

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dave Brown, on April 5, 1989, at 10:05 a.m.

ROLL CALL

Members Present: All members were present with the following exception:

Members Excused: Rep. Kelly Addy

Members Absent: None.

Staff Present: Julie Emge, Secretary
John MacMaster, Legislative Council

Announcements/Discussion: None.

DISPOSITION OF SENATE BILL 446

Motion: Rep. Darko moved SB 446 BE CONCURRED IN, motion seconded by Rep. Rice.

Discussion: Rep. Mercer stated that he feels this issue is very much of a hot local issue in Lake County. In the previous administration, Gov. Schwinden and Director Flynn were essentially trying to work out disagreements that existed over jurisdiction and management of fish and game on the reservation. The committee should understand that the reservation is approximately 85% non-tribal members and about 15% tribal; however, there is much more tribal influence. The tribes and the state felt that the only way that they could pursue any agreement was in private. When they did that, they did not include citizens who live on the reservation, and that seems to be one of the main problems for the opposition. He commented that there is very much of a uniformity problem that the people of Lake County have with this legislation and more specifically, with the agreement. As a result of that they (Rep. Davis, Rep. Harding, Rep. Pinsoneault, Rep. Mercer) tried to put together some amendments in an effort to try to deal with the concerns that the people had at home. Rep. Mercer submitted and reviewed with the committee proposed amendments listed as EXHIBIT 1. Additionally, Rep. Mercer submitted a letter from James Manley, an attorney from the reservation (EXHIBIT 2) which indicated that several attorneys from Lake County feel that this issue has not been adjudicated in a fashion that makes it absolutely clear, but in any respect they don't feel the state should be entering

into an agreement which would put a non-tribal member in a tribal court. This particular bill has been sold to the legislature on the intent that it is enabling legislation and it is not the agreement. Rep. Mercer stated that it seems to him that once an agreement is entered into, then it is something that ought to be subject to ratification by the State Legislature as is stated in amendment 6.

Amendments, Discussion, and Votes: Rep. Mercer moved the proposed amendments (EXHIBIT 1), and the motion was seconded by Rep. Eudaily.

Rep. Daily suggested to divide amendment 6 from the rest of the amendments and vote on it separately. The following discussion is on amendments 2-5:

Rep. Knapp questioned amendment 5 where it states, "may not provide for the adjudication or prosecution of a person who is not a member of the tribe in a tribal court." Where then would they be prosecuted? Would they be prosecuted in district court, or would it be in tribal court? Rep. Mercer commented that it is his understanding that currently, if a person is arrested for a fish and game violation on non-tribal land they appear in justice court. If they are arrested on tribal land, they appear in tribal court.

Rep. Brown asked Rep. Mercer from where do the tribal courts get their authorization? Rep. Mercer stated that he did not know, but would imagine that they get it from a number of places; from the treaty, the federal government, inherent powers that tribes reserve, etc. Rep. Brown stated that his concern is with sub-B, which is trying to regulate something that they cannot regulate. They are talking about federal jurisdiction matter as well as several Supreme Court cases where because of that federal jurisdiction the tribal courts clearly have jurisdiction over affairs on the reservation. What is the point of inserting sub-B into the bill?

Rep. Mercer addressed his concern by stating that the amendment says that the agreement can't provide for it. It doesn't say the Indian's don't have it. He doesn't feel that it has anything to do with whether it's legal or illegal, it just says that they don't want the state agreeing to the prosecution of non-tribal members in tribal court. Continuing, the issue of what is the law and what is not the law, as he understands it, there was a different treaty. There was a case in Montana that said the tribe does not have jurisdiction over non-tribal lands. There is also a case that says they don't have jurisdiction over non-tribal members in criminal matters, and Montana State Fish and Game Laws are criminal laws. The tribe reclassified fish and game violations as civil laws in an attempt to gain jurisdiction. Lastly, there is no Supreme Court case that he has been aware of that says in black and white

that the tribe does have civil jurisdiction over fish and game matters over non-tribal members. Regardless, Rep. Mercer stated that they are not trying to change the law, they are just saying that they don't want the state entering into agreements that would provide that.

Rep. Brown submitted U.S. Supreme Court Examples establishing that Indian tribes, and their courts, may exercise civil jurisdiction over non-Indians (EXHIBIT 3).

Rep. Brooke stated that she reads it as the draft agreement specifies that violations on non-Indian lands will go to state court while violations on Indian lands will go to tribal court. The bill does allow the Dept. to agree to all fish and game violations being heard in either state or tribal court. It seems to her that the agreement that they would be enabling with this legislation has answered a lot of those concerns. With the three year review built in they are not really ratifying the agreement, but they are, in essence, enabling this agreement to continue to be discussed and then ratified. This gives her a sense of cooperation between the Dept. and the tribes.

