COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL MEANS, Appellant,	)	Case No. 01-17489
vs.	)	
	)	United States District Court
NAVAJO NATION, et al., Appellees.	)	CIV 99-1057-PCT-EHC (SLV)

APPELLEES' ANSWERING BRIEF

Donovan D. Brown, Sr.
Acting Deputy Ass't Attorney General
Office of the Attorney General
Navajo Nation
Post Office Drawer 2010
Window Rock, Arizona 86515
Tele: (520)871-6935

Dated May 23, 2002

TABLE OF CONTENTS

TABLE OF AUTHORITES

Cases

United States Constitution

Statutes

Legislative History

Treaty

Administrative Opinion

Publications

I. JURISDICTION

Petitioner Russell Means was denied a Writ of Habeas Corpus and/or Prohibition by the United States District Court of Arizona on September 20, 2001. Means filed a timely notice of appeal with the Ninth Circuit Court on October 18, 2001. This Court has jurisdiction over Means' appeal pursuant to 28 U.S.C. §§1291 (District Court decision pursuant to 25 U.S.C. §1303), 1331 (federal question), and 2253-55 (habeas corpus).

II. QUESTIONS PRESENTED

1. Does the Indian Commerce Clause provide Congress with the power to regulate tribal criminal jurisdiction over nonmember Indians?
2. Did Congress properly exercise its Commerce Clause authority when it amended the Indian Civil Rights Act to recognize and affirm "...the inherent power of Indian tribes...to exercise criminal jurisdiction over all Indians"?
3. Did Congress repeal, modify or disregard the Navajo Treaty of 1868 when it amended 25 U.S.C. §1301(2)?
4. Which law, 25 U.S.C. §1301(2) or the Navajo Treaty of 1868, controls this case?
5. Does 25 U.S.C. §1301(2) violate the equal protection provision of the Fifth Amendment to the United States Constitution?

III. STATEMENT OF THE CASE

Means was denied a Writ of Habeas Corpus and/or Prohibition by the United States District Court of Arizona on September 20, 2001. His petition to the U.S. District Court followed more than three years of Navajo Nation District and Appellate Court challenges to the Navajo Nation's criminal jurisdiction. In each proceeding, including the latest in the U.S. District Court, it was found that Means' claim of Constitutional violations were unsubstantiated and lacked merit. Means disagreed with these lower decisions and now appeals to the Ninth Circuit Court.

On December 28, 1997, the Navajo Nation charged Means with three offenses: committing battery on his then father-in-law Leon Grant in violation of Title 17 of the Navajo Nation Code (N.N.C.) §316, threatening Mr. Grant in violation of 17 N.N.C. §310, and committing battery on his then nephew Jeremiah Bitsui, also in violation of 17 N.N.C. §316. At the time of the alleged offenses, Means, a member of the Oglala Sioux Nation, was married to Gloria Grant, an enrolled Navajo woman, and resided for ten years (from 1987 through early December 1997) near Chinle, Arizona, within the territorial boundaries of the Navajo Nation.

Sentencing guidelines for these offenses are regulated pursuant to 18 U.S.C. §3553(a)(4)(guidelines applied are those that are in effect on the date a defendant is

sentenced)[1] by the January 28, 2001 amended Title 17 of the Navajo Nation Code (Criminal Code). For each offense of battery, Means *may* be sentenced to imprisonment for a term not to exceed 180 days, or be ordered to pay a fine not exceeding $500, or both. For the offense of threatening, Means *may* be sentenced to imprisonment for a term not to exceed 90 days, or be ordered to pay a fine not exceeding $250, or both. There is a presumption against incarceration,[2] except in cases where a defendant has caused serious injury or other serious circumstances warrant a jail sentence. Restitution to victims of the alleged offenses and/or participation in the peacemaking are the more likely results of a conviction in matters of this nature.

Means filed a motion to dismiss the three charges on January 23, 1998. The Chinle District Court held an evidentiary hearing on the motion on April 14, 1998. Means testified at the hearing where he related the voluntary character of his relationships with Navajos and his participation in Navajo social, political, and economic life. The District Court denied the motion on July 20, 1998.

On August 19, 1998, Petitioner filed a Petition for Writ of Prohibition with the Navajo Nation Supreme Court. On May 11, 1999, the Navajo Nation Supreme Court declined to issue the Writ. The Court found that Means assumed sufficient tribal relations with the Navajo Nation to warrant his implied consent to Navajo

[1] Unless a court determines that use of the guidelines in effect on the date that the defendant is sentenced would violate the Ex Post Facto Clause of the Constitution, the court must use the guidelines in effect on the date that the offense was committed. USSG §1B1.11(b)(1) (18 U.S.C. Appx).
[2] Amended 17 N.N.C.§220.

criminal jurisdiction, that this inherent Navajo criminal jurisdiction is recognized by provisions in the Navajo Treaty of 1868 (hereinafter "Treaty"),[3] and that when applied these Treaty provisions do not deny him equal protection of the law. The Court remanded the matter to the Chinle District Court for trial.

Prior to the scheduled trial in the Chinle District Court, Means filed the Verified Petition for Writ of Habeas Corpus and/or for a Writ of Prohibition with the U.S. District Court for Arizona. It is the U.S. District Court's subsequent denial of that Petition which now comes before this Honorable Court on appeal.

