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Update of Selected Studies in Transportation Law, Volume 8, Section 3: Indian Transportation Law

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Background

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. The NCHRP Legal Research Digest and the Selected Studies in Transportation Law (SSTL) series are intended to keep departments up-to-date on laws that will affect their operations.

Foreword

This digest examines and updates 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, legal issues arising out of rights-of-way through Indian reservations, regional planning issues, compliance with state environmental laws bumping up against Indian sovereign immunity, tort liability issues, etc. The federal government has a relationship with Indian tribes based upon unique trust obligations derived from treaties (which are federal law) and the status of tribes as domestic dependent nations. States and local governments do not have the same relationship and yet interact with tribal governments in a number of ways that can involve legal issues. The authority conferred upon state and local jurisdictions in Indian country, to the extent it exists, is patchwork and varies depending upon the jurisdiction and unique factual situation. 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.

Most of the case law examined in the original document published in 2007 continues to be good law today; where this is not the case the document has been updated. Since the original version of this Section, federal regulations concerning grants of right-of-way over Indian lands have changed significantly. This section also contains new guidance concerning land acquisition, project development, construction, maintenance, and government-to-government agreements related to Indian Transportation law. Sections on reservation boundary disputes, defining Indian country, and land ownership in Indian country have been added, and the portions of the document addressing jurisdictional issues have been revised significantly.

This digest will be useful to transportation lawyers, engineers, and planners who work on reservations and Indian country more broadly.

Volume 8: Transportation Law and Government Relations of the Selected Studies in Transportation Law series covers civil rights and transportation agencies, transportation and the United States Constitution, Indian transportation law, and motor vehicle law. The complete Volume 8 may be accessed at: http://www.trb.org/Publications/Blurbs/159372.aspx.

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UPDATE OF SELECTED STUDIES IN TRANSPORTATION LAW, VOLUME 8, SECTION 3: INDIAN TRANSPORTATION LAW

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A. INTRODUCTION

This section of *Selected Studies in Transportation Law: Volume 8: Indian Transportation Law*, examines the intersection of transportation law and Indian law as it relates to federal, state, and local transportation agencies. Indian law is a particularly complex area of law that is uniquely rooted in history. For that reason, this section begins by providing background information on Indians, tribes, and the history of the federal government's Indian policy and Indian law. With this background information in mind, this section goes on to discuss jurisdiction in Indian country beginning with three basic concepts (inherent tribal sovereignty, Indians and tribal membership, and Indian country). The section on Indian country discusses basic terms for land ownership on reservations and in Indian country more generally. These concepts are necessary to understand the cases and issues discussed in this section. Following the discussion of these foundational concepts, this document goes on to provide an overview of federal, state, and tribal civil jurisdiction in Indian country, followed by an overview of criminal jurisdiction in Indian country. This document also explores the law related to reservation boundary disputes, the fee-to-trust process and reservation proclamations, state sovereign immunity in suits involving Indian tribes, contracting with Indian tribes and tribal entities, acquisitions of Indian lands for public transportation purposes, and federal highway and transit programs involving Indian tribes. The latter sections of this document explore planning and project development activities, construction activities, and operation and maintenance of highways in Indian country followed by a final section on government-to-government cooperation between states and Indian tribes.

B. INDIANS, TRIBES, AND HISTORICAL BACKGROUND

1. Background

In the 2010 Census, 5.2 million people identified as American Indian or Alaska Native alone or in combination with other races (1.5 percent of the total U.S. population); 2.9 million people identified as American Indian or Alaska Native alone.[1] The Census Bureau estimated that 20.5 percent of American Indians and Alaska Natives (alone or in combination with one or more races) live on reservations, on trust lands outside reservations, or in other American Indian designated statistical areas.[2] As of the 2010 Census, California (360,424) had the largest American Indian and Alaska native population (alone or in combination with one or more races), followed by Oklahoma (161,073) and Texas (144,292).[3]

The Navajo Nation is the largest reservation in the United States both in terms of geographical size and American Indian population. According to the 2010 Census, an estimated 169,321 American Indians live on the Navajo Nation Reservation and off-reservation trust lands.[4]

a. Indians[5]

The term "Indian" may be used to refer both to a race of people and as a political designation; these two applications of the term are not necessarily synonymous. Consider the U.S. Supreme Court case *Morton v. Mancari*,[6] in upholding a Bureau of Indian Affairs (BIA) Indian employment preference, the U.S. Supreme Court declared the Indian employment preference to be "political rather than racial in nature."[7]

There is no single federal or tribal criterion to establish that a person is Indian.[8] Government agencies use different criteria to determine who is an Indian eligible to participate in various programs. For example, the Indian Reorganization Act (IRA)[9] uses this definition:

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[1] 2010 Census Briefs, U.S. Census Bureau, The American Indian and Alaska Native Population: 2010 (January 2012), *available at* https://www.census.gov/history/pdf/c2010br-10.pdf (accessed May 26, 2018).

[2] *Id.* American Indian designated statistical areas include the following: Oklahoma tribal statistical areas, tribal designated statistical areas, state American Indian reservations, and state designated American Indian statistical areas.

[3] *Id.*

[4] *Id.* A map of the United States that shows Indian lands can be found at: https://catalog.data.gov/dataset/bia-indian-lands-dataset-indian-lands-of-the-united-states.

[5] *See generally*, William C. Canby, Jr. American Indian Law In A Nut Shell 3-9 (6th ed., West Academic 2015) (1998) (hereinafter Canby); Felix S. Cohen, Handbook Of Federal Indian Law 19-26 (LexisNexis 2012) (1941) (hereinafter Cohen); Stephan L. Pevar, The Rights Of Indians And Tribes: The Basic ACLU Guide To Indian And Tribal Rights (2002) (hereinafter Pevar).

[6] 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).

[7] *Id.* at 553 n.24, 94 S. Ct. at 2484, 41 L. Ed. 2d at 302. *See also*, Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 480, 96 S. Ct. 1634, 1645, 48 L. Ed. 2d 96, 110 (1976); United States v. Antelope, 430 U.S. 641, 645, 97 S. Ct. 1395, 1398, 51 L. Ed. 2d 701, 706 (1977); Greene v. Comm'r of the Minn. Dep't of Human Servs., 733 N.W.2d 490 (2007).

[8] *See* Cohen, *supra* note 5, § 3.03, *Definition of Indian.*

[9] 73 Pub. L. No. 383, 48 Stat. 984, 988 (1934), (codified at 25 U.S.C. §§ 5101-5103, 5107-5113, 5115-5116, 5118, 5120-5121, 5123-5125, and 5129 (2018).

> 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 the present boundaries of any Indian 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 peoples of Alaska shall be considered Indians.[10]

An important definition is the one used in the Indian Self-Determination and Education Assistance Act (ISDEAA),[11] which provides that "'Indian' means a person who is a member of an Indian tribe."[12] The process for determining tribal membership is defined and administered by each tribe. Tribes vary their criteria for membership.[13] One common requirement for tribal membership is being a lineal descendant of a member of the tribe. Someone who is a tribal member might also be called an "enrolled member" or said to be "enrolled" or an "enrollee." These terms all mean the same thing.[14] Note that the varying definitions of "Indian" require the practitioner to specifically determine the purpose for which identification is relevant when conducting legal research.

b. Tribes[15]

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.[16] Even though the U.S. Constitution, Article I, Section 8, Clause 3, and many federal statutes and regulations use the term, today there is no single federal statute that defines "Indian Tribe" for all purposes.[17] ISDEAA at 25 U.S.C. § 5304(e) states as follows:

> (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. §§ 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[.]

In 1978, the U.S. Department of the Interior (DOI) adopted regulations establishing a procedure for tribal recognition.[18]. While a group of Indians may consider itself a "tribe," that group must meet the requirements for recognition established by the Secretary of the Interior to qualify for federal benefits afforded federally recognized Indian tribes. Such recognition by the Secretary of the Interior is given substantial deference by courts.[19] The government's recognition of a tribe or failure to recognize a tribe, while a political decision, is still subject to judicial review for compliance with the law and due process requirements.[20]

As late as 1977, out of 400 tribes that then existed, less than 300 had been officially recognized by the Secretary of the Interior.[21] By 1991, there were 510 federally recognized tribes in the United States, including about 200 village groups in Alaska.[22] In 2002, the BIA listed 562 recognized tribes, which included some 225 Alaska Native entities.[23] The latest BIA listing, published on January 30, 2018, listed 570 recognized tribes and Alaska Native entities.[24]

2. Historical Background—Federal Government Indian Policy

a. Introduction

Indian law is best understood in historical perspective because the law reflects national Indian policy that has been constantly changing. "Some commenters liken the federal-Indian

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[10] *See* 25 U.S.C. § 5129 (2018).

[11] 93 Pub. L. No. 638, 88 Stat. 2203. 2204 §4(a) (1975), (codified at 25 U.S.C. § 5301-5423) (2018). ~~5404(d).~~

[12] 23 USC § 5304(d) (2018).

[13] U. S. Dept. of Interior, Office of Public Affairs – Indian Affairs, A guide to Tracing American Indian and Alaska Native Ancestry, 4, https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/public/pdf/Guide_to_Tracing_AI_and_AN_Ancestry.pdf.

[14] *See* Jessica Bardill (Cherokee), Ph.D., *Tribal Sovereignty and Enrollment Determinations*, National Congress of American Indians, American Indian -Alaskan Native Genetics Resource Center (undated), http://genetics.ncai.org/tribal-sovereignty-and-enrollment-determinations.cfm.

[15] *See generally*, L. R. Weatherhead, *What Is an "Indian Tribe"—The Question of Tribal Existence*, 8 AM. Indian L. Rev. 1 (1980); Cohen, *supra* note 5, at 131-140; American Indian Law Deskbook 82-116 (Thomson Reuters 2014) (1993) (hereinafter Deskbook); at 79–83; Pevar, *supra* note 5, at 20-21.

[16] *See*, Montoya v. United States, 180 U.S. 261, 266, 21 S. Ct. 358, 359, 45 L. Ed. 521, 523 (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."

[17] Cohen, *supra* note 5, at 131.

[18] 25 C.F.R. Part 83

[19] Deskbook, *supra* note 15, at 109-110, 110 n.23; but *see* Koke v. Little Shell Tribe of Chippewa Indians of Mont., 2003 Mt. 121, 133, 315 Mont. 510, 513, 68 P.3d 814, 816-17 (2003): "[t]ribes may still be recognized as such under common law. The United States 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 (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."

[20] Canby, *supra* note 5, 6, citing Muwekma Ohlone Tribe v. Salazar, 708 F.3d 209 (D.C. Cir. 2013); Samich Indian Nation v. United States, 419 F.3d 1355, 1370-73 (Fed. Cir. 2005).

[21] American Indian Policy Review Commission, Final Report 461 (1977).

[22] Deborah M. Tootle, *American Indians: Economic Opportunities and Development*, 102, USDA Economic Research Service, USDA, Rural Americans, https://www.ers.usda.gov/webdocs/publications/40678/32997_aer731i_002.pdf?v=0

[23] Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,328 (July 12, 2002).

[24] Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 4235 (Jan. 30, 2018).

relationship to a pendulum that has shifted back and forth between attempts to annihilate tribes during certain periods of time and attempts to support tribal self-government and autonomy at other times "(citations omitted).[25] Understanding the history of these shifting policies is important to understanding American Indian law because there are lasting effects from each policy. The following sections briefly cover federal Indian policy from the colonial era to the present.

b. Colonial and Treaty Making Era

At the outset of European settlement of North America, the continent was occupied by approximately 500 independent Indian nations.[26] Agreements between the European colonists and tribes reflected treatment of each tribe as a sovereign nation. British colonists generally purchased Indian lands with consent of the tribe.[27] During the colonization period, the English Crown also treated Indian tribes as foreign sovereigns and provided for protection of tribes from 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.[28]

The Continental Congress declared its jurisdiction over Indian tribes on July 12, 1775.[29] The Delaware Treaty of Fort Pitt, also known as the Treaty with the Delawares,[30] was the first of 367 ratified Indian treaties between 1778 and 1868, when the final treaty was signed with the Nez Perce. [31] The Fort Pitt Treaty guaranteed the Delaware Indians "all their territorial rights in the fullest and most ample manner…."[32] From the beginning, federal policy recognized a separate status for tribal Indians in their territory.[33]

Following the Revolutionary War, Congress continued to make strong efforts to resist state/citizen aggression towards Indians and Indian lands to avoid retaliation. The Northwest Ordinance of 1787[34] 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."[35] 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, which 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. Congress, in passing a series of Trade and Intercourse Acts beginning in 1790, began a statutory pattern designed to separate Indians from non-Indians for purposes of 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.

However, when gold was discovered on Georgia's Cherokee lands in the late 1820s it heightened the demand for white access to the Cherokee land and increased illegal entry by whites, leading to conflict and violence.[36] 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."[37] This climate of hostility was the backdrop for two of the important U.S. Supreme Court cases that make up Chief Justice Marshall's Indian Trilogy. These cases will be discussed in section B.3 of this digest entitled "Historical Background-Indian Law."

c. Removal Policy (1830 to 1861)[38]

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 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.[39] 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.[40]

Under Jackson, who was elected president in 1828, the removal policy ripened into official action. Jackson's first message

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[25] Pevar, *supra* note 5, at 4.

[26] *Id*. at 1.

[27] Bryon H. Wildenthal, Native American Sovereignty On Trial: A Handbook With Cases, Laws, And Documents, 21 (Charles Zelden ed., 2003) (hereinafter Wildenthal).

[28] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 (1810). *See* Wildenthal, *supra* note 27, at 21.

[29] 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."

[30] 2 Kapp 3; 7 Stat. 13 (1778).

[31] Nez Perce Treaty, *available at*, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5108216.pdf

[32] 7 Stat. 13, Art. VI.

[33] Cohen, *supra* note 5, at 140.

[34] 1 Stat. 50 (Aug. 7, 1789).

[35] Pevar, *supra* note 5, at 6.

[36] Wildenthal, *supra* note 27, at 39.

[37] *Id.*

[38] *See generally*, John Ehle, Trail Of Tears: The Rise And Fall Of The Cherokee Nation 170 (1988); 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 27, at 39–40.

[39] *See e.g.*, Treaty with the Kansas Tribe of Indians, 12 Stat. 1111 (1859); Treaty with the Winnebago Tribe of Indians, 12 Stat. 1101 (1859); Treaty with the Menominee Tribe of Indians, 10 Stat. 1064 (1854).

[40] Prucha, *supra* note 38, at 156.

to Congress sought federal legislation to authorize removal of the Cherokees and the other four "Civilized Tribes" (the Choctaw, Chickasaw, Creek, and Seminole) to the west.[41] In response, following bitter debate, Congress passed the Indian Removal Act which President Jackson signed on May 28, 1830.[42] The Act authorized the President to negotiate with the eastern tribes for relocation. It 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").[43]

The program of voluntary land exchange and removal became one of coercion. This led to journeys of great hardship and suffering. The Trail of Tears, resulting from the forced removal of the Five Civilized Tribes from the Southeast to what is now Oklahoma, is a well-known example of this.[44]

> 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.[45]

> Between 1832 and 1843 most eastern tribes either were removed to the West or forced to live on smaller reservations in the East. In their treaties with the United States, many eastern tribes were promised that their new homes in Arkansas, Kansas, Iowa, Illinois, Missouri, or Wisconsin would be theirs permanently. The United States broke almost every one of these treaties, often within a few years after they were signed, and some tribes moved several times to 'permanent homes' farther west.[46]

d. Reservation Policy (1861 to 1887)

The period from 1861 to 1887 is known as the "Reservation Period." During this time, 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.[47] Other such Enabling Acts or state constitutions recognized "reservations" and disavowed state jurisdiction in these areas.[48] The move to make reserved lands permanent helped provide stability to tribal territorial boundaries. Eventually, the reservations "came to be viewed…as instruments for 'civilizing' the Indians," with federally appointed Indian agents placed to ensure Indian adaptation to non-Indian ways.[49]

e. Allotment and Assimilation Policy (1887 to 1934)

Tribal land was held in common for the benefit of all members of the tribe prior to the allotment period. During the allotment period, the United States followed a policy of allotting tribal land to individual Indians.[50] This involved dividing land held in common into allotments, or parcels of land, for individual Indians, and then opening the "surplus" land to non-Indians for settlement. One of the intentions of the policy was to promote assimilation of Indians into American society.[51] 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 de-

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41 Wildenthal, *supra* note 27, at 38.

42 4 Stat. 411 (1830).

43 *Id*. at 40.

44 Canby, *supra* note 5, at 19-20.

45 Prucha, *supra* note 38, at 182.

46 Pevar, *supra* note 5, at 7.

47 Act of Jan. 29, 1861, ch. 20, § 1, 12 Stat. 126, 127; *see also* Robert H. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951, 960–61 (1975).

48 Eleven states initially disclaimed jurisdiction over Indian lands, including Indian reservation land, in their state constitutions at the time they received statehood. However, this was not necessarily 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.

49 Canby, *supra* note 5, at 21, 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.

50 *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).

51 *See* Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 650 n.1, 96 S. Ct. 1793, 1794, 48 L. Ed. 2d 274, 277 (1976). Cited in S. Cal. Edison Co. v. Rice, 685 F.2d 354, 356 (9th Cir. 1982) and Murphy v. Royal, 875 F.3d 896, 934 (10th Cir. 2017).

velop a "middle class" of Indian farmers.[52] Under this policy, the United States allotted millions of acres of tribal lands on certain Indian reservations.[53]

The passage of the General Allotment Act of 1887,[54] commonly referred to as the Dawes Act, formalized this policy, and is considered "the most important and, to the tribes, the most disastrous piece of Indian legislation in United States history."[55] 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.[56] Section 5 of the Act provided that title to allotments would be held in trust by the United States for 25 years (i.e., the federal government would hold title to the land and manage it for the individual Indian allottee) with title passing to the allottee at the end of the 25-year period. Section 5 of the Dawes Act also provided that the President could extend the trust period beyond 25 years.

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*[57], upheld the allotment policies of Congress. According to one legal scholar, this "is probably the most infamous and harshly criticized Indian law decision in the history of U.S. courts."[58] A unanimous Court, in rejecting the challenge, held this:

> 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.[59] *** 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.[60]

Furthermore, scholars and researchers have stated:

> Rather than assist Indians overcome poverty, the GAA [General Allotment Act of 1887] drove them further into it. Most Indians fiercely resisted assimilation and did not want to abandon their communal society to become farmers and ranchers. Besides, not only were many allotments unsuitable for small-scale agriculture but few Indians possessed the capital to buy the equipment, cattle, or seeds to initiate these ventures. Thousands of impoverished Indians sold their allotments to white settlers or lost their land in foreclosures when they were unable to pay state real estate taxes. .[61]

Many Indian lands passed from Indian ownership to non-Indian ownership under the allotment policy.[62] Out of approximately 156 million acres of Indian lands in 1881, less than 105 million remained by 1890, and by 1900, only 78 million remained.[63] In 1924, during this period of allotment and assimilation, Congress conferred citizenship on all Indians born in the United States (8 U.S.C. § 1401(b)). By 1934, approximately 90 million acres had passed from tribal ownership, through individual Indian allotment status, to non-Indian fee ownership.[64] Although the allotment policy ended with passage of the IRA in 1934, the allotment policy resulted in reservations becoming a checkerboard of land ownership between allotments held in trust and patented lands owned in fee by either Indians or non-Indians and no longer in trust status. This checkerboard of ownership still exists today within the boundaries of many reservations. On some reservations there is a high percentage of land owned and occupied by non-Indians, although 140 reservations comprise entirely tribally owned land.[65] Today, this checkerboard of land ownership significantly complicates the process of acquiring lands within most reservations because federal requirements differ depending on how the land is owned.

f. Indian Reorganization Policy (1934 to 1953)

The 1930s saw an abrupt policy change in the federal government's handling of Indian affairs, due in large measure to recognition that the Dawes Act had been a failure. A major vehicle for this change was a Brookings Institution two-year study by Lewis Meriam that produced a report released in 1928 entitled, *The Problem of Indian Administration* (commonly called the "Meriam Report"),[66] which documented the failure of the allotment policy.[67] 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;[68] he "aggressively promoted a new policy in Indian affairs that revived tribalism

[52] Canby, supra note 5, at 22. See also County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 253–54, 112 S. Ct. 683, 686, 116 L. Ed. 2d 687, 694 (1992); Shangreau v. Babbitt, 68 F.3d 208, 209-211 (8th Cir. 1995).

[53] President Roosevelt described the allotment process in his message to Congress in 1903 as "a mighty pulverizing engine to break up the tribal mass." 35 CONG. REC. 90 (1902).

[54] Pub. L. No. 49-119, 244 Stat. 388.

[55] Canby, *supra* note 5, at 22.

[56] *Id.* at 23.

[57] 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903).

[58] Wildenthal, *supra* note 27, at 53.

[59] *Lone Wolf*, 187 U.S. at 566, 23 S. Ct. at 221, 47 L. Ed. at 306.

[60] *Id.* at 568, 23 S. Ct. at 222, 47 L. Ed. at 307(1903).

[61] Pevar, *supra* note 5, at 9.

[62] In 1934, Congress enacted the Indian Reorganization Act, 73 Pub, L. No. 383, 48 Stat. 984, ch. 576 (1934) (codified as amended at 25 U.S.C. §§ 5101-44 (2018)), which ended the allotment policy.

[63] D. Otis, *supra* note 50, at 87.

[64] *Id.* at 17.

[65] USACE, *Consulting with Tribal Nations*, 3 (2013).

[66] Complete Meriam Report *available at* https://files.eric.ed.gov/fulltext/ED087573.pdf.

[67] Prucha, *supra* note 38, at 374 n.29; Canby, *supra* note 5, at 25.

[68] Pevar, *supra* note 5, at 10. 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." *Id.* n.48 Commissioner of Indian Affairs, *Annual Report*, 1934, at 90.

and Indian cultures."[69] Congress passed the Indian Reorganization Act (Wheeler–Howard Act) in 1934,[70] adopting much of his program, including efforts to strengthen and modernize tribal governments.[71] "The 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."[72]

The purpose of the IRA 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."[73] Major features of the IRA included provisions for the following: 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); and requiring the Secretary of Interior to give Indians preference in employment for BIA positions.