Rep. Daily stated that he would like to speak in favor of the first five amendments. The testimony that was presented indicates that no matter what they do with this situation, is probably going to apply to the other six reservations as well. They need to look at this as a complete picture, not just on an individual Indian reservation. They need to think about Montana and their constituents and what could happen to them. For those reasons, Rep. Daily expressed that he feels it is very important to adopt the first five amendments into the bill. Without those five amendments, it is not a good bill for his constituents.

Rep. Brown, responding to Rep. Daily, commented that each reservation has a different treaty. The Flathead Treaty is much broader and more comprehensive in scope than some of the other treaty's. This process took most of two years to get to the legislative point, while this agreement structures some aspects that would be similar to any other tribal agreement with the State of Montana. Each of those treaty's will require a different type of agreement with each of those reservations in the case of those tribes that have less than adequate court systems. Even if all six reservations consider looking into a potential agreement, it will have to be structured around the treaty that applies to that reservation with all of the limitations that are involved in that specific treaty.

Rep. Strizich, in response to Rep. Daily, commented that they have to remember that the quality or functioning of each tribal court is no different than the functioning of the lower courts or any other court found in any different county across the state. Additionally, the agreements that

have been negotiated over the years deals with each individual tribe. SB 446 gives them a framework to work with.

Rep. Eudaily stated that he personally thinks that SB 446 should have stopped at about the bottom of page 2. Pages 1 and 2 deal with enabling legislation and that is what the proponents are trying to sell them on. Once you turn to pages 3 and 4 you get into more details and more specifics. Therefore, Rep. Eudaily commented that he feels it is necessary that they have the amendments to clarify some of the information on pages 3 and 4. Additionally, they need amendment 5. Looking on page 4, it doesn't say anything. Page 4 says that they can provide responsibility, but it does not state what that responsibility will be. Amendment 5 states the specifics of what the responsibilities should be.

Rep. Boharski stated that his concern is that if they pass SB 446 without adopting amendment 5, they will then in essence enter into another treaty that goes beyond the scope of the present treaty on a state level. It would then be legally binding and allow the Dept. of Fish, Wildlife and Parks and the Governor to sign an agreement, which they as the legislature have no say over what the final law is going to be. He feels that they should adopt amendment 5 to be sure that they don't go beyond court cases which have never been decided. Rep. Boharski expressed that he does not see any reason for them to enter into a treaty that grants more authority to the tribes than the existing treaty's already do. As a legislative body they need to set guidelines.

Rep. Hannah agreed with the above comments stated by Rep. Boharski.

A Roll Call Vote was taken on Rep. Mercer's amendments 2-5 and FAILED with 7 voting aye and 11 voting nay.

The following discussion is on amendment 6 of Rep. Mercer's proposed amendments which requires legislative approval of any final agreement:

Rep. Hannah stated that the fact of the matter is that the legislature has a responsibility when it comes to fishing licenses or selling land, etc. The point that he objects to is that the pressure that has been brought to the committee is that they ought to take this agreement hook, line and sinker. It is foolish of them to succumb to the pressure that they better not amend the bill for court reasons. He feels that it is critical that if they are going to set a basis where they are going to negotiate with the tribes of the State of Montana then the tribes should come to the legislature with those agreements. Amendment 6 is a very critical amendment.

- Rep. Eudaily commented that since the committee voted against amendments 2-5, then 6 is a very vital amendment as expressed by Rep. Hannah. This amendment is constructed so that they can go ahead with the agreement, put it in place, but then come back and tell the legislature what they have done and take another look at to see if it might need some fine tuning. If they don't have this agreement, it is possible that this is the last they'll ever see of anything like it again.
- Rep. Darko stated that she has some problems with the amendment. Anytime she has ever been involved in negotiations, the first thing that is set down is ground rules. What they are doing by adding this amendment to the bill is changing the ground rules.
- Rep. Daily in response to Rep. Darko's comment about changing the rules, stated that this is the first time that they have seen the rules. This is their first opportunity to have some input into the rules or how the game is being played. Since they did not adopt amendments 2-5, amendment 6 is more important than ever. With the other amendments the people in Montana had some input into this bill. They don't have any anymore. With amendment 6, at least they can protect their constituency.
- Rep. Boharski expressed disappointment as to the failure of the first five amendments. Now that they are dead, they most definitely need to adopt amendment 6. It brings two things to mind for him: 1.) When the initial treaties were signed, the President of the United States didn't have the authority to sign those, they had to be ratified by the Senate. 2.) Do they want to give that much authority to the governor alone without them being able to control the situation? In light of those two points, he asked the committee to at least stay consistent in their thinking.
- Rep. Hannah disagreed with Rep. Darko's comment that they are changing the rules. He feels that they are setting the rules. There is an agreement that is being worked on and it is before them to authorize the move to go forward. He stated that he is in agreement with Rep. Daily that this is a statewide precedent. If they establish the rule which will be future negotiated agreements with the tribes of the State of Montana being outside of the review of the legislature, then they want to vote against the amendment. If they think future negotiated agreements with the tribes of the State of Montana ought to be over-viewed and looked at by the legislature, then they should vote for the amendment. Rep. Hannah expressed that they are the elected Representatives of the State of Montana. They are looking at an amendment that says that major public policies with major constituencies of the State of Montana is going to be outside of the committee's review.