As a nonmember Indian living within the territorial boundaries of the Navajo Nation, Means enjoys the rights to obtain employment (including important positions in Navajo government), own and operate his own business, participate freely in Navajo political processes, serve on Navajo juries, and claim the superior due process protections of the Navajo Nation Bill of Rights.

IV. SUMMARY OF THE ARGUMENT

The Commerce and Treaty Clauses of the United States Constitution provide Congress with complete control over Indian affairs, including the power to recognize and affirm tribal criminal jurisdiction over nonmember Indians.

The enactment of a federal rule in Indian affairs is generally made by the people through their elected representatives in Congress, rather than the federal

[3] 15 Stat. 667.

judiciary whom are purposefully insulated from democratic pressures. When the federal judiciary does create a rule in Indian affairs, as it did in *Duro v. Reina*,[4] the rule originates from a background of federal common law. That being the case, Congress has the Constitutional power to expand, contract or override the judicial rule because it has legislative authority over federal common law. Therefore, when Congress amended the 25 U.S.C. §1301(2) to override the *Duro* rule, it properly and explicitly recognized and affirmed inherent tribal criminal jurisdiction over nonmember Indians.

The provisions in both 25 U.S.C. §1301(2) and the Treaty that govern tribal criminal jurisdiction over nonmember Indians are consistent, and therefore no modification of Treaty provisions was required or occurred. Since the statute and the Treaty stand upon the same level and are equally valid, and as in the case of all laws emanating from an equal authority, the earlier in date yields to the later. That is, 25 U.S.C. §1301(2) determines the jurisdictional issue in dispute, and it vests criminal jurisdiction over nonmember Indians with the Navajo Nation.

While the Navajo Nation is neither subject to the Constitution nor the strict judicial scrutiny required for equal protection issues, it *is* subject to the supreme legislative authority of Congress. When Congress expressly singles out Indian tribes as subjects of legislation, as it did with the Indian Civil Rights Act, the U.S.

[4] 495 U.S. 676 (1990) (the retained sovereignty of an Indian tribe does not include criminal jurisdiction over nonmember Indians on its reservation).

Supreme Court has repeatedly held that such legislation is expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's ongoing trust relationship with Indians. Thus, while Means is not a direct beneficiary of equal protection under the United States Constitution, he is duly protected under the Indian Civil Rights Act (hereinafter "the ICRA") and the superior Navajo Nation Bill of Rights. Means does not claim equal protection violations under either the Navajo Bill of Rights or the ICRA.

V. ARGUMENT

A. The Indian Commerce Clause Provides Congress With The Power To Regulate Tribal Criminal Jurisdiction Over Nonmember Indians

Means claims that the regulation of tribal criminal jurisdiction is not "commerce" to be regulated by Congress under the Commerce Clause, but rather a factor to be determined by the Executive Department under its treaty-making authority.[6] *See Appellant's Opening Brief*, at 35 ("The 1990 amendments to the ICRA do not regulate commerce and are not an appropriate exercise of power by Congress."). This simply is not so.

Article 1, §8, cl. 3 provides that "Congress shall have the Power... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Article II, §2, cl. 2 gives the President and the Senate the power

---

[5] 25 U.S.C. §1301(2).

[6] So stated in spite of the fact that Congress precluded the Executive Branch from treaty-making by the Act of March 3, 1871, 16 Stat. 566, 25 U.S.C. §71.

to make treaties with Indian tribes. Together, these constitutional provisions provide Congress with "all that is required" for complete control over Indian affairs. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); *see also U.S. v. Kagama*, 118 U.S. 375 (1886).

The scope of Congress' Commerce Clause authority over Indian affairs is virtually unlimited. That is, Congress has plenary power over all Indian tribes, their government, their members and their property.[7] The U.S. Supreme Court recently stated that "Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government." *U.S. v. Wheeler*, 435 U.S. 313, 319 (1978); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

This absolute authority and power, as broad as is required in any given case, has been recognized since our Country's earliest years. Chief Justice Marshall said that it was the intention of Constitutional Convention

> ...to give the whole power of managing [Indian] affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it....

FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 92 (William S. Hein Co. 1988), *citing Cherokee Nation v. Georgia*, 5 Pet. 1, 13 (1831). For many

years thereafter, the Indian Commerce Clause was broadly interpreted to include not only commercial transactions, "but also aspects of intercourse which had little or no relation to commerce, such as travel, crimes by whites against Indians or Indians against whites, survey of land, trespass and settlement by whites in the Indian country, the fixing of boundaries, and the furnishing of articles, services, and money by the Federal Government." *Id.* (omitting internal citations).

Modern interpretations hold that "[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." *Wheeler*, 435 U.S. at 323, *see also United States v. Wadena*, 152 F.3d 831, 843 (8th Cir. 1998).

> Indian tribes are, of course, no longer possessed of the full attributes of sovereignty. 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. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.

435 U.S. at 323 (internal citations and quotations omitted). *See also Duro v. Reina*, 495 U.S. 676, 685 (1990)(Indian tribes are "limited sovereigns [that are] necessarily subject to the overriding authority of the United States.");[8] *Santa Clara Pueblo*, 436 U.S. at 56; *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d

---

[7] *U.S. v. Sandoval*, 231 U.S. 28 (1913); *Morton v. Mancari*, 417 U.S. 535 (1974).

[8] *See* United States Magistrate Judge Stephen L. Verkamp, *Second Report and Recommendation*, May 17, 2001, to the Arizona District Court. Judge Verkamp's *Second Report* was approved by Arizona District Court Judge Carroll on September 20, 2001.