Between 1934 and 1953, "Indian land holdings increased by over two million acres, and federal funds were spent to improve reservation roads, homes, health facilities, community schools, and irrigation systems, and tribal governments experienced a revitalization."[74] The IRA stopped further reduction of the tribal land base. The "encouragement of tribal self-government enjoyed a more limited success."[75] However, scholars note, "[O]n 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."[76]

g. Termination Policy (1953 to 1969)

Congress abruptly changed federal Indian policy again in 1953, adopting a 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.[77] The BIA began a survey of tribes suitable for termination, which resulted in the termination of more than 100 tribes by congressional action, primarily in Oregon and California.[78] Upon termination, "the tribe's property was distributed to its members or to a tribal corporation. Once the property was distributed, the reservation was eliminated, and tribal members became subject to state law."[79]

Another product of termination policy was the enactment of Public Law 83-280,[80] which is commonly referred to as Public Law 280. Public Law 280 gave five states (California, Minnesota, Nebraska, Oregon, and Wisconsin[81]) extensive criminal and civil jurisdiction in Indian country.[82] Alaska also received this grant of criminal and civil jurisdiction in Indian country under Public Law 280 in 1958.[83] Public Law 280 also gave the remaining states the option of assuming such jurisdiction.[84] Out of 44 "option" states, only 10 assumed jurisdiction under Public Law 280.[85] 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."[86]

h. Self-Determination Policy (1969 to Present)

The Termination Era was short-lived, and by 1959, "the Eisenhower administration backed off any further pursuit

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[69] Prucha, *supra* note 38, at 374–75.

[70] 73 Pub. L. No. 383, 48 Stat. 984 (1934) (codified, as amended, at 25 U.S.C. §§ 5101-44(2018)).

[71] Prucha, *supra* note 38, at 374–75.

[72] Canby, *supra* note 5, at 25.

[73] Pevar, *supra* note 5, at 10 n.50, 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. 1267,1272, 36 L. Ed. 2d 114, 121 (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, 975, 94 L. Ed. 2d 10, 18 (1987); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335, 103 S. Ct. 2378, 2387, 76 L. Ed. 2d 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).

[74] Pevar, *supra* note 5, at10.

[75] Canby, *supra* note 5, at 26.

[76] *Id.* at 27.

[77] H. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

[78] Pevar, *supra* note 5, at 67 n.73: American Indian Policy Review Commission, Final Report, at 447- 53.

[79] *Id.* at 67-68, n.71 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)."

[80] Act of Aug. 15, 1953, Pub. L. No. 83-28, 67 Stat. 588, ch. 505 amending ch. 53 of 18 U.S.C. to add § 1162 and ch. 85 of 28 U.S.C. to add § 1360.

[81] Note that Public Law 280 never granted the State of Minnesota any additional jurisdiction on the Red Lake Reservation and never granted the State of Oregon additional jurisdiction over the Warm Springs Reservation. Also note that Public Law 280 did not take away jurisdiction from Indian tribes; thus, tribes retain jurisdiction in Indian country resulting in situations where concurrent jurisdiction exists. *See* section C for additional information.

[82] Later court decisions clarified that Public Law 280 is not a grant of civil regulatory jurisdiction to the states in Indian country. *See* section C.3 for additional information.

[83] Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545.

[84] Pub. L. No. 83-280, §§ 6, 7.

[85] Pevar, *supra* note 5, at 125: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington.

[86] Canby, *supra* note 5, at 29 citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).; *See also*, Canby, *supra* note 5, at 265-291, Chapter VII, at Public Law 280: A Federal Grant of Jurisdiction to the States.

of termination without Indian consent, which was decidedly lacking."[87] Wildenthal observes that the historical timing of the U.S. Supreme Court's unanimous decision in *Williams v. Lee*[88] 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."[89] The issue in *Williams* was whether the Arizona State courts had jurisdiction over a suit brought by Lee, a non-Indian store merchant on the Navajo Reservation, to collect for goods sold on credit to Williams, a Navajo Indian. Williams motioned to dismiss on the grounds that jurisdiction lay in the tribal court rather than state court. His motion was denied. The Supreme Court, however, held that the motion should have been granted, concluding the following:

> 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.[90]

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."[91]

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."[92] The same year Congress passed the Indian Civil Rights Act of 1968 (ICRA),[93] 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 ICRA amended Public Law 280 to require tribal consent for states to assume civil and criminal jurisdiction over Indian country.[94] In addition, a procedure was enacted providing for states to retrocede jurisdiction previously assumed under Public Law 280.[95] By 1992, six states had retroceded jurisdiction to some extent.[96]

Building on President Johnson's rejection of termination policy, President Nixon called for a federal policy of "self-determination" for the Indian tribes in a landmark message in 1970. He denounced 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."[97] 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.[98] This consensus has produced a significant number of legislative enactments advancing "self-determination" for Indian tribes.[99]

The first piece of legislation in this era was the Indian Education Act of 1972,[100] 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."[101] Next came the Indian Financing Act of 1974,[102] establishing a revolving loan fund to aid development of Indian resources. Then came the

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[87] Wildenthal, *supra* note 27, at 31.

[88] 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

[89] Wildenthal, *supra* note 27, at 86.

[90] Williams, 358 U.S. at 223,79 S. Ct. at 272, 3 L. Ed. 2d at 255., citing Lone Wolf v. Hitchcock, 187 U.S. 553, 564-566, 23 S. Ct. 216, 221, 47 L. Ed. 299, 306 (1903).

[91] 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).

[92] Pevar, *supra* note 5, at 12 n.65 citing, 4 Gov't Printing Office, Presidential Documents, Weekly Compilation Of, no. 10 (1968).

[93] Pub. L. No. 90- 284, 82 Stat. 77 (codified at 25 U.S.C. § 1301 -1341(2018)).

[94] 25 U.S.C. §§ 1321-22, 1326 (2018).

[95] 25 U.S.C. § 1323. (2018).

[96] Pevar, *supra* note 5 at 126-127.

[97] *Id*. at 12.

[98] Wildenthal *supra* note 27, at 31.

[99] *See* Cohen, *supra* note 5, at 93-108. *See also* Canby, *supra* note 5, at 33, 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, "Proclamation 6407 of March 2, 1992", 57 Fed. Reg. 7873 (March 4, 1992), 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 trial self-determination." *Id*. at 7873. 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. Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22, 951 (May 4, 1994). This was further endorsed by President Clinton in 2000, Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000), President George W. Bush in 2004, Executive Order 13336 of April 30, 2004, American Indian and Alaska Native Education, 69 Fed. Reg. 25,293 (May5, 2000), and President Obama in 2009, Tribal Consultation Memorandum of November 5, 2009, 74 Fed. Reg. 57,879 (Nov. 9, 2009).

[100] Pub. L. No. 92-318, 86 Stat. 235-334 (1972).

[101] American Indian Policy, *supra* note 91, at 253.

[102] Pub. L. No. 93-262, 88 Stat. 77 (codified at 25 U.S.C. §§ 1451 -1543 (2018).

Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA),[103] The ISDEAA along with other legislation important to Indian transportation law are as follows:

- The ISDEAA directs the Secretary of the Interior and the Secretary of Health and Human Services, upon request of a tribe, to contract with tribal organizations for specified programs administered by their departments for the benefit of Indians, including construction programs.[104] Relative to subcontracting, 25 U.S.C. § 5307(b) requires all federal agencies, to the greatest extent feasible, 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.[105]

In connection with employment, 25 U.S.C. § 5407(b)(1) requires all federal agencies —to the greatest extent feasible—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.

- The Archaeological Resources Protection Act of 1979 (ARPA)[106] provides for the protection and management of archaeological resources, and specifically requires notification of the affected Indian tribe if the 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)[107] in the promulgation of uniform regulations.
- AIRFA resulted from a joint resolution to establish a policy to remedy and alleviate the suppression of the practice of Indian religions, though it provided no enforcement remedy. Section 1 of the Act states 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)[108] requiring that the views of Indian leaders 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.[109] A more detailed discussion of AIRFA is at section K.2.c of this digest entitled "Environmental and Related Issues."

- The Indian Gaming Regulatory Act of 1988 (IGRA)[110] requires states that do not totally prohibit gambling (meeting certain criteria) to negotiate compacts with Indian tribes that want to establish gambling operations.[111] Congress enacted IGRA

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[103] Pub. L. No. 93-638 (Jan. 7, 1975), 88 Stat. 2205, 25 U.S.C. §§ 5301 - 5423. (formerly, 25 U.S.C. §§ 450e *et seq*.).

[104] 25 U.S.C. § 5321(a); formerly, 25 U.S.C. § 450f(a).

[105] *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. Constitution and upholding the preference for Indian-owned construction companies in HUD 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." *Id*. at 992. 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 Indians as part of the broader population.

[106] Pub. L. No. 96-95, 93 Stat. 721 (1979) (codified at 16 U.S.C. § 470aa-470mm (2018)). The federal regulations interpreting ARPA are at 43 C.F.R. § 7.

[107] Pub. L. No. 95-341; 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996-1996b).

[108] Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C.§§4321-4370m-12)

[109] Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983).

[110] Pub. L. No. 100–497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–2721 (2018)).

[111] *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. L.A. 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. 255 (1993).

in response to the U.S. Supreme Court decision in *California v. Cabazon Band of Mission Indians*,[112] where the Court held that neither the state nor the county had authority to enforce its gambling laws within the reservations of the Cabazon and Morongo Bands of Mission Indians in Riverside County, California. In *Cabazon*, the Court followed the rule in *Bryan v. Itasca County*[113] that even in Public Law 280 states, state law may be applicable when it is prohibitory and inapplicable when it is regulatory. Both tribes, through 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 7-2 opinion, Justice White reasoned that Public Law 280 did not authorize state regulation because the state law at issue was not criminal/prohibitory (noting in footnote 11 that "it is doubtful that Pub. 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 (a practice condemned by the Court in *Washington v. Confederated Tribes of the Colville Indian Reservation*[114]), stating:

> [The] decision in this case turns on whether state authority is preempted by the operation of federal law; and "[s]tate jurisdiction is preempted…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.[115]

> While noting that the State's concern that organized crime would be attracted to the high stakes games, the court noted this factor as "a legitimate concern…we are unconvinced that it is sufficient to escape the preemptive force of federal and tribal interests apparent in this case" and "the prevailing federal policy continues to support these tribal enterprises…."[116]

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."[117] The Act requires Indian tribes to appropriate the profits from gaming activities for specified purposes including to fund tribal government operations or programs and to promote economic development.[118] One section of IGRA, dealing with newly acquired trust lands, has particular relevance to states. Section 2719(a) prohibits gaming on lands acquired in trust for Indian tribes after October 17, 1988. However, it provides for 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.

- The Native American Graves Protection and Repatriation Act (NAGPRA)[119] applies to the human remains of Native American peoples, to funerary objects, and to sacred and cultural patrimony objects. It also governs the intentional excavation or removal of Native American human remains and objects from federal or tribal lands. NAGPRA prohibits excavation or removal unless authorized by permit under the ARPA.[120] 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.[121] This Act is discussed in more detail at section K.2.c. of this digest entitled "Laws Addressing Cultural and Religious Concerns."

3. Historical Background—Indian Law

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

Three opinions by Chief Justice John Marshall, known as the Marshall Trilogy, established the foundational principles of American Indian law. The primary principle established by the Marshall Trilogy is federal plenary power in Indian affairs. In the first case, *Johnson v. McIntosh*,[122] the Court held that Indians had only a right of possession to land, with legal title and the power to transfer ownership resting only in the federal government. In the second case, *Cherokee Nation v. Georgia*,[123] the Court clarified the status of Indian tribes within the legal framework of the United States as being neither states nor foreign nations, but "domestic dependent nations…in a state of pupilage." In the third case, *Worcester v. Georgia*,[124] 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.

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

[112] 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987).

[113] 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 710 (1976).

[114] 447 U.S. 134, 155, 100 S. Ct. 2069, 2082, 65 L. ed. 2d 10, 30 (1980)

[115] Cabazon, 480 U.S. at 216, 107 S. Ct. at 1092, 94 L. Ed. 2d at 260.

[116] *Id*. at 221, 107 S. Ct. at 1094, 94 L. Ed. 2d at 263.

[117] 25 U.S.C. §2702(1).

[118] 25 U.S.C. § 2710(b)(2)(B).

[119] 101 Pub. L. No. 601, 104 Stat. 3048 (1990) (Codified at 25 U.S.C §§ 3001–3013, 18 U.S.C. § 1170).

[120] 16 U.S.C. §§ 470aa–470mm

[121] San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 887–88 (2003).

[122] 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823).

[123] 30 U.S. 1, 8 L. Ed. 25 (1831).

[124] 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832).

plaintiffs. The defendant claimed ownership under a grant from the United States. The court held that the Indian conveyances were invalid. In the opinion, Chief Justice Marshall reasoned 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[125]…. So, too, with respect to the concomitant principle, that Indian inhabitants are to be considered merely as occupants, to be protected. . .in the possession of their lands, but to be deemed incapable of transferring the absolute title to others[126]…. [t]heir 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….[127]

- *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 asserted "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."[128] 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 pathmarking opinion for the majority, concluding that

> The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts…[129][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."[130]

As to the legal status of Indian tribes, Chief Justice Marshall penned the following language, which formed the basis for the principle that the federal government has a "trust responsibility" to tribes:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned 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.[131]

- *Worcester v. Georgia* is considered the more important of the Cherokee cases; it establishes the foundation for federal jurisdiction 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 for 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."[132] Chief Justice Marshall identified the issue as "whether the act of the legislature of Georgia, under which the plaintiff [Worcester] in error has been prosecuted and condemned, be consistent with, or repugnant to, the constitution, laws and treaties of the United States."[133] 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."[134] 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. * * *[135] 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 which the plaintiff in error was prosecuted is consequently void, and the judgment a nullity….[136]

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

Beyond establishing federal plenary power in Indian affairs, the Marshall Trilogy also established the following enduring principles:[137]

> 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 tribes' dependence on the United States, the government has a trust responsibility relative to Indians and their lands.

[125] *Id*. at 587, 5 L. Ed. at 692.

[126] *Id*. at 591, 5 L. Ed. at 693.

[127] *Id.* at 603, 5 L. Ed. at 696.

[128] *Cherokee Nation*, 30 U.S. (5 Pet.) at 15, 8 L. Ed. at 30.

[129] *Id.* at 16, 8 L. Ed. at 30.

[130] *Id*. at 20, 8 L. Ed. at 31.

[131] *Id*. at 17., 8 L. Ed. 31.

[132] *Worcester*, 31 U.S. at 537, 8 L. Ed. at 492.

[133] *Id.* at 541, 8 L. Ed. at 494.

[134] *Id.* at 547, 8 L. Ed. at 496.

[135] *Id.* at 551, 8 L. Ed. at 500.

[136] *Id.* at 561, 8 L. Ed. at 501.

[137] Deskbook, *supra* note 15, at 8.

c. Federal Trust Responsibility

The federal government entered into more than 600 treaties with Indian tribes between 1787 and 1871 when Congress ended treaty making. [138] Many of these treaties explicitly provided for territorial protection by the United States and numerous treaties declared the tribes' status to be that of a dependent nation.[139] During the period of "extinguishment" of aboriginal title and establishment of reservations, the concept of a federal trust responsibility to Indians evolved judicially.[140] It first appeared in *Cherokee Nation v. Georgia*,[141] where Chief Justice Marshall concluded that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations…in a state of pupilage…[with t]heir relation to the United States resembl[ing] that of a ward to his guardian."[142]

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."[143] The Court in *Seminole Nation v. United States* went on to describe this trust obligation:

> 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.[144]

In 1977, the American Indian Policy Commissions issued a final report to the U.S. Congress that expressed 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.[145]

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 nothing to prevent Congress from attempting to disregard 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 trust obligations.[146]

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[147] 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*,[148] 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.[149]

d. Canons of Construction[150]

There are canons of construction specific to Indian law. Citing *Choctaw Nation v. United States*,[151] 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."[152] Treaties are federal law[153] and "it is well established that treaties should be construed liberally in favor of Indians […]."[154] In *Choctaw*, it was the opinion of the Court that courts,

> may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties….

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[138] 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.

[139] Cohen, *supra* note 5, at 26, n.25.

[140] *See generally*, *Id.* at 220–21.

[141] 30 U.S. 1, 8 L. Ed. 25 (1831).

[142] *Id.* at 17, 8 L. Ed. at 31.

[143] Seminole Nation v. United States, 316 U.S. 286, 296, 62 S. Ct. 1049, 1054, 86 L. Ed. 1480, 1490 (1942).

[144] *Id*. at 296–97. 62 S. Ct. at 1054, 86 L. Ed. at 1490.

[145] American Indian Policy Review Commission, Final Report, at 130 (May 17, 1977).

[146] Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (1975), citing Squire v. Capoeman, 351 U.S. 1, 7-8, 76 S. Ct. 611, 100 L. Ed. 883 (1956).

[147] Cohen, *supra* note 5, 412-416.

[148] 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983).

[149] Writing for the majority, Justice Thurgood Marshall stated:

> 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]. *Id*.at 226, 103 S. Ct. at 2972-2973, 77 L. Ed.2d at 597.

[150] *See generally*, Deskbook, *supra* note 15, at 40-51; Canby, *supra* note 5, at 122-130; Prucha, *supra* note 38, at 386–87.

[151] 318 U.S. 423, 431–432, 63 S. Ct. 672, 87 L. Ed. 877 (1943).

[152] County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247, 105 S. Ct. 1245, 1258, 84 L. Ed. 2d 169, 187 (1985).

[153] Litigation based on treaty-rights can arise in ways that may be not be expected by states. Take for example United States v. Washington, 853 F.3d 946 (2017), in which an equally divided Supreme Court in a *per curiam* order affirmed the lower court's ruling directing the State to correct culverts that violated a treaty with the tribes which provided for a "a sufficient quantity of fish to satisfy their moderate living needs." 2018 U.S. LEXIS 3501, June 11, 2018.

[154] *Oneida*, 470 U.S. at 247, 105 S. Ct. at 1258, 84 L. Ed. 2d at 187.

> 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).[155]

The same general rule of liberal construction has been applied by the Supreme Court to "statutes passed for the benefit of the dependent Indian tribes or communities,"[156] and even to tax exemptions.[157] The U.S. Court of Appeals for the Ninth Circuit 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."[158] Canby notes that "the usual rule is that the canon of sympathetic construction has more strength than the ordinary canons of statutory interpretation."[159] 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."[160]

Canby goes on to use two cases to demonstrate how "the presumption against unexpressed exemption"[161] 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."[162] In the first case, *Cree v. Flores*,[163] 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 *Ramsey v. United States*,[164] 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."[165]

C. JURISDICTION IN INDIAN COUNTRY

The following sections provide a basic outline for understanding jurisdiction in Indian country. It is not always easy to determine which government entities have the authority to make and enforce law on a reservation or in other types of Indian country. Before delving into the court cases that establish the framework for jurisdiction in Indian country, it is important to understand three things: tribes retain inherent tribal sovereignty; being Indian and/or a member of a tribe is a legal status that changes how laws apply to an individual; and the types of land make up "Indian country." Indian country is the area where questions arise about which government entities (e.g., tribes, states, federal government) get to make and enforce law. With this background in mind, the next sections will explore federal civil jurisdiction in Indian country, state civil jurisdiction in Indian country, tribal civil jurisdiction in Indian country, and criminal jurisdiction in Indian country.

1. Concepts Necessary to Understand Jurisdiction in Indian Country

a. Inherent Tribal Sovereignty

Beginning with the opinions of Chief Justice Marshall in *Cherokee Nation v. Georgia*[166] and *Worcester v. Georgia*,[167] the U.S. Supreme Court 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 these 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.'" [168] The nine most important areas of tribal self-government are:

1. Forming a government;

2. Determining tribal membership;

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[155] *Choctaw Nation of Indians,* 318 U.S. at 433, 63 S. Ct. at 678. 87 L. Ed. at 877. Chief Justice Marshall established the principle in Worcester v. Georgia, 31 U.S. at 582, 8 L. Ed. at 505, "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."

[156] Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 89, 39 S. Ct. 40, 42, 63 L. Ed. 138, 141 (1918).

[157] Carpenter v. Shaw, 280 U.S. 363, 366, 50 S. Ct. 121, 122, 74 L. Ed. 478, 481 (1930).

[158] Confederated Tribes of Chehalis Indian Reservation v. State of Washington, 96 F.3d 334, 340 (1996) (citations omitted).

[159] Canby, *supra* note 5, at 129-130, citing Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766, 105 S. Ct. 2399, 2403, 85 L. Ed. 2d 753, 759 (1985), stating "The standard principles of statutory construction do not have their usual force is cases involving Indian law."

[160] *Id.* at 128, citing Chickasaw Nation v. United States, 534 U.S. 84 (2001).

[161] *Id.* at 129.

[162] *Id.* quoting Cree v. Flores, 157 F. 3d 762, 674 (9th Circuit 1998).

[163] 157 F.3d 762 (9th Cir. 1998).

[164] 302 F.3d 1074 (9th Cir. 2002).

[165] *Id.* at 1076.

[166] 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831).

[167] 31 U.S. 515, 8 L. Ed. 483 (1832).

[168] Indian Country, U.S.A. v. Okla. Tax Comm'n, 829 F.2d 967, 976 (10th Cir. 1987), citing California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (quoting United States v. Mazurie, 419 U.S. 544, 557 and Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980)); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331–33, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983).

3. Regulating tribal property;

4. Regulating individual property;

5. The right to tax;

6. The right to maintain law and order;

7. The right to exclude nonmembers from tribal territory;

8. The right to regulate domestic relations;

9. The right to regulate commerce and trade.[169]

In its early decisions, the Court viewed the Indian nations as having distinct boundaries within which their jurisdictional authority was exclusive—a "territorial test." However, the Court has now rejected the broad assertion that the federal government has exclusive jurisdiction in Indian country for all purposes, and in *Mescalero Apache Tribe v. Jones*[170] cautioned as follows:

> 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 (citations omitted).[171]

While it is true that tribes retain inherent sovereignty, jurisdiction within reservation boundaries, and in Indian country generally, became much more complex in the years following the Marshall Trilogy.

b. Indians and Tribal Membership

For legal purposes, the term "Indian," is defined in a variety of ways in statutes and case law. For example, the definition in the IRA is this:

> 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 the present boundaries of any Indian 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 peoples of Alaska shall be considered Indians.[172]

The definition in the Indian Child Welfare Act[173] is, "any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation…."[174] Likewise, the ISDEAA defines "Indian" as "a person who is a member of an Indian tribe."[175] There are also common law, multi-factored tests used to determine whether an individual is an Indian for legal purposes, particularly in the context of federal criminal law.[176] Most commonly, the law defines "Indian" as a member of an Indian tribe.[177] Under 25 USC § 4103 (13) (a) the term Indian tribe means a tribe that is a federally recognized or state recognized tribe. The next sections will discuss in more detail how this impacts jurisdiction.

c. What is Indian Country?

Although the term "Indian reservation"[178] has been historically used, is more commonly known, and appears in scores of provisions of the U.S. Code, the controlling term of art for jurisdictional purposes is actually "Indian country." This is the area where practitioners should have questions about which government entities may make and enforce law.[179] The term Indian country has its origins in the first Indian treaty after the Continental Congress declared its jurisdiction over Indian tribes on July 12, 1775.[180] The treaty guaranteed the Delaware Indians "all their territorial rights in the fullest and most ample manner…"[181] and in describing the territory controlled by Indians, used the term "Indian country."[182] Thereafter, the term was used in various criminal statutes relating to Indians, but usually was not defined.[183] The U.S. Supreme

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[169] Pevar, *supra* note 5, at 88-111.