Rep. Strizich asked the legal staff if there is any precedent for the legislature reviewing any kind of interlocal agreements or any agreements between the local government and the tribes. John MacMaster referred to title 18, chapter 11 which relates to agreements negotiated between state government and the tribes.

Rep. Strizich asked about agreements between Glacier County and Toole County, for example. Is there any legislative review of those kinds of agreements? Eddy McClure of the legislative council stated that none of the agreements have been reviewed by the legislature.

Rep. Mercer addressed to the committee that this is not an agreement between local governments. The tribal council has made it very specific that they are dealing with the state government. The idea of changing the ground rules concerns him. This agreement that has been signed by the tribal council chairman has not yet been authorized by Montana State law and that is why the bill is before them. How can they say that they are changing the ground rules? This bill provides for a significant amount of money and the legislature has the exclusive constitutional right to handle appropriations of state funds and it would additionally be appropriate for them to review this bill in the future. Rep. Mercer stated that the fundamental thing that bothers him is the misunderstanding of the people. The way they see it, there is a proposed agreement, there will be public meetings, don't worry about the agreement, this is just enabling legislation and if they can sneak the enabling legislation by the legislature then the legislature will never see this matter again. He feels that that is unfair. If the enabling legislation can come before the legislature, then the agreement itself ought to come before the legislature as well. What is the fear? If it's a good agreement, the legislature will approve it. If it's not a good agreement, then they won't. Why are they afraid to accept that power? It is not changing the rules, it is just good government. He had a discussion with some of the representatives of the tribal government and they indicated that they wanted to deal government to government. In their opinion, the government is the governor. In Rep. Mercer's opinion, the legislature is part of that government. If they want to deal themselves out, then they should reject the amendment. If they want to stay involved, then they should vote for it.

Rep. Rice stated that in some ways it seems very logical and very popular to vote for amendment 6, it seems like the safe thing to do. They need to remember that presently, they are just dealing with the bill. He asked the committee to consider what would happen if they passed the amendment. Next legislative session they wouldn't be dealing with only the bill itself, they would be dealing with the agreement. If they think there has been a lot of controversy over

attempting to amend the bill, just think of what would happen in the attempt to amend the agreement. It would be a nightmare. Rep. Rice directed the committee's attention to page 16, paragraph 13 of the bill that provides that the agreement can be terminated with or without cause by either party. If there is a single problem, or even if there isn't a problem, and the governor decides he no longer likes the agreement, the agreement is dead. Do they want to invite the nightmare that would occur if they tried to take this amendment through the various committee's in the legislative process?

Rep. Brown commented that Rep. Rice brought about an issue that he too is concerned with. Additionally, he hoped that the committee had read through the agreement carefully and thoroughly. His concern as well as his failure to agree in concurrence with the amendment is that not only do they have that 120 day protection built into the bill, but when that agreement is signed by the governor, anyone of them can put in legislation saying that they want that agreement terminated using that 120 day clause if they are absolutely convinced that their constituents are not happy with it. The legislature is not abdicating any responsibility here. It is also the case that the tribes negotiated in good faith with the State of Montana and out of all of the issues that the opponents have raised, whether they are tribal court jurisdiction, concern about private land on the reservation concerning trespass laws, etc., not once has the concern been raised that this agreement changes under existing federal or state statutes bringing harm private lands involved. He stated that when they vote on the amendment, and when they vote on the bill, they need to take all of those factors into account. Rep. Brown expressed that he is against the amendments, and in favor of the bill.

Rep. Daily stated that he feels the committee is giving up all of their authority and responsibility without amendment 6.

A Roll Call Vote was taken on amendment 6 of Rep. Mercer's proposed amendments and FAILED 7-11.