874, 881 (2d Cir. 1996) ("Even aspects of 'sovereignty' thought to derive from the status of Indian nations as distinct self-governing entities are subject to Congressional limitation.").

The foregoing is a bittersweet reality for the Navajo Nation. In this instance, the federal government's plenary power protects our interests even though we would prefer to regulate our own affairs as do all other sovereign entities. Nevertheless, we recognize that the Indian Commerce Clause provides Congress with *complete* legal authority to regulate tribal criminal jurisdiction over nonmember Indians.

B. Congress Properly Exercised Its Commerce Clause Authority When It Recognized And Affirmed Inherent Tribal Criminal Jurisdiction Over All Indians

In 1990, the *Duro* Court held that "the sovereignty retained by the tribes in their dependent status within our scheme of government [does not include] the power of criminal jurisdiction over [non-member Indians]." 495 U.S. at 679, 684. Congress reacted to the *Duro* decision by passing the 1990 amendments to the Indian Civil Rights Act, specifically 25 U.S.C. §1301(2), which "recognized and affirmed" the "inherent power of Indian tribes...to exercise criminal jurisdiction over all Indians." The critical question here is "[d]id Congress have the power to override *Duro* and, in effect, legislate its own version of the scope of tribal

sovereignty?" *U.S. v. Enas*, 255 F.3d 662, 673 (9th Cir. 2001)(en banc), *cert. denied*, 122 S.Ct. 925 (2002).

The question clearly requires a "Separation of Powers" analysis.[9] If the "issue is a constitutional one, the courts have the last word." *Id. citing Cooper v. Aaron*, 358 U.S. 1, 18, 78 S.Ct 1401, 3 L.Ed.2d 5 (1958); *Marberry v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). If the issue is one of statutory interpretation, "Congress can trump the court by amending the statute." *Id. citing* Michael E. Solimine & James Walker, *The Next Word: Congressional Response to Supreme Court Statutory* Decisions, 65 Temple L.Rev. 425, 454-58 (1992); Abner J. Mikva & Jeff Bleich, *When Congress Overrules the* Court, 79 Cal. L.Rev. 729 (1991). But, if the issue is "...within the realm of federal common law—and the federal common law of tribes—[then] Congress is supreme." *Id.* at 675, *citing Morton v. Mancari*, 417 U.S. 535, 551-52, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

There are absolutely no constitutional referents in the *Duro* decision. *Id.* at 674. Nor did the *Duro* Court interpret any particular statute relating to tribal criminal jurisdiction over nonmember Indians. *Id.* In the absence of "directly controlling constitutional or statutory provisions," the *Duro* decision then exists as "legally binding federal [common] law." *Id.* at 674, *citing* Erwin Chemerinsky,

[9] *See generally, U.S. v. Enas*, 255 F.3d at 673-75.

Federal Jurisdiction 349 (3d ed.1999); *see also* Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L.Rev. 881, 890 (1986).

> [T]he question of what powers Indian tribes inherently possess...has always been a matter of federal common law. As a recent law review article noted, "*Oliphant* and *Duro* were not constitutional decisions; they were founded instead on federal common law." *See* L. Scott Gould, *The Consent Paradigm*, 96 Colum. L.Rev. 809, 853 (1996). That being the case, Congress has the power to expand and contract the inherent sovereignty that Indian tribes possess because it has legislative authority over federal common law.

United States v. Weaselhead, 156 F.3d 818, 825 (8th Cir. 1998), *on reh'g*, 165 F.3d 1209 (en banc), *cert. denied*, 528 U.S. 829, 120 S. Ct. 82 (1999). In addition, because Congress has authority over federal common law, it may refine or alter the scope of tribal power as described by the United States Supreme Court if the Court itself described the scope of the tribal power as a matter of federal common law. *See City of Milwaukee v. States of Illinois & Mich., 451* U.S. 304, 312-14 (1981) ("The enactment of a federal rule in an area of national concern...is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress....We have always recognized that federal common law is 'subject to the paramount authority of Congress.'") (internal citations omitted).

Therefore, in the realm of federal common law, Congress possessed the supreme power in 1990 to amend 25 U.S.C. §1301(2) to recognize and affirm

inherent tribal criminal jurisdiction over nonmember Indians. *Enas* at 675. "With the 1990 amendments [to the Indian Civil Rights Act], Congress exercised its plenary power under the Indian Commerce Clause to restore prospectively the inherent authority of Indian tribes 'over all Indians,' including non-members." *Id.* at 679 (concurring opinion).

The Supreme Court denied certiorari of *U.S. v. Enas* in January of this year.[10] While a denial "carries with it no implication whatever regarding the Court's views on the merits of [the] case it has declined to review,"[11] it is hard to imagine that the extraordinary antagonism between the *Enas* and *Duro* decisions went undetected by the Justices. Perhaps the Court recognized overriding Congressional authority in this common law matter. *See, for example, Duro v. Reina,* 495 U.S. 676, 698 (1990) ("If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then *the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs.*") (emphasis added); *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 211-12. (1978) ("We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to anyone tried in Indian

[10] 122 S.Ct. 925 (2002).

tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. *But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians.*") (emphasis added); *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. *If this power is to be taken away from them, it is for Congress to do it.*") (emphasis added); *Strate v. A-1 Contractors*, 520 U.S. 438, n.5 (1997) (Court's acknowledgment that "[s]hortly after our decision in Duro, Congress provided for tribal criminal jurisdiction over nonmember Indians.").

