

## SECTION 3

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# INDIAN TRANSPORTATION LAW

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## A. INTRODUCTION

### 1. Purpose and Scope of This Report

This report will examine legal issues arising out of federal, state, and local transportation agencies' relations with Indian tribes. Government-to-government relations with Indian tribes touch a gamut of legal issues: contracting with tribes, Tribal Employment Rights Ordinances (TERO), funding issues, land-use impacts of tribal improvements on state highways, real property issues arising out of rights-of-way through Indian reservations, regional planning issues, compliance with environmental laws bumping up against Indian sovereign immunity, tort liability issues, etc. The federal government has a fairly well delineated relationship with Indian tribes based upon unique trust obligations owed to them as domestic dependent nations. States and local governments do not have the same relationship and yet must interact with tribal governments on a number of legal issues. The constitutional or statutory authority conferred upon these state and local jurisdictions, to the extent it exists, is a patchwork of laws that varies from jurisdiction to jurisdiction. In some cases there are huge gaps in the law relative to a state or local transportation agency's ability to conduct business with a tribe. Moreover, there is an overlay of federal law that may affect the rights and obligations of state and local agencies.

Two prior Legal Research Digests related to Indian legal issues are *Legal Issues Relating to the Acquisition of Right-of-Way and the Construction and Operations of Highways over Indian Lands*,<sup>1</sup> and *Application of Outdoor Advertising Controls on Indian Land*.<sup>2</sup> This report is designed to revise, update, and condense the material from these earlier digests.

## B. INDIANS, INDIAN TRIBES, INDIAN RESERVATIONS, AND INDIAN COUNTRY

### 1. Background

The U.S. Census Bureau estimates that as of July 1, 2003, the number of people who are American Indian and Alaska Native or American Indian and Alaska Native in combination with one or more other races is 4.4 million—1.5 percent of the total

U.S. population.<sup>3</sup> It estimates the number of American Indians and Alaska Natives alone or in combination with one or more races living on reservations or other trust lands to be 538,300 (175,200 reside on Navajo Nation Reservations and trust lands that span portions of Arizona, New Mexico, and Utah). According to the Bureau's July 1, 2003, estimates, California has an American Indian and Alaska native population of 683,900, followed by Oklahoma (394,800), and Arizona (327,500).<sup>4</sup> The Bureau of Indian Affairs (BIA) estimates that in 1990 almost 950,000 Indians lived on or adjacent to Federal Indian reservations.<sup>5</sup>

There are a total of 278 land areas in the United States administered as Federal Indian reservations (reservations, pueblos, rancherias, communities, etc.), located in 34 states. The Navajo Reservation is the largest, occupying 16 million acres of land in Arizona, New Mexico, and Utah.<sup>6</sup> Many of the smaller reservations are less than 1,000 acres, with the smallest less than 100 acres. A total of 56.2 million acres of land are held in trust by the United States for various Indian tribes and individuals. While much of this is reservation land, not all trust land is reservation land, and vice versa.<sup>7</sup> A map of the United States that shows the Indian lands can be found at <http://epa.gov/pmdesignations/biamap.htm>.

<sup>3</sup> News Release, U.S. Census Bureau, U.S. Department of Commerce, American Indian and Alaska Native Heritage Month: November 2004 (October 25, 2004), available at <http://www.census.gov/Press-Release/www/releases/archives/002950.html>.

<sup>4</sup> *Id.* Reporting American Indian tribal groups with more than 50,000 members as Apache, Cherokee, Chippewa, Choctaw, Lumbee, Navajo, Pueblo, and Sioux. Cherokee and Navajo are easily the largest, with populations of 234,000 and 204,000, respectively. Eskimo is the largest Alaska Native tribal group, with 37,000 members.

<sup>5</sup> BUREAU OF INDIAN AFFAIRS, AMERICAN INDIANS TODAY 9-10 (1991) (hereinafter AMERICAN INDIANS TODAY), available at <http://www.cwis.org/fwdp/Americas/biafaq91.htm>.

<sup>6</sup> Other large reservations include the San Carlos (1.8 million acres), Hopi (1.6 million acres), Tohono O'odham (1.2 million acres), and Fort Apache (1.7 million acres), all in Arizona; the Wind River in Wyoming (1.9 million acres); the Pine Ridge (1.8 million acres) and Cheyenne River (1.4 million), both in South Dakota; the Crow (1.5 million acres) in Montana; and the Yakima (1.1 million acres) in Washington.

<sup>7</sup> AMERICAN INDIANS TODAY, *supra* note 5 at 9.

<sup>1</sup> RICHARD O. JONES (NCHRP Legal Research Digest No. 30, 1994).

<sup>2</sup> RICHARD O. JONES (NCHRP Legal Research Digest No. 41, 1998).

## 2. Who Are Indians?<sup>8</sup>

The term "Indian," as applied to the inhabitants of the Americas, is a misnomer stemming from Columbus's belief that he had reached India. The term remains in use to refer to those inhabitants and their descendants. It was institutionalized by being placed in the U.S. Constitution.<sup>9</sup> The term carries both racial and legal implications, with the two not necessarily being conjoined. According to Cohen:

The term "Indian" may be used in an ethnological or in a legal sense. If a person is three-fourths Caucasian and one-fourth Indian, that person would ordinarily not be considered an Indian for ethnological purposes. Yet legally such a person may be an Indian. Racial composition is not always dispositive in determining who are Indians for purposes of Indian law. In dealing with Indians, the federal government is dealing with members or descendants of political entities, that is, Indian tribes, not with persons of a particular race.<sup>10</sup> (citations omitted)

There is no single federal or tribal criterion establishing a person's identity as an Indian. Government agencies use differing criteria to determine who is an Indian eligible to participate in their programs. Tribes also vary their criteria for membership.<sup>11</sup> For example, the Indian Reorganization Act of 1934 (IRA),<sup>12</sup> used this definition:

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal people of Alaska shall be considered Indians.<sup>13</sup>

Courts also have adopted various definitions of the term "Indian" that could be used by the courts.<sup>14</sup> The diversity of the use and varying definitions of

<sup>8</sup> See generally WILLIAM C. CANBY, JR. *AMERICAN INDIAN LAW IN A NUT SHELL* 3-10 (4th ed., West Group 2004) (1998); FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 19-26 (The Michie Company 1982) (1941); ROBERT N. CLINTON, NELL JESSUP NEWTON, MONORE EDWIN PRICE, *AMERICAN INDIAN LAW: CASES AND MATERIALS* (1991); STEPHAN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE BASIC ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* (1992).

<sup>9</sup> Lawrence R. Baca, *The Pinta, the Nina, the Santa Maria...and Now Voyager II: An Introduction to Federal Indian Law*, 36 FED. B. NEWS J. No. 6, at 421 (1989).

<sup>10</sup> COHEN, *supra* note 8, at 19.

<sup>11</sup> AMERICAN INDIANS TODAY, *supra* note 5, at 13.

<sup>12</sup> 25 U.S.C. §§ 461-79 (1982).

<sup>13</sup> See 25 U.S.C. § 479.

<sup>14</sup> Baca, *supra* note 9, at 421.

the term "Indian" require the practitioner to specifically determine at the outset the purpose for which identification is relevant. Perhaps the most important definition is the one used in the Indian Self-Determination and Education Assistance Act (ISDEAA),<sup>15</sup> which provides that "Indian" means a person who is a member of an Indian tribe."

## 3. What Is an Indian Tribe?<sup>16</sup>

Originally, an Indian tribe was a body of people bound together by blood ties who were socially, politically, and religiously organized; who lived together in a defined territory; and who spoke a common language or dialect.<sup>17</sup> Even though the Constitution, Article I, Section 8, Clause 3, and many federal statutes and regulations use the term, there is today no single federal statute that defines "Indian Tribe" for all purposes.<sup>18</sup> Probably the most important definition is that provided in Section 450b(e) of the ISDEAA:

(e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C.S. §§ 1601 et seq.] which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

While a group of Indians may consider itself to be a "tribe," that group must meet the requirements for recognition established by the Secretary of the Interior to presently qualify for federal benefits afforded "Indian tribes." Such recognition by the Secretary of the Interior is given substantial, perhaps complete, deference by courts.<sup>19</sup> The govern-

<sup>15</sup> 25 U.S.C.S. § 450 *et seq.*, 450b(d).

<sup>16</sup> See generally Weatherhead, *What Is an "Indian Tribe"—The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1 (1980); COHEN, *supra* note 8, at 3-4; AMERICAN INDIAN LAW DESKBOOK 28-34 (1993) (hereinafter DESKBOOK); CLINTON et al., *supra* note 8, at 79-83; PEVAR, *supra* note 8, at 14-15.

<sup>17</sup> AMERICAN INDIANS TODAY, *supra* note 5, at 13; See also *Montoya v. United States*, 180 U.S. 261, 266 (1901), where the Court said: "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."

<sup>18</sup> COHEN, *supra* note 8, at 3.

<sup>19</sup> DESKBOOK, *supra* note 16, at 32, n.19; but see *Koke v. Little Shell Tribe of Chippewa Indians of Mont.*, 2003 Mt. 121, 133, 315 Mont. 510, 513, 68 P.3d 814, 816 (2003): "[t]ribes may still be recognized as such under common law. The Supreme Court established criteria for common law recognition of a tribe in *Montoya v. United States*, 180 U.S. 261, 21 S. Ct. 358, 359, 45 L. Ed. 521, 36 Ct. Cl. 577

ment's recognition or failure to recognize a tribe, while a political decision, is still subject to judicial review for compliance with law and regulation or due process claims.<sup>20</sup> In 1978, the U.S. Department of the Interior (DOI) adopted regulations<sup>21</sup> establishing a procedure for tribal recognition. The extensive elements mandatorily required to be stated in a petition for recognition are set out in 25 C.F.R. § 83.7.

As late as 1977, out of 400 tribes then claiming to exist, less than 300 had been officially recognized by the Secretary of the Interior.<sup>22</sup> By 1991, there were 510 federally recognized tribes in the United States, including about 200 village groups in Alaska.<sup>23</sup> In 2002, the BIA listed 562 recognized tribes, which included some 225 Alaska Native entities.<sup>24</sup> The latest BIA listing, published on March 21, 2005,<sup>25</sup> shows additional increases.<sup>26</sup>

#### 4. What Are Meant by the Terms "Indian Country" and "Indian Reservations"?<sup>27</sup>

##### a. "Indian Reservation"

Although the term "Indian reservation" has been historically used, and appears in scores of provisions of the U.S.C., particularly Title 25, "Indians," there is no single federal statute that defines it for all purposes. However, the term does have an accepted meaning in law. Prior to 1850, the definition of the term "Indian reservation" was a "parcel of land set aside by the federal government for Indian use."<sup>28</sup> The modern meaning, since 1850, has been

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(1901); first, members must be of the same or a similar race; second, they must be united in a community; third, they must exist under one leadership or government; and fourth, they must inhabit a particular, though sometimes ill-defined territory." Little Shell Tribe of Chippewa Indians, 68 P.3d at 816–17.

<sup>20</sup> CANBY, *supra* note 8, at 5–6, citing *Miami Nation of Indians v. United States Dep't of the Interior*, 255 F.3d 342, 347–49 (7th Cir. 2001); *Greene v. Babbitt*, 64 F.3d 1266, 1274–75 (9th Cir. 1995).

<sup>21</sup> 25 C.F.R. pt. 83.

<sup>22</sup> AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 461 (1977).

<sup>23</sup> AMERICAN INDIANS TODAY, *supra* note 5, at 9.

<sup>24</sup> 67 Fed. Reg. 46328 (July 12, 2002).

<sup>25</sup> The list is published pursuant to 25 U.S.C. § 479a-1.

<sup>26</sup> 70 Fed. Reg. 13518 (March 21, 2005).

<sup>27</sup> See Pommersheim, *The Reservation as Place: A South Dakota Essay*, 36 S.D. L. REV. 246 (1989); COHEN, *supra* note 8, at 27–46; CLINTON et al., *supra* note 8, at 39–41; DESKBOOK, *supra* note 16, at 14–15; PEVAR, *supra* note 8, at 16–19.

<sup>28</sup> *Sac and Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1266 (10th Cir. 2001).

"land set aside under federal protection for the residence of tribal Indians."<sup>29</sup> For purposes of Title 23, the term "Indian reservation road" includes a public road on or providing access to an Indian reservation, Indian trust land, or restricted Indian land.<sup>30</sup>

##### b. "Indian Country"

Federal policy from the beginning has recognized and protected separate status for tribal Indians in their own territory.<sup>31</sup> After the Continental Congress declared its jurisdiction over Indian tribes on July 12, 1775,<sup>32</sup> the first Indian treaty guaranteed the Delaware Indians "all their territorial rights in the fullest and most ample manner..."<sup>33</sup> In describing the territory controlled by Indians, the Congress first used the term "Indian country."<sup>34</sup> Thereafter, the term was used in various criminal statutes relating to Indians, but usually was not defined.<sup>35</sup> The U.S. Supreme Court, in supplying a definition, developed a recognized common law test or definition.<sup>36</sup> This common law definition was adopted by Congress in its 1948 revision of Title 18, U.S.C., the Major Crimes Act. The Reviser's Notes

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<sup>29</sup> *Id.*

<sup>30</sup> 23 U.S.C. § 101 (2001).

<sup>31</sup> COHEN, *supra* note 8, at 28.

<sup>32</sup> 2 J. CONTINENTAL CONG. 175 (1775). See also U.S. CONST. art. 1, § 8, cl. 3, giving Congress "power to regulate commerce with the Indian tribes."

<sup>33</sup> "Treaty with the Delawares," Sept. 17, 1778, 7 Stat. 13.

<sup>34</sup> "The Trade and Intercourse Act of 1790," 1 CONG. ch. 33, 1 Stat. 137.

<sup>35</sup> See *United States v. John*, 437 U.S. 634, 649 n.18, 98 S. Ct. 2541, 2549, 57 L. Ed. 2d 489, 500, where the Court notes that

Throughout most of the 19th century, apparently the only statutory definition [of "Indian Country"] was that in § 1 of the Act of June 30, 1834, 4 Stat. 729.... This Court was left with little choice but to continue to apply the principles established under earlier statutory language and to develop them according to changing conditions. See *e.g.*, *Donnelly v. United States*, 228 US 243 (1913).

<sup>36</sup> *Id.* at 647–49 nn. 16 and 18 (1978). For example, see *United States v. McGowan*, 302 U.S. 535, 58 S. Ct. 286, 82 L. Ed. 410 (1937), involving the Reno Indian Colony, which was situated on 28.38 acres of land owned by the United States and purchased to provide lands for needy Indians scattered throughout the State of Nevada, and established as a permanent settlement. *Held*: "[I]t is immaterial whether Congress designates a settlement as a 'reservation' or 'colony,' ...it is not reasonably possible to draw any distinction between this Indian 'colony' and 'Indian country' [within the meaning of 25 U.S.C. § 247, relating to taking intoxicants into 'Indian country.']"

indicate that this definition was based on several decisions of the Supreme Court interpreting the term as it was used in various criminal statutes relating to Indians.<sup>37</sup> In revising the Act, Congress deleted the express reference to “reservation” in favor of the use of the term “Indian country.” The term is defined in 18 U.S.C. § 1151:<sup>38</sup>

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country,” as used in this chapter [18 U.S.C. 1151 *et seq.*], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

In *Indian Country, U.S.A. v. Oklahoma Tax Comm’n*,<sup>39</sup> denying Oklahoma the right to enforce State bingo regulations and tax bingo sales in Indian country, the Tenth Circuit Court noted that “[a]lthough section 1151 by its terms defines Indian country for purposes of determining federal criminal jurisdiction, the classification generally applies to questions of both civil and criminal jurisdiction. See *Cabazon*, 107 S. Ct. At 1087 n. 5.” Thus, whether a court is applying 18 U.S.C. § 1151 in a criminal case, or using that section as a common law definition of “Indian country” in a civil case, it simply refers to those lands that Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments.<sup>40</sup> In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,<sup>41</sup> denying the right of Oklahoma to collect a tax on tribal cigarette sales to Indians on trust land not formally designated a “reservation,” Chief Justice Rehnquist noted that

In *United States v. John*, 437 U.S. 634 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated “trust land” or “reservation.” Rather, we ask whether the area has been “validly set apart for the use of the Indians as such, under the superintendence of the Government.” *Id.*, at 648-649; see also *United States v. McGowan*, 302 U.S. 535, 539 (1938).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 647 n.16.

<sup>39</sup> 829 F.2d 967, 973 (10th Cir. 1987).

<sup>40</sup> *Id.*

<sup>41</sup> 498 U.S. 505, 511, 111 S. Ct. 905, 910, 112 L. Ed. 2d 1112, 1121 (1991).

The term “Indian country” has become the controlling term of art for jurisdictional issues in Indian law. Even though 18 U.S.C. § 1151 *et seq.* deals primarily with crimes and criminal procedures, extending the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States,<sup>42</sup> the U.S. Supreme Court has held that the definition given by § 1151 also applies to state *civil* jurisdiction:<sup>43</sup> “[T]he principle that section 1151 defines Indian country for both civil and criminal jurisdiction purposes is firmly established. Any suggestion to the contrary...is simply erroneous.”<sup>44</sup> The Court has also held that a tribe may exercise civil authority over Indian country as defined by 18 U.S.C. § 1151.<sup>45</sup> In addition, the Supreme Court has held that land held in trust by the United States for a tribe is Indian country subject to tribal control whether or not that land has reservation status.<sup>46</sup>

## C. HISTORICAL BACKGROUND OF TRIBAL/INDIAN STATUS

### 1. Early History: Colonial and Formative Era

At the outset of the European settlement of North America, the continent was occupied by more than 400 independent Indian nations, with an estimated population of nearly 1 million.<sup>47</sup> Whether out of fear, respect, or both, agreements between the colonists and the tribes reflected treatment of each tribe as a sovereign nation, recognizing tribal ownership of the lands Indians occupied. Thus, the British colonists were generally prudent to pur-

<sup>42</sup> 81 U.S.C. § 1152: “Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian country.”

<sup>43</sup> *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996), *citing*: *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2, 95 S. Ct. 1082, 1084, 43 L. Ed. 2d 300, 304 (1975). (Mustang was a civil case that considered the issue of whether the Cheyenne-Arapaho Tribes of Oklahoma may impose a severance tax on oil and gas production on allotted lands, holding that the definition of Indian Country in 18 U.S.C. § 1151 applied, supporting jurisdiction in the tribe.)

<sup>44</sup> *Id.* at 1385, quoting *Pittsburgh & Midway Coal Mining v. Watchman*, 52 F.3d 1531, n.10 (10th Cir. 1995).

<sup>45</sup> *DeCoteau*, 420 U.S. at 427, n.2.

<sup>46</sup> *Okl. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511, 111 S. Ct. 905, 910, 112 L. Ed. 2d 1112, 1121 (1991).

<sup>47</sup> PEVAR, *supra* note 8, at 1–2.

chase Indian lands with consent of the tribe.<sup>48</sup> During this colonization period, the English Crown also treated the Indian tribes as foreign sovereigns and provided protection of the tribes from any encroachment by the colonists. For example, following the end of the French and Indian War (1754–1763) and the defeat of France by England, King George III, by royal proclamation, prohibited settlement or encroachment on Indian lands west of the Appalachian Mountains. One of the disputes arising from this proclamation resulted in the first U.S. Supreme Court decision relating to Indian law.<sup>49</sup>

The Continental Congress declared its jurisdiction over Indian tribes on July 12, 1775.<sup>50</sup> The Delaware Treaty of Fort Pitt<sup>51</sup> was the only treaty ratified by the Continental Congress.<sup>52</sup> This would be the first of 367 ratified Indian treaties between 1778 and 1868, when the final treaty was signed with the Nez Percés.<sup>53</sup> The Fort Pitt Treaty guaranteed the Delaware Indians “all their territorial rights in the fullest and most ample manner...”<sup>54</sup> Thus, federal policy from the beginning has recognized and protected separate status for tribal Indians in their own territory.<sup>55</sup>

Following the Revolutionary War, Congress continued to make strong efforts to resist state/citizen aggression towards Indians and Indian lands to avoid Indian retaliation. The Northwest Ordinance of 1787<sup>56</sup> clearly reflects this effort by declaring: “The utmost good faith shall always be observed towards Indians; their land and property shall never be taken from them without their consent.”<sup>57</sup> The establishment of central government power over Indian affairs by the Continental Congress in 1775 was continued in the new U.S. Constitution. Article 1, Section 8, Clause 3, provides that “Congress shall have power...to regulate commerce with foreign Nations, among the several States and with the Indian Tribes.” The President was authorized to make treaties with Indian tribes, with Senate consent, by Article II, Section 2, Clause 2. Con-

<sup>48</sup> BRYON H. WILDENTHAL, *NATIVE AMERICAN SOVEREIGNTY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS*, 21 (Charles Zelden ed., 2002) (hereinafter WILDENTHAL).

<sup>49</sup> *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). See WILDENTHAL, *supra* note 48, at 21.

<sup>50</sup> 2 J. CONTINENTAL Cong. 175 (1775). See also U.S. CONST. art. 1, § 8, cl. 3, giving Congress “power to regulate commerce with Indian tribes.”

<sup>51</sup> 7 Stat. 13-15 (Sept. 17, 1778).

<sup>52</sup> *Id.* at 31–33.

<sup>53</sup> *Id.* at 1.

<sup>54</sup> 7 Stat. 13 (1778).

<sup>55</sup> COHEN, *supra* note 8, at 28.

<sup>56</sup> 1 Stat. 50 (Aug. 7, 1789).

<sup>57</sup> PEVAR, *supra* note 8, at 3.

gress, in passing a series of Trade and Intercourse Acts beginning in 1790, began a statutory pattern designed to separate Indians from non-Indians under federal control and regulation. For example, Congress required persons trading with Indians to have a federal license, authorized criminal prosecution of non-Indians for crimes against Indians, and prohibited acquisition of Indian land without federal government consent.

Gold was discovered on Georgia’s Cherokee lands in the late 1820s. This heightened the demand for white access to the Cherokee land and increased illegal entry by whites, leading to conflict and violence.<sup>58</sup> The State of Georgia reacted by passing several laws “purporting to abolish the Cherokee government, nullify all Cherokee laws, and extend Georgia state law over the Cherokee Nation.”<sup>59</sup> It would be in this climate of hostility that the Cherokees would turn to the U.S. Supreme Court for help, utilizing the able assistance of William Wirt, former Attorney General under Presidents Monroe and Adams.

## 2. Foundation Principles Established by Early Supreme Court Cases

### a. Chief Justice Marshall’s Indian Trilogy: Federal Plenary Power

Three opinions by Chief Justice John Marshall, known as the Marshall trilogy, established the foundation principles of American Indian law. The primary principle is federal plenary power in Indian affairs. In the first case, *Johnson v. McIntosh*,<sup>60</sup> the Court held that the Indians had only a right of possession, with legal title and the power to transfer ownership resting only in the federal government. In the second case, *Cherokee Nation v. Georgia*,<sup>61</sup> the Court clarified the status of Indian tribes within our legal framework as being neither states nor foreign nations, but “domestic dependent nations...in a state of pupillage.” In the third case, *Worcester v. Georgia*,<sup>62</sup> the Court concluded that the states have no power in Indian territory and that the Indian nations are distinct political communities, having territorial boundaries within which their authority is exclusive, subject to federal plenary power.

(1) *Johnson v. McIntosh* was the first decision of the Supreme Court determining ownership of land occupied by Indians and the power of Indians to

<sup>58</sup> Anchor-Books Editions, WILDENTHAL, *supra* note 48, at 39.

<sup>59</sup> *Id.*

<sup>60</sup> 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823).

<sup>61</sup> 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831).

<sup>62</sup> 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832).

convey such land. The plaintiffs claimed the land under 1773 and 1775 grants by chiefs of the Illinois and the Piankeshaw Indian Nations. The grants purported to convey the soil as well as the right of dominion to the grantees. The defendant claimed ownership under a grant from the United States. The court held the Indian conveyances invalid. Chief Justice Marshall's opinion found that the United States government became owner of lands under the European doctrine of discovery and conquest:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.... So, too, with respect to the concomitant principle, that Indian inhabitants are to be considered merely as occupants, to be protected of their lands, but to be deemed incapable of transferring the absolute title to others.... Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right....<sup>63</sup>

(2) *Cherokee Nation v. Georgia* resulted from an original bill brought in the U.S. Supreme Court by the Cherokee Nation seeking an injunction to restrain the State of Georgia from executing certain state laws, which it alleged "go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force."<sup>64</sup> The Cherokee Nation proceeded as a foreign state against the State of Georgia under Article III, Section 2, of the Constitution, which gives the court jurisdiction in controversies between a state of the United States and a foreign state. Chief Justice Marshall delivered the path-marking opinion for the majority, and had no difficulty in concluding that

[t]he acts of our government plainly recognize the Cherokee Nation as a State, and the courts are bound by those acts...[but] the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution, and cannot maintain an action in the courts of the United States.<sup>65</sup>

As to the legal status of Indian tribes, Chief Justice Marshall provided the following language, which has been seized upon in developing the "trust responsibility" of the federal government:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestionable right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may be doubted whether those tribes...can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.... Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.<sup>66</sup>

(3) *Worcester v. Georgia*, considered the more important of the Cherokee cases, produced Chief Justice Marshall's opinion that is considered the foundation of federal jurisdictional law over Indian affairs. The case was heard on a writ of error issued to certain Georgia judges to review the conviction of Worcester and others with the offense of "residing within the limits of the Cherokee nation without a license" and "without having taken the oath to support and defend the constitution and laws of the state of Georgia." Readily accepting jurisdiction, Chief Justice Marshall identified the issue as "whether the act of the legislature of Georgia, under which [Worcester] has been prosecuted and condemned, be consistent with, or repugnant to, the Constitution, laws and treaties of the United States."<sup>67</sup> The opinion reviews the history of Indian affairs under the English Crown, finding "no example...of any attempt on the part of the crown to interfere with the internal affairs of the Indians." It goes on to review practices under the Continental Congress, finding that it followed the Crown's model in its Indian treaties. Chief Justice Marshall then reviews in detail the 1785 Treaty of Hopewell and the 1791 Treaty of Holston between the United States and the Cherokee Nation. His opinion concludes:

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. \* \* \* The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States. The act of the State of Georgia under

<sup>63</sup> *McIntosh*, 21 U.S. (8 Wheat.), at 586, 587, 603.

<sup>64</sup> *Cherokee Nation*, 30 U.S. (5 Pet.), at 15.

<sup>65</sup> *Id.* at 16, 20.

<sup>66</sup> *Id.* at 17.

<sup>67</sup> *Worcester*, 31 U.S. (6 Pet.) at 541-42.

which the plaintiff in error was prosecuted is consequently void, and the judgment a nullity....<sup>68</sup>

### *b. Enduring Principles of Chief Justice Marshall's Indian Trilogy*

Besides establishing federal plenary power in Indian affairs, these three cases also established the following enduring principles.<sup>69</sup>

1. Indian tribes, because of their original political/territorial status, retain incidents of pre-existing sovereignty;
2. This sovereignty may be diminished or dissolved by the United States, but not by the states;
3. Because of this limited sovereignty and the tribe's dependence on the United States, the government has a trust responsibility relative to Indians and their lands.

### *c. Court Emphasis on Trust Responsibility*

In applying these enduring principles in the intervening years, the Court has continually emphasized "the distinctive obligation of trust incumbent upon the Government in its dealing with these dependent and sometime exploited people." (*Seminole Nation v. United States*).<sup>70</sup> The Court went on to express this "obligation of trust":

In carrying out its treaty obligations with Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.<sup>71</sup>

Thus, the federal government has long been recognized as holding, along with its plenary power to regulate Indian affairs, a trust status towards Indians—a status accompanied by fiduciary obligations. While there is legally nothing to prevent Congress from disregarding its trust obligations, the courts, by interpreting ambiguous statutes in favor of Indians, attribute to Congress an intent to exercise its plenary power in the manner most consistent with the Nation's trust obligations.<sup>72</sup>

<sup>68</sup> *Id.* at 557, 561.

<sup>69</sup> DESKBOOK, *supra* note 16, at 4.

<sup>70</sup> 316 U.S. 286, 296, 62 S. Ct. 1049, 1054, 86 L. Ed. 1480, 1490 (1942).

<sup>71</sup> *Id.* at 296–97.

<sup>72</sup> *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (1975), citing *Squire v. Capoman*, 351 U.S.

## **3. Federal Policy Regarding Indians and Indian Tribes**

### *a. Introduction*

Indian law is best understood in historical perspective because it reflects national Indian policy that has been constantly changing, never consistent. Federal Indian policy has shifted "from regarding tribes as sovereign equals, to relocating tribes, to attempts to exterminate or assimilate them, and currently, to encouraging tribal self-determination."<sup>73</sup> Understanding the history of these shifting policies is important to the student of American Indian law because there are lasting effects from each policy that still linger today. Given the importance of these shifting views, we begin the historical perspective with the removal policy.

### *b. Removal Policy (1830 to 1861)*<sup>74</sup>

The period between 1830 and 1861 is known as the "Removal Period," marking a time when, because of increasing pressure from the states, the federal government began to force the eastern tribes to cede their land by treaty in exchange for reserved land in the west. Several treaties in the 1850s "reserved" land for tribal occupancy.<sup>75</sup> According to Prucha:

In the late 1820s and the 1830s a full-scale debate on Indian treaties renewed the criticisms of treaty making that Andrew Jackson had brought forth a decade earlier. There was a powerful onslaught against the treaties and the Indian nationhood on which they rested and an equally vigorous and eloquent defense of both, set in a framework of preservation of national faith and honor. The debate centered on the Cherokees in Georgia, but it had broader applicability.<sup>76</sup>

Under Jackson, elected president in 1828, the removal policy ripened into official action. Jackson's first message to Congress sought federal legislation to authorize removal of the Cherokees and the other four "Civilized Tribes" (the Choctaw,

1, 7-8, 76 S. Ct. 611, 100 L. Ed. 883 (1956).

<sup>73</sup> PEVAR, *supra* note 8, at 2.

<sup>74</sup> See generally JOHN EHLE, *TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION* 170 (1988) (hereinafter EHLE); FRANCIS P. PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 156–207 (1944) (hereinafter PRUCHA); ROBERT V. REMINI, *ANDREW JACKSON AND HIS INDIAN WARS* 226–53 (2001); WILDENTHAL, *supra* note 48, at 39–40.

<sup>75</sup> CLINTON ET AL., *supra* note 8, at 146, citing as examples: Treaty with the Kansas, Oct. 5, 1859, 12 Stat. 1111; Treaty with the Winnebago, Apr. 15, 1859, 12 Stat. 1101; Treaty with the Menominee, May 12, 1854, 10 Stat. 1064.

<sup>76</sup> PRUCHA, *supra* note 74, at 156.



Chickasaw, Creek, and Seminole) to the west.<sup>77</sup> In response, following bitter debate, Congress passed the Indian Removal Act, and President Jackson signed it on May 28, 1830 (4 Stat. 411), authorizing the President to negotiate with the eastern tribes for relocation. The act expressly provided for grants of federal land west of the Mississippi for any Indians who “may choose to exchange the lands where they now reside, to remove there” (Oklahoma “Indian Territory”).<sup>78</sup>

The program of voluntary land exchange and removal became one of coercion, with journeys of great hardship and imposed suffering, such as that of the Trail of Tears experienced by the Five Civilized Tribes during their movement from the Southeast to what is now Oklahoma.<sup>79</sup> Prucha notes that

The southern Indians had been forced into treaties they did not want, treaties whose validity they denied but which were adamantly enforced. The hardships of removal were extreme. Yet these Indian nations were not destroyed.... [S]upporters in Congress and the decisions of John Marshall in the Cherokee cases provided a theoretical basis for the continuing political autonomy of the tribes and their rights to land.<sup>80</sup>

According to Pevar:

Between 1832 and 1843 most of the eastern tribes either had their lands reduced in size or were coerced into moving to the West. Many tribes, at first given “permanent” reservations in Arkansas, Kansas, Iowa, Illinois, Missouri, and Wisconsin, were forced to move even farther west to the Oklahoma Indian Territory. Indian treaties were broken by the government almost as soon as they were made.<sup>81</sup>

### c. Reservation Policy (1861 to 1887)

The period 1861 to 1887 is known as the “Reservation Period,” when Congress recognized the treaty “reserved” lands as permanent areas under tribal jurisdiction within the states (“reservations”). This was first done in the Enabling Act for the Kansas Territory.<sup>82</sup> Other such Enabling Acts or state constitutions recognized these “reservations” and disavowed state jurisdiction.<sup>83</sup> The move to

make the reserved lands permanent helped to give stability to tribal territorial boundaries and honor to the treaties. During the treaty-making period (1789–1871), the overriding goal of the United States was to obtain aboriginal Indian lands, especially those being encircled by non-Indian settlements.<sup>84</sup> During this treaty-making period, “aboriginal title” was virtually extinguished, usually by treaties reserving different lands for exclusive tribal occupancy, and reservations were established by statute,<sup>85</sup> agreements, and Executive Orders.<sup>86</sup> Eventually, the reservations “came to be viewed...as instruments for ‘civilizing’ the Indians,” with federally appointed Indian agents placed to insure Indian adaptation to non-Indian ways.<sup>87</sup>

### d. Allotment and Assimilation Policy (1887 to 1934)

Although tribal land is held in common for the benefit of all members of the tribe, during a long

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This disclaimer, however, is not to be interpreted as a total disclaimer of jurisdiction over the actions of Indians. These states are:

1. Alaska: ALASKA CONST. art. 12, § 12; Enabling Act, 72 Stat. 339, § 4, as amended, 73 Stat. 141.
2. Arizona: ARIZ. CONST. art 20; Enabling Act, 36 Stat. 568, § 19.
3. Idaho: IDAHO CONST. art 21, § 19; Enabling Act, 26 Stat. 215.
4. Montana: MONT. CONST. ord. I, § 2; Enabling Act, 25 Stat. 676, §§ 4 and 10; Pres. Procl. 26 Stat. 1551.
5. New Mexico: N. M. CONST. art 21, §§ 2 and 10; Enabling Act, 36 Stat. 557; Joint Res., 37 Stat. 39; Pres. Procl., 37 Stat. 1723.
6. North Dakota: N. D. CONST. art. 16; Enabling Act, 25 Stat. 676, §§ 4 and 10; Pres. Procl., 26 Stat. 1548.
7. Oklahoma: OKLA. CONST. art. I, § 3; Enabling Act, 34 Stat. 267, §§ 1, 2, and 3; Pres. Procl., 35 Stat. 2160.
8. South Dakota: S. D. CONST. art. 22, § 2; Enabling Act, 25 Stat. 676, §§ 4 and 10; Pres. Procl., 26 Stat. 1549.
9. Utah: UTAH CONST. art. 3; Enabling Act, 28 Stat. 107, § 3; Pres. Procl., 29 Stat. 876.
10. Washington: WASH. CONST. art. 26; Enabling Act, 25 Stat. 676; Pres. Procl., 26 Stat. 1552.
11. Wyoming: WYO. CONST. art. 21, § 26; Enabling Act, 26 Stat. 222.

<sup>77</sup> WILDENTHAL, *supra* note 48, at 38.

<sup>78</sup> *Id.* at 40.

<sup>79</sup> CANBY, *supra* note 8, at 18.

<sup>80</sup> PRUCHA, *supra* note 74, at 182.

<sup>81</sup> PEVAR, *supra* note 8, at 4.

<sup>82</sup> *Id.* at 147, citing the Act of Jan. 29, 1861, ch. 20, § 1, 12 Stat. 127; see also Robert H. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 960–61 (1975).

<sup>83</sup> Eleven states initially disclaimed jurisdiction over Indian lands, including Indian reservation land, in their state constitutions at the time they received statehood.

<sup>84</sup> COHEN, *supra* note 8, at 66.

<sup>85</sup> DESKBOOK, *supra* note 16, at 45–46.

<sup>86</sup> COHEN, *supra* note 8, at 28.

<sup>87</sup> CANBY, *supra* note 8, at 19, where he also notes:

The appointment of Indian agents came to be heavily influenced by organized religions, and when reservation schools were first set up in 1865, they too were directed by religious organizations with a goal of “Christianizing” the Indians. In 1878, off-reservation boarding schools were established to permit education of Indian children away from their tribal environments.

period of our history, 1854 to 1934, the United States followed a policy of allotting tribal land to individual Indians.<sup>88</sup> This policy was intended to promote assimilation of Indians into American society.<sup>89</sup> There were those, sympathetic to the plight of Indians living in hopeless poverty, who sincerely believed this could be remedied by granting individual ownership of land, which would thereby develop a “middle class” of Indian farmers.<sup>90</sup> Under this policy, the United States allotted millions of acres of tribal lands on certain Indian reservations.<sup>91</sup> The passage of the General Allotment Act of 1887, commonly referred to as the Dawes Act, constituted a formalization of this policy, and is considered to be “the most important and, to the tribes, the most disastrous piece of Indian legislation in United States history.”<sup>92</sup>

The Dawes Act provided for the mandatory allotment of reservation lands to individual Indians, with surplus lands made available to non-Indians by fee patent. It also provided that allottees became U.S. citizens and would be subject to state criminal and civil law.<sup>93</sup> In 1924, Congress conferred citizenship upon all Indians born within the United States (8 U.S.C. § 1401(b)). Although Section 5 of the Act provided that title to allotments were to be held in trust by the United States for 25 years—longer if determined by the President—the majority of Indian lands passed from native ownership under the allotment policy.<sup>94</sup>

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<sup>88</sup> See generally DELOS S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS, READJUSTMENT OF INDIAN AFFAIRS: HEARINGS ON H.R. 7902 BEFORE THE HOUSE COMM. ON INDIAN AFFAIRS, 73d CONG., 2d SESS. 428–89* (Francis P. Prucha, ed., Univ. of Oklahoma Press, 1973) (1934) (History of the Allotment Policy) (hereinafter D. OTIS).

<sup>89</sup> See *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1, 96 S. Ct. 1793, 1794, n.1, 48 L. Ed. 2d 274 (1976). Cited in *S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir. 1982).

<sup>90</sup> CANBY, *supra* note 8, at 21. See also *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253–154, 112 S. Ct. 683, 685–86, 116 L. Ed. 2d 687, 695 (1992); *Shangreau v. Babbitt*, 68 F.3d 208 (8th Cir. 1995).

<sup>91</sup> President Roosevelt described the allotment process in his message to Congress in 1906 as “a mighty pulverizing engine to break up the tribal mass.” 35 CONG. REC. 90 (1906).

<sup>92</sup> CANBY, *supra* note 8, at 21.

<sup>93</sup> *Id.* at 22.

<sup>94</sup> In 1934, Congress enacted the Indian Reorganization Act, ch. 576, 48 Stat. 984 (codified as amended 25 U.S.C.A. §§ 461-479 (2005)), which ended the allotment policy.

The Dawes Act was challenged by the confederated tribes of the Kiowa, Comanche, and Apache Indians, residing in the Territory of Oklahoma, alleging violation of their treaty rights. The resulting 1903 U.S. Supreme Court decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553, upholding the allotment policies of Congress, according to one legal scholar, “is probably the most infamous and harshly criticized Indian law decision in the history of U.S. courts.”<sup>95</sup> A unanimous Court, in rejecting the challenge, held that

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of government policy, particularly if consistent with perfect good faith towards the Indians. \* \* \* We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises.<sup>96</sup>

According to Pevar:

The effect of the General Allotment Act on Indians was catastrophic. Most Indians did not want to abandon their communal society and adopt the way of life of a farmer. Further, much of the tribal land was unsuitable for small scale agriculture. Thousands of impoverished Indians sold their parcels of land to white settlers or lost their land in foreclosures when they were unable to pay state real estate taxes. Moreover, tribal government was seriously disrupted by the sudden presence of so many non-Indians on the reservation and by the huge decrease in the tribe’s land base.<sup>97</sup>

Out of approximately 156 million acres of Indian lands in 1881, less than 105 million remained by 1890, and 78 million by 1900.<sup>98</sup> By 1934 approximately 90 million acres passed from tribal lands status, through individual Indian allotment status, to non-Indian fee ownership.<sup>99</sup> Although the allotment policy ended with passage of the IRA in 1934,<sup>100</sup> it resulted in reservations becoming checkerboarded between tribal lands, allotted individual Indian lands held in federal trust, and patented

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<sup>95</sup> WILDENTHAL, *supra* note 48, at 53.

<sup>96</sup> 187 U.S. 553, 566, 568, 23 S. Ct. 216, 221, 222, 17 L. Ed. 299, 306–07 (1903).

<sup>97</sup> PEVAR, *supra* note 8, at 5.

<sup>98</sup> D. OTIS, *supra* note 89, at 87.

<sup>99</sup> *Id.* at 17.

<sup>100</sup> 48 Stat. 984, 73 Pub. L. No. 383 (1934).

lands, owned in fee by either Indians or non-Indians, but no longer in trust status. This situation exists today within the exterior boundaries of many reservations. On some reservations there is a high percentage of land owned and occupied by non-Indians, although 140 reservations have entirely tribally owned land.<sup>101</sup> This checkerboard, mixed ownership situation on many reservations significantly complicates the process of acquiring lands within those reservations because the federal requirements differ as to each type of land holding.

#### e. Indian Reorganization Policy (1934 to 1953)

The 1930s saw an abrupt policy change in the government's handling of Indian affairs, due in large measure to recognition that the Dawes Act had been a failure. A major vehicle for change was a Brookings Institution 2-year study by Lewis Meriam that produced a report entitled, *The Problem of Indian Administration* (commonly called the "Meriam Report"), which was released in 1928, documenting the failure of the allotment policy.<sup>102</sup> John Collier, who had long been actively involved in the Indian reform movement, was appointed as Commissioner of Indian Affairs by President Roosevelt in 1933,<sup>103</sup> and "aggressively promoted a new policy in Indian affairs that revived tribalism and Indian cultures."<sup>104</sup> Congress, in passing the IRA in 1934 (Wheeler-Howard Act),<sup>105</sup> adopted much of his program, including the strengthening and modernizing of tribal governments.<sup>106</sup> Canby states that "[t]he Indian Reorganization Act was based on the assumption, quite contrary to that of the Allotment Act, that the tribes not only would be in existence for an indefinite period, but that they *should* be."<sup>107</sup>

The purpose of the Act was "to rehabilitate the Indian's economic life and give him a chance to develop the initiative destroyed by a century of oppression and paternalism."<sup>108</sup> Major features of the Act included provisions for

- Ending the allotment policy.
- Holding Indian allotments in trust indefinitely.
- Returning to tribes the surplus land not already sold.
- Authorizing the Interior Secretary to acquire lands for tribes.
- Authorizing the Interior Secretary to create new reservations.
- Authorizing tribes to organize as federally chartered corporations and adopt constitutions (with approval of the Secretary of Interior and subject to ratification by a majority of tribal members).
- Requiring the Secretary of Interior to give Indians preference in employment for BIA.

Pevar notes that between 1935 and 1953, "Indian land holdings increased by over two million acres, and federal funds were spent for on-reservation health facilities, irrigation works, roads, homes, and community schools."<sup>109</sup> Probably the greatest success of the Act was stopping further reduction of the tribal land base. The "encouragement of tribal self-government enjoyed a more limited success."<sup>110</sup> "But on the whole the Act must be considered a success in providing a framework, however flawed, for growing self-government by the tribes in the decades following its passage."<sup>111</sup>

#### f. Termination Policy (1953 to 1969)

Congress abruptly changed Indian policy in 1953, adopting a radical new policy of "termination." The 83rd Congress enacted House Concurrent Resolution No. 108, resolving to, at the earliest possible time, "make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States," ending their status as wards of the United States.<sup>112</sup> The BIA began a survey of tribes suitable for termination, which resulted in termination of more than 100 tribes by congressional

<sup>101</sup> AMERICAN INDIANS TODAY, *supra* note 5, at 9.

<sup>102</sup> PRUCHA, *supra* note 74, at 374, n.29; CANBY, *supra* note 8, at 24.

<sup>103</sup> PEVAR, *supra* note 8, at 6. Pevar notes that Collier declared in 1934 that "No interference with Indian religious life or expression will hereafter be tolerated. The cultural history of Indians is in all respects to be considered equal to that of any non-Indian group." Citing at footnote 22 the *Annual Report*, Commissioner of Indian Affairs, 1934, at 90.

<sup>104</sup> PRUCHA, *supra* note 74, at 374-75.

<sup>105</sup> 48 Stat. 984, 73 Pub. L. No. 383 (1934), codified at 25 U.S.C. §§ 461-494.

<sup>106</sup> PRUCHA, *supra* note 74, at 374-75.

<sup>107</sup> CANBY, *supra* note 8, at 24.

<sup>108</sup> PEVAR, *supra* note 8, at 6, citing H.R. REP. NO. 73-1804, at 6, 90 (1934). *See also* Mescalero Apache Tribe v.

Jones, 411 U.S. 145, 152, 93 S. Ct. 1267, 1273, 36 L. Ed. 2d 114, 122 (1973) (quoting H.R. REP. NO. 73-1804, at 6 (1934); *see also* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 n.5, 107 S. Ct. 971, 976, 94 L. Ed. 2d 10, 19 (1987); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335, 103 S. Ct. 2378, 2387, 76 L. Ed. 611, 621 (1983); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 168, 100 S. Ct. 2069, 2089, 65 L. Ed. 2d 10, 38 (1980).

<sup>109</sup> PEVAR, *supra* note 8, at 7.

<sup>110</sup> CANBY, *supra* note 8, at 25.

<sup>111</sup> *Id.*

<sup>112</sup> H. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

action, primarily in Oregon and California.<sup>113</sup> Pevar points out that upon termination, “the tribe lost its powers of self-government, the tribe and its members became ineligible for government services generally provided to Indians and tribes, and tribal members became subject to state law.”<sup>114</sup>

Another product of this termination policy was enactment of Public Law 83-280<sup>115</sup> (commonly referred to as Public Law 280, hereinafter “P.L. 280”), the only federal law extending state jurisdiction to Indian reservations generally.<sup>116</sup> This Act mandatorily delegated civil and criminal jurisdiction over reservation Indians to five states (California, Minnesota, Nebraska, Oregon, and Wisconsin), the “mandatory” states. A sixth mandatory state, Alaska, was added in 1958.<sup>117</sup> In addition, the Act authorized for the remaining states the option of assuming such jurisdiction.<sup>118</sup> Out of 44 “option” states, only 10 assumed jurisdiction under P.L. 280.<sup>119</sup> According to Canby:

The effect of Public Law 280 was drastically to change the traditional division of jurisdiction among those states where the law was applied...[displacing] otherwise applicable federal law and...[leaving] tribal authorities with a greatly diminished role. It ran directly counter to John Marshall’s original characterization of Indian country as territory in which the laws of the state “can have no force.” *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).<sup>120</sup>

### *g. Self-Determination Policy (1969 to Present)*

(1) *General.*—The Termination Era was short-lived, and by 1959, “the Eisenhower administration backed off any further pursuit of termination without Indian consent, which was decidedly lacking.”<sup>121</sup> Wildenthal observes that the historical timing of the U.S. Supreme Court’s unanimous decision in

*Williams v. Lee*<sup>122</sup> was also a significant factor and “a key turning point in the return to a policy of self-determination and greater respect for tribal sovereignty.”<sup>123</sup> The issue in *Williams* was whether the Arizona State courts had jurisdiction of a suit by Lee, a non-Indian store merchant on the Navajo Reservation, to collect for goods sold on credit to Williams, a Navajo Indian resident. Williams’s motion for dismissal, on the ground that jurisdiction lay in the tribal court rather than state court, was denied. The Supreme Court held that the motion should have been granted, concluding in an opinion by Justice Black:

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian.... 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. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564–566.

Vine Deloria, writer and a leading Indian historian, observes that, by 1958, Indians were becoming active voters, causing congressional candidates to become more cautious about suggesting a break in “the traditional federal-Indian relationship,” and that the “[t]ermination policy simply evaporated in the early 1960s because not enough advocates could be found in Congress to make it an important issue.”<sup>124</sup>

In 1968, building on social welfare programs benefiting impoverished Indians, President Johnson, in a message to Congress, described Indians as the “forgotten” Americans, declaring: “We must affirm the rights of the first Americans to remain Indians while exercising their rights as Americans. We must affirm their rights to freedom of choice and self-determination.”<sup>125</sup> The same year Congress passed the Indian Civil Rights Act of 1968 (ICRA), 82 Stat. 77, 25 U.S.C. § 1301 *et seq.*, imposing upon the tribes most of the Bill of Rights, including protection of free speech, free exercise of religion, and due process and equal protection of the laws. Another provision of that Act amended P.L. 280, to require tribal consent for states to assume civil and

<sup>113</sup> PEVAR, *supra* note 8, at 57, citing at n.63: American Indian Policy Review Commission, Final Report, at 447-53.

<sup>114</sup> *Id.* at 57, citing, “e.g., Menominee Termination Act, 25 U.S.C. Secs. 985 *et seq.*; Klamath Termination Act, 25 U.S.C. Secs. 564 *et seq.* See discussion, *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986).”

<sup>115</sup> Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588, amending ch. 53 of 18 U.S.C. to add § 1162 and ch. 85 of 28 U.S.C. to add § 1360.

<sup>116</sup> PEVAR, *supra* note 8, at 113.

<sup>117</sup> Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545.

<sup>118</sup> Pub. L. No. 83-280, §§ 6, 7.

<sup>119</sup> PEVAR, *supra* note 8, at 116: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington.

<sup>120</sup> CANBY, *supra* note 8, at 28, 232–58.

<sup>121</sup> WILDENTHAL, *supra* note 48, at 31.

<sup>122</sup> 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

<sup>123</sup> WILDENTHAL, *supra* note 48, at 86.

<sup>124</sup> AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY (Vine Deloria, Jr., ed., 1985); VINE DELORIA, JR., THE EVOLUTION OF FEDERAL INDIAN POLICY MAKING 251 (hereinafter AMERICAN INDIAN POLICY).

<sup>125</sup> PEVAR, *supra* note 8, at 8, citing in n.27, 4 GOV’T PRINTING OFFICE, PRESIDENTIAL DOCUMENTS, WEEKLY COMPILATION OF, no. 10 (1968).

criminal jurisdiction over Indian country (25 *United States Code Annotated* (U.S.C.A.) §§ 1321-22, 1326). In addition, a procedure was enacted providing for states to retrocede jurisdiction previously assumed under P.L. 280 (25 U.S.C.A. § 1323). By 1992, six states had retroceded jurisdiction to some extent.<sup>126</sup>

President Nixon is credited with changing the direction of the federal government and its treatment of Indian tribes and Indians. Building on President Johnson's rejection of the Termination Policy, President Nixon, in a landmark message in 1970, called for a federal policy of "self determination" for the Indian tribes. He denounced the termination policy, stating, "This, then, must be the goal of any new Indian policy toward the Indian people: to strengthen the Indian sense of autonomy without threatening his sense of community."<sup>127</sup> While stressing the continued importance of the trust relationship, he urged Congress to undertake a program of legislation that would permit the tribes to manage their own affairs. This ignited a bipartisan consensus that has remained, more or less, ever since.<sup>128</sup> This consensus has produced a significant number of legislative enactments validating and advancing "self determination" for Indian tribes, officially supported by the six ensuing U.S. Presidents.<sup>129</sup>

(2) *Significant Self-Determination Era Legislation.*—The first piece of legislation in this era was

<sup>126</sup> *Id.* at 116–18.

<sup>127</sup> *Id.* at 8, quoting from: GOV'T PRINTING OFFICE, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY.

<sup>128</sup> WILDENTHAL, *supra* note 48, at 31.