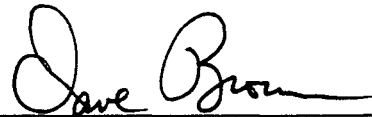
Rep. Mercer expressed his disappointment as to the failure of the amendments and stated that as a legislator from Lake County, he feels that he and other legislators have bent over backwards in an effort to try to make this work in a fashion that will be acceptable to the citizens who live in that area. He stated that he must vote against the bill because the from what he gathers, the tribal council and the administration have been able to convince the committee that there should be no amendments to the bill. They tried to sell the bill in Lake County on the grounds that legitimate concerns would be listened to and that the agreement could be flexible. He is concerned that even though there will be public hearings, he can't be confident that they will be flexible at that time. Rep. Mercer commented that he hoped

that the people who live on the reservation do not throw up their hands at the actions of the committee and of the legislature. He hopes that they will vigorously participate in the upcoming public meetings and express their concerns and make every effort they can to try to adjust the agreement. He can only wish that once Governor Stephens hears what the people have to say that he will seek modifications of the agreement. The tribal council and the state have got to understand that the non-members still live there. Dealing in secret without outside negotiators from state government will never work. They have to deal with the people that are involved and the sooner they start to do that they better. He can only anticipate that that meeting process will be the first step.

Recommendation and Vote: A voice vote was taken on the motion that SB 446 BE CONCURRED IN and CARRIED with Rep.'s Gould, Mercer, Daily, Eudaily, Aafedt, Boharski and Hannah voting No.

ADJOURNMENT

Adjournment At: 11:10 a.m.



REP. DAVE BROWN, Chairman

DB/je

7808.min

DAILY ROLL CALL

JUDICIARY

COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date MARCH 5, 1989

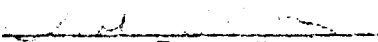
NAME	PRESENT	ABSENT	EXCUSED
REP. KELLY ADDY, VICE-CHAIRMAN			X
REP. OLE AAFEDT	X		
REP. WILLIAM BOHARSKI	X		
REP. VIVIAN BROOKE	X		
REP. FRITZ DAILY	X		
REP. PAULA DARKO	X		
REP. RALPH EUDAILY	X		
REP. BUDD GOULD	X		
REP. TOM HANNAH	X		
REP. ROGER KNAPP	X		
REP. MARY McDONOUGH	X		
REP. JOHN MERCER	X		
REP. LINDA NELSON	X		
REP. JIM RICE	X		
REP. JESSICA STICKNEY	X		
REP. BILL STRIZICH	X		
REP. DIANA WYATT	X		
REP. DAVE BROWN, CHAIRMAN	X		

STANDING COMMITTEE REPORT

April 5, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that
SENATE BILL 446 (third reading copy -- blue) be concurred in .

Signed: 
Dave Brown, Chairman

[REP. RUSSELL WILL CARRY THIS BILL ON THE HOUSE FLOOR]

Amendments to Senate Bill No. 446
Third Reading Copy

For the Committee on the Judiciary

Prepared by John MacMaster

March 28, 1989 and April 5, 1989

1. Title, line 18.

Following: "AGREEMENT;"

Insert: " PROVIDING THAT THE AGREEMENT MAY NOT REGULATE OR
INCLUDE PRIVATE LAND WITHIN RESERVATION BOUNDARIES, MAY NOT
PROVIDE FOR THE PROSECUTION OF A NONMEMBER IN TRIBAL COURT,
AND AND MAY NOT GRANT JURISDICTION OVER ANY LAND OWNED BY A
PERSON WHO IS NOT A MEMBER OF THE TRIBE; PROVIDING THAT AN
AGREEMENT MUST BE RATIFIED BY THE NEXT LEGISLATURE; "

2. Page 3, lines 19 and 22.

Following: "all" on each line

Insert: "or a portion of"

3. Page 4, line 12.

Following: "subsection (1)"

Insert: ":"

4. Page 4, line 13.

Following: line 12 (and before "must")

Insert: "(a)"

Strike: "."

Insert: ";

5. Page 4, line 14.

Following: line 13

Insert: "(b) may not provide for the prosecution or adjudication
of a person who is not a member of the tribe in a tribal
court;"

(c) may not authorize, or grant the tribe, jurisdiction
over fee lands owned by persons who are not members of the
tribe; and

(d) may not include or regulate private lands that are
within the reservation boundaries."

6. Page 4.

Following: line 19

Insert: "(4) The agreement must be ratified by a majority vote of
each house of the legislature and if the agreement is not
ratified at the first regular session following the signing
of the agreement, the agreement is void on the date of
adjournment sine die of that legislative session. An
agreement may be entered into and enforced pending
ratification."