C. Congress Did Not Repeal, Modify or Disregard the Navajo Treaty of 1868 when it Amended 25 U.S.C. §1301(2) To Recognize And Affirm Inherent Tribal Criminal Jurisdiction Over All Indians

One of Means' main contentions is that "Congress cannot by implication overrule a prior Indian Treaty."[12] Therefore, he says, the 1990 amendments to 25 U.S.C. §1301(2) "did not express an intent to abrogate the Navajo Treaty nor dozens of other, similar treaties," and that, "[a]s a result, the Treaty of 1868 must

---

[11] *State of Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919, 70 S.Ct. 252, 94 L.Ed. 562 (1950); *see also Singleton v. Commissioner of Internal Revenue*, 439 U.S. 940 (1978).

prevail"[13] (where strict statutory construction allows for Federal, rather than Navajo, criminal jurisdiction). He cites as primary authority a Federal Circuit case and numerous Supreme Court cases. *Id.* at 16-20; *citing Tsosie v. U.S.*, 825 F.2d 393 (Fed.Cir. 1987); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Washington v. Fishing Vessels Ass'n.*, 443 U.S. 658 (1979); *United States v. Dion*, 476 U.S. 734 (1986); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). The Navajo Nation cannot argue with Means' statement that treaty abrogation requires explicit statutory language. Neither can we conceive of more explicit language than that found in 25 U.S.C. §1301(2), particularly in light of Congress' very careful distinction between "delegated" and "inherent" tribal authority.

Here, however, the issue is not whether Treaty abrogation was explicit; rather, it is whether abrogation even occurred. The Navajo Nation contends that the relevant provisions in both the ICRA and the Treaty are consistent, and therefore no modification of Treaty provisions is required or ever occurred. Since the statute and the Treaty stand upon the same level and are equally valid, and as in the case of all laws emanating from an equal authority, the earlier in date yields to the later. That is, 25 U.S.C. §1301(2) determines the jurisdictional issue in dispute, the statute affirms the Navajo Nation's criminal jurisdiction over nonmember Indians.

---

[12] *Appellant's Opening Brief* at 16.
[13] *Id.* at 8.

When it amended the ICRA in 1990, Congress recognized and affirmed "...the inherent power of Indian tribes...to exercise criminal jurisdiction over all Indians." 25 U.S.C. §1301(2). The Navajo Supreme Court found that the Treaty similarly provides for Navajo criminal jurisdiction over nonmember Indians. *Means v. Chinle Judicial District Court*, SC-CV-61-98, 15 (Nav. S.Ct. 1998). In other words, Congress simply recognized and affirmed the scope of tribal criminal jurisdiction such as the Navajo people always understood it to be. It did so based on "...governmental policy...consistent with perfect good faith towards the Indians"[14] that recognizes inherent tribal control of internal affairs.

The present controversy revolves around a somewhat generic clause in Article I of the Treaty. Called the "Bad Men Clause," it provides

> If bad men among the Indians commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, *deliver up the wrongdoer to the United States, to be tried and punished according to its laws....*

(emphasis added).

This clause, as Means points out, is similar or identical to clauses in numerous other Indian treaties.[15] The emphasized language, he claims, "expressly

---

[14] H. Rept. No. 474, Comm. On Indian Affairs, 23d Cong. 1st Sess., May 20, 1834.

[15] *See Appellant's Opening Brief* at 15. Means goes to great lengths to cite identical "bad men" provisions in numerous other Indian treaties. He suggests that their sheer number and similarity are evidence of the express intent of the federal government to ensure the extradition of both Indian and non-Indian "bad men." We suggest the sheer number and similarity of "bad men" clauses mean something quite different: that the "bad men" clause is simply a broadly-applied generic term intended to prevent revenge and retaliatory strikes by people perceived as

provides for federal jurisdiction over alleged crimes by nonmembers."[16] While his conclusion seems plausible, it suffers from a fatal deficiency: it applies the strict statutory construction anathema to settled judicial interpretation of Indian treaties. In other words, Means completely ignores the procedural canons of treaty construction developed by federal courts to ensure fulfillment of the federal trust obligation toward all Indian nations (such as the Oglala Sioux or Navajo Nation).[17] These canons guarantee that rigid construction like the one proposed by Means will not control the determination of Indian rights.

One of the cardinal rules of treaty construction provides that a treaty must be construed as the Indians understood it. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *United States v. Winans*, 198 U.S. 371, 380-381 (1905).[18] Indian treaties are so construed because

> ...it must always...be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand,

---

"bloodthirsty savages," and that it was incorporated into every treaty without regard to individual circumstances or the understanding of the subordinate negotiating party.

Regardless of other treaty language, it should be noted that the treaty language applicable here is found in the Navajo Treaty of 1868. No other treaties apply.

[16] *Id.*

[17] Means apparently believes that settled canons of treaty construction render "'politically correct' decisions favoring 'Indian tribes' [that] do not provide sound legal analysis...." *Appellant's Opening Brief* at 18.

[18] This principle was first articulated in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-554, 582 (1832).

> are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that *the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.*

Jones v. Meehan, 175 U.S. 1, 11 (1899) (emphasis added).

> More recently, Justice Stevens wrote:
>
> Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would be naturally understood by the Indians." Jones v. Meehan, 175 U.S. 1, 11. This rule in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indian's favor.

