied an emergency motion to recall the mandate on August 20, 1984. The next day JUSTICE REHNQUIST granted the petitioners' application for a temporary stay. On September 10, 1984, he continued the stay pending disposition of the petitioners' petition for certiorari. —— U. S. —— (1984). On September 19, the Tribal Court entered an order postponing a ruling on the motion to set aside the default judgment until after final review by this Court. Br. in Opp. App. 15a. Subsequently, the Court of Appeals for the Ninth Circuit stayed all proceedings in the District Court. On April 24, 1985, JUSTICE REHNQUIST denied an application to "dissolve" the Court of Appeals' stay. —— U. S. —— (1985).

[5] 28 U. S. C. § 1331.

[6] *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 100 (1972).

[7] See *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 392–393 (1959) (opinion of BRENNAN, J.); cf. *County of Onieda* v. *Onieda*

Thus, in order to invoke a federal district court's jurisdiction under § 1331, it was not essential that the petitioners base their claim on a federal statute or a provision of the Constitution. It was, however, necessary to assert a claim "arising under" federal law. As Justice Holmes wrote for the Court, a "suit arises under the law that creates the cause of action."[8] Petitioners contend that the right which they assert—a right to be protected against an unlawful exercise of tribal court judicial power—has its source in federal law because federal law defines the outer boundaries of an Indian tribe's power over non-Indians.

As we have often noted, Indian tribes occupy a unique status under our law.[9] At one time they exercised virtually unlimited power over their own members as well as those who were permitted to join their communities. Today, however, the power of the federal government over the Indian tribes is plenary.[10] Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial and political rights of the Indian tribes. The tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America.[11]

Indian Tribe, —— U. S. ——, —— (1985); *Texas Industries* v. *Radcliff Mterials*, 451 U. S. 630, 640 (1981); *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580, 593–592 (1973); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78–79 (1938).

[8] *American Well Works* v. *Layne*, 241 U. S. 257, 260 (1915).

[9] See, *e. g.*, *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978); *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975); cf. *Turner* v. *United States*, 248 U. S. 354, 354–355 (1919).

[10] *Escondido Mutual Water Co.* v. *La Jolla, Rincon, San Pasqual, Pauma and Banks of Mission Indians*, —— U. S. ——, —— (1984) ("all aspects of Indian sovereignty are subject to defeasance by Congress"); *Rice* v. *Rehner*, 463 U. S. 713, 719 (1983); *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 143 (1980); *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978).

[11] *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142 (1980); *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 55–56 (1978).

This Court has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians.[12] We have also been confronted with a series of questions concerning the extent to which a tribe's power to engage in commerce has included an immunity from state taxation.[13] In all of these cases, the governing rule of decision has been provided by federal law. In this case the petitioners contend that the tribal court has no power to enter a judgment against them. Assuming that the power to resolve disputes arising within the territory governed by the Tribe was once an attibute of inherent tribal sovereignty, the petitioners, in essence, contend that the Tribe has to some extent been divested of this aspect of sovereignty. More particularly, when they invoke the jurisdiction of a federal court under § 1331, they must contend that federal law has curtailed the powers of the Tribe, and thus afforded them the basis for the relief they seek in a federal forum.

The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under § 1331.[14] Because petitioners contend that federal law has di-

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[12] Thus, in recent years we have decided whether a tribe has the power to regulate the sale of liquor on a reservation, *Rice* v. *Rehner*, 463 U. S. 713 (1983); the power to impose a severance tax on oil and gas production by non-Indian lessees, *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130 (1982); the power to regulate hunting and fishing, *Montana* v. *United States*, 450 U. S. 544 (1981), *Puyallup Tribe* v. *Washington Department of Game*, 433 U. S. 165 (1977); and the power to tax the sale of cigarettes to non-Indians, *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980).

[13] See, *e. g.*, *Mescalaro Apache Tribe* v. *Jones*, 411 U. S. 145 (1973); cf. *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980).