James A. Manley

Attorney at Law

Box 2276, Polson, Montana 59860

Telephone (406) 883-6285

EXHIBIT 2

DATE 4-5-89

HB SB 446

April 3, 1989

The Honorable John Mercer
Montana House of Representatives
Helena, MT 59601

Re: SB 446

Dear Representative Mercer:

As you know, a planeload of Lake County attorneys were coming to testify before your judiciary committee on SB 446 last Friday, but were unable to when our chartered plane was grounded by freezing rain. I hope, by this letter, to outline some of our concerns.

The five attorneys who wanted to testify represent a non-partisan cross-section of the Lake County legal community. None of us belongs to any anti-Indian faction.

For the past ten years, I have been an outspoken supporter of legitimate tribal rights. I have regularly practiced in this tribal court, as well as others in Montana and Idaho. I have worked as a tribal court advisor, and even wrote a part of the Flathead Tribal Code. In fact, most of the tribal court people were friends or clients of mine, until I recently began speaking out on this issue.

Like most attorneys here, I am deeply concerned with the attempted expansion, by tribal attorneys, of tribal court jurisdiction over non-members. This misinformation is being supplied to the legislature and governor's office by tribal attorneys, and even some state attorneys, as follows:

1. The Tribal Court has historically exercised jurisdiction over non-member defendants.
2. That Tribal Court has the clear right to do so.

These points are simply misrepresentations. The effects of Senate Bill 446 and the State-Tribal agreement would directly affect these matters, not only on this reservation but on the other six reservations in the State. The state-wide ramifications should be carefully considered.

John Mercer
April 3, 1989
Page 2

EXHIBIT 2
DATE 4-5-89
HB SB 446

Present State of the Law

The law is presently clear on the following points:

1. Tribal Court has no jurisdiction over non-members in criminal cases. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191(1978).
2. Tribal Court has no jurisdiction to regulate hunting and fishing on non-Indian lands within the reservation (absent significant treaty differences). Montana v. U.S., 450 U.S. 544(1981).
3. Neither the Tribe nor the State may regulate matters which the federal government has chosen to regulate (the federal pre-emption rule). New Mexico v. Moscalero Apache Indian Tribe, 462 U.S. 324(1984).

The law is unclear on:

1. Whether and to what extent the Tribal Court has jurisdiction over non-members in civil actions.

The Supreme Court has never once held that a tribal court does have jurisdiction over a non-member. This is an open question in the law.

The question has been directly addressed by the U. S. Supreme Court three times in recent times:

- a. Oliphant, (1978), holding no jurisdiction in criminal cases, (partly on federal pre-emption grounds).
- b. National Farmers Union v. Crow Tribe, 471 U.S. 845(1985), and Iowa Mutual v. LaPlant, 480 U.S. 9(1987). Both cases were auto accident, insurance coverage cases. The Supreme Court declined to rule on the jurisdiction issues, and merely ordered the parties to go back and fight about it in lower courts, and indicated that only then would the Supreme Court decide it. In National Farmers, the Court stated:

Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been

John Mercer
April 3, 1989
Page 3

altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Until the Supreme Court makes this "careful examination," no one knows for sure how the Court will rule on this important issue.

In LaPlant, the Court strongly indicated it might rule in favor of tribal court jurisdiction in some future civil cases, but stopped short of actually holding such.

Present Law Applied to This Controversy

It is far from clear whether jurisdiction would be held proper in Tribal Court for prosecution of non-members for violation of tribal hunting/fishing ordinance 44D, because of the following questions:

1. Is this a criminal prosecution? Under state or federal law, such prosecutions are considered criminal. The Tribe argues this is civil.
2. Has this area been pre-empted by Federal law? It is a federal crime to hunt unlawfully on a reservation. In New Mexico, the Supreme Court held that the State was pre-empted from prosecuting violations partly for that reason. The same reasoning may pre-empt Tribal prosecution.
3. After its "careful examination", the Supreme Court could still hold that tribal courts have no jurisdiction over non-members in any civil or criminal case.

Relation of This Controversy to Broader Issues

Historically, the Flathead Tribal Court has not tried to exert jurisdiction over non-member defendants in criminal or civil cases. The policy was to never do so unless the non-member defendant signed a "Consent to Jurisdiction" form, provided by the Court or attorneys. Any representations to the contrary are simply not true.