Washington v. Fishing Vessel Assn., 443 U.S. 658, 675-76 (1979); *citing Tulee v. Washington*, 315 U.S. 681 (1942); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); and *Washington v. Yakima Indian Nation*, 439 U.S. 463, 484 (1979).

Here, the Navajo Nation emphasizes that Means' construction of the Bad Men Clause in our Treaty is founded entirely on "the technical meaning of its words to learned lawyers," who are modern masters of their own written language as well as the "modes and forms of creating the various technical estates known to their [own] law." The proper interpretation of the Navajo Treaty lies not in how

Means' counsel understands its terms, but rather in the Navajo understanding of its terms.

Chief Justice Yazzie, a distinguished Navajo elder drawing on the Navajo experience through its oral traditions, provides the one legitimate account extant of ancestral Navajo and their descendant's understanding of the Bad Men Clause.[19] While Means and his counsel may consider the Chief Justice's logic and conclusions "tortured,"[20] they nonetheless represent the Navajo People's unique cultural perspective on this issue. And the Navajo perspective is the determinative factor with respect to this Treaty and this particular procedural canon of treaty construction.

Chief Justice Yazzie developed his Treaty interpretation upon three important factors. First, he presumed the Navajo Nation's sovereign right of inherent criminal jurisdiction over nonmember Indians—a right never explicitly taken away from his People by Congress[21] and, in fact, explicitly recognized and affirmed eight years before by Congress in 25 U.S.C. §1301(2). Second, he applied the oral traditions of his People, reinforced by historical records, to conclude that the Navajo Treaty also confers criminal jurisdiction over nonmember Indians. *Means* at 12-15. Finally, the Chief Justice used U.S. Supreme Court's citations,

[19] *See Means v. Chinle District Court*, No. SC-CV-61-98 (Nav. Sup. Ct. 1998).
[20] *See Appellant's Opening Brief* at 10 and 13.
[21] "What is not expressly limited remains with the domain of tribal sovereignty." FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945).

under *Oliphant* and *Duro*, to *United States v. Rogers*, 4 How. 567 (1846) and *Nofire v. United States*, 164 U.S. 657 (1897) which indicate that an individual who "assumes tribal relations" is subject to the laws of the Indian nation with which that person assumes such relations. *Means* at 15-19; *See also, Navajo Nation v. Hunter*, N.L.R. Supp. 429, 431 (Nav. Sup. Ct. 1996).

Regarding the first factor, Chief Justice Yazzie recognized that the only explicit federal legislation on the issue of tribal criminal jurisdiction lies in 25 U.S.C. §1301(2). That is, Congress recognized and affirmed tribal criminal jurisdiction that exists (1) since time immemorial, and (2) as a sovereign right never expressly taken away by Congress from the Navajo Nation.

To develop the second factor, Chief Justice Yazzie conducted an analysis of Navajo oral tradition through historical circumstances surrounding the Treaty's formation. The Court began by noting that the Treaty between the Navajo Nation and the United States was negotiated for three days at the end of May 1868 in the desolate terrain surrounding Fort Sumner, New Mexico Territory.[22] During the first day of negotiations, Lieutenant General William T. Sherman and Colonel Samuel F. Tappan "negotiated" with approximately 9,500 Navajos present because Navajo

[22] The negotiations climaxed the dismal failure of a federal removal policy that resulted in the deaths of over half the population of Navajos by starvation, disease, maltreatment and neglect.

representatives had yet to be chosen.[23] Eventually, Navajo leader Barboncito and some of his brethren were chosen to negotiate on behalf of the Navajo People.[24]

The *Means* Court provided the following account that identifies the source for Navajo understanding of the Bad Men Clause:

> Barboncito...gave an opening speech where he outlined the hardships suffered by Navajos at the adjoining Bosque Redondo "reservation." He complained: "I think that all nations around here are against us (I mean Mexicans and Indians) the reason is that we are a working tribe of Indians, and if we had the means we could support ourselves far better than either Mexican or Indian. The Comanches are against us I know it for they came here and killed a good many of our men. In our own country we knew nothing about the Comanches."...General William T. Sherman said this in reply: "The Army will do the fighting, you must live at peace, if you go to your own country the Utes will be the nearest Indians to you, you must not trouble the Utes and the Utes must not trouble you, *If, however, the Utes or Apaches come into your country with bows and arrows and guns you of course can drive them out* but must not follow beyond the boundary line."

Means at 14, *citing* Link at 3-5 (emphasis added).

The Utes did come to Navajo Country. The *Means* Court narrated an incident that occurred thirteen years after the Treaty took affect that effectively demonstrates the Navajo People's true understanding of General Sherman's reply:

---

[23] *See Williams v. Lee* 358 U.S. 217, 222-23 (1959) ("On June 1, 1868, a treaty was signed between General William T. Sherman, for the United States, and numerous chiefs and headmen of the 'Navajo nation or tribe of Indians.' At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promises to keep peace, this treaty 'set apart' for 'their permanent home' a portion of what had been their native country, and provided that no one, except United States Government personnel, was to enter the reserved area. Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in Worcester v. Georgia, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.").

[24] Link, *Treaty Between the United States of America and the Navajo Tribe of Indians*, 3-4 (1968).