<sup>129</sup> See COHEN, *supra* note 8, at 181–88. See also CANBY, *supra* note 8, at 32, pointing out that: "In 1983 President Reagan reaffirmed the policy of strengthening tribal governments...[and] repeated President Nixon's repudiation of the termination policy. Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983)." President George H.W. Bush issued a proclamation on March 2, 1992, 57 Fed. Reg. 7873, proclaiming 1992 as the "Year of the American Indian," affirming "the right of Indian tribes to exist as sovereign entities...[and] express[ed] our support for tribal self-determination." In 1994, President Clinton issued a Presidential Memorandum to all heads of executive departments and agencies, recognizing the sovereignty of tribal governments, directing that each department and agency operate "within a government-to-government relationship with federally recognized tribal governments," and requiring all federal agencies to consult with tribal councils before developing federal regulations affecting Indian reservations. 59 Fed. Reg. 22951 (1994). This was further endorsed by President Clinton in 2000, 65 Fed. Reg. 67249, and President George W. Bush in 2002, 67 Fed. Reg. 67773.

the Indian Education Act of 1972,<sup>130</sup> designed to meet the special needs of Indian children, but which one commentator viewed as opening "a Pandora's box of benefits because it failed to describe precisely the Indians who were to be the beneficiaries of an expanded federal effort in Indian education."<sup>131</sup> Next came the Indian Financing Act of 1974,<sup>132</sup> establishing a revolving loan fund to aid development of Indian resources. Then came the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA),<sup>133</sup> "perhaps the single most important piece of Indian legislation since the Indian Reorganization Act."<sup>134</sup> This Act and other selected legislation considered important to Indian transportation law issues are discussed immediately below. Other "self-determination" legislation will be discussed in detail in later sections.

(a) *The ISDEAA* directs the Secretary of the Interior and the Secretary of Health and Human Services to contract with tribal organizations for specified programs administered by their departments for the benefit of Indians, including construction programs.<sup>135</sup> Relative to subcontracting, 25 U.S.C. § 450e(b)(2) requires all federal agencies to the greatest extent practicable to give preference in the award of subcontracts to Indian organizations and Indian-owned economic enterprises in any contracts with Indian organizations or for the benefit of Indians.<sup>136</sup>

<sup>130</sup> 86 Stat. 334, 92 Pub. L. No. 318 (1972).

<sup>131</sup> AMERICAN INDIAN POLICY, *supra* note 124, at 253.

<sup>132</sup> 25 U.S.C. §§ 1451 *et seq.*

<sup>133</sup> Pub. L. No. 93-638 (Jan. 7, 1975), 88 Stat. 2205, 25 U.S.C. §§ 450e *et seq.*

<sup>134</sup> PEVAR, *supra* note 8, at 8.

<sup>135</sup> 25 U.S.C. § 450f(a).

<sup>136</sup> See Alaska Chapter, Associated General Contractors v. Pierce, 694 F.2d 1162 (9th Cir. 1982), holding that the Indian Self-Determination Act, § 7(b), 25 U.S.C.S. § 450e(b), did not violate the Due Process Clause of the U.S. Const., and upholding the HUD preference for Indian-owned construction companies regulations; See also St. Paul Intertribal Housing Bd. v. Reynolds, 564 F. Supp. 1408 (D. Minn. 1983), upholding HUD program giving contracting preference to Indian-owned businesses in HUD-financed Indian housing programs; See also Hoopa Valley Indian Tribe v. United States, 415 F.3d 986 (9th Cir. July 2005), where the court of appeals affirmed both the administrative and district court decision that certain activities under the Trinity River Mainstream Restoration Program were not subject to ISDEAA because they were designed to benefit the public as a whole rather than "Indians because of their status as Indians." This case offers an excellent discussion on contracting preferences pursuant to both Title I and Title IV of ISDEAA. The case further distinguishes programs that are specifically targeted to Indians in contrast to programs that collaterally benefit

In connection with employment, 25 U.S.C. § 450e(b)(1) requires all Federal agencies to the greatest extent practicable to give preference in opportunities for training and employment to Indians in any contracts with Indian organizations or for the benefit of Indians. The Act's provisions for Indian preference in contracting and subcontracting has caused much confusion relative to the Federal-Aid Highway Program. This is due, in part, to the fact that Indian tribal officials believed its provisions to apply to all federal highway construction funds, including the grant-in-aid to the states for highway construction. The confusion is understandable given the fact that certain earmarked funds from the Highway Trust Fund administered by the Secretary of the Interior are subject to the ISDEAA, i.e., Indian reservation road funds administered under 23 U.S.C. § 204. However, no contracting preference for Indian-owned firms is either authorized or mandated under the Federal-Aid Highway Program.

(b) *Archaeological Resources Protection Act of 1979 (ARPA)*.<sup>137</sup> ARPA provides for the protection and management of archaeological resources, and specifically requires notification of the affected Indian tribe if archaeological investigations proposed would result in harm to or destruction of any location considered by the tribe to have religious or cultural importance. This Act directs consideration of the American Indian Religious Freedom Act (AIRFA) in the promulgation of uniform regulations.

(c) *American Indian Religious Freedom Act (AIRFA)*.<sup>138</sup> AIRFA was a joint resolution to establish a policy to remedy and alleviate the suppression of the practice of Indian religions, but providing no enforcement remedy. Section 1 provides as follows:

[H]enceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites.

Federal agencies are directed to evaluate their policies and procedures to determine if changes are needed to ensure that such rights and freedoms are not disrupted by agency practices. The Court of Appeals for the D.C. Circuit determined that there is a compliance element in this Act in the context of the National Environmental Policy Act of 1969 (NEPA), requiring that the views of Indian leaders

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Indians as part of the broader population.

<sup>137</sup> Pub. L. No. 96-95, 93 Stat. 721, 16 U.S.C. § 470aa.

<sup>138</sup> S.J. Res. 102, Aug. 11, 1978, Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C. § 1996 (1979).

be obtained and considered when a proposed land use might conflict with traditional Indian religious beliefs or practices, and that unnecessary interference with Indian religious practices be avoided during project implementation on public lands, although conflict does not bar adoption of proposed land uses where they are in the public interest.<sup>139</sup> A more detailed discussion of AIRFA may be found at H.2.c.1, *infra*.

(d) *Indian Gaming Regulatory Act of 1988 (IGRA)*.<sup>140</sup> This Act requires states that do not totally prohibit gambling (meeting certain criteria) to negotiate compacts with Indian tribes desiring to establish gambling operations.<sup>141</sup> Congress enacted IGRA in response to the U.S. Supreme Court decision in *California v. Cabazon Band of Mission Indians*,<sup>142</sup> where it held that neither the State nor the county had any authority to enforce its gambling laws within the reservations of the Cabazon and Morongo Bands of Mission Indians in Riverside County, California, following the rule in *Bryan v. Itasca County*<sup>143</sup> that state law may be applicable when it is prohibitory and inapplicable when regulatory. Both tribes, by ordinances approved by the federal government, conducted on-reservation bingo games. The Cabazon Band also operated a card club for draw poker and other card games. The games were open to the general public and predominantly played by non-Indians coming onto the reservations. In a seven to two opinion, Justice White found P.L. 280 did not authorize State

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<sup>139</sup> *Wilson v. Block*, 708 F.2d 735, 747, 228 U.S. App. D.C. 1661 (D.C. Cir. 1983).

<sup>140</sup> 102 Stat. 2467, Pub. L. No. 100-497 (1988) (codified at 25 U.S.C. §§ 2701-2721).

<sup>141</sup> See generally Jason Kalish, *Do the States Have an Ace in the Hole or Should the Indians Call Their Bluff? Tribes Caught in the Power Struggle Between the Federal Government and the States*, 38 ARIZ. L. REV. 1345 (1996); Anthony J. Marks, *A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming?* 17 LOY. ENT. L. J. 157 (1996); Jason D. Kolkema, *Federal Policy of Indian Gaming on Newly Acquired Lands and the Threat to State Sovereignty: Retaining Gubernatorial Authority Over the Federal Approval of Gaming on Off-Reservation Sites*, 73 U. DET. MERCY L. REV. 361 (1996);

Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 ST. THOMAS L. REV. 769 (1995); Jeffrey B. Mallory, *Congress' Authority to Abrogate a State's Eleventh Amendment Immunity from Suit: Will Seminole Tribe v. Florida be Seminal?*, 7 ST. THOMAS L. REV. 791 (1995); Leah L. Lorber, *State Rights, Tribal Sovereignty, and the "White Man's Firewater": State Prohibition of Gambling on New Indian Lands*, 69 IND. L. J. 215 (1993).

<sup>142</sup> 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987).

<sup>143</sup> 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 710 (1976).

regulation here since criminal laws were not involved (noting in footnote 11 that “it is doubtful that P.L. 280 authorizes application of any local laws to Indian reservations”). The Court rejected California’s contention that the tribes were “marketing an exemption” from state law (condemned by the Court in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 155), stating:

[T]he decision...turns on whether state authority is pre-empted by the operation of federal law; and “[s]tate jurisdiction is pre-empted...if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify assertion of state authority.” *Mescalero*, 462 U.S. at 333, 334. The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its “overriding goal” of encouraging tribal self-sufficiency and economic development. *Id.* at 334–335. While noting that the State’s concern that organized crime would be attracted to the high stakes games, was “a legitimate concern...we are unconvinced that it is sufficient to escape the pre-emptive force of federal and tribal interests apparent in this case” and “the prevailing federal policy continues to support these tribal enterprises....”<sup>144</sup>

Congress enacted IGRA to provide a statutory basis for the operation of gaming by Indian tribes as a “means of promoting tribal economic development, self-sufficiency, and strong tribal governments.” The Act requires Indian tribes to appropriate the profits from gaming activities to fund tribal government operations or programs and to promote economic development.<sup>145</sup> One section of IGRA, dealing with newly acquired trust lands, has particular relevance to state transportation agencies. Section 2719(a) prohibits gaming on lands acquired in trust for Indian tribes after October 17, 1988. However, it provides a waiver of this provision in section 2719(b)(1)(A), where:

[T]he Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary’s determination.

(e) *Native Americans Graves Protection and Repatriation Act (NAGPRA)*.<sup>146</sup> NAGPRA applies to the human remains of Native American peoples, to

<sup>144</sup> Cabazon Band of Mission Indians, 480 U.S. at 202.

<sup>145</sup> 25 U.S.C. § 2710(b)(2)(B) (1994).

<sup>146</sup> 101 Pub. L. No. 601, 104 Stat. 3048 (1990) (Codified at 25 U.S.C §§ 3001–3013, 18 U.S.C. § 1170).

funerary objects, and to sacred and cultural patrimony objects, and also governs the intentional excavation or removal of Native American human remains and objects from federal or tribal lands, not allowing excavation or removal unless authorized by permit under the ARPA, 16 United States Code Service (U.S.C.S.) § 470aa–470mm. NAGPRA’s site protection measures only apply to remains and objects located on tribal, Native Hawaiian, or federal lands. The Act also governs the inadvertent discovery of Native American cultural items on federal or tribal lands.<sup>147</sup>

#### 4. Federal Trust Responsibility and “Indian Title”

##### a. Federal Government’s Trust Responsibility to Indian Tribes

In the more than 600 treaties entered into with Indian tribes between 1787 and 1871, when Congress ended such treaty making,<sup>148</sup> many explicitly provided for territorial protection by the United States,<sup>149</sup> while numerous treaties declared the tribes’ status to be dependent nations. During this period of “extinguishment” of aboriginal title and establishment of reservations, the concept of a federal trust responsibility to Indians evolved judicially.<sup>150</sup> It first appeared in *Cherokee Nation v. Georgia*,<sup>151</sup> where Chief Justice Marshall concluded that Indian tribes “may, more correctly, perhaps, be denominated domestic dependent nations...in a state of pupilage and that [t]heir relation to the United States resembles that of a ward to his guardian.”<sup>152</sup> Pevar cites a 1977 Senate report as expressing the modern view of this trust relationship:

The purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.<sup>153</sup>

<sup>147</sup> *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 887–88 (2003).

<sup>148</sup> The Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71). The federal government continued to deal with Indian tribes after 1871 by agreements, statutes, and executive orders that had legal ramifications similar to treaties.

<sup>149</sup> COHEN, *supra* note 8, at 65, n.38.

<sup>150</sup> *See generally id.* at 220–21.

<sup>151</sup> 30 U.S. (5 Pet.) 1 (1831).

<sup>152</sup> *Id.* at 17.

<sup>153</sup> PEVAR, *supra* note 8, at 27, 34, n.13, American Indian Policy Review Commission, Final Report, at 130 (1977).

This trust relationship is now one of the significant features of Indian law, and it plays a major role in the procedures established for the acquisition of Indian lands<sup>154</sup> and in state police power regulation of Indian lands, as will be discussed later. The strength of the trust relationship is demonstrated by the decision in *United States v. Mitchell*,<sup>155</sup> where the Court held the United States subject to suit for money damages for violation of fiduciary duties in its management of forested allotted lands.<sup>156</sup>

### b. Indian Title

(1) *“Aboriginal” or “Indian” Title.*—The aboriginal entitlement concept was addressed in the early case of *Johnson v. McIntosh*,<sup>157</sup> where Chief Justice Marshall held that discovery gave the European powers the fee simple ownership of the domain they discovered, subject to a right of occupancy by the Indians, or “Indian Title.” The discovering sovereign thus acquired “an exclusive right to extinguish the Indian title either by purchase or conquest.” This fee title passed to the United States on independence.<sup>158</sup> “Aboriginal title” derives from actual, exclusive, and continuous occupancy for a long period of time.<sup>159</sup> And such title is good against anyone but the United States.<sup>160</sup> The federal government possesses the unquestioned power to convey the fee lands occupied by Indian tribes, although the grantee takes only the naked fee and cannot dis-

turb the occupancy of the Indians.<sup>161</sup> Subsequent decisions clearly established that the extinguishment of Indian title (occupancy) could only be accomplished by Congress through treaty, statute or congressionally authorized Executive actions,<sup>162</sup> or by voluntary abandonment of aboriginal land.<sup>163</sup>

(2) *“Treaty” or “Recognized Title.”*—The second type of Indian title, “recognized” or “treaty” title, derives from an acknowledgment by the United States that a particular tribe of Indians has a legal right permanently to occupy and use certain land.<sup>164</sup> This type of title constitutes a legal interest in the land that can only be extinguished upon payment of compensation.<sup>165</sup> Abrogation of treaty-recognized title requires an explicit statement by Congress or congressional intent that is clear from the legislative history or surrounding circumstances of the particular act.<sup>166</sup> Such intent was found by the U.S. Supreme Court in *Clairmont v. United States*,<sup>167</sup> where the Court found that Congress intended to extinguish Indian title by the grant of a railroad right-of-way through the Flathead Reservation in Montana.<sup>168</sup> However, as noted by Canby, “[r]ecognition of title is a question of intent, and is sometimes the subject of great controversy. See *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945).”<sup>169</sup>

<sup>154</sup> COHEN, *supra* note 8, at 221.

<sup>155</sup> 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983)

<sup>156</sup> Writing for the majority, Justice Marshall stated, *inter alia*:

Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.... This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of trust [citations omitted]. 463 U.S. 206, 226.

<sup>157</sup> 21 U.S. (8 Wheat.) 543 (1823).

<sup>158</sup> *Id.* at 587–88.

<sup>159</sup> *Strong v. United States*, 518 F.2d 556, 560, 207 Ct. Cl. 254, 259 (1975); *Sac and Fox Tribe of Okla. v. United States*, 315 F.2d 896, 903, 161 Ct. Cl. 189, 201 (1963).

<sup>160</sup> See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288–89, 75 S. Ct. 313, 321–22, 99 L. Ed. 314, 325–26 (1955).

<sup>161</sup> *Bennett County S.D. v. United States*, 394 F.2d 8, 11. *Cf.*, *United States v. Thomas*, 151 U.S. 577, 14 S. Ct. 426, 38 L. Ed. 276 (1894); *State of Wisconsin v. Hitchcock*, 201 U.S. 202, 26 S. Ct. 498, 50 L. Ed. 727 (1906).

<sup>162</sup> See, e.g., *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 945 (Ct. Cl. 1974).

<sup>163</sup> *Barker v. Harvey*, 181 U.S. 481, 498–99, 21 S. Ct. 690, 696–97, 45 L. Ed. 963, 971 (1901).

<sup>164</sup> *United States v. Bouchard*, 464 F. Supp. 1316, 1347 (W.D. Wis. 1978); *Bennett County, S.D. v. United States*, 394 F.2d 8, 11.

<sup>165</sup> See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 n.29, 100 S. Ct. 2716, 2740, 65 L. Ed. 2d 844, 876 (1980); *Minn. Chippewa Tribe v. United States*, 315 F.2d 906, 161 Ct. Cl. 258 (1963); *United States v. Creek Nation*, 295 U.S. 103, 55 S. Ct. 681, 79 L. Ed. 1331 (1935).

<sup>166</sup> *Lac Courte Oreilles Band, Etc. v. Voigt*, 700 F.2d 341, 352 (7th Cir. 1983), *citing* *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S. Ct. 2245, 37 L. Ed. 92 (1973).

<sup>167</sup> 225 U.S. 551, 32 S. Ct. 787, 56 L. Ed. 1201 (1912).

<sup>168</sup> *Id.* at 555–56.

<sup>169</sup> CANBY, *supra* note 8, at 377–78. Canby notes: “Executive orders do not establish recognized title, and lands set aside by that method may be taken by the federal government without compensation.” *citing* *Sioux Tribe v. United States*, 316 U.S. 317 (1942); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949); *Karuk Tribe v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000).



(3) *“Trust Status” Title.*—As noted in C.5, *supra*, Congress, in enacting the IRA, recognized that one of the keys to tribal self-determination was the ability of the Indian tribes to retain, protect, and supplement their land base. Accordingly, the IRA expressly discontinued the allotment program,<sup>170</sup> indefinitely extended the periods of trust status of Indian trust lands,<sup>171</sup> authorized the Secretary of the Interior to restore unallotted surplus reservation lands to Indian “trust status” ownership,<sup>172</sup> limited the sale or transfer of restricted Indian land,<sup>173</sup> and specifically addressed the problem of lost Indian land by authorizing the Interior Secretary to acquire land in trust “for the purpose of providing land for Indians.”<sup>174</sup> Stricter limits apply to acquisitions of land into trust if it is to be used for Indian gaming. The IGRA (25 U.S.C. § 2719), with certain exceptions, prohibits gaming on off-reservation lands that were acquired in trust after 1988, unless the Interior Secretary, after consultation with the Indian tribe and appropriate state and local officials, including officials of other nearby Indian tribes, determines that such a gaming establishment would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but “only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary’s determination....”

In enacting IRA Section 5 (25 U.S.C. § 465), Congress, by providing that the legal condition would be federal ownership in “trust status,” doubtlessly intended and understood that Indians would be able to use the land free from state and local regulation or interference as well as free from taxation.<sup>175</sup> BIA regulations clearly reflect this understanding and intent. 25 C.F.R. Part I provides as

<sup>170</sup> IRA § 1, 25 U.S.C. § 461.

<sup>171</sup> IRA § 2, 25 U.S.C. § 462.

<sup>172</sup> IRA § 3, 25 U.S.C. § 463.

<sup>173</sup> IRA § 4, 25 U.S.C. § 464.

<sup>174</sup> IRA § 5, 25 U.S.C. § 465, which provides, *inter alia*, as follows:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians....

Title to any lands or rights acquired...shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

<sup>175</sup> *Chase v. McMasters*, 573 F.2d 1011 (1978).

follows in subsection 1.4, “*State and local regulation of the use of Indian property*”:

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(4) *Authorities, Policy, and Procedures for Trust Acquisitions.*—While Indian trust land acquisitions are authorized by 25 U.S.C. § 465, they must comply with procedures established in 25 C.F.R. Part 151.<sup>176</sup> These procedures require notice to state and local governments of any request for land to be purchased in or converted to Indian trust status. The notice is to inform these governments of the 30-day written comment opportunity relative to “potential impacts on regulatory jurisdiction, real property taxes and special assessments.” The regulation also sets out the criteria the Secretary will consider in evaluating requests.<sup>177</sup>

<sup>176</sup> 25 C.F.R. § 151.1 prescribes the purpose and scope of these regulations:

The regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations even though such land may, by operation of law, be held in restricted status following acquisition. Acquisition of land in trust status by inheritance or escheat is not covered by these regulations. These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members.

<sup>177</sup> 25 C.F.R. § 151.10 (2005): On-reservation acquisitions.

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition’s potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in

In 1996, in response to the Court of Appeals for the Eighth Circuit decision in *State of South Dakota v. U.S. Department of the Interior*,<sup>178</sup> the DOI published a new regulation providing that “the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust,” and that “the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.”<sup>179</sup> Both the DOI and the U.S. Department of Justice now take the position that judicial review of an IRA land trust acquisition may be obtained by filing suit within the 30-day waiting period, although action taken after the United States formally acquires title will continue to be barred by the Quiet Title

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trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW, Room 4525 MIB, Washington, DC 20240.)

<sup>178</sup> 69 F.3d 878 (8th Cir. 1995).

<sup>179</sup> 25 C.F.R. § 151.12. See 61 Fed. Reg. 18082 (1996). The preamble states that it is being adopted “[i]n response to a recent court decision, *State of South Dakota v. U.S. Department of the Interior*, 69 F.3d 878 (8th Cir. 1995),” and that the procedure set forth “permits judicial review before transfer of title to the United States.”

Act,<sup>180</sup> which waives immunity from suit for suits to quiet title, but not to trust or restricted Indian lands.<sup>181</sup>

## 5. Legal Presumptions and Canons of Construction<sup>182</sup>

Supreme Court Justice Powell observed in a 1985 decision that “[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of Indians, *Choctaw Nation v. United States*, 318 U.S. 423, 431–432 (1943).”<sup>183</sup>

In *Choctaw*, it was the opinion of the Court that

[W]e may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.... Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and “in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.” [citations omitted].<sup>184</sup>

The same general rule of liberal construction has been applied by the Supreme Court to “statutes

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<sup>180</sup> 28 U.S.C. § 2409a.

<sup>181</sup> 28 U.S.C. § 2409a(a). See 519 U.S. 919, 117 S. Ct. 286, 136 L. Ed. 205 (1996). The United States petition for *certiorari* abandoned the government’s position that decisions under Section 465 were not reviewable under the Administrative Procedure Act, advising the U.S. Supreme Court as follows:

The Department of Interior has accordingly determined (and the Department of Justice agrees) that a decision to acquire land in trust under Section 5 of the IRA is subject to judicial review under the APA, see 5 U.S.C. 706(2), taking into account the factors identified in the Secretary’s regulations as relevant in making such decisions.

<sup>182</sup> See generally DESKBOOK, *supra* note 16, at 7–9; CANBY, *supra* note 8, at 109–17; PRUCHA, *supra* note 74, at 386–87.

<sup>183</sup> *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247, 105 S. Ct. 1245, 1258, 84 L. Ed. 2d 169, 187 (1985).

<sup>184</sup> *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431, 63 S. Ct. 672, 87 L. Ed. 877, 883 (1943). Chief Justice Marshall established the principle in *Worcester v. The State of Georgia*, 31 U.S. 515, 6 Pet. 515, 582, 8 L. Ed. 483, “The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.”

passed for the benefit of the dependent Indian tribes or communities,<sup>185</sup> even to tax exemptions.<sup>186</sup> The U.S. Court of Appeals for the Ninth Circuit recently observed that “[C]ourts have uniformly held that treaties, statutes and executive orders must be liberally construed in favor of establishing Indian rights.... Any ambiguities in construction must be resolved in favor of the Indians.”<sup>187</sup> Canby notes that the usual rule “is that the canon of sympathetic construction has more strength than the ordinary canons of statutory interpretation.”<sup>188</sup> But he cautions that “[t]he Supreme Court has recently expressed doubt that the canon of sympathetic construction carries as much force when a court is interpreting a statute rather than a treaty,” noting that the Court, in denying a federal tax exemption to tribal gaming, “relied on the canon of construction that federal tax provisions should not be interpreted to create exemptions that are not clearly expressed.”<sup>189</sup>

Canby goes on to use two cases to demonstrate how “the presumption against unexpressed exemption” from federal taxation can trump a treaty provision, previously held to defeat state taxes against Indians. The holdings, both by the U.S. Ninth Circuit Court of Appeals, involved the 1855 Treaty with the Yakama Indian Nation, which assured the Yakamas “the right, in common with citizens of the United States, to travel upon all public highways.” In the first case, *Cree v. Flores*,<sup>190</sup> the court interpreted this treaty provision, using the canons of interpretation for treaties, to exempt the Yakamas from Washington truck license and overweight permit fees. But in the later case, *Ramsey v. United States*,<sup>191</sup> the court found the *Cree* decision not binding in a lawsuit dealing with federal heavy vehicle and diesel fuel taxes, because the “federal standard requires a definite expression of exemption stated plainly in a statute or treaty before any further inquiry is made or any canon of interpretation employed.”

Whether a specific federal statute of general applicability applies to activities on Indian lands depends on the intent of Congress.<sup>192</sup> Certainly, such

laws will be held to apply where Indians or tribes are expressly covered, but also where it is clear from the statutory terms that such coverage was intended.<sup>193</sup> Where retained sovereignty is not invalidated and there is no infringement of Indian rights, Indians and their property are normally subject to the same federal laws as others.<sup>194</sup>

## D. JURISDICTION OVER INDIANS, INDIAN TRIBES, AND INDIAN COUNTRY

### 1. Inherent Tribal Sovereignty

Notwithstanding the plenary power of Congress, beginning with the opinions of Chief Justice Marshall in *Cherokee Nation v. Georgia*<sup>195</sup> and *Worcester v. Georgia*,<sup>196</sup> the U.S. Supreme Court has held that Indian tribes retain inherent sovereign authority over their reservation lands and activities, except to the extent withdrawn by treaty, federal statute, or by implication as a necessary result of their status as “dependent domestic nations.” Since those decisions, the Supreme Court “has consistently recognized that Indian tribes retain ‘attributes of sovereignty over both their members and their territory,’...and that ‘tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.’”<sup>197</sup> In these decisions, the Court viewed the Indian nations as having distinct boundaries within which their jurisdictional authority was exclusive—a “territorial test.” Pevar examines nine of the most important areas of tribal self-government.<sup>198</sup>

1. Forming a government;
2. Determining tribal membership;
3. Regulating tribal property;
4. Regulating individual property;
5. The right to tax;
6. The right to maintain law and order;

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 283.

<sup>187</sup> 30 U.S. (5 Pet.) 1 (1831).

<sup>188</sup> 31 U.S. (6 Pet.) 515 (1832).

<sup>189</sup> *Indian Country, U.S.A. v. Okla. Tax Comm’n*, 829 F.2d 967 (10th Cir. 1987), *citing* *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) (quoting *United States v. Mazurie*, 419 U.S. 544, at 557, 95 S. Ct. at 718, and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154, 100 S. Ct. 2069, 2081, 65 L. Ed. 2d 10 (1980)); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331–33, 103 S. Ct. 2378, 2384–85, 76 L. Ed. 2d 611 (1983).

<sup>190</sup> PEVAR, *supra* note 8, at 79–110.

<sup>185</sup> *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89, 39 S. Ct. 40, 42, 63 L. Ed. 138, 141 (1918).

<sup>186</sup> *Carpenter v. Shaw*, 280 U.S. 363, 366, 50 S. Ct. 121, 122, 741 L. Ed. 478, 481 (1930).

<sup>187</sup> *Confederated Tribes of Chehalis Indian Reservation v. State of Washington*, 96 F.3d 334, 340 (1996).

<sup>188</sup> CANBY, *supra* note 8, at 116, *citing* *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

<sup>189</sup> *Id.* at 115, *citing* *Chickasaw Nation v. United States*, 534 U.S. 84, 122 S. Ct. 428, 151 L. Ed. 2d 474 (2001).

<sup>190</sup> 157 F.3d 762 (9th Cir. 1998).

<sup>191</sup> 302 F.3d 1074 (9th Cir. 2002).

<sup>192</sup> COHEN, *supra* note 8, at 282.

7. The right to exclude nonmembers from tribal territory;
8. The right to regulate domestic relations;
9. The right to regulate commerce and trade.

However, the Court has now rejected the broad assertion that the federal government has exclusive jurisdiction in Indian matters for all purposes, and cautioned that

Generalizations on this subject have become particularly treacherous. The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia*...has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together affect the respective rights of State, Indians, and the Federal Government, *Mescalero Apache Tribe v. Jones*,<sup>199</sup>.... The upshot has been the repeated statements of this Court to the effect that, *even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.*<sup>200</sup> (*Emphasis supplied*)

## 2. "Indian Country," the Jurisdictional Benchmark

Although the term "Indian reservation" has been historically used and appears in scores of provisions of the U.S.C., particularly Title 25 (Indians), the controlling term of art has become "Indian country." The origin and meaning of the term "Indian country" are discussed at B.2.b, *supra*. The classification of land as "Indian country" is considered "the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian Lands."<sup>201</sup> The Supreme Court has held that land held in trust by the United States for

<sup>199</sup> *Id.* at 148 (1973), *citing* *Organized Village of Kake v. Egan*, 369 U.S. 60, 71–73, 82 S. Ct. 562, 568–69, 7 L. Ed. 2d 573 (1962).

<sup>200</sup> *Id.*, *citing* *Kake*, at 75, 82 S. Ct. at 570; *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959); *N.Y. ex rel. Ray v. Martin*, 326 U.S. 496, 499, 66 S. Ct. 307–08, 90 L. Ed. 261 (1946); *Draper v. United States*, 164 U.S. 240, 17 S. Ct. 107, 41 L. Ed. 419 (1896).

<sup>201</sup> *Indian Country*, 829 F. 2d at 973, *citing* *Solem v. Bartlett*, 465 U.S. 463, 465 n.2, 104 S. Ct. 1161, 1163 n.2, 79 L. Ed. 2d 443 (1984); *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427–28 & n.2, 95 S. Ct. 1082, 1084 & n.2, 43 L. Ed. 2d 300 (1975); *Kennerly v. Dist. Court*, 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971); *Cheyenne-Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980); *COHEN*, *supra* note 8, at 27–46 ("Indian country" is usually the governing legal term for jurisdictional purposes). *COHEN*, *supra* note 8, at 5–8 ("Indian country" generally determines allocation of tribal, federal, and state authority).

a tribe is Indian country subject to tribal control whether or not that land has reservation status.<sup>202</sup> While there is a presumption against state jurisdiction in Indian country,<sup>203</sup> the Supreme Court has recognized that state laws may reach into Indian country "if Congress has expressly so provided," and a state may validly assert such jurisdiction even absent express consent in very limited circumstances.<sup>204</sup>

While there have been several laws enacted conferring state jurisdiction over particular tribes,<sup>205</sup> the only federal law extending state jurisdiction to Indian reservations generally is P.L. 280.<sup>206</sup> Although P.L. 280 provides criminal jurisdiction in Indian country to certain listed states, as an exception to 18 U.S.C. §§ 1152 and 1153,<sup>207</sup> the civil jurisdiction provided such states<sup>208</sup> has been construed by the Supreme Court as being limited to allowing state courts to resolve private disputes in "civil causes of action between Indians or to which Indians are parties which arise in areas of Indian country" in the listed states.<sup>209</sup> The civil jurisdiction

<sup>202</sup> *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511, 111 S. Ct. 905, 910, 112 L. Ed. 2d 1112, 1121 (1991).

<sup>203</sup> *Indian Country*, 829 F.2d at 976, *citing* *Cabazon*, at 107 S. Ct. 1092 n.18; *Cheyenne-Arapaho Tribes*, 618 F.2d at 668; *cf.* *Montana v. United States*, 450 U.S. 544, 557, 101 S. Ct. 1245, 1254, 67 L. Ed. 2d 493 (1981); *see generally* C. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 93-106 (1987).

<sup>204</sup> *CABAZON*, 107 S. Ct. at 1087, 1091.

<sup>205</sup> *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 361 L. Ed. 2d 114 (1973).

<sup>206</sup> *PEVAR*, *supra* note 8, at 113.

<sup>207</sup> *See* 18 U.S.C. § 1162. States listed are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.

<sup>208</sup> 28 U.S.C. § 1360. *State civil jurisdiction in actions to which Indians are parties*

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil cause of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

<sup>209</sup> *Bryan v. Itasca County*, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976). *See* *PEVAR*, *supra* note 8, at 161:

The only difference between a P.L. 280 state and a non-P.L. 280 state is that courts of the former are permitted to resolve private disputes brought by reservation Indians. A state court in a non-P.L. 280 state has no jurisdiction over such a dispute, even if all the parties ask the court to re-

provided clearly does not extend to the full range of state regulatory authority:

Public Law 280 merely permits a State to assume jurisdiction over “civil causes of action” in Indian country. We have never held that Public Law 280 is independently sufficient to confer authority on a State to extend the full range of its regulatory authority, including taxation, over Indians and Indian reservations.<sup>210</sup>

P.L. 280 and the implications of this ruling are discussed further in D.9, *infra*.

### 3. Jurisdictional Tests for Impermissible State Jurisdiction

In the early decisions of the U.S. Supreme Court, when the Court viewed the Indian nations as having distinct boundaries within which their jurisdictional authority was exclusive, the test for impermissible state jurisdiction was a “territorial test,” which simply asked whether the state action had invaded Indian tribal territory. Later cases developed the “infringement test,” which asked whether the state action had infringed on the rights of reservation Indians to make their own laws and be ruled by them.<sup>211</sup> Still later, the trend was “away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption,” the “preemption test,”<sup>212</sup> which

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solve it. [citing, *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986); *Camenout v. Burdman*, 84 Wn 2d 192, 525 P.2d 217 (Wash. 1974). *Cf.* *Kennerly v. District Court*, 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971).]

<sup>210</sup> *Okla. Tax Comm’n v. Potawatomi Tribe*, 498 U.S. 505, 111 S. Ct. 905, 911, 112 L. Ed. 2d 1112, 1122–23 (1991), citing *Bryan v. Itasca County, Id.*, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 and *Rice v. Rehner*, 463 U.S. 713, 734, n.18, 103 S. Ct. 3291, 77 L. Ed. 2d 761 (1983); and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208–10, and n.8, 107 S. Ct. 1083, 1088–89, 94 L. Ed. 2d 244, 254–55 (1987).

<sup>211</sup> *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 271, 3 L. Ed. 2d 251, 256 (1959): “Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”

<sup>212</sup> *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172, 92 S. Ct. 1257, 1262, 36 L. Ed. 2d 129, 135–36 (1973). *See also White Mountain Apache*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980), where the Court set out the modern preemption principles, and where a state motor carrier license tax on a non-Indian contractor was overturned; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983), where a unanimous Court denied New Mexico concurrent jurisdiction of non-Indian fishermen and hunters on the

asked whether federal action had preempted any state action. The analysis of preemption in Indian cases differs from traditional preemption analysis because the courts will find it to exist even in the absence of congressional intent. Preemption of state regulation of Indians by federal regulation takes three forms: (1) preemption when federal law expressly provides; (2) preemption due to comprehensive or pervasive federal regulation; and (3) preemption due to conflict with federal policies or achievement of congressional purpose found in underlying statutes.<sup>213</sup>

The modern cases “avoid reliance on platonic notions of Indian sovereignty and look instead to the applicable treaties and statutes which define the limits of state power.”<sup>214</sup> The Indian sovereignty doctrine is still considered relevant, not because it always provides a definitive resolution, but “because it provides a backdrop against which the applicable treaties and statutes must be read.”<sup>215</sup>

The two barriers of “infringement” and “preemption” are still considered independent because either standing alone can be a sufficient basis for holding state law inapplicable.<sup>216</sup> The principles for applying the two tests were set out by the Supreme Court in the 1980 decision *White Mountain Apache Tribe v. Bracker*,<sup>217</sup> which held, in a suit for refund of motor carrier license and use fuel taxes paid by a logging company under contract to sell, load, and transport timber on a reservation, that such taxes were preempted by federal law. In a six to three

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reservation on the basis of federal preemption, concluding: “Given the strong interest 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 preempted.” *Mescalero*, 462 U.S. 324.

<sup>213</sup> These preemption tests appear to be the same that are used in implied regulatory preemption cases. *See CHMERINSKI, CONSTITUTIONAL LAW 374–81* (2d ed., 2005).

<sup>214</sup> *McClanahan*, 411 U.S. at 172, comparing *United States v. Kagama*, 118 U.S. 375 (1886), with *Kennerly v. Dist. Court*, 400 U.S. 423 (1971) and providing the following comment:

The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question. *Cf. Organized Village of Kake v. Egan*, 369 U.S. 60, 62 (1962); *Federal Indian Law 846*. The question is generally of little more than theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.

<sup>215</sup> *Id.*

<sup>216</sup> *White Mountain Apache Tribe*, 448 U.S. 136, 144, 100 S. Ct. 2578, 2583, 65 L. Ed. 2d 665, 672 (1980).

<sup>217</sup> *Id.*

decision, Justice Marshall, writing for the majority concluded:

Where, as here, the Federal government has undertaken comprehensive regulation of the harvesting and sale of timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.<sup>218</sup>

Justice Marshall's opinion provided distinct standards for applying the "infringement" and "preemption" tests when state authority in Indian country is challenged, and observed:

This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a *particularized inquiry* into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law....<sup>219</sup> (emphasis added).

State efforts to exercise authority in matters affecting tribes continue to be subject to this particularized inquiry standard.

#### 4. Judicial Limitations on Tribal Sovereignty

For almost 150 years the U.S. Supreme Court did not add to the nonstatutory limitations on tribal sovereignty arising from Chief Justice Marshall's decisions in the Cherokee trilogy.<sup>220</sup> Those limitations were: that due to their status as "domestic dependent nations,"<sup>221</sup> (1) tribes could not freely alienate their land, and (2) they could not make treaties with foreign nations. But in 1978, with the criminal case of *Oliphant v. Suquamish Indian Tribe*, the Court began to formulate a modern doctrine for determining the extent of tribal sovereignty. The Court there found new inherent limitations on tribal sovereignty as it pertained to criminal jurisdiction over non-Indians, stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns. Five years later, in *Montana v. United States*, the Court extended the *Oliphant* decision to hold that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the

tribe unless authorized by Congress. A brief review of these cases follows:

##### a. *Oliphant v. Suquamish Indian Tribe*<sup>222</sup>

This case involved two non-Indian residents of the Port Madison Reservation in Washington, Mark David Oliphant and Daniel B. Belgrade, who were arrested by tribal authorities. Oliphant was charged with assaulting a tribal officer and resisting arrest. Belgrade, after a high-speed race along reservation highways, was charged with "recklessly endangering another person" and "injuring tribal property."<sup>223</sup> The tribe argued that it had inherent sovereign authority to exercise criminal jurisdiction over these non-Indians.<sup>224</sup> Justice Rehnquist, joined by six other justices, held that criminal prosecution of non-Indians was outside the inherent sovereign powers of the tribes, due to the tribe's domestic dependent status: "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress \* \* \* Indian tribes do not have inherent jurisdiction to try and to punish non-Indians...." Canby observed that these "new inherent limitations on tribal sovereignty...represented a significant potential threat to tribal governmental power."<sup>225</sup> This threat was soon realized by the Court's decision in *Montana v. United States*, where it stated: "Though *Oliphant* only determined tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."<sup>226</sup>

##### b. *Montana v. United States*

The "particularized inquiry" called for in *Bracker* was made by the Court in *Montana*, which has been called the "seminal" case on tribal jurisdiction in the modern era. In *Montana*, the Crow tribe sought a declaratory judgment to sustain its regulatory authority to prohibit hunting and fishing by nonmembers within the reservation boundaries. The tribe claimed ownership of the bed of the Big Horn River, relying on the Fort Laramie treaties of 1851 and 1868.<sup>227</sup> The suit involved the attempt by

<sup>218</sup> *Id.* at 152.

<sup>219</sup> *Id.* at 145. See also *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980); and *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989).

<sup>220</sup> See C.3.a, *supra*.

<sup>221</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

<sup>222</sup> 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 909 (1978).

<sup>223</sup> *Id.* at 194.

<sup>224</sup> *Id.* at 196.

<sup>225</sup> CANBY, *supra* note 8, at 77.

<sup>226</sup> 450 U.S. 544, 565, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493, 510 (1980).

<sup>227</sup> *Montana*, 450 U.S. at 547-48. By Article II of the 1868 treaty, the United States agreed that the reservation "shall be...set apart for the absolute and undisturbed use and occupation" of the Crow Tribe, and that no non-

both the State of Montana and the Crow Tribe to regulate fishing by *non-Indians* on *non-Indian-owned fee lands* within the reservation. Due to the sale of fee-patented lands under the Allotment Acts, about 30 percent of the Crow reservation was now owned in fee by non-Indians.<sup>228</sup> The Court held that the treaties “fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to new States when they assume sovereignty.”<sup>229</sup> The Court then held that the 1868 treaty language “must be read in light of the subsequent alienation of those lands” [by the Allotment Acts], ruling that the 1868 treaty provides no support for tribal authority to regulate hunting and fishing on land owned by non-Indians.<sup>230</sup>

In addition to relying on the treaties, the Crow tribe relied on its inherent power as a sovereign to prohibit hunting and fishing by nonmembers. In responding to this assertion, the Court, in denying tribal jurisdiction over non-Indians on fee-owned land, went on to create a general rule as to the “inherent power” of Indian tribal governments:

Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members and to prescribe rules of inheritance for members.... *But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation....* Since regulation of hunting and fishing by *nonmembers* of a tribe on lands no longer owned by the Tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow tribe to [do so].... The Court recently applied these general principles in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over *non-Indians*[,] [s]tressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns.... Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the *inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe*.<sup>231</sup> (Emphasis added).

The Court went on to establish two basic exceptions for determining when inherent sovereign

power of a tribe could exercise some forms of civil jurisdiction over nonmembers on their reservations, even on non-Indian fee lands.<sup>232</sup>

1. A tribe may regulate, through taxation, licensing, or other means, the activities of *nonmembers* who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements;
2. 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.

The Court provided a list of cases fitting within these two exceptions, indicating the type of activities the Court had in mind for allowing tribal civil jurisdiction over nonmembers, even on non-Indian fee lands. The four cases listed as fitting exception one were as follows:<sup>233</sup>

- *Williams v. Lee*<sup>234</sup> (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants);
- *Morris v. Hitchcock*<sup>235</sup> (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation);
- *Buster v. Wright*<sup>236</sup> (upholding tribe’s permit tax on nonmembers for the privilege of conducting business within tribe’s borders; court characterized as “inherent” the tribe’s “authority...to prescribe the terms upon which noncitizens may transact business within its borders”);
- *Washington v. Confederated Tribes of Colville Indian Reservation*<sup>237</sup> (tribal authority to tax on-reservation cigarette sales to nonmembers “is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status”).

The Court listed four cases addressing exception two, each of which raised the question of whether a state’s exercise of authority would unduly interfere with tribal self-government. In the first two cases, the Court held that a state’s exercise of authority would intrude, and in the last two, the Court saw no impermissible intrusion:

<sup>232</sup> *Id.* at 565–66.

<sup>233</sup> *Id.* *Strate v. A-1 Contractors*, 520 U.S. 438, 457, 117 S. Ct. 1404, 1415, 137 L. Ed. 2d 661, 677–78 (1997).

<sup>234</sup> 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

<sup>235</sup> 194 U.S. 384, 24 S. Ct. 712, 48 L. Ed. 1030 (1904).

<sup>236</sup> 135 F. 947, 950 (Cal. 8th 1905).

<sup>237</sup> 447 U.S. 134, 152–54, 100 S. Ct. 2069, 2081–82, 65 L. Ed. 2d 10, 28–30 (1980).

Indians except agents of the government “shall ever be permitted to pass over, settle upon, or reside in” the reservation.

<sup>228</sup> *Id.* at 548.

<sup>229</sup> *Id.* at 553.

<sup>230</sup> *Id.* at 561.

<sup>231</sup> *Id.* at 544, 564.

- *Fisher v. District Court*<sup>238</sup> (recognizing the exclusive competence of a tribal court over an adoption proceeding when all parties belonged to the tribe and resided on its reservation);
- *Williams v. Lee*<sup>239</sup> (holding a tribal court exclusively competent to adjudicate a claim by a non-Indian merchant seeking payment from tribe members for goods bought on credit at an on-reservation store);
- *Montana Catholic Missions v. Missoula County*<sup>240</sup> (“the Indians’ interest in this kind of property [livestock], situated on their reservations, was not sufficient to exempt such property, when owned by private individuals, from [state or territorial] taxation”);
- *Thomas v. Gay*<sup>241</sup> (“[territorial] tax put upon cattle of [non-Indian] lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians”).

Before the decision in *Montana*, tribal authority to regulate was based upon geography, which meant that tribes could regulate all activity and land within the reservation’s boundaries. But under the *Montana* general rule, tribal sovereignty has been reduced to a mixture of geography and tribal membership. One commentator notes that “[a]s a ‘rule’ limiting inherent tribal sovereignty, it continues to gain strength, indeed, *it appears to have become the foundation case for contemporary Indian law in the Supreme Court.*”<sup>242</sup> (Emphasis added.)

## 5. Selected Progeny of Montana

### a. *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*<sup>243</sup>

The case involved the authority of the tribes to impose zoning regulations on two pieces of property owned in fee by nonmembers, when the land was already zoned by Yakima County, Washington. The reservation was divided informally into an “open area” and a “closed area,” with one fee-owned property at issue being in this open area. The other fee-owned property at issue was in the closed area,

<sup>238</sup> 424 U.S. 382, 386, 96 S. Ct. 943, 946, 947, 47 L. Ed. 2d 106, 110 (1976).

<sup>239</sup> *Lee*, 358 U.S. at 220.

<sup>240</sup> 200 U.S. 118, 128–29, 26 S. Ct. 197, 201, 50 L. Ed. 398 (1906).

<sup>241</sup> 169 U.S. 264, 273, 18 S. Ct. 340, 344, 42 L. Ed. 740, 744 (1898).

<sup>242</sup> CANBY, *supra* note 8, at 78.

<sup>243</sup> 492 U.S. 408, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989).

97 percent of which was tribal land containing no permanent residents and described as an “undeveloped refuge of cultural and religious significance,” with restricted access to nonmembers. There were three separate opinions, with three distinct views of inherent power:

1. Justice White, joined by three justices, held that the tribe had neither treaty-reserved nor inherent powers to zone nonmember fee land.
2. Justice Blackmun, joined by two justices, concluded that the tribe had the full inherent sovereign power to zone both member and nonmember fee lands lying within the reservation.
3. Justice Stevens, joined by one justice, was of the opinion that the tribe could zone the nonmember fee property in the closed area, but not the open area.

This split decision resulted in tribal zoning being upheld only as to the closed area. The White opinion is significant because four justices departed from the analysis in *Montana*, holding that tribal regulatory jurisdiction over nonmember fee lands was prohibited *per se*, even when conduct (overdevelopment) threatened the political integrity, the economic security, or the health and welfare of the tribe (exception (2) of *Montana*).<sup>244</sup> The analysis of *Brendale* in the *American Indian Law Deskbook* concludes that

[d]espite the fractured nature of the opinions in *Brendale*, a present majority of the Court has adopted the general premise that, outside a land-use situation, inherent tribal regulatory authority extends to nonmembers only when express or constructive consent is present, such as through voluntary on-reservation business transactions with tribes or use of tribal lands.<sup>245</sup>

### b. *Strate v. A-1 Contractors*<sup>246</sup>

The Court’s decision in this case is extremely important to state highway agencies maintaining right-of-way over Indian reservations. Before this decision, the *Montana* rule covered only the regulatory authority of a tribe over nonmembers. But here, the Court extended the *Montana* rule to apply to cases dealing with the adjudicatory authority of tribes: “tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question.”

<sup>244</sup> *Montana*, 450 U.S. at 565.

<sup>245</sup> DESKBOOK, *supra* note 16, at 109–10.

<sup>246</sup> 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).



The suit arose out of a collision between plaintiff, the wife of a deceased tribal member, and defendant, an employee of a contractor doing business with the tribe on the reservation, both nonmembers. The collision occurred on a North Dakota state highway running through the Fort Berthold Indian Reservation. In a unanimous decision upholding the *en banc* decision of the Court of Appeals for the 8th Circuit, the Court ruled that the State's federally granted right-of-way over tribal trust land was the "equivalent, for nonmember governance purposes, to alienated, non-Indian land."<sup>247</sup> It therefore concluded that *Montana*, "the pathmarking case concerning tribal civil authority over nonmembers,"<sup>248</sup> was the controlling precedent, and rejected Tribal court subject matter jurisdiction over nonmembers in the case. In reaching this ruling, the Court considered the following factors relative to the right-of-way: (1) the legislation that created the right-of-way; (2) whether the right-of-way was acquired by the state with the consent of the tribe; (3) whether the tribe had reserved the right to exercise dominion and control over the right-of-way; (4) whether the land was open to the public; and (5) whether the right-of-way was under state control.<sup>249</sup> The Court held that the tribe's loss of the "right of absolute and exclusive use and occupa-

<sup>247</sup> *A-I Contractors*, 520 U.S. at 454. *Accord*, *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (accident between member and nonmember on Montana U.S. Highway 2 on the Blackfeet Reservation, State right-of-way found to be equivalent to fee land); *See also Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) (death action arising from a collision between an automobile and train on railroad right-of-way, within the exterior boundaries of the Crow Reservation. *Held*: "[A] right-of-way granted to a railroad by Congress over reservation land is 'equivalent for nonmember governance purposes, to alienated, non-Indian land.'" Court rejected contention that *Montana's* exception (1) ("consensual relationships") applied, holding that "[a] right-of-way created by congressional grant is a transfer of a property interest that does not create a continuing consensual relationship." At 1064.).

<sup>248</sup> *Id.* at 445.

<sup>249</sup> *See A-I Contractors*, 520 U.S. at 455-56; *See also State of Mont. Dep't of Transp. v. King*, 191 F.3d 1108, 1113 (n.1) (9th Cir. 1999). *But see McDonald v. Means*, 309 F.3d 530, 536, 539 (9th Cir. 2001) (Tort action arising from car striking horse on Bureau of Indian Affairs Route 5 on Northern Cheyenne Reservation, *Held*:

We conclude that BIA roads constitute tribal roads not subject to *Strate*, and that the BIA right-of-way did not extinguish the Tribe's gatekeeping rights to extent necessary to bar tribal court jurisdiction under *Montana*.... The BIA right-of-way is not granted to the State, and forms no part of the State's highway system.

tion...implied the loss of regulatory jurisdiction over the use of the land by others."<sup>250</sup> The Court went on to hold that "[a]s to nonmembers...a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."<sup>251</sup> (Emphasis supplied).

The Court rejected assertions that either of the *Montana* two exceptions applied. In rejecting application of exception two ("threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"), due to safety concerns, the Court stated:

Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana's* second exception requires no more, the exception would severely shrink the rule.... Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them...." The *Montana* rule, therefore, and not its exceptions, applies to this case.<sup>252</sup>

### *c. Atkinson Trading Co. v. Shirley*<sup>253</sup>

The decision in this case relates to the taxation of nonmembers on non-Indian fee land and may have implications for contractors working solely on state highway agency right-of-way. The primary importance of the case is the Court's ruling on the two *Montana* exceptions.

Chief Justice Rehnquist, writing for a unanimous Court, addressed the question of whether the general rule of *Montana* applied to tribal attempts to tax nonmember hotel occupants of a hotel operating within the confines of the Navajo Reservation, but on non-Indian fee land. There was no dispute that the hotel benefited from the Navajo Nation's police and fire protection. The Court invalidated the tax,

<sup>250</sup> *A-I Contractors*, 520 U.S. at 456, quoting *South Dakota v. Bourland*, 508 U.S. 679, 689, 113 S. Ct. 2309, 2316, 24 L. Ed. 2d 606, 619 (1993).

<sup>251</sup> *Id.* at 453.

<sup>252</sup> *Id.* at 458-59. *See also Michael Boxx v. Long Warrior*, 265 F.3d 777 (9th Cir. 2001) (an alcohol-related truck rollover accident was not such a safety concern to tribe as to qualify for *Montana* exception (2).); *In County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998), a suit by a tribal member for false arrest by a county deputy on tribal lands, the court of appeals, in denying applicability of *Montana* exception (1), held that "*Montana's* exception for suits arising out of consensual relationships has never been extended to contractual agreements between two governmental entities and we decline to hold that the exception applies to an intergovernmental law enforcement agreement.").