EXHIBIT 2
DATE 4-5-89
HB SB 446John Mercer
April 3, 1989
Page 4

The Tribal Code was amended in 1985 to broaden jurisdiction over non-members. In the past year, the Tribal Court, under the guidance of the tribal attorneys, has attempted to assert jurisdiction over non-member defendants in the following cases:

1. Criminal-assault. Under the theory that the non-member defendant was a "descendant" of a tribal member.
2. Hunting/fishing violations.
3. Traffic accident-civil. Long-haul truck driver (non-member and non-resident of the Reservation) was named as a defendant, and judgment was entered against him for over \$1,000,000.
4. Breach of contract-civil. Allen (non-member) sold a vehicle to Small Salmon (member) for about \$1,500. A downpayment was made, and the balance was never paid. Apparently a dispute exists over when payment was to be made. Several months later, Allen went and got the car. Small Salmon has now sued non-member Allen in Tribal Court for \$1,500, plus lost income, plus \$10,000 punitive damages.

Those cases all represent new, uncharted legal ground. On the first case, Tribal Court advisor Smith first took the position that the Court's criminal jurisdiction extended to "descendants." Following inquiries by newspaper reporters, the Tribal attorneys consented to dismissal. The other cases are all pending in one form or another.

The tribal attorneys cannot deny, in good faith, that they have recently attempted broad expansion of Tribal Court jurisdiction over non-members. The law is very unclear at present (see attached article on the Allen case and quote by U. S. Attorney Dunbar).

The Supreme Court will have to decide these issues. Part of the analysis will turn on a balancing test, balancing federal, tribal and state interests. The State/Tribal Agreement which SB 446 would allow, would be "Exhibit 'A'" in any future litigation, to show that the State of Montana has acknowledged Tribal Court jurisdiction.

One of the long-term effects which I see of this tribal court expansion is discrimination against tribal members. I have recently been told, by a dentist, a lawyer, and a businessman, that they would decline to do business with tribal members rather than subject themselves to the uncertainties of tribal court.

John Mercer
April 3, 1989
Page 5

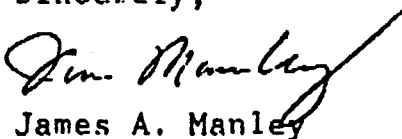
It would seem only prudent, before the legislature allows the governor to consent to tribal court jurisdiction over non-members, that the legislature take a long, thorough look at the issue. I would think that the legislature would want to consider the following questions.

1. What do the citizens of Montana think about it?
2. Would this result in such non-member jurisdiction for all tribal courts? To what extent?
3. What protections of basic civil rights are there? Does the U. S. Constitution apply?
4. For violation of Constitutional rights or rights under the Indian Civil Rights Act, is there appeal from tribal courts? If, for example, a defendant loses his property by denial of due process, can he appeal to State or Federal Court?
5. Are most tribal courts and judges competent?
6. In actual practice, do tribal courts make decisions based upon the race, religion, or status of the parties, or on who their relatives are?
7. Is the jury made up of a cross-section of the community or only tribal members?

As you know, there are some very good tribal court judges, such as Judges Dupuis and Lozar, in our Court. However, it is my experience that they are the exception, and that the answers to the above questions would surprise and shock the legislature.

Without answers to these basic questions, it would seem somewhat irresponsible for the legislature to delegate to the Governor, by SB 446, the power to sign the State-Tribal Agreement in its present form. In addition, the delegation of such power is of very questionable legality and would probably resort in state court litigation over the separation of powers issue between the legislature and the Governor's duties.

Sincerely,



James A. Manley
JAM/cr

Lawsuit sparks more legal questions

by Ron Selden
PABLO—A civil lawsuit filed against a non-tribal Flathead Reservation resident in Salish and Kootenai Tribal Court here is opening up renewed questions about the extent of tribal jurisdiction over non-members.

The case revolves around a 1976 Jeep four-wheel-drive pickup truck that Steven Small Salmon, a tribal member, says he bought last year from Michael "Buster" Allen, a non-tribal member who sells used vehicles and flatbed trailers from property located about five miles north of St. Ignace.

A complaint filed in tribal court last December by Small Salmon says he paid Allen \$500 cash for the truck, and "on an oral conditional sales contract" promised to pay a balance of \$1,000 with firewood, deemed to be worth \$75 a cord.

According to court documents, no certificate of title or registration was transferred at the time of sale, and no timetable was established for delivery of the wood.

The complaint alleges that after a portion of the wood had been delivered last summer, both parties agreed to postpone further deliveries until Allen was able to make more room on his property.

However, Small Salmon claims Allen came to his property last September, repossessed the vehicle without notifying him, and sold it to another person. Small Salmon is asking for \$10,000 in exemplary

damages, unspecified other damage awards and reimbursement for court costs.

Allen is out of town this week and could not be reached for comment. Court records indicate that he has not officially retained legal counsel in his defense.