> On September 27, 1881, Agent Galen Eastman wrote to the Commissioner of Indian Affairs to inform him that about forty Pah-Utes (Paiutes) had arrived in a starving condition and were begging for food. They said "they were going to cease their predatory life and use the hoe thereafter." The Navajo reply was that "if the Great Father is willing, we will try you again and be responsible for your good behavior for we used to be friends and have intermarried with your people and yours with ours...*but if you return to your bad life, thieving and murdering we (the Navajos) will hang you.*"

Means at 13, *citing* Link at 3-5 (emphasis added).

The *Means* Court noted that Navajo leaders were plainly thinking of admitting Paiutes to the Navajo Nation on the specific condition they would be subject to punishment by Navajos for theft and murder. *Id.* at 15. In other words, Navajo leaders naturally understood assurances by the United States' lead Treaty negotiator to mean that Navajos exercise criminal jurisdiction over offending nonmember Indians residing within their territorial boundaries.[25]

Therefore, the ancestral Navajo people understood, and their descendants presently understand, that they exercise criminal jurisdiction over nonmember Indians residing in their homeland. The Treaty cannot be appropriately construed otherwise. While "delivering up the wrongdoer to the United States" may appear to have a specific meaning to modern lawyers like Means' counsel, the Navajo People have always understood their criminal jurisdiction as it was represented by General

[25] Means believes that Barboncito's speech refers to the power of exclusion, not criminal jurisdiction. *Appellant's Opening Brief* at 10. The Paiute incident clearly illustrates contemporary Navajo understanding of their inherent criminal jurisdiction over nonmember Indians, not just their exclusionary power. After all, what could be more an exercise of criminal jurisdiction than the "hanging" of offending nonmember Indians.

Sherman: a recognition of Navajo authority to prosecute offending nonmember Indians. [26]

Finally, Chief Justice Yazzie acknowledged the U.S. Supreme Court citation under *Duro* to *United States v. Rogers*, 4 How. 567 (1846) and *Nofire v. United States*, 164 U.S. 657 (1897), which indicates that an individual who "assumes tribal relations" is subject to the laws of the Indian nation with which that person assumes such relations. *Means* at 15-16; *citing* 495 U.S. at 694; *See also, Navajo Nation v. Hunter*, N.L.R. Supp. 429, 431 (Nav. Sup. Ct. 1996). The *Nofire* and *Rogers* decisions turned on consent by intermarriage and adoption respectively, where a non-Indian "becomes entitled to certain privileges in the tribe, and make[s] himself amenable to their laws and usages." 495 U.S. at 694, *citing* 4 How. at 573; 164 U.S. at 662.[27] The *Means* decision turned on consent by virtue of being a "*hadane*" ("in-law") through intermarriage or intimate relations and concomitant reciprocal obligations of clan relationships. Such voluntary relationships subject non-Navajos to Navajo law. *Means* at 16-18.

Means makes much of the fact that he cannot legally be adopted or otherwise become eligible for the benefits of membership in the Navajo Nation. *Appellant's*

[26] Article I was intended to prevent conflict and retaliation, not to prohibit punishment of nonmember Indians that entered and offended the Navajo Nation. Given the serious crime problem on the Navajo Nation, the number of crimes committed by nonmember Indians, and the inadequacy of the federal system in addressing such crimes, declining criminal jurisdiction over those the Navajo Nation permits within its territorial boundaries would only encourage the revenge and retaliation that the Treaty was intended to prevent.

[27] For similar rulings in criminal cases, *see Means* at 16, *citing In re Mayfield*, 141 U.S. 107 (1891); *Alberty v. United States*, 162 U.S. 499 (1896); *Lucas v. United States*, 163 U.S. 612 (1869).

Opening Brief at 11; *citing* 1 N.N.C. §§701-703. He further claims that "...the *Means* opinion by Chief Justice Yazzie fails to identify any benefits from the clan relation." *Id.* First, it must be noted that Means is once again misled by his penchant for rigid technical construction of legal language. Chief Justice Yazzie's discussion of both "adoption" and the "reciprocal obligations" of clan relationships referred to generally recognized methods of assuming tribal relations. That is, neither the Supreme Court of the United States nor the Navajo Nation ever suggested that adoption or membership criteria were specific and exclusive factors for measuring the sufficiency of assumed tribal relations. The U.S. Supreme Court noted that non-Indians *could* assume a degree of tribal relations that subject them to a tribe's laws, and Chief Justice Yazzie described how Means assumed such relations with the Navajo Nation. *Means* at 15-19 ("We find that the petitioner, by reason of his marriage to a Navajo, longtime residence within the Navajo Nation, his activities here, and his status as a *hadane*, consented to Navajo Nation criminal jurisdiction.").