[170] 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

[171] *Id.* at 148, 93 S. Ct. at 1270, 36 L. Ed. 2d at 119.

[172] *See* 25 U.S.C. § 5129.

[173] Pub. L. No. 95-608, 92 Stat. 3069 (1987) (codified at 25 U.S.C. §§ 1901-1963).

[174] 25 U.S.C. § 1903 (3).

[175] 25 U.S.C. § 5404(d).

[176] *See for example*, United States v. Rogers, 45 U.S. 567, 11 L. Ed. 1105 (1846); United States v. Cruz, 554 F.3d 840 (9th Cir. 2009).

[177] 25 U.S.C. § 2201 (2) (A).

[178] *See* Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 36 S.D. L. Rev. 246 (1989); Cohen, *supra* note 5, at 183-202; Deskbook, *supra* note 15, at 116-17; Pevar, *supra* note 5, at 21-24.

[179] Indian Country, U.S.A. v. Okla. Tax Comm'n, 829 F.2d 967, 973 (10th Cir. 1987) citing Solem v. Bartlett, 465 U.S. 463, 465 n.2, 124 S. Ct. 1161, 79 L. Ed. 2d 443 (1984); DeCoteau v. Dist. County Court, 420 U.S. 425, 427–28 & n.2, 95 S. Ct. 1082, 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 5, at 183-202m ("Indian country" is usually the governing legal term for jurisdictional purposes).

[180] 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."

[181] "Treaty with the Delawares," Sept. 17, 1778, 7 Stat. 13.

[182] "The Trade and Intercourse Act of 1790," 1 Cong. ch. 33, 1 Stat. 137.

[183] *See* United States v. John, 437 U.S. 634, 649 n.18, 98 S. Ct. 2541, 2549, 57 L. Ed. 2d 489, 501 (1978), where the Court notes:

> 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, 35 S. Ct. 449, 57 L. Ed. 820 (1913).

Court eventually developed a common law definition[184] which was adopted by Congress in its 1948 revision of the Major Crimes Act.[185] This definition was based on several Supreme Court decisions interpreting the term as it was used in various criminal statutes relating to Indians.[186] In revising the Act, Congress deleted the express reference to "reservation" in favor of the term "Indian country." The term is defined in 18 U.S.C. § 1151:[187]

> Except as otherwise provided in sections 1154 and 1156[188] of this title, the term "Indian country," as used in this chapter, 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.

Even though 18 U.S.C. § 1151 is part of the federal criminal code, the U.S. Supreme Court has stated that the definition is also generally applicable to questions of civil jurisdiction.[189] Thus, understanding the types of land referred to in the definition of Indian country at 18 U.S.C. § 1151, and understanding common types of land ownership on reservations, are both essential for practitioners. The remainder of this section will cover these topics.

There are two broad categories of land ownership on reservations: trust land and fee land.

- Trust land: In a trust, one party (the trustee) has legal ownership of something of value (like land) for the benefit of another party (the beneficiary). The trustee has legal responsibilities to the beneficiary, including acting in the beneficiary's best interest. The federal government holds legal title to land for tribes and individual Indians. The beneficial interest in the land (profits and other benefits of land ownership) belong to either the tribe or individual Indian. When the federal government holds title to land for an individual Indian, the land is called allotted trust land. When the land is held in trust for a tribe, the land might be called tribal trust land. The federal government carries out its trust responsibilities through the BIA, which is part of the Department of the Interior. While most trust land is inside reservation boundaries, it can also be found outside reservation boundaries.
- Fee land: There are two broad categories of fee land, restricted fee land and unrestricted fee land. The tribe or individual Indian holds legal title to restricted fee land, but the federal government places certain restrictions on the land including restrictions against encumbrance (e.g., liens, easements) and alienation (selling or transferring the land). The BIA must give approval for this type of land to be encumbered or alienated. Restricted fee land owned by an individual Indian is called a restricted allotment. Restricted fee land can be found inside and outside reservation boundaries. Unrestricted fee land is fee simple land; this is the most common type of land ownership in the United States. Individual Indians and tribes can own unrestricted fee land. Non-Indians can also own unrestricted fee land, even inside reservation boundaries. Fee simple land owned by an individual Indian might be called fee patent or patent-in-fee.

Indian country includes the following categories:

- Reservations. The term "reservation" derives from the practice of tribes "reserving" land for themselves in treaties with the federal government. Prior to 1850, the definition of the term "Indian reservation" was a "parcel of land set aside by the federal government for Indian use."[190] The modern meaning, since 1850, has been "land set aside under federal protection for the residence of tribal Indians."[191] Reservations may have been created by treaty, executive order, or an act of Congress. All land inside reservation boundaries is Indian country, even land owned in fee simple by a non-Indian. Land inside reservation boundaries remains Indian country even where a right-of-way has been granted. Note that sometimes reservation boundaries are clearly defined, but there may be disputes about boundary lines or even the existence of a reservations. This is discussed in more detail in section D.
- Dependent Indian Communities. A dependent Indian community is land that is not a reservation or allotment which is federally supervised and set aside for the use of Indians.[192] Dependent Indian communities are often found on tribal trust land outside of reservation boundaries. However, there is no requirement that dependent Indian communities be located on tribal trust land or even land owned by a tribe.[193] Circuit courts have found the following to be dependent Indian communities: a school for Indian children outside a reservation or allotment located on land owned by the United States;[194] a tribal housing

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[184] *John*, 437 U.S. at 647 n.16, 98 S. Ct. at 2548, 57 L. Ed. 2d at 499 and *Id*. at 649 n.18, 98 S. Ct. at 2549, 57 L. Ed. 2d at 500. For example, *see* United States v. McGowan, 302 U.S. 535, 58 S. Ct. 286, 82 L. Ed. 410 (1938), 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 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.']" *Id*. at 538-539, 58 S. Ct. at 288, 82 L. Ed. 413-414.

[185] Pub. L. No. 80-772, 62 Stat. 683 §1153 (1048).

[186] *John*, 437 U.S. 634, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978).

[187] *Id.* at 647 n.16, 98 S. Ct. at 2548, 57 L. Ed. 2d at 499.

[188] Defining "Indian country" differently for purposes of federal law dealing with possessing and dispensing of intoxicants.

[189] DeCoteau v. District County Court, 420 U.S. 425, 427 n.2, 95 S. Ct. 1082, 1084, 43 L. Ed. 2d 300, 304 (1975).

[190] Sac and Fox Nation of Mo. v. Norton, 240 F.3d 1250, 1266 (10th Cir. 2001).

[191] *Id.* at 1264.

[192] Alaska v. Native Village of Venetie, 522 U.S. 520, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998).

[193] United States v. M.C., 311 F. Supp. 2d 1281 (10th Cir. 2004).

[194] *Id*.; Pevar, *supra* note 5 at 29 & n.30 citing U.S. v. South Dakota, 665 F. 2d 837 (8th Cir. 1981), *cert denied*. 459 U.S. 823 (1983); U.S. v. Martine, 442 F. 2d. 1022 (10th Cir. 1971).

project;[195] and a tribal government building on off-reservation trust land.[196]

- Allotments. Allotments are land owned by, or held in trust for, an individual Indian. The term derives from the General Allotment Act (Dawes Act) which authorized dividing tribal lands into individual tracts (allotments) and assigning those lands to individual Indians with the "surplus" land being opened to European settlers. For additional historical background see section B.2.e of this digest entitled "Allotment and Assimilation Policy (1887 to 1934)."

Simply knowing whether an area is Indian country does not answer the question of which entities have jurisdiction or which laws apply, but it is a first step in attempting to answer this question.

2. Civil Jurisdiction—Federal Jurisdiction in Indian Country

Most of the time federal law applies in Indian country, but there are some limited exceptions. Since the U.S. Congress possesses plenary power over Indian affairs, in determining whether a federal law applies in Indian country, the question is not, "Can Congress apply this law in Indian country," but rather, "Has Congress chosen to apply this law in Indian country?" The question, then, is one of Congressional intent. [197]

The basic rule is that laws of general applicability (laws that apply to a broad scope of people) also apply in Indian country.[198] Most laws are laws of general applicability. The limited exception to this basic rule is when a federal law limits a specific right reserved to Indians; in these instances, for the law to apply in Indian country there must be clear and plain congressional intent showing that Congress meant to apply the law to Indians. Such laws will be held to apply where Indians or tribes are expressly covered, and also where it is clear from the statutory terms that coverage was intended.[199]

The Eighth Circuit Court of Appeals applied this test in a case involving a claim under the federal Age Discrimination in Employment Act of 1967 (ADEA).[200] The claim was brought by the Equal Employment Opportunity Commission (EEOC) on behalf of a tribal member against a tribe and a tribally owned construction company. The court found that the ADEA was a law of general applicability, but held that the case before it—relating to a tribal member, a tribe, and a tribally owned company working primarily on the reservation—involved matters strictly internal to the tribe so that ADEA did not apply because it would limit the specific right of tribal self-governance and there was no clear and plain congressional intent to apply the law on Indian reservations.[201] When discussing what constitutes a specific right reserved to Indians for purposes of this analysis, the court noted as follows:

> Although the specific Indian right involved usually is based upon a treaty, such rights may also be based upon statutes, executive agreements, and federal common law. See *Dion,* 476 U.S. at 745 n. 8, 106 S. Ct. at 2223 n. 8 ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty.") (citations omitted); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141, 102 S. Ct. 894, 903, 71 L. Ed. 2d 21 (1982) ("Tribe's authority to tax non-Indians who conduct business on the reservation ... is an inherent power necessary to tribal self-government and territorial management."); *Santa Clara Pueblo*, 436 U.S. at 55-56, 98 S. Ct. at 1675 (Indian tribes have the right to regulate their internal and social relations, to make their own substantive law in internal matters, and to enforce that law in their own forum) (citations omitted). As this court has previously stated, "areas traditionally left to tribal self-government, those most often the subject of treaties, have enjoyed an exception from the general rule that congressional enactments, in terms applying to all persons, includes Indians and their property interests." *United States v. White,* 508 F.2d 453, 455 (8th Cir. 1974) (footnotes omitted).[202]

In summary, 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. Most federal laws apply in Indian country.

3. Civil Jurisdiction—State Jurisdiction in Indian Country

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.[203] Still later, the trend was "away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on a federal pre-

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[195] Pevar, *supra* note 5, at 171, but *see also*, Narragansett Indian Tribe v. Narragansett Electric Company, 89 F.3d 908, 911, 912-22 (1st Cir. 1996).

[196] Pevar, *supra* note 5, at 129 & n.32 citing U.S. v. Roberts, 185 F.3d 1125 (10th Cir. 1999), *cert. denied,* 529 U.S. 1108 (2000).

[197] Cohen, *supra* note 5, at 113-116.

[198] Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960).

[199] Cohen, *supra* note 5, at 113-116.

[200] Pub. L. No. 202, 81 Stat. 602 (codified at 29 U.S.C. §§621-634).

[201] EEOC v. Fond du Lac Heavy Equipment and Construction Co., Inc., Fond du Lac Band of Lake Superior Chippewa, 986 F.2d 246 (8th Cir. 1993).

[202] *Id.* at 248.

[203] Williams v. Lee, 358 U.S. 217, 220, 79 S. Ct. 269, 270, 3 L. Ed. 2d 251, 254 (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."

emption [pre-emption test]"[204] which asked whether federal action had preempted any state action.

Today, the test for determining whether a state law applies within the boundaries of an Indian reservation can be summarized as follows: (1) Where Congress has specifically given states authority to enforce a law, or type of law, within reservations boundaries the state law applies; or (2) a state law applies within reservation boundaries if the state law in question is not federally preempted and does not unlawfully infringe on the right of Indians living on reservations to make their own laws and be ruled by them. The remainder of this section considers both routes to state jurisdiction.

- Where Congress has specifically given states authority to enforce a law, or type of law, within reservations boundaries the state law on that topic applies. There are limited instances where Congress has given states authority to enforce particular types of laws on Indian reservations. For example, Congress has given states authority to enforce sanitation and quarantine laws on Indian reservations.[205] There is, however, no general law conferring upon states civil regulatory jurisdiction over Indian reservations. This is true even in Public Law 280 states. The civil jurisdiction provided to Public Law 280[206] states 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 the areas of Indian country."[207] The civil jurisdiction provided does not extend to the full range of state civil regulatory authority.[208]

For practitioners in Public Law 280 states,[209] before proceeding to the preemption and infringement test described below, it is important to determine whether the state law in question is a civil-regulatory law or a criminal-prohibitory law. The test below applies only to a state's civil-regulatory laws whereas Public Law 280 states have broader authority to apply criminal-prohibitory laws. A civil-regulatory law is a law that permits but regulates conduct, whereas a criminal-prohibitory law prohibits conduct. The U.S. Supreme Court clarified this principle in *California v. Cabazon Band of Mission Indians*,[210] a case involving an attempt by the state and county to regulate gambling (bingo and draw poker) on the reservations of the Cabazon and Morongo Bands of Mission Indians. In that case, the Supreme Court stated that: "[W]hen 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."[211]

The Court went on to describe the distinction between civil-regulatory and criminal-prohibitory laws this way:

> [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.[212]

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….[213] In light of the fact that California permits a substantial

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[204] McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172, 93 S. Ct. 1257, 1262, 36 L. Ed. 2d 129, 135 (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 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." *Id*. at 344, 103 S. Ct. at 2391, 76 L. Ed. 2d at 627.

[205] Pevar, *supra* note 5, at 128 n.55 citing 25 U.S.C. § 231.

[206] 28 U.S.C. § 1360. *State civil jurisdiction in actions to which Indians are parties*

> Each of the States 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 to the same extent that such State has jurisdiction over other civil causes of action and those civil laws of such State 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.
>
> Note that this does not divest tribes of any jurisdiction. Accordingly, in Public Law 280 states, tribes and the state may have concurrent jurisdiction over some civil actions. [Included in the chart were Alaska, California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin].

[207] Bryan v. Itasca County, 426 U.S. 373, 383-385, 96 S. Ct. 2102, 2108-2109, 48 L. Ed. 2d 710, 718-719 (1976).

[208] Okla. Tax Comm'n v. Potawatomi Tribe, 498 U.S. 505, 513, 111 S. Ct. 905, 911, 112 L. Ed. 2d 1112, 1123 (1991), citing Bryan v. Itasca County, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976), Rice v. Rehner, 463 U.S. 713, 734, n.18, 103 S. Ct. 3291, 3303, 77 L. Ed. 2d 961, 979 (1983), and California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208–10, and 209 n.8, 107 S. Ct. 1083, 1087-1089, and 1088 n.8, 94 L. Ed. 2d 244, 255-256, and 255 n.8 (1987).

[209] When researching the applicability of Public Law 280 in their state, practitioners should note that some states may have a grant of authority over some,but not all, reservations in the state under Public Law 280. They should also be mindful that many states retroceded (gave back) jurisdiction that was once conferred by Public Law 280 over some, or all reservations, and that criminal jurisdiction and jurisdiction over civil actions can be retroceded separately, meaning that a state may have jurisdiction over civil actions arising on a particular reservation under Public Law 280, but may not have the criminal jurisdiction granted under Public Law 280 on that same reservation.

[210] 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987).

[211] *Id*. at 208, 107 S. Ct. at 1088, 94 L. Ed. 2d at 254.

[212] *Id.* at 209, 107 S. Ct. at 1088, 94 L. Ed. 2d at 255.

[213] *Id.* at 210, 107 S. Ct. at 1088-1089, 94 L. Ed. 2d at 255.

> 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.…[214] 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.[215]

In summary, before proceeding to the test below, all practitioners should consider whether Congress has granted states authority to enforce the type of law in question, and practitioners in Public Law 280 states should also consider whether the law in question is a criminal-prohibitory law that the state has broader authority to enforce, or a civil-regulatory law that should be analyzed using the following test.

A state law applies within reservation boundariesif the state law in question is not federally preempted and does not unlawfully infringe on the right of Indians living on reservations to make their own laws and be ruled by them. The preemption analysis in Indian law cases differs from traditional preemption analysis because the courts will find preemption even in the absence of congressional intent. Federal preemption of state regulation of Indians can take 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. For this third type of preemption, bear in mind that tribes and the federal government have a shared interest in promoting tribal sovereignty, self-sufficiency, and economic development that will be balanced against the state interest in determining whether the state regulation conflicts with federal policies.[216] Even if a court finds that a state regulation is not federally preempted, the law still may not be applied on an Indian reservation if it "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."[217] The "two barriers [of infringement and preemption] are [considered] independent because either standing alone can be a sufficient basis for holding state law inapplicable."[218]

The principles for applying these two tests were set out by the Supreme Court in the 1980 decision *White Mountain Apache Tribe v. Bracker*,[219] in which the Court held that motor carrier license and use fuel taxes paid by a logging company under contract to sell, load, and transport timber on a reservation, were preempted by federal law and therefore not applicable on the Fort Apache Reservation. In a 6-3 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.[220]

Justice Marshall's opinion provided distinct standards for applying the "infringement" and "preemption" tests when state authority in Indian country is challenged, he 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.…[221] (emphasis added).

Reviewing the body of case law on this topic results in the following general observations: it is difficult for a state to enforce its regulatory laws against a tribal member on the reservation in which they are enrolled (largely because of the infringement test), but states are often able to enforce regulatory law on non-Indians on reservations. However, it is important to keep in mind that state efforts to exercise authority in matters affecting tribes continue to be subject to the particularized inquiry standard described above, and each regulatory law needs to be

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[214] *Id.* at 211, 107 S. Ct. at 1090, 94 L. Ed. 2d at 256.

[215] *Id.* at 212, 107 S. Ct. at 1090, 94 L. Ed. 2d at 256. Foerster 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. Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. Rev. 1333, 1359 (1999).

But see *San Manual Indian Bingo and Casino*, 341 NLRB 1055 (2004), where the NLRB overturned 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 1075 (2004), where the Board found no NLRB jurisdiction in Alaska Native health facility. Arguably, one distinction in these cases is that unlike the gaming facility, only Alaska Natives could utilize the health facility.

[216] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980). Note, however, that the Supreme Court has explicitly rejected this balancing test in the context of taxation cases. *See* Oklahoma Tax Commission v. Chicksaw Nation, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995) which is discussed later in this section.

[217] Williams v. Lee, 358 U.S. 217, 220, 79 S. Ct. 269, 271, 3 L. Ed. 2d 251, 256 (1959).

[218] *White Mountain Apache Tribe*, 448 U.S. at. 143, 100 S. Ct. at 2583, 65 L. Ed. 2d at 672.

[219] 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980).

[220] *Id.* at 152.

[221] *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).

analyzed and researched individually to determine its applicability within an Indian reservation.

While most cases on this topic deal with the applicability of state regulatory laws on reservations, case law indicates that there are also limits to state regulatory jurisdiction in off-reservation Indian country. Consider the following cases:

- *DeCoteau v. District Court* [222]: The question before the Supreme Court in this case was whether the reservation had been terminated. The parties to the case agreed that if the land was Indian country, the state did not have jurisdiction and that if the reservation had not been terminated, the land was Indian country. In a footnote, the Court stated:

> If the lands in question are within a continuing "reservation," jurisdiction is in the tribe and the Federal Government "notwithstanding the issuance of any patent, [such jurisdiction] including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151(c). Even within "Indian country," a State may have jurisdiction over some persons or types of conduct, but this jurisdiction is quite limited. *See, e.g., McClanahan v. Arizona State Tax Comm'n,* 411 U. S. 164; *Williams v. Lee,* 358 U. S. 217; Worcester v. Georgia, 6 Pet. 515. While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.[223] (citations omitted)

- *U.S. v. South Dakota*[224]: The Eighth Circuit Court of Appeals affirmed the lower court's order which held that a tribal housing project located on tribal trust land was a dependent Indian community and restrained the State of South Dakota from asserting jurisdiction over the housing project.

- *Indian Country U.S.A. v. Oklahoma Tax Commission*[225]: holding that an off-reservation tract of land that was owned by the tribe, but not held in trust, was Indian country and therefore the state could not regulate or tax bingo activities on the land. The court stated:

> Although section 1151 [25 U.S.C. § 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. Numerous cases confirm the principle that the Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands. See, e.g., id.; *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. District 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. District Court*, 400 U.S. 423 (1971); *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980); see also Cohen's Handbook of Federal Indian Law 27-46 (R. Strickland ed. 1982) [hereinafter Cohen's Handbook] ('Indian country' usually the governing legal term for jurisdictional purposes); F. Cohen, Handbook of Federal Indian Law 5-8 (1942) ('Indian country' generally determines allocation of tribal, federal, and state authority). We note that the Supreme Court of Oklahoma has also recognized the importance of this classification:
>
> 'The touchstone for allocating authority among the various governments has been the concept of `Indian Country,' a legal term delineating the territorial boundaries of federal, state and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian Country have been matters of federal and tribal concern. Outside Indian Country, state jurisdiction has obtained.'
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> *Ahboah v. Housing Auth. of the Kiowa Tribe*, 660 P.2d 625, 627 (Okla. 1983); see *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77, 79-82 n. 26 (Okla. 1985) (recognizing relevance of Indian country classification in eastern Oklahoma, formerly Indian Territory).
>
> The State contends on appeal that the Mackey site is not Indian country because it is not a "reservation," nor is the fee title held in trust by the federal government for the Creek Nation. For the reasons set out below, we conclude that under both historical and contemporary definitions, the Mackey site has retained its status as Indian country and land reserved under the jurisdiction of the federal government and the Tribe.[226]

- *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*[227]: This case involved a tribe that was selling cigarettes at a convenience store that it owned on off-reservation trust land. The Oklahoma tax commission sent a letter demanding that the tribe pay back taxes on the cigarette sales. The tribe sued to enjoin the assessment and the tax commission counterclaimed to enforce the assessment and enjoin the tribe from making future sales without collecting and paying taxes to the state. The tribe motioned to dismiss the counterclaim on the basis of sovereign immunity. The Supreme Court held that the tribe was entitled to sovereign immunity for conduct on the off-reservation trust land and stated:

> The issue presented in this case is whether a State that has not asserted jurisdiction over Indian lands under Public Law 280 may validly tax sales of goods to tribesmen and nontribal members occurring on land held in trust for a federally recognized Indian tribe. We conclude that, under the doctrine of tribal sovereign immunity, the State may not tax such sales to Indians, but remains free to collect taxes on sales to nontribal members.[228]

- *Oklahoma Tax Commission v. Sac and Fox Nation*[229]: involved attempts by the Oklahoma Tax Commission to tax the income of tribal members and impose vehicle taxes and registration fees on tribal members. The Tax Commission argued that the tribe did not have an established reservation, but instead had allotted trust lands, and thus was not immune from the state taxes. The Court vacated the judgment and remanded the case to the lower court for it to determine whether the tribal members that the state was attempting to tax lived in Indian country. In doing so the Court stated:

> But our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in "Indian country." Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments,

[222] 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975).

[223] *Id.* at 427 n.2, 95 S. Ct. at 1084, 43 L. Ed. 2d at 304.