However, Allen's wife suggested Monday that Polson attorney Keith Rennie be contacted for comment.

"I've not decided whether I'm going to take the case," Rennie said in declining to discuss details of the matter.

Records show that after being summoned to appear in December, Allen filed a motion asking that the suit be dismissed because he is not a tribal member, and the complaint regards "transactions between an individual on a personal basis without any business affiliation."

"That probably is a good defense, if he can show that," U. S. Attorney Pete Dunbar said in a phone interview last week. He cautioned, however, that he felt that "no definitive, black and white decision" has been made by state or federal courts regarding the extent of tribal court jurisdiction over non-Indians.

"Basically, if the activity of a non-tribal member on the reservation affects the health, welfare, economic development, or normal operations of a tribe or tribal member, the tribal court does have jurisdiction," Dunbar said.

"There's an awful lot of gray area there," Dunbar added. "I would say

"I would say there's not two lawyers in the state who would answer the question the same way."

- U.S. Attorney Pete Dunbar

there's not two lawyers in the state who would answer the question the same way."

Nonetheless, Montana Legal Services attorney Carolyn Reardon of Kalispell and tribal paralegal advocate Leslie Kallowat, who both represent Small Salmon in the case, last month asked the court to deny Allen's motion to dismiss the suit.

They maintain the Tribes have the power to regulate the activities of "non-members who enter into consensual relationships with the Tribes or its members." They contend such jurisdiction has been established by both the Montana Supreme Court and U.S. Supreme Court.

Reardon, contacted last Thursday, refused to comment on the case. She said, however, that she has repeat-

edly told Allen he should retain an attorney.

On March 2, Associate Tribal Judge Louise Burke denied Allen's motion for dismissal.

"Nothing in either the Treaty of Hellgate nor federal law explicitly limits the Tribes' jurisdiction over non-Indians in civil actions," Burke said in a written opinion released last week. "The court finds that issues raised by this civil action are within the recognized scope of the tribal court's jurisdiction."

According to the opinion, Allen must respond to the court complaint next week. If he doesn't, Small Salmon can ask for a default judgment, said tribal court attorney Maylin Smith.

Examples of Court Cases Establishing That Indian Tribes,
and Their Courts, May Exercise Civil Jurisdiction Over Non-Indians

Prepared by the Confederated Salish and Kootenai Tribes

U.S. Supreme Court Examples

1. Tribal courts have exclusive jurisdiction over a suit by any person against an Indian for a claim arising in Indian country. Williams v. Lee, 358 U.S. 217 (1959). Accord, Kennerly v. District Court of Ninth Judicial District of Montana, 400 U.S. 423 (1971).
2. "Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) (emphasis added).
3. "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian lands. . . . 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. . . ." Montana v. United States, 450 U.S. 544, 564-65 (1981) (emphasis added).
4. "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty . . . and jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." Iowa Mutual Insurance v. LaPlante, 107 S.Ct. 971, 978 (1987) (emphasis added).
5. "The exercise of concurrent jurisdiction by the State would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and nonmembers, interfere with the comprehensive tribal regulatory scheme, and threaten Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development. Given the strong interests favoring exclusive tribal jurisdiction and the absence of state interests which justify the assertion of concurrent authority, we conclude that the application of the State's hunting and fishing laws to the reservation is pre-empted." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 343-44 (1983).
6. Though the U.S. Supreme Court has limited Indian Tribes' criminal jurisdiction over non-Indians in the Oliphant case, the Supreme Court has refused to carry the Oliphant reasoning to the civil area: "Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, see Oliphant v. Suquamish Indian Tribe,

435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), their civil jurisdiction is not similarly restricted." Iowa Mutual Insurance Company v. LaPlante, 107 S.Ct. 971, 976 (1987).

Note: The courts have specifically rejected the argument that tribal ordinances affecting non-Indians are illegal because non-Indians have no voice in tribal elections. United States v. Mazurie, 419 U.S. 544, 577 (1975). Accord, Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951, 964 n. 31 (9th Cir. 1982), cert. denied, 459 U.S. 977 (1982).

Federal Court of Appeals Examples

1. The Salish-Kootenai Tribes may exercise civil jurisdiction "to regulate the riparian rights of non-Indians owning lands within the Flathead Reservation." Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951, 965 (9th Cir. 1982), cert. denied, 459 U.S. 977 (1982)

2. An Indian tribe can enforce building, health and safety codes against non-Indian fee land owners within reservations. Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), cert. denied, 459 U.S. 967 (1982).