<sup>253</sup> 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001).

holding that the *Montana* general rule applied “straight up,” that such a tax upon nonmembers on non-Indian fee land was “presumptively invalid,” and that “neither of Montana’s exceptions obtains here.”<sup>254</sup> The opinion distinguished the Court’s ruling in *Merrion v. Jicarilla Apache Tribe*,<sup>255</sup> upholding a severance tax imposed on non-Indian lessees authorized to extract oil and gas from tribal land, pointing out that *Merrion* was “careful to note that an Indian tribe’s inherent power to tax only extended to ‘transactions occurring on trust lands and significantly involving a tribe or its members.’”<sup>256</sup>

In rejecting the applicability of *Montana* exception one, “consensual relationship,” the Court observed:

[W]e think the generalized availability of tribal services patently insufficient to sustain the Tribe’s civil authority over nonmembers on non-Indian fee land. The consensual relationship must stem from “commercial dealing, contracts, leases, or other arrangements,” [citations omitted]...and a nonmember’s actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection.... We therefore, reject respondents’ broad reading of *Montana*’s first exception, which ignores the dependent status of Indian tribes and subverts the territorial restriction upon tribal power.<sup>257</sup>

In rejecting the applicability of *Montana* exception two, the Court raised the threshold for the political integrity exception announced in *Montana*:

[W]e fail to see how petitioner’s operation of a hotel on non-Indian fee land “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>258</sup> [U]nless the drain of the nonmember’s conduct upon tribal services and resources is so severe that it actually “imperil[s]” the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.<sup>259</sup>

#### *d. Nevada v. Hicks*<sup>260</sup>

*Hicks* clearly expanded the application of the *Montana* rule, holding that *Montana* applies regardless of land status, and making clear that tribal jurisdiction over nonmembers is extremely limited, even on tribal land. In addition, it further narrowed the *Montana* exceptions.

<sup>254</sup> *Id.* at 647, 654, 659.

<sup>255</sup> 445 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982).

<sup>256</sup> *Atkinson Trading*, 532 U.S. at 653, citing *Jicarilla Apache Tribe*, 455 U.S. at 137.

<sup>257</sup> *Id.* at 655.

<sup>258</sup> *Id.* at 657.

<sup>259</sup> *Id.*, n.12.

<sup>260</sup> 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).

*Hicks* presented the question of whether a tribal court may assert jurisdiction over civil claims against state game wardens who entered tribal land to execute state and tribal court search warrants against a tribal member suspected of having violated state law outside the reservation.<sup>261</sup> Hicks, a member of the Fallon Paiute–Shoshone Tribes in Nevada, resided on tribally owned trust land within the reservation, and was suspected of killing, off the reservation, a California bighorn sheep, a gross misdemeanor under Nevada law. Acting under search warrants issued by both state and tribal courts, Nevada game wardens, accompanied by tribal officers, unsuccessfully searched Hicks’ home. Hicks, claiming that certain Rocky Mountain bighorn sheep heads (unprotected species) had been damaged and that the search exceeded the bounds of the warrant, brought suit in tribal court against the tribal judge, tribal officers, state wardens, and the State of Nevada. Following tribal court dismissals and voluntary dismissals, only his suit against the state wardens in their individual capacities remained. The causes of action included trespass to land and chattels, abuse of process, denial of equal protection, denial of due process, and unreasonable search and seizure, each remediable under 42 U.S.C. § 1983.<sup>262</sup> The Ninth Circuit affirmed the district court in supporting tribal jurisdiction over tortious conduct claims against nonmembers arising from their activities on tribal trust land. 193 F.3d 1020 (1999). The U.S. Supreme Court granted *certiorari* and reversed. Justice Scalia delivered the Court’s opinion, joined by Chief Justice Rehnquist and Justices Kennedy, Souter, Thomas, and Ginsburg. Concurring opinions were rendered by Justices Souter, Kennedy, Thomas, Ginsburg, O’Connor, Stevens, and Breyer.

Justice Scalia’s opinion identifies the “principle of Indian law central to” the issue of tribal court jurisdiction over civil claims against nonmembers as

our holding in *Strate v. A-1 Contractors* [citation omitted]: “As to nonmembers...a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction....” We first inquire, therefore, whether the... Tribes—either as an exercise of their inherent sovereignty, or under grant of federal authority—can regulate state wardens executing a search warrant for evidence of an off-reservation crime. Indian tribes’ regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States* [citations omitted], which we have called the “pathmarking case” on the subject.<sup>263</sup>

<sup>261</sup> *Id.* at 355.

<sup>262</sup> *Id.* at 356–57.

<sup>263</sup> *Id.* at 357–58. In footnote 2, Justice Scalia points out that

The tribe and the United States argued that “since Hick’s home and yard are on tribe-owned land within the reservation, the tribe may make its exercise of regulatory authority over nonmembers a condition of nonmembers’ entry.”<sup>264</sup> Justice Scalia responded by pointing out that in *Oliphant*, the Court drew no distinctions based on the status of land in denying tribal criminal jurisdiction over nonmembers; however, he recognized that non-member ownership status of land was central to the analysis in both *Montana and Strate*. But, he concludes that the “ownership status of land...is only one factor to consider in determining whether regulation of the activities of nonmembers is ‘necessary to protect tribal self-government or control internal relations[,]’ [b]ut the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers.”<sup>265</sup> (Emphasis supplied.)

The opinion then proceeds to the questions: (1) “whether regulatory jurisdiction over state officers in the present context is ‘necessary to protect tribal self-government or to control internal relations,’ and, if not, (2) whether such regulatory jurisdiction has been congressionally conferred.”<sup>266</sup> The Court answered both questions in the negative. In responding to question one, the opinion stresses the need for “accommodation” of tribal, federal government, and state interests, using, essentially, a balancing of interests test.<sup>267</sup>

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we have never held that a tribal court had jurisdiction over a nonmember defendant. Typically, our cases have involved claims brought against tribal defendants. See, e.g., *Williams v. Lee*, 358 US 217, 3 L Ed 2d 251, 79 S Ct. 269 (1959). In *Strate v. A-1 Contractors*, 520 US 438, 453, 137 L Ed 2d 661, 117 S Ct 1404 (1997), however, we assumed that “where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts,”... Our holding in this case is limited to the question of tribal court jurisdiction over state officers enforcing state law. We leave open the question of tribal court jurisdiction over nonmember defendants in general.

<sup>264</sup> *Id.* at 359.

<sup>265</sup> *Id.* at 360.

<sup>266</sup> *Id.*

<sup>267</sup> See Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001), at 1236, who observes:

A devoted Indian law optimist might attempt to cabin the implications of *Hicks* by noting that, essentially, the Court adopted a balancing test to determine whether the tribal court had jurisdiction over these non-Indian defendants, and the state’s strong interest in investigating off-reservation crimes outweighed the tribal interest. There is room, the optimist might protest, for other non-Indian defendants to present stronger cases for tribal jurisdiction,

Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.... Our cases make clear that the Indians right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation’s border...it was “long ago” that “the Court departed from Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries. [citations omitted] ...the principle that Indians have the right to make their own laws and be governed by them requires “an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.” *Washington v. Confederated Tribes of Colville Reservation*, 447 US 134, 156, 65 L Ed 2d 10, 100 S Ct 2069 (1980) ...a proper balancing of state and tribal interests would give the Tribes no jurisdiction over state officers pursuing off-reservation violations of state law.”<sup>268</sup>

The opinion responds to the pending questions as follows:

We conclude today...that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to “the right to make laws and be ruled by them.” The State’s interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe’s self-government than federal enforcement of federal law impairs state government.... Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation.... Because the...Tribes lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent’s claim.... Nor can the Tribes iden-

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even in the absence of a consensual relationship. (Footnotes omitted).

See also David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001), at 331, who observes:

...Justice Scalia stressed that “the State’s interest in execution of process is considerable enough to outweigh the tribal interest in self-government even when it relates to Indian-fee lands.” As Justice O’Connor observed, “The majority’s sweeping opinion, without cause, undermines the authority of tribes to make their own laws and be ruled by them.” From the perspective of one knowledgeable in Indian law, “The majority’s analysis...is exactly backwards.”

<sup>268</sup> *Id.* at 361–62, 374.

tify any authority to adjudicate respondents § 1983 claim.<sup>269</sup>

One treatment of *Montana's* consensual relationship exception by the Court appears in a footnote that concludes that “other arrangement” is clearly another “private consensual relationship,” implying that governmental consensual relationships are not excepted.<sup>270</sup> This treatment is disturbing because it may adversely affect or seriously inhibit state/tribal cooperative agreements. Justice O'Connor takes issue with the majority's dismissal of the applicability of this exception, contending that “the majority provides no support for this assertion.”<sup>271</sup> After an extensive review of existing state authority to enter into consensual relationships with tribes and giving several examples of consensual relationships between state and tribal governments, she asserts that “our case law provides no basis to conclude that such a consensual relationship could never exist,” concluding that “[T]here is no need to create a per se rule that forecloses future debate as to whether cooperative agreements, or other forms of official consent, could ever be a basis for tribal jurisdiction.”<sup>272</sup>

Canby observed that

*Hicks* is thus the culmination of a series of cases that has reversed the usual presumption regarding sovereignty when the tribe's power over nonmembers is concerned. Instead of presuming that tribal power exists, and searching whether statutes or treaties negate that presumption, the Court presumes that tribal power over nonmembers is absent unless one of the *Montana* exceptions applies or Congress has otherwise conferred the power. *Hicks*, 533 U.S. at

<sup>269</sup> *Id.* at 364, 366, 374.

<sup>270</sup> See *Hicks*, 533 U.S. at 359, n.3: “Montana recognized an exception...for tribal regulation of ‘the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.’” *Montana*, 450 U.S. at 565. Though the wardens in this case “consensually” obtained a warrant from the Tribal Court before searching respondent's home and yard, we do not think this qualifies as an “other arrangement” within the meaning of this passage. Read in context, an “other arrangement” is clearly another *private consensual* relationship, from which the official actions at issue in this case are far removed.

<sup>271</sup> *Hicks*, 533 U.S. at 392.

<sup>272</sup> *Id.* at 394. CANBY, *supra* note 8, at 84, observes that *Hicks*

appears to render futile and unnecessary the cooperative arrangements reflected in the state court's requirement in *Hicks* of a tribal warrant, or in tribal-state extradition agreements that have been worked out during the past fifty years. See, e.g., *Arizona ex rel. Merrill vs. Turtle* 413 F.2d 683 (9th Cir. 1969).

359–60.... In any event, the Supreme Court appears to have cemented firmly its view that tribes, as domestic dependent nations, have no authority over nonmembers unless one of the two *Montana* exceptions applies, and no criminal authority over non-Indians at all.<sup>273</sup>

## 6. Tribal Court “Exhaustion Rule”

The last question addressed by the Court in *Hicks* was “whether the petitioners were required to exhaust their jurisdictional claims in Tribal Court before bringing them in Federal District Court. See *National Farmers Union Ins. Co. v. Crow Tribe*, 471 US 845, 856–857, 105 S Ct 2447, 85 L Ed 2d 818 (1985).”<sup>274</sup> *National Farmers* was a federal-question case arising from a tort claim for injury to an Indian child resulting from an accident on school property owned by the State of Montana within the Crow Reservation. The decision in *National Farmers* had announced that, prudentially, a federal court, although having authority to determine whether a tribal court has exceeded the limits of its jurisdiction, should stay its hand “until after the Tribal Court has had a full opportunity to determine its own jurisdiction.”<sup>275</sup> This general rule became known as the “tribal court exhaustion rule.” The Court recognized three exceptions to the exhaustion requirement in *National Farmers*:<sup>276</sup>

1. Where the assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith;
2. Where the action is patently violative of express jurisdictional prohibitions; or
3. Where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

The Court in *Hicks* determined that “[n]one of these exceptions seems applicable to this case,” but noted that

we added a broader exception in *Strate*: “[w]hen...it is plain that no federal grant provides for tribal governance of nonmembers conduct on land covered by *Montana's* main rule,” so the exhaustion requirement “would serve no purpose other than delay.” 520 US, at 459-460, and n 14, 137 L Ed 2d 661, 117 S Ct 1404.<sup>277</sup>

The Court, while finding this exception “technically inapplicable,” found the reasoning behind it clearly applicable: “Since it is clear, as we have

<sup>273</sup> CANBY, *supra* note 8, at 84–86.

<sup>274</sup> *Hicks*, 533 U.S. at 369.

<sup>275</sup> *National Farmers*, 471 U.S. at 857.

<sup>276</sup> *Id.* at 856, n.21.

<sup>277</sup> *Hicks*, 533 U.S. 369.

discussed, that tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties, adherence to the tribal exhaustion requirements in such cases “would serve no purpose other than delay,” and is therefore unnecessary.<sup>278</sup>

*Strate*, discussed *supra*, D.5.b, was a tort action by non-Indians occurring on state-owned right-of-way found to be covered by *Montana’s* rule that the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally does not extend to the activities of nonmembers of the tribe. Because the tribal court clearly did not have subject matter jurisdiction, the *Strate* decision added another exception to the exhaustion rule, as referred to in *Hicks*: “Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement...must give way, for it would serve no purpose other than delay.”<sup>279</sup>

The decision in *Strate* discussed at length the Court’s decision in *Iowa Mutual Insurance Co. v. LaPlante*. *Iowa Mutual* involved an accident in which a member of the Blackfeet Indian Tribe was injured while driving a cattle truck within the boundaries of the reservation.<sup>280</sup> The injured member was employed by a Montana corporation that operated a ranch on the reservation. The driver and his wife, also a tribe member, sued in the Blackfeet Tribal Court, naming several defendants: the Montana corporation that employed the driver; the individual owners of the ranch, who were also Blackfeet Tribe members; the insurer of the ranch; and an independent insurance adjuster representing the insurer. See *ibid.* Over the objection of the insurer and the insurance adjuster—both companies not owned by members of the tribe—the tribal court determined that it had jurisdiction to adjudicate the case.<sup>281</sup>

Thereafter, the insurer commenced a federal-court action against the driver, his wife, the Montana corporation, and the ranch owners. Invoking federal jurisdiction based on diversity of citizenship,<sup>282</sup> the insurer alleged that it had no duty to defend or indemnify the Montana corporation or the ranch owners because the injuries fell outside the coverage of the applicable insurance policies.<sup>283</sup>

<sup>278</sup> *Id.*

<sup>279</sup> *Strate*, 520 U.S., at 459–60, and n.14. *Accord*, State of Montana Dep’t of Transp. v. King, 191 F.3d 1108 (9th Cir. 1999). Burlington N. R.R. Co. v. Red Wolf, 196 F.2d 1059 (9th Cir. 1999) and Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997).

<sup>280</sup> 480 U.S. 10, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987).

<sup>281</sup> *Id.* at 12.

<sup>282</sup> 28 U.S.C. § 1332.

<sup>283</sup> *Iowa Mutual*, 480 U.S. at 12–13.

Federal District Court dismissed the insurer’s action for lack of subject-matter jurisdiction, and the Court of Appeals affirmed.<sup>284</sup> The Supreme Court reversed and remanded, holding that:

Although petitioner alleges that federal jurisdiction in this case is based on diversity of citizenship, rather than the existence of a federal question, the exhaustion rule announced in *National Farmers Union* applies here as well. Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a “full opportunity to determine its own jurisdiction.” *Ibid.* In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter’s authority over reservation affairs.... At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts...alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement....<sup>285</sup>

The U.S. Supreme Court added another exception, albeit a narrow one, to the tribal exhaustion rule in *El Paso Natural Gas Co. v. Neztosie*,<sup>286</sup> holding that it was improper for lower federal courts to require tribal exhaustion over Price-Anderson claims jurisdiction. El Paso Natural Gas Co. operated open uranium mines on Navajo Nation lands. The suit was filed in the District Court of the Navajo Nation, alleging severe injuries to Neztosie and others from exposure to radioactive and other hazardous materials resulting from the mine operation. The Supreme Court found that the preemption provision of the Price-Anderson Act,<sup>287</sup> which transforms into a federal action “any public liability action arising out of or resulting from a nuclear accident,” Section 2210(n)(2), applied to the facts. The Court recognized that the Act “not only gives a district court original jurisdiction over such a claim...but provides for removal to a federal court as of right if a putative Price-Anderson action is brought in a state court.”<sup>288</sup> However, the Act was silent as to removal from tribal court, and the Court found it implausible that this omission favored tribal court exhaustion:

We are at a loss to think of any reason that Congress would have favored tribal exhaustion. Any generalized sense of comity toward non-federal courts is obviously displaced by the provisions for preemption and removal from state courts, which are thus accorded neither jot nor tittle of deference.... *The ap-*

<sup>284</sup> *Id.* at 13–14.

<sup>285</sup> *Id.* at 16, 17, 19.

<sup>286</sup> 526 U.S. 473, 119 S. Ct. 1430, 143 L. Ed. 2d 635 (1999).

<sup>287</sup> 42 U.S.C. § 2014(hh).

<sup>288</sup> *El Paso Natural Gas*, 526 U.S. at 484.

parent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal- as to state-court litigation. (Emphasis added).<sup>289</sup>

The United States Court of Appeals for the Ninth Circuit has required exhaustion in diversity cases brought by Indian plaintiffs even if there are no proceedings pending in tribal court.<sup>290</sup>

### 7. Full Faith and Credit/Comity on Judgments<sup>291</sup>

The United States Constitution, Article IV, Section 1, provides that each state shall give full faith and credit to the “public Acts, Records, and judicial Proceedings of every other state,” but by its terms does not provide for full faith and credit to the judgments of Indian tribes. The implementing statute, 28 U.S.C. § 1738, provides that such “records and judicial proceedings...shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.” Because Indian nations are not referenced in the statute, the question is whether tribes are “territories or possessions” of the United States under the statute.

The United States Court of Appeals for the Ninth Circuit, in *Wilson v. Marchington*,<sup>292</sup> addressed this question and whether, and under what circumstances, a tribal court tort judgment is entitled to recognition in the United States courts. The court noted that the “United States Supreme Court has not ruled on the precise issue and its pronouncements on collateral matters are inconclusive.”<sup>293</sup>

<sup>289</sup> *Id.* at 485–86.

<sup>290</sup> *Wellman v. Chevron U.S.A.*, 815 F.2d 577 (9th Cir. 1987); *Crawford v. Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991).

<sup>291</sup> See generally CANBY, *supra* note 8, at 226–29; DESKBOOK, *supra* note 16, at 147–50; Robert N. Clinton, *Comity & Colonialism: The Federal Courts’ Frustration of Tribal/Federal Cooperation*, 36 ARIZ. L. REV. 1 (2004).

<sup>292</sup> 127 F.3d 805 (9th Cir. 1997) (1998).

<sup>293</sup> *Marchington*, 127 F.3d at 808. See CLINTON, *supra* note 291, where Professor Clinton disagrees with the 9th Circuit statement and states that “[u]ntil recently the assumption that judgments of tribal courts of record were entitled to full faith and credit went unquestioned,” at 13. He goes on to point out that most of the early tribal courts of record were located in the Indian Territory and decisions of the Eighth Circuit Court of Appeals covered that region, citing 8th Circuit Court decisions giving full faith and credit to tribal judgment (e.g. *Standley v. Roberts*, 59 F.836, 845 (8th Cir. 1894), where the court noted: “judgment of the courts of these [tribal] nations, in cases within their jurisdiction, stand on the same footing [as] those of the courts of territories of the Union and are entitled to

The court gave as an example, *United States ex rel. Mackey v. Coxe*,<sup>294</sup> where the court held the Cherokee Nation was a territory as that term was used in a federal letters of administration statute. By contrast it cited *New York ex rel. Kopel v. Bingham*,<sup>295</sup> where the court cited with approval *Ex Parte Morgan*,<sup>296</sup> in which the district court held that the Cherokee Nation was not a “territory” under the federal extradition statute. They noted that “State courts have reached varied results, citing either *Mackey* or *Morgan* as authority.”<sup>297</sup>

In consideration of this inconclusive status of the law, the court was of the view that

the decisive factor in determining Congress’s intent was the enactment of subsequent statutes which expressly extended full faith and credit to certain tribal proceedings, believing that such “later legislative [enactments] can be regarded as a legislative interpretation of an earlier act and ‘is therefore entitled to great weight in resolving any ambiguities and doubts.’ [citations omitted].”<sup>298</sup>

The court went on to note that

there are policy reasons which could support an extension of full faith and credit to Indian tribes...which] are within the province of Congress

the same full faith and credit.” Clinton also points out that the Supreme Court has given “indication that, ‘Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts.’” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 n.21, 98 S. Ct. 1670, 1681, 56 L. Ed. 2d 106, 120 (1978).

<sup>294</sup> 59 U.S. 100, 103–04, 15 L. Ed. 299, 301 (1855).

<sup>295</sup> 211 U.S. 468, 474–75, 29 S. Ct. 190, 191–92, 53 L. Ed. 286, 289 (1909).

<sup>296</sup> 20 F. 298, 305 (W.D. Ark. 1883).

<sup>297</sup> *Id.* at n.2.:

Compare *Jim v. CIT Fin. Serv.*, 87 N.M. 362, 533 P.2d 751 (N.M. 1975) (citing *Mackey* and holding that tribes are entitled to full faith and credit), and *In re Buehl*, 87 Wash. 2d 649, 555 P.2d 1334 (Wash. 1976) (citing CIT and concluding that tribes are entitled to full faith and credit) with *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689 (Ariz. Ct. App. 1977) (citing *Morgan* and holding that an Indian reservation is not a territory for purposes of full faith and credit).

<sup>298</sup> *Id.* at 808–09, citing the Indian Land Consolidation Act, 25 U.S.C. §§ 2201–2211 (1983) (extending full faith and credit for certain actions involving trust, restricted or controlled lands), the Maine Indian Claims Settlement Act, 25 U.S.C. § 1725(g) (1980) (requiring the Passamaquoddy Tribe, the Penobscot Nation and the State of Maine to “give full faith and credit to the judicial proceedings of each other”), and the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* (Extending full faith and credit to tribal custody proceedings).

or the states, not this Court[,] concluding that “[f]ull faith and credit is not extended to tribal judgments by the Constitution or Congressional act, and we decline to extend it judicially.”<sup>299</sup>

The court further concluded that

[i]n absence of a Congressional extension of full faith and credit, the recognition and enforcement of tribal judgments in federal court must inevitably rest on principles of comity...[which] ‘is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.’ *Hilton v. Guyot*, 159 U.S. 113, 163–64, 40 L. Ed. 95, 16 S. Ct. 139 (1895).<sup>300</sup>

Recognizing that “the status of Indian tribes as ‘dependent domestic nations’ presents some unique circumstances,” the court believed that “comity still affords the best general analytical framework for recognizing tribal judgments.”<sup>301</sup> While believing that the guiding principles of comity were provided by *Hilton* and the *Restatement (Third) of Foreign Relations Law of the United States* (1986), the court concluded

that as a general principle, federal courts should recognize and enforce tribal judgments, [but] not if:

1. the tribal court did not have both personal and subject matter jurisdiction; or
2. the defendant was not afforded due process of law.

In addition, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances:

1. the judgment was obtained by fraud;
2. the judgment conflicts with another final judgment that is entitled to recognition;
3. the judgment is inconsistent with the parties’ contractual choice of forum; or
4. recognition of the judgment, or cause of action upon which it is based, is against public policy of the United States or the forum state in which recognition of the judgment is sought.<sup>302</sup>

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<sup>299</sup> *Id.*, and n.3: See, e.g., OKLA. STAT. tit. 12, § 728 (permitting the Supreme Court of the State of Oklahoma to extend full faith and credit to tribal court judgments); WIS. STAT. § 806.245 (granting full faith and credit to judgments of Wisconsin Indian tribal courts); WYO. STAT. ANN. § 5-1-111 (granting full faith and credit to judicial decisions of the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation). Montana has judicially refused to extend full faith and credit to tribal orders, judgments, and decrees. *In re Day*, 272 Mont. 170, 900 P.2d 296, 301 (Mont. 1995).

<sup>300</sup> *Id.* at 809.

<sup>301</sup> *Id.* at 810.

<sup>302</sup> *Id.*

The court, commenting on *due process*, as that term is employed in comity, observed that it

encompasses most of the *Hilton* factors, namely that there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and there is no showing of prejudice in the tribal court or in the system governing laws. Further, as the Restatement (Third) noted, evidence “that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition.” Restatement (Third) § 482 emt. b.<sup>303</sup>

The opinion went on to recognize that comity “does not require that a tribe utilize judicial procedures identical to those used in the United States Courts...and that] [e]xtending comity to tribal judgments is not an invitation for...unnecessary judicial paternalism in derogation of tribal self-governance.”<sup>304</sup>

Turning to the tribal court judgment under review, the court found that it was not entitled to recognition or enforcement “because the tribal court lacked subject matter jurisdiction, one of the mandatory reasons for refusing to recognize tribal court judgment...*Strate v. A-1 Contractors* [citation omitted].”<sup>305</sup> The court noted that

this case mirrors the facts of *Strate* almost precisely: it was an automobile accident between two individuals on a United States highway designed, built, and maintained by the State of Montana, with no statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway...Thus, although the parameters of the *Strate* holding are not fully defined, its application to the specific circumstances of this case precludes tribal court jurisdiction.<sup>306</sup>

The opinion concludes:

The principles of comity require that a tribal court have competent jurisdiction before its judgment will be recognized by the United States courts. Because the tribal court did not have subject matter jurisdiction over Marchington or Inland Empire Shows, Inc., Wilson’s judgment may neither be recognized nor enforced in the United States courts.<sup>307</sup>

Marchington urged the court to require reciprocal recognition of judgments as an additional mandatory prerequisite, but the court declined to do so, noting that “[t]he question of whether a reciprocity requirement ought to be imposed on an Indian tribe

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<sup>303</sup> *Id.* at 811.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 813.

<sup>306</sup> *Id.* at 814–15.

<sup>307</sup> *Id.* at 815.

before its judgments may be recognized is essentially a public policy question best left to the executive and legislative branches...[t]he fact that some states have chosen to impose such a condition by statute reinforces this conclusion....<sup>308</sup>

Subsequent to *Marchington*, the United States Court of Appeals for the Ninth Circuit, in *Bird v. Glacier Electric Coop.*,<sup>309</sup> addressed the issue of whether the district court could give comity to a tribal court judgment where the closing argument of the successful plaintiff in tribal court included numerous statements encouraging ethnic and racial bias of an all-tribal-member jury against a corporate defendant that was owned and controlled by persons who were not tribal members. The court concluded “that the district court erred in giving comity to recognize and enforce the tribal court judgment here because, in view of the closing argument the tribal court proceedings offended due process.”<sup>310</sup>

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<sup>308</sup> *Id.* at 812, and n.6: “See, e.g., S.D. Codified Laws § 1-1-25(2)(b) (permitting South Dakota courts to recognize a tribal judgment if the courts of that tribe recognize the orders and judgments of the South Dakota courts); OKLA. STAT. tit. 12, § 728(B) (allowing the Supreme Court of Oklahoma to recognize tribal court judgments where the tribal courts agree to grant reciprocity of judgment); WIS. STAT. § 806.245(1)(e) (granting full faith and credit to judgments if, *inter alia*, the tribe grants full faith and credit to the judgments of Wisconsin courts); WYO. STAT. ANN. § 5-1-111(a)(iv) (granting full faith and credit to the Eastern Shoshone and Northern Arapaho Tribes if, *inter alia*, the tribal court certifies that it grants full faith and credit to the orders of judgments of Wyoming).

<sup>309</sup> 255 F.3d 1136 (9th Cir. 2000).

<sup>310</sup> *Id.* at 138, 1152.

## 8. Sovereign Immunity of Tribes and Tribal Officials<sup>311</sup>

### a. The Doctrine of Tribal Immunity

The U.S. Supreme Court noted in its decision in *Oklahoma Tax Commission v. Citizen Band Pottawatomie Indian Tribe of Oklahoma*<sup>312</sup> that “[a] doctrine of Indian tribal sovereign immunity was originally enunciated by this Court, and has been reaffirmed in a number of cases. *Turner v. United States*, 248 U.S. 354, 358 (1919); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58.” The Court’s decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,<sup>313</sup> reaffirmed the doctrine in a suit for breach of contract involving off-reservation commercial conduct of a tribal entity. The suit was on a note signed by the chairman of the tribe’s Industrial Development Commission, in the name of the tribe. The note was for the purchase from Manufacturing Technologies of corporate stock in Clinton–Sherman Aviation, Inc., and contained no waiver of immunity by the tribe. The Court noted that “[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.... [O]ur cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred...[n]or have we yet drawn a distinction between governmental and commercial activities of a tribe [citations omitted].”<sup>314</sup> The Court went on to express

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<sup>311</sup> See generally DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 217–48 (2001); CANBY, *supra* note 8, at 95–104; Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L. J. 137 (2004); Gabriel S. Galanda, *Arizona Indian Law: What You Should Know*, 39 ARIZ. ATTORNEY 24 (2003); Dao Lee Bernardi-Boyle, *State Corporations for Indian Reservations*, 26 AM. INDIAN L. REV. 41 (2001–2002); Michael P. O’Connell, 2000 *Native American Law Symposium: Citizen Suits Against Tribal Governments and Tribal Officials Under Federal Environmental Laws*, 36 TULSA L. J. 335 (2000); John F. Petoskey, *Northern Michigan: Doing Business with Michigan Indian Tribes*, 76 MICH. BAR JOUR. 440, 441–42 (1997); William V. Vetter, *Doing Business with Indians and the Three “S”es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169 (1994); Amelia A. Fogleman, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 VA. L. REV. 1345 (1993).

<sup>312</sup> 498 U.S. 505, 509, 111 S. Ct. 905, 910, 112 L. Ed. 2d 1112, 1120 (1991).

<sup>313</sup> 523 U.S. 751, 118 S. Ct. 170, 140 L. Ed. 2d 981 (1998).

<sup>314</sup> *Id.* at 754–55. Cf. McNally CPA’s & Consultants, S.C.



doubt as to “the wisdom of perpetuating the doctrine,” noting that “tribal immunity extends beyond what is needed to safeguard tribal self-governance...[but] declin[ing] to revisit our case law and choos[ing] to defer to Congress.”<sup>315</sup>

### *b. Immunity Covers Tribal Officials Acting in Official Capacity*

Tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority.<sup>316</sup> An exception to the immunity of tribal officials is invoked when the complaint alleges that the named officer defendants have acted outside the authority that the sovereign is capable of bestowing, and suit may proceed against them to determine that issue.<sup>317</sup> In addition, tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.<sup>318</sup> “Tribal officials are not immune from suit to test the constitutionality of the taxes they seek to collect.”<sup>319</sup>

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v. DJ Hosts, Inc., 2004 Wis. App. 221; 2004 Wis. App. LEXIS 960 (2004) (suit by accounting firm for services for Wisconsin for-profit corporation, DJ Hosts, prior to purchase of 100 percent of corporate shares by The Ho-Chuck Nation, where circuit court dismissed the action based on tribal sovereign immunity. *Held*: “We conclude that when the sole facts are that an Indian tribe purchases all of the shares of an existing for-profit corporation and takes control over the operations of the corporation, tribal immunity is not conferred on the corporation.”). *See also* Bernardi-Boyle, *supra* note 311, where the author states, *inter alia*:

This article suggests that tribes can overcome the stigma of instability and attract capital by conducting business through corporations formed under state law. In this way tribes can assure a fair deal to investors despite their sovereign immunity, taxing power, and ability to escape suits in non-tribal court systems. While multiple law review articles have been written on this topic, few have proposed ways in which the tribes themselves can eliminate the immunity problem.

26 AM. INDIAN L. REV. 41, 42.

<sup>315</sup> *Kiowa*, 523 U.S. at 758, 760. In *Thomas v. Choctaw Services Enterprise*, 313 F.3d 910 (5th Cir. 2002), the court of appeals held that a tribally owned enterprise was not subject to liability under Title VII, the same as tribes.

<sup>316</sup> *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479–80 (9th Cir. 1985).

<sup>317</sup> *Tenneco Oil Co. v. The Sac and Fox Tribe of Indians*, 725 F.2d 572, 574–75 (10th Cir. 1984).

<sup>318</sup> *Ariz. Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1134 (9th Cir. 1995).

<sup>319</sup> *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000), quoting *Burlington N. R.R. Co. v. Blackfeet Tribe Burlington*.

The Court, in holding that sovereign immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute, applied the rule of *Ex parte Young* to tribal officials.<sup>320</sup> In addition, tribal officers may be sued if the suit is not related to official duties.<sup>321</sup>

### *c. Waiver of Immunity*

(1) *Congressional Action Restricting Tribal Immunity*.—Tribal immunity is subject to the superior and plenary control of Congress, and it may be abrogated by statute.<sup>322</sup> But, “a waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed,’”<sup>323</sup> and “courts should ‘tread lightly in the absence of clear indications of legislative intent’ when determining whether a particular federal statute waives tribal sovereign immunity.”<sup>324</sup> In *Public Service Company of Colorado v. Shoshone-Bannock Tribes*, the court found that the Hazardous Materials Transportation Act (HMTA),<sup>325</sup> by its terms, “clearly contemplates that Indian tribes may be sued in court if they enact regulations that are alleged to be preempted by the

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<sup>320</sup> O’Connell, *supra* note 311 at 399 cites *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), as providing a

long-recognized exception to sovereign immunity by suit against government officials [that] requires an allegation made competently and in good faith that a government official, purportedly acting on behalf of the government he or she serves, acted outside of lawful authority of the sovereign and therefore in his or her individual capacity in violation of a federal law or constitutional provision.

*See also* CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* 287–95 (4th ed. 1983), providing a valuable discussion of *Ex parte Young* and stating, *inter alia*, that: “There is no doubt that the reality is as [dissenting] Justice Harlan stated it, and that everyone knew that the Court was engaging in fiction when it regarded the suit as one against an individual named Young rather than against the state of Minnesota,” (at 289). Wright goes on to note at 292 that: “[F]or half a century Congress and the Court have vied in placing restrictions on the doctrine there announced. Yet this case, ostensibly dealing only with the jurisdiction of the federal courts, remains a landmark in constitutional law.”

<sup>321</sup> *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 171–73, 97 S. Ct. 2616, 2621, 53 L. Ed. 2d 667, 674 (1977).

<sup>322</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56–58, 98 S. Ct. 1670, 1676–77, 56 L. Ed. 2d 106, 114–15 (1978).

<sup>323</sup> *Id.* at 58.

<sup>324</sup> *Pub. Serv. Co. of Colo. v. Shoshone-Bannock Tribes*, 30 F.3d 1203, 1206 (9th Cir. 1994), quoting *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 462 (8th Cir. 1993).

<sup>325</sup> 49 U.S.C. §§ 1801 *et seq.* (now 49 U.S.C. §§ 5101 *et seq.*)

HMTA...[and] therefore necessarily abrogates the tribes' immunity from suit."<sup>326</sup> Tribes are also subject to suit in federal court under the citizen suit provisions of the Resource Conservation and Recovery Act (RCRA).<sup>327</sup> In addition, suits are authorized against tribes under the whistleblower provisions of the Safe Drinking Water Act.<sup>328</sup> However, the ADA has been held not to waive tribal immunity "because it contains no terms indicating an intent to permit suits against tribes."<sup>329</sup>

(2) *Express Waiver*.—The Supreme Court's decision in *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*,<sup>330</sup> held that North Dakota could not require a tribe's blanket waiver of sovereign immunity as a condition for permitting the tribe to sue private parties in state court, finding that condition "unduly intrusive on the Tribe's common law sovereign immunity."<sup>331</sup> So tribal immunity is a matter of federal law and is not subject to diminution by the states.<sup>332</sup> But, while *Kiowa* reaffirmed the doctrine of tribal immunity, it also reaffirmed that such immunity could be voluntarily waived by the tribe.<sup>333</sup> The Court's decision in *C & L Enterprises, Inc v. Citizen Band Potawatomi Indian Tribe*<sup>334</sup> addressed the question of whether the tribe had waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with C & L in accordance with a standard contractual arbitration clause.<sup>335</sup> The Court, while

noting that "to relinquish its immunity, a tribe's waiver must be 'clear[,]...'"<sup>336</sup> was "satisfied that the Tribe in this case has waived, with the requisite clarity, immunity from the suit C & L brought to enforce its arbitration award."<sup>337</sup> The Court rejected the tribe's insistence that express words of waiver were required, citing with approval *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*<sup>338</sup> (clause requiring arbitration of contractual disputes and authorizing entry of judgment upon arbitral award "in any court having jurisdiction thereof" expressly waived tribe's immunity).

(3) *Waiver by Tribal Corporations*.—The Court of Appeals for the Ninth Circuit in its decision in *American Vantage Companies, Inc. v. Table Mountain Rancheria*<sup>339</sup> noted that there is a historical connection between waiver of immunity and incorporation of Indian tribes. Enactment of Section 17 of the IRA gave tribes the power to incorporate. This was "done so in part to enable tribes to waive sovereign immunity, thereby facilitating business transactions and fostering tribal economic development and independence. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 157, 36 L. Ed. 2d 114 (1973)." But "[a] tribe that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so."<sup>340</sup> Canby points out that many of the corporate charters under the Act conferred the power to "sue and be sued," but "[a] majority of courts, however, has held that a

<sup>326</sup> *Id.* at 1206–07.

<sup>327</sup> *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989).

<sup>328</sup> *Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999).

<sup>329</sup> *Fla. Paralegic Ass'n v. Miccosukee Tribe of Fla.*, 166 F.3d 1126 (11th Cir. 1999).

<sup>330</sup> 476 U.S. 877, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986).

<sup>331</sup> *Id.* at 891.

<sup>332</sup> *Kiowa*, 523 U.S. at 756.

<sup>333</sup> *Id.* at 754.

<sup>334</sup> 532 U.S. 411, 121 S. Ct. 1589; 149 L. Ed. 2d 623 (2001).

<sup>335</sup> See *Citizen Band*, 532 U.S. at 414–15: The Tribe entered into a contract with C & L for installation of a roof on a building owned by the Tribe. The building was not on the Tribe's reservation or on land held by the federal government in trust for the Tribe. The contract was a standard form agreement copyrighted by the American Institute of Architects, proposed by the Tribe and its architect. The arbitration clause in question provided:

All claims or disputes between the Contractor and the Owner arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise.... The award

rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

The American Arbitration Association Rules provide that "Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." The contract included a choice-of-law clause, providing; "The contract shall be governed by the law of the place where the Project is located." Oklahoma has adopted a Uniform Arbitration Act, which instructs that "the making of an agreement...providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder." OKLA. STAT. tit. 15, § 802B. The Act defines "court" as "any court of competent jurisdiction in this state."

<sup>336</sup> *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 112 L. Ed. 2d 1112, 111 S. Ct. 905 (1991).

<sup>337</sup> *Id.* at 418.

<sup>338</sup> 86 F.3d 656, 660 (7th Cir. 1996).

<sup>339</sup> 292 F.3d 1091, 1098 (2002).

<sup>340</sup> *Id.* at 1099. See *Parker Drilling*, 451 F. Supp. at 1136; see also *Ransom v. St. Regis Mohawk Educ. U. Cmty. Fund*, 86 N.Y.2d 553, 658 N.E.2d 989, 994–95, 635 N.Y.S.2d 116 (N.Y. 1995). CANBY, *supra* note 8, at 94–95.

mere 'sue and be sued' clause does not constitute a waiver."<sup>341</sup> "Similarly, incorporation of a tribal sub-entity under state laws enabling corporations to sue and be sued does not waive immunity. *Ransom*, [supra]...."<sup>342</sup>

#### *d. Tribal Issues with State Sovereign Immunity*

(1) *Eleventh Amendment Immunity*.—In *United States v. Minnesota*,<sup>343</sup> the U.S. Supreme Court held that the United States had standing to sue on behalf of Indian tribes as guardians of the tribe's rights, and that, since "the immunity of the State is subject to the constitutional qualification that she may be sued in this Court by the United States," no Eleventh Amendment bar would limit the United States' access to federal courts for that purpose. But as to Indian tribes suing states, the Supreme Court decision in *Blatchford v. Native Village of Noatak*<sup>344</sup> held that the Eleventh Amendment bars such suits without the state's consent.<sup>345</sup> The Court rejected the argument that 28 U.S.C. § 1362 (granting district courts original jurisdiction to hear all civil actions brought by Indian tribes) abrogated state sovereign immunity.<sup>346</sup>

Congress passed IGRA in 1988, pursuant to the Indian Commerce Clause, to provide a statutory basis for the operation and regulation of gaming by

Indian tribes.<sup>347</sup> The Act provided in Section 2710(d)(1) that class III gaming must, *inter alia*, be conducted in conformance with a tribal-state compact. Section 2710(d)(7) provided that a tribe could bring an action in federal court against the state for refusal to bargain in good faith for a state-tribal gaming compact. The Supreme Court decision in *Seminole Tribe of Florida v. Florida*<sup>348</sup> involved a suit to compel negotiations under that provision of IGRA. The State of Florida's motion to dismiss on the ground of sovereign immunity was dismissed by the District Court, and the Court of Appeals for the Eleventh Circuit dismissed the Tribe's appeal. The Supreme Court granted *certiorari*, affirming the Eleventh Circuit's dismissal of the Tribe's suit. Chief Justice Rehnquist, writing for the majority in a five to four decision, agreed that "Congress clearly intended to abrogate the State's sovereign immunity through § 2710(d)(7)[,]" but held that the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes pursuant to the Indian Commerce Clause and that *Ex parte Young* may not be used to enforce Section 2710(d)(3) against a state official.<sup>349</sup>

A year later the Court rendered another decision involving the doctrine of *Ex parte Young*, in the case of *Idaho v. Coeur d'Alene Tribe of Idaho*,<sup>350</sup> again illustrating its careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case, particularly where there is a state judicial remedy available. The case involved an action by a tribe alleging ownership in the submerged lands and the bed of Lake Coeur d'Alene and various of its navigable tributaries and effluents (submerged lands) lying within the original boundaries of the Coeur d'Alene Reservation within the State of

<sup>341</sup> CANBY, *supra* note 8, at 102. See, e.g., *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 86–87 (2d Cir. 2001); *Ninegret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 29–30 & n.5 (1st Cir. 2000); *Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581 (8th Cir. 1998).

<sup>342</sup> CANBY, *supra* note 8, at 102.

<sup>343</sup> 270 U.S. 181, 46 S. Ct. 298, 70 L. Ed. 539 (1926).

<sup>344</sup> 501 U.S. 775, 111 S. Ct. 2578, 1115 L. Ed. 2d 696 (1991).

<sup>345</sup> The Eleventh Amendment provides as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The *Blatchford* Court commented at 501 U.S. 779, that:

Despite the narrowness of its terms, since *Hans v. Louisiana*, 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, [citations omitted] and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention" [citations omitted].

<sup>346</sup> *Blatchford*, 501 U.S. at 787.

<sup>347</sup> 25 U.S.C. § 2702.

<sup>348</sup> 517 U.S. 44, 116 S. Ct. 1114, 130 L. Ed. 2d 878 (1996).

<sup>349</sup> *Id.* at 53–75. Chief Justice Rehnquist stated:

The situation presented here, however, is sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine.... Here, of course, we have found that Congress does not have authority under the Constitution to make a State suable in federal court under § 2710(d)(7). Nevertheless, the fact that Congress chose to impose upon the State a liability which is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under § 2710(d)(3).

At 1132–33.

<sup>350</sup> 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997).

Idaho. The Tribe sought, *inter alia*, a declaratory judgment establishing its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands. The District Court found that the Eleventh Amendment barred all claims against the State and its agencies and officials, but the Ninth Circuit, while agreeing on the Eleventh Amendment bar, found that the doctrine of *Ex parte Young* was applicable and allowed the claims for declaratory and injunctive relief against the officials to proceed insofar as they sought to preclude continuing violations of federal law. The Supreme Court readily affirmed that, as to the State, the suit was barred based upon Eleventh Amendment sovereign immunity, citing *Blatchford*.<sup>351</sup> Turning to the availability of the *Ex parte Young* exception, the Court stated that “[w]e do not then, question the continuing validity of the *Ex parte Young* doctrine,”<sup>352</sup> but in providing extensive analysis of the doctrine, the Court noted:

Today...it is acknowledged that States have real and vital interests in preferring their own forum in suits brought against them, interest that ought not to be disregarded based upon a waiver presumed in law and contrary to fact. See e.g., *Edelman v. Jordan*, 415 U.S. 651, 673, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974). In this case, there is neither warrant nor necessity to adopt the *Young* device to provide an adequate judicial forum for resolving the dispute between the Tribe and the State. Idaho’s courts are open to hear the case, and the State neither has nor claims immunity from their process or their binding judgment.<sup>353</sup>

The Court continued: “Our recent cases illustrate a careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case...[t]his case-by-case approach to the *Young* doctrine has been evident from the start.”<sup>354</sup> The Court went on to find the *Ex parte Young* exception inapplicable, holding that “[t]he dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and insist upon responding to these claims in its own courts, which are open to hear and determine the case.”<sup>355</sup>

(1) *State Immunity in Tribal Court*.—Eleventh Amendment immunity was not an issue in *State of*

*Montana v. Gilham*,<sup>356</sup> where the Court of Appeals for the Ninth Circuit addressed the question of whether the State of Montana may be subject to a tort action in Blackfeet Tribal Court. The suit involved the fatal injury of the decedent’s daughter, a tribal member, when the car in which she was a passenger struck a permanently anchored highway sign at the intersection of U.S. Highways 2 and 89 within the external boundaries of the Blackfeet Indian Reservation in Montana. The mother, Toni Gilham, brought an action against the driver of the car, who was intoxicated at the time of the accident, and the State of Montana in Blackfeet Tribal Court, alleging negligent design, construction, and maintenance of the intersection. Montana filed a motion to dismiss for lack of jurisdiction, based upon sovereign immunity. The tribal court denied the motion and the case proceeded to trial, resulting in a judgment against the driver and Montana for \$280,000.<sup>357</sup> Appeals by Montana to the Blackfeet Court of Appeals and the Blackfeet Supreme Court on the immunity issue were not successful. These courts found that Article II, Section 18, of the Montana Constitution waived Montana’s immunity from suit in the tribal courts.<sup>358</sup> Montana filed suit in U.S. District Court challenging tribal court jurisdiction and seeking an injunction against further proceedings. The district court granted summary judgment and injunctive relief to Montana, denying Gilham’s cross-motion for summary judgment. The court held that Article II, Section 18, of the Montana Constitution did not waive immunity for suit in tribal court since it only waives Montana’s immunity in state courts.<sup>359</sup>

The Ninth Circuit decision initially noted that “any limitation on tribal court authority to entertain a suit against a State must arise from a source other than direct application of the Eleventh Amendment or congressional act.” The court then concluded “that the States have retained their historic sovereign immunity from suits by individuals and that nothing in the inherent retained powers of tribes abrogates that immunity.”<sup>360</sup> The court distinguished the decision in *Nevada v. Hall*<sup>361</sup> (holding that sovereign immunity did not prevent Cali-

<sup>356</sup> 133 F.3d 1133 (1997).

<sup>357</sup> *Id.* at 1134.

<sup>358</sup> *Id.* at 1135. MONT. CONST. art II, § 18 provides: “State subject to suit. The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.”

<sup>359</sup> *Gilham*, 133 F.3d at 1135.

<sup>360</sup> *Id.* at 1136–37.

<sup>361</sup> 440 U.S. 410, 411–12, 99 S. Ct. 1182, 1183–84, 59 L. Ed. 2d 416, 419 (1979).

<sup>351</sup> *Id.* at 261, 268–69, citing *Blatchford* at 501 U.S. 775, 782, where the Court said “we reasoned that the States likewise did not surrender their immunity for the benefit of the tribes. Indian tribes, we therefore concluded, should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity.”

<sup>352</sup> *Id.* at 269.

<sup>353</sup> *Id.* at 274.

<sup>354</sup> *Id.* at 278–80.

<sup>355</sup> *Id.* at 287–88.

fornia residents injured in an automobile accident with an employee of the University of Nevada from suing the State of Nevada in California state courts) on the basis that Gilham's suit directly implicated the exercise of Montana's sovereign functions, a factor not involved in *Nevada v. Hall*, which was simply a *respondeat superior* case.<sup>362</sup> The court then turned to the issue of whether Montana had waived immunity to suit in tribal court. The court reviewed the rationale of several decisions that found that a state's waiver of immunity in its own courts did not constitute a waiver of its Eleventh Amendment immunity from suit in federal courts. The court then held that

[f]or similar reasons, Montana has not waived its immunity from suit in tribal court.... [I]ndeed, given the standard to find a waiver, the only reasonable construction of the language of Article II, § 18 is that Montana has consented to suit only in its own state courts. See, e.g. *Holladay v. Montana*, 506 F. Supp. 1317, 1321....<sup>363</sup>

The court went on to note that "under the circumstances presented in this case, where the tribal courts lack jurisdiction because of Montana's sovereign immunity, state court jurisdiction would be proper."<sup>364</sup> The court declined to address whether agents of a state may be sued in tribal court or whether states may be subject to a contract suit in tribal court, limiting its holding to the facts presented by this case.<sup>365</sup>

## 9. Criminal Jurisdiction<sup>366</sup>

### a. General

While jurisdictional lines regarding crimes committed in Indian country are more or less settled, jurisdictional disputes on Indian reservations often involve questions of overlapping federal, state, and tribal jurisdiction.<sup>367</sup> The following terse comment is pertinent:

<sup>362</sup> *Gilham* at 133 F.3d at 1137–38.

<sup>363</sup> *Id.* at 1139.

<sup>364</sup> *Id.* at n.6.

<sup>365</sup> *Id.* at 1140 n.8.

<sup>366</sup> See generally CANBY, *supra* note 8, at 124–84; Vernoica L. Bowen, *The Extent of Indian Regulatory Authority Over Non-Indian: South Dakota v. Bourland*, 27 CREIGHTON L. REV. 605, 612–15, 631–34 (1994); Peter Fabish, *The Decline of Tribal Sovereignty: The Journey from Dicta to Dogma in Duro v. Reina*, 66 WASH. L. REV. 567 (1994); DESKBOOK, *supra* note 16, at 84–97; PEVAR, *supra* note 8, at 129–53.

<sup>367</sup> *State of Washington v. Schmuck*, 121 Wash. 2d 373, 380; 850 P.2d 1332, 1335 (1993), citing F. COHEN, FEDERAL INDIAN LAW, ch. 6 (1982); *Falling Through the Cracks After Duro v. Reina: A Close Look at a Jurisdictional Failure*, 15 PUGET SOUND L. REV. 229, 230–35

Law enforcement in Indian Country is a complicated matter. On most Indian reservations federal, state, and tribal governments all have a certain amount of authority to prosecute and try criminal offenses. This jurisdictional maze results from a combination of Congressional enactment, judge-made law, and the principle of inherent tribal sovereignty. Thus a determination of who has authority to try a particular offense depends upon a multitude of factors: the magnitude of the crime, whether the perpetrator or the victim is an Indian or a non-Indian, and whether there are any statutes ceding jurisdiction over certain portions of Indian Country from one sovereign to another.<sup>368</sup>

### b. P. L. 280<sup>369</sup>

As previously discussed at Section III.C.6, one of the legislative products of the termination policy was the enactment in 1953 of P.L. 83-280, 67 Stat. 588, mandatorily delegating extensive civil and criminal jurisdiction over Indian country to five states (California, Minnesota, Nebraska, Oregon, and Wisconsin), with a sixth mandatory state (Alaska) added in 1958. P.L. 280, Section 7, gave all other states the option of assuming such jurisdiction. Nine states chose to assume either total or partial jurisdiction (Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah and Washington).<sup>370</sup> A 10th state, South Dakota, attempted to assume jurisdiction in 1966, but only over highways. This action was invalidated by the Eighth Circuit Court, and therefore the state has no P.L. 280 jurisdiction.<sup>371</sup> ICRA<sup>372</sup> amended P.L. 280 in two important aspects. First, as to optional states acquiring new civil or criminal jurisdiction, Congress imposed as a condition of approval that there be tribal consent based upon a positive vote of a ma-

(1991).

<sup>368</sup> David H. Getches, Daniel M. Rosenfelt, Charles F. Wilkinson, CASES AND MATERIALS ON FEDERAL INDIAN LAW (1979), quoting T. Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 KAN. L. REV. 387 (1974).

<sup>369</sup> See generally CANBY, *supra* note 8, at 232–58; Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. REV. 1333 (1999); Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975); PEVAR, *supra* note 8, at 129–53.

<sup>370</sup> PEVAR, *supra* note 8, at 116–17.

<sup>371</sup> *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990). For an analysis of this case, see Keith Cable, *Rosebud v. South Dakota: How Does Tribal Sovereignty Affect the Determination of State Jurisdiction on Reservation Highways?*, 36 S.D. L. REV. 400 (1991).