As for Chief Justice Yazzie's failure to identify any benefits from clan relationships, the Navajo Nation directs this Honorable Court's attention to language in *Means* that indicates otherwise:

> The petitioner complained of a lack of hospitality toward him when he resided within the Navajo Nation. He said he could not vote, run for Navajo Nation office (including judicial office), become a Navajo Nation council delegate, the president, vice president, or be a member

> of a farm board. In sum, he could not attain any Navajo Nation political position. TR at 8. He said he could not sit on a jury and received no notice to appear for jury duty. TR at 8-9....He complained at length about his inability to get a job or start a business because of Navajo Nation employment and contracting preference laws.
>
> * * *
>
> The "facts" the petitioner related from his testimony are only partially correct. While it is true that there are preference laws for employment and contracting in the Navajo Nation, they are not an absolute barrier to either employment or the ability to do business. There are many non-Navajo employees of the Navajo Nation (some of whom hold high positions in Navajo Nation government), and non-Navajo businesses operate within the Navajo Nation. The ability to work or do business within the Navajo Nation has a great deal more to do with individual initiative and talent than preference laws. The petitioner was most likely not called for jury duty because he did not register to vote in Arizona. Non-Navajos [including non-Indians] have been called for jury duty since at least 1979. *George v. Navajo Tribe* 2 Nav. R. 1 (1979); *Navajo Nation v. MacDonald*, 6 Nav. R. ___, No. A-CR-09-90 (decided December 30, 1991). The 126 Sioux Indians listed in the 1990 census can be called for jury duty if they are on a voter list and are called. If the petitioner was an indigent at the time of his arraignment, he would have been eligible for the appointment of an attorney.

Means at 9-10.

In other words, contrary to Means' claim, Chief Justice Yazzie identified the ability of non-Navajos to be employed in public office (and, in many cases, supervisory positions), own and operate a business, sit on a Navajo jury and obtain counsel. The Chief Justice also noted Means' active participation in the Navajo political process. *Id.* at 9. And while there are indeed constraints on Means' full participation in Navajo government, we note that such constraints are widely-

accepted and broadly applied. Take, for example, Means' lament at TR 8 that he cannot run for Navajo Nation President: "No person shall serve as President...of the Navajo Nation unless he/she is an enrolled member of the Navajo Nation...." 2 N.N.C. §1004(A) (where "membership" requires at least one-quarter Navajo blood as an indication of "natural born" under 1 N.N.C.§701); compare with the United States Constitution, Art. II, §1, cl.5: "No Person except a natural born Citizen...shall be eligible to the Office of President." (preventing naturalized citizens from holding the office of President). As Chief Justice Yazzie noted, "the ability to run for public office...has utterly nothing to do with a fair criminal trial." *Means* at 21.

In summation, if Means had not completely disregarded federal procedural canons of treaty construction in his argument, he would have recognized that relevant provisions in both the ICRA and the Treaty are consistent, and that, consequently, no modification of the Treaty was ever required or occurred.

Furthermore, since both laws are equally valid and emanate from the equal authority of Congress, the Treaty yields to 25 U.S.C. §1301(2):[28]

[28] Navajo law defers to federal law, especially when applied in a federal forum: "In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable...." 7 N.N.C.§204(A). In our own tribal forum, Navajo Courts will apply "...any laws or customs of the Navajo Nation *not prohibited by applicable federal laws*." *Id.* (emphasis added). Since the 1990 ICRA amendments and the Treaty are consistent and the former does not prohibit the use of the latter unless a conflict arises, and because *Means* was litigated in a Navajo forum, Chief Justice Yazzie applied Treaty provisions. Given a choice, as was Justice Yazzie in *Means*, Navajo law is held as "the law of preference" in the Navajo Nation. *Navajo Nation v. Platero*, N.L.R.Supp. 278, 280 (Nav. Sup.Ct. 1991); *citing Estate of Belone*, 5 Nav.R. 161, 165 (1987).

> By the 6th article of the Constitution, treaties as well as statutes are the laws of the land. There is nothing in the Constitution which assigns different ranks to treaties and to statutes. The Constitution itself is of higher rank than either by the very structure of the government. A statute not inconsistent with it, and a treaty not inconsistent with it, relating to subjects within the scope of the treaty-making power, seem to stand upon the same level, and to be of equal validity; and as in the case of all laws emanating from an equal authority, the earlier in date yields to the later.

FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 35 (William S. Hein Co. 1988), *citing* Op. A. G. 354, 357 (1870).

Therefore, since Article I of the Treaty is consistent with Section 1301(2) of the ICRA, and the former yields to the latter, 25 U.S.C. §1301(2) determines the jurisdictional issue in dispute and affirms the Navajo Nation's criminal jurisdiction over nonmember Indians.

D. 25 U.S.C. §1301(2) Does Not Violate The Equal Protection Provision Of The Fifth Amendment To The United States Constitution

Means claims that the legislation reversing the holding in *Duro* is unconstitutional because it deprives him of equal protection of the law by subjecting Indians rather than non-Indians and "similarly-situated" nonmember Indians to tribal court jurisdiction. *Appellant's Opening Brief* at 43-52. While this is an interesting argument, Means is generally misleading the Court. Due process protections are generally derivative of a constitution. However, the federal

constitution does not apply to tribal governments,[29] unless the tribe adopts a Bill of Rights with the same or similar protection as has the Navajo Nation.[30] In fact, part of the reason for passage of the ICRA was to clarify the minimum process due to an Indian by a tribal government. It is the height of irony that Means, by attacking the "*Duro* fix," also attacks the one document under federal law that affords him due-process protection. Perhaps this is in recognition of the superior protection afforded under Navajo law.

Means' protracted equal protection argument may be condensed to his concluding quotation from *Adarand Constructors, Inc. v. Pena*: "...any person, of whatever race, has the right to demand that any governmental actor *subject to the Constitution* justify any racial discrimination subjecting that person to unequal treatment under the strictest judicial scrutiny." *Appellant's Opening Brief* at 51, *citing* 515 U.S. 200, 224 (1995) (emphasis added). As noted above, the Navajo Nation is a governmental actor that is neither subject to the Constitution nor the strict judicial scrutiny that Means desires. However, the Navajo Nation *is* subject to regulation by Congress as a "domestic dependent nation:"[31]

---

[29] In 1996, the U.S. Supreme Court held that the U.S. Constitution places no limits on tribal self-government. Neither the Constitution nor any federal law requires tribes to obey the Constitution. Consequently, the Court said, each Indian tribe retained the right to govern itself as its members saw fit. *Talton v. Mayes*, 163 U.S. 376 (1896); *see also U.S. v. Wheeler*, 435 U.S. 313 (1978).