[224] 665 F.2d 837 (8th Cir. 1981).

[225] 829 F.2d 967 (10th Cir. 1987).

[226] *Id*. at 973

[227] 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991).

[228] *Id.* at 507, 111 S. Ct. at 908, 112 L. Ed. 2d at 1118.

[229] 508 U.S. 114, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993).

whether restricted or held in trust by the United States. See 18 U. S. C. § 1151.[230]

It went on to say:

> If the tribal members do live in Indian country, our cases require the court to analyze the relevant treaties and federal statutes against the backdrop of Indian sovereignty. Unless Congress expressly authorized tax jurisdiction in Indian country, the McClanahan presumption counsels against finding such jurisdiction.[231]

- *Oklahoma Tax Commission v. Chicksaw Nation*[232]: This Supreme Court decision addressed two questions: (1) May Oklahoma impose its motor fuels excise tax upon fuel sold by Chickasaw Nation retail stores on tribal trust land; (2) May Oklahoma impose its income tax upon members of the Chickasaw Nation who are employed by the tribe but who reside in the state outside Indian country.

The Court answered these questions as follows:

> We hold that Oklahoma may not apply its motor fuels tax, as currently designed, to fuel sold by the Tribe in Indian country. In so holding, we adhere to settled law: when Congress does not instruct otherwise, a State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country. We further hold, however, that Oklahoma may tax the income (including wages from tribal employment) of all persons, Indian and non-Indian alike, residing in the State outside Indian country.[233]

The Court also expressly rejected application of the balancing test to certain taxation cases, stating:

> We have balanced federal, state, and tribal interests in diverse contexts, notably, in assessing state regulation that does not involve taxation, see, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-217, 107 S.Ct. 1083, 1091-1092, 94 L.Ed.2d 244 (1987) (balancing interests affected by State's attempt to regulate on-reservation high-stakes bingo operation), and state attempts to compel Indians to collect and remit taxes actually imposed on non-Indians. See, e.g., *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483, 96 S.Ct. 1634, 1646, 48 L.Ed.2d 96 (1976) (balancing interests affected by State's attempt to require tribal sellers to collect cigarette tax on non-Indians; precedent about state taxation of Indians is not controlling because "this collection burden is not, strictly speaking, a tax at all").
>
> But when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: 'Absent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians." *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258, 112 S. Ct. 683, 688, 116 L.Ed.2d 687 (1992) (citation omitted). Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country. See, e.g., *Bryan v. Itasca County*, 426 U.S. 373, 96 S. Ct. 2102, 48 L.Ed.2d 710 (1976) (tax on Indian-owned personal property situated in Indian country); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 165-166, 93 S. Ct. 1257, 1258-1259, 36 L.Ed.2d 129 (1973) (tax on income earned on reservation by tribal members residing on reservation).[234]

[230] *Id.* at 123, 113 S. Ct. at 1991, 124 L. Ed. 2d at 39.

[231] *Id.* at 126, 113 S. Ct. at 1992, 124 L. Ed. 2d at 41.

[232] 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995).

[233] *Id.* at 453, 115 S. Ct. at 2217, 132 L. Ed. 2d at 405.

[234] *Id.* at 458, 115 S. Ct. at 2220, 132 L. Ed. 2d at 409.

- *Alaska v. Native Village of Venetie Tribal Government*[235]: In this case, the Supreme Court held that the land at issue was not a dependent Indian community and was therefore not Indian country. The Court's opinion, however, discussed the definition of Indian country at 25 U.S.C. § 1151[236] and stated, "Although this definition by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction such as the one at issue here. See *DeCoteau v. District County Court for Tenth Judicial Dist.*" (internal citation omitted).[237]

The footnote following this language stated, "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."[238] (citation omitted).

4. Tribal Jurisdiction—Tribal Jurisdiction in Indian Country

a. Tribal Regulatory and Adjudicatory Jurisdiction in Indian Country

The Marshall Trilogy placed two limitations on tribal sovereignty due to tribes' status as "domestic dependent nations:"[239] (1) tribes could not freely alienate their land, and (2) they could not make treaties with foreign nations. For almost 150 years, the U.S. Supreme Court did not add to these non-statutory limitations on tribal sovereignty. However, the jurisdictional landscape has since become much more complex. Today, a tribe has jurisdiction over its members unless Congress specifically directs otherwise. Except where Congress has specifically provided for tribal jurisdiction, determining when a tribe has adjudicatory or regulatory jurisdiction over nonmembers is an extraordinarily complex and fact-specific undertaking. The modern rules for determining when tribes have jurisdiction over nonmembers, as well as the confusion and complexity surrounding these rules, is best understood by reviewing a series of Supreme Court decisions. A basic understanding of land ownership on reservations is necessary to understand the cases discussed in this section; a summary of land ownership on reservations can be found at section C.1.c. of this digest entitled "What is an Indian Country?" This section will review the following decisions one-by-one in more detail to orient the reader and highlight the shifts in law over time. Ownership of the underlying land is important in each case.

- *Oliphant v. Suquamish Indian Tribe*[240]: The Court began to formulate a modern doctrine for determining the

[235] 522 U.S. 520, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998).

[236] *See* section C.1.c in this digest.

[237] *Native Village of Venetie,* 522 U.S. at 527, 118 S. Ct. at 952, 948, 140 L. Ed. 2d at 37-38.

[238] *Id.* at 527 n.1, 118 S. Ct. at 952, 140 L. Ed. 2d at 37 Citing South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 118 S. Ct. 789, 139 L. Ed. 2d 773 (1998).

[239] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17, 8 L. Ed. 25(1831).

[240] 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 909 (1978).

extent of tribal sovereignty. In Oliphant, the Court placed limitations on a tribe's ability to obtain criminal jurisdiction over non-Indians.

- *Montana v. United States*[241]: The Court extended the Oliphant decision by substantially limiting tribal jurisdiction over nonmembers on non-Indian fee lands within reservation boundaries, holding that generally tribes do not have regulatory jurisdiction over nonmembers on non-Indian fee lands. The Court articulated two exceptions—now known as the *Montana* exceptions—to this general rule: (1) a tribe may have regulatory jurisdiction over nonmembers who enter a consensual relationship with the tribe, and (2) a tribe may have regulatory jurisdiction over a nonmember when the nonmember's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.
- *Merrion v. Jicarilla Apache Tribe*[242]: The Court held that the tribe had regulatory authority to tax nonmembers on trust lands. The Court did not mention the *Montana* decision, arguably highlighting the fact that the *Montana* rule applied only to non-Indian fee lands and not trust lands.
- *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*[243]: This case involved the regulatory authority of a tribe to zone nonmember fee land within reservation boundaries that the county had already zoned. The Court held that the tribe could zone a "closed area" of the reservation that was primarily undeveloped tribal land to which nonmember access was restricted, but that the tribe could not zone an "open area" of the reservation. The Court wrote three separate opinions providing different reasoning and conclusions. The opinion that the largest number of justices signed emphasized the word "may" in the *Montana* exceptions; essentially stating that a tribe might have regulatory authority if a *Montana* exception exists, but that it "depends on the circumstances"[244] and that the *Montana* exceptions were inapplicable to the question of zoning authority at issue in the case.
- *Strate v. A-l Contractors*[245]: The Court applied the *Montana* rule to determine whether the tribe had adjudicatory jurisdiction to hear a matter arising out of a car accident on a highway running through the reservation. In applying the *Montana* rule, the Court likened the right-of-way to alienated non-Indian fee land.
- *Atkinson Trading Co. v. Shirley*[246]: The Court held that the tribe did not have regulatory jurisdiction to tax non-Indian occupants of a hotel operating on non-Indian owned fee land within reservation boundaries. The Court applied the *Montana* test, noting that the burden of establishing that one of the *Montana* exceptions exists is on the tribe. The Court also noted that for the tribe to obtain jurisdiction over a nonmember, there must be a nexus between the consensual relationship and the regulation imposed. In essence, this means that a consensual relationship does not result in all of the tribe's regulations applying to the nonmember; only those regulations with a sufficient connection to the consensual relationship will apply to the nonmember. The Court distinguished its decision in *Merrion v. Jicarilla Apache Tribe*, by pointing out that *Merrion* involved trust land, whereas the instant case involved non-Indian fee land thus making the *Montana* rule applicable.
- *Nevada v. Hicks*[247]: This decision was made in the same term as the *Atkinson* decision. In *Hicks*, the Court applied the *Montana* test to conduct occurring on tribal trust land to hold that the tribe did not have adjudicatory jurisdiction to hear a civil action against state game wardens who—along with tribal officers—had entered trust land to execute state and tribal search warrants. In applying the *Montana* rule on trust lands, the Court pointed out that Oliphant did not involve distinctions based on land status. The Court also noted that a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction, leaving open the question of whether a tribe's legislative jurisdiction might be broader than its adjudicative jurisdiction. The decision in *Hicks* was subsequently read both broadly, to apply the *Montana* rule to all attempts by tribes to obtain jurisdiction over nonmembers regardless of the land status (e.g., whether the activity at issue took place on trust land or non-Indian fee land),[248] and narrowly, as extending the *Montana* rule to trust lands only in instances that involve tribal court jurisdiction over state officers enforcing state law.
- *Plains Commerce Bank v. Long Family Land & Cattle Co.*[249]: The Court held that the tribal court did not have adjudicatory jurisdiction over a civil suit against a nonmember bank arising out the sale of a property on non-Indian fee land within reservation boundaries. Because this case involved non-Indian fee land, it did little to provide clarity about how narrowly or broadly to read the Court's opinion in *Hicks*.
- *Dollar General Corporation v. Mississippi Band of Choctaw Indians*[250]: The Fifth Circuit Court of Appeals upheld the tribe's adjudicatory jurisdiction to hear a claim against a nonmember based on the "consensual relationship" *Montana* exception. The conduct at issue took place on trust land, but the court merely mentioned this fact in passing essentially assuming that the *Montana* rule applied regardless of the land status.[251] The petition for certiorari likewise assumed that the *Montana* rule applied. The Supreme Court granted cert, but ultimately issued a 4-4 decision with no precedential value and no written opinion

[241] 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

[242] 445 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982).

[243] 492 U.S. 408, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989).

[244] *Id.* at 429, 109 S. Ct. at 3007, 106 L. Ed. 2d at 362.

[245] 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).

[246] 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001).

[247] 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).

[248] *See for example,* Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir. filed Jan. 10, 2006); Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa, 609 F.3d 927 (8th Cir. filed July 7, 2010).

[249] 554 U.S. 316., 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2007).

[250] 136 S. Ct. 2159, 195 L. Ed. 2d 637 (2016).

[251] Dolgencorp, Inc. and Dollar General Corp v. Mississippi Band of Choctaw Indians, 732 F.3d 409 (5th Cir. 2013) (opinion substituted by 746, F. 3d 167 (5th Cir. 2014).

beyond a simple order affirming the lower court's holding and noting that the Court was equally divided.

The tendency of lower courts over time has been to favor a broad reading of *Hicks* that applies the *Montana* rule to all matters involving tribal adjudicatory and regulatory jurisdiction over nonmembers regardless of the land status involved; this is despite the fact that in *Hicks*, the Supreme Court highlighted the narrow nature of the holding in a footnote. Nevertheless, the foregoing case summary makes it clear that the jurisdictional landscape is complex and unanswered questions remain. With this birds-eye view in mind, the remainder of this section will discuss some of the cases previously highlighted in greater detail.

- *Oliphant v. Suquamish Indian Tribe*[252]: Non-Indian residents of the Port Madison Reservation in Washington, Mark David Oliphant and Daniel B. Belgrade, were arrested by tribal authorities. Oliphant was charged with assaulting a tribal officer and resisting arrest. After a high-speed race along reservation highways, Belgrade was charged with "recklessly endangering another person" and "injuring tribal property."[253] The tribe argued that it had inherent sovereign authority to exercise criminal jurisdiction over non-Indians.[254] The Court held that criminal prosecution of non-Indians was outside the inherent sovereign powers of the tribe due to the tribe's status as a domestic dependent nation. The Court stated: "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 * * *[255] Indian tribes do not have inherent jurisdiction to try and to punish non-Indians…." [256] One commentator notes that these "new inherent limitations on tribal sovereignty…represented a significant potential threat to tribal governmental power."[257]
- *Montana v. United States*[258]: Montana 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 reservation boundaries. Due to the sale of fee-patented lands under the Allotment Acts, about 30 percent of the Crow reservation was owned in fee by non-Indians.[259] Both the State of Montana and the Crow Tribe were regulating fishing by non-Indians on non-Indian-owned fee lands within the reservation. The Court found that relevant treaties did not give the tribe authority to regulate hunting and fishing on land owned by non-Indians and that the tribe did not have inherent powers as a sovereign to engage in such regulation. The Court stated the following in regard to the "inherent powers" 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.[260] (Emphasis added)

The Court opined that while the tribe may regulate nonmember hunting and fishing on land belonging to the tribe or held in trust for the tribe, that the tribe usually cannot exercise jurisdiction over nonmembers on non-Indian fee lands within reservation boundaries. The Court, however, noted that there are two exceptions to this general rule; tribes may exercise some forms of civil jurisdiction over nonmembers on non-Indian fee lands within reservation boundaries if one of the following exceptions exists:[261]

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 two exceptions listed above are now known as the *Montana* exceptions. The Court provided a list of cases fitting within these two exceptions. The four cases listed as falling within the first exception were as follows:[262]

- *Williams v. Lee*.[263] Holding that the tribal court—not state court—had jurisdiction over a lawsuit arising out of an on-reservation sales transaction between a nonmember plaintiff and member defendants.

[252] 435 U.S. 191, 98 S. Ct. 1011,55 L. Ed.2d 209 (1978).

[253] *Id*. at 194, 98 S. Ct. at 1014, 55 L. Ed.2d at 213.

[254] *Id*. at 196, 98 S. Ct. at 1014, 55 L. Ed.2d at 213.

[255] *Id.* at 210, 98 S. Ct. at 1021, 55 L. Ed.2d at 222

[256] *Id*. at 212, 98 S. Ct. at 1022, 55 L. Ed.2d at 223.

[257] Canby, *supra* note 5, at 78.

[258] 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

[259] *Id.* at 548, 101 S. Ct. at 1249, 67 L. Ed. 2d at 499-500.

[260] *Id.* at 564, 101 S. Ct. at 1258, 67 L. Ed. 2d at 510.

[261] *Id.* at 565–66, 101 S. Ct. at 1258, 67 L. Ed. 2d at 510-511.

[262] *Id.;* Strate v. A-1 Contractors, 520 U.S. 438, 457, 117 S. Ct. 1404,1415, 137 L. Ed. 2d 661, 677-678 (1997).

[263] 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

- *Morris v. Hitchcock*.[264] Upholding a tribal permit tax on nonmember-owned livestock within reservation boundaries.
- *Buster v. Wright*.[265] Upholding the tribe's permit tax on nonmembers for the privilege of conducting business within the tribe's borders; the Court characterized as "inherent" the tribe's "authority…to prescribe the terms upon which noncitizens may transact business within its borders."[266]
- *Washington v. Confederated Tribes of Colville Indian Reservation*.[267] 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."[268]

The Court also listed four cases falling within the second *Montana* exception:

- *Fisher v. District Court*.[269] 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*.[270] Holding a tribal court exclusively competent to adjudicate a claim by a non-Indian merchant seeking payment from tribal members for goods bought on credit at an on-reservation store.
- *Montana Catholic Missions v. Missoula County*.[271] "[T]he 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."[272]
- *Thomas v. Gay*.[273] "[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."[274]

Before the decision in *Montana*, tribal authority to regulate was based upon geography; essentially, tribes could regulate all activity and land within reservation boundaries. Under the rule articulated in *Montana*, tribal sovereignty was reduced to a mixture of geography and tribal membership.

- *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*[275]: The dispute in this case was about the authority of the tribes to impose zoning regulations on two pieces of property owned in fee by nonmembers when the area at issue was already zoned by the county. The reservation was divided informally into an "open area" and a "closed area," with one fee-owned property at issue located in the open area. The other fee-owned property at issue was in the closed area, 97 percent of which was tribal land containing no permanent residents and described as an "undeveloped refuge of cultural and religious significance,"[276] with restricted access to nonmembers. The Court wrote 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, said that the tribe could zone the nonmember fee property in the closed area, but not the open area.

This split decision resulted in the tribe's authority to zone being upheld only as to the closed area. Justice White's opinion is significant because in it four justices departed from the analysis in *Montana*, holding that tribal regulatory jurisdiction over nonmember fee lands was not necessarily prohibited, even when conduct (over-development) threatened the political integrity, the economic security, or the health and welfare of the tribe (the second *Montana* exception).[277]

- *Strate v. A-l Contractors*[278]: The Court's decision in this case is important to state highway agencies with right-of-way over Indian reservations. Before this decision, the Montana rule covered only the regulatory authority of a tribe over nonmembers. But in this case, the Court extended the Montana rule to a case addressing the adjudicatory authority of tribes, stating: "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."[279]

The suit arose out of a collision between the plaintiff who was a nonmember wife of a deceased tribal member and a nonmember defendant who was an employee of a contractor doing business with the tribe on the reservation. 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 Eighth Circuit Court of Appeals, the Court found that the state's federally granted right-of-way over tribal trust land was the "equivalent, for nonmember governance purposes,

[264] 194 U.S. 384, 24 S. Ct. 712, 48 L. Ed. 1030 (1904).

[265] 135 F. 947 (Cal. 8th 1905).

[266] *Id*. at 950.

[267] 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).

[268] *Id.* at 152, 100 S. Ct. at 2081, 65 L. Ed. 2d at 28.

[269] 424 U.S. 382, 386, 96 S. Ct. 943, 946, 47 L. Ed. 2d 106, 111 (1976).

[270] *Lee*, 358 U.S. at 220, 79 S. Ct. at 271, 3 L. Ed. 2d at 254.

[271] 200 U.S. 118, 26 S. Ct. 197, 50 L. Ed. 398 (1906).

[272] *Id*. at 128-129, 26 S. Ct. at 211.

[273] 169 U.S. 264, 18 S. Ct. 340, 42 L. Ed. 740 (1898).

[274] *Id*. at 273, 18 S. Ct. at 343, 42 L. Ed. at 744.

[275] 492 U.S. 408, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989).

[276] *Id*. at 441, 109 S. Ct. at 3013, 106 L. Ed. 2d at 370.

[277] Montana v. United States, 450 U.S. 544, 565, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493, 510 (1981).

[278] 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).

[279] *Id.* at 442, 117 S. Ct. at 1407, 137 L. Ed. 2d at 668.

to alienated, non-Indian land."[280] In reaching this conclusion, 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.[281] The Court reasoned that the tribe's loss of the "'right of absolute and exclusive use and occupation…implied the loss of regulatory jurisdiction over the use of the land by others.'[282] [and that] "[a]s to nonmembers…a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[283] It therefore concluded that *Montana*, "the pathmarking case concerning tribal civil authority over nonmembers,"[284] was the controlling precedent.

After concluding that *Montana* was the applicable precedent, the Court rejected assertions that either of the two *Montana* 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"), 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….[285] 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.[286]

- *Atkinson Trading Co. v. Shirley*[287]: 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 occupants of a hotel operating on non-Indian owned fee land on the Navajo Reservation. There was no dispute that the hotel benefited from the Navajo Nation's police and fire protection. However, the Court invalidated the tax, holding that the Montana rule applied "straight up," that such a tax upon nonmembers on non-Indian fee land was "presumptively invalid," and that neither of the Montana exceptions applied.[288] The opinion distinguished the Court's ruling in Merrion v. Jicarilla Apache Tribe,[289] in which the Court upheld 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.'"[290]

In rejecting the applicability of the first *Montana* exception ("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 tribe and subverts the territorial restriction upon tribal power.[291]

Furthermore, in rejecting the applicability of the second *Montana* exception, the Court described a high bar for conduct that would fall within the second *Montana* exception:

> [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."[292][U]nless the drain of the nonmember's conduct upon tribal services and re-

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[280] *Id.* at 454, 117 S. Ct. at 1413, 137 L. Ed. 2d at 676; *Accord*, Wilson v. Marchington, 127 F.3d 805 (9th Cir. filed Sept. 23, 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 the first *Montana* exception ("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." *Id.* at 1064.).

[281] *See Strate*, 520 U.S. at 455–56, 117 S. Ct. at, 1414, 137 L. Ed. 2d at 676. *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 (9th Cir. filed Oct. 18, 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…." *Id*. 536. "The BIA right-of-way is not granted to the State, and forms no part of the State's highway system." *Id*. 539.

[282] *Strate*, 520 U.S. at 456, 117 S. Ct. at, 1414, 137 L. Ed. 2d at 676, quoting South Dakota v. Bourland, 508 U.S. 679, 689, 113 S. Ct. 2309, 2316, 124 L. Ed. 2d 606, 619 (1993).

[283] *Id*. at 453, 117 S. Ct. at, 1413, 137 L. Ed. 2d at 675.

[284] *Id*. at 445, 117 S. Ct. at, 1409, 137 L. Ed. 2d at 670.

[285] *Id.* at 457-458, 117 S. Ct. at, 1415, 137 L. Ed. 2d at 678.

[286] *Id*. at 459, 117 S. Ct. at, 1415, 137 L. Ed. 2d at 679. See also Michael Boxx v. Long Warrior, 265 F.3d 777 (9th Cir. 2001) (amended opinion reported at 2001 U.S. App. LEXIS 24917 (9th Cir. filed Sept. 6, 2001) (an alcohol-related truck rollover accident was not such a safety concern to tribe as to fall within the second *Montana* exception); County of Lewis v. Allen, 163 F.3d 509 (9th Cir. filed Dec. 11, 1998), suit by a tribal member for false arrest by a county deputy on tribal lands, the court of appeals, in finding the first *Montana* exception inapplicable, stated "*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.").

[287] 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001).

[288] *Id*. at 647, 654, 659, 121 S. Ct. at 1832, 1835, 149 L. Ed. 2d at 889, 902.

[289] 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982).

[290] *Atkinson Trading*, 532 U.S. at 653, 121 S. Ct. at 1831, 149 L. Ed. 2d at 898 citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137, 102 S. Ct. 894, 901, 71 L. Ed. 2d 21, 29 (1982).

[291] *Id*. at 655, 121 S. Ct. at 1833, 149 L. Ed. 2d at 900.

[292] *Id*. at 657, 121 S. Ct. at 1834, 149 L. Ed. 2d at 901.