<sup>372</sup> 82 Stat. 73 (Title II—Rights of Indians; Civil Rights Act of 1968. Pub. L. No. 90-284).

jury of the tribe's members.<sup>373</sup> At this time no tribe has granted such consent. Secondly, Congress authorized the federal government "to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction" previously granted.<sup>374</sup> Six states have retroceded jurisdiction over tribes, in whole or in part (Minnesota, Nebraska, Nevada, Oregon, Washington, and Wisconsin).<sup>375</sup>

The Supreme Court's decision in *Bryan v. Itasca County, Minnesota*<sup>376</sup> noted that the

provision for state criminal jurisdiction over offenses committed by or against Indians on the reservations was the central focus of Pub. L. 280...§ 2 of the Act, ...[but] [i]n marked contrast in the legislative history is the virtual absence of expression of congressional policy or intent respecting § 4's grant of civil jurisdiction to the States.

The civil authority granted by Section 4 is over "civil causes of action," but the *Bryan* Court held that this was limited to adjudicatory jurisdiction:

[T]he consistent and exclusive use of the terms "civil causes of action," "[arising] on," "civil laws...of general application to private persons or private property," and "[adjudication]," in both the Act and its legislative history virtually compels our conclusion that the primary intent of § 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court.<sup>377</sup>

Thus, the *Bryan* decision limited the civil grant of P.L. 280, Section 4, to adjudication of private civil cases involving Indians in state court, but held that it did not grant general *civil regulatory* authority.<sup>378</sup> This *Bryan* principle has significant impacts on state efforts to regulate certain conduct, including motor vehicle violations, which will be discussed in paragraph 3.

### c. State Criminal/Prohibitory Versus Civil/Regulatory under P.L. 280

The U.S. Supreme Court would approve and further clarify the *Bryan* principle in *California v. Cabazon Band of Mission Indians*,<sup>379</sup> a case involving the attempt by the State of California and Riverside County, California, to regulate gambling (bingo and draw poker) on the reservations of the Cabazon and Morongo Bands of Mission Indians. There the Supreme Court found that

when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.<sup>380</sup>

The Court noted with approval the Ninth Circuit Court of Appeals' use of a distinction between state "criminal/prohibitory" laws and state "civil/regulatory" laws, which it had used in an earlier decision to apply what it thought to be the civil/criminal dichotomy drawn in *Bryan*:<sup>381</sup>

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.<sup>382</sup>

The Court concluded:

We are persuaded that the prohibitory/regulatory distinction is consistent with *Bryan's* construction of Pub. L. 280. It is not a bright-line rule.... In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.... But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law.... Accordingly, we conclude that Pub. L. 280 does not authorize California to enforce Cal. Penal Code Ann. § 326.5 (West Supp. 1987) within the Cabazon and Morongo Reservations.... Nor does Pub. L. 280 authorize the county to apply its gambling ordinances to the reservations.<sup>383</sup>

<sup>380</sup> *Id.* at 208.

<sup>381</sup> See *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy*, 694 F.2d 1185 (1982), which also involved applicability of § 326.5 of the California Penal Code to Indian reservations.

<sup>382</sup> *Bryan*, 426 U.S. at 209.

<sup>383</sup> *Id.* at 210–11, n.11. Foerster, *supra* note 369 at 1359, considers *Cabazon* to be ineffective:

The Criminal/regulatory test set forth in *Cabazon* and the factors upon which courts have come to rely are ineffective in distinguishing between criminal and regulatory laws. Cases involving essentially the same laws are resolved differently because of arbitrary and irrelevant distinctions. Often, the different outcomes are based on the importance of the law to the state rather than on any meaningful analysis about the criminal nature of the statute.

But see *San Manual Indian Bingo and Casino*, 341 NLRB No. 138, at 1055 (2004), where the NLRB over-

<sup>373</sup> 25 U.S.C. §§ 1322, 1326.

<sup>374</sup> 25 U.S.C. § 1323(a).

<sup>375</sup> PEVAR, *supra* note 8, at 118.

<sup>376</sup> 426 U.S. 373, 380, 96 S. Ct. 2102, 2107, 48 L. Ed. 2d 710, 716 (1976).

<sup>377</sup> *Id.* at 385.

<sup>378</sup> *Id.* at 385, 388–90.

<sup>379</sup> 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 244 (1987).

(1) *State Traffic and Motor Vehicle Statutes.*—The following cases dealing with whether a state statute is criminal/prohibitory or civil/regulatory are instructive:

- In *County of Vilas v. Chapman*,<sup>384</sup> the Supreme Court of Wisconsin relied on the analysis and principles established in *Rice v. Rehner*<sup>385</sup> in holding that Vilas County, Wisconsin, had jurisdiction to enforce a noncriminal traffic ordinance against a member of the Lac du Flambeau Band of Lake Superior Chippewa Indians for an offense occurring on a public highway within the boundaries of a reservation. The State Supreme Court went through a three-step process as outlined in *Rice*:

1. Deciding whether the tribe had a tradition of tribal self-government in the area of traffic regulation on Highway 47 within the reservation;<sup>386</sup>
2. Evaluating the balance of federal, state, and tribal interest in the regulation of Highway No. 47;<sup>387</sup> and
3. Determining whether the federal government had preempted state jurisdiction to regulate Highway 47 within the Lac du Flambeau Reservation.<sup>388</sup>

The Wisconsin Court, while noting that it had found a tradition of traffic regulation by the Menominee Tribe in an earlier case, found in marked contrast that the Lac du Flambeaus had no motor vehicle code in effect at the time of the offense, and therefore no tradition of self-government in this area. In balancing the federal, state, and tribal interest, the Supreme Court of Wisconsin found that the State had a dominant interest in regulating traffic on Highway 47 against both Indians and other users of public highways.

- In *Confederated Tribes of the Colville Reservation v. Washington*,<sup>389</sup> the tribe sought to prohibit the State of Washington from enforcing its traffic laws on public roads within the tribe's reservation.

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turned longstanding previous policy and held that gaming facility tribally owned and within confines of reservation was subject to NLRB jurisdiction. Contrast this case with *Yukon Kuskokwin Health Corp. v. Int'l Bhd. of Teamsters, Local 959*, 341 NLRB 139, at 1075 (2004), where the Board found no NLRB jurisdiction in Alaska Native health facility. Arguably, one distinction in these cases is that while in both situations there were many non-tribal member employees, unlike the gaming facility only Alaska Natives could utilize the health facility.

<sup>384</sup> 122 Wis. 2d 211, 361 N.W.2d 699 (Wis. 1985).

<sup>385</sup> 463 U.S. 713, 103 S. Ct. 329, 77 L. Ed. 2d 961 (1983).

<sup>386</sup> *Chapman*, 361 N.W. at 702.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 702–03.

<sup>389</sup> 938 F.2d 146 (9th Cir. 1991).

In 1979, the state legislature had “decriminalized” several traffic offenses, including speeding, and designated each as a “traffic infraction”: “a traffic infraction may not be classified as a criminal offense.”<sup>390</sup> The Washington State courts had found a traffic infraction not to be a felony or misdemeanor.<sup>391</sup> The court noted that while “speeding remains against the state’s public policy, *Cabazon* teaches that this is the wrong inquiry [that] *Cabazon* focuses on whether the prohibited activity is a small subset or facet of a larger, permitted activity... or whether all but a small subset of a basic activity is prohibited.”<sup>392</sup> The Court of Appeals held that “speeding is but an extension of driving—the permitted activity—which occasionally is incident to the operation of a motor vehicle,” concluding that “RCW Ch. 46.63 should be characterized as a civil, regulatory law...[which] the state may not assert...over tribal members on the Colville reservation.”<sup>393</sup> Noteworthy are these comments by the court relative to tribal traffic codes:

Indian sovereignty and the state’s interest in discouraging speeding are both served by our decision here: the Tribes have enacted a traffic code, employ trained police officers, and maintain tribal courts staffed by qualified personnel to deal with criminal traffic violations. The Tribes are willing and able to enforce their own traffic laws against speeding drivers and even to commission Washington state patrol officers to assist them.<sup>394</sup>

- *Germaine v. Circuit Court for Vilas County, Wis.*<sup>395</sup> A habeas corpus proceeding was held following the conviction in state court of Germaine, an enrolled member of the Lac du Flambeau Band of Lake Superior Chippewa Indians, for operating his motor vehicle on a state highway within the reservation after his driver’s license had been revoked for the fourth time. The fourth conviction carried a mandatory minimum jail sentence of 60 days as well as a minimum fine of \$1,500.<sup>396</sup> Germaine challenged Wisconsin’s jurisdiction under P.L. 280 to enforce its traffic laws on the reservation. The court, in upholding the dismissal of the writ of habeas corpus, relied on the “shorthand test” of *Cabazon* to determine whether the conduct at issue violated the State’s public policy:

The State of Wisconsin seeks to protect the lives and property of highway users from all incompetent, incapacitated, and dangerous drivers anywhere on its

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<sup>390</sup> WASH. REV. CODE § 46.63.020.

<sup>391</sup> *Confederated Tribes*, 938 F.2d at 148.

<sup>392</sup> *Id.* at 149.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

<sup>395</sup> 938 F.2d 75 (7th Cir. 1991).

<sup>396</sup> WIS. STAT. § 343.44(1)-(2).

highways on a reservation or off. A clear and mandatory criminal penalty is imposed to enforce its prohibition. This is public policy enforcement of high order. The state's public policy in enforcing this criminal penalty and deterring dangerous drivers does no violence to any tribal vehicle regulation which the tribe enforces.... Congress has made it plain that Wisconsin can enforce its criminal laws on reservations. That is all Wisconsin is doing.<sup>397</sup>

• *State of Minnesota v. Stone*.<sup>398</sup> Members of the White Earth Band of Chippewa Indians were cited for the following violations of Minnesota's traffic and driving-related laws: no motor vehicle insurance and no proof of insurance; driving with an expired registration; driving without a license; driving with an expired license; speeding; no seat belt; and failure to have child in child-restraint seat. The district court dismissed these charges for lack of jurisdiction under P.L. 280 because the traffic and driving-related laws at issue were civil/regulatory rather than criminal/prohibitory. The Minnesota Supreme Court affirmed<sup>399</sup> and adopted a two-step approach to applying the *Cabazon* test for Minnesota courts:

The first step is to determine the focus of the *Cabazon* analysis. The broad conduct will be the focus of the test *unless* the narrow conduct presents substantially different or heightened public policy concerns. If this is the case, the narrow conduct must be analyzed apart from the broad conduct. After identifying the focus of the *Cabazon* test, the second step is to apply it. If the conduct is generally permitted, subject to exceptions, then the law controlling the conduct is civil/regulatory. If the conduct is generally prohibited, the law is criminal/prohibitory. In making this distinction in close cases, we are aided by *Cabazon's* "shorthand public policy test," which provides that conduct is criminal if it violates the state's public policy...we interpret "public policy," as used in the *Cabazon* test, to mean public criminal policy...[which] seeks to protect society from serious breaches in the social fabric which threaten grave harm to persons or property.<sup>400</sup>

<sup>397</sup> *Germaine*, 938 F.2d at 77–78.

<sup>398</sup> 572 N.W.2d 725 (Minn. 1997).

<sup>399</sup> *Id.* at 727.

<sup>400</sup> *Id.* at 730. The state high court found the following factors to be useful in determining whether an activity violates the state's public policy in a nature serious enough to be considered "criminal.":

- (1) the extent to which the activity directly threatens physical harm to persons or property or invades the rights of others;
- (2) the extent to which the law allows for exceptions and exemptions;
- (3) the blameworthiness of the actor;
- (4) the nature and severity of the potential penalties for violation of the law. The list is not meant to be exhaustive, and no single factor is dispositive.

The Minnesota Supreme Court went on to determine that "the broad conduct of driving is the proper focus of the *Cabazon* test," applying the test to hold that "driving is generally permitted, subject to regulation [and] clearly does not violate the public criminal policy of the state...[finding] no need to apply the shorthand public policy test." The court found that "each of the laws involved...is civil/regulatory and the state lacks jurisdiction under Public Law 280 to enforce them against members of the [tribe]."<sup>401</sup>

• *State of Minnesota v. Couture*.<sup>402</sup> The issue presented was whether Couture, an Indian resident of the Fond du Lac Reservation, could be charged with aggravated driving on the reservation while under the influence of alcohol in violation of Minn. Stat. Section 169.129 (1996). The court, following the two-step approach of *Stone*, and relying on its decision in *State v. Zornes*,<sup>403</sup> held that the statute is a criminal/prohibitory law for which Couture could be charged under P.L. 280.<sup>404</sup>

• *State of Minnesota v. Busse*.<sup>405</sup> Busse was charged with a gross misdemeanor for driving after cancellation of his Minnesota driver's license as inimical to public safety under Minn. Stat. Section 171.04, subd. 1 (9) (1998). His driver's license had been cancelled as a result of four separate convictions for driving under the influence. Busse's conviction in state district court was reversed by the state court of appeals, which held that the charged offense was civil/regulatory, concluding that consideration of the offense that triggered the cancellation was inappropriate, and therefore driving after cancellation as inimical to public safety was no different than driving after revocation based on failure to show proof of insurance in *State v. Johnson*, 598 N.W.2d 680 (Minn. 1999).<sup>406</sup> The Minnesota Supreme Court disagreed, concluding that "looking at the underlying basis for a license revocation or, in this case, cancellation, is not prohibited when determining whether the offense involves heightened public policy concerns.... Accordingly, our focus remains on whether the specific offense reflects heightened public policy concerns."<sup>407</sup> The court concluded:

<sup>401</sup> *Id.* at 731.

<sup>402</sup> 587 N.W.2d 849 (Minn. App. 1999).

<sup>403</sup> *State v. Zornes*, 584 N.W.2d 7, 11 (1998), held that "driving while intoxicated gives rise to heightened policy concerns" and that "the states interest in enforcing its DWI laws presents policy concerns sufficiently different from general road safety."

<sup>404</sup> *Couture*, 587 N.W.2d at 854.

<sup>405</sup> 644 N.W.2d 79 (Minn. 2002).

<sup>406</sup> *Id.* at 80–82.

<sup>407</sup> *Id.* at 84.



In sum, the criminal sanction imposed, the direct threat to physical harm, the need for the state to be able to enforce cancellations based on a threat to public safety, and the absence of exceptions to the offense of driving after cancellation based on being inimical to public safety all demonstrate heightened public policy concerns.... Thus, the conduct at issue...is generally prohibited conduct and under our *Cabazon/Stone* analysis the offense is criminal/prohibitory...[and] Minnesota courts have subject matter jurisdiction....”<sup>408</sup>

- In *Prairie Band Potawatomi Nation v. Wagon*,<sup>409</sup> the court of appeals held that the State of Kansas cannot impose its motor vehicle laws on tribal members even when they travel off the reservation. The State has to recognize motor vehicle registration and title issued by the Nation. Kansas’s sovereignty and public safety interests do not trump the tribe’s interest in self-governance.

#### d. Hot Pursuit, Stop and Detain, and Arrest

A significant challenge facing tribal police officers and state/local police officers is how to determine jurisdiction to issue a citation or make an arrest when a violation is observed. The decisions in the following selected cases reflect how various courts have dealt with the issues of “hot pursuit,” “stop and detain,” and “arrest.”

- In *State of Washington v. Schmuck*,<sup>410</sup> the issue was whether an Indian tribal officer has the authority to stop and detain a non-Indian who allegedly violates state and tribal law while traveling on a public road within a reservation until that person can be turned over to state authorities for charging and prosecution. Schmuck was found guilty of driving while intoxicated on the Port Madison Reservation after being detained by a Suquamish tribal officer and turned over to the Washington State Patrol. The Supreme Court of Washington affirmed the conviction and, in upholding the tribal officer’s stop and detention, observed:

Thus, twice the Supreme Court has stated that a tribe’s proper response to a crime committed by a non-Indian on the reservation is for the tribal police to detain the offender and deliver him or her to the proper authorities. This is precisely what Tribal Officer Bailey did: he detained Schmuck and promptly delivered him up in accordance with *Oliphant’s* and *Duro’s* directive.... In addition...the Ninth Circuit has squarely addressed the issue of tribal authority to detain a non-Indian in a case directly on point. *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975).... The Ninth Circuit held that an Indian tribe has inherent authority to stop and detain a non-

Indian allegedly violating state or federal law on public roads running through the reservation until the non-Indian can be turned over to appropriate authorities.

- In *City of Farmington v. Benally*,<sup>411</sup> a city police officer observed a vehicle weaving in its lane, repeatedly crossing the center divider, and speeding within the city limits. He attempted to stop the vehicle, but it sped off. A high-speed chase ensued, during which other traffic violations were observed by the officer. The vehicle was finally pulled over, but it was almost 3 miles within the boundaries of the Navajo Reservation. Defendant Benally was identified as an enrolled member of the Navajo Nation. The officer observed that Benally smelled of alcohol and had slurred speech and bloodshot, watery eyes. He arrested him, transported him to Farmington City police station, and charged him with a number of offenses, including driving under the influence of intoxicating liquor and/or drugs. He was convicted by a magistrate court.<sup>412</sup> The district court’s dismissal was affirmed by the appeals court, relying on the New Mexico Supreme Court decision in *Benally v. Marcum*.<sup>413</sup>

The district court relied on *Benally*...where under nearly identical facts, a member of the Navajo Tribe was pursued onto the reservation and arrested for violation of city traffic ordinances.... Our Supreme Court held that the arrest was illegal because it violated tribal sovereignty by circumventing the procedure for extradition from the Navajo Reservation.... This holding was based on well-established law that Indian tribes have the right to self-government that may not be impaired or interfered with by the state, absent congressional approval. 89 N.M. at 465-66, 553 P.2d at 1272-73; see *Williams v. Lee*, 358 U.S. 217, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959).<sup>414</sup>

- In *United States v. Patch*,<sup>415</sup> the Ninth Circuit affirmed a decision to convict and fine defendant, a member of the Colorado River Indian Tribe (CRIT), for simple assault in violation of 18 U.S.C. § 113(a)(5). The issue was whether the assault victim, Michael Schwab, a La Paz County, Arizona, deputy sheriff, had the authority to stop vehicles on the state highway to determine his jurisdiction to issue a citation. The agreed facts were that, while patrolling State Highway 95 in Indian country, Schwab’s patrol car was “tailgated” by Patch. Schwab attempted to stop him, but had to pursue him to determine whether he was a tribal member. Under county procedures, once Swab knew that Patch was a tribal member, he was supposed to

<sup>408</sup> *Id.* at 88.

<sup>409</sup> 402 F.3d 1015 (10th Cir. 2005).

<sup>410</sup> 121 Wash. 2d 373, 850 P.2d 1332 (1993).

<sup>411</sup> 119 N.M. 496, 892 P.2d 629 (1995).

<sup>412</sup> *Id.* at 497.

<sup>413</sup> 89 N.M. 463, 553 P.2d 1270 (1976).

<sup>414</sup> *Benally*, 119 N.M. at 497.

<sup>415</sup> 114 F.3d 131 (9th Cir. 1997).

notify the tribal police who had jurisdiction on the CRIT. The pursuit ended at Patch's sister's house, where Schwab followed Patch onto the porch and attempted to detain him, but was assaulted by Patch. Patch's conviction for assault rested on whether Schwab was acting within his official duties when he grabbed Patch by the arm on the porch.<sup>416</sup>

The court stated:

Arizona State Highway 95 at issue here crosses the CRIT reservation and is subject to overlapping jurisdiction. Offenses committed in Indian country can be subject to federal, state, or tribal jurisdiction depending on the severity of the crime and on whether the offender and/or victim are tribal members. *Duro v. Reina* [citation omitted]. On this section of road, Arizona police have authority to arrest non-Indians for traffic violations...but they do not have authority to arrest tribal members. [citations omitted]. As a practical matter, without a stop and inquiry, it is impossible to know who was driving the pickup truck. The question therefore is whether Schwab had the authority to stop offending vehicles to determine whether he had authority to arrest.... We hold that the attempted stop in this case was valid as a logical application of [*Terry v. Ohio*, 392 U.S. 1 (1967)]...Schwab had the authority under *Terry* to stop vehicles on State Highway 95 to determine his jurisdiction to issue a citation....<sup>417</sup>

Concerning the issue of hot pursuit, the Court observed:

Under the doctrine of hot pursuit a police officer who observes a traffic violation within his jurisdiction to arrest may pursue the offender into Indian country to make the arrest...Schwab was justified in following Patch to a place where he could effect a stop, in this case the private porch of a residence in Indian country.<sup>418</sup>

• *State of Washington v. Waters*,<sup>419</sup> involved civil traffic infractions in West Omak, Washington, across the river from East Omak, which is on the Colville Indian Reservation. Omak City Police Sergeant Rogers, who is also a commissioned Colville Tribal Law Enforcement Officer, while on patrol in a marked police car, observed defendant Waters commit minor civil traffic infractions, and followed his car across the river to East Omak, activating his emergency lights. Waters, an enrolled member of the Colville Confederated Tribes, refused to stop. A hot pursuit ensued through residential areas at excessive speeds, with Waters running stop signs. After an hour-long, high-speed chase on state highways, Waters was arrested on tribal reservation trust property for felony eluding, driving while

license suspended, driving while under the influence, and resisting arrest. Waters moved to dismiss, arguing that the officers did not have authority to arrest him on the reservation.<sup>420</sup>

The court distinguished *Benally*, which involved misdemeanor violations, not a felony. The court held that because the charge was felony eluding,

the Omak police therefore had authority to arrest Mr. Waters, if the arrest followed a fresh pursuit. The Washington Mutual Air Peace Officers Powers Act authorizes officers to enforce state laws throughout the territorial bounds of the state when the officer is in fresh pursuit. RCW 10.93.070(6). Fresh pursuit empowers an officer to arrest criminal or traffic violators and take them into custody anywhere in the state, including a reservation. RCW 10.93.120(1)(a).<sup>421</sup>

## E. CONTRACTING WITH INDIAN TRIBES AND TRIBAL ENTITIES<sup>422</sup>

### 1. General

As a matter of federal law, Indian tribes, as sovereign governments, operate on a government-to-government basis with federal, state, and local governments. Tribal governments also engage in commercial activities on behalf of their members, which may include business-related contracts with federal, state, and local governments in connection with transportation projects/activities. The issues involved in commercial contracts with tribes and tribal entities will be discussed in this section. Government-to-government cooperation, including cooperative agreements, will be discussed in the next section.

Tribal business contracts with non-Indians raise three major issues:

#### 1. Sovereign immunity;<sup>423</sup>

<sup>420</sup> *Id.* at 973–74.

<sup>421</sup> *Id.* at 976.

<sup>422</sup> See generally Amelia A. Fogleman, *Notes: Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Business*, 79 VA. L. REV. 1345 (1993); Michael O'Connell, *Indian Law Theme Issue: Business Transactions with Tribal Governments in Arizona*, 34 ARIZ. ATTORNEY 27 (1998); John F. Petoskey, *Northern Michigan: Doing Business with Michigan Indian Tribes*, 76 MICH. B. J. 440 (1997); Mark A. Jarboe, *Fundamental Legal Principles Affecting Business Transactions in Indian Country*, 17 HAMLIN L. REV. 417 (1994); William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169 (1994).

<sup>423</sup> Sovereign immunity of tribes and tribal officials is discussed in Section D.8, with waiver of immunity being

<sup>416</sup> *Id.* at 132–33.

<sup>417</sup> *Id.* at 133–34.

<sup>418</sup> *Id.* at 134.

<sup>419</sup> 93 Wash. App. 969; 971 P.2d 538 (1999).

2. What law(s) may govern a transaction between an Indian tribe and a non-Indian; and
3. How will disputes be resolved: federal, state, or tribal courts?<sup>424</sup>

Relative to issue two, in situations where Indian lands are involved, contracts must be approved by the Secretary of the Interior.

Petoskey states that the “first focus of a business relationship is to determine what entity within the tribe, or in most cases the tribe itself, is doing business with the non-Indian entity.”<sup>425</sup> O’Connell notes that

tribal constitutions and other tribal laws, ordinances and resolutions usually establish the authority and limitations within which tribal governments and tribal representatives must act as a matter of tribal law, [and that] [a]bsent a valid delegation of authority under tribal law, tribal government representatives generally lack inherent authority to enter binding agreements on behalf of a Tribe, to waive tribal sovereign immunity, or to agree to arbitration or other dispute resolution procedures.<sup>426</sup>

These tribal representatives may be subordinate entities created or authorized to conduct tribal business, as “instrumentalities, agencies or departments of tribal government,” or as “tribal government corporations...which serve as arms and instrumentalities of government.”<sup>427</sup>

This critical examination of tribal constitution and other tribal laws, ordinances, and resolutions is demonstrated in *White Mountain Apache Indian*

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covered in Section D.H.C.

<sup>424</sup> Petoskey, *supra* note 422, at 440.

<sup>425</sup> *Id.* He notes that

Michigan tribes have varying degrees of separation of power within their tribal constitutions. Some tribal constitutions concentrate tribal power in the tribal chair, while others create a representative form of government, and still others have a “general council” where all eligible tribal citizens can overturn a decision of the “executive council.” Most Michigan tribal councils act in both legislative and executive capacities.

<sup>426</sup> O’Connell, *supra* note 422, at 27.

<sup>427</sup> *Id.* O’Connell notes that the phrase “tribal enterprise” describes

a broad class of entities which conduct tribal business as instrumentalities, agencies or departments of tribal government but which have not been established as a tribal corporation, authority or other separate legal entity with an independent board of directors. Like other instrumentalities, agencies or departments of tribal government, tribal Enterprises are vested with sovereign immunity and are not persons for diversity purposes under 28 U.S.C. § 1332. (Footnotes omitted).

*Tribe v. Shelley*.<sup>428</sup> This was an alleged breach of a road construction contract where the Arizona Supreme Court addressed the question of whether defendant Fort Apache Timber Company (FATCO) was a legal entity separate and apart from the White Mountain Apache Tribe (TRIBE), or part of the TRIBE and entitled to the TRIBE’s immunity. The court examined the TRIBE’s constitution and determined that the TRIBE had “the authority to create subordinate organizations for economic purposes.”<sup>429</sup> The court then examined the “Plan of Operation” of FATCO and found that it was “a subordinate economic organization of the TRIBE...[and] is a part of the TRIBE and as such enjoys the same immunity from suit that the TRIBE enjoys.”<sup>430</sup>

While tribal governments are free to establish business corporations under state corporate laws, Petoskey points out that

because of the implied waiver of sovereign immunity and the potential lack of immunity from federal and state taxation that would result, most tribes do not use state law to create these entities, and generally use tribal or federal law, 25 U.S.C 477 [Section 17 of the Indian Reorganization Act, 48 Stat. 987 (1934)], to create a federal corporation....<sup>431</sup>

Each tribe that accepted the IRA was given “the option to have the Secretary of the Interior (Secretary) issue a federal charter of incorporation to the tribal government [and] granted to such corporations...the power to engage in business and the power to lease tribal land....”<sup>432</sup> But, he notes, “Section 17 and tribally chartered corporations are generally immune if their charters or by-laws do not waive immunity.”<sup>433</sup>

## 2. IRA Business Corporations

IRA, Section 16 (25 U.S.C. § 476(e)), provides that “[i]n addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the...rights and powers...to negotiate with the Federal, State, and local

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<sup>428</sup> 107, Ariz. 4, 480 P.2d 654 (1971).

<sup>429</sup> *Id.* at 6.

<sup>430</sup> *Id.* at 6–7. *Cf.* Dixon v. Picopa Constr. Co., 160 Ariz. 251, 772 P.2d 1104 (1989), a suit in tort, where the Arizona Supreme Court found that Picopa, a corporation formed under the laws of the Salt River Pima-Maricopa Indian Community, was not a subordinate economic organization within the meaning of *White Mountain Apache*, but “has a board of directors, separate from the tribal government, which exercises full managerial control over the corporation...[and] unlike FATCO, ...the tribal government does not manage the corporation.”

<sup>431</sup> Petoskey, *supra* note 422, at 441.

<sup>432</sup> O’Connell, *supra* note 422, at 27–28.

<sup>433</sup> Petoskey, *supra* note 422, at 442.

governments.” IRA, Section 17, as amended,<sup>434</sup> provides as follows:

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

As discussed in Section D.8.c, this power to incorporate was done so in part to enable tribes to waive sovereign immunity, thereby facilitating business transactions and fostering tribal economic development and independence, but a tribe that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so. Vetter points out that while not all tribes are organized under IRA Section 16, a “large percentage of the tribes that established an I.R.A. Section 16 government also set up an I.R.A. Section 17 corporation...initially [adopting] an Interior Department model...[which] included a ‘sue and be sued’ clause, consistent with the 1934 congressional purpose.”<sup>435</sup> But, as previously noted, Canby points out that while many of the corporate charters under the IRA confer the power to “sue and be sued,” a majority of courts have held that such a clause standing alone does not constitute a waiver of immunity.<sup>436</sup> Because of this, modern Section 17 corporations have provided for limited waiver language in their charters.<sup>437</sup> Thus, as noted above, determining whether a waiver of sovereign immunity by the tribe or tribal entity exists becomes a critical issue in the formation of a contract.

<sup>434</sup> 25 U.S.C. § 477.

<sup>435</sup> Vetter, *supra* note 422, at 176, 180. He quotes this Department of Interior model provision as follows:

[The corporation has the power] [t]o sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and be sued shall not be deemed a consent by the said Tribe [I.R.A. § 16 government?], or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattels specially pledged or assigned.

<sup>436</sup> CANBY, *supra* note 8, at 102.

<sup>437</sup> O’Connell, *supra* note 422, at 28, n.17.

### 3. Approval by the Secretary of the Interior<sup>438</sup>

The most important federal statute concerning business transactions that relate to “Indian lands” was enacted in 1872, and is now codified in 25 U.S.C. § 81 (2005), entitled: “Contracts with Indian tribes or Indians.”<sup>439</sup> Subsections (b) and (c) provide:

(b) No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

(c) Subsection (b) shall not apply to any agreement or contract that the Secretary (or a designee of the Secretary) determines is not covered under that subsection.

Approval criteria, while cast in the negative, forces the contracting parties to contractually address the three major issues raised above:

(d) The Secretary (or a designee of the Secretary) shall refuse to approve an agreement or contract that is covered under subsection (b) if the Secretary (or a designee of the Secretary) determines that the agreement or contract—

- (1) violates Federal law; or
- (2) does not include a provision that—

(A) provides for remedies in the case of a breach of the agreement or contract;

(B) references a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe; or

(C) includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action).

Out of an abundance of caution, and in consideration of the fact that failure to obtain approval under Section 81 invalidates the agreement, the

<sup>438</sup> 25 U.S.C. § 81.

<sup>439</sup> Subsec. (a) provides as follows:

(a) In this section:

(1) The term “Indian lands” means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

(2) The term “Indian tribe” has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

(3) The term “Secretary” means the Secretary of the Interior.

prudent “course of action is to assume that Section 81 applies...until you have ruled out the possibility that approval is required.”<sup>440</sup> Vetter states that “it is probably safe to say that Secretarial approval is required for any contract that limits tribal control of Indian land or transfers possession or control (even for limited period) to a non-Indian party.”<sup>441</sup> O’Connell notes that “the uncertain boundaries of Section 81 often lead parties to seek BIA ‘accommodation approval’ of agreements where the need for Section 81 approval is unclear[,]” but cautions that such approvals “trigger review under NEPA, NHPA and ESA.”<sup>442</sup> He recommends consideration of “belt and suspenders” clauses “making all agreements with tribal governments and tribal business entities conditional to receipt of Section 81 approval.”<sup>443</sup>

#### 4. Dealing with Jurisdictional Issues

##### a. Personal Jurisdiction

The U.S. Supreme Court ruled unanimously in *Williams v. Lee*<sup>444</sup> that state courts have no jurisdiction over non-Indian civil suits against Indians for transactions arising on a reservation. So any state court jurisdiction in Indian country must be based upon specific federal law.<sup>445</sup> While there have been several laws enacted conferring state jurisdiction over a particular tribe(s), the only federal law extending state jurisdiction to Indian reservations generally is P.L. 280, discussed earlier, which allowed states to assume jurisdiction over civil causes of action in Indian country (see Section D.9.b. for current status of states having such state court jurisdiction).<sup>446</sup> But in *Montana v. United States*,<sup>447</sup>

<sup>440</sup> Petoskey, *supra* note 422, at 443, citing two recent cases that establish guidelines in applying § 81: *Capitan Grande Band of Mission Indians v. Amer. Mgmt. & Amusement*, 840 F.2d 1394 (9th Cir. 1987); *Altheimer v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993).

<sup>441</sup> Vetter, *supra* note 422, at 171, citing at n.5: *Barona Group of Capital Grande Band of Mission Indians v. Amer. Mgmt. & Amusement*, 840 F.2d 1394 (9th Cir. 1987); *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986); *Wisc. Winnebago Bus. Comm. v. Koberstein*, 762 F.2d 613 (7th Cir. 1985); *United States ex rel. Shakopee Mdewakanton Sioux Cmty. v. Pan Amer. Mgmt. Co.*, 616 F. Supp. 1200 (D. Minn. 1985).

<sup>442</sup> O’Connell, *supra* note 422, at 29.

<sup>443</sup> *Id.*

<sup>444</sup> 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

<sup>445</sup> *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 129 (1973).

<sup>446</sup> The Supreme Court held in *Okla. Tax Comm’n v. Pottawatomie Tribe*, 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991), that “Public Law 280 merely permits a

the Supreme Court held that Indian tribes retain inherent power to exercise civil jurisdiction over nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements; however, Indians and tribal entities are not restricted to tribal court, but may litigate in state court when there is state court jurisdiction over the non-Indian defendant, wherever the cause of action arose.”<sup>448</sup>

##### b. Subject Matter Jurisdiction

(1) *Tribal Courts*.—Vetter points out that while “most tribal courts have subject matter jurisdiction over all types of civil actions, [m]any tribal codes do not include commercial statutes, such as the Uniform Commercial Code, [n]or...an extensive ‘common law.’”<sup>449</sup> To remedy this, “tribal codes or tribal court decisions allow reference to federal and state law.”<sup>450</sup>

(2) *State Courts*.—Because the preservation of tribal self-government is so dominant in federal law, subject matter jurisdiction issues addressed by state courts “are almost entirely tied to tribal sovereignty issues...[and] turn, in part, on the extent to which the Indian entity or individual voluntarily goes outside reservation boundaries.”<sup>451</sup> Vetter cites *R.C. Hedreen Co. v. Crow Tribal Housing Authority*<sup>452</sup> as an example of a breach of contract diversity action filed by a non-Indian construction contractor where the court found “adequate substantial contacts with the state” to give the court jurisdiction.<sup>453</sup>

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State to assume jurisdiction over ‘civil causes of action’ in Indian country.”

<sup>447</sup> 450 U.S. 544, 565, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493, 510 (1981).

<sup>448</sup> *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g*, 476 U.S. 877 (1986). Canby points out that

on some reservations the Indian plaintiff has no alternative; a number of tribal codes provide for civil jurisdiction over non-Indian defendants only when they stipulate to it. In summary, then, it is clear that state courts have jurisdiction over suits against non-Indians (and perhaps nonmembers) no matter where the claim arose.

CANBY, *supra* note 8, at 189–90.

<sup>449</sup> Vetter, *supra* note 422, at 187–88.

<sup>450</sup> *Id.* at 188.

<sup>451</sup> *Id.*

<sup>452</sup> 521 F. Supp. 599 (D. Mont. 1981).

<sup>453</sup> Vetter, *supra* note 422, at 189. The substantial contacts were: (1) the contracts were made with non-Indian entities residing off the reservation, (2) they [the contracts] contemplated the procurement of supplies and labor off the reservation, (3) bids for the work were solicited off the reservation, (4) the [non-Indian] plaintiff executed the contracts off the reservation, and (5) the bond

But, the court's decision was criticized in *R.J. Williams Co. v. Ft. Belknap Housing Authority*,<sup>454</sup> where the Ninth Circuit employed a different test for significant contact.<sup>455</sup> Vetter cites an off-reservation construction contract case, *Padilla v. Pueblo of Acoma*,<sup>456</sup> where the exercise of state jurisdiction was held not to infringe on tribal self-government, "primarily because the contract-related events occurred almost exclusively off the reservation."<sup>457</sup>

(3) *Federal Courts*.—Federal courts have a limited role in civil disputes arising in Indian country. The two applicable bases for jurisdiction are federal question and diversity of citizenship. Claims arising under federal law may be brought under such statutes as 28 U.S.C. § 1331 or § 1343, provided all other requirements are met. Indian tribes are allowed by 28 U.S.C. § 1362 to bring suits in federal courts, but the claim must still be based on federal law.<sup>458</sup> For diversity jurisdiction, Indian tribes are not citizens of any state.<sup>459</sup> The United States Ninth Circuit Court recently noted in *American Vantage Companies v. Table Mountain Rancheria*<sup>460</sup> that "[m]ost courts to have considered the question—including the First, Second, Eighth and Tenth Circuits—agree that unincorporated Indian tribes cannot sue or be sued in diversity because they are not citizens of any state." [Citations omitted]. But individual Indians, tribal entities, and tribally incorporated corporations are citizens of the state where the reservation is located for diversity purposes.<sup>461</sup> Vetter points out that even though diver-

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essential to the contracts was procured and signed off the reservation. Hedreen 521, F. Supp. 607 n.4.

<sup>454</sup> 719 F.2d 979 (9th Cir. 1983).

<sup>455</sup> *Id.* The Court employed a "significant contacts" test commonly used in conflicts-of-law issues: In determining the locus of a contract dispute, courts generally look to (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the place of residence of the parties, evaluating each factor according to its relative importance with respect to the dispute. When a contract concerns a specific physical thing, such as land or a chattel, the location of the thing is regarded as highly significant. *Id.* at 985.

<sup>456</sup> 107 N.M. 174, 754 P.2d 845 (N.M. 1988).

<sup>457</sup> *Id.*

<sup>458</sup> CANBY, *supra* note 8, at 216–17.

<sup>459</sup> *Standing Rock Sioux v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974).

<sup>460</sup> 292 F.3d 1091, 1095 (9th Cir. 2002).

<sup>461</sup> Vetter, *supra* note 422, at 190, citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S. Ct. 971, 942 L. Ed. 2d. 10 (1987); *Weeks Constr. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986); *Enter. Elec. Co. v. Blackfeet Tribe*, 353 F. Supp. 991 (D. Mont. 1973).

sity or federal question is established, a federal forum is not assured:

Even with personal and subject matter jurisdiction, a federal court may stay proceedings, or dismiss the case pending exhaustion of tribal remedies, as a matter of comity. If there is a tribal court that has, or may have, jurisdiction, the federal policy supporting tribal self-government supports deferring to tribal court, particularly on issues of tribal court jurisdiction. That rule was first enunciated in *National Farmers Union Insurance Companies v. Crow Tribe*<sup>462</sup> concerning federal question jurisdiction, and was extended to diversity cases in *Iowa Mutual Insurance Co. v. LaPlante*.<sup>463</sup>

### c. *Planning Ahead*

Vetter states that "the court decisions that have considered an express contract provision providing for choice of law and choice of forum have enforced those provisions."<sup>464</sup> A recent example was the Supreme Court decision in *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*,<sup>465</sup> previously reviewed at Section D.8.d., which held that the tribe waived its immunity from suit in state court when it expressly agreed (1) to arbitrate contractual disputes, (2) to be governed by Oklahoma law, and (3) to contract enforcement of any arbitration awards in any court having jurisdiction thereof. Vetter recommends that a written contract should at least include, in addition to an express waiver of immunity, the following:<sup>466</sup>

- Consent to the jurisdiction of specific courts or jurisdictions (e.g. "North Dakota state courts" or "federal court system");
- Agreement that the law of a specific state will be applied in interpretation and enforcement; and
- Express consent to judicial enforcement of any arbitration award, if the agreement includes an arbitration clause.

But he concludes that "[i]f there is any doubt about the official nature of the contract, the tribe's governing body should be requested to approve it through a regularly adopted resolution."<sup>467</sup>

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<sup>462</sup> 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985).

<sup>463</sup> 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987).

<sup>464</sup> Vetter, *supra* note 422, at 194.

<sup>465</sup> 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001).

<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

**F. GOVERNMENT-TO-GOVERNMENT COOPERATION<sup>468</sup>**

**1. General**

Tribal–state relations are, without doubt, the most significant challenge in Indian law today. The sharing of “adjacent lands, resources and citizens...has historically created conflict, often leading to expensive and lengthy litigation...[which] has done little to resolve the core uncertainties and distrust between states and tribes.”<sup>469</sup> The great majority of the 28 U.S. Supreme Court Indian law decisions between 1991 and 2002 focused on tribal–state relations.<sup>470</sup> Commentators view the result as a loss to both parties, but suggest possible solutions to the problem of uncertainty and litigation:

The tribes and states have expended precious resources on continuous litigation.... The relationship between the tribes and states has been strained, causing both parties to jealously guard jurisdiction over areas that affect the other. Consequently, it is in the best interests of the tribes and states to direct time and money toward durable solutions to the underlying problems. States and tribes should look to a forum other than the courtroom to address their disagreements and reach solutions that benefit both parties’ objectives. One possible solution to the problem of uncertainty and litigation is a cooperative agreement between an Indian tribe and a state.<sup>471</sup>

<sup>468</sup> See generally Frank Pommersheim, *Tribal–State Relations: Hope for the Future?*, 36 S.D. L. REV. 239 (1991); Joel H. Mack and Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 PEPP. L. REV. 1295 (1993); DESKBOOK, *supra* note 16, at chap. 14, State-Tribal Cooperative Agreements; CTC & ASSOCIATES, WISCONSIN DOT SYNTHESIS REPORT: STATE DOTs AND NATIVE AMERICAN NATIONS (Jan. 2004), <http://www.dot.wiscosin.gov/library/research/docs/tsrs/tsrnativeamerican.pdf>.

<sup>469</sup> DESKBOOK, *supra* note 16, at 383.

<sup>470</sup> Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. UNIV. L. REV. 1177 (2001), Appendix: Supreme Court Indian Law Cases Since 1991, at 1268–71.

<sup>471</sup> Mack and Timms, *supra* note 468, at 1297–98, adding that:

Cooperative agreements between an Indian tribe and a state focus on substantive issues with the purpose of solving a particular problem affecting the states and the Indian tribes. Generally, the tribe and state agree to ignore jurisdictional issues for purposes of the agreement. Thus, cooperative agreements are able to frame the issues that need to be addressed and limit the continual jurisdictional disputes that lead to litigation. Furthermore, if conflicts do arise, litigation will be more focused on substantive issues rather than jurisdictional issues.

Professor Frank Pommersheim, recognized authority in Indian law, noted in his 1991 article, *Tribal–State Relations: Hope For The Future?*, that “[d]espite the absence of any readily applicable doctrine for understanding or describing tribal–state relations, there potentially exists a vital zone for creative free-play and mutual governmental respect and advancement.”<sup>472</sup> This “vital zone” includes the negotiation of tribal–state cooperative agreements. He concludes his case study of such agreements with this statement:

The preceding case studies reflect an array of recent tribal–state negotiations. Success has not always been forthcoming. The importance of these negotiating efforts, however, cannot be sufficiently emphasized. With the growing costs of litigation and the politically sensitive nature of many conflicts, both tribes and states are recognizing that negotiation is the only viable alternative.<sup>473</sup>

A joint project between the National Conference of State Legislatures (NCSL) and the National Congress of American Indians (NCAI) recently published the guide, *Government to Government: Understanding State and Tribal Governments* (2000),<sup>474</sup> intended to help states and tribes understand each other and begin the process of exploring new avenues for improvement of governmental service for the citizens of both tribes and states. This guide suggests that new intergovernmental

<sup>472</sup> Pommersheim, *supra* note 468, at 251.

<sup>473</sup> *Id.* at 298. Professor Pommersheim noted (at 266) that information from the states, together with analysis of available data at that time, 1991, showed that the majority of tribal–state agreements may be broken down into the following subject matter headings and number of agreements:

Jurisdiction or PL 280 Agreements. . . . .	5
Gaming Compacts. . . . .	12
Environmental Agreements. . . . .	13
Hunting and Fishing. . . . .	18
Health and Welfare Programs . . . . .	17
Water Agreements. . . . .	11
Indian Burial Sites. . . . .	4
Law Enforcement . . . . .	7
Economic or Taxing Agreements. . . . .	10
Education Agreements or Awareness Projects. . . . .	2

<sup>474</sup> Susan Johnson, Jeanne Kaufmann, John Dossett, and Sarah Hicks, NATIONAL CONFERENCE OF STATE LEGISLATURES AND NATIONAL CONGRESS OF AMERICAN INDIANS, GOVERNMENT TO GOVERNMENT: UNDERSTANDING STATE AND TRIBAL GOVERNMENTS 3 (2000) (hereinafter “NCSL/NCAI Guide”). The guide notes that a “major impetus for the increased need for improved tribal-state relations is devolution—the transfer of resources and responsibilities, often through federal block grants or other funding mechanisms, to state, local or tribal governments.”

institutions, including cooperative agreements, can protect jurisdiction and avoid expensive legal conflicts:

Many tribes and states are discovering ways to set aside jurisdictional debate in favor of cooperative government-to-government relationships that respect the autonomy of both governments. Tribal governments, state governments and local governments are finding innovative ways to work together to carry out their governmental functions. New intergovernmental institutions have been developed in many states, and state tribal cooperative agreements on a broad range of issues are becoming commonplace.

Cooperation does not mean that either a state or a tribe is giving away jurisdiction or sovereignty. Some areas of disagreement may always exist, as they may with any neighboring governments. Certainly, both states and tribes will preserve their ability to litigate over jurisdictional, legal and constitutional rights when it is in their best interest to do so. However, many costly and unproductive legal conflicts can be avoided and many beneficial results can be obtained through efforts by both states and tribes to understand each other and resolve conflicts.

The NCSL and NCAI, in a later publication, *Government to Government: Models of Cooperation Between States and Tribes (2002)*,<sup>475</sup> notes that “of all the state-tribal relationships, institutions and agreements in various states, one particular mechanism does not appear to be inherently better than another.... It is the function that matters, not the specific mechanism that might be used to achieve that function.” The NCSL/NCAI guide suggests these principles as the basis for those functions:<sup>476</sup>

- A Commitment to Cooperation;
- Mutual Understanding and Respect;
- Regular and Early Communication;
- Process and Accountability for Addressing Issues; and
- Institutionalization of Relationships.

The NCSL/NCAI guide provides 10 mechanisms or institutions that may facilitate improved inter-governmental relationships:

- *State Legislative Committees* (Fourteen states have 17 different legislative committees to address Indian issues).
- *State Commissions and Offices* (Approximately 34 states have an office or commission dedicated to Indian affairs).<sup>477</sup>
- *State-Tribal Government-to-Government Agreements and Protocols* (e.g., Washington Centennial Accord; Oregon Statute and Executive Order on Tribal-State Relations; Alaska Millennium Agreement).
- *Tribal Delegates in State Legislatures* (Maine is the only state with tribal delegates to state legislature, but Wisconsin, South Dakota, and Virginia have considered it).
- *Intertribal Organizations* (Membership organizations representing some or all tribes in a state or region).
- *Dedicated Indian Events at the Legislatures* (Several states, such as Arizona, Maine, New Mexico, Oklahoma, and Oregon, designate specific days during legislative sessions for interaction with tribal governments).
- *Individual Legislator Efforts*.
- *State Recognition of Native Cultures and Governments* (Twelve states—Alabama, Connecticut, Delaware, Georgia, Louisiana, Maine, Massachusetts, Michigan, New Jersey, New York, North Carolina, and Virginia—have recognized more than 40 American Indian tribes as separate and distinct governments within their borders).
- *Training for Legislators and Tribal Leaders on Respective Government Processes*.
- *Other Potential Legislative Mechanisms*.

As noted above, NCSL/NCAI report that approximately 34 states have an office or commission dedicated to Indian affairs, established to serve as a liaison between the state and tribes on matters of interest to the state and tribes. For example, in 1976, the Colorado legislature established its Commission of Indian Affairs in the Office of the Lieutenant Governor with this legislative declaration:<sup>478</sup>

The general assembly finds and declares that the affairs of the two Indian tribes whose reservations are largely within the state of Colorado, the Southern Ute tribe and the Ute Mountain tribe, include matters of state interest and that the state of Colorado recognizes the special governmental relationships and the unique political status of these tribes with respect to the federal government and, further, that

<sup>475</sup> Susan Johnson, Jeanne Kaufmann, John Dossett, and Sarah Hicks, NATIONAL CONFERENCE OF STATE LEGISLATURES AND NATIONAL CONGRESS OF AMERICAN INDIANS, *GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES* (2002) (hereinafter “NCAI/NCSL Models of Cooperation”).

<sup>476</sup> *Id.* at 6–11.

<sup>477</sup> The NCSL maintains a Web site listing State Committees and Commissions on Indian Affairs at <http://www.ncsl.org/programs/statetribestlegcom.htm>.

<sup>478</sup> COLO. REV. STAT. 24-44-101.



it is in the best interest of all the people of Colorado that there be an agency providing an official liaison among all persons in both the private and public sectors who share a concern for the establishment and maintenance of cooperative relationships with and among the aforesaid tribes.

The duties of the Colorado Commission of Indian Affairs are typical of the duties of other such state commissions or councils.<sup>479</sup> NCSL/NCAI report that many of these offices are called "Governor's Office of Indian Affairs," but most commissions are established through legislation, with membership a mix of Indian and non-Indian members.<sup>480</sup> At present, at least 16 states provide for such statutorily created organizations to coordinate intergovernmental dealings between tribal governments and the state.<sup>481</sup>

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<sup>479</sup> See COLO. REV. STAT. § 24-44-103: (1) It is the duty of the commission:

(a) To coordinate intergovernmental dealings between tribal governments and this state;

(b) To investigate the needs of Indians of this state and to provide technical assistance in the preparation of plans for the alleviation of such needs;

(c) To cooperate with and secure the assistance of the local, state, and federal governments or any agencies thereof in formulating and coordinating programs regarding Indian affairs adopted or planned by the federal government so that the full benefit of such programs will accrue to the Indians of this state;

(d) To review all proposed or pending legislation and amendments to existing legislation affecting Indians in this state;

(e) To study the existing status of recognition of all Indian groups, tribes, and communities presently existing in this state;

(f) To employ and fix the compensation of an executive secretary of the commission, who shall carry out the responsibilities of the commission;

(g) To petition the general assembly for funds to effectively administer the commission's affairs and to expend funds in compliance with state regulations;

(h) To accept and receive gifts, funds, grants, bequests, and devices for use in furthering the purposes of the commission;

(i) To contract with public or private bodies to provide services and facilities for promoting the welfare of the Indian people;

(j) To make legislative recommendations;

(k) To make and publish reports of findings and recommendations.

<sup>480</sup> NCAI/NCSL Models of Cooperation, *supra* note 475, at 24-25.

<sup>481</sup> Statutorily created commissions and councils include:

But whether the state organization is a legislative committee, a commission, a council, or the Governor's office, the mechanism or approach used in seeking a cooperative relationship, as noted above, may be as important as who leads it. Professor Pommersheim identified the State of Washington's approach in reaching its 1989 Centennial Accord as a prototype, making this statement:

Tribal-state relations are often caught in a history.... The principles embedded in a prototype set of negotiated sovereignty accords could go a long way toward ameliorating this declivity. \* \* \* These accords would involve no waiver or abridgement of any rights by either side, but would simply take the word "respect"...and apply it to the legal realm. The quality and texture of tribal-state relations are such that it is necessary for states to demonstrate publicly and in writing that they recognize tribal sovereignty—that is, the right of tribal governments to exist, to endure, and to flourish. Such accords might be seen as establishing an innovative set of new political and diplomatic protocols which might serve as a gateway to a more fulfilling and successful future.<sup>482</sup>

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Alabama (ALA. CODE §§ 41-9-708-717, Alabama Indian Affairs Commission).

Arizona (ARIZ. REV. STAT. ANN. §§ 41-541-594, Arizona Commission on Indian Affairs).

Colorado (COLO. REV. STAT. §§ 24-44-101-108, Colorado Commission on Indian Affairs)

Connecticut (CONN. GEN. STAT. ANN. §§ 10-381-391, Native American Heritage Advisory Council).

Georgia (GA. CODE ANN. §§ 44-12-280-285, Council on American Indian Concerns).

Idaho (IDAHO CODE §§ 67-4004-4007, Idaho Council on Indian Affairs).

Louisiana (LA. REV. STAT. ANN. tit. 46, § 2302, Governor's Office of Indian Affairs).