3. A tribe may regulate on-reservation repossession of motor vehicles by off-reservation dealers. Babbitt Ford, Inc. v. Navajo Tribe, 710 F.2d 587 (9th Cir. 1983).

4. The Tribes may enforce tribal zoning regulations against non-Indian fee land owners on the reservation. Knight v. Shoshone and Arapaho Indian Tribes, 670 F.2d 900 (10th Cir. 1982).

Federal District Court Examples

The Salish and Kootenai Tribes have the authority to license, regulate and control the hunting and fishing activities of non-Indians on trust status lands and waters of the Flathead Reservation. United States v. Pollman, 364 F.Supp. 995 (D.Mont. 1973); United States v. Zemple, ___ F.Supp. ___, 32 St. Rptr. 1130 (D.Mont. 1975).

Montana Supreme Court Examples

The Salish-Kootenai Tribal Court has exclusive jurisdiction over actions brought by non-Indians against an Indian regarding a commercial transaction on the Flathead Reservation. Security State Bank v. Pierre, 162 Mont. 298 (1973). Accord, Geiger v. Pierce, ___ Mont. ___, Cause No. 88-76 (1988).

EXHIBIT 3

DATE 4-5-89

HB SB 446

Salish-Kootenai Tribal Court

The Salish-Kootenai Tribal Court has civil jurisdiction to enforce the Tribes' Hunting and Fishing Conservation Ordinance (Ordinance 44D). Confederated Salish and Kootenai Tribes v. Brueckman, 14 ILR 6044, No. FG-4962-897 (CSKT Ct. 1987).

Endnote:

Neither Senate Bill 446 or the cooperative agreement define the State's or the Tribes' jurisdiction over non-Indians on the Flathead Reservation. In Article I of the agreement, the Tribes and State expressly agree to side-step all jurisdictional issues and, instead, to try cooperative joint management for a five year trial period. The agreement mandates that non-Indians cited on non-Indian land go to state court. Non-Indians would go to Tribal court only if they are cited on Indian lands. If the Director of the Montana Department of Fish, Wildlife and Parks agrees and gives his consent, all citations may be heard in Tribal court during all or a portion of the remaining two years of the agreement.

If Senate Bill 446 is killed or amended to death, or if the cooperative agreement is terminated, the Salish-Kootenai Tribes would be free to actively enforce Tribal Ordinance 44D, which was enacted in 1986. Tribal Ordinance 44D asserts tribal civil jurisdiction over all lands on the reservation for hunting and fishing purposes.

ROLL CALL VOTE

JUDICIARY

COMMITTEE

DATE APRIL 5, 1989

BILL NO. SB 446

NUMBER 1

NAME	AYE	NAY
REP. KELLY ADDY, VICE-CHAIRMAN		X
REP. OLE AAFEDT		X
REP. WILLIAM BOHARSKI	X	
REP. VIVIAN BROOKE		X
REP. FRITZ DAILY	X	
REP. PAULA DARKO		X
REP. RALPH EUDAILY	X	
REP. BUDD GOULD	X	
REP. TOM HANNAH	X	
REP. ROGER KNAPP		X
REP. MARY McDONOUGH		X
REP. JOHN MERCER	X	
REP. LINDA NELSON	X	
REP. JIM RICE		X
REP. JESSICA STICKNEY		X
REP. BILL STRIZICH		X
REP. DIANA WYATT		X
REP. DAVE BROWN, CHAIRMAN		X

TALLY

7 11

Julie Empe
Secretary

Chairman

Motion: Rep. Mercer's amendments (EX HB. 1).

Amendments 2-5 - Motion Fails.

ROLL CALL VOTE

JUDICIARY

COMMITTEE

DATE APRIL 5, 1989

BILL NO. SB 446

NUMBER 2.

NAME	AYE	NAY
REP. KELLY ADDY, VICE-CHAIRMAN		X
REP. OLE AAFEDT		X
REP. WILLIAM BOHARSKI	X	
REP. VIVIAN BROOKE		X
REP. FRITZ DAILY	X	
REP. PAULA DARKO		X
REP. RALPH EUDAILY	X	
REP. BUDD GOULD	X	
REP. TOM HANNAH	X	
REP. ROGER KNAPP	X	
REP. MARY McDONOUGH		X
REP. JOHN MERCER	X	
REP. LINDA NELSON		X
REP. JIM RICE		X
REP. JESSICA STICKNEY		X
REP. BILL STRIZICH		X
REP. DIANA WYATT		X
REP. DAVE BROWN, CHAIRMAN		X

TALLY

7 11

Julie Empe
Secretary

Chairman

Motion: Amendment #6 (EXHB. 1) proposed by Rep.
Mercer. Motion Fails.