> sources 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.[293]

• *Nevada v. Hicks*[294]: *Hicks* expanded the application of the *Montana* rule beyond non-Indian fee lands further diminishing the role that geography plays in determining the jurisdictional authority of a tribe. *Hicks* presented the question of whether a tribal court could 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.[295] 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 a California bighorn sheep outside reservation boundaries, which was 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 claimed that in the process his Rocky Mountain bighorn sheep heads (an unprotected species) had been damaged and that the search exceeded the bounds of the warrant. Hicks brought suit in tribal court against the tribal judge, tribal officers, state wardens, and the State of Nevada. Following a series of 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.[296] The Ninth Circuit affirmed the district court's holding that the tribal court had jurisdiction over the tortuous conduct claims against the nonmember game wardens arising from their activities on tribal trust land.[297]

The U.S. Supreme Court granted certiorari and reversed. The Court's opinion points to *Strate v. A-1 Contractors* for the principle that "As to nonmembers…a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction…."[298] The Court went on to state, "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.[299]

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."[300] The Court, however, pointed out that in *Oliphant*, the Court drew no distinctions based on the status of land in denying tribal criminal jurisdiction over nonmembers. Recognizing, however, that nonmember ownership of land was central to the analysis in both *Montana* and *Strate*, the Court still concluded 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."[301]

The opinion then proceeds to address two questions: "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, whether such regulatory jurisdiction has been congressionally conferred."[302] 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:

> 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] [303]…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 Reserva-*

[293] *Id*. at 657 n.12, 121 S. Ct. at 1834, 149 L. Ed. 2d at 901.

[294] 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).

[295] *Id.* at 355, 121 S. Ct. at 2308, 150 L. Ed. 2d at 405.

[296] *Id*. at 356–57, 121 S. Ct. at 2308, 150 L. Ed. 2d at 406.

[297] Nevada v. Hicks, 193 F.3d 1020 (1999).

[298] *Hicks,* 353 U. S. at 391, 121 S. CT. at 2326, 150 L. Ed. 2d at 428.

[299] *Id*. at 357–58, 121 S. Ct. at 2309, 150 L. Ed. 2d at 406-407. At *id*. 358 n.2, 121 S. Ct. at 2309, 150 L. Ed. 2d at 407, Justice Scalia points out:

> 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 U.S. 217 (1959). In Strate v. A-1 Contractors, 520 U.S. 438, 453 (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," without distinguishing between nonmember plaintiffs and nonmember defendants. See also *Iowa Mut. Ins. Co.* v. *LaPlante,* 480 U. S. 9, 18 (1987). 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.

[300] *Id.* at 359, 121 S. Ct. at 2310, 150 L. Ed. 2d at 408.

[301] *Id*. at 360, 121 S. Ct. at 2310, 150 L. Ed. 2d at 408.

[302] *Id*.

[303] *Id*. at 361, 121 S. Ct. at 2311, 150 L. Ed. 2d at 409.

> *tion*, 447 US 134, 156, 65 L. Ed 2d 10, 100 S Ct 2069 (1980)[304] …a proper balancing of state and tribal interests would give the Tribes no jurisdiction over state officers pursuing off-reservation violations of state law.[305]

As to the second question, the Court stated:

> 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….[306] 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….[307] 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 identify any authority to adjudicate respondents § 1983 claim.[308]

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 do not fall within the "consensual relationship" *Montana* exception.[309] 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."[310] 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,"[311] 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."[312]

- *Plains Commerce Bank v. Long Family Land & Cattle Co*.[313]: In this case, the question presented before the U.S. Supreme Court was whether a tribal court had jurisdiction to adjudicate a discrimination claim concerning a non-Indian bank's sale of fee land it owned. The court opined that it did not.

The Long Family Land and Cattle Company, an Indian-owned farming and ranching business subject to South Dakota laws and located within the Cheyenne River Sioux Indian Reservation mortgaged its land subject to an option to buy to Plains Commerce Bank, a South Dakota corporation located outside of the reservation. The mortgage loan agreement was negotiated on the reservation but signed in the Bank's off-reservation offices. The Long Company was unable to satisfy the loan agreement, including exercising their option to repurchase the land, and the Bank initiated state eviction proceedings. The Bank then parceled the land and sold these to nonmembers.

The Long Company filed a complaint in the tribal court alleging common law claims and discrimination. After losing in the tribal court system, the Bank filed an action in the federal district court claiming lack of jurisdiction of the tribal court over the discrimination claim. The district court found that the tribal court had jurisdiction over the Bank because of the nexus between the discrimination claim and the consensual relationship between the parties. The Eighth Circuit Court of Appeals agreed. However, the U.S. Supreme Court reversed the appel-

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[304] *Id*. at 361-362, 121 S. Ct. at 2311, 150 L. Ed. 2d at 409.

[305] *Id*. at 374, 121 S. Ct. at 2318, 150 L. Ed. 2d at 417. *See* Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. Rev. 1177, 1236 (2001);

> 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, even in the absence of a consensual relationship (footnotes omitted).*See also* David H. Getches, *Beyond Indian Law: The Rehniquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 Minn. L. Rev. 267, 331 (2001), at 331:
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> ···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."

[306] *Id*. at 364, 121 S. Ct. at 2312, 150 L. Ed. 2d at 411.

[307] *Id*. at 366, 121 S. Ct. at 2313, 150 L. Ed. 2d at 412.

[308] *Id*. at 374, 121 S. Ct. at 2318, 150 L. Ed. 2d at 417.

[309] *See Id*. at 359 n.3, 121 S. Ct. at 2310, 150 L. Ed. 2d at 407:

> 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.

[310] *Id*. at 392, 121 S. Ct. at 2327, 150 L. Ed. 2d at 429.

[311] *Id*. at 394, 121 S. Ct. at 2328, 150 L. Ed. 2d at 430.

[312] *Id*. at 394. Canby, *supra* note 5, at 85, 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)."

[313] 554 U.S, 316, 128 S. Ct. 2709, 171 L. Ed.2d 457 (2008).

late court, finding that the *Montana* exceptions did not apply in this case; *Montana* exceptions were meant only to permit tribal oversight of nonmember conduct that would threaten the tribe's internal affairs or self-rule and dignity. The effect of a sale of land ownership to a tribe's self-rule ends when the land passes from tribal ownership to non-Indian fee simple status.

Hicks and *Plain v. Long Family Land & Cattle Co.* are thus the culmination of a series of cases that reversed the usual presumption regarding sovereignty when the tribe's power over nonmembers is concerned at least. 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.…. 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 unless Congress authorizes it.[314] (citations omitted).

Lower courts proceeded to read *Hicks* in two ways: (1) broadly, as applying the *Montana* rule to all attempts by tribes to obtain jurisdiction over nonmembers regardless of the land status (e.g., whether the activity at issue took place on trust land or non-Indian fee land),[315]or (2) narrowly, as extending the *Montana* rule to trust lands only in instances that involved tribal court jurisdiction over state officers enforcing state law.[316] The Supreme Court in *Hicks* explicitly limited its holding to the question of tribal-court jurisdiction over state officers enforcing state law, leaving open the question of tribal-court jurisdiction over nonmember defendants in general. However, the decision in *Hicks* also contains broader language such as that found in the following passage:

> Both *Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not "assert a landowner's right to occupy and exclude," *Strate, supra*, at 456; *Montana,* supra, at 557, 564. Respondents and the United States argue that since Hicks'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. Not necessarily. While it is certainly true that the non-Indian ownership status of the land was central to the analysis in both *Montana* and *Strate,* the reason that was so was not that Indian ownership suspends the "general proposition" derived from *Oliphant* that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" except to the extent "necessary to protect tribal self-government or to control internal relations." 450 U.S., at 564—565. *Oliphant* itself drew no distinctions based on the status of land. And *Montana*, after announcing the general rule of no jurisdiction over nonmembers, cautioned that "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," 450 U.S., at 565–clearly implying that the general rule of *Montana* applies to both Indian and non-Indian land. The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is "necessary to protect tribal self-government or to control internal relations." It may sometimes be a dispositive factor.[317]

As noted in the introduction to this section, the tendency of lower courts has been to apply the *Montana* rule to all matters involving tribal adjudicatory and regulatory jurisdiction over nonmembers regardless of the land status involved. Due to the progression of the Supreme Court's decisions on tribal jurisdiction—as described in this section—it is important for practitioners to read other court decisions on this topic with an understanding of where each decision falls in the timeline of the major Supreme Court decisions described above. The precedential value of cases that pre-date some of these seminal decisions may be limited.

While Indian country is the widely acknowledged jurisdictional benchmark, there is a lack of case law directly addressing jurisdictional questions, and particularly tribal jurisdiction, in off-reservation Indian country. Nevertheless, consider the following cases on this topic:

- *Pittsburg Mining Co. v. Watchman*[318]: This case involved an attempt by the Navajo Nation to tax a mining company with a mine located on off-reservation land with a checkerboard of title including tribal trust land, non-Indian fee land, land owned by the tribe, BIA land, and land owned by the State of New Mexico. The Tenth Circuit found that part of the land area in question was Indian country and remanded to the lower court for additional factual findings necessary to determine whether other portions of the land were also Indian country. In doing so, while discussing the applicability of the tribal abstention doctrine (allowing the tribal court to hear the case before the federal court), the court stated:

> P & M [the mining company] relies upon a variety of cases, all concerning the inherent authority of Indian tribes, for its conclusion the Navajo Nation has no authority to regulate non-Indian activities on non-Indian lands. Nonetheless, we believe P M mischaracterizes the nature of this issue. The question is not whether the Navajo Nation possesses inherent authority as a sovereign to tax P M, but whether 18 U.S.C. § 1151 [defining Indian country] is a Congressional delegation of this authority throughout Indian country. As such, the cases P M cites are inapposite.
>
> P & M argues 18 U.S.C. § 1151 defines Indian country solely for criminal jurisdiction purposes. However, both the Supreme Court and this court have concluded § 1151 defines Indian country for both civil and criminal jurisdiction purposes. The Court first came to this conclusion in *DeCoteau v. District County Court*, 420 U.S. 425, 95 S. Ct. 1082, 43 L.Ed.2d 300 (1975). "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." Id. at 427

[314] Canby, *supra* note 5, at 87.

[315] *See for example*, Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir. filed Jan. 10, 2006); Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa, 609 F.3d 927 (8th Cir. filed July 7, 2010).

[316] *See for example*, McDonald v. Means, 309 F.3d 530 (9th Cir. filed Aug. 14, 2002).

[317] Nevada v. Hicks, 533 U.S. 353, 359-360, 121 S. Ct. 2304, 2310, 150 L. Ed. 2dd 398, 407-408 (2001).

[318] 52 F.3d 1531 (10th Cir. filed Apr. 19,1995). Note that the test for what constitutes a dependent Indian community used in this case was partially abrogated by the U.S. Supreme Court decision in Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998).

n. 2, 95 S. Ct. at 1085 n. 2. The Court has reaffirmed this principle in subsequent cases. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n. 5, 107 S. Ct. 1083, 1088 n. 5, 94 L.Ed.2d 244 (1987); *Oklahoma Tax Comm'n v. Sac Fox Nation*, [508] U.S. [114], [123], 113 S. Ct. 1985, 1991, 124 L.Ed.2d 30 (1993) (state could not exercise taxing authority over tribal members living in Indian country). We have consistently followed *DeCoteau*. See, e.g., *Indian Country U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987), cert. denied, 487 U.S. 1218, 108 S. Ct. 2870, 101 L.Ed.2d 906 (1988); *Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n*, 888 F.2d 1303, 1305-07 (10th Cir. 1989), *aff'd* in part and *rev'd* in part on other grounds, 498 U.S. 505, 111 S. Ct. 905, 112 L.Ed.2d 1112 (1991); *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.*), cert. denied*, [510] U.S. [994], 114 S. Ct. 555, 126 L.Ed.2d 456 (1993); *Texaco*, 5 F.3d at 1376 n. 3; *Sac Fox Nation v. Oklahoma Tax Comm'n*, 7 F.3d 925, 926 (10th Cir. 1993).[319]

We conclude these precedents establish 18 U.S.C. § 1151 defines Indian country for civil jurisdiction purposes. We hold § 1151 represents an express Congressional delegation of civil authority over Indian country to the tribes. As a result, the Navajo Nation has authority to tax any mining activities taking place in Indian country without violating any express jurisdictional prohibitions.[320]

The court's footnote following the string cite above is also informative:

Faced with these precedents, P & M argues the *DeCoteau* footnote is only dictum. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n. 2, 95 S. Ct. 1082, 1085 n. 2, 43 L.Ed.2d 300 (1975). The subsequent Supreme Court and Tenth Circuit cases following *DeCoteau* simply have repeated this general statement without analysis. P M supports this contention by asserting the four cases cited in the DeCoteau footnote do not support the proposition that § 1151 applies to civil cases. *General Motors Acceptance Corp. v. Chischilly*[321], 96 N.M. 113, 628 P.2d 683, 685 (1981) ("While this footnote may be read to support this theory, it is ambiguous and the cases cited in support of the statements in the footnote do not refer to any civil application of 18 U.S.C. § 1151."); *People of South Naknek v. Bristol Bay Borough*, 466 F. Supp. 870, 877 n. 11 (D. Alaska 1979) ("This dictum in a footnote does not settle the issue of the extent to which the definition of `Indian country' in the criminal statutes applies to a question of tax jurisdiction. In addition, the authority for this proposition cited by the Court does not support it."). We believe the principle that § 1151 defines Indian country for both civil and criminal jurisdiction purposes is firmly established. Any suggestion to the contrary in *General Motors* and *South Naknek* is simply erroneous.

We note, incidentally, that even if we agreed with P & M that the DeCoteau footnote were dictum, we still would likely be bound by the Court's rationale. "[F]ederal courts `are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement.'" *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) (brackets in original), cert. denied,[512] U.S. [1236] 114 S. Ct. 2741, 129 L.Ed.2d 861 (1994) (quoting *McCoy v. Massachusetts Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991), cert. denied, 504 U.S. 910, 112 S. Ct. 1939, 118 L.Ed.2d 545 (1992)).[322]

[319] *Id*. at 1540.

[320] *Id*. at 1540-1541.

[321] Note that this case was expressly overruled in Tempest Recovery Services, Inc. v. Belone, 74 P.3d 67 (N.M. 2003) which is discussed later in this section.

[322] *Id*. at 1541 n.10.

• *Tempest Recovery Services, Inc. v. Belone*[323]: In this case, the New Mexico Supreme Court expressly overruled its prior decision in *General Motors Acceptance Corp. v. Chischilly*[324] and held that the tribal court's jurisdiction extended to a case involving repossession of a tribal member's vehicle on the tribal member's off-reservation allotment. In doing so the court stated:

Chischilly, which is factually similar to the present case, also concerned the repossession of a vehicle on land included in the § 1151 definition of Indian Country. In finding that § 1151 defined Indian Country for criminal jurisdiction purposes only, we were unpersuaded by *Chischilly's* argument that the Supreme Court's footnote in *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975), provided authority to extend the § 1151 definition to civil jurisdiction matters. *Chischilly*, 96 N.M. at 115, 628 P.2d at 685. The relevant part of this footnote reads: "While § 1151 is concerned, on its face, only with criminal jurisdiction, the [Supreme] Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau*, 420 U.S. at 427 n.2. This Court held that the *DeCoteau* footnote was ambiguous and the cases cited as authority for it did not refer to any civil application of § 1151. *Chischilly*, 96 N.M. at 115, 628 P.2d at 685. We were concerned about the probable confusion created by the checkerboard pattern of jurisdiction and believed it would be much more manageable if the civil jurisdiction of the tribal court were simply co-extensive with the boundaries of the reservation. *Chischilly*, 96 N.M. at 114-15, 628 P.2d at 684-85. Because, with the exception of the footnote in *DeCoteau*, federal law on the subject seemed sparse, we did not feel compelled to extend the same confusing pattern of jurisdiction into the civil area.

Since *DeCoteau*, the Supreme Court and the Tenth Circuit have consistently held that § 1151 defines tribal territorial jurisdiction for both criminal and civil matters. See *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995) (holding "Oklahoma may not apply its motor fuels tax, as currently designed, to fuel sold by the Tribe in Indian country"); *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1385-86 (10th Cir. 1996) (holding that the Cheyenne-Arapaho Tribes had authority to impose a severance tax on oil and gas production occurring on allotted lands and reaffirming that such allotted lands constitute Indian Country); *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1540 (10th Cir. 1995) ("We have consistently followed DeCoteau."); *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1377 n.3 (10th Cir. 1993) ("This definition [of Indian Country], although found in the Major Crimes Act, applies to questions of both criminal and civil jurisdiction.").

The first explicit statement by the Supreme Court that § 1151's definition of Indian Country applies to questions of civil jurisdiction is found in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998). In that case, the Supreme Court addressed the term "dependent Indian communities" in § 1151(b). Id. Although that decision did not address allotted Indian lands, it is significant to our analysis of civil jurisdiction over allotted Indian lands because of the Supreme Court's explicit recognition of the language from *DeCoteau* where it noted: "Although this [§ 1151] definition by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction such as the one at issue here." Id.

This Court in a criminal case has recognized, albeit in gratis dictum, the application of § 1151 to civil jurisdiction determinations. See *State v. Frank*, 2002-NMSC-026, ¶¶ 19, 23, 132 N.M. 544, 52 P.3d 404 ("We adopt the two-prong test adopted in *Venetie* to resolve questions of

[323] 134 N.M. 133, 74 P.3d 67 (Filed June 10, 2003).

[324] 96 N. M. 113, 628 P.2d 683 (1981).

> Indian jurisdiction in civil and criminal cases."). We now expressly overrule *Chischilly*, and hold that the allotted Indian lands from which Tempest repossessed Belone's car was Indian Country pursuant to § 1151. [325]

b. Cases Addressing Tribal Jurisdiction in the Right-of-way

In addition to *Strate v. A-1 Contractors*, previously discussed, consider the following cases involving tribal jurisdiction in the right-of-way:

- *Montana Department of Transportation v. King*[326]: Relying on the decisions in *Montana* and *Strate*, the United States Court of Appeals for the Ninth Circuit 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 crossed the reservation on right-of-way owned by the state (specifically to enforce a TERO[327] against Montana DOT employees).[328] 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.[329] 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."[330] 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…."[331] citing its analysis in *Wilson v. Marchington*,[332] ultimately concluding that the easement did not create a consensual relationship (the first *Montana* exception) between the state and tribe, stating:

> 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…. [333]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.[334]

- *Nord v. Kelly*[335]: In this case a tribal member brought a claim against a non-Indian in tribal court for personal injuries arising out of an accident that occurred on a state highway within reservation boundaries. The Eighth Circuit Court of Appeals relied on the Supreme Court's decision in *Strate*, considered the instruments granting the right-of-way pursuant to federal regulations and found that the documents did not indicate that the tribe had retained a right of absolute and exclusive use and occupation and had not reserved regulatory or adjudicatory powers to itself. The court also found that the highway was still part of the state's highway system and was—as in *Strate*—the equivalent of alienated non-Indian land for purposes of regulating the activity of nonmembers. The court further found that neither of the *Montana* exceptions applied and held that the tribal court lacked jurisdiction to hear the personal injury claim brought against the non-Indian.

In *Strate*, *King*, and *Nord* each court considered how the right-of-way was created and the language in the document granting the right-of-way when determining tribal jurisdiction. It remains to be seen how the provisions relating to jurisdiction at 25 C.F.R. §§ 169.3-169.12 (grants of right-of-way over Indian lands), which retain jurisdiction for tribes and expressly disclaim state jurisdiction, will play into court decisions on this topic in the future.[336] This is an area of law that state transportation agencies should watch closely in the coming years.

c. Tribal Court "Exhaustion Rule"

Most of the time if a litigant wants to challenge the jurisdiction of a tribal court to hear a case, the litigant will need to exhaust their remedies in tribal court before they

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[325] *Belone*, 134 N.M. at 136-137, 74 P. 3d. at 70-71.

[326] 191 F.3d 1108 (9th Cir. filed Sept. 9, 1999).

[327] *See* section L.2 for a discussion of TERO Ordinances.

[328] *King* 191 F. 3d 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….

[329] *Id.* at 1111. *See* 23 U.S.C. §§ 101 *et seq*.

[330] *Id*. at 1113.

[331] *Id*. at 1113 n.1

[332] 127 F.3d 805, 813 (9th Cir. 1997).

[333] *King*, 191 F. 3d at 1113.

[334] *Id.* at 1115.

[335] 520 F.3d 848 (8th Cir. filed Apr. 4, 2008).

[336] These regulations are discussed in section H.2. The regulations state that rights-of-way granted under the 25 C.F.R. Part 169 are subject to federal law and tribal law that is not inconsistent with federal law and are generally not subject to the laws of the state and its political subdivisions. 25 C.F.R. § 169.9. They also explain that the grant of right-of-way will clarify that it does not diminish tribal jurisdiction, taxation or enforcement authority, civil jurisdiction over nonmembers, or the status of the land as Indian country. 25 C.F.R. § 169.10. Moreover, they provide that—subject only to federal law—permanent improvements in the right-of-way, activities on the right-of-way, and right-of-way interest are not subject to fees, taxes, assessments, levies or other charges imposed by a state or its political subdivisions but may be subject to taxation by the tribe with jurisdiction. 25 C.F.R. § 169.11.

can challenge jurisdiction in federal court.[337] There, are, however, exceptions to this general rule. The Supreme Court described three exceptions to the exhaustion requirement in *National Farmers Union Insurance Company v. Crow Tribe*:[338]

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.

In *Strate v. A-1 Contractors*, previously discussed, the Supreme Court added another exception to this list: when it is plain that the tribal court does not have jurisdiction over the nonmember's conduct. The Court's exact phrasing is as follows:

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. See *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 854 (1985). Therefore, when tribal court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, see supra, at 8-9, must give way, for it would serve no purpose other than delay.[339]

The Court later noted in *Nevada v. Hicks* that the factual scenario presented in *Hicks* (tribal court asserting jurisdiction over a state official in the performance of official duties) was an example of an instance where tribal court exhaustion was not required because it fell within the exception described in *Strate* since it was plain that the tribe lacked jurisdiction over the nonmember's conduct and exhaustion would serve no purpose other than delay.[340]

Finally, the U.S. Supreme Court added this narrow exception to the tribal exhaustion rule in *El Paso Natural Gas Co. v. Neztsosie*,[341] where federal law says that the claim can only be heard in federal court, exhaustion of tribal remedies is not required. In *El Paso Natural Gas Co*., the Court held tribal exhaustion was not required because the claims at issue arose out of a nuclear accident and the Price-Anderson Act places jurisdiction over such accidents solely with the federal court. While the Act was silent as to removal from tribal court, the Court found it implausible that this omission favored tribal court exhaustion stating:

> 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 apparent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal- as to state-court litigation. (Emphasis added).[342]

d. Full Faith and Credit/Comity on Judgments[343]

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*,[344] 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."[345] The court gave as an example, *United States ex rel. Mackey v. Coxe,*[346] where the Supreme 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*

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[337] National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 813 (1985). See also, Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 10, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987).

[338] *Nat'l Farmers*, 471 U.S. at 856, n.21, 105 S. Ct. at 2453, 85 L. Ed. 2d at 828.

[339] Strate v. A-1 Contractors, 520 U.S. 438, 559 n.14, 117 S. Ct. 1404, 1415, 137 L. Ed. 2d 661, 679 (1997).