[30] 1 N.N.C.§§1-9.

[31] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)("...it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.") Justice Marshall's definition effectively counters Petitioner's frequent and somewhat misleading portrayal of the Navajo Nation as a "foreign tribe" bent on "disenfranchis[ing Petitioner] from its democratic/political processes." *Appellant's Opening*

> The case...therefore depends upon whether the powers of [tribal] government...are federal powers created by and springing from the constitution of the United States, ...or whether they are local powers not created by the constitution, although subject to its general provisions and the paramount authority of congress. The repeated adjudications of this court have long since answered the former question in the negative.
>
> * * *
>
> True it is that in many adjudications of this court the fact has been fully recognized that, although possessed of these attributes of local self-government when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States.... But the existence of the right in congress to regulate the manner in which the local powers...shall be exercised does not render such local powers federal powers arising from and created by the constitution of the United States.

Talton v. Mayes, 163 U.S. 376, 382-83 (1896).

The Navajo Nation agrees with Means that the Due Process Clause prohibits Congress from enforcing any law that is arbitrary, unreasonable, or invidiously discriminatory. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *U.S. v. Antelope*, 430 U.S. 641 (1977). This means that Congress cannot discriminate against Indians on account of race.

Brief at 52; *see also Appellant's Opening Brief* at 45 ("The prosecution of Russell Means by the Navajo Nation pits a nonmember Indian against a foreign tribe."). Means argument seems to suggest that Justice Marshall's reference to "foreign nations" was limited to characteristics of the anglo/Indian relationship, not the Oglala/Navajo relationship, and that the latter relationship is somehow more detrimental to his due process rights. There might be substance to his claim were the Navajo Nation not a "domestic dependent nation" subject to the plenary power of Congress and the imposition of the ICRA, nor possessed of a superior Bill of Rights and a model Rules of Criminal Procedure.

Furthermore, common sense suggests that the degree of alienation between two Native American cultures could not possibly be more pronounced than that between European and Native American cultures. To suggest otherwise borders on complete folly.

However, the United States did not enter into treaties with Indians because of their race but because of their political status. For this reason—because the Commerce and Treaty Clauses authorize Congress to do so, and not because Indians and non-Indians are different races—Congress may differentiate between Indians and non-Indians.

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's [trust] relations with Indians.

Antelope, 430 U.S. at 645; *see also Morton v. Ruiz*, 415 U.S. 199, n. 18 (1974); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979); *Kicking Woman v. Hodel*, 878 F.2d 1203, 1205 n. 6 (9th Cir. 1989).

> Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, Worcester v. Georgia, 6 Pet. 515, 557 (1832); they are "a separate people" possessing "the power of regulating their internal and social relations...."

Id., citing United States v. Mazurie, 419 U.S. 544, 557 (1975).

> Literally every piece of legislation dealing with Indian tribes and reservations... single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased....

Id., citing Morton v. Mancari, 417 U.S. 535, 552 (1974).

> [F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "racial" group consisting of "Indians"....

Id. at 646, *citing* 417 U.S. at 553 n. 24.

In sum, while the Navajo Nation is neither subject to the Constitution nor the strict judicial scrutiny required for equal protection issues, it *is* subject to the supreme legislative authority of Congress. This supreme Congressional authority is solidly grounded in the Commerce and Treaty Clauses of the U.S. Constitution. And when Congress expressly singles out Indian tribes as subjects of legislation like 25 U.S.C. §1301(2), the U.S. Supreme Court has repeatedly held that such legislation is expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's ongoing trust relations with Indians. Thus, while Means is not a direct beneficiary of equal protection under the United States Constitution, he is duly protected under the ICRA, the Navajo Nation Bill of Rights, and the Navajo Rules of Criminal Procedure. We note only that Means, following his "traditional" equal protection analysis,[32] never cites a violation of equal protection under the Navajo Bill of Rights or the ICRA.

VI. CONCLUSION

For the foregoing reasons, the judgment and order of the United States District Court for Arizona which denied Means' petition should be affirmed. The Navajo Nation exercises inherent criminal jurisdiction over Russell Means, a nonmember Indian.

Respectfully submitted this 23rd day of May, 2002.

Donovan D. Brown, Sr., Acting Deputy Assistant Attorney General
Navajo Nation Office of the Attorney General
Post Office Drawer 2010
Window Rock, Arizona 86515
Tele: (520)871-6935

[32] *See Appellant's Opening Brief* at 44 and 45.

CERTIFICATE OF COMPLIANCE

Certificate of Compliance Pursuant to Federal Rules of Appellate Procedure, Rule 32(a)(7)(B) and (C).

I certify that:

Pursuant to Federal Rules of Appellate Procedure, the attached brief is double-spaced and uses a proportionately-spaced Roman typeface of 14 points, and a count of 7,040 words based on a word processing system.

Dated this 23rd day of May, 2002.

Donovan D. Brown, Sr.