[14] We have recognized that federal law has sometimes diminished the inherent power of Indian tribes in significant ways. As we stated in *United States* v. *Wheeler*, 435 U. S. 313, 322–326 (1978):

vested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action "arising under" federal law within the meaning of § 1331. The District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.

II

Respondents' contend that, even though the District Court's jurisdiction was properly invoked under § 1331, the Court of Appeals was correct in ordering that the complaint be dismissed because the petitioners failed to exhaust their remedies in the tribal judicial system. They further assert that the underlying tort action "has turned into a procedural and jurisdictional nightmare" because petitioners did not pursue their readily available Tribal Court remedies. Petitioners, in response, relying in part on *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191 (1978), assert that resort to exhaustion as a matter of comity "is manifestly inappropriate."

In *Oliphant* we held that the Suquamish Indian Tribal Court did not have criminal jurisdiction to try and to punish non-Indians for offenses committed on the Reservation.

"Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. . . . In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. 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. . . . Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation* v. *M'Intosh*, 8 Wheat. 543, 574. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester* v. *Georgia*, 6 Pet. 515, 559; *Cherokee Nation* v. *Georgia*, 5 Pet., at 17–18; *Fletcher* v. *Peck*, 6 Cranch 87, 147 (Johnson, J., concurring). And, as we have recently held, they cannot try nonmembers in tribal courts. *Oliphant* v. *Suquamish Indian Tribe* [435 U. S. 191 (1978)]."

That holding adopted the reasoning of early opinions of two United States Attorneys General,[15] and concluded that federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly pre-empted tribal jurisdiction. We wrote:

> "While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions." 435 U. S., at 204.

If we were to apply the *Oliphant* rule here, it is plain that any exhaustion requirement would be completely foreclosed because federal courts would *always* be the only forums for civil actions against non-Indians. For several reasons, ~~moreover~~ however, the reasoning of *Oliphant* does not apply to this case. First, although Congress' decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian Country supported the holding in *Oliphant*, there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation.[16] Moreover, the opinion of one Attorney General

[15] We stated:

"Faced by attempts of the Chocktaw Tribe to try non-Indian offenders in the early 1800's the United States Attorneys General also concluded that the Choctaws did not have criminal jurisdiction over non-Indians absent congressional authority. See 2 Op. Atty. Gen. 693 (1834); 7 Op. Atty. Gen. 174 (1855). According to the Attorney General in 1834, tribal criminal jurisdiction over non-Indians is, *inter alia*, inconsistent with treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation and the dependence of the Indians on the United States" 435 U. S., at 198–199.

[16] F. Cohen, Handbook of Federal Indian Law 253 (1982) ("The development of principles governing civil jurisdiction in Indian Country has been markedly different from the development of rules dealing with criminal jurisdiction").

on which we relied in *Oliphant*, specifically noted the difference between civil and criminal jurisdiction. Speaking of civil jurisdiction, Attorney General Cushing wrote :

> "But there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this, a question of property strictly internal to the Chocktaw nation; nor is there any written law which confers jurisdiction of such a case in any court of the United States. . . .
>
> . . . . . .
>
> The conclusion seems to me irresistible, not that such questions are justiciable no where, but that they remain subject to the local jurisdiction of the Chocktaws.
>
> . . . . . .
>
> Now, it is admitted on all hands . . . that Congress has 'paramount right' to legislate in regard to this question, in all its relations. *It has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters. . . . By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Chocktaw Nation.*" 7 Op. Att'y Gen., at 179–181 (emphasis added).[17]

Thus, we conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically forclosed, as an extension of *Oliphant* would re-

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[17] A leading treatise on Indian law suggests strongly that Congress has had a similar understanding:

"In the civil field, however, Congress has never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country. Furthermore, although treaties between the federal government and Indian tribes sometimes required the tribes to surrender non-Indian criminal offenders to state or federal authorities, Indian treaties did not contain provision for tribal relinquishment of civil jurisdiction over non-Indians." *Id.*, at 253–254.

quire.[18] Rather, the existence and extent of a tribal court's jurisdiciton will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested or diminished,[19] as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and adminstrative or judicial decisions.