[340] Nevada v. Hicks, 533 U.S. 353, 369, 121 S. Ct. 2304, 2315, 150 L. Ed. 2d 398, 413 (1994).

[341] 526 U.S. 473, 119 S. Ct. 1430, 143 L. Ed. 2d 635 (1999).

[342] *Id.* at 485–86, 119 S. Ct. at 1437, 143 L. Ed. 2d at 646.

[343] *See generally*, Canby, *supra* note 5, at 260-262; Deskbook, *supra* note 15, at 450-461; Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal/Federal Cooperation*, 36 ARIZ. St L. J. 1 (2004) (hereinafter Clinton).

[344] 127 F.3d 805 (9th Cir. 1997).

[345] *Id.* at 808. *Cf*., *See* Clinton, *supra* note 343, where Professor Clinton disagrees with the 9th Circuit 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 judgments (*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 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,'" citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 n.21 (1978).

[346] 59 U.S. 100, 103–04, 15 L. Ed. 299 (1855).

v. Bingham,[347] where the Supreme Court cited with approval *Ex Parte Morgan*,[348] in which the district court held that the Cherokee Nation was not a "territory" under the federal extradition statute. The court in *Wilson v. Marchington* noted that "State courts have reached varied results, citing either *Mackey* or *Morgan* as authority."[349] Ultimately, 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].[350]

The court went on to note that "[T]here are policy reasons which could support an extension of full faith and credit to Indian tribes…[which] are within the province of Congress 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 [declining] to extend it judicially."[351]

Recognizing that "the status of Indian tribes as 'dependent domestic nations' presents some unique circumstances,"[352] the court believed that "comity still affords the best general analytical framework for recognizing tribal judgments."[353] The court went on to cite *Hilton v. Guyot*[354] and the *Restatement (Third) of Foreign Relations Law of the United States*,[355]for the guiding principles of comity as follows:

> In synthesizing the traditional elements of comity with the special requirements of Indian law, we conclude that, as a general principle, federal courts should recognize and enforce tribal judgments. However, federal courts must neither recognize nor enforce tribal judgments 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 the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought.[356]

In defining due process for purposes of comity the court observed as follows:

> Due process, as that term is employed in comity, 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 cmt. b.[357]

The opinion went on to recognize, "[C]omity does not require that a tribe utilize judicial procedures identical to those used in the United States Courts. […] Extending comity to tribal judgments is not an invitation for…unnecessary judicial paternalism in derogation of tribal self-governance."[358]

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 a tribal court judgment."[359] The court noted:

> [T]his 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

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[347] 211 U.S. 468, 474–75, 29 S. Ct. 190, 191, 53 L. Ed. 286, 288-289 (1909).

[348] 20 F. 298, 305 (W.D. Ark. 1883).

[349] Wilson v. Marchington, 127 F.3d at 808 n.2 (9th Cir. 1997):

> 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).

[350] *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).

[351] *Id.,* at 809 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 where certain conditions are met); 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 under certain conditions). 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).

[352] *Id*. at 810.

[353] *Id*.

[354] 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1985).

[355] *Restatement (Third) of Foreign Relations Law of the United States* § 482 (1986).

[356] Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997).

[357] *Id*. at 811.

[358] *Id.*

[359] *Id.* at 813.

> nonmembers on the highway…[360] 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.[361]

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.[362]

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 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…."[363]

Subsequent to *Marchington*, the Ninth Circuit, in *Bird v. Glacier Electric Coop*.,[364] 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 statements encouraging ethnic and racial bias by an all-tribal-member jury against a corporate defendant that was owned and controlled by nonmembers. The court concluded "that the district court erred in giving comity to recognize and enforce the tribal court judgment…[365] because, in view of the closing argument the tribal court proceedings offended due process."[366]

When determining whether a tribal court order is entitled to full faith and credit, practitioners should review case law in their jurisdiction as well as state statutes and court rules to determine requirements and factors specific to their jurisdiction.

5. Criminal Jurisdiction in Indian Country[367]

While jurisdictional lines regarding crimes committed in Indian country are largely settled, jurisdictional disputes on Indian reservations often involve questions of overlapping federal, state, and tribal jurisdiction.[368] The following terse comment is pertinent:

> 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.[369]

Broadly, criminal jurisdiction on Indian reservations can be understand as summarized in the tables on the following page which are reproduced from the United States Department of Justice's Criminal Resource Manual.[370]

[The remainder of this page is intentionally blank.]

[360] *Id.* at 814.

[361] *Id*. at 815.

[362] *Id*.

[363] *Id*. at 812. See 812 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(l)(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).

[364] 255 F.3d 1136 (9th Cir. filed July 10, 2000).

[365] *Id*. at 1138.

[366] *Id.* at 1152.

[367] *See generally*, Canby, *supra* note 5, at 139-254; Veronica 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, 110 S. Ct. 2053 (1990)*, 66 Wash. L. Rev. 567 (1991); Deskbook, *supra* note 15, at 229-75; Pevar, *supra* note 5, at 142-166.

[368] 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); Eric B. White, *Falling Through the Cracks After Duro v. Reina: A Close Look at a Jurisdictional Failure*, 15 Univ. of Puget Sound L. Rev. 229, 230–35 (1991).

[369] T. Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. Kan. L. Rev. 387 (1974).

[370] U. S Department of Justice, Justice Manual, § 689, *available at*: https://www.justice.gov/usam/criminal-resource-manual-689-jurisdictional-summary (Updated September 2018).

Where jurisdiction has not been conferred on the state

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Federal jurisdiction under 18 U.S.C. § 1152 is exclusive of state and tribal jurisdiction.
Indian	Non-Indian	If listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated. If not listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but not of the tribe, under 18 U.S.C. § 1152. If the offense is not defined and punished by a statute applicable within the special maritime and territorial jurisdiction of the United States, state law is assimilated under 18 U.S.C. § 13.
Indian	Indian	If the offense is listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated. See section 1153(b). If not listed in 18 U.S.C. § 1153, tribal jurisdiction is exclusive.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach if an impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be both federal and tribal jurisdiction. Under the Indian Gaming Regulatory Act, all state gaming laws, regulatory as well as criminal, are assimilated into federal law and exclusive jurisdiction is vested in the United States.

Where jurisdiction has been conferred by Public Law 280, 18 U.S.C. § 1162

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	"Mandatory" state has jurisdiction exclusive of federal and tribal jurisdiction. "Option" state and federal government have jurisdiction. There is no tribal jurisdiction.
Indian	Non-Indian	"Mandatory" state has jurisdiction exclusive of federal government but not necessarily of the tribe. "Option" state has concurrent jurisdiction with the federal courts.
Indian	Indian	"Mandatory" state has jurisdiction exclusive of federal government but not necessarily of the tribe. "Option" state has concurrent jurisdiction with tribal courts for all offenses, and concurrent jurisdiction with the federal courts for those listed in 18 U.S.C. § 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach in an option state if impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent state, tribal, and in an option state, federal jurisdiction. There is no state regulatory jurisdiction.

Where jurisdiction has been conferred by another statute

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Unless otherwise expressly provided, there is concurrent federal and state jurisdiction exclusive of tribal jurisdiction.
Indian	Non-Indian	Unless otherwise expressly provided, state has concurrent jurisdiction with federal and tribal courts.
Indian	Indian	State has concurrent jurisdiction with tribal courts for all offenses, and concurrent jurisdiction with the federal courts for those listed in 18 U.S.C. § 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach if impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent state, federal and tribal jurisdiction. There is no state regulatory jurisdiction.

Note that a tribe's criminal jurisdiction extends to both member Indians and nonmember Indians.[371]

As discussed in the section on State Civil Jurisdiction (see section C.3), determining whether a law is a civil-regulatory law or a criminal-prohibitory law is an important step in answering jurisdictional questions in Public Law 280 states. Recall that Public Law 280 provides certain states criminal jurisdiction in Indian country, as well as jurisdiction over civil causes of action to which Indians are parties arising in Indian country, but that Public Law 280 does not grant states civil regulatory jurisdiction.[372]

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Public Law 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 Public Law 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.[373]

With this background in mind, the following sections will discuss various criminal court cases arising in Indian country that may be of interest to transportation professionals.

a. State Traffic and Motor Vehicle Statutes

The following cases address enforcement of state traffic or motor vehicle statute on reservations:

- In *County of Vilas v. Chapman*,[374] the Supreme Court of Wisconsin relied on the analysis and principles established in *Rice v. Rehner*[375] 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;[376]
2. Evaluating the balance of federal, state, and tribal interest in the regulation of Highway No. 47;[377] and
3. Determining whether the federal government had preempted state jurisdiction to regulate Highway 47 within the Lac du Flambeau Reservation.[378]

The Wisconsin Court, while noting that it found a tradition of traffic regulation by the Menominee Tribe in an earlier case, found that the Lac du Flambeau Band 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 court found that the state had a dominant interest in regulating traffic on Highway 47 for both Indians and other users of public highways.

- In *Confederated Tribes of the Colville Reservation v. Washington*,[379] the tribe sought to prohibit the State of Washington from enforcing its traffic laws on public roads within the tribe's reservation. In 1979, the state legislature "decriminalized" several traffic offenses, including speeding, and designated each a "traffic infraction," which "may not be classified as a criminal offense."[380] The Washington State courts, in other cases, had found a traffic infraction not to be a felony or misdemeanor.[381] The Ninth Circuit Court of Appeals 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."[382] The Ninth Circuit went on to opine 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."[383] 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.[384]

- *St. Germaine v. Circuit Court for Vilas County,Wis.*[385]: A habeas corpus proceeding was held following the conviction in state court of St. 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.[386] St. Germaine challenged Wisconsin's jurisdiction under Public

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[371] *See e.g.* United States v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 1651, 158 L. Ed. 2d 420, 449 (2004).

[372] *See* 18 U.S.C. § 1162; 28 U.S.C. § 1360. Bryan v. Itasca County, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976). *See* 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).]

[373] Cal. v. Cabazon Band of Mission Indians, 480 U.S. 202, 209, 107 S. Ct. 1083, 1089, 94 L. Ed. 2d 244, 255(1987).

[374] 122 Wis. 2d 211, 361 N.W.2d 699 (Wis. 1985).

[375] 463 U.S. 713, 103 S. Ct. 3291, 77 L. Ed. 2d 961 (1983).

[376] *Chapman,* 122 Wis. 2d at 216, 361 N.W.2d at 702.

[377] *Id*. at 216-217, 361 N.W.2d at 702.

[378] *Id.* at 217 at 361 N.W.2d at 702–03.

[379] 938 F.2d 146 (9th Cir. filed July 5, 1991).

[380] Wash. Rev. Code § 46.63.020.

[381] *Confederated Tribes of the Colville Reservation,* 938 F.2d at 148.

[382] *Id.* at 148-149.

[383] *Id.* at 149

[384] *Id.*

[385] 938 F.2d 75 (7th Cir. 1991).

[386] Wis. Stat. § 343.44(1)-(2).

Law 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 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.[387]

- *State of Minnesota v. Stone*[388]: 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 Public Law 280 because the traffic and driving-related laws at issue were civil/regulatory rather than criminal/prohibitory. The Minnesota Supreme Court affirmed[389] 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.[390]

The Minnesota Supreme Court went on to determine that "the broad conduct of driving is the proper focus of the *Cabazon* test,"[391] 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."[392] 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]."[393]

- *State of Minnesota v. Couture*[394]: 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. § 169.129 (1996). The court, following the two-step approach of *Stone*, and relying on its decision in *State v. Zornes*,[395] held that the statute is a criminal/prohibitory law for which Couture could be charged under Public Law 280.[396]
- *State of Minnesota v. Busse*[397]: 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. § 171.04, subd. 1 (9) (1998). His driver's license had been cancelled following 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).[398] 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."[399] The court concluded:

> 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…."[400]

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[387] *St. Germaine*, 938 F.2d at 77–78.

[388] 572 N.W.2d 725 (Minn. filed Dec. 11, 1997). However, note that the Minnesota Supreme Court held that certain civil-regulatory traffic offenses were enforceable against non-member Indians in both State v. R.M.H., 617 N.W.2d 55 (Minn. filed Aug. 25, 2000) and State of Minn. v. Davis, 773 N.W.2d 66 (Minn. filed Sept. 10, 2009).

[389] *Id*. at 727.

[390] *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.

[391] *Id*. at 731.

[392] *Id.*

[393] *Id*.

[394] 587 N.W.2d 849 (Minn. App. filed Jan. 12, 1999).

[395] State v. Zornes, 584 N.W.2d 7 (Minn. App. filed Sept. 22, 1998), held that "driving while intoxicated gives rise to heightened policy concerns" . . . "the states interest in enforcing its DWI laws presents policy concerns sufficiently different from general road safety." *Id*. at 11.

[396] *Couture,* 587 N.W.2d at 854.

[397] 644 N.W.2d 79 (Minn. App. filed May 16, 2002).

[398] *Id*. at 80–82.

[399] *Id*. at 84.

[400] *Id*. at 87-88.

b. 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 cases reflect how various courts have dealt with the issues of "hot pursuit," "stop and detain," and "arrest."

- In *State of Washington v. Schmuck*,[401] the issue was whether an Indian tribal officer had the authority to stop and detain a non-Indian who allegedly violated state and tribal law while traveling on a public road within a reservation until that person could 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….[402] 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.[403]

- In *City of Farmington v. Benally*,[404] 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 when it was almost three 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. The officer 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.[405] The district court's dismissal was affirmed by the appeals court, relying on the New Mexico Supreme Court decision in *Benally v. Marcum*:[406]

> 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. (citations omitted).[407]

- In *United States v. Patch*,[408] the Ninth Circuit affirmed a decision to convict and fine the 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. 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 Schwab knew that Patch was a tribal member, he was supposed to notify the tribal police who had jurisdiction. The pursuit ended at Patch's sister's house, where Schwab followed Patch onto the porch and attempted to detain him; during the attempt to detain Patch, Schwab 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.[409] 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, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1967)] . . . Schwab had the authority under *Terry* to stop vehicles on State Highway 95 to determine his jurisdiction to issue a citation….[410]

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.[411]

- *State of Washington v. Waters*[412] involved civil traffic infractions in West Omak, Washington, across the river from East Omak, which is on the Colville Indian Reservation.

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[401] 121 Wash. 2d 373, 850 P.2d 1332 (Filed May 6, 1993).

[402] *Id.* at 387-388, 850 P.2d at 1339-1340.

[403] *Id.*

[404] 119 N.M. 496, 892 P.2d 629 (Filed Feb. 20, 1995).

[405] *Id.* at 497, 892 P.2d at 630.

[406] 89 N.M. 463, 553 P.2d 1270 (1976).

[407] *Benally*, 89 N.M. at 497, 892 P.2d at 630.; *see* Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251, (1959).

[408] 114 F.3d 131 (9th Cir. filed May 29, 1997).

[409] *Id.* at 132–33

[410] *Id.* at 133–34.

[411] *Id.* at 134.

[412] 93 Wash. App. 969; 971 P.2d 538 (Filed Feb.11,1999).

While on patrol in a marked car, Omak City Police Sergeant Rogers (who was also a commissioned Colville Tribal Law Enforcement Officer), 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; the pursuit involved 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.[413]

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 of 1985 authorizes peace 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).[414]

D. RESERVATION BOUNDARY DISPUTES

There are instances where tribes, states, and the federal government may disagree about reservation boundaries (i.e., whether the reservation has been diminished); these entities may even disagree about whether a particular reservation exists at all (i.e., whether the reservation has been disestablished). Since all land within reservation boundaries is Indian country,[415] these disagreements can add another layer of complexity in determining which entities have jurisdiction.

Generally, cases determining whether a reservation has been diminished or disestablished involve interpreting a surplus lands act that opened up the land to settlement by non-Indians. (See section B.2.e for historical context.) The framework for determining whether a reservation has been diminished or disestablished is found in the U.S. Supreme Court case Solem v. Bartlett:[416]

> The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise. Diminishment, moreover, will not be lightly inferred.[417]

With this overarching principle in mind, the Court laid out a three-part test to determine whether a reservation has been diminished or disestablished:

1. The statutory language used to open the Indian lands:

   > The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished (internal citations omitted).[418]

2. Events surrounding passage of a surplus lands act:

   > [E]xplicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment. When events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.[419]

3. Events that occurred after the passage of a surplus lands act:

   > To a lesser extent, we have also looked to events that occurred after the passage of a surplus land Act to decipher Congress' intentions. Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands.
   >
   > On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred. In addition to the obvious practical advantages of acquiescing to de facto diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers (internal citations omitted).[420]

Note that the three factors mentioned above are not given equal weight by the Court in determining whether reservation boundaries have been diminished. The first factor is weighted

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[413] *Id.* at 973–74,71 P.2d at 540-41.

[414] *Id.* at 976, 71 P. 2d at 543. For additional case law on this topic *see*, State of Oregon v. Kurtz, 350 Or. 65, 249 P.3d 1271 (Filed Mar. 25, 2011) and State v. Cummings, 2004 S.D. 56, 679 N.W.2d 484 (Filed Apr. 21, 2004).

[415] There is one narrow exception to this general rule, which the Supreme Court discussed in City of Sherril v. Oneida Indian Nation of New York, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005). In that case, parcels of land inside reservation boundaries were sold to non-Indians nearly 200 years earlier, the state had been regulating the area, and its inhabitants were mostly non-Indian. The tribe then purchased the land. The Supreme Court held that the parcels of land were subject to local taxes under the doctrine of laches, acquiescence, and impossibility. The Supreme Court did, however, note that if the land were converted to trust land through the fee-to-trust process described in 25 U.S.C. § 465, that the land would then be exempt from state and local taxes.

[416] 465 U.S. 463, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984).

[417] *Id.* at 470, 104 S. Ct. at 1166, 79 L. Ed. 2d at 450.

[418] *Id.* at 470-71104 S. Ct. at 1166, 79 L. Ed. 2d at 450.

[419] *Id.* at 471, 104 S. Ct. at 1166, 79 L. Ed. 2d at 450-51.

[420] *Id.* at 471-72, 104 S. Ct. at 1166-67, 79 L. Ed. 2d at 451.

most heavily, followed by the second, and then, to a lesser extent, the court considers the third factor. In Solem, the Court ultimately held that the reservation boundaries had not been diminished by the Cheyenne River Act because isolated phrases in the act which referred to opened areas as "public domain" and unopened areas as "the reservation thus diminished" were not enough to overcome the Act's "stated and limited goal of opening up reservation lands for sale to non-Indian settlers."[421] Likewise, the Court found that the second factor did not favor a finding of diminishment because the Act had its origins in a bill to authorize the sale of surplus and unallotted reservation lands even though there was language in Senate and House reports referring to the reduced and diminished reservation. As to the third factor, the Court concluded that the subsequent treatment of the area was so contradictory and inconsistent that it did not weigh in favor of a finding either way.[422]

The Supreme Court has considered whether reservations had been diminished or disestablished in three other cases in recent years.

- *Hagen v. Utah*[423]: I n this case, the Court held that the reservation boundaries had been diminished based on an application of the three-part test in *Solem*. It described the third part of the Solem test as a determination of the "identity of the persons who actually moved onto the open lands."[424] The Court also noted that, "Throughout the diminishment inquiry, ambiguities are resolved in favor of the Indians…."[425] The Court found that the language of the operative act ("all the unallotted lands within said reservation shall be restored to the public domain") evidenced a congressional purpose to terminate the reservation.[426] The events surrounding passage of the act (letters and statements from Interior Department officials, congressional bills and statements by members of Congress, and a Presidential Proclamation opening the reservation to settlement) likewise showed an intent to diminish the boundaries that was not overcome by references to the reservation in both past and present tense in the later legislative record. The Court also found that the fact that the area was primarily occupied by non-Indians in the present day also weighed in favor of a finding of diminishment.[427]
- *South Dakota v. Yankton Sioux Tribe*[428]: The Court again applied the three-part test from Solem and found that that reservation boundaries had been diminished in this case. The reservation was created by treaty. Following passage of the Dawes Act, tribal members received allotments and the federal government reached an agreement with the tribe to purchase the unallotted land. The Court framed the matter this way:

> States acquired primary jurisdiction over unallotted opened lands where "the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries." In contrast, if a surplus land Act "simply offered non-Indians the opportunity to purchase land within established reservation boundaries," then the entire opened area remained Indian country (internal citations omitted).[429]

The Court went on to state that the explicit cessation language in the surplus lands Act combined with the payment of a fixed-sum created a presumption of diminishment:

> Article I of the 1894 Act provides that the Tribe will "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation"; pursuant to Article II, the United States pledges a fixed payment of $600,000 in return. This "cession" and "sum certain" language is "precisely suited" to terminating reservation status. Indeed, we have held that when a surplus land Act contains both explicit language of cession, evidencing "the present and total surrender of all tribal interests," and a provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises (internal citations omitted).[430]

The Court then found that the subsequent treatment of the land and the demographics of the land (parts two and three of the test stated in Solem) did not rebut this presumption.

- *Nebraska v. Parker*[431]: In contrast to the previous two cases, in this case the Supreme Court held that the reservation boundaries had not been diminished based on application of the three-part test laid out in Solem. The Court found that a 1982 surplus lands act merely opened the land for settlement and that the circumstances surrounding passage of the act, which it described as "dueling remarks by individual legislators," could not overcome the text of the act. While the Court recognized that the third part of the Solem test might favor a finding of diminishment since the tribe was absent from the area for more than 120 years and did not regulate the area, the Court described this factor as the least compelling evidence of diminishment and noted that it had never relied on this factor alone to find diminishment.

E. FEE-TO-TRUST PROCESS AND RESERVATION PROCLAMATIONS

Indian trust land acquisitions are authorized by 25 U.S.C. § 5108;[432] the regulations for these acquisitions can

[421] *Id.* at 475, 104 S. Ct. at 1168, 79 L. Ed. 2d at 453.

[422] *Id.* at 479 at 104 S. Ct. at 1170-71, 79 L. Ed. 2d at 455-56.

[423] 510 U.S. 399, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994).

[424] *Id.* at 399, 114 S. Ct. at 959, 127 L. Ed. 2d 258.

[425] *Id.* at 400, 114 S. Ct. at 959, 127 L. Ed. 2d 258.

[426] *Id.*

[427] *Id.*

[428] 522 U.S. 329, 118 S. Ct. 789, 139 L. Ed. 2d 773 (1998).

[429] *Id.* at 343, 118 S. Ct. at 797-98, 139 L. Ed. 2d at 786.

[430] *Id.* at 344, 118 S. Ct. at 798, 139 L. Ed. 2d at 788.

[431] 136 S. Ct. 1072, 194 L. Ed. 2d 153 (2016).

[432] Formerly 25 U.S.C. § 465.

be found at 25 C.F.R. Part 151.[433] These procedures require notice to state and local governments when there is any request for land to be purchased in, or converted to, Indian trust status. The types of land may be taken into trust status is described in 25 C.F.R. § 151.3:

> Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.
>
> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:
>
> (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
>
> (2) When the tribe already owns an interest in the land; or
>
> (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.
>
> (b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status:
>
> (1) When the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or
>
> (2) When the land is already in trust or restricted status.