Minnesota (MINN. STAT. § 3.922, Indian Affairs Council).

Nevada (NEV. REV. STAT. §§ 233A .010-233A.100, Nevada Indian Commission).

North Carolina (N.C. GEN. STAT. §§ 143B-404-411, Commission on Indian Affairs; N.C. 143B-411.1-411.4, North Carolina Advisory Council on The Eastern Band of Cherokee).

North Dakota (N.D.C.C. §§ 54-36-01-06, North Dakota Indian Affairs Commission).

Oklahoma (OKLA. STAT. tit. 74, §§ 1201-1205, Oklahoma Indian Affairs Commission).

Oregon (OR. REV. STAT. 172.100).

South Dakota (S.D. CENT. CODE § 1-4-1, Office of Tribal Governmental Relations).

Tennessee (TENN. CODE ANN. §§ 4-34-101-4-34-108, Tennessee Commission of Indian Affairs).

Utah (UTAH CODE ANN. §§ 9-9-101-108, Division of Indian Affairs).

<sup>482</sup> Pommersheim, *supra* note 468, at 269.

## 2. Washington's Centennial Accord

The 1989 Washington Centennial Accord between 28 federally recognized Washington Indian tribes and the State of Washington<sup>483</sup> is an outstanding example of a state expanding the liaison outreach of state government agencies to tribal governments in a full government-to-government relationship. This Accord, initiated by the Governor's proclamation of January 3, 1989, and signed by the Governor and a representative of each tribe, "provides a framework for that government-to-government relationship and implementation procedures to assure execution of that relationship." Pertinent to the issue of effective outreach is this provision of the Accord:

### a. Parties

There are twenty-eight federally recognized Indian tribes in the state of Washington. Each sovereign tribe has an independent relationship between the state of Washington, through its governor, and the signatory tribes.

The parties recognize that the state of Washington is governed in part by independent state officials. Therefore, although, this *Accord* has been initiated by the signatory tribes and the governor, it welcomes the participation of, inclusion in and execution by chief representatives of all elements of state government so that the government-to-government relationship described herein is completely and broadly implemented between the state and the tribes.

In 1999, the Governor's Office of Indian Affairs issued the *Washington State/Tribal Government-to-Government Implementation Guidelines*, which were determined by a combined tribal and state task force. WSDOT implemented these guidelines with its WSDOT Centennial Accord Plan (2003),<sup>484</sup> based on an Executive Order by Washington's Secretary of Transportation, issued in February, 2003,<sup>485</sup> providing, *inter alia*:

This Executive Order establishes the commitment of...WSDOT employees to provide consistent and equitable standards for working with the various tribes across the state, and flexibility in recognition that each federally recognized tribe is a distinctly sovereign nation. The goal is to create durable intergovernmental relationships that promote coordinated

transportation partnerships in service to all our citizens.<sup>486</sup>

WSDOT's Tribal Liaison Office, established in 2001, is assigned responsibility for assisting tribes and the department with implementing effective government-to-government relations, reporting to the WSDOT chief of staff. Office responsibilities include the following:<sup>487</sup>

- Providing tribes with a point of contact within the department and helping tribes gain access to the appropriate staff in understanding the department's programs, policies, and procedures;
- Assisting the department in understanding tribal issues, making contacts, initiating consultation, and promoting on-going coordination with tribes;
- Facilitating meetings, negotiating intergovernmental agreements on behalf of the department and Secretary, and helping reconcile differences between the department and tribal governments.

## 3. Minnesota's Transportation Accord

Minnesota's state-tribal "Government To Government Transportation Accord" was executed on April 1, 2002. Signatories were MnDOT, the 11 federally recognized Indian tribal governments within Minnesota, and FHWA's Minnesota Division. This accord reflected the signatories' "desire to improve their mutual cooperation as neighbors by improving the development, maintenance, and operation of interconnected transportation systems." Acknowledging the need for "better coordination and understanding between the parties on transportation planning, development and maintenance projects," the accord provided as one of its purposes and objectives this statement:

This agreement demonstrates a commitment by the parties to give practical implementation to a new government-to-government partnership in a broad array of transportation matters. This partnership is designed to demonstrate mutual respect for each other, to enhance and improve communication between the parties, to foster increased cooperation on transportation projects, and to facilitate the respectful resolution of inter-governmental differences that may arise from time to time in the area of transportation. The development of this agreement is intended to build confidence among its parties on each of these objectives. The parties have adopted this agreement in order to institutionalize new information-sharing cooperative intergovernmental project development within their respective governmental structures.

<sup>483</sup> The Centennial Accord is published on the Intranet by the Washington Governor's Office of Indian Affairs, available at <http://www.goia.wa.gov/Government-to-Government/Data/CentennialAccord.htm>.

<sup>484</sup> See WSDOT's Tribal Consultation Policy, [http://www.wsdot.wa.gov/tribal/consultation\\_policy.pdf](http://www.wsdot.wa.gov/tribal/consultation_policy.pdf).

<sup>485</sup> Washington Secretary of Transportation Executive Order No. E 1025.00, dated Feb. 19, 2003, entitled "Tribal Consultation." Source: Tribal Liaison Office, WSDOT, available at <http://www.wsdot.wa.gov/tribal/>.

<sup>486</sup> *Id.*

<sup>487</sup> *Id.*

Subsequent to completion of the Transportation Accord, Minnesota Governor Pawlenty, in April 2003, issued Executive Order 03-05, "Affirming the Government-to-Government Relationship Between The State of Minnesota and Indian Tribal Governments Located Within the State of Minnesota."<sup>488</sup> This Executive Order, *inter alia*, provided that

Agencies of the State of Minnesota and persons employed by state agencies (the "State") shall recognize the unique legal relationship between the State of Minnesota and Indian tribes, respect the fundamental principles that establish and maintain this relationship and accord tribal governments the same respect accorded to other governments.<sup>489</sup>

MnDOT's implementation of the Transportation Accord and the Executive Order include

- Issuance of Minnesota Tribes and Transportation E-Handbook, an online resource guide for tribal, township, city, county, state, and federal officials and citizens working on transportation issues affecting tribal land in Minnesota.<sup>490</sup>
- Development of "Indian Employment: Memorandum of Understanding,"<sup>491</sup> now executed by six tribes.<sup>492</sup>
- Execution in August 2004 of programmatic agreements with three tribes for complying with Section 106 of the National Historic Preservation Act.<sup>493</sup>

<sup>488</sup> Executive Order 03-05, dated April 9, 2003, filed with the Secretary of State, April 11, 2003.

<sup>489</sup> *Id.*

<sup>490</sup> <http://www.dot.state.mn.us/mntribes/handbook/toc.html>.

<sup>491</sup> <http://www.dot.state.mn.us/mntribes/mouemployment.html>.

<sup>492</sup> Bois Forte Band of Chippewa, Leech Land Band of Ojibwe Indians, Red Lake Band of Chippewa Indians, Shakopee Mdewakanton Sioux Community, Upper Sioux Indian Community, and White Earth Band of Ojibwe.

<sup>493</sup> Lower Sioux Indian Community, the Bois Forte Band of Chippewa, and the Fond du Lac Band of Chippewa. As previously noted, Section H.3.C of the National Historic Preservation Act requires all federal agencies to consult with Indian tribes for undertakings that may affect properties of traditional religious and cultural significance on or off tribal lands. The regulations (36 C.F.R. § 800.2(c)(2)(ii)(A)) require agency officials to ensure that consultation in the § 106 process provides the Indian tribe a reasonable opportunity to identify its concerns about historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.

#### 4. Other State Approaches/Experiences<sup>494</sup>

Wisconsin DOT's Transportation Synthesis Report of January 2004 summarized the existing state strategies for coordinating relationships with Native American nations on transportation issues as follows:<sup>495</sup>

- Tribal Liaison (person or office): California, Washington, Montana, Minnesota, and Arizona;
- Tribal Summits: Washington, New Mexico, Iowa, Idaho, Minnesota, Pennsylvania, and Wisconsin; and
- Advisory Committee: In addition to their tribal liaisons, California and Arizona have standing committees that meet regularly to address tribal transportation issues. California's Native American Advisory Committee, which advises the Caltrans director, consists of tribal representatives. Arizona's Tribal Strategic Partnering Team includes representatives from tribes and state and federal agencies.

The approaches and experiences of selected states are set out below.

##### a. Arizona<sup>496</sup>

Arizona has 21 federally recognized tribes, all but one with a reservation in the state. Indian reservations occupy 27.7 million acres, about 28 percent of the State's land base. In 1999, the Arizona Department of Transportation (ADOT) established its ADOT Tribal Strategic Partnering Team (ATSPT), bringing together representatives from state, tribal, federal, and local agencies to discuss tribal transportation issues and to develop forums to address these issues. The ATSPT meets quarterly and distributes the results of its proceedings to participants, tribal representatives, and area planning organizations. ADOT has 10 districts responsible for construction and maintenance, each headed by a district engineer whose duties include working with Native American tribes on such issues as highway improvements, funding, and operational matters.

##### b. California<sup>497</sup>

California has a larger number of tribal governments (109) than any other state. Caltrans has established a Native American Liaison Branch in the Office of Regional and Interagency Planning to serve as the initial contact and ombudsperson on Native American issues. This office promotes government-to-government relationships, providing

<sup>494</sup> CTC & ASSOCIATES, *supra* note 468.

<sup>495</sup> *Id.* at 2.

<sup>496</sup> *Id.* at 3–4.

<sup>497</sup> *Id.* at 3.

information, training, and facilitation services. A Native American Advisory Committee advises the Caltrans director about issues of interest, and recommends policies and procedure for adoption. Caltrans has also set up Native American cultural coordinators in each of its districts, with many districts also having Native American liaisons. Caltrans has published an extensive *Transportation Guide for Native Americans*, dated February 2002, as a resource guide for Native American officials.<sup>498</sup>

### c. Iowa<sup>499</sup>

Iowa has over 25 tribes having a current or historic interest in the state. In May 2001, the FHWA Iowa Division and the Iowa DOT partnered with the Iowa Office of the State Archaeologist and the Iowa State Historic Preservation Officer to host the Tribal Summit on Historic Preservation and Transportation. A follow-up workshop and site visit helped tribal representatives learn more about the transportation planning process and mitigation efforts for Section 106 resources. Planning for both the summit and the workshops included tribal representatives. Agreement on process and procedures included tailored Memoranda of Understanding with affected tribes, standardized notification form, and standardized tribal consultation points.

### d. New Mexico<sup>500</sup>

New Mexico has 22 federally recognized tribes and carries on tribal liaison through participation in an action committee that includes representatives from the New Mexico DOT, New Mexico Land Office and Office of Indian Affairs, FHWA, Department of Energy, BIA, tribal organizations, and several tribes. This action committee follows up on issues raised in a 1999 tribal-state transportation summit. Summit attendees included local, state and federal agencies, together with tribal government representatives to discuss transportation concerns. Attendees signed Memoranda of Agreement and created the action committee to implement government-to-government protocols between tribal governments and state transportation agencies.

<sup>498</sup> <http://www.dot.ca.gov/hq/tpp/offices/orip/na/Trans-GuideForNativeAmericans.pdf>.

<sup>499</sup> *Respectful Communication Accelerates the Section 106 Process: Iowa's New Tribal Constitution Process, SUCCESSES IN STEWARDSHIP* (FHWA, Washington, DC), July 2002, available at <http://environment.fhwa.dot.gov/strmlng/newsletters/jul02.htm>.

<sup>500</sup> CTC & ASSOCIATES, *supra* note 468, at 8.

### e. Wisconsin<sup>501</sup>

The Wisconsin Department of Transportation (WisDOT) and the Wisconsin Division of FHWA have partnered to work with Wisconsin's 11 federally recognized tribes on a government-to-government basis. Assisting and partnering with them have been the Lac Courte Oreilles Ojibwa Community College and the College of the Menominee Nation. This alliance has resulted in positive benefits to all partners, tribal governments, and individual Indians. Activities have included sharing of resources, outreach and training for Native American individuals and firms, development of the Lac Courte Oreilles/Sawyer County Transit System, and the advancement of Native American hiring preference. Historic coordination with the tribes occurs at two levels: a policy committee and direct project-related. The tribes are invited to participate in the policy committee along with FHWA, WisDOT Central Office, WisDOT district representatives, and several archeologists. An historic Memorandum of Agreement has been prepared for use on major construction projects to cover any potential archaeological involvement during construction. WisDOT is developing a statewide policy for working with the tribes, as well as a WisDOT/Tribal Partnership Agreement, outlining how business will be conducted between the Department and Wisconsin's 11 tribes.

## 5. Tribal-State Cooperative Agreements

### a. Background

A "cooperative agreement" between an Indian tribe and a state may be described as an intergovernmental agreement that settles or avoids jurisdictional disputes and determines certain substantive matters by forming political policies between governmental entities.<sup>502</sup> While properly drafted tribal-state cooperative agreements should be developed on general contract principles and designed to be enforceable in court, it is not clear whether or not they are enforceable as contracts due to the paucity of case law dealing with the issue.<sup>503</sup> The

<sup>501</sup> MARY B. WILLIAMS & JOHN C. CARROLL, REPORT: OUTREACH TO NATIVE AMERICANS: A COMPREHENSIVE LOOK AT WISCONSIN'S EFFORTS (October 31, 2002), available at [http://www.fhwa.dot.gov/hep/tribaltrans/oct31\\_03.htm](http://www.fhwa.dot.gov/hep/tribaltrans/oct31_03.htm).

<sup>502</sup> MACK & TIMMS, *supra* note 468, at 1305.

<sup>503</sup> *Id.* See also *State of Minnesota v. Manypenny*, 662 N.W.2d 183, 187 (2003), where the court in upholding a cooperative agreement authorizing tribal officers to lawfully arrest Indians on the reservation stated that "the scant case-law treatment addressing the issue of cooperative agreements appears only in dicta." In the earlier case of *State of Minnesota v. Stone*, 572 N.W.2d 725, 732

discussion and recommendations appearing in Section XI on contracting with Indian tribes and tribal entities should be considered should parties to a cooperative agreement intend to treat such an agreement as enforceable.

Pommersheim's case study clearly demonstrated that the use of tribal-state cooperative agreements is not a new thing. For example, he points out that some states, retroceding jurisdiction under P.L. 280, entered into cross-deputization agreements between tribal law enforcement and state patrol.<sup>504</sup> He also refers to the 1989 *Legislative Report of The National Conference of State Legislatures*, which addressed existing state-tribal transportation agreements as a beginning point to dealing with routing and emergency response issues for nuclear waste transportation.<sup>505</sup>

Cooperative agreements were also pioneered by Congress in the Indian Child Welfare Act (1978)<sup>506</sup> and IGRA (1988),<sup>507</sup> which authorize or require state-tribal cooperative agreements to effectuate each Act. The U.S. Supreme Court suggested the use of cooperative agreements in its decision in *Oklahoma Tax Commission v. Citizen Band Pota-*

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(1997), the Minnesota Supreme Court stated: "We anticipate that tribes without the resources to sustain their own [motor vehicle] enforcement systems will enter into cooperative agreements with state and local governments to obtain these services."

<sup>504</sup> Pommersheim, *supra* note 468, at 239, n.184. The Indian Law Enforcement Reform Act, Pub. L. No. 101-379, 104 Stat. 473 (1990) (See 25 U.S.C. §§ 2801-2809), was enacted by Congress to provide authority for cross-deputization agreements involving enforcement of federal or tribal laws by states in Indian country.

<sup>505</sup> *Id.*, note 152, at 260. See also MACK & TIMMS, *supra* note 468, citing Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 410; and JAMES B. REED & MARA A. COHEN, JURISDICTION OVER NUCLEAR WASTE TRANSPORTATION ON INDIAN TRIBAL LANDS: STATE TRIBAL RELATIONSHIPS (NCSL, State Legislative Report, Vol. 16, No. 4, at 5, 1991):

For example, the Wisconsin Department of Natural Resources entered into a cooperative agreement with the Menominee Tribe to fill in the regulatory gaps relating to hazardous and solid waste management. Prior to the agreement, state officials were unsure of their proper rule; therefore, they were hesitant to work with Indian tribes, even when asked to help. State workers who responded to a Menominee hazardous waste spill did not know if their insurance covered them while working outside the state's jurisdiction.

<sup>506</sup> Pub. L. No. 95-606, 92 Stat. 3069 (1978).

<sup>507</sup> Pub. L. No. 100-497, 102 Stat. 2467 (1988).

*watomi Indian Tribe of Oklahoma*.<sup>508</sup> The Court ruled that Oklahoma had no jurisdiction to tax tribal members on trust land cigarette sales, but upheld the State's right to collect such taxes on sales to nonmembers of the tribe. The Court suggested that this could be done by a tribal-state cooperative agreement: "States may also enter into agreements with tribes to adopt a mutually satisfactory regime for the collection of this sort of tax."<sup>509</sup>

The Montana legislature responded to the Supreme Court's suggestion in 1993 by amending its State-Tribal Cooperative Agreement Act<sup>510</sup> to specifically include a cooperative regime for tax assessment and collection or refund by the State, a public agency, or a Montana Indian tribe. The Preamble to the amendment<sup>511</sup> is noteworthy for its focus on state-tribal government-to-government relationship and cooperation:

WHEREAS, the Legislature finds it necessary to clarify provisions of the State-Tribal Cooperative Agreements Act in order to reduce the delays in implementing taxation agreements entered into between the State of Montana and Montana Indian Tribes; and

WHEREAS, clarifying provisions of the State-Tribal Cooperative Agreements Act will also reduce the need for duplicative language, which results in increased costs associated with publication of the Montana Code Annotated; and

WHEREAS, the Supreme Court, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S. Ct. 905 (1991), stated, among alternatives, that the state and a tribe may adopt a "mutually satisfactory regime" for collection of a tax but did not mandate that a state collect the tax; and

WHEREAS, in an effort to promote a government-to-government relationship between the State of Montana and Montana Indian Tribes and in recognition that both the state and tribal governments must be trusted to act responsibly, it is appropriate that the party designated to collect taxes on an Indian reservation pursuant to any agreement be subject to negotiation.

THEREFORE, the Legislature of the State of Montana finds it appropriate to amend the State-Tribal Cooperative Agreements Act to specifically include tax assessment and collection or refund and to establish specific requirements for tax assessment and collection or refund by the state, a public agency, or a Montana Indian Tribe. (Emphasis supplied).

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<sup>508</sup> 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991).

<sup>509</sup> *Id.* at 514.

<sup>510</sup> MONT. CODE ANN. §§ 18-11-101, *et seq.*

<sup>511</sup> See MONT. CODE ANN. § 18, ch. 625, L. 1993.

### *b. State's Legal Authority for Intergovernmental Agreements with Tribes*

A survey was conducted of state transportation attorneys requesting their feedback on the state's approach and legal authority to contract and enter into cooperative agreements and funding agreements with Indian tribes/tribal entities. Eight states responded,<sup>512</sup> with three reporting no authority due to absence of federally recognized tribes.<sup>513</sup> Four states reported having statutory authority to contract or enter into cooperative agreements with tribes.<sup>514</sup> One state, Colorado, reported that the authority for such agreements comes from basic principles of sovereignty and Article XIV, Section 18, of the Colorado Constitution, dealing with intergovernmental relationships. Colorado has used this authority to enter into two intergovernmental agreements with the Southern Ute Tribe: (1) a Taxation Compact; and (2) an Air Quality Compact. These compacts have been approved by the State legislature and enacted as positive law.<sup>515</sup>

### *c. State Enabling Statutes*

Based upon the results of the survey and additional research, it was determined that there are at least 16 states that have enacted statutes authorizing the governor, state agencies, and/or local governments to enter into agreements with tribes for prescribed purposes, including the joint exercise of jurisdiction.<sup>516</sup> State enabling legislation takes two

broad forms: the joint powers approach under which each cooperating entity must have the appropriate power; and the power of one unit approach under which only one of the consenting entities needs to have the appropriate power. The State of Washington's Interlocal Cooperation Act was enacted in 1967 to enable local governmental units to cooperate with other localities, including "any Indian tribe recognized as such by the federal government."<sup>517</sup> The statute authorizes "joint powers agreements," mandating specified provisions in the agreement.<sup>518</sup> The State of New Mexico has a simi-

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Montana: MONT. CODE ANN. § 18-11-101, *et seq.* (State-Tribal Cooperative Agreements)

Nebraska: R.R.S. NEB. § 13-1502, *et seq.* (State-Tribal Cooperative Agreements)

New Mexico: N.M. STAT. ANN. § 11-1-1, *et seq.* (Joint Powers Agreements)

North Dakota: N.D. CENT. CODE § 54-40.2-01, *et seq.* (Administrative Services)

Oklahoma: OKLA. STAT. ANN. chap. 35A, § 1221, *et seq.* (Mutual Interest Issues)

South Dakota: S.D.C.C. § 10-12A-4.1

Utah: UTAH CODE ANN. §§ 11-13-103, 11-13-201 (Joint Powers)

Washington: WASH. REV. CODE § 39.34.010, *et seq.* (Joint Powers)

Wisconsin: WIS. STAT. ANN. § 14.035 (Gaming Compacts); WIS. STAT. ANN. § 66.0301(b)(2) (Interlocal Cooperative Agreements); WIS. STAT. ANN. § 160.36 (Ground Water Monitoring);

<sup>517</sup> WASH. REV. CODE 39.34. WASH. REV. CODE 39.34.020(1) defines "Public agency," as follows:

any agency, political subdivision, or unit of local government of this state including, but not limited to, municipal corporations, quasi municipal corporations, special purpose districts, and local service districts; any agency of the state government; any agency of the United States; any Indian tribe recognized as such by the federal government; and any political subdivision of another state.

<sup>518</sup> WASH. REV. CODE 39.34.030, Joint powers—Agreements for joint or cooperative action, requisites, effect on responsibilities of component agencies—Financing of joint projects, provides, *inter alia*:

(1) Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having the power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency.

(2) Any two or more public agencies may enter into agreements with one another for joint or cooperative action

<sup>512</sup> Colo., Ill., Md., Minn., Ohio, Utah, Wash., and Wis.

<sup>513</sup> Ill., Md., and Ohio.

<sup>514</sup> Minn., Utah, Wash., and Wis.

<sup>515</sup> COLO. REV. STAT. 24-61-101, *et seq.*; COLO. REV. STAT. 24-62-101, *et seq.*

<sup>516</sup> California:

CAL. STS. & HIGH. CODE § 94 (Traffic Mitigation, cultural, environ.)

CAL. FISH & GAME CODE § 16000, *et seq.* (Indian Fishing);

CAL. HEALTH & SAFETY CODE § 25198.1, *et seq.* (Hazardous Waste)

CAL. PUB. RES. CODE § 44201, *et seq.* (Waste Management)

CAL. GOV'T CODE § 98000, *et seq.* (Indian Gaming)

Idaho: IDAHO CODE § 67-4001, *et seq.* (State-Tribal Relations Act)

Iowa: IOWA CODE ANN. § 232B.11 (Care & Custody of Indian Children)

Illinois: 230 ILL. COMP. STAT. 35 (Native American Gaming Compact Act, eff. 1/1/05)

Kansas: KAN. STAT. ANN. §§ 46.2301-2302 (Indian Gaming Compacts)

Michigan: MICH. COMP. LAWS ANN. § 205.30c(12) (Taxation Agreements)

Minnesota: MINN. STAT. § 161.368, *et seq.* (Highway Contracts)

lar Joint Powers Agreement Act,<sup>519</sup> which defines the covered “public agency” to include “an Indian nation, tribe or pueblo; a subdivision of an Indian nation, tribe or pueblo that has authority pursuant to the law of that nation, tribe or pueblo to enter into joint powers agreements directly with the state.”<sup>520</sup> Montana enacted its State–Tribal Cooperative Agreement Act in 1981 “to promote cooperation between the state or public agency and a sovereign tribal government in mutually beneficial activities and services.”<sup>521</sup> Nebraska enacted its

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pursuant to the provisions of this chapter.... Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies of the participating public agencies shall be necessary before any such agreement may enter into force.

(3) Any such agreement shall specify the following:

(a) Its duration; (b) The precise organization, composition and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, provided such entity may be legally created...; (c) Its purpose or purposes; (d) The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor; (e) The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination; (f) Any other necessary and proper matters.

<sup>519</sup> N.M. STAT. ANN. §§ 11-1-1–11-1-7.

<sup>520</sup> N.M. STAT. ANN. § 11-1-2 (2004). The authority to enter into agreements and the requirement for approval of the secretary of finance and administration are provided in § 11-1-3:

If authorized by their legislative or other governing bodies, two or more public agencies by agreement may jointly exercise any power common to the contracting parties, even though one or more of the contracting parties may be located outside this state; provided, however, nothing contained in this Joint Powers Agreements Act [11-1-1 to 11-1-7 NMSA 1978] shall authorize any state officer, board, commission, department or any other state agency, institution or authority, or any county, municipality, public corporation or public district to make any agreement without the approval of the secretary of finance and administration as to the terms and conditions thereof. Joint powers agreements approved by the secretary of finance and administration shall be reported to the state board of finance at its next regularly scheduled public meeting. A list of the approved agreements shall be filed with the office of the state board of finance and made a part of the minutes.

<sup>521</sup> MONT. CODE ANN. 18-11-101, *et seq.* Section 103 provides as follows:

18-11-103 Authorization to enter agreement—general contents.

State-Tribal Cooperative Agreements Act in 1989.<sup>522</sup> Among other features of this Act is a provision

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(1) Any one or more public agencies may enter into an agreement with any one or more tribal governments to:

(a) perform any administrative service, activity, or undertaking that a public agency or a tribal government entering into the contract is authorized by law to perform; and

(b) assess and collect or refund any tax or license or permit fee lawfully imposed by the state or a public agency and a tribal government and to share or refund the revenue from the assessment and collection.

(2) The agreement must be authorized and approved by the governing body of each party to the agreement. If a state agency is a party to an agreement, the governor or the governor's designee is the governing body.

(3) The agreement must set forth fully the powers, rights, obligations, and responsibilities of the parties to the agreement.

(4) (a) Prior to entering into an agreement on taxation with a tribal government, a public agency shall provide public notice and hold a public meeting on the reservation whose government is a party to the proposed agreement for the purpose of receiving comments from and providing written and other information to interested persons with respect to the proposed agreement.

(b) At least 14 days but not more than 30 days prior to the date scheduled for the public meeting, a notice of the proposed agreement and public meeting must be published in a newspaper of general circulation in the county or counties in which the reservation is located.

(c) At the time the notice of the meeting is published, a synopsis of the proposed agreement must be made available to interested persons.

<sup>522</sup> R.R.S. NEB. §§ 13-1502, *et seq.* The statute mandates the required contents of the agreement:

§ 13-1504. Agreement; contents

An agreement shall specify:

(1) Its duration;

(2) The precise organization, composition, and nature of any separate legal entity created;

(3) Its purpose;

(4) The manner of financing the agreement and establishing and maintaining a budget;

(5) The method to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination, if any;

(6) Provisions for administering the agreement, which may include, but not be limited to, the creation of a joint board responsible for such administration;

authorizing the appropriation of funds and provision of personnel or services:

§ 13-1507. Public agency; appropriate funds; provide personnel

Any public agency entering into an agreement may appropriate funds for, and may sell, lease, or otherwise give or supply material to, any entity created for the purpose of performance of the agreement and may provide such personnel or services as are within its legal power to furnish.

Minnesota has expressly authorized the department of transportation to enter into cost-sharing agreements with tribal authorities for highway work on tribal lands. Minn. Stat. Section 161.368, enacted in 2003, provides:

On behalf of the state, the commissioner [Commissioner of Transportation] may enter into cost-sharing agreements with Indian tribal authorities for the purpose of providing maintenance, design, and construction to highways on tribal lands. These agreements may include (1) a provision for waiver of immunity from suit by a party to the contract on the part of the tribal authority with respect to any controversy arising out of the contract and (2) a provision conferring jurisdiction on state district courts to hear such a controversy.

Caltrans' authority to enter into contracts with federally recognized tribes is limited to "activities related to on-reservation or off-reservation cultural resource management and environmental studies and off-reservation traffic impact mitigation projects on or connecting to the state highway system."<sup>523</sup> The statute mandates that the contract

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(7) The manner of acquiring, holding, and disposing of real and personal property used in the agreement;

(8) When an agreement involves law enforcement:

(a) The minimum training standards and qualifications of law enforcement personnel;

(b) The respective liability of each public agency and tribal government for the actions of law enforcement officers when acting under the provisions of an agreement;

(c) The minimum insurance required of both the public agency and the tribal government; and

(d) The exact chain of command to be followed by law enforcement officers acting under the agreement; and

(9) Any other necessary and proper matters.

<sup>523</sup> CAL STS. & HIGH. CODE (2005) § 94. Authority to enter into contracts; Contracts with federally recognized Indian tribes

(a) The department may make and enter into any contracts in the manner provided by law that are required for performance of its duties, provided that contracts with fed-

erally recognized Indian tribes shall be limited to activities related to on-reservation or off-reservation cultural resource management and environmental studies and off-reservation traffic impact mitigation projects on or connecting to the state highway system.

(b) To implement off-reservation traffic impact mitigation contracts with federally recognized Indian tribes, all of the following shall apply:

(1) Any contract shall provide for the full reimbursement of expenses and costs incurred by the department in the exercise of its contractual responsibilities. Funds for the project shall be placed in an escrow account prior to project development. The contract shall also provide for a limited waiver of sovereign immunity by that Indian tribe for the state for the purpose of enforcing obligations arising from the contracted activity.

(2) The proposed transportation project shall comply with all applicable state and federal environmental impact and review requirements, including, but not limited to, the California Environmental Quality Act (Division 13 (commencing with *Section 21000*) of the *Public Resources Code*).

(3) The department's work on the transportation project under the contract shall not jeopardize or adversely affect the completion of other transportation projects included in the adopted State Transportation Improvement Program.

(4) The transportation project is included in or consistent with the affected regional transportation plan.

<sup>524</sup> *Id.* at (b)(1).

<sup>525</sup> *Bennett County S.D. v. United States*, 394 F.2d 8, 11 (8th Cir. 1968). *Cf. Mo.-Kan.-Tex. Ry. Co. v. United States*, 235 U.S. 37, 35 S. Ct. 6, 59 L. Ed. 116 (1914); *N. Pac. Ry. Co. v. United States*, 227 U.S. 355, 33 S. Ct. 368, 57 L. Ed. 544 (1913); *Putnam v. United States*, 248 F.2d 292 (8th Cir. 1957).

<sup>526</sup> *Bennett County*, 394 F.2d at 11, *Cf. United States v. Santa Fe Pac. Ry. Co.*, 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941).

## G. ACQUISITION OF INDIAN LAND FOR PUBLIC TRANSPORTATION PURPOSES

### 1. General

As a general rule, Indian lands are not included in the term "public lands," which are subject to sale or disposal under general statutory law,<sup>525</sup> and all questions with respect to rights of occupancy in land, and the manner, time, and conditions of extinguishment of Indian title are solely for consideration of the federal government.<sup>526</sup> As a corollary to this, third parties such as states and political



subdivisions acquire only such rights and interests in Indian lands as may be specifically granted to them by the federal government. To assure the utmost fairness in transactions between the United States and Indian tribes, any intent to deprive a tribe of its rights in land, or otherwise bring about the extinguishment of Indian title, either by grants in abrogation of existing treaties or through other congressional legislation, must be clearly and unequivocally stated, and language appearing in such grants and statutes is not to be construed to the prejudice of the Indians.<sup>527</sup>

## 2. Grants of Indian Land for Highway Purposes

### a. Use of BIA Authority and Procedures

(1) *Statutory Provisions.*—The Act of March 3, 1901, 31 Stat. 1058, was one of an amalgam of special purpose access statutes dating back as far as 1875, each limiting the nature of rights-of-way to be obtained and creating an unnecessarily complicated procedure.<sup>528</sup> Two methods were provided for acquiring right-of-way for highways through lands allotted in severalty: (1) by grant of permission by the Secretary of the Interior<sup>529</sup> and (2) by condemnation.<sup>530</sup> In 1948, Congress enacted a general stat-

<sup>527</sup> *Bennett County*, 394 F.2d at 11 and 12. See *United States v. Santa Fe Pac. Ry. Co.*, 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941); *N. Pac. Ry. Co. v. United States*, 227 U.S. 355, 33 S. Ct. 368, 57 L. Ed. 544 (1913). *Leavenworth, etc. R.R. Co. v. United States*, 92 U.S. 733, 23 L. Ed. 634 (1875); *United States v. Shoshone Tribe*, 304 U.S. 111, 58 S. Ct. 794, 82 L. Ed. 1213 (1938).

<sup>528</sup> See, e.g., 25 U.S.C. §§ 311 (opening of highways); 312 (rights-of-way for railway, telegraph, and telephone lines); 318a (roads on Indian reservations); 319 (rights-of-way for telephone and telegraph lines); 320 (acquisition of lands for reservoirs or materials); 321 (rights-of-way for pipe lines); 43 U.S.C. §§ 959 (rights-of-way for electrical plants); 961 (rights-of-way for power and communications facilities).

<sup>529</sup> See 25 U.S.C.A. § 311. Ch. 832, § 4, 31 Stat. 1058, 1084 (codified at 25 U.S.C. § 311), provides:

The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.

<sup>526</sup> See 25 U.S.C.A. § 357. Chap. 832, § 3, 31 Stat. 1084 (codified at 25 U.S.C. § 357) provides: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where

ute entitled "Indian Right of Way Act."<sup>531</sup> The purpose of this Act was to simplify and facilitate the process of granting rights-of-way across Indian lands.<sup>532</sup> Section 1 of the Act, codified as 25 U.S.C.A. § 323, authorizes the Secretary of the Interior to grant rights-of-way for any purposes over all trust and restricted lands.<sup>533</sup> The statute provides that "any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands" was not repealed. Thus, 25 U.S.C.A. §§ 311 and 357 remain unchanged.<sup>534</sup> The 1948 statute provides that "no grant of a right-of-way over and across any lands belonging to a tribe" organized under IRA "shall be made without the consent of the proper tribal officials."<sup>535</sup> Consent of each tribe is required by Departmental regulations for

located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

<sup>531</sup> Act of Feb. 5, 1948, ch. 45, 62 Stat. 17 (codified at 25 U.S.C. §§ 323–28).

<sup>532</sup> *Neb. Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956, 958 (8th Cir. 1983). For example, the court noted that frequently, "many individual Indians, often widely scattered, owned undivided interests in a single tract of land. Obtaining the signatures of all the owners was a time-consuming and burdensome process, both for the party seeking the right-of-way and for the Interior Department." *Id.* at 959.

<sup>533</sup> 25 U.S.C.A. § 323 (2004), Rights-of-way for all purposes across any Indian Lands, provides:

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

<sup>534</sup> 25 U.S.C.A. § 326 (2004), provides: "Sections 323 to 328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920...nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed." See also *Neb. Pub. Power Dist. v. 100.95 Acres of Land in County of Thurston, Neb.*, 719 F.2d 956, 959 (1983), holding that: "The 1948 Act does not, by its express terms, amend or repeal any existing legislation concerning rights-of-way across Indian lands."

<sup>535</sup> Chap. 45, § 2, 62 Stat. 18 (codified at 25 U.S.C.A. § 324 (2004)). Consent is also required for tribes organized under the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501–509, and for Alaska Native villages organized under the Indian Reorganization Act. 25 U.S.C. §§ 461–479.

any rights-of-way over tribal lands.<sup>536</sup> Consent of individual Indians is also generally required<sup>537</sup> with certain statutory exceptions covered by the Act.<sup>538</sup>

(2) *BIA Regulations (25 C.F.R. Part 169)*.—The BIA implementation regulations appear at 25 C.F.R. Part 169. The BIA regulation covering applications for rights-of-way for public highways is 25 C.F.R. § 169.28, which refers specifically to 25 U.S.C. § 311. Excepted from the regulation are the States of Nebraska and Montana, which are to follow the requirements of the Act of March 4, 1915 (38 Stat. 1188).<sup>539</sup> The regulations require that applications for public highway rights-of-way over and across roadless and wild areas “shall be considered in accordance with the regulations contained in part 265 of this chapter.”<sup>540</sup>

(3) *Judicial Construction of Highway Right-of-Way Grants*.—The Supreme Court of Arizona, in

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<sup>536</sup> 25 C.F.R. § 169.3(a) (2004). See *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983), holding that “[t]he Secretary acted within his power in requiring by regulation that tribal consent be obtained for the acquisition of rights-of-way....”

<sup>537</sup> See 25 C.F.R. § 169.3(b).

<sup>538</sup> 25 U.S.C. § 324; 25 C.F.R. § 169.3(c) (2004). The Secretary may issue permission to survey with respect to, and he may grant rights-of-way over and across individually owned lands without the consent of the individual Indian owners when: (1) The individual owner is a minor or non compos mentis, and the Secretary finds that such grant will cause no substantial injury to the land or owner, which cannot be adequately compensated for by monetary damages; (2) The land is owned by more than one person, and the owners or owner of a majority of the interests consent to the grant; (3) The whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (4) The heirs or devisees of a deceased owner of the land have not been determined, and the Secretary finds that the grant will cause no substantial injury to the land or owner thereof; (5) The owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof. 25 C.F.R. § 169.3(a) (2004).

<sup>539</sup> Sec. 169.28(b) provides an optional course for two states:

In lieu of making application under the regulations in this part 169, the appropriate State or local authorities in Nebraska or Montana may, upon compliance with the requirements of the Act of March 4, 1915 (38 Stat. 1188), lay out and open public highways in accordance with the respective laws of those States.

<sup>540</sup> 25 C.F.R. pt. 265.

*Application of Denet-Claw*,<sup>541</sup> dismissed traffic citations to a Navajo Indian for violations occurring on U.S. 66 within the Navajo Reservation. The court rejected

the State's contention that the granting of an easement for a right of way [under 25 U.S.C. § 311] by implication conferred jurisdiction on Arizona courts over Indian traffic offenders [as] untenable as it completely ignores the express definition of what constitutes “Indian country” found in section 1151, [18 U.S.C. § 1151].<sup>542</sup>

The Supreme Court of New Mexico, in *State of New Mexico v. Begay*, agreed, holding,

[T]hat the authority under which the State was permitted to construct Highway 666 through, and over, the Navajo reservation [25 U.S.C. § 311] failed to extinguish the title of the Navajo Indian Tribe.... Since the State has no jurisdiction over Indian reservations until title in the Indians is extinguished, and the easement to the State did not affect the beneficial title, there is no basis upon which the State can claim jurisdiction.<sup>543</sup>

Finally, in *State v. Webster*,<sup>544</sup> the Wisconsin Supreme Court held that the State did not have jurisdiction to charge and prosecute traffic offenses by Menominee Indians on a state highway within the reservation because (a) title to the land underlying the state highway remained part of the reservation, (b) the tribe had a well-established tradition of tribal self-government in the area of traffic regulation, and (c) state jurisdiction would interfere with tribal self-government and impair a right granted or reserved by federal law. The court said:

We conclude that the language of 25 U.S.C. sec. 311, taken together with the expressed congressional intent to include rights-of-way as part of Indian country, implies that the granting of the Highway 47 right-of-way pursuant to sec. 311 neither extinguished title in the Menominee Tribe nor constituted a general grant of jurisdiction to the state over the land constituting the right-of-way. Anything in *State v. Tucker*, *supra*, contrary to our holding in this case is hereby overruled.<sup>545</sup>

As previously noted at Section D.5.b., the U.S. Supreme Court, in *Strate v. A-1 Contractors*, considered the adjudicatory authority of the tribe in

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<sup>541</sup> 83 Ariz. 299, 320 P.2d 697 (1958).

<sup>542</sup> *Id.* at 700.

<sup>543</sup> 63 N.M. 409, 320 P.2d 1019–20 (1958).

<sup>544</sup> 114 Wis. 2d 418, 338 N.W.2d 474 (1983).

<sup>545</sup> *Id.* at 480. The Court cited *United States v. Harvey*, 701 F.2d 800, 805 (9th Cir. 1983), (25 U.S.C. § 311 is not a general grant of jurisdiction to the states over the land constituting the right-of-way); *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975) (rights-of-way running through a reservation remain part of the reservation and within the territorial jurisdiction of tribal police); *Id.* at 479.

connection with a 6.59-mi stretch of North Dakota State Highway No. 8, conveyed by the United States to the State by “an easement for a right-of-way” over tribal lands pursuant to 25 U.S.C. § 325. The granting instrument detailed only one specific reservation by Indian landowners: “to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupancy of the premises affected by the right-of-way.”<sup>546</sup> The Court, noting that “the right-of-way is open to the public, and traffic on it is subject to the State’s control...[with the Tribe] retain[ing] no gatekeeping right,” held that the 6.59-mi stretch was “equivalent, for nonmember governance purposes, to alienated, non-Indian land.” The Court, in a unanimous decision based on the *Montana* rule,<sup>547</sup> held that “[a]s to nonmember...a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction [and] civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally [do] not extend to the activities of nonmembers of the tribe.”<sup>548</sup>

Relying on the decisions in *Montana* and *Strate*, the United States Court of Appeals for the Ninth Circuit, in *State of Montana Department of Transportation v. King*,<sup>549</sup> held that the Fort Belknap Indian Community lacked jurisdiction to regulate the State’s employment practices in performing repair work on a state highway that crosses the reservation on right-of-way owned by the State (specifically to enforce a TERO against Montana DOT employees).<sup>550</sup> The State acquired the right-of-way over the Fort Belknap Indian Reservation from the United States, pursuant to 25 U.S.C. §§ 323–328, in order to construct and maintain Highway 66. As part of the transfer, the State became responsible

for constructing and maintaining the highway pursuant to the Federal-Aid Highway Act of 1956.<sup>551</sup> The court noted that the “community consented to the transfer, and each individual allottee received compensation for the easement...[t]he State agreed to construct and maintain the highway, and the highway is open to the public.” The court of appeals observed that *Strate* “held that the tribe’s loss of the ‘right of absolute and exclusive use and occupation...implies the loss of regulatory jurisdiction over the use of the land by others....” citing its analysis in *Wilson v. Marchington*,<sup>552</sup> and concluding:<sup>553</sup>

Thus, Montana’s main rule, which is consistent with the origins of tribal power, precludes the Community from exercising regulatory jurisdiction over the State’s employment practices on the right of way owned by the State.... As to the issues before us, we hold that the State of Montana and its officials are outside of the regulatory reach of the Community’s TERO for work performed on the right of way owned by the State.<sup>554</sup>

The following factors, considered by the courts in *Strate* and the *Montana DOT* case, will no doubt become critical when construing grants of highway right-of-way across Indian lands: (1) the legislation that created the right-of-way, (2) whether the right-of-way was acquired by the state with the consent of the tribe, (3) whether the tribe had reserved the right to exercise dominion and control over the right-of-way, (4) whether the land was open to the public, and (5) whether the right of way was under state control. Another important factor will be the extent to which the tribe has retained reservations within the granting instrument. Because of unfavorable court decisions involving right-of-way in Indian country, this issue remains a topic of importance.

(4) *Utilities within the Right-of-Way*.—The Supreme Court considered the question of whether a grant of right-of-way over allotted lands held in trust under 23 U.S.C. § 311 included the right to permit maintenance of rural electric service lines within the highway bounds, in *United States v. Oklahoma Gas & Electric Co.*<sup>555</sup> The action was brought by the Secretary of the Interior, who considered this use, under license by the Oklahoma State Highway Commission, as not warranted by the grant. The Court noted that such use was a lawful and proper highway use under Oklahoma law. It held that the utility use in accordance with state law was covered under the § 311 grant of

<sup>546</sup> *Strate*, 520 U.S. at 454–55.

<sup>547</sup> *Id.* at 454–56.

<sup>548</sup> *Id.* at 453, citing *Montana*, 450 U.S. at 565.

<sup>549</sup> 191 F.3d 1108 (9th Cir. 1999).

<sup>550</sup> *Id.* at 1111:

To address the lack of employment opportunities, the Fort Belknap Indian Community Council enacted an affirmative action policy, called the Tribal Employment Rights Ordinance (“TERO”). The TERO regulates the employee relations of covered employers through restrictions on hiring, promotion, transfer, and reduction in force preferences for tribal members, Native Americans who are not tribal members, and spouses of tribal members. The TERO’s affirmative action requirements include hiring quotas, special seniority rules, use of the TERO office as an employment source, mandatory advertising, and mandatory cross-cultural training. All covered employers are required by the TERO to secure a permit and pay an annual business fee of \$100.00. Each employee of a covered employer is required to obtain a work permit, which costs \$100.00....

<sup>551</sup> *Id.* at 1111. See 23 U.S.C.A. §§ 101 *et seq.*

<sup>552</sup> 127 F.3d 805, 813 (9th Cir. 1997).

<sup>553</sup> *King*, 191 F.3d at 1113.

<sup>554</sup> *Id.* at 1113, 1115.

<sup>555</sup> 318 U.S. 206, 63 S. Ct. 534, 87 L. Ed. 716 (1943).

right-of-way. A U.S. district court followed this precedent in *United States v. Mountain States Telephone and Telegraph Co.*, which involved buried cable on state highway across tribal land, ruling that "Mountain Bell does have a right to maintain its buried telephone cable in the highway right-of-way and is not trespassing."<sup>556</sup>

While utilities do have the right to place and maintain facilities within the right-of-way, this in no way solves the issue of utilities using tribal lands to gain access to their facilities located on state right-of-way. It seems clear that in such a situation the utility company would come under the jurisdiction of the tribal government and be subject to tribal requirements for any necessary licenses or permits. In addition, if the utility facilities moved off the state highway right-of-way and entered tribal land, the utility would need to obtain the necessary rights-of-way, licenses, or permits.

#### *b. Use of FHWA Title 23 U.S.C. Procedures*

The question sometimes arises as to whether the right-of-way acquisition or appropriation procedures of 23 U.S.C. §§ 107 and 317 may be used to obtain rights-of-way over Indian lands. Section 107 authorizes the Secretary of Transportation, at the request of a state, to acquire by federal condemnation lands or interests in lands required for rights-of-way for the Interstate system of highways, when the state is unable to do so. Section 317 details the procedure to be followed in appropriating lands or interests in lands owned by the United States for the right-of-way of any highway upon application of the Secretary of Transportation to the federal agency having jurisdiction over the land.<sup>557</sup> This provision of law was addressed by the Court of Appeals for the Ninth Circuit in *United States v. 10.69*

<sup>556</sup> 434 F. Supp. 625 (D. Ct. Mont. 1977), at 629. *Accord*: *Gates of the Mountains Lakeshore Homes, Inc. v. Noble*, 565 F. Supp. 788, 794 (D. Ct. Mont. 1983). *See also* *State of Wyoming ex rel. Alice Peterson v. Milbank Mut. Ins. Co.*, 617 P.2d 1056, 1076 (1980).

<sup>557</sup> Subsec. (a) of § 317 provides that the Secretary of Transportation "shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands it is desired to appropriate." Subsec. (b) provides that the lands may be appropriated for highway purposes if within 4 months after the filing of the map by the Secretary of Transportation, the Secretary of the Department having jurisdiction over the lands either (1) does not certify that appropriation would be "contrary to the public interest or inconsistent with the purposes for which such land (has) been reserved," or (2) does agree to the appropriation under such conditions as "he deems necessary for the adequate protection and utilization of the reserve." 23 U.S.C. § 317.

*Acres of Land*,<sup>558</sup> involving Indian tribal lands held in trust by the United States for the benefit of the Confederated Tribes and Bands of the Yakima Indian Nation, which the WSDOT needed for an Interstate highway right-of-way. The U.S. DOT was requested to acquire the land invoking § 107, and the Department of Justice commenced condemnation action in the U.S. district court. The district court dismissed, and the Ninth Circuit affirmed, on the ground that such tribal lands can be appropriated for highway purposes "only by utilizing the administrative procedures provided for in 23 U.S.C. § 107(d) and 317," which the court said "are to be read together."<sup>559</sup> The court of appeals reviewed the Title 23 U.S.C. procedures of §§ 107 and 317 together with the Title 25 U.S.C. procedures of §§ 311, 323–328, and 357, and found them to be complementary. Circuit Judge Browning concluded:

The structure of these provisions of Titles 23 and 25, and the evident purpose they serve, offer strong support for interpreting sections 107(a) and (d) and 317 of Title 23 to mean that Indian tribal lands may be secured for highway use only by administrative appropriation under sections 107(d) and 317, and not by condemnation under section 107(a). The officials most immediately concerned with the administration of the federal highway program are apparently of the same view (referring to Bureau of Public Roads Policy and Procedure Memorandum 80-8 of April 17, 1967).<sup>560</sup>

Based upon this Ninth Circuit decision, it seems clear that a state transportation agency may apply directly to the BIA for rights-of-way across Indian lands, following the procedures of 25 C.F.R. Part 169, or it may make application through the FHWA. FHWA regulation at 23 C.F.R. § 710.601 provides that the state transportation department "may file an application with FHWA, or it can make application directly to the land-owning agency if the land-owning agency has its own authority for granting interests in land."<sup>561</sup> In either

<sup>558</sup> 425 F.2d 317 (9th Cir. 1970).

<sup>559</sup> *Id.* at 318.

<sup>560</sup> *Id.* at 319–20, and n.8. PPM 80-8 provided that applications for rights-of-way across Indian lands "shall be filed with the Department of Interior in accordance with the regulations established by the Bureau of Indian Affairs for the processing of applications under 25 U.S.C. 325-328," referring to 25 C.F.R. § 161, which is now 25 C.F.R. § 169.

<sup>561</sup> The criteria for applications are listed in 23 C.F.R. § 710.601 as follows:

(d) Applications under this section shall include the following information:

- (1) The purpose for which the lands are to be used;
- (2) The estate or interest in the land required for the project;

case, as pointed out by the court, the consent of the Secretary of the Interior would be necessary, and his approval, if given, would be subject to such requirements as deemed necessary.

The power of the United States to control the affairs of Indians is subject to constitutional limitations and does not enable the United States, without paying just compensation, to appropriate lands of an Indian tribe.<sup>562</sup> Therefore, unlike the vast majority of federal land transfers occurring under 23 U.S.C. §§ 107 and 317, which are at no cost to a state transportation agency, just compensation of not less than the fair market value of the rights granted, plus severance damages, if any, must be paid to the tribe or individual Indian owners for rights-of-way granted, except when waived in writing.<sup>563</sup>

### 3. Use of Eminent Domain to Acquire Indian Land

The Act of March 3, 1901, provided, *inter alia*, that "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."<sup>564</sup> This provision of law was considered by the U.S. Supreme Court in *State of Minnesota v. United States*,<sup>565</sup> where the United States challenged a condemnation action brought by Minnesota in State court for a highway over nine parcels allotted in severalty to individual Indians by trust patents. Minnesota contended that the statute (25 U.S.C. § 357) authorized it to condemn allotted lands in state courts without making the United States a party. The Court first held that

since the United States was the owner of the fee, the suit was one against the United States and it was an indispensable party to the condemnation. Secondly, the Court noted that the statute "contains no permission to sue in the court of a state[,]"<sup>566</sup> and that "judicial determination of controversies concerning [Indian] lands has been commonly committed exclusively to federal courts."<sup>567</sup>

Several U.S. circuit courts have rejected the contention that the Indian Right of Way Act of 1948 impliedly repealed portions of the Act of 1901 and that a condemnation action requires the consent of the Secretary of the Interior or of the Indians.<sup>568</sup> According to these cases, § 357 stands alone in providing the authority to condemn allotted Indian land without consent of Indians or the Secretary of the Interior. However, as previously noted, tribal land is not subject to condemnation.<sup>569</sup> In *Nebraska Public Power District v. 100.95 Acres of Land in County of Thurston, Nebraska*, while the utility had the authority to condemn allotted land, just prior to the condemnation action the allottees transferred all but a life estate to the United States, in trust for the Winnebago Tribe, making the needed land tribal land not subject to condemnation under § 357. However, land owned in fee simple by a tribe is subject to condemnation.<sup>570</sup> The court of appeals also held that since the condemnation was an action *in rem*, the suit was not barred by tribal sovereign immunity.

The U.S. Supreme Court in *United States v. Clarke*<sup>571</sup> considered the question of whether 25 U.S.C. § 357 authorizes the taking of allotted In-

(3) The Federal-aid project number or other appropriate references;

(4) The name of the Federal agency exercising jurisdiction over the land and identity of the installation or activity in possession of the land;

(5) A map showing the survey of the lands to be acquired;

(6) A legal description of the lands desired; and

(7) A statement of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4332, *et seq.*) and any other applicable Federal environmental laws, including the National Historic Preservation Act (16 U.S.C. 470(f)), and 23 U.S.C. 138.