We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.[20] That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.[21] Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.[22] The risks of the kind of "pro-

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[18] Cf. *Kennerly* v. *District Court*, 400 U. S. 423 (1971); *Williams* v. *Lee*, 358 U. S. 217 (1959).

[19] See, *e. g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 331–332 (1983); *Merrion* v. *Jicarilla Apache Tribe*, 455 U. S. 130, 137 (1982); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 152 (1980).

[20] *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 332 (1983); *Merrion* v. *Jacarilla Apache Tribe*, 455 U. S. 130, 138, n. 5 (1982); *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 143–144 & n. 10 (1980); *Morton* v. *Mancuri*, 417 U. S. 535, 551 (1974); *Williams* v. *Lee*, 358 U. S. 217, 223 (1959).

[21] We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," cf. *Juidice* v. *Vail*, 430 U. S. 327, 338 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

[22] Four days after receiving notice of the default judgment, petitioners requested that the District Court enter an injunction. Crow Tribal Court Rule of Civil Procedure 17(d) provides that a party in a default may move to set aside the default judgment at any time within 30 days. App. 17.

cedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction[23] and to rectify any errors it may have made.[24] Exhaustion of Tribal Court remedies, moreover, will encourage Tribal Courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.[25]

III

Our conclusions that § 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction, and that exhaustion is required before such a claim may be entertained by a federal court, require that we reverse the of the Court of Appeals. Until petitioners have exhausted the remedies available to them in the tribal court system, *supra*, n. 4, it would be premature for a federal court to consider any relief. Whether the federal action should be dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings, is a question that should be addressed in the first instance by the District Court. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so Ordered.

Petitioners did not utilize this legal remedy. It is a fundamental principle of longstanding that a request for an injunction will not be granted as long as an adequate remedy at law is available. See, *e. g.*, *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49, 57 (1975); *Sampson* v. *Murray*, 415 U. S. 61, 88 (1974).

[23] C. Wright, Handbook of the Law of Federal Courts § 16 (1976).

[24] *Weinberger* v. *Salfi*, 422 U. S. 749, 765 (1975).

[25] *Weinberger* v. *Salfi*, 422 U. S., at 765; see, *e. g.*, *North Dakota ex rel. Wefald* v. *Kelly*, 10 Indian L. Rep. 6059 (1983); *Crow Creek Sioux Tribe* v. *Buum*, 10 Indian L. Rep. 6031 (1983).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 23, 1985

No. 84-320 National Farmers Union Insurance Cos. v. Crow Tribe of Indians

Dear John,

Please join me.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 24, 1985

Re: 84-320 - National Farmers Union v. Crow Tribe of Indians

Dear John:

I join.

Regards,

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 24, 1985

No. 84-320

National Farmers Union Insurance Companies and Lodge Grass School District No. 27 v. Crow Tribe of Indians, et al.

Dear John,

I'm persuaded. Please join me.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

May 24, 1985

84-320 National Farmers Union v. Crow Tribe

Dear John:

Please join me.

Sincerely,

Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 24, 1985

Re: 84-320 - National Farmers Union v. Crow Tribe of Indians

Dear John:

Please join me.

Sincerely,

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 28, 1985

Re: No. 84-320, National Farmers Ins. Co. v. Crow Tribe

Dear John:

Please join me.

Sincerely,

Harry

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 28, 1985

84-320 - National Farmers Union Insurance Companies and Lodge Grass School District No. 27 v. Crow Tribe of Indians

Dear John,

Please join me.

Sincerely yours,

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 28, 1985

Re: No. 84-320-Nat'l Farmers Union Insurance, et al.
v. Crow Tribe of Indians, et al.

Dear John:

Please join me.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

84-320 National Farmers Union v. Crow Tribe (Annmarie)

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