Part of the process for taking land into trust involves notifying state and local governments with regulatory jurisdiction over the land. When the state and local governments are notified, these entities are asked to provide written comments on the potential impact to regulatory jurisdiction, real property taxes, and special assessments.[434] The process differs slightly for applications to take land into trust when the land is located within a reservation or is contiguous to a reservation than when it is outside or noncontiguous to a reservation.[435] For both types of applications, one of the factors the Secretary of the Interior considers is "jurisdictional problems and potential conflicts of land use which may arise."[436] The farther the land is from the tribe's reservation, the greater scrutiny the application will receive and the more weight any concerns raised by state and local governments related to potential impacts on regulatory jurisdiction, real property taxes, and special assessment will be given.[437] The BIA Affairs issued a new Fee-to-Trust Handbook in June 2016 which provides additional details on the process.[438]

The Fee-to-Trust Handbook includes a procedure for simultaneously requesting a trust acquisition and a reservation proclamation. Reservation proclamations are authorized by 25 U.S.C. § 5110,[439] which provides:

> The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

The *Fee-to-Trust Handbook* defines a reservation proclamation as a formal declaration issued by the Secretary of the Interior, or his or her designee, proclaiming that certain lands are a new reservation or an addition to an existing reservation. A reservation proclamation can encompass multiple trust parcels or a portion of a parcel taken into trust. [440]

F. STATE SOVEREIGN IMMUNITY IN SUITS INVOLVING TRIBES

States are not immune from suits brought by the federal government on behalf of Indian tribes.[441] However, states do have immunity from federal suits brought by Indian tribes subject to *Ex Parte Young* exceptions.[442] The *Ex Parte Young*[443] doctrine

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[433] 25 C.F.R. § 151.1 prescribes the purpose and scope of these regulations:

> These 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.

[434] *Id.* §§ 151.10, 151.11.

[435] *Id.* §§ 151.10, 151.11.

[436] *Id.* §§ 151.10(f), 151.11(a).

[437] 25 C.F.R. § 151.11.

[438] Department of Interior, Bureau of Indian Affairs, Office of Trust Services, Division of Real Estate Services Acquisition of Title to Land in Fee or Restricted Fee Status (Fee-to-Trust) Handbook, Release #16-47, v. IV (rev. 1) (6/28/16), *available at*, https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Acquisition_of_Title_to_Land_Held_in_Fee_or_Restricted_Fee_Status_50_OIMT.pdf (accessed July 8, 2018) (hereinafter Fee-To-Trust Handbook).

[439] Formerly 25 U.S.C. § 467.

[440] Fee-To-Trust Handbook, *supra* note 438, at 5.

[441] United States v. Minnesota, 270 U.S. 181, 46 S. Ct. 298, 70 L. Ed. 539 (1926).

[442] Blatchford v. Native Village of Noatak, 501 U.S. 775, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991). 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:

> 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]. *Id*. at 779, 775, 111 S. Ct. at 2581, 115 L. Ed. 2d at 694.

[443] *Ex Parte Young,* 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

permits suits in federal courts seeking prospective injunctive relief to end a continuing violation of federal law when the suit is brought against a state official acting in their official capacity.

The Supreme Court considered state sovereign immunity in the context of a suit brought by an Indian tribe in *Seminole Tribe of Florida v. Florida*.[444] In that case, the tribe brought suit to compel negotiations for a state-tribal gaming compact under the IGRA. 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.[445] The Act provided in Section 2710(d)(1) that class III gaming must, among other things, 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 held that Congress's attempt to abrogate the sovereign immunity of the states in IGRA was a violation of the Eleventh Amendment. The Supreme Court also found that the suit could not proceed as an *Ex Parte Young* action because IGRA created "a detailed remedial scheme for the enforcement against a State" mandating "only a modest set of sanctions against a State, culminating in the Secretary of the Interior prescribing gaming regulations where an agreement is not reached through negotiation or mediation." The Court reasoned that permitting tribes to bring *Ex Parte Young* actions to enforce Section 2710(d)(7) would render the remedial scheme described in IGRA superfluous.[446]

A year later, the Court issued another decision involving the doctrine of *Ex Parte Young*, in *Idaho v. Coeur d' Alene Tribe of Idaho*,[447] 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 navigable tributaries and effluents (submerged lands) lying within the original boundaries of the Coeur d'Alene Reservation in Idaho. The Tribe sought a declaratory judgment establishing its exclusive use and occupancy and the right to quiet enjoyment of the submerged lands. The Supreme Court held that the suit against the state was barred by Eleventh Amendment sovereign immunity, citing.[448] The Court then considered whether an *Ex Parte Young* exception was available. While explicitly stating that the *Ex Parte Young* doctrine remains valid, the Court noted:

> Today…it is acknowledged that States have real and vital interests in preferring their own forum in suits brought against them, interests 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.[449]

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…[450][t]his case-by-case approach to the *Young* doctrine has been evident from the start."[451] 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."[452]

While there is not a plethora of case law on the topic, the Ninth Circuit addressed state sovereign immunity in tribal court in *Montana v. Gilham*.[453] The suit involved the fatal injury of 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 decedent's 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.[454] 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,

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[444] 517 U.S. 44. 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

[445] 25 U.S.C. § 2702.

[446] Seminole Tribe of Florida, 517 U.S. at 73, 116 S. Ct. at 1132, 134 L. Ed. 2d at 278. 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" *Id.* at 73, 116 S. CT. at 1132, 134 L. Ed. 2d at 277. He went on to state,

> 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). *Id.* at 75-76, 116 S. Ct. at 1133, 134 L. Ed. 2d at 279.

[447] 521 U. S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438. (1997).

[448] *Id.* at 268–69, 117 S. Ct. at 2034, 138 L. Ed. 2d at 447. The court citing *Blatchford* 501 US at 779-82, 111 S. Ct. at 2581, 115 L. Ed. 2d at 694-95, stated, "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." *Coeur d' Alene Tribe,* 521 U. S. at 268–69, 117 S. Ct. at 2034, 138 L. Ed. 2d at 447.

[449] *Id.* at 274, 117 S. Ct. at 2035, 138 L. Ed. 2d at 451.

[450] *Id.* at 278, 117 S. Ct. at 2038, 138 L. Ed. 2d at 454.

[451] *Id.* at 280, 117 S. Ct. at 2039, 138 L. Ed. 2d at 454-55.

[452] *Id*. at 287–88, 117 S. Ct. at 2043, 138 L. Ed. 2d at 459.

[453] 133 F.3d 1133 (Filed Oct. 22, 1997).

[454] *Id*. at 1134.

Section 18, of the Montana Constitution waived Montana's immunity from suit in the tribal courts.[455] 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 waived Montana's immunity in state courts.[456]

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." [457] 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."[458] The court distinguished the decision in *Nevada v. Hall*[459] (holding that sovereign immunity did not prevent California 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.[460] The court then turned to the issue of whether Montana had waived immunity in tribal court. The court reviewed the rationale of several decisions which 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, "[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…."[461]

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."[462] 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.[463]

G. CONTRACTING WITH INDIAN TRIBES AND TRIBAL ENTITIES[464]

1. Introduction

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, which may include business-related contracts with federal, state, and local governments or private industry in connection with transportation projects and activities. Tribal business contracts with non-Indians raise three major issues:

1. Sovereign immunity;
2. What law(s) may govern a transaction between an Indian tribe and a non-Indian; and
3. How will any disputes be resolved: federal, state, or tribal courts?[465]

The sections below will begin with an overview of initial considerations to keep in mind when contracting with tribes and tribal entities followed by a discussion of each of the three major issues listed above. The final section on contracting covers requirements for transactions involving Indian lands.

2. Initial Considerations: What Type of Entity Is Entering the Contract and Who Has Authority to Bind That Entity?

Practitioners wishing to contract with tribes or tribal entities should first determine whether the contract will be with the tribe itself (including an instrumentality or agency of the tribe or a political subdivision), or with a tribally owned business.[466]

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[455] *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."

[456] *Id.*

[457] *Id.* at 1136.

[458] *Id.* at 1137.

[459] 440 U.S. 410, 411–12, 99 S. Ct. 1182, 1183, 59 L. Ed. 2d 416, 419-20 (1979).

[460] *Gilham*, 133 F.3d at 1137–38.

[461] *Id*. at 1139.

[462] *Id*. at n.6.

[463] *Id.* at 1140 n.8.

[464] *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) (hereinafter O'Connell); John F. Petoskey,*Northern Michigan: Doing Business with Michigan Indian Tribes*, 76 Mich. B. J. 440 (1997) (hereinafter Petoskey); Mark A. Jarboe, *Fundamental Legal Principles Affecting Business Transactions in Indian Country*, 17 Hamline 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) (hereinafter Vetter).

[465] Petoskey, *supra* note 464, at 440.

[466] *Id*. For example, 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. *Id.*

A tribally owned business can be structured in three ways: (1) through a federal charter under Section 17 of the IRA, (2) as a tribally chartered corporation organized under the tribe's laws, or (3) or as a state-chartered corporation organized under a state's laws. While tribal governments are free to establish business corporations under state corporate laws, as Petoskey points out, "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 [now at 25 U.S.C. § 5124], to create a federal corporation…."[467] Conversely, federally chartered and tribally chartered corporations "are generally immune if their charters or by-laws do not waive immunity."[468] For tribally chartered businesses the tribe's applicable law on waiver needs to be considered and for state charted businesses applicable state law on waiver needs to be considered.

Practitioners should also ensure that any individuals negotiating or signing contracts have the authority to bind the government or entity the individual is negotiating or signing for. Bear in mind 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.[469]

The need to examine the tribe's constitution, laws, ordinances, and resolutions is demonstrated in *White Mountain Apache Indian Tribe v. Shelley*.[470] The case involved an alleged breach of a road construction contract. In it, 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, or part of the tribe and therefore entitled to the tribe's immunity. The court examined the tribe's constitution and determined that it gave the tribe "the authority to create subordinate organizations for economic purposes."[471] The court then examined the "Plan of Operation" of FATCO and found that it was "a subordinate economic organization" and therefore entitled to immunity to the same extent as the tribe.[472]

3. Tribal Sovereign Immunity[473]

a. Sovereign Immunity of Tribes, Tribal Officials, and Employees

Like state governments, Indian tribes are generally immune from suit.[474] In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,[475] the Supreme Court reaffirmed the doctrine of tribal immunity in a suit for breach of contract involving off-reservation commercial conduct of a tribal entity. The Court noted:

> As 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]."[476]

The Court went on to express doubt as to "the wisdom of perpetuating the doctrine," noting that "tribal immunity extends beyond what is needed to safeguard tribal self-governance" but the Court declined to revisit the case law, instead deferring to Congress.[477] However, when the Supreme Court revisited tribal

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[467] Petoskey, *supra* note 464, at 441.

[468] *Id.* at 442.

[469] 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) at 27.

[470] 107 Ariz. 4, 480 P.2d 654 (1971).

[471] *Id.* at 6, 480 P.2d at 656.

[472] *Id.* at 6–7, 480 P.2d at 657. *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." *Id.* at 256, 772 P. 2d at 1109.

[473] *See generally*, David E. Wilkins & K. Tsianina Lomawaima, Uneven Ground: American Indian Sovereignty And Federal Law 217–48 (2001); Canby, *supra* note 5, at 99-114; 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); Vetter, *supra* note 464.; Amelia A. Fogleman, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 Va. L. Rev. 1345 (1993).

[474] Okla. Tax Commission v. Citizen Band, Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509, 111 S. Ct. 905, 909, 112 L. Ed. 2d 112, 119-20 (1991); Turner v. United States, 248 U.S. 354, 358, 39 S. Ct. 109, 110, 63 L. Ed. 291, 294 (1919); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677. 56 L. Ed. 2d 981 (1978).

[475] 523 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998).

[476] *Id.* at 754–55, 118 S. Ct at 1702, 140 L. Ed. 2d at 985.

[477] *Id.* at 758, 118 S. Ct. at 1704, 140 L. Ed. 2d at 987. 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.

sovereign immunity in 2014 in *Michigan v. Bay Mills Indian Community*,[478] it reaffirmed the doctrine of tribal sovereign immunity holding that it extends to commercial activities off of Indian lands and can only be waived by the tribe or Congress.

Tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority.[479] It does not extend to tribal officials acting outside the scope of the sovereign's authority.[480] Tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.[481] The Ninth Circuit has held that "Tribal officials are not immune from suit to test the constitutionality of the taxes they seek to collect."[482] In addition, tribal officers may be sued if the suit is not related to official duties.[483]

The Supreme Court recently addressed tribal sovereign immunity in *Lewis v. Clarke*.[484] Lewis arose out of a car accident on an interstate involving a tribal gaming employee who was transporting people from the casino back to their homes. The tribal gaming employee was sued in state court in his individual capacity. The tribal gaming authority employee argued that he was immune from suit because the gaming authority was an arm of the tribe and he was acting in the scope of employment at the time of the accident. Alternatively, the employee argued that he was entitled to immunity because tribal law required the gaming authority to indemnify him. The Supreme Court held that the employee, not the tribe, was the real party in interest in the suit and that sovereign immunity was therefore not implicated. It also held that an indemnification provision—as a matter of law—cannot extend sovereign immunity to individual employees who are not otherwise entitled to sovereign immunity. The Supreme Court did not consider whether the employee was entitled to the personal immunity defense of official immunity because the argument was raised for the first time on appeal.

b. Waiver of Tribal Sovereign Immunity

Tribal sovereign immunity may be waived by an act of Congress, by the tribe, or by a tribal corporation. Tribal immunity is subject to the superior and plenary control of Congress; Congress may waive tribal sovereign immunity, but states may not.[485] A congressional waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed."[486] Federal court decisions instruct that "courts should 'tread lightly in the absence of clear indications of legislative intent' when determining whether a particular federal statute waives tribal sovereign immunity."[487] By way of example, in *Public Service Company of Colorado v. Shoshone–Banock Tribes,*[488] the Ninth Circuit found that the Hazardous Materials Transportation Act (HMTA),[489] 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 HMTA…[and] therefore necessarily abrogates the tribes' immunity from suit."[490] The Eighth Circuit has held that tribes are subject to suit in federal court under the citizen suit provisions of the Resource Conservation and Recovery Act (RCRA).[491] In addition, the Tenth Circuit has held that suits are authorized against tribes under the whistleblower provisions of the Safe Drinking Water Act.[492] Conversely, the Eleventh Circuit has held "Congress did not unequivocally express an intent to abrogate tribal immunity from private suit under Title III of the ADA [Americans with Disabilities Act]."[493]

Tribal sovereign immunity may also be waived by the tribe.[494] The Supreme Court's decision in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*[495] 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

[478] 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014).

[479] 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).

[480] Tenneco Oil Co. v. The Sac and Fox Tribe of Indians, 725 F.2d 572, 574–75 (10th Cir. 1984).

[481] Ariz. Pub. Serv. Co. v. Aspaas, 77 F.3d 1128, 1134 (9th Cir. filed Nov. 7, 1995).

[482] 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, 924 F. 2d 899, 901 (Filed Jan. 22, 1991).

[483] Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 171–73, 97 S, Ct, 2616, 2620-21, 53 L. Ed. 2d 667, 673-74 (1977).

[484] 581 U.S. , 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017).

[485] Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C, 476 U.S. 877, 106 S. Ct. 2305, 90L. Ed. 2d 881 (1986); Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 756, 118 S. Ct. 1700, 1703-04, 140 L. Ed. 2d 981, 986 (1998).

[486] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. CT. 1670, 1677, 56 L. Ed. 2d 106, 115 (1978).

[487] Pub. Serv. Co. of Colo. v. Shoshone-Bannock Tribes, 30 F.3d 1203, 1206 (9th Cir. filed July 27, 1994), quoting N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty., 991 F.2d 458, 462 (8th Cir. 1993).

[488] 30 F.3d 1203 (9th Cir. 1994).

[489] Pub. L. No. 93-933, 88 Stat. 2157 (1975) (codified at 49 U.S.C. §§ 5101-5127) (formerly 49 U.S.C. 1801, *et. seq.)*

[490] *Shoshone-Bannock Tribes*, 30 F.3d at 1206-07.

[491] Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989).

[492] Osage Tribal Council v. U.S. Dep't of Labor, 187 F.3d 1174, 1181 (10th Cir. 1999).

[493] Fla. Paraplegic Ass'n v. Miccosukee Tribe of Fla., 166 F.3d 1126, 1135 (11th Cir. 1999). (The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, is codified at 42 USC §§12101-12213).

[494] Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 118 S. Ct. 1700, 1702, 140 L. Ed. 2d 981, 985 (1991).

[495] 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001).

contractual arbitration clause.[496] The Court, while noting that "to relinquish its immunity, a tribe's waiver must be 'clear[,]'…"[497] 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."[498] 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.*[499] in which the Seventh Circuit held that a clause requiring arbitration of contractual disputes and authorizing entry of judgment upon arbitral award "in any court having jurisdiction thereof" expressly waived the tribe's immunity.

Likewise, tribal corporations may waive immunity. As discussed above, a tribally owned business may incorporate under tribal law, state law, or under Section 17 of the IRA (federally chartered). The power to incorporate under Section 17 was provided in part to enable tribes to waive sovereign immunity, thereby facilitating business transactions and fostering tribal economic development and independence;[500] however, a tribe that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so.[501] The initial model provided by the Interior Department for incorporating under Section 17 included a "sue and be sued" clause.[502] However, a majority of courts have held that such a clause standing alone does not constitute a waiver of immunity.[503] Because of this, modern Section 17 corporations may provide for limited waiver language in their charters.[504] Reviewing the charter and bylaws for federally chartered corporations is important to determining the extent of any waiver. Likewise, for tribally chartered businesses, the charter and bylaws as well as the tribe's applicable law on waiver needs to be considered, and for state charted businesses the charter and bylaws and applicable state law on waiver needs to be considered.

4. Dealing with Jurisdictional Issues: Choice of Law and Forum Selection Clauses

Because of the jurisdictional complexities that can arise, it is advisable to include a choice of law and forum selection clause when contracting with tribes and tribal entities. Courts have generally enforced express provisions like this.[505] Take for example, the Supreme Court decision in *C & L. Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*,[506] in which the Court found that the tribe waived its immunity from suit in state court when it expressly agreed (1) to arbitrate contractual disputes,[507] (2) to be governed by Oklahoma law,[508] and (3) to contract enforcement of any arbitration awards in any court having jurisdiction thereof.[509] Vetter recommends that a written contract should at least include, in addition to an express waiver of immunity, the following:

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[496] *See id.* at 414–15, 121 S. Ct. at 1592, 149 L. Ed. 2d at 629. 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." *Id.* at 415, 121 S. Ct. at 1592-93, 149 L. Ed. 2d at 629.

[497] *Id.* at 418, 121 S. Ct. at 1595, 149 L. Ed. 2d at 632, citing Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509, 111 S. Ct. 905, 909, 112 L. Ed. 1112, 1119 (1991).

[498] *Id.* at 418, 121 S. Ct. at 1594, 149 L. Ed. 2d at 631.

[499] 86 F.3d 656, 660 (7th Cir. 1996).

[500] American Vantage Companies, Inc. v. Table Mountain Rancheria, 292 F.3d 1091, 1098 (2002).

[501] *Id.* at 1099. See Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127, 1136 (D. Alaska 1978); *see also* Ransom v. St. Regis Mohawk Educ. U. Cmty. Fund, 86 N.Y.2d 553, 563, 658 N.E.2d 989, 994–95, 635 N.Y.S.2d 116, 121-22 (N.Y. 1995). Canby, *supra* note 5, at 110-12.

[502] *See* Vetter, *supra* note 464, at 179-80, where 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.

[503] Canby, *supra* note 5, at 111. *See, e.g.*, Garcia v. Akwesasne Housing Auth., 268 F.3d 76, 86–87 (2d Cir. 2001); Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth., 207 F.3d 21, 29–30 & 29 n.5 (1st Cir. 2000); Dillon v. Yankton Sioux Tribe Housing Auth., 144 F.3d 581 (8th Cir., filed May 20, 1998).

[504] O'Connell, *supra* note 464, at 28, n.17.

[505] Vetter, *supra* note 464, at 194.

[506] 532 U.S. 411 121 S. Ct. 1589, 149 L. Ed 2d 623 (2001).

[507] *Id.* at 414, 121 S. Ct. at 1592, 149 L. Ed 2d at 628.

[508] *Id.* at 415, 121 S. Ct. at 1593, 149 L. Ed 2d at 629.

[509] *Id.* at 422, 121 S. Ct. at 1596, 149 L. Ed 2d at 634.

1. Consent to the jurisdiction of specific courts or jurisdictions (e.g. "North Dakota state courts" or "federal court system");
2. Agreement that the law of a specific state will be applied in interpretation and enforcement; and
3. Express consent to judicial enforcement of any arbitration award, if the agreement includes an arbitration clause.[510]

When writing a choice of law and forum selection clause, bear in mind that the court will need jurisdiction to hear the contract dispute. 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.[511] For purposes of diversity jurisdiction, Indian tribes are not citizens of any state.[512] The United States Ninth Circuit Court noted in *American Vantage Companies v. Table Mountain Rancheria*[513] 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)." However, individual Indians, tribal entities, and tribally incorporated corporations are citizens of the state where the reservation is located for diversity purposes.[514] Vetter points out that even when diversity 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*, concerning federal question jurisdiction, and was extended to diversity cases in *Iowa Mutual Insurance Co. v. LaPlante*. (citations omitted).[515]

Since federal jurisdiction is limited, that leaves state and tribal court as the only available forum for many contract related disputes. As section C of this document discusses, the framework for determining both the regulatory and adjudicatory authority of tribes and states in Indian country is complex. Mediation or arbitration clauses and choice of law and forum selection clauses seek to mitigate this complexity. Michael P. O'Connell, writing in the *American Indian Law Journal*,[516] provides this summary:

> Where a tribe brings an action in state court over an on-reservation or off-reservation matter, the state court would have jurisdiction, other requirements of jurisdiction being met.[517] Where a tribe agrees in advance and in writing to state court jurisdiction in respect to an on-reservation matter, there are strong arguments that the tribe's agreement should be binding on it as a matter of freedom of contract, as long as other requirements sufficient for the exercise of state court jurisdiction are met and there is no question as to the validity of the agreement so providing.[518] When tribes engage in transactions outside their reservations, they are subject to jurisdiction of the courts otherwise capable of exercising jurisdiction over such disputes, provided the tribe has waived its sovereign immunity.[519]

5. Transactions that Relate to Indian Lands[520]

Federal law contains additional requirements for certain agreements that encumber Indian lands. 25 U.S.C. § 81 (a)-(d) provides:

> (a) Definitions
>
> 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 5304(e) of this title.
>
> (3) The term "Secretary" means the Secretary of the Interior.
>
> (b) Approval
>
> 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) Exception
>
> 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.
>
> (d) Unapproved agreements
>
> 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-

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[510] Vetter, *supra* note 464, at 194.