<sup>562</sup> *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119, 123, 58 S. Ct. 799, 82 L. Ed. 1219 (1938).

<sup>563</sup> 25 U.S.C. § 325; 25 C.F.R. § 169.12.

<sup>564</sup> Appropriations Act of Mar. 3, 1901, ch. 832, § 3, 31 Stat. 1058, 1084 (codified at 25 U.S.C. § 357).

<sup>565</sup> 305 U.S. 382, 59 S. Ct. 292, 83 L. Ed. 235 (1939).

<sup>566</sup> *Id.* at 386.

<sup>567</sup> *Id.* at 389. In *Nicodemus v. Wash. Power Co.*, 264 F.2d 614 (9th Cir. 1959), the court cited *Minnesota v. United States*, in holding: "The United States is an indispensable party to a suit to establish or acquire an interest in allotted Indian land held under a trust patent, and such a suit must be instituted and maintained in the federal court." at 615. *Accord*: *S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir. 1982), *United States v. City of Tacoma*, 332 F.3d 574 (9th Cir. 2003).

<sup>568</sup> See *Nicodemus v. Wash. Water Power Co.*, 264 F.2d 614 (9th Cir. 1969), *S. Cal. Edison Co. v. Rice* (9th Cir. 1882), *Yellowfish v. City of Stillwater*, 691 F.2d 926 (10th Cir. 1982); *Neb. Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956 (8th Cir. 1983).

<sup>569</sup> *United States v. 10.69 Acres of Land*, 425 F.2d 317 (9th Cir. 1970); *Neb. Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956 (8th Cir. 1983).

<sup>570</sup> See *Cass County Water Res. Dist. v. 1.43 Acres of Land in Highland Township, Cass County, N.D.*, 643 N.W.2d 685 (N.D. 2002).

<sup>571</sup> 445 U.S. 253, 100 S. Ct. 1127, 63 L. Ed. 2d 373 (1980).

dian land by physical occupation, commonly called "inverse condemnation." The Court, reversing the Court of Appeals for the Ninth Circuit, found that the word "condemned," as used in 1901 when 25 U.S.C. § 357 was enacted, had reference to a judicial proceeding instituted for the purpose of acquiring title to private property and paying just compensation for it, not to physical occupation, or "inverse condemnation," even though that method was authorized by state law.<sup>572</sup> The Supreme Court decision strictly construes the statute and would appear to foreclose any taking of allotted Indian land except by formal condemnation proceedings. This would also seem to preclude, for example, "regulatory takings" that were not authorized in formal condemnation proceedings. In *Imperial Granite Company v. Pala Band of Mission Indians*,<sup>573</sup> the Court held that Indian trust land could not be acquired for a road of necessity by prescription, or adverse possession.<sup>574</sup>

## H. FEDERAL HIGHWAY PROGRAMS INVOLVING INDIAN LANDS<sup>575</sup>

### 1. The Federal-Aid Highway Program

The Federal-Aid Highway Program is a federally assisted state program. The state highway agency (SHA) is the recipient of federal funds and is responsible for administering the program. The role of FHWA is to administer the Federal-aid program in partnership with the SHA.

In order to participate in the Federal-Aid Highway Program, each state is required to have a SHA that has the power and is equipped and organized to discharge the duties required by Title 23.<sup>576</sup>

<sup>572</sup> *Id.* at 254, 259.

<sup>573</sup> 940 F.2d 1269, 1272 (9th Cir. 1991).

<sup>574</sup> *Id.*

Imperial cannot acquire property rights in trust property by prescription. See *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956) (Indian Intercourse Act, 25 U.S.C. § 177, prohibiting alienation of Indian lands other than by treaty or convention, provides "special reason why the Indians' property may not be lost through adverse possession"), *cert. denied*, 352 U.S. 988, 77 S. Ct. 386, 1 L. Ed. 2d 367 (1957); *United States v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939).

<sup>575</sup> Congress recently passed new highway reauthorization H.R. 3; Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU); Pub. L. No. 109-59 (Aug. 10, 2005; 119 Stat. 1144; 835 pp). SAFETEA-LU changes will be discussed in various sections of this paper, as applicable.

<sup>576</sup> 23 U.S.C. § 302.

States typically select and develop specific transportation projects, award construction contracts, and are responsible for maintenance. While tribes are not direct recipients of apportioned Federal-aid funds for state highway transportation projects, states do have numerous statutory responsibilities to tribal governments in the use of these funds. However, federal-aid dollars are apportioned with numerous state responsibilities towards tribes. For example, and as discussed later, states with tribal lands within the state's boundaries are required to consult with tribal governments and the Secretary of the Interior in the planning process.<sup>577</sup> Similar tribal government and DOI consultation is also required in the preparation of the State Transportation Improvement Program (STIP).<sup>578</sup> While there is no clear enforcement mechanism set forth in Section 135 relative to state and tribal government consultation, FHWA has a continuing and strong interest in ensuring that the consultation requirements are met. Indeed, FHWA guidance directs its division offices to establish and maintain a working relationship with tribes and to ensure that tribal governments are part of the SHA's planning, environment, and technology transfer with respect to the Federal-Aid Highway Program.<sup>579</sup> In this regard, it is not uncommon for states to use Federal-aid highway funds for state- and county-owned roads running near, through, or entirely on a reservation.<sup>580</sup> Finally, states constructing roads totally within a reservation are not constrained by Federal-aid matching requirements; 100 percent federal funding is permitted.<sup>581</sup> However, should a state wish to construct a project within a reservation without the requisite 100 percent funding, a tribe is permitted to use its own Indian Reservation Roads (IRR) funds to meet any cost sharing requirements should a state need additional funds.<sup>582</sup> Although IRR funds are federal funds, they represent an exception to the rule that federal funds cannot be used to match other federal funds. This is

<sup>577</sup> 23 U.S.C. § 135.

<sup>578</sup> *Id.*

<sup>579</sup> 1997 FHWA Guidance on Relations with American Indian Tribes has been updated to 2004 Guidance found at <http://www.fhwa.dot.gov/hep/tribaltrans/topics.htm>.

<sup>580</sup> The BIA system consists of over 50,000 mi of roads almost evenly divided between BIA/tribal roads and State/county owned roads.

<sup>581</sup> 23 U.S.C. § 120 (f).

<sup>582</sup> Section 106(j) of the ISDEAA (25 U.S.C. § 450 j-1 (j)) provides as follows: "(n) notwithstanding any other provision of law, a tribal organization may use funds provided under a self-determination contract to meet matching or cost participation under other Federal and non-Federal programs."

because Section 106(j) of the ISDEAA provides express statutory authority to use funds provided under a self-determination contract to meet the nonfederal matching share. Presumably, this would also apply to a self-governance agreement.

## 2. The Indian Reservation Road Program

The federal government's role with respect to road projects on Indian lands originates from a 1928 Act<sup>583</sup> now codified in Title 25.<sup>584</sup> This Act authorized the Secretary of Agriculture (which had responsibility for federal roads at that time) to cooperate with SHAs and DOI to survey, construct, reconstruct, and maintain Indian reservation roads serving Indian lands.<sup>585</sup> The Federal-Aid Highway Act of 1944<sup>586</sup> required the Public Roads Administration to approve the location, type, and design of all IRR roads and bridges before any expenditure was made and generally to supervise all such construction. In 1946, the predecessor agencies of BIA and FHWA (the Office of Indian Affairs and the Public Roads Administration) entered into their first agreement to jointly administer the statutory requirements for the IRR program. In 1958, the laws related to highways were revised, codified, and reenacted as Title 23, U.S.C.<sup>587</sup> Since that time, there have been other interagency agreements to carry out FHWA and BIA duties and responsibilities.<sup>588</sup> In 1973, BIA and FHWA entered into an agreement for an "Indian Roads Needs Study"; FHWA was to assist BIA in identifying roads that were at that time, or that should have been, included, as BIA's responsibility. In 1974, BIA and FHWA entered into two separate agreements that set out the joint and individual statutory responsibilities of FHWA and BIA for constructing and improving Indian reservation roads and bridges. The intent of both agreements was to establish a Federal-aid Indian road system consisting of public Indian reservation roads and bridges for which no other Federal-aid funds were available. Both BIA and FHWA jointly designated those roads, but FHWA was responsible for approving the location, type, and design of IRR and bridge projects and supervising construction of these projects. At that time, IRR projects were authorized under the Fed-

eral-Aid Highway Act<sup>589</sup> but constructed with DOI appropriations. In 1979, BIA and FHWA entered into another agreement that explicitly recognized the role of individual tribes in defining overall transportation needs. This agreement provided that the Indian road system was to consist of

[t]hose Indian reservations roads and bridges which are important to overall public transportation needs of the reservations as recommended by the tribal governing body. These are public roads for which BIA has primary responsibility for maintenance and improvement. Roads included on the Indian Road System shall not be on any Federal-aid system for which financial aid is available under 23 U.S.C. 104.<sup>590</sup>

It was not until 1982 that the IRR program became a multiyear reauthorization, similar to the Federal-Aid Highway Program. Until then, the Indian road system was funded under the DOI's General Appropriations and administered by the BIA. Since funding varied from year to year with no multiyear funding assurances, it was difficult to develop the type of long-range transportation planning that the states had come to rely upon through the highway reauthorization bills. In 1982, under STAA,<sup>591</sup> Congress created the Federal Lands Highway Program (FLHP). This coordinated program addressed access needs to and within Indian and other federal lands. The IRR program is a funding category within the FLHP. In addition, the STAA expanded the IRR system to include tribally owned public roads as well as state- and county-owned roads. Today, IRRs are an integral part of the FLHP.<sup>592</sup> This program is jointly administered by FHWA and BIA; however, FHWA has direct oversight and coordinating responsibilities to ensure that all federal roads that are public roads are treated under uniform policies similar to those governing federal-aid highways.

After STAA's enactment, BIA and FHWA entered into a new 1983 Memorandum of Agreement that set forth the respective duties and responsibilities of each agency for the IRR program. Under the interagency agreement, BIA, working with each tribe, was to develop an annual priority program of construction projects and submit it to FHWA for review, concurrence, and allocation of funds. This 1983 agreement also specifically referenced the Buy Indian Act<sup>593</sup> in response to a new Title 23 provision<sup>594</sup> that provided an exemption, if in the public

<sup>583</sup> Pub. L. No. 520, 45 Stat. 750 (May 26, 1928). *See also* SAFETEA-LU § 1119(a), which allows IRR funds to be used for any matching or cost participation under another federal program.

<sup>584</sup> 25 U.S.C. § 318a.

<sup>585</sup> *Id.*

<sup>586</sup> Pub. L. No. 521, 58 Stat. 838, § 10(c).

<sup>587</sup> Pub. L. No. 85-767, 72 Stat. 885 (Aug. 27, 1958).

<sup>588</sup> 23 U.S.C. § 208, repealed in 1983. Pub. L. No. 97-424, 96 Stat. 2115, tit. 1, § 126 (d) (Jan. 6, 1983).

<sup>589</sup> *Id.*

<sup>590</sup> FHWA/BIA Agreement of 1979.

<sup>591</sup> Pub. L. No. 97-424, 96 Stat. 2097 (1983).

<sup>592</sup> 23 U.S.C. § 204.

<sup>593</sup> Act of June 25, 1910, 25 U.S.C. § 47 (2005). 35 Stat. 71; *see also* 25 U.S.C. § 13.

<sup>594</sup> 23 U.S.C. § 204(e).

interest, to the competitive bidding requirements with respect to all funds appropriated for the construction and improvements of IRRs that the Secretary administers. The 1983 interagency agreement also recognized that, although FHWA's assistance and oversight would continue, both FHWA and BIA would be responsible for the implementation and success of the IRR program. As a result of Section 1028 of ISTEA, which provided for the Highway Bridge Replacement and Rehabilitation Program, BIA and FHWA amended their 1983 agreement to provide for their respective responsibilities for that program.

STAA changed the way BIA could do business with respect to IRRs. The 1982 STAA authorized IRR funding from the Highway Trust Fund in the amount of \$75 million for FY 1983 and \$100 million for FYs 1984–86.<sup>595</sup> In 1986, STURAA was passed.<sup>596</sup> While the level of funding dropped to \$80 million per year for FYs 1987–91, the program could still rely on long-term funding. A large jump in IRR funding occurred with the passage of the 1991 highway reauthorization, commonly known as ISTEA.<sup>597</sup> This 6-year transportation bill placed a significant emphasis on state transportation planning and the consultation involvement of tribal governments.<sup>598</sup> IRR funding increased to \$159 million for FY 1992 and \$191 million for FYs 1993–97.<sup>599</sup> ISTEA made changes to the IRR bridge program<sup>600</sup> to require an inventory, classification, and prioritization of replacement of IRR bridges, and required that a percentage of state funds be used for IRR bridge projects.<sup>601</sup> In addition, ISTEA allowed tribes to use their planning funds pursuant to the ISDEAA.<sup>602</sup>

The 2005 highway reauthorization, SAFETEA-LU, contains many new provisions affecting the IRR program as well as other transportation issues and needs in Indian country. However, the IRR program remains a program jointly administered by BIA and FHWA's Federal Lands Highway.<sup>603</sup> The purpose of the IRR program is to provide safe and adequate transportation and public road access to and within Indian reservations, Indian lands, and communities for Indians and Alaska Natives, visitors, recreational users, resource users, and others, while contributing to economic development, self-

determination, and employment of Indians and Alaska Natives. As of October 2000, the IRR system consisted of approximately 25,700 mi of BIA and tribally owned public roads and 25,600 mi of state, county, and local government public roads.

The duties and responsibilities of BIA and FHWA are described in a Memorandum of Agreement between the two agencies. Each fiscal year FHWA determines the amount of funds available for construction. The funds are then allocated to the BIA.<sup>604</sup> Prior to the implementation of the new Final Rule on IRR Funding, Policies, and Procedures in November 2004,<sup>605</sup> BIA worked with tribal governments and tribal organizations to develop an annual priority program of construction projects that was submitted to FHWA for approval based on available funding. BIA then distributed the allocated funds to the IRR regions according to the annual approved priority program of projects based on a relative-need formula. In light of the new rule discussed, *infra*, the procedure and distribution of funds has markedly changed.

In 1998, the new highway reauthorization, TEA-21, again addressed the IRR program.<sup>606</sup> It provided that an Indian tribal government could enter into contracts or agreements with the BIA pursuant to the ISDEAA for IRR program roads and bridges.<sup>607</sup> It established an Indian Reservation Roads Bridge Program (IRRB), under which a minimum of \$13 million of IRR program funds was set aside for a nationwide priority program for improving deficient IRR bridges.<sup>608</sup> The IRR funding level was increased to \$1.6 billion for FYs 1998–2003 (\$275 million per year).<sup>609</sup> Following TEA-21, the U.S. DOT issued an Order to ensure that programs, policies, and procedures administered by the DOT were responsive to the needs and concerns of American Indians, Alaska Natives, and tribes.<sup>610</sup> In addition, guidelines were issued regarding IRR Transportation Planning Procedures. These guidelines were developed jointly by various tribal, federal, state, and

<sup>604</sup> It is expected that new procedures will be implemented in light of SAFETEA-LU.

<sup>605</sup> 69 Fed. Reg. 43090 (July 19, 2004); 23 C.F.R. pt. 170.

<sup>606</sup> TEA-21, Pub. L. No. 105-178, 112 Stat. 107 (June 9, 1998).

<sup>607</sup> *Id.* § 1115.

<sup>608</sup> *Id.*, now codified at 23 U.S.C. § 202(d)(3)(B). *See also* FHWA's final rule for the IRRBP at 68 Fed. Reg. 24642, now found at 23 C.F.R. § 661.

<sup>609</sup> *Id.* § 1101(a)(8). With numerous extensions of TEA-21, funding has been at the FY 2004 level. As stated previously, reauthorization bills are currently pending in Congress.

<sup>610</sup> DOT Order 5301, Nov. 16, 1999.

<sup>595</sup> Pub. L. No. 97-424.

<sup>596</sup> Pub. L. No. 100-17, 101 Stat. 132 (Apr. 2, 1987).

<sup>597</sup> Pub. L. No. 102-240, 105 Stat. 1914 (Dec. 18, 1991).

<sup>598</sup> *Id.* § 1025.

<sup>599</sup> *Id.* § 1003.

<sup>600</sup> *Id.* § 1028.

<sup>601</sup> *Id.*

<sup>602</sup> *Id.*, now codified at 23 U.S.C. § 202.

<sup>603</sup> 23 U.S.C. § 204.



association representatives.<sup>611</sup> Finally, TEA-21 required that the federal government (with representatives from DOI and the DOT) enter into negotiated rulemaking with tribal governments to develop IRR program procedures and a funding formula to allocate IRR funds.<sup>612</sup> The Negotiated Rulemaking Committee developed proposed regulations for the IRR program to implement the applicable portions of TEA-21 and established a funding formula for FY 2000 and each subsequent year based on factors that reflect the relative needs of the Indian tribes, and reservations or tribal communities, for transportation assistance; the relative administrative capacities of, and challenges faced by, various Indian tribes, including the cost of road construction in each BIA area; geographic isolation; and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources.<sup>613</sup> In short, the Secretary of the Interior was required to develop this rule in a manner that reflects the unique government-to-government relationship between Indian tribes and the United States.<sup>614</sup>

The Rulemaking Committee was further charged to develop a funding distribution method based on factors that reflect the relative needs of the Indian tribes and reservation or tribal communities for transportation assistance; the relative administrative capacities of, and challenges faced by, various Indian tribes, including the cost of road construction in each BIA area; geographic isolation; and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources.<sup>615</sup> The committee arrived at a new distribution formula, now known as the Tribal Transportation Allocation Methodology.<sup>616</sup> This new distribution formula for IRR funds is essentially a tribal shares program with each federally recognized tribe receiving a portion of the future allocated IRR funds based on a defined methodology. The negotiated rule provided for an IRR Coordinating Committee to address ongoing issues in tribal transportation. This committee has already been established with tribal members from each of the 12 BIA regions and 2 federal members. This committee, announced in the September 8, 2005,

*Federal Register*, will meet twice a year. The first meeting was held in the fall of 2005.

The 2005 highway legislation, SAFETEA-LU, made significant changes to the IRR program.<sup>617</sup> While TEA-21 had a level \$275 million per year for the IRR program, SAFETEA-LU provides greatly increased funding, from \$300 million in FY 2005 with steady increases up to \$450 million for FY 2009. An additional \$14 million per year of contract authority is provided for the IRRBP. Prior to SAFETEA-LU, FHWA had stewardship and oversight responsibilities but no direct agreements with tribes, as the BIA had administered the IRR program. The new highway legislation significantly changed the administration of the IRR program. The FHWA may now provide IRR funding directly to a requesting Indian tribal government or consortium (two or more tribes) that has satisfactorily demonstrated financial stability and financial management to the Secretary of Transportation. The IRR funds may be used to carry out, in accordance with ISDEA,<sup>618</sup> contracts and agreements for planning, research, design, engineering, construction, and maintenance relating to the IRR program or project. In addition, SAFETEA-LU codifies existing policy, namely that IRR funds shall only be expended on projects identified in a transportation improvement program approved by the Secretary of Transportation.<sup>619</sup> However, tribal governments may now approve plans, specifications, and estimates and commence construction with IRR funds if certifications are provided that applicable health and safety standards are met.<sup>620</sup>

Because the Tribal Transportation Allocation Method (tribal shares funding formula) is in large part driven by the IRR inventory, SAFETEA-LU requires a comprehensive National Tribal Transportation Facility Inventory within 2 years of enactment.<sup>621</sup> Finally, although BIA will retain primary responsibility for IRR maintenance programs through DOI appropriations, up to 25 percent of a tribe's IRR funds may now be used for the purpose of road and bridge maintenance.<sup>622</sup> In addition, the legislation clearly provides that an Indian tribe may enter into a road maintenance agreement with a state to assume the responsibilities of the state for roads in and providing access to Indian reservations. These maintenance agreements will be tracked and reported back to Congress.<sup>623</sup>

<sup>611</sup> The 1999 TTAP can be found at <http://www.fhwa.dot.gov/flh/reports/indian/intro.htm>.

<sup>612</sup> TEA-21, § 1115. The Rule was negotiated pursuant to 5 U.S.C. § 561, The Negotiated Rulemaking Act of 1990, Pub. L. No. 101- 648, 104 Stat. 4969.

<sup>613</sup> *Id.*

<sup>614</sup> *Id.*

<sup>615</sup> *Id.*, codified at 23 U.S.C. § 202(d)2(D).

<sup>616</sup> 69 Fed. Reg. 43090, subpt. C at 43115 (July 19, 2004).

<sup>617</sup> See §§ 110l(a)(9) and 119 of SAFETEA-LU.

<sup>618</sup> 25 U.S.C. § 450b, et seq.

<sup>619</sup> Sec. 1119 of SAFETEA-LU.

<sup>620</sup> Sec. 1119(e) of SAFETEA-LU.

<sup>621</sup> Sec. 1119(f) of SAFETEA-LU.

<sup>622</sup> Sec. 1119(i) of SAFETEA-LU.

<sup>623</sup> Sec. 1119(k) of SAFETEA-LU.

The new highway legislation provides tribes more visibility at the U.S. DOT. SAFETEA-LU creates a new political position, Deputy Assistant Secretary of Transportation for Tribal Government Affairs.<sup>624</sup> This position is established to plan, coordinate, and implement DOT programs serving Indian tribes.

### 3. The IRR Bridge Program

Prior to TEA-21, IRR bridges were part of the highway bridge replacement and rehabilitation program.<sup>625</sup> Under this program, a small percentage of bridge funds from each of the 50 states was used for IRR bridge repair. The current IRRBP was authorized under TEA-21.<sup>626</sup> It is a national priority program designed to improve deficient IRR bridges. The word “national” is used both in the statute as well as in the legislative history, making clear the point that the funds were to be used throughout the country, presumably in a prudent manner, wherever there were deficient IRR bridges.<sup>627</sup> Both the IRRBP statute and its legislative history<sup>628</sup> envision a national program to address the large number of deficient IRR bridges. TEA-21 directed the Secretary to establish a nationwide priority program for improving deficient IRR bridges, and provided that, in cooperation with the Secretary of the Interior, not less than \$13 million in IRR funds shall be set aside for projects to replace or rehabilitate eligible deficient IRR bridges recorded in the National Bridge Inventory; and, that funds to carry out IRR bridge projects would be available only on approval of plans, specifications, and estimates by the Secretary.<sup>629</sup> The new highway authorization, SAFETEA-LU, provides an additional \$14 million from the Highway Trust Fund for FYs 2005–09 for IRRBP. Unlike TEA-21, where IRRBP funds were a set-aside from the program, these funds are in addition to the annual IRR program funding level. In addition, the statute now explicitly allows these funds to be used for planning and design in addition to engineering and construction activities.<sup>630</sup>

### 4. Emergency Relief Program for Federally Owned Roads

FHWA operates the Emergency Relief for Federally Owned Roads (ERFO) program.<sup>631</sup> The Office of Federal Lands Highways is responsible for management oversight and accountability of the ERFO program.<sup>632</sup> This program provides disaster assistance for federal roads, including Indian reservation roads. The ERFO program is intended to help pay the unusually heavy expenses associated with the repair and reconstruction of federal roads and bridges seriously damaged by a natural disaster over a wide area or a catastrophic failure from any external cause.<sup>633</sup>

Structural deficiencies, normal physical deterioration, and routine heavy maintenance do not qualify for ERFO funding.<sup>634</sup> Tribal governments that have the authority to repair or reconstruct federal roads may apply for ERFO funds.<sup>635</sup> Tribes can also administer approved ERFO repairs under a self-determination contract or self-governance agreement.<sup>636</sup> FHWA determines if the natural disaster or catastrophic failure is of sufficient extent and intensity to warrant consideration for ERFO funding. If approved for ERFO funding, the federal share payable is 100 percent.<sup>637</sup> In addition, if ERFO funds are approved and available, they can be used to supplement ordinarily allocated IRR construction funds for FHWA-approved repairs.<sup>638</sup> ERFO funds can also supplement maintenance funds for FHWA-approved repairs, and can be used to repay other funds used on approved ERFO repairs.<sup>639</sup> However, the total cost of an ERFO project may not exceed the cost of repair or reconstruction of a comparable facility.<sup>640</sup>

### 5. Discretionary Public Lands Highway Program (23 U.S.C. § 204)

Any public road providing access to and within federal lands is eligible for public lands highway (PLH) funding. States submit applications for funding in response to an FHWA request for PLH

<sup>624</sup> Sec. 1119(l) of SAFETEA-LU.

<sup>625</sup> 23 U.S.C. § 144.

<sup>626</sup> Sec. 23 U.S.C. § 202 was amended by § 1115(b)(4) of TEA-21, Pub. L. No. 105-178, 112 Stat. 107 (June 9, 1998).

<sup>627</sup> 23 U.S.C. § 202(d)(4); *see also* the Interim Final Rule (IFR) on the IRRBP (64 Fed. Reg. 38565 July 19, 1999); 23 C.F.R. pt. 661.

<sup>628</sup> S. REP. No. 105-95, at 13, Summary, § 1122; H. R. REP. No. 105-550, at 416–17.

<sup>629</sup> *Id.*

<sup>630</sup> Sec. 1119(g) of SAFETEA-LU.

<sup>631</sup> 23 U.S.C. §§ 120 and 125. *See also* 23 C.F.R. § 668.201, *et seq.*

<sup>632</sup> FED. HIGHWAY ADMIN., EMERGENCY RELIEF FOR FEDERALLY OWNED ROADS, DISASTER ASSISTANCE MANUAL (Publication No. FHWA-FLH-04-007, 2004).

<sup>633</sup> *Id.*

<sup>634</sup> 25 C.F.R. § 170.923(b).

<sup>635</sup> *Id.*

<sup>636</sup> 25 C.F.R. § 170.926.

<sup>637</sup> *Id.*

<sup>638</sup> 25 C.F.R. § 170.925.

<sup>639</sup> *Id.*

<sup>640</sup> 23 U.S.C. § 120.

projects.<sup>641</sup> State transportation agencies are to coordinate any application with the appropriate federal land agency or tribal government. Tribes and federal agencies are encouraged to work with states in developing and submitting project applications, which must be submitted through the states. The project selection is discretionary, and selection is made by the FHWA Administrator within available funding. In recent years, this program has been heavily earmarked by Congress.<sup>642</sup>

## 6. Tribal Technical Assistance Centers

The Tribal Technical Assistance Program (TTAP) cooperative agreements have statutory authorization for their existence and funding.<sup>643</sup> ISTEA provided for research funding for not less than two education and assistance centers designed to provide transportation assistance to Indian tribal governments.<sup>644</sup> During ISTEA, the FHWA and BIA jointly funded four such Indian Technical Assistance Centers. The centers were provided with 100 percent federal funding to provide training to American Indian tribal governments on intergovernmental transportation planning and project selection, as well as tourism and recreational travel.<sup>645</sup>

TEA-21 repealed Section 326 and amended Title 23 by adding Chapter 5, entitled "Research and Technology."<sup>646</sup> At present, there are six TTAP centers, all funded through cooperative agreements with educational institutions.<sup>647</sup> These centers con-

duct workshops, distribute transportation materials, and provide technical training on a continual basis. The 2005 highway legislation reauthorizes the TTAP centers and specifically provides for 100 percent federal funding for the centers.<sup>648</sup>

## I. FEDERAL TRANSIT PROGRAMS INVOLVING INDIAN TRIBES

The FTA is one of 11 modal administrations in the U.S. DOT. It functions through a Washington, D.C., headquarters office and 10 regional offices that assist transit agencies in all 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa. FTA provides financial assistance for public transportation systems, including buses, subways, light rail, commuter rail, monorail, passenger ferry boats, trolleys, inclined railways, and people movers. FTA oversees thousands of grants to hundreds of state and local transit providers, primarily through its 10 regional offices. The grantees are responsible for managing their programs in accordance with federal requirements, and FTA is responsible for ensuring that grantees follow federal mandates along with statutory and administrative requirements.<sup>649</sup>

Prior to SAFETEA-LU, FTA's statutory authority, regulations, and policy guidance did not establish any specific assistance programs for Indian tribes or tribal entities as such, but it was clear that an "Indian tribe" was eligible to become a grant recipient.<sup>650</sup> However, an Indian tribal government, like a state or local government, must agree to certain conditions if it chooses to receive federal financial assistance from FTA. Acceptance of these conditions is, in effect, a matter of contract between the FTA and the grantee. One particular condition that may be of interest to tribal governments is the requirement that recipients of FTA grants who will let \$250,000 or more in FTA-assisted contracts (exclusive of transit vehicle purchases) must have a DBE program, as mandated by Section 1101(b) of TEA-21. A recipient is "not eligi-

<sup>641</sup> 23 U.S.C. § 202(b).

<sup>642</sup> Sec. 1101(a)(9)(D) of SAFETEA-LU authorizes \$1.41 billion over 5 years for PLH funding.

<sup>643</sup> 23 U.S.C. § 204(b) and 23 U.S.C. § 504(b), Training and Education.

<sup>644</sup> *Id.* § 6004, which amended 23 U.S.C. chap. 3 by adding a new § 326, "Education and Training Program." TEA-21 continued this funding and there are now six TTAP Centers nationwide.

<sup>645</sup> ISTEA, § 6004, 23 U.S.C. § 326(b), as amended.

<sup>646</sup> 23 U.S.C. § 504(b)(2)(D)(ii) authorizes the Secretary to enter into grants, cooperative agreements, or contracts to operate local technical assistance program centers (LTAPs) to provide transportation technical assistance to Indian tribal governments. The Federal Lands Funding for TTAPs is set forth in 23 U.S.C. § 204(b), which provides that the Secretary of Interior may reserve funds from the Bureau of Indian Affairs (BIA) administrative funds associated with the Indian reservation roads (IRR) program to finance the Indian technical centers authorized under 504(b).

<sup>647</sup> The centers are located at Michigan Tech University; Colorado State University; Eastern Washington University (offices in Spokane and Sitka, Alaska); Oklahoma

State University; Great Plains Tribal College; and in California to serve tribes in Nevada and California.

<sup>648</sup> Sec. 5204 of SAFETEA-LU.

<sup>649</sup> [http://www.fta.dot.gov/4862\\_ENG\\_HTML.htm](http://www.fta.dot.gov/4862_ENG_HTML.htm).

<sup>650</sup> 49 U.S.C. § 5302(a)(6): Local governmental authority. The term "local governmental authority" includes—

1. a political subdivision of a State;
2. an authority of at least one State or political subdivision of a State;
3. an Indian tribe; and
4. a public corporation, board, or commission established under the laws of a State.

ble to receive financial assistance unless DOT has approved your DBE program and you are in compliance with it....” and the DOT DBE regulation.<sup>651</sup> This requirement remains unchanged with the 2005 reauthorization.

Under the U.S. DOT’s DBE program, Native Americans are presumed to be socially and economically disadvantaged individuals.<sup>652</sup> This means that a small business owned and controlled by Native Americans is eligible to be certified as a DBE. A small business firm owned by a tribal organization may also be eligible for certification.<sup>653</sup>

Title III of SAFETEA-LU greatly enlarged the role of public transportation in Indian country.<sup>654</sup> Significantly, the Act explicitly defines “recipients” to include a state or Indian tribe that receives a federal transit program grant from the federal government.<sup>655</sup> The Act provides for \$45 million for Indian tribe transit grants for FY 2005–09.<sup>656</sup> The change of words from “mass” to “public” reflects the broader applicability of transit systems beyond urban areas.<sup>657</sup> The former planning requirements are

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<sup>651</sup> 49 C.F.R. § 26.21, Who must have a DBE program?

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

(2) FTA recipients receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) exceeding \$ 250,000 in FTA funds in a Federal fiscal year;

(b)(1) You must submit a DBE program conforming to this part by August 31, 1999 to the concerned operating administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except that goals are reviewed by the particular operating administration that provides funding for your DOT-assisted contracts).

(2) You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part. You must continue to carry out your program until all funds from DOT financial assistance have been expended.

<sup>652</sup> 49 C.F.R. § 26.5.

<sup>653</sup> 49 C.F.R. § 26.73(i).

<sup>654</sup> Sec. 3001 *et seq.* of SAFETEA-LU, entitled “Federal Public Transportation Act of 2005.”

<sup>655</sup> SAFETEA-LU § 3013(a)(a)(1).

<sup>656</sup> SAFETEA-LU § 3013(c)(c)(1).

<sup>657</sup> House Bill language, § 3001 in Conference Report on H.R. 3.

amended,<sup>658</sup> and require that the state’s general public transportation planning process consider the concerns of Indian tribal governments and federal land management agencies that have jurisdiction over land within the state boundaries.<sup>659</sup> The Act further requires the development of a 20-year, long-range transportation plan that provides for the development and implementation of the intermodal transportation system of the state. With respect to an area of the state under the jurisdiction of an Indian tribal government, the statewide long-range plan is to be developed in consultation with the tribal government and the Secretary of the Interior.<sup>660</sup> Similarly, the statewide public transportation improvement program, which is updated at least every 4 years, also requires appropriate tribal government consultation.<sup>661</sup>

Clearly, the Congress recognized the importance of improving public transportation in Indian country. This is in accord with previous regulatory policy. Under the recent Final Rule on Indian Reservation Roads, Policies, and Procedures, “transit” is an eligible activity, i.e., use of IRR funds is very broadly defined.<sup>662</sup>

## J. PLANNING AND PROJECT DEVELOPMENT ACTIVITIES

### 1. Planning<sup>663</sup>

#### *a. Transportation Planning to Include Tribal Governments*

In view of the sovereign status of the Indian tribes, it is important to recognize during planning and project development that a government-to-government relationship is being entered into when a state or local government plans a highway project on lands under jurisdiction of Indian tribal governments. Congress underscored this feature of transportation planning when it enacted ISTEA,<sup>664</sup> first by defining “public authority” to include “Indian tribe,”<sup>665</sup> and second by adding new statewide planning requirements which, *inter alia*, mandate

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<sup>658</sup> 49 U.S.C. § 5304.

<sup>659</sup> SAFETEA-LU § 3006(9)(e)(2).

<sup>660</sup> SAFETEA-LU § 3006(e)(2) and (f)(2)(C).

<sup>661</sup> SAFETEA-LU § 3006(g)(1)(C).

<sup>662</sup> 25 C.F.R. § 170.148–170.152.

<sup>663</sup> See FHWA Web site for Tribal Planning, *available at* <http://www.planning.dot.gov/tribal.asp>.

<sup>664</sup> Pub. L. No. 102-240, 105 Stat. 1914 (Dec. 18, 1991).

<sup>665</sup> *Id.* § 1005, amending 23 U.S.C. § 101: “The term ‘public authority’ means a Federal, State, county, town, or township, Indian tribe, municipal or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities.”

the development of statewide plans which "shall, at a minimum, consider...[t]he concerns of Indian tribal governments having jurisdiction over lands within the boundaries of the State."<sup>666</sup> In addition, ISTEA required that with respect to areas of the state under Indian tribal government jurisdiction, the long-range transportation plan be developed in consultation with the tribal government and the Secretary of the Interior.<sup>667</sup> Finally, ISTEA added the requirement that the STIP also be developed in similar consultation for areas of the state under the jurisdiction of an Indian tribal government.<sup>668</sup> The planning requirements for states and Indian tribal governments coupled with increased funding for the IRR program—\$191 million for years 1991–95—greatly increased the visibility of transportation issues in Indian country.

In light of the requirements of ISTEA and the new emphasis on planning, the U.S. DOT issued new regulations on statewide planning on October 28, 1993,<sup>669</sup> which significantly amplify the statutory requirements. These regulations, which apply to both FHWA programs and FTA programs, amended the regulations of Title 23, C.F.R., Part 450—Planning Assistance and Standards. Subsection 450.208 prescribes 23 factors that shall be considered, analyzed, and reflected in the planning process products, including "(23) The concerns of Indian tribal governments having jurisdiction over lands within the boundaries of the State." Subsection 450(b) provides as follows:

The degree of consideration and analysis of the factors should be based on the scale and complexity of many issues, including transportation problems, land use, employment, economic development, environmental and housing and community development objectives, the extent of overlap between factors and other circumstances statewide or in subareas within the State.

Under Section 450.210, Coordination, each State, in cooperation with participating organizations "such as...Indian tribal governments...shall, to the extent appropriate, provide for a fully coordinated process," including 13 listed categories, such as: "(5) Transportation planning carried out by the State with transportation planning carried out by Indian tribal governments; ...." and "(12) Transportation planning with analysis of social, economic, employment, energy, environmental, and housing and community development effects of transportation actions."

<sup>666</sup> *Id.* § 1025(a), amending 23 U.S.C. § 135. Codified at 23 U.S.C. § 135(d)(2).

<sup>667</sup> 23 U.S.C. § 135(d)(2)(c).

<sup>668</sup> 23 U.S.C. § 135(f)(B)(iii).

<sup>669</sup> 58 Fed. Reg. 58040, 23 C.F.R., pt. 450 and 49 C.F.R., pt. 613 (Oct. 28, 1993).

Subsection 450.214(c) provides that in developing the statewide plan, the state shall, *inter alia*, "(2) Cooperate with the Indian tribal government and the Secretary of the Interior on the portions of the plan affecting areas of the State under the jurisdiction of an Indian tribal government; ...."

Section 450.104 defines the key terms "consultation," "cooperation," and "coordination," as follows:

*Consultation* means that one party confers with another identified party and, prior to taking action(s), considers that party's views.

*Cooperation* means that the parties involved in carrying out the planning, programming and management systems processes work together to achieve a common goal or objective.

*Coordination* means the comparison of the transportation plans, programs, and schedules of one agency with related plans, programs and schedules of other agencies or entities with legal standing, and adjustment of plans, programs and schedules to achieve general consistency.

At present, the FHWA/FTA environmental regulations in 23 C.F.R. Part 771, which prescribe the procedures for compliance with NEPA,<sup>670</sup> exempt "regional" transportation plans from preparation of environmental analysis.<sup>671</sup> This "exemption" is supported by case law.<sup>672</sup> While the Statewide Planning Regulations place great emphasis on, and establish requirements concerning, the environmental effects of transportation decisions, they do not mandate a NEPA environmental analysis. However, the Council on Environmental Quality (CEQ) regulations provide that "agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts."<sup>673</sup> Given the importance to Indian tribes of reversing the loss of tribal resources and preserving the integrity of tribal lands, state transportation planning and project development will necessitate the use of environmental inventorying. However, since NEPA documents are to be prepared before any irreversible and irretrievable

<sup>670</sup> Pub. L. No. 91-190, Jan. 1, 1970, 83 Stat. 852, 42 U.S.C. §§ 4321, *et seq.*

<sup>671</sup> See 23 C.F.R. § 109(a)(1) (1993):

The provisions of this regulation and the CEQ regulations apply to actions where the Administration exercises sufficient control to condition the permit or project approval. Actions taken by the applicant which do not require Federal approvals, such as preparation of a regional transportation plan are not subject to this regulation.

<sup>672</sup> See, e.g., *Atlanta Coalition on Transportation Crisis v. Atlanta Reg'l Comm'n*, 599 F.2d 1333 (5th Cir. 1979).

<sup>673</sup> 40 C.F.R. § 1501.2.

commitment of resources, any firm commitments prior to full NEPA compliance must be avoided.<sup>674</sup>

SAFETEA-LU reemphasizes the importance of planning by amending Title 23, U.S.C. §§ 134 and 135.<sup>675</sup> The requirements to consult with tribal governments are again set forth both for statewide planning and the long-range transportation plan.<sup>676</sup> Finally, tribal governments are specifically included in the section addressing efficient environmental reviews for project decisionmaking.<sup>677</sup>

### *b. Executive Initiatives on Government-to-Government Relations*

There have been a series of executive branch initiatives on government-to-government relations. These initiatives, beginning with President Reagan in 1984, stemmed from a policy initiated by President Nixon and are listed below.<sup>678</sup>

(1) *Presidential Indian Policy Statement of January 24, 1983*.<sup>679</sup>—Pledged a government-to-government relationship between the U.S. Government and Indian tribes.

(2) *Presidential Memorandum of April 29, 1994: Government-to-Government Relations with Native American Tribal Governments*.<sup>680</sup>—Directed all executive departments and agencies to implement activities affecting Indian tribal rights or trust resources “in a knowledgeable, sensitive manner respectful of tribal sovereignty,” mandating six guiding principles:

- a. Operate within a government-to-government relationship with federally recognized tribal governments;
- b. Consult to the greatest extent practicable and permitted by law with Indian tribal governments before taking actions that affect federally recognized tribes;
- c. Assess the impact of activities on tribal trust resources and assure that tribal interests are considered before the activities are undertaken;
- d. Remove procedural impediments to working directly with tribal governments on activities that affect trust property or governmental rights of tribes;
- e. To the extent permitted by law, design solutions and tailor federal programs as appropriate to address specific or unique needs of tribal communities; and
- f. Cooperate with other agencies to accomplish these goals.

Following issuance of the April 29, 1994, Presidential Memorandum, program development guidance emphasized that FHWA/FTA field offices and the states should take every opportunity to encourage Indian tribes to become involved in the planning process, particularly in development of long-range plans.<sup>681</sup> Subsequent guidance strongly encouraged FHWA Division Administrators to meet with tribal government officials and establish dialogues with tribal governments leading to a better understanding of transportation needs, cultural issues, and resource impacts, and resulting in added benefit to policy, planning, and the project development process.<sup>682</sup>

(3) *FHWA Indian Task Force Report (February 4, 1998)*.<sup>683</sup>—The FHWA Indian Task Force Report of February 4, 1998, was issued to provide guidance regarding FHWA’s relationship with federally recognized tribal governments with respect to the Federal Lands Highway and Federal-Aid Highway programs. Paragraph F of the report, entitled “Fed-

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<sup>674</sup> See *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) (EA/Fonsi in support of decision granting Makah Indian Tribe authorization to resume whaling was set aside because federal defendants had signed a contract obligating them to make a proposal to the International Whaling Commission for a gray whale quota and to participate in the harvest of those whales; *Held*: In making such a firm commitment before preparing an EA, the federal defendants failed to take a “hard look” at the environmental consequences of their actions and therefore violated NEPA.) See also Todd Miller, *Exercising Cultural Self-Determination: The Mahah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165 (2001).

<sup>675</sup> SAFETEA-LU § 6001.

<sup>676</sup> *Id.*

<sup>677</sup> SAFETEA-LU § 6002.

<sup>678</sup> “The terminology of a ‘government-to-government’ relationship that is based on a consultation process originated in the 1970s as part of the Tribal Self-Determination Policy initiated by President Nixon...embodied in a series of federal policy documents begun by President Reagan in 1984...,” NCAI/NCSL Models of Cooperation, *supra* note 475, at 33.

<sup>679</sup> Reagan Administration Indian Policy Initiatives, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983).

<sup>680</sup> 59 Fed. Reg. 22951 (May 4, 1994).

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<sup>681</sup> Memorandum dated Dec. 12, 1994, from FHWA’s Associate Administrators for Program Development, Federal Lands Highway Program and Grants Management, to FHWA Regional Federal Highway Administrators, Regional Federal Transit Administrators and Federal Lands Highway Division Engineers.

<sup>682</sup> Memorandum of Feb. 24, 1998, from the Federal Highway Administrator Kenneth R. Wykle to the FHWA Leadership Team, Subject: Action: Guidance on Relations with American Indian Tribal Governments, transmitting FHWA Indian Task Force Report dated Feb. 4, 1998. This guidance was updated in 2004.

<sup>683</sup> *Id.*

eral-aid Tribal Planning and Environmental Issues,” includes the following statement:<sup>684</sup>

Although traditionally environmental issues and processes have been handled in project development through the FHWA National Environmental Policy Act (NEPA) process, environmental issues are now being addressed to a greater degree in the transportation planning process. The groundwork for consideration of sensitive environmental and community values is laid out during the planning process and continued during the project development process. In light of this, to the greatest extent practical and permitted by law, FHWA will ensure that during the transportation planning and FHWA NEPA processes, tribes are consulted and tribal concerns are considered for federally funded state transportation projects that impact tribal trust resources, tribal communities or Indian interests....

(4) *Presidential Executive Order 13084 of May 14, 1998: Consultation and Coordination with Indian Tribal Governments.*<sup>685</sup>—This first consultation and coordination Executive Order (E.O.) recognized that the United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights. It ordered, among other things, the establishment of regular and meaningful consultation and collaboration with Indian tribal governments in the development of *regulatory practices* on federal matters that significantly or uniquely affect their communities.

(5) *Presidential Executive Order 13175 of November 6, 2000: Consultation and Coordination with Indian Tribal Governments.*<sup>686</sup>—This E.O. revoked and replaced E.O. 13084 and ordered the establishment of regular and meaningful consultation and collaboration with tribal officials in the development of *federal policies that have tribal implications*. “Policies that have tribal implications” refers to regulations, legislative comments or proposed regulation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.

(6) *Presidential Executive Order 13336 and Memorandum to Heads of Executive Departments and Agencies Entitled: Government-to-Government Relationships with Tribal Governments, dated September 23, 2004.*—This E.O. adopted a national policy of self-determination for Indian tribes and committed the administration to continuing work

with federally recognized tribal governments on a government-to-government basis.

## 2. Environmental and Related Issues<sup>687</sup>

### a. General

Whether a specific federal statute of general applicability, such as NEPA, applies to activities on Indian lands depends on the intent of Congress.<sup>688</sup> Certainly, such laws will be held to apply where Indians or tribes are expressly covered, but they will also apply where it is clear from the statutory terms that such coverage was intended.<sup>689</sup> Where retained sovereignty is not invalidated and there is no infringement of Indian rights, Indians and their property are normally subject to the same federal laws as others.<sup>690</sup> There were no reported cases found where an Indian tribe had successfully challenged applicability of federal environmental laws to Indian lands. The BIA routinely addresses environmental matters as a part of its trust responsibility.

Federal statutory environmental law has been a fertile field for litigation between states and tribes both as to applicability and jurisdiction.<sup>691</sup> Thus far, state environmental laws have been held not to apply to Indian reservations.<sup>692</sup> However, while “(s)tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply,”<sup>693</sup> the Supreme Court has not established an inflexible *per se* rule precluding state jurisdiction in the absence of express congressional consent.<sup>694</sup> As the Court said in *New Mexico v. Mescalero Apache Tribe*:<sup>695</sup> “[U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and ...in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of

<sup>687</sup> See generally DESKBOOK, *supra* note 16, chap. 10, Environmental Regulation, at 263–300.

<sup>688</sup> COHEN, *supra* note 8, at 282.

<sup>689</sup> *Id.*

<sup>690</sup> *Id.* at 283.

<sup>691</sup> See generally B. Kevin Gover and Jana L. Walker, *Tribal Environmental Regulation*, 39 FED. B.J. 438 (1989); DESKBOOK, *supra* note 16, chap. 10, at 263–300.

<sup>692</sup> *State of Wash. Dep’t of Ecology v. U.S. Env’tl. Prot. Agency*, 752 F.2d 1495 (9th Cir. 1985), which addressed the issue of whether the Resource Conservation and Recovery Act (RCRA) authorizes state authority over tribal lands.

<sup>693</sup> *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973).

<sup>694</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. at 214–15.

<sup>695</sup> 462 U.S. at 331–32.

<sup>684</sup> *Id.* at 5.

<sup>685</sup> 63 Fed. Reg. 27655 (May 19, 1998).

<sup>686</sup> 65 Fed. Reg. 67249 (Nov. 9, 2000).

tribal members.” But, the Court made clear in *Washington v. Confederated Tribes of the Colville Indian Reservation, supra*,<sup>696</sup> the tribes have no right “to market an exemption” from state law.

### b. NEPA Compliance<sup>697</sup>

NEPA establishes a national policy for the protection and enhancement of the human environment. One of the continuing responsibilities under the Act is to “preserve important historic, cultural, and natural aspects of our national heritage.”<sup>698</sup> It requires that an agency must prepare an Environmental Impact Statement (EIS) for all “proposals for legislation and other major federal actions significantly affecting the quality of the human environment.”<sup>699</sup> The CEQ regulations implementing NEPA provide agencies with specific guidelines for compliance.<sup>700</sup> NEPA is silent on its applicability to Indian country and Indian tribal agencies, and the BIA initially took the position that it was not applicable to Indian country, since only federal approvals were involved. In *Davis v. Morton*,<sup>701</sup> the Court of Appeals for the Tenth Circuit addressed the applicability of NEPA to the BIA approval of a 99-year lease on the Tesuque Indian Reservation in Santa Fe County, New Mexico. The Court of Appeals held as follows: “We conclude approving leases on federal lands constitutes major federal action and thus must be approved according to NEPA mandates. As our court had occasion to consider once before, this Act was intended to include all federal agencies, including the Bureau of Indian Affairs.”<sup>702</sup>

Subsequent to this ruling, the BIA, in cooperation with the various Indian tribes, began prepar-

ing environmental analyses in compliance with NEPA. BIA has issued a NEPA handbook to provide guidance to BIA personnel and others who seek to use Indian lands that are subject to federal approval. Normally, the BIA would be the jurisdictional agency, but it may also act as a “cooperating agency” with another federal agency, such as FHWA or FTA, who is acting as “lead agency,” under the CEQ regulations.<sup>703</sup> The CEQ regulations mandate that the lead agency invite “the participation of...any affected Indian tribe” in the scoping process.<sup>704</sup> A tribe, although lacking approval authority, may still be a cooperating agency, which would assure its direct involvement throughout the NEPA process.<sup>705</sup> The Montana Department of Highways started the practice of entering into a memorandum of understanding with FHWA and the jurisdictional Indian tribe regarding the procedures to be followed in preparation of an EIS for highway improvements.<sup>706</sup>

The following cases dealing with NEPA compliance relative to Indian lands are noteworthy:

- *Manygoats v. Kleppe*<sup>707</sup> determined that individual members of an Indian tribe could challenge the adequacy of an EIS without joinder of the tribe under Rule 19, Fed. R. Civ. P.<sup>708</sup>
- *County of San Diego v. Babbitt*<sup>709</sup> examined the CEQ regulation requiring agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives.”<sup>710</sup> The County challenged the adequacy of an EIS for construction of a solid waste disposal

<sup>703</sup> 40 C.F.R. pt 1500, §§ 1501.5, 1501.6.

<sup>704</sup> 40 C.F.R. § 1501.7(a).

<sup>705</sup> See 40 C.F.R. § 1508.5, which provides, *inter alia*: “A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.”

<sup>706</sup> *E.g.*, the memorandum of understanding (MOU) among the FHWA, Montana Department of Highways, and the Confederated Salish and Kootenai Tribes of the Flathead Nations, dated May 29, 1991, covering improvements to U.S. 93. See 2002 report on this MOU and related activities at <http://www.fhwa.dot.gov/hep/tribaltrans/montsalish.htm>.

<sup>707</sup> 558 F.2d 556 (10th Cir. 1977).

<sup>708</sup> The EIS covered the proposed BIA approval of an agreement between the Navajo Tribe and Exxon for mining leases. The Court noted that “dismissal of the action for nonjoinder of the Tribe would produce an anomalous result. No one, except the Tribe, could seek review of an [EIS] covering significant federal action.... NEPA is concerned with national environmental interests. Tribal interests may not coincide with national interests....” (Marygoats, 558 F.2d at 558).

<sup>709</sup> 847 F. Supp. 768 (S.D. Cal. 1994).

<sup>710</sup> 40 C.F.R. § 1502.14.

<sup>696</sup> 447 U.S. at 155.

<sup>697</sup> FHWA/FTA guidance can be found on FHWA’s Web site: <http://www.fhwa.dot.gov/environment/htm>.

<sup>698</sup> 42 U.S.C. § 4331(b)(4).

<sup>699</sup> 42 U.S.C. § 4332(2)(c).

<sup>700</sup> See 40 C.F.R. §§ 1500–1508. As noted in *National Indian Youth Council v. Watt*, 664 F.2d 220, 224–25, (1981), CEQ was created by NEPA to advise the President on environmental policy. See 42 U.S.C. § 4342. A 1970 Presidential Order authorized CEQ to issue “guidelines” for the preparation of statements on proposals affecting the environment. See *Andrus v. Sierra Club*, 442 U.S. 347, 353 n.10, 99 S. Ct. 2335, 2339, 60 L. Ed. 2d 943. These guidelines were advisory. *Id.* at 356–57. A 1977 Presidential Order required CEQ to issue regulations for NEPA procedure. *Id.* at 357. The guidelines thus became mandatory. *Id.* at 357 and 358.

<sup>701</sup> 469 F.2d 593 (10th Cir. 1972).

<sup>702</sup> *Id.* at 597–98. See also *Nat’l Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971). *Accord*, *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975) (Approval of coal leases constituted a “major federal action” requiring an EIS).



facility on the Campo Band of Mission Indians Reservation for, among other things, the failure to consider alternative sites off the reservation. The district court held that since the purpose of the project was to provide a significant economic development opportunity for the tribe, the range “need not extend beyond those alternatives reasonably related to the purposes of the project.”<sup>711</sup> The court found that although the BIA did not consider landfill sites off the reservation, it did properly consider and analyze a reasonable range of alternatives on the reservation for meeting the goals of the project, thus meeting the requirements of NEPA.<sup>712</sup>

• *Muckleshoot Indian Tribe v. U.S. Forest Service*<sup>713</sup> was a challenge to a land exchange whereby the Forest Service would transfer to the Weyerhaeuser Company land in the area of Huckleberry Mountain in Washington State, used historically and presently by the Tribe for cultural, religious, and resource purposes. The Tribe, *inter alia*, claimed that the EIS failed to consider the cumulative impact of the exchange, as required by CEQ regulation 40 C.F.R. § 1508.7, and failed to consider an adequate range of alternatives. *Held*: “...the cumulative impact statements that are provided in the EIS are far too general and one-sided to meet NEPA requirements...[and] Forest Service violated NEPA by failing to consider a range of appropriate alternatives to the proposed exchange.”<sup>714</sup>

• *Colorado River Indian Tribes v. Marsh*<sup>715</sup> was a challenge to the U.S. Army Corps of Engineers’ (COE’s) issuance of a permit to a private developer for placement of riprap along a riverbank without preparing an EIS. The developer proposed to construct single-family homes and commercial facilities on land situated between a major highway and the river and adjacent to land containing several recorded significant cultural and archaeological sites. The COE retracted its Draft EIS, which had found significant impacts to the adjacent land, and limited the scope of its environmental assessment to activities within its defined jurisdiction. *Held*: “In limiting the scope of its inquiry, the Corps acted improperly and contrary to the mandates of NEPA.... The Corps should have analyzed the indirect effects of the bank stabilization on both ‘on site’ and ‘off site’ locations.”<sup>716</sup>

<sup>711</sup> *Babbitt*, 847 F. Supp. at 776.

<sup>712</sup> *Id.*

<sup>713</sup> 177 F.3d 800 (9th Cir. 1999).

<sup>714</sup> *Id.* at 811–12.

<sup>715</sup> 605 F. Supp. 1425 (C.D. Cal. 1985).

<sup>716</sup> *Id.* at 1433.

### c. Cultural and Religious Concerns of Indians<sup>717</sup>

In addition to the specific environmental statutes noted above, the following federal laws and legal issues should also be considered when planning a project on or near Indian lands. Consultation with the Indian tribe is either mandated or recommended in each instance. The U.S. National Park Services, National Center for Cultural Resources, maintains a Native American Consultation Database for identifying consultation contacts for Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations, which provides a starting point for the consultation process by identifying tribal leaders and contacts.<sup>718</sup>

(1) *AIRFA*<sup>719</sup> and *First Amendment Free Exercise and Establishment Issues*.<sup>720</sup>—*AIRFA* provides that

On or after August 11, 1978 it shall be the policy of the United States to protect and preserve for the American Indian, Eskimo, Aleut, and Native Hawaiian the inherent right of freedom to believe, express, and exercise their traditional religions, including but not limited to access to religious sites, use and possession of sacred objects, and freedom to worship through ceremonies and traditional rites.

John Petoskey notes that “since the late 1970s a new issue in First Amendment law has confronted the federal judiciary [as] American Indians are increasingly making claims to the protection of the First Amendment for their religious practices in opposition to the decisions of federal land managers.”<sup>721</sup> Canby observes that:

Enforcement of the right of free exercise of religion often takes a distinctive turn when Indians are involved. Many Indian religious beliefs and practices center on particular places or objects. The places may be on federal lands outside of any reservation. The objects may be eagle feathers or peyote. In these

<sup>717</sup> See generally CANBY, *supra* note 8, at 339–45; Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623 (2004); David S. Johnston, *The Native American Pledge: Protection and Preservation of Sacred Sites*, 8 WIDENER L. SYMP. J. 443 (2002). Lydia T. Grimm, *Sacred Lands and the Establishment Clause: Indian Religious Practices on Federal Lands*, 12 NAT. RES. & ENV’T 19–78 (1997); JOHN PETOSKEY, *Indians and the First Amendment*, in AMERICAN POLICY IN THE TWENTIETH CENTURY, 221–37 (3d. ed. 1985).

<sup>718</sup> This NACD may be accessed at: <http://web.cast.uark.edu/other/nps/nacd>.

<sup>719</sup> Act of Aug. 11, 1978, Pub. L. No. 95-341; 92 Stat. 469, 42 U.S.C. § 1996, *et. seq.*

<sup>720</sup> The Free Exercise Clause of the first Amendment provides that “Congress shall make no law...prohibiting the free exercise [of religion].” U.S. CONST. amend. 1.

<sup>721</sup> PETOSKEY, *supra* note 717, at 221.

cases, federal management or regulation may interfere substantially with religious uses. In recognition of this problem, Congress in 1978 passed an unusual statute called the “American Indian Religious Freedom Act [AIRFA].”<sup>722</sup>

In one of the early cases construing AIRFA, a federal district court concluded that the Act did not create a cause of action in federal courts for violation of rights of religious freedom:

The Act is merely a statement of the policy of the federal government with respect to traditional Indian religious practices.... This court has concluded that with respect to the free exercise rights of plaintiffs, the conduct of defendants complied with the dictates of the first amendment. The American Indian Religious Freedom Act requires no more.<sup>723</sup>

In *Wilson v. Block*, the Court of Appeals for the D.C. Circuit further interpreted AIRFA in the context of NEPA compliance.<sup>724</sup> There, the Hopi and Navajo Indian Tribes had challenged the Forest Service’s permitted expansion of the government-owned Snow Bowl ski area on the San Francisco Peaks in Coconino National Forest because it would interfere with religious ceremonies and practices of their people. The tribes contended that AIRFA “proscribes all federal land uses that conflict or interfere with traditional Indian religious beliefs or practices, unless such uses are justified by compelling government interests.”<sup>725</sup> The court of appeals declined to give such a broad reading to AIRFA, but recognized a duty under NEPA:

Thus AIRFA requires federal agencies to consider, but not necessarily defer to, Indian religious values. It does not prohibit agencies from adopting all land

uses that conflict with traditional Indian religious beliefs or practices. Instead, an agency undertaking a land use project will be in compliance with AIRFA if, in the decision-making process [NEPA], it obtains and considers the views of Indian leaders, and if, in project implementation, it avoids unnecessary interference with Indian religious practices.... [W]e find that the Forest Service complied with AIRFA...[because]...views expressed [by Indian leaders] were discussed at length in the [FEIS] and were given due consideration in the evaluation of the alternative development schemes proposed for Snow Bowl.<sup>726</sup>

The Supreme Court addressed AIRFA in *Lyng v. Northwest Indian Cemetery Protective Association*,<sup>727</sup> a challenge of the Forest Service’s road building and timber harvesting decisions by an Indian organization, individual Indians, a nature organization, and others, for alleged violation of the First Amendment’s Free Exercise Clause. The road project covered a 6-mi paved segment through the Chimney Rock section of the Six Rivers National Forest, situated between two other portions of the road already completed.<sup>728</sup> A Forest Service–commissioned study found that the entire area “is significant as an integral and indispensable [sic] part of Indian religious conceptualization and practice.” Specific sites are used for certain rituals, and “successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting.” The study concluded that constructing a road along any of the available routes “would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeways of Northwest California Indian peoples.” The report recommended that the road not be completed.<sup>729</sup> The Forest Service decided not to adopt this recommendation and prepared a Final EIS for construction of the road, selecting a route that avoided archaeological sites and was removed as far as possible from the sites used by contemporary Indians for specific spiritual activities.<sup>730</sup>

Justice O’Connor, writing for the majority, noted that “[e]xcept for abandoning its project entirely, and thereby leaving the two existing segments of road to dead-end in the middle of the National Forest, it is difficult to see how the Government could have been more solicitous,” finding that [s]uch solicitude accords with the policy expressed in AIRFA, and further finding that “[n]o where in the

<sup>722</sup> CANBY, *supra* note 8, at 339.

<sup>723</sup> *Crow v. Gullet*, 541 F. Supp. 785, 793 (D.S.D. 1982), (citing *Hopi Indian Tribe v. Block*, 8 ILR at 3076), *affirmed*, 706 F.2d 856 (8th Cir. 1983). CANBY, *supra* note 8, at 340–41, points out that:

Several controversies have involved attempts by government to develop its public lands in a manner that adversely affects Indian religious practices. Initially, the lower courts resolved such controversies by balancing the governmental interest in developing the particular project against the burden it placed on Indian religion. The balancing nearly always came out in favor of the government. The courts rejected, for example, Indian attempts to prevent the government from inundating sacred places upstream from federal dams. *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980); *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir. 1980). They also rejected attempts to prevent expansion of a ski area on a sacred mountain...*Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), and the establishment of a state park in sacred ground, *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983).

<sup>724</sup> *Wilson v. Block*, 708 F.2d 735, 747 (D.C. Cir. 1983).

<sup>725</sup> *Id.* at 745.

<sup>726</sup> *Id.* at 747.

<sup>727</sup> 485 U.S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988).

<sup>728</sup> *Id.* at 442.

<sup>729</sup> *Id.* at 443.

<sup>730</sup> *Id.*

law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.<sup>731</sup>

In addressing the First Amendment challenge, the Court's ruling rejected balancing of interests as inappropriate and "presumably puts an end to free exercise challenges to governmental development projects."<sup>732</sup> The Court stated:

[I]ncidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [cannot] require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." [citation omitted].... Even if we assume that...the G-O road will "virtually destroy the Indians' ability to practice their religion,"...the Constitution simply does not provide a principle that could justify upholding respondent's legal claims.... The first amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.... What ever rights the Indians have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land. *Cf. Bowen v. Roy*, 476 U.S., at 724-727.<sup>733</sup>

The Court's decision, despite closing the door on Free Exercise claims, cautioned that

[n]othing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to use its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents. *Cf. Sherbert*, 374 U.S., at 422-23.

This statement should reduce any fear of "excessive entanglement" when government officials negotiate with native shamans in attempting to accommodate Native American religious practices.

President Clinton's E.O. No. 13007, "Indian Sacred Sites," issued on May 24, 1996, clearly shared the Court's exhortation. The E.O. directed federal agencies "to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, to (1) accommodate access to ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred

sites."<sup>734</sup> This E.O. is said to have filled a gap in AIRFA "by requiring federal agencies to avoid harming the physical integrity of such sacred sites."<sup>735</sup> One commentator observes that since *Lyng*, "agencies like the Park Service, the Forest Service, and the Bureau of Land Management have all increasingly sought ways to protect many of the Indian sacred sites located on federal lands and to accommodate the religious and cultural practices associated with them."<sup>736</sup>

Sometimes this protection of Indian cultural and religious sites leads to challenges based on alleged violation of the First Amendment's Establishment Clause. For example, in *Bear Lodge Multiple Use Association v. Babbitt*,<sup>737</sup> the Court reviewed a challenge, based on the Establishment Clause, to the order of the District Court of Wyoming, which ruled that the U.S. Secretary of the Interior lawfully approved a National Park Service plan to place a voluntary ban on climbing at Devil's Tower. Devil's Tower is a National Monument, as well as the place of creation and religious practice for many American Indians. The Court upheld the voluntary ban, but dismissed the case for lack of standing by the climber group due to failure to show injury in fact. The district court had properly concluded that a government policy benefiting Native American tribes did not constitute excessive entanglement with religion because "Native American tribes...are not solely religious organizations, but also represent common heritage and culture." 2 F. Supp. 2d 1448, 1456 (D. Wyo. 1998).

*Cholla Ready Mix v. Civish*<sup>738</sup> was an Establishment Clause challenge in a highway case. The decision upholds the efforts of ADOT to discourage the use of materials from Woodruff Butte, Arizona, in state construction projects because of the Butte's religious, cultural, and historical significance to the Hopi Tribe, Zuni Pueblo, and Navajo Nation (the Tribes). Earlier, ADOT's allowance of materials mined from the Butte to being used in state highway construction projects had led to litigation involving the Tribes, Cholla, ADOT, and FHWA.<sup>739</sup> In

<sup>734</sup> 61 Fed. Reg. 26771.

<sup>735</sup> Johnston, *supra* note 717, at 459, citing Grimm, *supra* note 717.

<sup>736</sup> Yablon, *supra* note 717, at 1638.

<sup>737</sup> 175 F.3d 814 (10th Cir. 1999).

<sup>738</sup> CV-02-01185-FJM (9th Cir. 2004).

<sup>739</sup> According to Cholla's complaint, ADOT faced years of controversy about the destruction of Woodruff Butte. A federal district court in previous litigation awarded the Hopi Tribe a preliminary injunction requiring consultation with the tribe before spending federal funds on a construction project using materials from Woodruff Butte because of the Butte's historical and cultural importance. The court did not rule that FHWA must engage in the §

<sup>731</sup> *Id.* at 455.

<sup>732</sup> CANBY, *supra* note 8, at 342. See also Yablon, *supra* note 717, at 1629-30.

<sup>733</sup> *Lyng*, 485 U.S. at 450-52.

1999, ADOT promulgated new commercial source regulations, which require each applicant for a commercial source number to submit an environmental assessment that considers, *inter alia*, adverse effects on places eligible for listing on the National Register of Historic Places (NRHP). Woodruff Butte was declared eligible for listing on the NRHP in or around 1990. On June 26, 2000, ADOT denied Cholla's application for a new commercial source number because of the projected adverse effects on historic property on Woodruff Butte. Cholla filed suit alleging that the policy against using materials from the Butte in state construction projects, *inter alia*, violates Cholla's rights under the Establishment Clause of the First Amendment. The district court granted defendant's motion to dismiss.

On appeal, the court of appeals found Cholla's Establishment Clause claim to be premised on flawed analysis of the governing law. The court then outlined the governing law:

Government conduct does not violate the Establishment Clause if (1) it has a secular purpose, (2) its principal or primary effect is not to advance or inhibit religion, and (3) it does not foster excessive government entanglement with religion. *See, e.g. Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Particular attention is paid to whether the challenged action has the purpose or effect of endorsing religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989).

As to the issue of "secular purpose," the court found that ADOT's "actions have the secular purpose of carrying out state construction projects in a manner that does not harm a site of religious, historical, and cultural importance to several Native American groups and the nation as a whole."<sup>740</sup> On

106 process for every possible material source site prior to the authorization of federal funds for an undertaking; however, the court did hold that once it became known that Woodruff Butte would be used as a materials source site, the FHWA was required to comply with the procedures set forth in 36 C.F.R. § 800.11.

<sup>740</sup> The court of appeals noted that the secular purpose prong "does not mean that the law's purpose must be unrelated to religion—that would amount to a requirement that the government show a callous indifference to religious groups." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 335, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987). The Court added that

carrying out government programs to avoid interference with a group's religious practices is a legitimate, secular purpose. *Id.*; *Kong v. Scully*, 341 F.3d 1132, 1140 (9th Cir. 2003) ("Accommodation of a religious minority to let them practice their religion without penalty is a lawful secular purpose."); *Mayweathers v. Newland*, 314 F.3d 1062, 1068 (9th Cir. 2002).

the "primary effect" issue, the court found that ADOT's policy "does not convey endorsement or approval of the Tribes' religions. *See County of Allegheny*, 492 U.S. at 592; *Buono v. Norton*, 371 F.3d 543, 548-50 (9th Cir. 2004)...."<sup>741</sup> Finally, on the "excessive entanglement" issue, the Court found that the "facts alleged cannot support the conclusion that defendant's actions excessively entangle the government with the Tribes' religions."<sup>742</sup>

(2) *National Historic Preservation Act of 1966 (NHPA)*.<sup>743</sup>—NHPA addresses the preservation of "historic properties," which are defined in the Act as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such property."<sup>744</sup> Section 106 requires federal agencies to take into account the effects of an undertaking on historic properties and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. In some cases, properties

<sup>741</sup> The court of appeals noted that the

Establishment Clause does not require governments to ignore the historical value of religious sites. Native American sacred sites of historical value are entitled to the same protection as the many Judeo-Christian religious sites that are protected on the NRHP, including the National Cathedral in Washington, D.C.; the Touro Synagogue, America's oldest standing synagogue, dedicated in 1763; and numerous churches that played a pivotal role in the Civil Rights Movement, including the Sixteenth Street Baptist Church in Birmingham, Alabama.

<sup>742</sup> The Court, noting that the "only fact alleged relevant to entanglement is that the Tribes were consulted in the process of evaluating Cholla's application for a commercial source number." The Court found that

some level of interaction between government and religious communities is inevitable; entanglement must be "excessive" to violate the Establishment Clause. *Agonstini v. Felton*, 521 U.S. 203, 233 (1997); *KDM ex rel. WJM v. Reedsport School Dist.*, 196 Fed. 3d 1046, 1051 (9th Cir. 1999) (noting that courts consistently find that routine administrative contacts with religious groups do not create excessive entanglement).... The institutions benefited here, Native American tribes, are not solely religious in character or purpose. Rather, they are ethnic and cultural in character as well. *See, Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1456 (D. Wyo. 1998) (concluding that a government policy benefiting Native American tribes did not constitute excessive entanglement with religion because "Native American tribes...are not solely religious organizations, but also represent a common heritage and culture").

<sup>743</sup> Pub. L. No. 89-665, 80 Stat. 915, 16 U.S.C. § 470, *et seq.*

<sup>744</sup> 16 U.S.C. § 470w.

may be eligible in whole or in part because of historical importance to Native Americans, including traditional religious and cultural importance.<sup>745</sup> The 1992 Amendments to NHPA require all federal agencies to consult with Indian tribes<sup>746</sup> or Native Hawaiian organizations for undertakings that may affect properties of traditional religious and cultural significance on or off tribal lands.<sup>747</sup> The Section 106 regulations<sup>748</sup> implementing the NHPA were last revised on December 12, 2000,<sup>749</sup> and reflect these requirements. Section 36 C.F.R. § 800.2(c)(2)(ii)(A) provides that

The agency official<sup>750</sup> shall ensure that consultation in the section 106 process provides the Indian tribe...a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's

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<sup>745</sup> ACHP guidance, "Consulting with Indian Tribes in the Section 106 Review Process," is available at <http://www.achp.gov/regs-tribes.html>. FHWA guidance on historic preservation, "Tribal Issues," is available at <http://environment.fhwa.dot.gov/histpres/tribal.htm>, with valuable links to ACHP sites and other FHWA guidance and information on Native American coordination, including: "Q&As on Tribal Consultation," <http://www.fhwa.dot.gov/hep/tribaltrans/tcqa.htm>.

<sup>746</sup> NHPA defines "Indian Tribe" as an Indian Tribe, band, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602), which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians (16 U.S.C. § 470w).

<sup>747</sup> ACHP guidance, "Consulting with Indian Tribes in the Section 106 Review Process," (<http://www.achp.gov/regs-tribes.html>) provides that:

NHPA and ACHP's regulations require Federal agencies to consult with Indian tribes when they attach religious and cultural significance to a historic property regardless of the location of that property. The circumstances of history may have resulted in an Indian tribe now being located a great distance from its ancestral homelands and places of importance. It is also important to note that while an Indian tribe may not have visited a historic property in the recent past, its importance to the tribe or its significance as a historic property of religious and cultural significance may not have diminished for purposes of Section 106.

<sup>748</sup> 36 C.F.R. pt. 800.

<sup>749</sup> 65 Fed. Reg. 7775.

<sup>750</sup> 36 C.F.R. § 800.2(a) provides that "The agency official may be a State, local, or tribal government official who has been delegated responsibility for compliance with section 106...."

effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes...that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolved concerns about the confidentiality of information on historic properties.

The following cases dealing with NHPA compliance relative to Indian lands are noteworthy:

- *Apache Survival Coalition v. United States*<sup>751</sup> was an action to halt construction of several telescopes on Mount Graham, Arizona, within the Coronado National Forest, based upon, *inter alia*, violation of NHPA's obligation to undertake an additional Section 106 process when new and significant information is brought to the attention of the federal agency.<sup>752</sup> The court of appeals ruled that the laches standard used in NEPA cases applied to this NHPA claim.<sup>753</sup> It concluded "that the six year period between 1985 when the Tribe first was solicited for input, and the date of filing suit constitutes unreasonable delay," barring the claim for laches.<sup>754</sup> The decision noted that "the very information that the Coalition now wants the Forest Service to consider—the asserted importance of Mount Graham to San Carlos Apache religious practices and culture—would have been brought to the agency's attention by the Tribe had it not consistently ignored the NHPA process."<sup>755</sup>

- *Pueblo of Sandia v. United States*<sup>756</sup> involved the issue of whether the Forest Service made a "reasonable and good faith effort to identify historic properties that may be affected by the undertaking and gather sufficient information to evaluate the eligibility of these properties for the National Register."<sup>757</sup> The challenge was to the Forest Service undertaking to realign and reconstruct Las Huer-tas Canyon Road, which lies in the Cibola National Forest, New Mexico, near the Sandia Pueblo reservation. The canyon is visited by tribal members to gather evergreen boughs, herbs, and plants used in cultural ceremonies and traditional healing practices, and it contains many shrines and ceremonial paths of religious and cultural significance to the Pueblo.<sup>758</sup> The Pueblo alleged that the Forest Service failed to comply with NHPA when it refused to evaluate the canyon as a traditional cultural prop-

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<sup>751</sup> 21 F.3d 895 (9th Cir. 1994).

<sup>752</sup> 36 C.F.R. § 800.11(b)(2).

<sup>753</sup> *Apache*, 21 F.3d at 906.

<sup>754</sup> *Id.* at 910.

<sup>755</sup> *Id.* at 911–12.

<sup>756</sup> 50 F.3d 856 (10th Cir. 1995).

<sup>757</sup> 36 C.F.R. § 800.4(b).

<sup>758</sup> *Pueblo of Sandia*, 50 F.3d at 857.

erty eligible for inclusion on the NRHP.<sup>759</sup> The State Historic Preservation Officer (SHPO) initially concurred in the Forest Service's conclusion of ineligibility for the National Register, but later, upon learning that the Forest Service had withheld important information, withdrew his concurrence, recommending further evaluation.<sup>760</sup>

The court of appeals noted that the Forest Service requested information from the Sandia Pueblo and other local Indian tribes, but stated that

[A] mere request for information is not necessarily sufficient to constitute the 'reasonable effort' section 106 requires. Because communications from the tribes indicated the existence of traditional cultural properties and because the Forest Service should have known that tribal customs might restrict the ready disclosure of specific information, we hold that the agency did not reasonably pursue the information necessary to evaluate the canyon's eligibility for inclusion in the National Register.... We conclude...that the information the tribes did communicate to the agency was sufficient to require the Forest Service to engage in further investigations, especially in light of the regulations warning that tribes might be hesitant to divulge the type of information sought.<sup>761</sup>

The decision stated that by "withholding relevant information from the SHPO during the consultation process...the Forest Service further undermined any argument that it had engaged in a good faith effort," holding that "the Forest Service did not make a good faith effort to identify historic properties in Las Huertas Canyon."<sup>762</sup>

• *Hoonah Indian Association v. Morrison*<sup>763</sup> deals with the issue of what constitutes a historic "site" under NHPA. The NHPA issue had to do with whether the route or routes one clan of the Tlingits Indians, the Kiks.adi, followed when retreating from a battle with Russia in 1804 should have been listed by the Forest Service as a cultural site on the NRHP.<sup>764</sup> The SHPO determined that the Survival

March Trail (designated in the record as the "Kiks.adi Survival March") was not eligible because it did not meet established criteria that "it have identified physical features" and that it be "a location where the people regularly returned to."<sup>765</sup> The court of appeals found that the Forest Service followed the regulations and used the National Register criteria...and] [t]hose criteria do not support the Tribe's position."<sup>766</sup> The decision noted: "That important things happened in a general area is not enough to make the area a 'site.' There has to be some good evidence of just where the site is and what its boundaries are, for it to qualify for federal designation as a historical site."<sup>767</sup>

• *Muckleshoot Indian Tribe v. U.S. Forest Service* involved a challenged land exchange in the area of Huckleberry Mountain.<sup>768</sup> The NHPA issue was whether the Forest Service had adequately mitigated the adverse effect of transferring intact portions of the Divide Trail, a 17.5-mi historic aboriginal transportation route.<sup>769</sup> The regulations offer three options to mitigate adverse effects, two of which were available to the Forest Service on this trail: (1) Conduct appropriate research "[w]hen the historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research...."<sup>770</sup> (2) An adverse effect becomes "not adverse" when the undertaking is limited to the "transfer, lease, or sale of a historic property, and adequate restrictions or conditions are included to ensure preservation of the property's significant historic features."<sup>771</sup> The Forest Service selected option 1, the tribe disagreed, and the court of appeals agreed with the tribe: "We conclude that documenting the trail did not satisfy the Forest Service's obligations to minimize the adverse effect of transferring the intact portions of the trail."

(3) *Section 4(f) of the Department of Transportation Act of 1966*.<sup>772</sup>—Provides for a policy of making special effort to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites, mandating that transportation programs and projects may use such land, where determined by state

<sup>759</sup> *Id.* at 858.

<sup>760</sup> *Id.* at 858–59.

<sup>761</sup> *Id.* at 860. The court of appeals noted that the Forest Service received communications clearly indicating why more specific responses were not forthcoming. "At the meeting with the San Felipe Pueblo, tribal members indicated that 'they did not want to disclose any specific details of the site locations or activities.'" The Court went on to note that "this reticence to disclose details of their cultural and religious practices was not unexpected. National Register Bulletin 38 warns that 'knowledge of traditional cultural values may not be shared readily with outsiders' as such information is 'regarded as powerful, even dangerous' in some societies." *Id.* at 861.

<sup>762</sup> *Id.* at 862.

<sup>763</sup> 170 F.3d 1223 (9th Cir. 1999).

<sup>764</sup> *Id.* at 1230.

<sup>765</sup> *Id.* at 1231. See 36 C.F.R. § 800.4(c)(3).

<sup>766</sup> *Id.*

<sup>767</sup> *Id.* at 1232.

<sup>768</sup> *Muckleshoot*, 177 F.3d at 804.

<sup>769</sup> *Id.* at 808.

<sup>770</sup> 36 C.F.R. § 800.9(c)(1).

<sup>771</sup> 36 C.F.R. § 800.9(c)(3).

<sup>772</sup> Pub. L. No. 89-670, revised and recodified by Pub. L. No. 97-499, Jan. 12, 1983, 96 Stat. 2419, and amended by Pub. L. No. 100-17, tit. I, § 133(d), Apr. 2, 1987, 101 Stat. 173, 49 U.S.C. § 303 (1994).

or local officials to be significant, only if there is no feasible and prudent alternative and all possible planning to minimize harm has taken place.

(4) *Archaeological Resources Protection Act of 1979*.<sup>773</sup>—Provides for the protection and management of archaeological resources and sites that are on public lands or Indian lands, and specifically requires notification of the affected Indian tribe if archaeological investigations proposed would result in harm to or destruction of any location considered by the tribe to have religious or cultural importance. A permit is required, and permits for excavation or removal of any archaeological resource located on Indian lands require consent of the Indian or Indian tribe owning or having jurisdiction over the land. This Act directs consideration of AIRFA in the promulgation of uniform regulations. ARPA “is clearly intended to apply specifically to purposeful excavation and removal of archeological resources, not excavations which may, or in fact inadvertently do, uncover such resources.”<sup>774</sup>

(5) *Native American Grave Protection and Repatriation Act (NAGPRA)*.<sup>775</sup>—Enacted in 1990, NAGPRA safeguards the rights of Native Americans by protecting tribal burial sites and rights to items of cultural significance to Native Americans.<sup>776</sup> Cultural items protected include Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.<sup>777</sup> NAGPRA has two distinct schemes governing the return of Native American cultural items to tribes, with the analysis turning upon whether the item is presently held by a federal agency or museum or was discovered on federal lands after November 16, 1990, NAGPRA’s effective date. First, the Act addresses items excavated on federal lands after November 16, 1990, and enables Native American groups affiliated with those items to claim ownership. Second, NAGPRA provides for repatriation of cultural items currently held by federal agencies, including federally funded museums.

NAGPRA’s site protection measures only apply to remains and objects located on tribal, Native Hawaiian, or federal lands. The statute defines “federal lands” as “any land other than tribal lands which are controlled or owned by the United States.” FHWA has addressed the question of

whether FHWA “controls” the land on which Federal-aid projects are built so as to invoke NAGPRA’s site protection requirements.<sup>778</sup> The agency advised that “FHWA’s position is that NAGPRA does not apply in the normal Federal-aid situation; i.e., where the State owns both the right-of-way and...is responsible for operation and maintenance.” This was based upon the fact that “FHWA takes no property interest, and has extremely limited contractual interests, in Federal-aid right-of-way.” The one possible exception to this position noted was “where the excavation or inadvertent discovery takes place on land that was transferred to the State under 23 U.S.C. § 317, since the Federal government retains a reversionary property interest.”

The FHWA memorandum cites in support of its position the decision in *Abenaki Nation of Missisquoi v. Hughes*.<sup>779</sup> There the district court examined the meaning of “control” of federal land relative to the issuance of a permit by the COE for expansion of a hydroelectric project. In addressing the NAGPRA claim, the decision stated:

Plaintiffs urge a broad construction of “control” to include the Corps’ regulatory powers under the CWA and its involvement in devising and supervising the mitigation plan. Such a broad reading is not consistent with the statute, which exhibits no intent to apply the Act to situations where federal involvement is limited as it is here to the issuance of a permit. To adopt such a broad reading of the Act would invoke its provisions whenever the government issued permits or provided federal funding pursuant to statutory obligations.<sup>780</sup>

#### *d. Tribal Enforcement Authority for Federal Environmental Statutes Other than NEPA*

In *State of Washington Department of Ecology v. United States Environmental Protection Agency*,<sup>781</sup> involving RCRA, the Court of Appeals for the Ninth Circuit noted:

The federal government has a policy of encouraging tribal self-government in environmental matters. That policy has been reflected in several environmental statutes that give Indian tribes a measure of control over policy making or program administration or both...The policies and practices of EPA also reflect the federal commitment to tribal self-regulation in environmental matters.

<sup>773</sup> Pub. L. No. 96-95, 93 Stat. 721, 16 U.S.C. § 470aa-470mm.

<sup>774</sup> *San Carlos Apache Tribe v. United States* (DOI), 272 F. Supp. 2d 860, 888 (D.C. Ariz. 2003), citing *Attakai v. United States*, 746 F. Supp. 2d 1395, 1410 (D.C. Ariz. 1990).

<sup>775</sup> Pub. L. No. 101-601, 104 Stat. 3048 (25 U.S.C. §§ 3001-3013).

<sup>776</sup> See 43 C.F.R. § 10.1.

<sup>777</sup> 25 U.S.C. § 3001(3).

<sup>778</sup> Memorandum from FHWA Chief Counsel, Application of NAGPRA to FHWA (Mar. 28, 1995), available at <http://www.environment.fhwa.dot.gov/guidebook/chapters/v2ch10.asp>.

<sup>779</sup> 806 F. Supp. 234 (1992).

<sup>780</sup> *Id.* at 252.

<sup>781</sup> 752 F.2d at 1470.

In that case, and in the earlier Ninth Circuit case of *Nance v. Environmental Protection Agency*,<sup>782</sup> which involved EPA delegations to a tribe under the Clean Air Act, the court of appeals approved EPA's development of regulations and procedures authorizing the treatment of Indian tribes on a government-to-government basis, encouraging Indian self-government on environmental matters, notwithstanding the fact that none of the major federal environmental regulatory statutes at that time provided for delegation to tribal governments.

Subsequently, as these and other environmental statutes came before Congress for amendment or reauthorization, Congress expressly provided tribal governments various degrees of jurisdictional authority. Major environmental statutes granting such tribal authority, which may be involved in the development or maintenance of a highway project on an Indian reservation, are as follows:

1. *Clean Air Act*<sup>783</sup> (eligible tribes may assume primary responsibility for all assumable programs);
2. *Safe Drinking Water Act*<sup>784</sup> (eligible tribes may assume primary responsibility for all assumable programs);
3. *Federal Water Pollution Control Act (Clean Water Act)*<sup>785</sup> (eligible tribes, *inter alia*, allowed to establish water quality standards, and nonpoint source management plans, and issue National Pollutant Discharge Elimination System and Section 404 dredge/fill permits, allowing tribes to be treated as states); and
4. *Comprehensive Environmental Response, Compensation, and Liability Act*<sup>786</sup> (Section 9626 provides that tribes are to be treated as states for certain purposes, including notification of release, consultation on remedial actions, access to information, and cooperation in establishing and maintaining national registries).

Another environmental statute, which has not been amended to provide for tribal primacy, is RCRA.<sup>787</sup> This statute was construed in *Washington Department of Ecology v. EPA*<sup>788</sup> to not allow state enforcement on tribal lands, but rather EPA enforcement.

<sup>782</sup> 645 F.2d 701 (9th Cir. 1981).

<sup>783</sup> 42 U.S.C. § 7401, *et seq.* See § 7601.

<sup>784</sup> 42 U.S.C. § 300f, *et seq.* See §§ 300j-11, 300h-1(e).

<sup>785</sup> 33 U.S.C. § 1251, *et seq.* See § 1377(e).

<sup>786</sup> 42 U.S.C. § 9601, *et seq.*

<sup>787</sup> 42 U.S.C. § 6901, *et seq.*

<sup>788</sup> 752 F.2d 1495 (9th Cir. 1985).

## K. CONSTRUCTION ACTIVITIES

### 1. Indian Employment Preferences and Contracting

#### a. General

Section 7(b) of the ISDEAA<sup>789</sup> provides authority for Indian preference in awarding contracts and Indian employment preference in the administration of such contracts. Section 7(b) provides:

(b) Preference requirements for wages and grants

Any contract, subcontract, grant, or sub-grant pursuant to this subchapter, the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. 452 *et seq.*] or by any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require to the greatest extent feasible—

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given Indians; and

(2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.

The Section 7(b) preference applies to all grants or contracts made pursuant to statutes or implementing regulations that expressly identify Indian organizations as potential grant recipients or contractors.<sup>790</sup> It also applies to contracts or grants made for the benefit of Indians even when the authorizing statute and regulations do not expressly identify Indian organizations as potential recipients.... One court of appeals' decision in this area has interpreted "to the greatest extent feasible" within the context of Section 7(b) to mean the maximum, "to take every affirmative action they could."<sup>791</sup>

The BIA and the Indian Health Service are required to utilize the Section 7(b) preferences in ad-

<sup>789</sup> Pub. L. No. 93-638; 25 U.S.C., *et seq.*

<sup>790</sup> See also 48 C.F.R. § 1426.7003(a)(3), which provides that the § 7(b) preference clause be inserted in contracts awarded by: the Bureau of Indian Affairs; A contracting activity other than the Bureau of Indian Affairs, when the contract is entered into pursuant to an act specifically authorizing contracts with Indian organizations; and a contracting activity other than the Bureau of Indian Affairs where the work to be performed is specifically for the benefit of Indians and is in addition to any incidental benefits that might otherwise accrue to the general public.

<sup>791</sup> Alaska Chapter, Associated Gen. Contractors of America v. Pierce, 694 F.2d 1162 (9th Cir. 1982).



ministering their respective programs. The FHWA does not extend the 7(b) preference to the Federal-Aid Highway Program. When the IRR program is administered by the BIA, the Section 7(b) preference is required. In a 1982 Ninth Circuit case, the applicability of Section 7(b) was expanded.<sup>792</sup> However, that case, which involved the construction of Indian housing by the U.S. Department of Housing and Urban Development (HUD) can be readily distinguished. Indeed, it would be difficult to find a more precise example than Indian housing where the contract is "for the benefit of Indians."<sup>793</sup> Similar to the Indian Health Service requiring proof of eligibility, it is clear that the housing in question required some sort of tribal (Alaska Native) affiliation.<sup>794</sup> Public roads are simply not analogous to Indian housing. By definition, "public roads" are open to all and, with limited exception, closed to none. Indeed, the FHWA has consistently refused to fund any roads through the IRR program that were not open to the general public.<sup>795</sup> By its very definition, an IRR must be a public road.

In January 2001, the Department of Justice, Office of Legal Counsel, issued a memorandum to the General Counsel for the Department of Agriculture.<sup>796</sup> The memorandum was in response to a request for an opinion concerning the applicability of Section 7(b) of the ISDEAA.<sup>797</sup> A number of statu-

<sup>792</sup> *Id.* The case did not limit § (7b) to the Bureau of Indian Affairs and the Indian Health Service. However, that case involved the construction of HUD Indian housing.

<sup>793</sup> See 25 C.F.R. § 256, Housing Improvement Program (HIP) for Indians, which has strict tribal enrollment criteria for eligibility. See also 24 C.F.R. pt. 1000 [Native American Housing Activities]. These regulations were promulgated after enactment of the Native American Housing Assistance and Self-Determination Act (NAHASDA) at 25 U.S.C. § 4101, *et seq.* The § 7(b) requirements in the NAHASDA regulations are found at 24 C.F.R. §§ 1000.48, 1000.50, 1000.52, 1000.54. The most cursory reading of these regulations shows the procedures of enforcement.

<sup>794</sup> *Pierce*, 694 F.2d 1162 (9th Cir. 1982), was decided before "tribal" status was officially conferred upon more than over 200 Alaska Native villages.

<sup>795</sup> There are some limited exceptions to this "open to the public" requirement such as certain tribal cultural events, weather, and other emergencies. However, in the one instance where a tribe wanted to close an IRR to the public in general, the road was removed from the IRR Inventory for any future public funding of any sort.

<sup>796</sup> Memorandum from Randolph Moss, Assistant Attorney General, to Charles Rawls, General Counsel, Department of Agriculture (Jan. 17, 2001) (available at the Office of the General Counsel, USDA) (hereinafter "Justice Memorandum").

<sup>797</sup> 25 U.S.C. § 450, *et. seq.*

tory interpretation issues were addressed as well. At the outset, the memorandum set forth the clear 7(b) parameters. First, Section 7(b) applies to statutes that make Indians or Indian organizations the sole eligible recipient. Second, Section 7(b) applies where the statute expressly provides that Indians and Indian organizations are one of many eligible recipients. The more difficult issues addressed and answered in the affirmative were that section 7(b) applies (1) where the statute does not expressly provide that Indian or Indian organizations are eligible recipients, but the implementing regulation expressly identifies Indian or Indian organizations as eligible recipients; and (2) where neither the statute nor the implementing regulations expressly provide that Indians or Indian-owned organizations are eligible recipients, but both support activities that will in fact principally benefit Indians.

For FHWA, the Indian employment preference in Section 7(b)(1) is already statutorily allowed in 23 U.S.C. § 140(d) and 23 C.F.R. § 635.117(d). Training opportunities are usually encompassed within "Indian preference." And, additional opportunities for training tribes and tribal contractors are set forth in 23 U.S.C. § 504(b)(2)(A). One of the lingering issues that has caused questions involves both tribal and Indian organization and enterprise-owned "subcontractor preference" in the Federal-Aid Highway Program.<sup>798</sup>

Title 25, U.S.C., includes the following definitions for "Indian organization" and "Indian enterprise." Title 25, U.S.C. § 1452(e), provides: "*Economic Enterprise* means any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit: *Provided*, That such Indian ownership shall constitute not less than 51 per centum of the enterprise." Title 25, U.S.C. § 1452(f), provides: "*Organization* as unless otherwise specified, shall be the governing body of any Indian tribe..., or entity established or recognized by such governing body for purposes of this chapter."<sup>799</sup>

It is clear that the definition set forth above encompasses a tribal government or tribal entity as an "Indian organization." However, as stated previously, the FHWA considers "tribes" or "tribal enti-

<sup>798</sup> While the practical effects of Indian preference (individually or as subcontractors) favor the particular tribe where a project is located, tit. 25 U.S.C. § 450e(c) does not allow tribal preference except when the self-determination contract is for the benefit of a specific tribe (also known as the § 7(c) preference).

<sup>799</sup> The ISDEAA's definition of "tribal organizations" ensures that the contractor is tied to tribal life and is likely to be devoted to economic development on a reservation. See Justice Memorandum, *supra* note 796, at 9.

ties” to be within the definition of “public agency.”<sup>800</sup> This is buttressed by the fact that “Indian tribes” are specifically included in the definition of “public authority” set forth in 23 U.S.C. § 101(23). FHWA does not treat tribes as “public agencies,” i.e., a public authority; any tribal preference in subcontracting would contradict 23 C.F.R. § 635.112(e). The preference for “Indian-owned economic enterprises,” outside of the department’s DBE program, conflicts with FHWA’s longstanding view on competitive bidding.

The purpose of the ISDEAA is to promote Indian self-government through strengthening the administrative capacities of tribes and tribal organizations.<sup>801</sup> The Justice Memorandum states:

Preferences for Indians in training and employment connected to the administration of federal grants to or contracts with Tribes and tribal organizations and in grants and contracts for the benefit of Indians help foster the administrative capacities of Tribes by enabling their members to gain the experience and develop the expertise necessary to handle projects and run institutions previously overseen by Federal officials and staffed with Federal employees.<sup>802</sup>

There are a number of statutes where Indians and Indian organizations are not expressly identified as recipients or beneficiaries, yet the Section 7(b) preference has been used.<sup>803</sup> While conceding that the issue is not free from doubt, the Justice Memorandum concludes that the central purpose of the ISDEAA is served by reading Section 7(b) as

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<sup>800</sup> The issue of tribal contracting was among those clarifications in the 1998 Guidance, *See* pt. H. Pt. H is incorrect in allowing tribes to compete.

<sup>801</sup> The term “administrative capacity” is also used in 23 U.S.C. § 202(d)(2)(D)(ii) as one of the factors to be considered by the Negotiated Rulemaking for the Indian Reservation Roads Program in developing a new funding formula.

<sup>802</sup> Justice Memorandum, *supra* note 796, at 8.

<sup>803</sup> For example, 7 U.S.C. § 1926, which authorizes the Secretary of Agriculture to make “rural business opportunity grants,” and its implementing regulations include tribes as eligible recipients; 7 U.S.C. § 343(d) (Smith-Lever Act), which authorizes the Secretary of Agriculture to expend sums for “administrative, technical and other services and for coordinating the extension work of the Department and several States, Territories, and possessions.” The latter statute has no implementing regulations but Agriculture has made many grants to state extension services for programs to benefit Indians in the area of food and water safety. In addition, 7 U.S.C. § 2034 (Food Stamp Act) makes no mention of Indians, has no implementing regulations, but authorizes Agriculture to make grants to certain nonprofit entities. The Justice Department concludes that § 7(b) applies to each of these programs.

applicable to grants or contracts for the benefit of Indians because of their status as Indians.<sup>804</sup> This reading is supported by a recent Ninth Circuit decision,<sup>805</sup> where the court of appeals affirmed both the administrative and district court decision that certain activities under the Trinity River Mainstream Restoration Program were not subject to the ISDEAA because they were designed to benefit the public as a whole rather than “Indians because of their status as Indians.”

It is an incomplete analysis to argue that the DOT has established Indian preferences in certain grants made under the Federal Highway Act.<sup>806</sup> However, many of the references are not complete in their analysis. This is because there is specific statutory authority to administer the FLHP IRR program pursuant to the ISDEAA with its Section 7(b) requirements.<sup>807</sup> Likewise, the Emergency Relief Program<sup>808</sup> and the IRRBP<sup>809</sup> are two further examples where Indians, by virtue of the IRR requirements, are the intended recipients. Using Title 23 as an example, the memorandum states that if grants or contracts are for the benefit of Indians and they are authorized pursuant to a particular statute, then that statute necessarily is one “authorizing Federal contracts...or grants...for the benefit of Indians.”<sup>810</sup> The only limitation is that the contract must not be of incidental benefit; it must be intended to benefit Indians because of their Indian identity.<sup>811</sup> This interpretation fits squarely within the FHWA and BIA’s current administration of the IRR program.

There is a further rationale not to apply the 7(b) preference to the Federal-Aid Highway Program.

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<sup>804</sup> Of course, the Department of Interior and Department of Health and Human Services, both of which have primary responsibility to implement the ISDEAA, require § 7(b) preferences in any contract awarded by the Bureau of Indian Affairs and to those where the work performed is specifically for the benefit of Indians. 48 C.F.R. § 426.7003; 48 C.F.R. § 1452.226-70; 48 C.F.R. § 370.202(a). The memorandum also cites Environmental Protection Agency and Housing and Urban Development regulations that also provide for § 7(b) preferences in grant programs if the “project benefits Indians” (citations omitted).

<sup>805</sup> *Hoop Valley Indian Tribe v. Ryan*, 415 F.3d 986 (9th Cir. July 2005).

<sup>806</sup> Justice Memorandum, *supra* note 796, at 9, n.8.

<sup>807</sup> 23 U.S.C. § 202(d)(3).

<sup>808</sup> 23 U.S.C. § 125. Sec. 7(b) has been applied in emergency relief situation administered by the BIA.

<sup>809</sup> 23 U.S.C. § 144(c)(3). This program is authorized under 23 U.S.C. § 202(d)(4), with an increase in funding under SAFETEA-LU.

<sup>810</sup> Justice Memorandum, *supra* note 796, at 10.

<sup>811</sup> *Id.* at 11.

This is because, with few exceptions, full and open competition is the basis of government contracts.<sup>812</sup> While the Federal-Aid Highway Program is not a government contract program, it does contain the requirement for competition. And, 23 U.S.C. § 112(b), with its competitive bidding requirements, is the statutory basis that requires competition in highway construction. Competition is considered so important that 23 C.F.R. § 635.112(f) requires that a statement of noncollusion accompany each bid. Moreover, the FHWA has enacted numerous collateral regulations designed to protect the competitive bidding process.<sup>813</sup> There are exceptions to the competitive bidding process,<sup>814</sup> but these exceptions are narrow in scope<sup>815</sup> and still require a finding that the organization undertaking the work is equipped and staffed to perform the work satisfactorily and cost-effectively. Although none of the above provisions specifically address subcontracting, 23 C.F.R. § 635.112(e) prohibits any public agency from bidding in competition or entering into subcontracts with private contractors. While tribes are not specifically identified as a “public agency” in 23 C.F.R. § 635.101, a fair reading would encompass tribes, i.e., “any organization with administrative or functional responsibilities which are directly or indirectly affiliated with a governmental body of any nation, State, or local government.”<sup>816</sup> Finally, tribes are specifically listed as a “public authority” in 23 U.S.C. § 101(23), “The term public authority means a Federal, State, county, town, or township, Indian

tribe, municipal or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities.”<sup>817</sup>

In short, the FHWA does not apply the Section 7(b) subcontractor preference to the Federal-Aid Highway Program. In contrast, the Federal Lands Highway IRR program is designed to benefit Indians because of their status as Indians. There is statutory authority to apply the ISDEAA and its requirements of Indian preference to all Federal Lands IRR projects. While the Federal-aid program includes Indian tribal governments and Indian reservation roads in many of its statutory requirements such as planning,<sup>818</sup> rural technical assistance,<sup>819</sup> bridge inventory,<sup>820</sup> and emergency relief,<sup>821</sup> the Federal-aid program is not, in general, directed to benefit Indians because of their status as Indians. A number of states have entered into Section 132 agreements with the BIA regarding a particular project.<sup>822</sup> This provision allows a state and the BIA to enter into an agreement to carry out a Federal-aid project under which the state provides cash equal to the federal share and any applicable non-federal match to the BIA and is immediately reimbursed by FHWA based upon such payment. This specific statutory authority allows the BIA to “carry out,” i.e., administer, the project whereby ISDEAA and Section 7(b) applies. However, this section relies on the state *requesting* and the BIA *agreeing* to carry out the project. The latter would only be done if the project were such that the BIA would normally administer it under the IRR program.

### *b. In the Federal Highway Program*

(1) *Indian Employment and Contracting Preference, 23 U.S.C. § 140.*—Section 122 of STURAA<sup>823</sup> amended the antidiscrimination provisions contained in Title 23, U.S.C. § 140, to make them consistent with certain provisions of Title VII of the Civil Rights Act of 1964. The Indian preference provisions are codified at 23 U.S.C. § 140(d).

The 1987 amendment expressly permits (but does not require) employment preference of Indians living on or near a reservation on projects and con-

<sup>812</sup> See Federal Acquisition Regulation pt. 6, 48 C.F.R. § 6000, *et seq.*

<sup>813</sup> See, for example, 23 C.F.R. § 635.104(a) requiring actual construction contracts by competitive bidding; 23 C.F.R. § 635.110(b), which prohibits procedures or licenses that restrict competitive bidding; 23 C.F.R. § 635.110(c), which prohibits prequalification requirements to affect submission of bids; 23 C.F.R. § 635.112(d) nondiscriminatory bidding procedures; 23 C.F.R. § 635.114(a) requiring award only on the basis of the lowest responsive bid; 23 C.F.R. § 635.117(b) prohibiting local hiring preferences; 23 C.F.R. § 635.409 prohibiting restrictions on materials.

<sup>814</sup> See 23 U.S.C. § 112(b) requiring a cost-effective or emergency determination by the state transportation department; see also 23 C.F.R. § 635.104(b).

<sup>815</sup> In order to utilize noncompetitive procedures, 23 U.S.C. § 112(b) requires the state transportation department to demonstrate that an emergency exists or that another method is more cost effective. See also 23 C.F.R. § 635.104(a). While 23 C.F.R. § 635.201 subpt. B sets forth the regulations on Force Account work under 23 U.S.C. § 112(b), the regulations specifically refer to a state or subdivision thereof; the section does not reference tribes.

<sup>816</sup> This section was adopted in 56 Fed. Reg. 37004 (Aug. 2, 1991). “Public agency” was not defined in the previous regulation, 39 Fed. Reg. 35152 (Sept. 30, 1974).

<sup>817</sup> SAFETEA-LU is replete with sections that specifically list tribal governments in the same defining paragraphs as states and local governments.

<sup>818</sup> 23 U.S.C. § 134, 135.

<sup>819</sup> 23 U.S.C. § 504(b)(2)(D).

<sup>820</sup> 23 U.S.C. § 144(c)(3).

<sup>821</sup> 23 U.S.C. § 125(e).

<sup>822</sup> 23 U.S.C. § 132.

<sup>823</sup> Pub. L. No. 100-17, 101 Stat. 160 (1987). The provision was contained in the Senate Bill and in the Administration’s Bill; no provision in the House Bill. The Conferees adopted the Senate amendment.

tracts on Indian reservation roads.<sup>824</sup> The legislative history of that provision specifically notes the goal of more Indian labor when building on or near reservations.<sup>825</sup> And the Indian hiring preference set forth in 23 U.S.C. § 140(d) and 23 C.F.R. §§ 635, 117(d) and (e) refers to the employment of individual Indians, rather than contractor or subcontractors. Title 23, U.S.C. § 140(d), was further amended in 1991. Section 1026(c) of ISTEA<sup>826</sup> added a new sentence to § 140(d): “States may implement a preference for employment of Indians on projects carried out under this title near Indian reservations.”

Again, the legislative history of that provision specifically notes the goal of more Indian labor when building on or near reservations.<sup>827</sup> Hence, the 1987 amendment was directed at Indians living on or near reservations; the 1991 amendment was directed at projects near reservations. After the enactment of STURAA, the then-FHWA Administrator issued a memorandum dated May 8, 1987, on Indian preference. A clarifying memorandum on this subject, dated October 6, 1987, was distributed shortly thereafter. This latter memorandum contained language that the singular intent of the STURAA amendment was to permit and encourage Indian preference in employment on Indian reservation roads and that the only contracting preference that could be recognized in a Federal-aid highway contract was that authorized by the DBE statutory provisions. The memorandum continued this view by stating, “The availability of certified Indian owned businesses should be considered in setting contract DBE goals.”<sup>828</sup> These FHWA memoranda reference the Federal-Aid Highway Program where, as stated previously, the only contracting preference allowed is that authorized by highway legislation and in regulations such as 23 C.F.R. § 635.107, which affirmatively encourages DBE participation in the highway construction program.<sup>829</sup> This position was reiterated in a 1994 TRB

<sup>824</sup> Sec. 122 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURRA), Pub. L. No. 100-17 (Apr. 2, 1987).

<sup>825</sup> “[T]his bill extends Indian employment preferences so that more Indian labor will be used when building on or near reservations.” 137 CONG. REC. E-3566 (Oct. 28, 1991).

<sup>826</sup> Pub. L. No. 102-240, 105 Stat. 1914 (Dec. 18, 1991).

<sup>827</sup> “[T]his bill extends Indian employment preferences so that more Indian labor will be used when building on or near reservations.” 137 CONG. REC. E-3566 (Oct. 28, 1991).

<sup>828</sup> *Id.* Item 4, at 2 and 3.

<sup>829</sup> The Disadvantaged Enterprise Program was first authorized in § 105(f) of the Surface Transportation Assistance Act of 1982 (STAA). Pub. L. No. 97-424 (Jan. 6, 1983), and has been in every highway reauthorization

paper<sup>830</sup> and again recently in FHWA’s Guidance on Relations with American Indian Tribal Governments.<sup>831</sup>

(2) *FHWA Notice 4720.7 (1993), Indian Preference in Employment on Federal-Aid Highway Projects on and Near Reservations*—In 1993, FHWA issued a Notice entitled, “Indian Preference in Employment on Federal-aid Highway Projects on and near Indian Reservations.” Its purpose was to consolidate all previous guidance for FHWA field officials, State highway agencies, and their subrecipients and contractors regarding the allowance for Indian employment preference on Federal-aid projects on and near Indian reservations. This Notice, implementing regulations,<sup>832</sup> and subsequent legal guidance have all been consistent in the approach that the 23 U.S.C. § 140(d) Indian employment preference provision was permissive, not mandatory. The purpose of the preference in amending Title 23 was to conform 23 U.S.C. § 140 with 42 U.S.C. § 2000e-2(i) (Section 703(i) of the Civil Rights Act of 1964), which allowed private businesses or enterprises on or near reservations to grant employment preference to Indians living on or near reservations. However, despite the “permissive,” not mandatory, interpretation, FHWA’s policy has been to encourage states to implement Indian employment preference in applicable contracts; the agency has never required a state to follow Indian employment preference. Indeed, the State of Alaska has explicitly rejected Indian preference as violating its State Equal Protection statute.<sup>833</sup>

thereafter, most recently in § 1101(b) of TEA-21, Pub. L. No. 105-178 (June 9, 1998). The DBE regulations are found at 49 C.F.R. pt. 26. *See* 40 C.F.R. §§ 26.5 and 26.67, where “Native Americans” are presumed disadvantaged.

<sup>830</sup> RICHARD JONES, LEGAL ISSUES RELATING TO THE ACQUISITION OF RIGHT OF WAY AND THE CONSTRUCTION AND OPERATION OF HIGHWAYS OVER INDIAN LANDS, pt. C, at 11. (NCHRP 1994). (Exhibit 5).

<sup>831</sup> This 1998 guidance was recently updated by the FHWA’s Native American Coordinator, a position created in 2000.

<sup>832</sup> 23 C.F.R. § 635.117(d) is the implementing regulation on Indian employment preference.

<sup>833</sup> ALASKA CONST. art. I, § 3. *See also* Alaska v. Native Village of Venetie, 522 U.S. 520 (1998) and Malabed v. North Slope Borough, 42 F. Supp 2d 927 (D. Alaska 1999) affm mem., 335 F.3d 864 (9th Cir. 2003), regarding status of Alaska Native Claims Settlement Act land status (neither Indian Country nor Reservations). *Malabed* specifically rejected a 1988 EEOC Notice equating Alaska’s Native Villages to reservations for employment preference purposes.

The 1993 FHWA Notice has been in effect for more than 10 years. The Notice's recitation on Indian employment preference and the use of the words "near" and "reasonable commuting distance" are taken directly from the statute, as well as the Office of Federal Contract Compliance Program regulations that further define "work on or near reservations."<sup>834</sup> The Notice was recently the subject of litigation, discussed, *infra*.

### *c. State DOTs: Employment Preferences, Restrictions on National Origin, State Constitutional/Statutory Constraints*

As noted above, the Alaska Supreme Court, in *Malabed v. North Slope Borough*,<sup>835</sup> held "that the borough's hiring preference violates the Alaska Constitution's guarantee of equal protection because the borough lacks a legitimate governmental interest to enact a hiring preference favoring one class of citizens at the expense of others and because the preference enacted is not closely tailored to meet its goals."<sup>836</sup> It should be noted that this rejection of Indian hiring preference was preceded in November 1996 by California's passage of Proposition 209,<sup>837</sup> prohibiting preferential treatment in public employment, public education, or public contracting. This quickly evolved into a national trend, spawning passage of Initiative 200 in Washington in 1998, banning affirmative action in higher education, public contracting, and hiring.<sup>838</sup> For example, in 1997, 33 anti-affirmative action bills and/or resolutions were introduced in 15 states, followed in 1998 by 16 bills proposed in 9 states, and in 1999 by 20 bills introduced in 14 states. However, of the 102 bills and resolutions introduced during 1997–2004, only 6 have been enacted (in Alaska, Colorado, Florida, Iowa, Missouri, and Utah).<sup>839</sup>

<sup>834</sup> 41 C.F.R. § 60-1.5(a)(6). And 25 C.F.R. § 20.100 defines "near reservation" as those areas or communities designated by the Assistant Secretary that are adjacent or contiguous to reservations where financial assistance and social service programs are provided.

<sup>835</sup> 70 P.3d 416 (Alaska 2003).

<sup>836</sup> The equal protection clause of the Alaska Constitution art. I, § 1, provides:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people of the State.

<sup>837</sup> CAL. CONST. art. I, § 31. See text at American Civil Rights Institute Web page: <http://www.acri.org/209/290text.html>.

<sup>838</sup> See <http://www.dailybruin.ucla.edu/DB/issues/98/11.18/view.editorial.html>.

Florida, Iowa, Missouri, and Utah).<sup>839</sup> Efforts to pass initiatives banning affirmative action at the state level continue, usually based on the form of the ballot initiative sponsored by Ward Connerly, former University of California Regent, who led the Proposition 209 initiative in California.

The state constitution changes in California and Washington, as well as the E.O. in Florida, may have caused the DOTs of those states to be cautious, even to take a hands-off approach regarding Indian hiring preference on projects on or near Indian reservations. However, due to the permissive guidance by FHWA, the state practices relative to contractors using Indian hiring preference do not appear to have been altered up to this time. Faced with the issue of tribal sovereignty and the mandating of Indian hiring preference and quotas by TEROs, it seems unlikely that states would prohibit contractors from TERO compliance.

## **2. Tribal Employment Rights Ordinances**

### *a. Background*

As stated earlier, since 1987, it has been the policy of FHWA to support Indian employment preference on Federal-aid highway projects on or near reservations. It has also been FHWA's policy to support the use of TERO<sup>840</sup> offices to assist with Indian employment and to participate in TERO fees on applicable projects as an allowable cost as long as these fees do not discriminate or otherwise single out Federal-aid highway construction contracts for special or different tax treatment. While the employment preference and payment of TERO fees are not statutory requirements imposed upon

<sup>839</sup> *Alaska*, in 1997, passed and signed into law Resolutions HJR 34 and SJR 29, asking the North Pacific Fishery Management Council to reject an Affirmative Action (AA) program; *Colorado*, in 1999, passed and signed into law HB 1076 prohibiting consideration of race, gender, color, creed, religion, or disability in appointments and promotions of state employees; In *Florida*, in 1999, Governor Jeb Bush signed Executive Order 99-281, the "One Florida Initiative," giving direction to the governor's office and executive agencies to dispense with certain practices regarding the use of racial or gender set-asides, preferences, or quotas in government employment, contracting, and education; *Iowa*, in 2001, enacted and signed into law HB 579 relating to the administration and management of the State Department of Personnel, requiring AA reports to be filed with the governor's office; *Missouri*, in 1999, enacted and signed into law HB 568 eliminating AA for firefighters and law enforcement officers; *Utah*, in 2003, enacted and signed into law HB 16 requiring the Department of Human Resource Management to use an equal opportunity plan instead of an AA plan.

<sup>840</sup> Tribal Employment Rights Office or Ordinance.

the states, this longstanding FHWA policy has been successful in addressing high unemployment on Indian reservations, has brought more Indian people into the workforce of highway construction, and has helped tribal TERO offices in their training and employment goals.

TERO began in the early 1970s as a result of the failure of construction contractors to live up to Indian hiring commitments that had been made to the Navajo Nation in connection with the Salt River generating plant.<sup>841</sup> The EEOC became involved and conducted a study that concluded that tribes had the sovereign right to enforce employment requirements on employers conducting business on the reservation. While the original TERO focus was on employment, it also addressed the imposition of fees for doing business on the reservation. In past years, one of the strongest TERO advocates has been the Council on Tribal Employment Rights.<sup>842</sup>

Although the Indian preference provisions are silent on TERO, the legislative history is helpful because it formed the basis of the agency's guidance on TERO. It provides in part:

Many tribes have a tax of one-half to one percent on contracts performed on the reservation to provide job referral, counseling, liaison, and other services to contractors. Because the tax is used for specific services that directly benefit a highway project, Congress approves of the Secretary's current practice of reimbursing such costs incurred.... The Secretary is instructed to cooperate with tribal governments and States to ensure that contractors know in advance of such tribal requirements. For the purpose of Federal-aid highway contracts, the TERO tax shall be the same as imposed on other contractors and shall not exceed one percent. In order to develop workable and acceptable employment agreements covering affected projects, highway agencies are encouraged to meet with TEROs and contractors prior to bid letting on a project to set employment goals.<sup>843</sup>

After the enactment of STURAA, FHWA issued a clarifying memorandum on both Indian Preference and TERO fees. FHWA used the legislative history as guidance; hence the memorandum contains similar language as in the Senate Report. It provides:

The TERO-Tax—Many tribes have established a TERO tax which is applied to contracts for projects performed on the reservation. The proceeds are used by the tribes to fund job referral, counseling, liaison, and other services relating to the employment of In-

dians. It has been FHWA's longstanding policy to participate in State and local taxes which do not discriminate or otherwise single out Federal-aid highway construction contracts for special or different tax treatment. Thus, if the TERO tax rate on Federal-aid highway contracts is the same as imposed on other projects such costs are eligible for Federal-aid reimbursement.

The legislative history on Indian employment preference clearly supports FHWA's current practice of reimbursing TERO fees on Federal-aid contracts as long as the TERO fee rate on highway construction contracts is the same as that imposed on other contracts on the reservation. FHWA has maintained its strong support of Indian employment preference, use of TERO offices, and reimbursing TERO fees on applicable Federal-aid projects. This positive approach on TERO fees has been successful with many tribes and in many states. As intended, it has assisted in the hiring of more Indians in highway construction and in providing tribes necessary funds for services and activities related to employment and training. And it is expected that based on prior practice or other agreements, many states and tribes will continue to agree on TERO matters. It is FHWA's present position to allow a TERO fee assessed on a Federal-aid project to be treated as an eligible cost; FHWA will not determine whether its imposition on a particular project is within the tribe's jurisdiction. Of note, neither STURAA, ISTEA, TEA-21, or the most recent highway reauthorization, SAFETEA-LU, have addressed TERO ordinances or fees.

#### *b. Problems Encountered Under TERO Agreements*

There is frequently confusion over Indian employment preference, Section 7(b) preference, and tribal preference. The Indian employment preference provisions in Title 23 do not permit "tribal employment preference" on Federal-aid projects.<sup>844</sup> Even the Section 7(b) preference does not recognize tribal preference. The ISDEAA does permit tribal preference where there is a contract or agreement under the ISDEAA that is intended to benefit one tribe.<sup>845</sup>

A further TERO issue is the amount of the TERO fee. There is no statute dictating the amount or percentage a tribe can set with respect to a TERO fee; this is a sovereignty issue, as is the tribe's ex-

<sup>841</sup> For a thorough discussion, see JONES, *supra* note 830.

<sup>842</sup> The CTER was utilized by FHWA in developing and conducting courses on TERO for state contractors.

<sup>843</sup> Senate Committee on Environment and Public Works, S. REP. NO. 100-4 (1987).

<sup>844</sup> 23 C.F.R. § 635.117(d).

<sup>845</sup> 25 U.S.C. § 450e79(c), also known as the § 7(c) preference. Note that Justice recognizes that the practical effect of a general Indian preference under § 7(b) will be the same as a TERO tribal preference because the Indians who benefit will largely be members of the tribe whose TERO would otherwise govern the operations of the contractor or grant recipient.

penditure of TERO receipts. On the other hand, there is no separate source of Highway Trust Fund money to pay TERO fees. For Federal-aid highway projects, the cost of TERO is paid out of the state's highway money as an allowable cost. The fact that FHWA has determined a nondiscriminatory TERO fee to be allowable does not mean a state receives additional funds to pay this cost.

### c. *Litigation of TEROs*

(1) *FMC v. Shoshone-Bannock Tribes, et al.*<sup>846</sup>— This case, which affirms TEROs, presented the question of the extent of power Indian tribes have over non-Indians acting on fee land located within the confines of a reservation. The district court held that the tribes did not have such power, but the Ninth Circuit reversed the decision and upheld the tribe's jurisdiction, affirming the decision of the Tribal Appellate Court.

FMC operated its plant on fee land, manufacturing elemental phosphorus. It was the largest employer on the reservation, with 600 employees. At the time, FMC got all of its phosphate shale (one of three primary raw materials required) from mining leases located within the reservation and owned by the tribes or individual Indians. Upon notification of the passage of the TERO, FMC objected to the ordinance's application to its plant. However, after negotiations with the tribe, FMC entered into an employment agreement, based on a 1981 TERO, that resulted in a large increase in the number of Indian employees at FMC. In late 1986, the tribes became dissatisfied with FMC's compliance and filed civil charges in tribal court. FMC immediately challenged the tribal court's jurisdiction in federal district court and got an injunction from enforcement of any order against FMC until the tribal court had an opportunity to rule on the tribe's jurisdiction over FMC. The tribal court then found that the tribes had jurisdiction over FMC, based upon *Montana v. United States*,<sup>847</sup> and held that the company had violated the TERO. The Tribal Appellate Court affirmed those rulings and entered into a compliance plan that required 75 percent of all new hires and 100 percent of all promotions to be awarded to qualified Indians, mandated that one-third of all internal training opportunities be awarded to local Indians, and levied an annual TERO fee of approximately \$100,000 on FMC. The federal district court preliminarily enjoined enforcement of this compliance order, and, in April 1988, it reversed the Tribal Appellate Court.

The court of appeals noted that the standard of review of a tribal court decision regarding tribal

jurisdiction "is a question of first impression among the circuits." It further noted that the leading case on the question of tribal court jurisdiction is *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*,<sup>848</sup> which established that a federal court must initially "stay[ ] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made," allowing a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed.<sup>849</sup> After further reviewing the opinion in *National Farmers Union*, the court of appeals determined that the standard of review would be one of "clearly erroneous" as to factual questions and *de novo* on federal legal questions, including the question of tribal court jurisdiction.

In its review of tribal jurisdiction, the court of appeals cited *Montana* as the leading case on tribal jurisdiction over non-Indians and quoted the two circumstances in which the Supreme Court said Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands:

[1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.

[2] 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.<sup>850</sup>

The court of appeals found that FMC had entered into "consensual relationships" with the tribe or its members and that *Montana's* first test was met:

FMC has certainly entered into consensual relationships with the Tribes in several instances. Most notable are the wide ranging mining leases and contracts FMC has for the supply of phosphate shale to its plant. FMC also explicitly recognized the Tribes' taxing power in one of its mining agreements. FMC agreed to royalty payments and had entered into an agreement with the Tribes relating specifically to the TERO's goal of increased Indian employment and training. There is also the underlying fact that its plant is within reservation boundaries, although, significantly, on fee and not on tribal land. In sum, FMC's presence on the reservation is substantial, both physically and in terms of the money in-

<sup>846</sup> 905 F.2d 1311 (9th Cir. 1990).

<sup>847</sup> 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

<sup>848</sup> 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985).

<sup>849</sup> *Id.* at 856–57.

<sup>850</sup> *Shoshone-Bannock Tribes*, 905 F.2d 1314, citing *Montana*, 450 U.S. at 565–66.

volved.... FMC actively engaged in commerce with the Tribes and so has subjected itself to the civil jurisdiction of the Tribes. *See, e.g., Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983).

The court of appeals disagreed with the district court and FMC that these connections between the company and the tribes, although substantial, did not provide a sufficiently close "nexus" to employment to support the TERO, citing *Cardin v. De La Cruz*,<sup>851</sup> and pointed out that *Cardin* contained no explicit requirement of a nexus.<sup>852</sup> The case was remanded to the tribal court to "give FMC an opportunity to challenge the application of the TERO under the Indian Civil Rights Act, 25 U.S.C. § 1302."

In October 2002, the State of South Dakota filed suit against the Secretary of Transportation in federal district court seeking declaratory relief that the language in FHWA's Notice, Section (4), was without legal authority on State-owned rights-of-way.<sup>853</sup> The Notice language is as follows:

(4) TERO Tax—many tribes have established a tax which is applied to contracts for projects performed on the reservation. Tribes may impose this tax on reservations, but they have no tax authority off reservations. In off reservation situations, TERO's can bill contractors at an agreed upon rate for services rendered, i.e., recruitment, employee referral and related supportive services. The proceeds are used by the tribes to develop and maintain skills banks to fund job referral, counseling, liaison, and other services and activities related to the employment and training of Indians.<sup>854</sup> It has been FHWA's long-standing policy to participate in State and local taxes which do not discriminate against or otherwise single out Federal-aid highway construction contracts for special or different tax treatment. Therefore, if the TERO tax rate on highway construction contracts is the same as that which is imposed on other contracts on the reservation, such costs are eligible for Federal-aid reimbursement. [emphasis added]

The language that in part prompted the lawsuit is as follows: "[T]ribes may impose this tax on reservations, but they have no tax authority off reservations." An issuance by FHWA's Office of Civil Rights concerning a discrimination complaint prompted the State to file the lawsuit.<sup>855</sup> The South

Dakota lawsuit was later dismissed by the Federal District Court on the grounds that the Department of Transportation had not taken any final agency action against the State and thus South Dakota's lawsuit was not ripe for adjudication.<sup>856</sup> Importantly, the court did not address the merits of South Dakota's claim that FHWA cannot require the State (or the State's contractors) to pay TERO fees. The court ruled that this issue was not ripe "at this time." Moreover, without litigation, the New Mexico State Highway and Transportation Department issued a policy in December 2002 that takes a similar position regarding State highway rights-of-way and TERO fees,<sup>857</sup> namely, that non-Indian-owned contractors would not be reimbursed for any tribal government taxes for contract activities on State highway rights-of-way.

Following the South Dakota case, FHWA examined the questioned language in the 1993 Notice. The agency determined that it will continue to participate in nondiscriminatory TERO fees as an allowable cost but will not get involved in the jurisdictional aspects of TERO, i.e., whether or not a tribe has authority to assess the TERO on a particular right-of-way, which is a judicial determination. However, FHWA continues to encourage both tribes and states to confer and address both TERO issues and Indian employment preference on Federal-aid projects on and near reservations<sup>858</sup> and encourages states to utilize Tribal Employment Rights Office (TERO or TECRO) representatives to set Indian employment goals. Indeed, following dismissal of the South Dakota lawsuit, the State and the tribe entered into a comprehensive TERO agreement.

<sup>851</sup> 671 F.2d 363 (9th Cir.).

<sup>852</sup> *Shoshone-Bannock Tribes*, 905 F.2d at 1315.

<sup>853</sup> *South Dakota v. Mineta*, 278 F. Supp. 2d 1025 (D.S.D. 2003).

<sup>854</sup> The language directing a Tribe's use of TERO fees is taken from the legislative history surrounding 23 U.S.C. § 140(d). There is no statutory requirement addressing the use of TERO fees.

<sup>855</sup> The Rosebud Sioux Tribe filed a discrimination complaint against the State because of the State's refusal to

negotiate with the tribe over its TECRO tax on a Federal-aid project on the reservation. After investigating the complaint, the FHWA Office of Civil Rights found the State to be in noncompliance with FHWA policy reflected in the Notice. The Civil Rights letter of findings was withdrawn before the State initiated the lawsuit. After further review, in December 2003, an official determination of nondiscrimination by the State was made by FHWA's Office of Civil Rights.

<sup>856</sup> The case was dismissed on August 20, 2003.

<sup>857</sup> Letter from Arthur Waskey, General Counsel, New Mexico State Highway and Transportation Department to former Chief Counsel Jim Rowland (dated Jan. 16, 2003) (available at the Office of the Chief Counsel of FHWA).

<sup>858</sup> See language in Judge Kornmann's Order in *South Dakota v. Mineta*, 278 F. Supp. 2d 1025, 1029 (2003).



## L. LEGAL ISSUES RELATING TO THE OPERATION AND MAINTENANCE OF HIGHWAYS ON INDIAN LANDS

### 1. State Enforcement of Highway Laws

State enforcement of traffic and motor vehicle statutes was previously discussed at Section D.9.b., *supra*. In addition, see the discussion at Section E.2., *supra*, on the judicial construction of highway right-of-way grants.

### 2. Jurisdictional Issues Carrying Out Federal Programs

#### a. Sign Control on Indian Lands Under the Highway Beautification Act

(1) 23 U.S.C. § 131(a) provides: “The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the safety and recreational value of public travel, and to preserve natural beauty.”

The focus of the program is the segregation of signs to areas of similar land use (i.e., commercial and/or industrial areas) so that areas not having commercial or industrial character would be protected for safety, recreational value, and preservation of natural beauty. In order to accomplish this purpose, the states, using their police power and their power of eminent domain,<sup>859</sup> were required to

<sup>859</sup> 23 U.S.C. § 131(g) provides, *inter alia*, as follows:

Just compensation shall be paid upon the removal of any outdoor advertising sign, display or device lawfully erected under State law and not permitted under subsection (c) of this section whether or not removed pursuant to or because of this section.... Such compensation shall be paid for the following: (A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and (B) the taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

In addition, § 401 of the Act, 79 Stat. 1033, provided, “Nothing in this Act or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act.”

In November 1966, Acting Attorney General Ramsey Clark issued his opinion “that section 131 is to read as requiring each State to afford just compensation as a condition of avoiding the 10% reduction of subsection (b).” (42 Op. Atty. Gen. No. 26 (1966)). See also Roger A. Cunningham, *Billboard Control Under the Highway Beautification*

enact laws that would provide the “effective control” prescribed in federal law<sup>860</sup> and as set out in agreements to be entered into with the Secretary of Commerce (now with the Secretary of Transportation).<sup>861</sup> While legally the states can choose not to

*Act of 1965*, 71 MICH. L. REV. 1295, 1309–26 (1973).

<sup>860</sup> 23 U.S.C. § 131(c) provides, *inter alia*, that:

Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, ...if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection the term “free coffee” shall include coffee for which a donation may be made, but is not required.

<sup>861</sup> 23 U.S.C. § 131(d) provides, *inter alia*, that:

In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained...within areas adjacent to the...[highway]...which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the states in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning

provide such effective control of outdoor advertising, as a practical matter they must comply or become subject to a penalty equal to 10 percent of their Federal-aid highway funds.<sup>862</sup>

(2) *Subsection 131(h) and Its Interpretation*—Subsection 131(h) of Title 23, U.S.C., remains unchanged from its original enactment by Congress in 1965: “(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.”<sup>863</sup> (Emphasis added). Subsection 131(h) is written in the passive voice, making it unclear who has the responsibility and authority for compliance: the states or the federal jurisdictional agencies. In addition, it is not clear as to its applicability to Indian reservations. The legislative history of Subsection 131(h) is of little help in clarifying these issues. The language originated in the Senate bill (S. 2084) and was revised in House Report 1084 to add the phrases (1) “of the United States,” and (2) that the national standards be “promulgated by the Secretary.” There were no floor amendments or discussion during debate in either the Senate or the House, and no executive communications, relative to this subsection. The only statement relating to Subsection 131(h) appears in the House Report, and makes no reference to who has the responsibility to enforce on public lands or reservations, or whether such lands include Indian reservations:

This section simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or primary system the same controls covering other roads which are subject to this legislation. The committee expects

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authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreements in the zoned commercial and industrial areas within the geographical jurisdiction of such authority....

<sup>862</sup> 23 U.S.C. § 131(b):

Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices...shall be reduced by amounts equal to 10 percent of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control....

<sup>863</sup> 79 Stat. 1029 (23 U.S.C. § 131(h)). See *South Dakota v. Goldschmidt*, 635 F.2d 698 (8th Cir. 1980), where the Act was held constitutional; See also *Vermont v. Brinegar*, 379 F. Supp. 606 (D.C. Vt. 1974), upholding 10 percent reduction in federal highway aid.

in the case where portions of public lands or reservations are leased for commercial operations that such portions will have the same exception from control as are given by this legislation to areas zoned or used for commercial or industrial purposes in a State.

(3) *Synopsis of NCHRP Legal Research Digest No. 41 (LRD No. 41)*.<sup>864</sup>—Reference is made to LRD No. 41 for detailed coverage of 23 U.S.C. § 131(h), federal agency interpretations/positions, and relative case law. This report concluded that the failure of Congress to expressly cover Indian reservations and the lack of legislative history indicating such coverage have left the Act open to varying interpretations by courts and administrative agencies as to whether Indian country is covered. Another problem of interpretation is what governmental entities have jurisdiction to enforce the Act on “public lands or reservations.” The rule that laws of general applicability apply to all persons throughout the United States, including Indians and non-Indians in Indian country,<sup>865</sup> would appear not to apply because the HBA is structured so as to leave enforcement up to the states, using their inherent police power and eminent domain authority. However, federal case law does not permit states to use eminent domain on Indian reservations without express congressional authority, which is missing in the HBA.

FHWA, the federal agency with jurisdiction to implement the HBA, concluded in 1976 that failure of the Act to delegate either to FHWA or DOI the explicit authority to implement the Act on Indian reservations resulted in the HBA not being applicable to Indian reservations, due in part to the lack of delegation of state authority. Attempts to obtain control through DOI, using its general regulatory powers, proved unsuccessful. The BIA follows the 1979 ruling of the Interior Board of Indian Appeals (IBIA), which held that Congress did not intend to cover Indian reservations under the HBA and that the states could not control outdoor advertising on Indian reservations without express authority.<sup>866</sup> The California Supreme Court, in a 1985 decision, found the IBIA interpretation “debatable,” but found it unnecessary to resolve that issue because

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<sup>864</sup> RICHARD O. JONES, APPLICATION OF OUTDOOR ADVERTISING CONTROLS ON INDIAN LAND (NCHRP Legal Research Digest No. 41, 1998).

<sup>865</sup> See *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 80 S. Ct. 543, 553, 4 L. Ed. 2d 584, 596 (1959).

<sup>866</sup> See *Appeal of the Morongo Band of Mission Indians v. Area Director, BIA*, 7 IBIA 299, 86 I.D. 680 (1979), which held that “Absent clear congressional license to the states to control outdoor advertising on Indian reservations, such an intrusion by the states into ‘the right of reservation Indians to make their own laws and be ruled by them’ is without sanction.” 86 I.D. 687.

“it does not follow that Congress has authorized state enforcement of the act on such reservations.”<sup>867</sup> FHWA attempted to amend the HBA in 1986, to provide that “effective control” of outdoor advertising on Indian reservations would be a federal responsibility.<sup>868</sup> Later, the U.S. Senate unanimously agreed to this approach in the 99th Congress (S. 2405), but Congress failed to make it law in passing STURAA.

In 1995, FHWA issued a legal memorandum that again addressed the issue of state regulation of outdoor advertising on Indian reservations pursuant to the HBA. The memorandum acknowledged that since 1976 FHWA had taken the general position that states cannot be penalized for failure to enforce the HBA on federal Indian reservations because they lack authority to condemn Indian reservation land. The opinion, which was limited to regulation of outdoor advertising on land owned by non-Indians within Indian reservation land and

based upon *Brendale v. Confederated Tribes and Bands of Yakima Nation*,<sup>869</sup> concluded as follows:

[As] a general rule the States have the legal authority to enforce the HBA on land within an Indian Reservation owned in fee by non-Indians. The actual extent of their enforcement will vary due to the facts of the situation, but the States have to make a good faith effort to maintain effective control of outdoor advertising on such land to be in compliance with the HBA. If a State believes that it does not have the legal authority to enforce zoning on land within an Indian Reservation owned in fee by non-Indians...an opinion from the State Attorney General on the question [would be required].

The early administrative opinions, decisions, and case law dealing with 23 U.S.C. § 131(h) focused primarily on outdoor advertising controls on Indian reservation lands, but more recent jurisdictional conflicts have involved attempts to control outdoor advertising on Indian lands that are off the reservation but held in “trust status” by the United States. The authority, policy, and procedures for trust acquisition were previously discussed at Section C.4., *supra*. As noted there, BIA regulations clearly reflect that state and local law shall not be applicable to such trust property.<sup>870</sup> LRD No. 41 discussed the then pending litigation in U.S. District Court of Utah, *Shivwits Band of Paiute Indians and Kunz Outdoor Advertising v. State of Utah, Utah Department of Transportation and St. George City, Utah*.<sup>871</sup> The issue for resolution was whether the defendant governmental agencies have the authority to impose restrictions on the placement of billboards on land owned by the United States in trust for the tribe. There, the land in trust was being used by a non-Indian sign company for billboard display. The district court ruled adversely to the defendants in denying preliminary injunctive relief in a 1995 bench ruling. A final judgment, issued on October 22, 2003, ruled against the defendants and in favor of the tribe. This court’s decision will be discussed in more detail in paragraph d.(1), *infra*.

Also discussed in LRD No. 41 was the *City of Fife v. George*,<sup>872</sup> involving the placement of a sign 20 by 60 ft, rising approximately 80 ft above the ground, on land in Fife, Washington, held in trust by the United States for the Puyallup Tribe of Indians. This case did not involve issues under the HBA or state outdoor advertising control laws, but related to the interpretation of a 1988 settlement agreement between the parties.

<sup>867</sup> See *People v. Naegele Outdoor Adver. Co. of Cal.*, 38 Cal. 3d 509, 213 Cal. Rptr. 247, 698 P.2d 150 (1985). The court held:

It appears logically imperative that, had Congress intended the states to enforce the provisions of the Highway Beautification Act against nonconforming advertising displays located on Indian tribal lands, it would have empowered the relevant state authorities to condemn reservation lands, to regulate tribal land use, and to sue Indian tribes. No such authorization can be found in the Highway Beautification Act. We therefore conclude that, even if Congress intended the outdoor advertising standards of the [HBA] to apply on Indian reservations, it did not intend that these standards be enforced through assertion of state power. Thus, we reject the Department’s argument that the [HBA] authorizes state regulation of outdoor advertising on Indian reservation lands.... In our opinion, Congress may have intended the act’s provisions to apply on Indian reservations. But if so, it reserved to federal authorities the responsibility for enforcing the act’s provisions upon federal lands and reservations. For this reason, we conclude that the state’s regulatory authority in this area is preempted by the operation of federal law and the judgment in favor of the Department must be reversed. (Emphasis supplied)

<sup>868</sup> A memorandum dated March 7, 1986, from the FHWA Chief Counsel to the Federal Highway Administrator advised that “FHWA has long recognized that the requirement of 23 U.S.C. 131(h) that outdoor advertising on public lands and reservations be controlled was unclear with respect to enforcement,” and advised that pending legislation to amend 131(h) would vest authority to control outdoor advertising on Indian lands in the federal agency with jurisdiction of those lands.

<sup>869</sup> 492 U.S. 408, 109 S. Ct. 2994, 106 L. Ed. 29, 343 (1989).

<sup>870</sup> See 25 C.F.R. § 1.4(a).

<sup>871</sup> No. 2:95CV 1025S (D. Utah, filed Nov. 17, 1995).

<sup>872</sup> No. C96-6008 FDB, W.D. Wash., filed Dec. 6, 1996.

Noteworthy on the issue of outdoor advertising control is the decision in *Washington v. Confederated Tribes*,<sup>873</sup> which established that the principles of preemption and tribal self-government did not authorize Indian tribes to “market an exemption” from state law for non-Indians in Indian country.<sup>874</sup> In the later case of *California v. Cabazon Band of Mission Indians*,<sup>875</sup> the Court, while rejecting the contention, recognized that a state’s claim of jurisdiction may be stronger where a tribe is merely marketing an exemption from state laws. In *the Shivwits Band* case, the State of Utah argued that the tribe was “marketing an exemption” to state and local laws when it leased billboard space to Kunz Outdoor Advertising.

(4) *Recent Case Law*.—(a) *Shivwits Band of Paiute Indians, et al. v. State of Utah, et al.* In an unreported decision of October 22, 2003, U.S. District Judge Zimmer held:

Like the *Naegele* Court [*People v. Naegele Outdoor Advertising Company of California, supra.*], this court concludes that even if the HBA applies to the trust land at issue here, the Act is subject to federal (not state) enforcement, and the Act does not expressly authorize the regulation intended by Utah and St. George.... 25 C.F.R. § 1.4 (2003) provides additional support for the argument that the State Defendants do not have authority to regulate the subject property.... [In addition,] the court finds that the Shivwits have not marketed an exemption by obtaining the subject land and leasing it to Kunz.... The court holds that the State Defendants have no authority, express or implied, to regulate Kunz’s placement of billboards on the subject property, held in trust for the Shivwits.<sup>876</sup>

This decision has been appealed by the State of Utah to the U.S. Court of Appeals for the Tenth Circuit, and the matter was submitted on argument in early 2005.

(b) *Blunk v. Arizona DOT*<sup>877</sup>—This was a suit to challenge the right of the State of Arizona to regulate Plaintiff Blunk’s commercial use of nonreservation fee land owned by the Navajo Nation. He had a permit from the tribe to erect billboards on the land, but failed to obtain a State permit from ADOT. ADOT told Blunk he would have to take down the billboards and apply for a permit. Blunk refused and sued, seeking declaratory judgment that ADOT’s attempted regulation violated federal preemption and Navajo sovereignty. The court held:

<sup>873</sup> 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).

<sup>874</sup> *Id.* at 155.

<sup>875</sup> 480 U.S. 202, 219–20, 94 S. Ct. 1083, 1094, 94 L. Ed. 2d 244, 262 (1987).

<sup>876</sup> *Shivwits Band of Paiute Indians v. State of Utah*, No. 2:95cv1025 TC (D. Utah 2003), at 7, 9, 15.

<sup>877</sup> 177 F.3d 879 (9th Cir. 1999).

In sum, the requirements for the Navajo Fee Land to be “Indian country” are not met in this case. Because the land is not “Indian country,” the ADOT is not preempted by the federal preemption prong of the Indian preemption doctrine from regulating Blunk’s erection of billboards on the land. We need not consider the *White Mountain* balancing test.... Finally, our holding that the state may impose regulations on a non-Indian’s use of the Navajo Fee Land is consistent with Justice Steven’s opinion in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 106 L. Ed. 2d 343, 109 S. Ct. 2994 (1989), a case involving zoning of fee lands owned by nonmembers of the Tribe’s reservation....

#### *b. Application of the Federal Motor Carrier Safety Regulations (FMCSRs) to Indian Tribes*

An FHWA memorandum in 1993 concluded that the FMCSRs applied to Indian tribal entities, that the Federal Hazardous Materials Regulations (FHMRS) applied to Indians living on tribal lands and involved in interstate commerce, that the FHMRS apply when the “interstate transportation is conducted solely within the tribe’s reservation,” and that the FMCSRs apply in the same manner in similar situations. It advised that:

[T]he FMCSRs generally apply to the various Indian tribes as they do not interfere with purely intramural affairs of the tribe, and there is no evidence in the Congressional history of the act that Congress intended to exclude the Indian tribes from regulation under the act. Lastly, although it is doubtful that a treaty would exclude enforcement of the act, every treaty with each specific tribe MUST be consulted before a definite answer can be given. Treaties with specific Indian tribes may limit the ability of Federal agents entering Indian lands without the tribes’ prior consent.

#### *c. Application of Preemption Provisions of HMTA<sup>878</sup> to Indian Tribes<sup>879</sup>*

The HMTA provides for the regulation of the transportation of hazardous materials. Section 5125(a), with certain exceptions, provides for the preemption of state, local, and tribal requirements that are inconsistent with federal laws, regulations, and directives:

[A] requirement of a State, political subdivision of a State, or Indian tribe is preempted if—(1) complying with [such] a requirement and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible, or (2) the re-

<sup>878</sup> 49 U.S.C. § 5125 (2005) (formerly 49 U.S.C. § 1811).

<sup>879</sup> SAFETEA-LU addresses Indian tribes and hazardous material transportation in its re-authorizing language in §§ 7102, *et seq.*

quirement...as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

Procedures for securing decisions on preemption are set forth in Section 5125(d), which provides, in part:

(1) A person (including a State, political subdivision of a State, or Indian tribe) directly affected by [such] a requirement...may apply to the Secretary, as provided by regulations prescribed by the Secretary, for a decision on whether the requirement is preempted.... The Secretary shall publish notice of the application in the Federal Register. The Secretary shall issue a decision on an application for a determination within 180 days.

\* \* \*

(3) Subsection (a) of this section does not prevent a State, political subdivision of a State, or Indian tribe, or another person directly affected by a requirement, from seeking a decision on preemption from a court of competent jurisdiction instead of applying to the Secretary under paragraph (1) of this subsection.

The statute goes on to provide in Section 5125(f) for judicial review “in an appropriate district court of the United States...of the decision of the Secretary not later than 60 days after the decision becomes final.”

A tribal ordinance to control shipment of nuclear materials was held to be preempted under HMTA and enjoined in *Northern States Power Company v. The Prairie Island Mdewakeanton Sioux Indian Community*.<sup>880</sup> The tribal nuclear radiation control ordinance required transporters to obtain a tribal license for each shipment of nuclear materials across the reservation land. The ordinance also required that license applications be filed 180 days in advance of each shipment, accompanied by a fee of \$1,000. The tribal council was authorized to determine whether to issue a license, and to impose a \$1 million civil fine for willful violations of the ordinance. Northern States Power Company’s (NSP’s) Prairie Island plant, in operation since 1974, was located near the reservation, and the only ground access to the plant was provided by a railroad line and a county road, both of which crossed the reservation. NSP moves approximately 70 shipments of nuclear materials in and out of the plant each year.<sup>881</sup>

NSP brought this suit for declaratory judgment following a ruling by the IBIA that it lacked authority to enjoin a tribe from enforcing a tribal

ordinance.<sup>882</sup> The tribe and tribal officials appealed the district court’s granting of preliminary injunction against enforcement of the tribal ordinance, arguing, *inter alia*, that the district court failed to recognize and apply principles of tribal sovereignty, including the tribe’s immunity from suit pending exhaustion of tribal court remedies, which “precludes the suit and protects the tribal officers.”<sup>883</sup> The circuit court affirmed the district court, holding as follows:

We conclude that the [HMTA] preempts the tribal ordinance. In resolving to enforce the ordinance, the member of the Tribal Council were acting to enforce an ordinance that the tribe had no authority to enact. The Council members acted beyond the scope of their authority and placed themselves outside the tribe’s sovereign immunity.... Indian tribes are expressly subjected to the Act’s preemption rules.... The Act’s plain language indicates that, sovereign immunity notwithstanding, states and Indian tribes are subject to the preemption rules, including the provision that allows preemption cases to be brought in “any court of competent jurisdiction.” 49 U.S.C. § 1811(c)(2) [now 49 U.S.C. § 5125(d)(3)].<sup>884</sup>

As previously noted at Section D.8.c., the U.S. Ninth Circuit Court of Appeals, in *Public Service Co. of Colorado v. Shoshone-Bannock Tribes*,<sup>885</sup> also held that the HMTA abrogates tribal immunity from suit in federal court.

#### d. Traffic Safety

The NCSL report entitled, *Traffic Safety on Tribal Lands*,<sup>886</sup> states that the leading cause of death for American Indians between the ages of 1 and 44 years is from injuries sustained in motor vehicle crashes and pedestrian-related crashes. It further reports that although many tribal governments have adopted strict laws to address traffic safety, there is difficulty in effectively enforcing such laws due to limited police resources.<sup>887</sup> In addressing traffic safety issues, the NHTSA has established a Safe Communities Service Center with the goal of creating and promoting community-based solutions for solving problems arising from traffic crashes. This program is also dedicated to establishing Safe Community programs for tribal lands.<sup>888</sup> The NCSL report highlights several exam-

<sup>882</sup> *Id.* at 459–60.

<sup>883</sup> *Id.*

<sup>884</sup> *Id.* at 462–64.

<sup>885</sup> 30 F.3d 1203, 1207 (9th Cir. 1994).

<sup>886</sup> MELISSA SAVAGE, NAT’L CONFERENCE OF STATE LEGISLATURES, *TRAFFIC SAFETY ON TRIBAL LANDS 1* (2004).

<sup>887</sup> *Id.* at 3.

<sup>888</sup> *Id.* at 6. See *Traffic Safety and Native Americans*, available at <http://www.nhtsa.dot.gov/safecommunities/>

<sup>880</sup> 991 F.2d 458 (8th Cir. 1993).

<sup>881</sup> *Id.* at 459.

ples of tribal communities that have adopted and are effectively using the Safe Communities program. Federal funding for Safe Communities and other traffic safety programs is available to tribal governments through NHTSA. NHTSA reports that 25 tribes submitted project proposals for FY 2005 funding. A selection committee comprised of the BIA, NHTSA, Indian Health Service, BIA Law Enforcement, and a State Traffic Safety Coordinator met to score proposals in June 2004. The nine tribes selected for funding for FY 05 include Turtle Mountain (North Dakota); Fort Peck (Montana); Rocky Boy (Montana); Crow (Montana); Fort Belknap (Montana); Rosebud (South Dakota); Ramah Navajo (New Mexico); Jemez Pueblo (New Mexico); and Pyramid Lake (Nevada). The BIA Indian Highway Safety Program sponsored the first ever Tribal Traffic Safety Judicial Summit in September 2005.<sup>889</sup>

#### *e. Highway Maintenance Responsibility*

Maintenance of state highways is a statutory responsibility of the states and political subdivisions of the states not the federal government. Title 23, U.S.C. § 116 (2005), provides as follows:

(a) It shall be the duty of the State transportation department to maintain, or cause to be maintained, any project constructed under the provisions of this chapter [23 U.S.C.S. § § 101 et seq.] or constructed under the provisions of prior Acts. The State's obligation to the United States to maintain any such project shall cease when it no longer constitutes a part of a Federal-aid system.

(b) In any State wherein the State transportation department is without legal authority to maintain a project constructed on the Federal-aid secondary system, or within a municipality, such highway department shall enter into a formal agreement for its maintenance with the appropriate officials of the county or municipality in which such project is located.

This maintenance responsibility extends to state, county, and municipal roads on the BIA system, including roads on Indian lands, if the state or local entity owns the road or has agreed to maintain the road. The extent of this maintenance responsibility is reflected in the previously discussed IRR inventory, consisting of approximately 63,000 mi of road. Approximately one-half of these miles are state- and county-owned roads and the other half are BIA or tribal roads, all of which are public roads. With respect to BIA and tribal roads, the BIA has a Road Maintenance Program currently funded out of the annual Department of the Interior Appropriations.

servicecenter.

<sup>889</sup> See <http://www.nhtsa.dot.gov/safecommunities/ServiceCenter/scnews/features7.html>.

BIA road maintenance facilities are eligible for these maintenance funds. In addition, public tribal transportation facilities are eligible, as are non-BIA transportation facilities if public health and safety issues are involved.<sup>890</sup> Finally, SAFETEA-LU allows a tribe to use up to 25 percent of its IRR program funds for maintenance. This allowance is in addition to any DOI funds a tribe may receive for maintenance purposes.<sup>891</sup>

## **M. CONCLUSION**

From the outset of the European settlement of North America, the Indian tribes were treated as

<sup>890</sup> 25 C.F.R. § 170.803 (2005) provides as follows:

§ 170.803 What facilities are eligible under the BIA Road Maintenance Program?

(a) The following public transportation facilities are eligible for maintenance under the BIA Road Maintenance Program:

(1) BIA transportation facilities listed in paragraph (b) of this section;

(2) Non-BIA transportation facilities, if the tribe served by the facility feels that maintenance is required to ensure public health, safety, and economy, and if the tribe executes an agreement with the owning public authority within available funding;

(3) Tribal transportation facilities such as public roads, highway bridges, trails, and bus stations; and

(4) Other transportation facilities as approved by the Secretary.

(b) The following BIA transportation facilities are eligible for maintenance under paragraph (a)(1) of this section:

(1) BIA road systems and related road appurtenances such as signs, traffic signals, pavement striping, trail markers, guardrails, etc.;

(2) Highway bridges and drainage structures;

(3) Airport runways and heliport pads, including runway lighting;

(4) Boardwalks;

(5) Adjacent parking areas;

(6) Maintenance yards;

(7) Bus stations;

(8) System public pedestrian walkways, paths, bike and other trails;

(9) Motorized vehicle trails;

(10) Public access roads to heliports and airports;

(11) BIA and tribal post-secondary school roads and parking lots built with IRR Program funds; and

(12) Public ferry boats and boat ramps.

<sup>891</sup> SAFETEA-LU § 1119(i).

sovereign nations by the English crown. Federal congressional and executive policy from the beginning recognized and protected separate status for tribal Indians in their own territory. Indian law is best understood in historical perspective because it reflects national Indian policy, which has been constantly changing, never consistent. Federal policy has shifted from regarding tribes as sovereign equals, to relocating tribes, to attempts to exterminate or assimilate them, and currently to encouraging tribal self-determination. The current federal policy of “self-determination” for Indians and tribal governments began in 1969. President Nixon, building on President Johnson’s rejection of the termination policy, is credited with changing the direction of the federal government and its treatment of Indian tribes and Indians, urging Congress to undertake a program of legislation that would permit the tribes to manage their own affairs. The bipartisan consensus that resulted has remained ever since, producing a significant number of legislative enactments to benefit Indians and Indian tribes and recognize or extend tribal sovereignty. The validation and advancement of self-determination for Indian tribes has now been officially supported by the Congress and eight consecutive Presidents.

Running on a parallel track with the legislative and executive policies, but not always consistent with such policies, were the opinions of the federal judiciary. Chief Justice John Marshall’s Indian trilogy of opinions established the foundation principles of American Indian law, with the primary principle being conquest rendered the Indian tribes subject to federal plenary power in Indian affairs. The enduring principles of these opinions are (1) Indian tribes, because of their original political/territorial status, retain incidents of preexisting sovereignty; (2) this sovereignty may be diminished or dissolved by the United States, but not by the states; (3) because of this limited sovereignty and the tribe’s dependence on the United States, the government has a trust responsibility relative to Indians and their lands.<sup>892</sup>

For over 100 years the federal judiciary held close to the principles of Chief Justice Marshall’s opinion in *Worcester v. Georgia*,<sup>893</sup> excluding states from power over Indian affairs. As late as 1959, in the unanimous decision in *Williams v. Lee*, the U.S. Supreme Court noted that

Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them...this Court [has] consistently guarded the authority of Indian

governments over their reservations.... If this power is to be taken away from them, it is for Congress to do it.<sup>894</sup>

But, in 1973, the Court would recognize that Chief Justice Marshall’s view

has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together affect the respective rights of State, Indians, and the Federal Government...[and that] even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.<sup>895</sup>

In 1978, the Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*<sup>896</sup> went significantly further, reducing tribal sovereignty by denying tribal criminal jurisdiction over nonmembers. It established a new “inherent limitation” on tribal sovereignty. The Court ruled that by submitting to the overriding sovereignty of the United States, Indian tribes necessarily gave up their power to exercise criminal jurisdiction over nonmembers except in a manner acceptable to Congress.<sup>897</sup> This inherent limitation doctrine was extended to civil jurisdiction over nonmembers by the Supreme Court’s 1981 landmark decision in *Montana v. United States*, where the Court stated: “*Oliphant*...principles...support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”<sup>898</sup> The Court held that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation.”<sup>899</sup> Two basic exceptions were established allowing inherent sovereign power to be exercised by some forms of civil jurisdiction over nonmembers on their reservations, even on non-Indian fee lands:<sup>900</sup>

1. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements;
2. 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

<sup>892</sup> DESKBOOK, *supra* note 16, at 4.

<sup>893</sup> 31 U.S. (6 Pet.) 515 (1832).

<sup>894</sup> 358 U.S. 217, 220, 223 (1959).

<sup>895</sup> *Mescalero Apache Tribe*, 411 U.S. at 148.

<sup>896</sup> *Oliphant*, 435 U.S. 191 (1978).

<sup>897</sup> *Id.* at 210.

<sup>898</sup> *Montana*, 450 U.S. at 565.

<sup>899</sup> *Id.* at 554.

<sup>900</sup> *Id.* at 565–66.

integrity, the economic security, or the health or welfare of the tribe.

Subsequent Supreme Court decisions to date have strongly adhered to the *Montana* principle concerning tribal civil authority over nonmembers, but narrowly construed the two exceptions. For example, one of the most significant of these decisions for state DOTs and their contractors is *Strate v. A-1 Contractors*,<sup>901</sup> which arose out of a collision between two non-Indians on a North Dakota state highway running through a reservation. In a unanimous decision, the Court found that the state's federally granted right-of-way over tribal trust land was the "equivalent, for nonmember governance purposes, to alienated, non-Indian land," rejecting tribal court jurisdiction over tort litigation involving nonmembers.<sup>902</sup> The Court rejected assertions that either of the *Montana* two exceptions applied. Another example relevant to state DOTs is the decision in *Montana Department of Transportation v. King*,<sup>903</sup> which held that the State and its officials were outside the regulatory reach of the TERO for work performed on the right-of-way owned by the State. The recent Supreme Court decision in *Nevada v. Hicks*<sup>904</sup> is the culmination of a series of cases since *Montana* that has limited tribal sovereign power and extended state power in Indian country, holding that *Montana* applies regardless of land status and making clear that tribal jurisdiction over nonmembers is extremely limited, even on tribal land.

While the federal judiciary was significantly reducing the breadth of tribal sovereignty during the last quarter century, the Congress and Executive Branch, in contrast, have broadened and strengthened tribal authority. For example, Congress in enacting ISTEA mandated that statewide planning requirements include consultation, cooperation, and coordination with Indian tribal governments on a government-to-government basis. Executive initiatives during this period also established requirements for government-to-government relationships that respected tribal sovereignty. Congress also enacted legislation designed to protect natural, religious, and cultural assets important to Indians and Indian tribes. For example, the 1992 amendments to the NHPA require consultation with Indian tribes or Native Hawaiian organizations for undertakings that may affect properties of traditional religious and cultural significance on or off tribal lands. More recently, Congress has ex-

pressly provided for tribal governments to exercise degrees of jurisdictional authority under the Clean Air Act, Safe Drinking Water Act, Clean Water Act, and Comprehensive Environmental Response, Compensation, and Liability Act.

Core uncertainties and distrust resulting from these contrasting actions, discussed above, have led to continuous and expensive litigation between the tribes and the states. But this litigation has done little to resolve the core uncertainties and distrust. Both parties jealously guard jurisdiction over areas that affect the other. It would be in the best interests of the tribes and states to expend time and money on lasting solutions. Both tribes and states are now recognizing that negotiation leading to cooperative agreements may be the best solution. There are many examples of cooperative solutions to mutual problems, including gaming compacts, environmental agreements, hunting and fishing shared regulation, water agreements, and law enforcement agreements. Many states have enacted enabling legislation authorizing state-tribal cooperative agreements. Several state DOTs have taken a leadership role in developing state-tribal compacts on transportation issues. Only time will tell whether such cooperation, including the sharing of jurisdiction, will truly resolve the core uncertainties and distrust and reduce the litigation.

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<sup>901</sup> 520 U.S. 438, 1175 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).

<sup>902</sup> *Id.* at 445.

<sup>903</sup> 191 F.3d 1108 (9th Cir. 1999).

<sup>904</sup> 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).