[511] Canby, *supra* note 5, at 247-48.

[512] Standing Rock Sioux v. Dorgan, 505 F.2d 1135 (8th Cir. 1974).

[513] 292 F.3d 1091, 1095 (9th Cir. filed June14, 2002).

[514] Vetter, *supra* note 464, 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 Housing Auth., 797 F.2d 668 (8th Cir. 1986); Enter. Elec. Co. v. Blackfeet Tribe, 353 F. Supp. 991 (D. Mont. 1973).

[515] *Id.*

[516] O'Connell, Michael P. *Fundamentals of Contracting by and with Indian Tribes*, American Indian Law Journal: Vol. 3: Iss. 1, Article 4. (2014), https://digitalcommons.law.seattleu.edu/ailj/vol3/iss1/4 (accessed June 16, 2018).

[517] *Id.* at 193 n.185, citing Three Affiliated Tribes v. Wold Engineering, P.C., 476 U.S. 877 (1986). *See also* Navajo Nation v. MacDonald, 485 P.2d 1104 (Ariz. App. 1994).

[518] *Id.* at 193 n. 186, citing Outsource Services Management LLC v. Nooksack Business Corporation, 333 P.3d 380 (Wash. 2014).

[519] *Id.* at 193 n.187, citing C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001).

[520] Note also that Public Law 280 does not provide Public Law 280 states with jurisdiction to adjudicate "ownership or right of possession" of trust or restricted lands. 28 U.S.C. § 1360(b).

> (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).

Federal regulations implementing 25 U.S.C. § 81 provide additional guidance and can be found at 25 C.F.R. Part 84. Out of an abundance of caution, and in consideration of the fact that failure to obtain approval under Section 81 invalidates the agreement, the prudent "course of action is to assume that Section 81 applies…until you have ruled out the possibility that approval is required."[521] 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."[522] 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."[523] 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."[524]

H. 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,[525] 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.[526] 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.[527]

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 a complex procedure.[528] 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[529] and (2) by condem-

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[521] Petoskey, *supra* note 464, at 443, citing two 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).

[522] Vetter, *supra* note 464, 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).

[523] O'Connell, *supra* note 464, at 29.

[524] *Id.*

[525] 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).

[526] *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).

[527] *Id.* 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, 35 S. Ct. 368, 57 L. Ed. 544 (1913). Leavenworth, 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).

[528] *See, e.g.*, 31 Stat. 1058, 1084 (1901) (codified at 25 U.S.C. § 311) (opening highways); 30 Stat. 990 (1899) (codified at 25 U.S.C. §312) (rights-of-way for railway, telegraph, and telephone lines); Pub. L. No. 70-520, 45 Stat. 750 (1928) (codified at 25 U.S.C. § 318a((roads on Indian reservations); 31 Stat. 1058, 1083 (1901) (codified at 25 U.S.C. §319) (rights-of-way for telephone and telegraph lines); Pub. L. No. 60-316, 35 Stat. 781(1909) (codified at 25 U.S.C. § 320) (acquisition of lands for reservoirs or materials); Pub. L. No. 58-45, 33 Stat. 65 (1904) (codified at 25 USC § 321) (rights-of-way for pipe lines); 31 Stat. 790 (1901), (codified at 43 U.S.C. § 959) (rights-of-way for electrical plants); Pub. L. No. 61-478, 36 Stat. 1253 (1911) (codified at 25 U.S.C. § 961) (rights-of-way for power and communications facilities).

[529] *See* 25 U.S.C. § 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.

nation.[530] The following sections will address both grants of right-of-way and condemnation involving Indian lands.

2. Bureau of Indian Affairs (BIA) Grants of Right-of-Way

In 1948, Congress enacted a general statute entitled "Indian Right of Way Act of 1948."[531] The purpose of this Act was to simplify and facilitate the process for granting rights-of-way across Indian lands.[532] 25 U.S.C. §323 provides the Secretary of the Interior authority to grant rights-of-way for any purpose across Indian lands. A summary of 25 U.S.C § 324-328 follows below.

- **§ 324, Consent requirements.** The consent of any tribe organized under the IRA is required for grants of right-of-way across the tribe's lands. Rights-of-way over lands of individual Indians requires consent of the individual Indian owners unless the land is owned by more than one person and the owner(s) of the majority interests consent, the owner is unknown and any known owners have given consent, the heirs or devisees of a deceased owner have not been determined and the Secretary of the Interior finds that the grant of right-of-way will not cause substantial injury to the land or owner, or there are so many owners that the Secretary of the Interior finds it would be impracticable to obtain their consent and that the grant of right-of-way will not cause substantial injury to the land or owner.
- **§ 325, Compensation.** Grants of right-of-way require the payment of just compensation as determined by the Secretary of the Interior.[533]
- **§ 326, Other authority unaffected.** 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 §§ 311 and 357 remain unchanged.[534]
- **§ 327, Rights-of-way for federal departments and agencies.** Permits federal departments and agencies to use the process described in § 323-328 to obtain a grant of right-of-way.
- **§ 328, Regulations.** Permits the Secretary of the Interior to promulgate regulations to administer the grants of right-of-way.

The BIA has promulgated regulations found at 25 C.F.R. Part 169 to "streamline the procedures and conditions under which BIA will consider a request to approve (i.e., grant) rights-of-way over and across tribal lands, individually owned Indian lands, and BIA lands, by providing for the use of the broad authority under 25 U.S.C. §§ 323-328, rather than the limited authorities under other statutes."[535]

25 C.F.R. Part 169 expressly covers BIA grants of rights-of-way for public roads and highways[536] and applies to BIA land," which the regulations define as, "any tract, or interest therein, in which the surface estate is owned and administered by the BIA, not including Indian land" and to "Indian land," which the regulations define as "individually owned Indian land and/or tribal land."[537] The regulations further define "individually owned Indian land" as "any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more individual Indians in trust or restricted status."[538] "Tribal Land" is defined as "any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more tribes in trust or restricted status. The term also includes the surface estate of lands held in trust for a tribe but reserved for BIA administrative purposes and includes the surface estate of lands held in trust for an Indian corporation chartered under Section 17 of the Indian Reorganization Act of 1934 (25 U.S.C. 477)."[539] In essence, these regulations apply to BIA grants of right-of-way for BIA land, allotted trust land, restricted allot-

[530] *See* 25 U.S.C. § 357. Chap. 832, § 3, 31 Stat. 1058, 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 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."

[531] Act of Feb. 5, 1948, ch. 45, Pub. L. No. 80-407, 62 Stat. 17 (codified at 25 U.S.C. §§ 323–28).

[532] 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.

[533] Information on how the Secretary of Interior determines "just compensation" can be found at 25 C.F.R. §§ 169.110-169.122.

[534] 25 U.S.C. § 326, 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 hereby." *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."

[535] 25 C.F.R. § 169.1(a). *See* Bureau of Indian Affairs Chart, Rights-of-Way on Indian Land (25 CFR) Comparison of Current Rule and New Rule, March 2016, https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc1-033607.pdf (accessed July 7, 2018); U. S. Department of interior. Asst. Sec- Indian Affairs/ Office of Regulatory Affairs and Collaborative Action/ Rights-of-Way, (25 CFR 169), https://www.bia.gov/as-ia/raca/rights-way-25-cfr-169 (accessed July 7, 2018).

[536] 25 C.F.R. § 169.5(a)(2).

[537] *Id.* §§ 169.2, 169.3.

[538] *Id.* § 169.2.

[539] *Id.* C.F.R. § 169.2.

ments, tribal trust land, and restricted fee land owned by tribes; the regulations collectively refer to these lands as BIA land and Indian land.[540] The regulations specify that the BIA will not take any action regarding unrestricted fee lands.[541] It is important to note that the regulations state that the procedural provisions of 25 C.F.R. Part 169 even apply to BIA grants of right-of-way prior to April 21, 2016.[542] The BIA has issued guidance describing which provisions of 25 C.F.R. Part 169 it views as procedural and therefore applicable to BIA grants of right-of-way prior to April 21, 2016. This guidance can be found on the BIA's website.[543] Practitioners may be surprised to which provisions the BIA views as procedural and should review BIA guidance on this topic carefully.

Generally, to obtain a grant of right-of-way across Indian land, any person or entity (including government entities) who is not an owner of the Indian land needs BIA approval, "with the consent of the owners of the majority interest in the land, and the tribe for tribal land, before crossing the land or any portion thereof."[544] Specific exceptions to this general requirement—including instances where authorization is provided by certain leases and permits—can be found at 25 C.F.R. § 169.4(b).

The regulations also provide for tribes or tribal organizations to enter a contract or compact under the ISDEAA "to administer on BIA's behalf any portion of 25 C.F.R. Part 169 that is not a grant, approval, or disapproval of a right-of-way document, waiver of a requirement for right-of-way grant or approval (including but not limited to waivers of fair market value and valuation), cancellation of a right-of-way, or an appeal."[545] To find out if a tribe has entered such a compact or contract, the BIA instructs applicants to inquire with the tribe or BIA.[546]

A right-of-way grantee must request a new right-of-way if the grantee intends to use all or part of the existing right-of-way for a purpose not within the scope of the original grant of right-of-way and the new use requires ground disturbance. If the new use is not within the scope of the existing grant of right-of-way, but does not require ground disturbance, then the grantee can request an amendment to the right-of-way using the process outlined in 25 C.F.R. §§ 169.204-169.206.[547]

For grants of right-of-way that allow assignment, a new user may obtain assignment to use an existing grant of right-of-way for a use specified in the original grant or within the scope of the specified use. Information on assignments can be found at 25 C.F.R. §§ 169.207-169.209. A new user may use part or all of an existing grant of right-of-way for a use not within the scope of the original grant of right-of-way only if the new user requests a new right-of-way within or overlapping the existing right-of-way.[548] State transportation agencies should consider the impact these requirements may have on third-party activities that the state authorizes on its rights-of-way.

Both the BIA and tribe may investigate non-compliance with right-of-way requirements.[549] Possession or use of Indian land or BIA land without a right-of-way where right-of-way is required, or unauthorized use of a right-of-way, may result in the BIA taking action to recover possession, including eviction and other available remedies under the law. Indian landowners may also pursue available remedies under the law.[550] Additional information about enforcement of right-of-way requirements can be found at 25 C.F.R. §§ 169.401-169.415.

An application to obtain a grant of right-of-way is submitted to the BIA Office with jurisdiction over the land where the right-of-way is desired. Practitioners should be sure to determine whether a tribe is administering portions of this process by contacting the BIA. While there is not a standard application form, the application must identify all of these things:

(1) The applicant;

(2) The tract(s) or parcel(s) affected by the right-of-way;

(3) The general location of the right-of-way;

(4) The purpose of the right-of-way;

(5) The duration of the right-of-way: and

(6) The ownership of permanent improvements associated with the right-of-way and the responsibility for constructing, operating, maintaining, and managing permanent improvements under §169.105.[551]

The following must be submitted with the application:

(1) An accurate legal description of the right-of-way, its boundaries, and parcels associated with the right-of-way;

(2) A map of definite location of the right-of-way (this requirement does not apply to easements covering the entire tract of land);

(3) Bond(s), insurance, and/or other security meeting the requirements of §169.103;

(4) Record that notice of the right-of-way was provided to all Indian landowners;

(5) Record of consent for the right-of-way meeting the requirements of §169.107, or a statement requesting a right-of-way without consent under §169.107(b);

[540] *See* Section C.1.c of this digest entitled "What is Indian Country?" for a discussion of land ownership in Indian country.

[541] 25 C.F.R. § 169.3(a).

[542] *Id.* C.F.R. § 169.7(b).

[543] *See* BIA, What Are Procedural Provisions Of The Rights-Of-Way On Indian Land Final Rule?, https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc1-033661.pdf (accessed August 25, 2018).

[544] 25 C.F.R. § 169.4. More detailed information about consent requirements and obtaining consent can be found at *Id.*. §§ 169.106-169.109.

[545] *Id.* § 169.8.

[546] *Id.*

[547] *Id.* § 169.127.

[548] *Id.* § 169.127.

[549] *Id.* § 169.402.

[550] *Id.* § 169.413.

[551] *Id.* §169.102(a).

(6) If applicable, a valuation meeting the requirements of §169.114;

(7) If the applicant is a corporation, limited liability company, partnership, joint venture, or other legal entity, except a tribal entity, information such as organizational documents, certificates, filing records, and resolutions, demonstrating that:

(i) The representative has authority to execute the application;

(ii) The right-of-way will be enforceable against the applicant; and

(iii) The legal entity is in good standing and authorized to conduct business in the jurisdiction where the land is located;

(8) Environmental and archaeological reports, surveys, and site assessments, as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements; and

(9) A statement from the appropriate tribal authority that the proposed use is in conformance with applicable tribal law, if required by the tribe.[552]

If the applicant needs access to the land to prepare the application materials (e.g., survey), then the applicant needs to obtain consent from the Indian landowners (the BIA's consent is not necessary at this step). If needed, the BIA can provide information on the Indian landowners so that they can be contacted to obtain their consent.[553] The regulations provide that the BIA can give consent to access the land if the right-of-way will be granted under 25 C.F.R. § 169.107(b) which describes instances in which the owners of interests in the land are so numerous that it would be impracticable to obtain their consent.[554]

After receiving the application for a grant of right-of-way, the BIA will determine if the right-of-way is in the best interest of the Indian landowners. The BIA describes its review process like this:

(a) Before we grant a right-of-way, we must determine that the right-of-way is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the right-of-way application and supporting documents;

(2) Identify potential environmental impacts and adverse impacts, and ensure compliance with all applicable Federal environmental, land use, historic preservation, and cultural resource laws and ordinances; and

(3) Require any modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving a right-of-way application, we will promptly notify the applicant whether the package is complete. A complete package includes all of the information and supporting documents required under [subpart C of 25 C.F.R. Part 169], including but not limited to, an accurate legal description for each affected tract, documentation of landowner consent, NEPA review documentation and valuation documentation, where applicable.

(1) If the right-of-way application package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of an application package, the parties may take action under §169.304.

(2) If the right-of-way application package is complete, we will notify the applicant of the date of our receipt of the complete package. Within 60 days of our receipt of a complete package, we will grant or deny the right-of-way, return the package for revision, or inform the applicant in writing that we need additional review time. If we inform the applicant in writing that we need additional time, then:

(i) Our letter informing the applicant that we need additional review time must identify our initial concerns and invite the applicant to respond within 15 days of the date of the letter; and

(ii) We will issue a written determination granting or denying the right-of-way within 30 days from sending the letter informing the applicant that we need additional time.

(c) If we do not meet the deadlines in this section, then the applicant may take appropriate action under §169.304.

(d) We will provide any right-of-way denial and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter to the parties to the right-of-way. If the right-of-way is granted, we will provide a copy of the right-of-way to the tribal landowner and, upon written request, make copies available to the individual Indian landowners, and provide notice under §169.12.[555]

The BIA will grant or deny the right-of-way in writing and will grant the right-of-way unless the requirements of subpart C of 25 C.F.R. Part 169 have not been met or there is "a compelling reason to withhold the grant in order to protect the best interests of the Indian landowners." In determining the best interest of the Indian landowners, the BIA will "defer, to the maximum extent possible, to the Indian landowners' determination that

[552] *Id.* § 169.102 (b).

[553] *Id.* § 169.101.

[554] *Id.* § 169.101.

[555] *Id.* § 169.123

the right-of-way is in their best interest."[556] Specified decisions of the BIA can be appealed utilizing the process described at 25 C.F.R. Part 2.[557]

If the application for right-of-way is approved, it will incorporate any conditions upon which the Indian landowner(s) gave their consent. It will also describe the authorized use, the conditions, if any, upon which assignment and mortgage of the right-of-way are permitted, and who owns permanent improvements on the right-of-way. The grant of right-of-way will also reserve the right of the tribe to reasonable access to the land in order to determine compliance with any consent conditions or to protect public health and safety, and will state that the grantee "has no right to any of the products or resources of the land, including but not limited to, timber, forage, mineral, and animal resources, unless otherwise provided for in the grant."[558] The grant will also provide that in the event "historic properties, archeological resources, human remains, or other cultural items not previously reported are encountered during the course of any activity associated with th[e] grant, all activity in the immediate vicinity of the properties, resources, remains, or items will cease and the grantee will contact BIA and the tribe with jurisdiction over the land to determine how to proceed and appropriate disposition."[559] If permanent improvements are being constructed on the right-of-way, the grant will include a schedule for completion of construction and a process for changing the schedule by mutual consent (the BIA has authority to waive this requirement if it is in the best interest of the Indian landowners).[560] The grant of right-of-way will also specify a duration. For tribal land, the BIA will defer to the tribe to determine what time period is reasonable. For individually owned Indian lands, the BIA will consider a reasonable duration in light of the purpose of the grant of right-of-way; this will generally be a maximum of 20 years for oil and gas purposes and 50 years for other purposes (this maximum includes any renewals; the process for renewals is outlined at 25 C.F.R. § 169.202 and § 169.203).[561]

The grant of right-of-way will also address jurisdictional issues on the right-of-way.[562] The regulations state that rights-of-way granted under 25 C.F.R. Part 169 are subject to federal law and tribal law that is not inconsistent with federal law and are generally not subject to the laws of the state and its political subdivisions.[563] The grant of right-of-way must clarify that it does not diminish tribal jurisdiction, taxation or enforcement authority, civil jurisdiction over nonmembers, or the status of the land as Indian country.[564] Moreover, the regulations provide that—subject only to federal law—permanent improvements in the right-of-way, activities on the right-of-way, and right-of-way interest are not subject to fees, taxes, assessments, levies or other charges imposed by a state or its political subdivisions, but may be subject to taxation by the tribe with jurisdiction.[565]

The regulations also place certain requirements on the grantee including the following:

- Constructing and maintaining any improvements in the right-of-way "in a professional manner consistent with industry standards";
- Upon completion of construction restoring the land "as nearly as may be possible to its original condition… to the extent compatible with the purpose for which the right-of-way was granted, or reclaim the land if agreed to by the landowners";
- "Clear and keep clear the land within the right-of-way, to the extent compatible with the purpose of the right-of-way, and dispose of all vegetative and other material cut, uprooted, or otherwise accumulated during the construction and maintenance of the project";
- "Build and maintain necessary and suitable crossings for all roads and trails that intersect the improvements constructed, maintained, or operated under the right-of-way";
- "Refrain from interfering with the landowner's use of the land, provided that the landowner's use of the land is not inconsistent with the right-of-way";
- "Hold the United States and the Indian landowners harmless from any loss, liability, or damages resulting from the applicant's use or occupation of the premises" unless the grantee is prohibited by law from doing so;
- "Indemnify the United States and the Indian landowners against all liabilities or costs relating to the use, handling, treatment, removal, storage, transportation, or disposal of hazardous materials, or release or discharge of any hazardous material from the premises that occurs during the term of the grant, regardless of fault, with the exception that the applicant is not required to indemnify the Indian landowners for liability or cost arising from the Indian landowners' negligence or willful misconduct." This requirement does not apply if the grantee is prohibited by law from doing this.[566]

Note also that the regulations at 25 C.F.R. § 169.219 provide a process for instances where engineering or other complications prevent construction in the location identified in the original application and grant of right-of-way.

The regulations at Part 169 also specify a process for service lines in the right-of-way. They require the right-of-way grantee

[556] *Id.* § 169.124.

[557] Id. § 169.13.

[558] *Id.* § 169.125.

[559] *Id.* § 169.125(c)(4).

[560] *Id.*. § 169.105.

[561] *Id.* § 169.201.

[562] *Id.* § 169.125. *See also*, section C.4.b. in this digest entitled "Tribal Court 'Exhaustion Rule'".

[563] *Id.* § 169.9.

[564] *Id.* § 169.10.

[565] *Id.* § 169.11.

[566] *Id.* § 169.125(c)(5).

to file a service line agreement with the BIA to obtain access to Indian lands for service lines. Service lines are defined as "a utility line running from a main line, transmission line, or distribution line that is used only for supplying telephone, water, electricity, gas, internet service, or other utility service to a house, business, or other structure. In the case of a power line, a service line is limited to a voltage of 14.5 kv or less, or a voltage of 34.5 kv or less if serving irrigation pumps and commercial and industrial uses."[567] The service line agreement is signed by the utility provider and landowners "for the purpose of providing limited access to supply the owners (or authorized occupants or users) of one tract of tribal or individually owned Indian land with utilities for use by such owners (or occupants or users) on the premises."[568]

For service lines across tribal land, the utility provider and tribe (or the legally authorized occupants or users of the tribal land and upon request, the tribe) must execute the service agreement before work begins. For individually owned land, the utility provider (or the legally authorized occupants or users) must execute a service line agreement before work begins.[569] The service line agreement should describe the utility services being supplied, who the utilities are being provided to, "and other appropriate details." The agreement should also address how any damages incurred during construction and restoration (or reclamation, if agreed to by the owners or authorized occupants or users) will be mitigated.[570] The fully executed service line agreement along with a plat or diagram showing the ownership parcel and point of connection of the service line with the distribution line must be filed with the BIA's Land Titles and Records Office within 30 days of execution of the agreement. If the plat or diagram is on a separate sheet, it must include the signatures of the parties to the service line agreement.[571] Practitioners should note how narrow the definition of "service line" is in the regulations. Uses of right-of-way that fall outside this definition need to be analyzed in accordance with the broader provisions of the regulations covering new uses of the right-of-way (25 C.F.R. §§ 169.127-128, 169.204-209) by the grantee or a third party which were discussed earlier in this section.

Practitioners should carefully analyze these regulations to determine which rights-of-way they apply to, including how these regulations might apply to BIA grants of right-of-way issued both prior to, and after, April 21, 2016. Practitioners should consider how the regulations might impact current practice, particularly with regard to how rights-of-way are used by both the entity with a right-of-way and by third parties pursuant to the permission of a right-of-way grantee. Practitioners should also take efforts to stay abreast of any future court decisions addressing these regulations as this has the potential to be a developing area of law with a substantial impact for transportation agencies.

[567] *Id.* § 169.51.

[568] *Id.* § 169.52.

[569] *Id.* 169.54.

[570] *Id.* § 169.53.

[571] *Id.* § 169.56.

3. State Eminent Domain Powers and Indian Land

Congress has not provided states with general powers of eminent domain for tribal lands,[572] but states may condemn allotments as provided in 25 U.S.C. § 357, which states, "Lands 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."

Courts have consistently held that although there are specific provisions for obtaining rights-of-way over allotments that require the consent of the Secretary of the Interior, the provisions of 25 U.S.C. § 357 provide a separate and distinct process for obtaining right-of-way by condemnation of allotments.[573] Actions to condemn allotments must be brought in federal court and the United States must be named as a defendant in the suit.[574] Allotments may not be taken by physical occupation; the U.S. Supreme Court has held that § 357 refers to formal condemnation proceedings and does not encompass inverse condemnation.[575] Additionally, lower courts have held

[572] 25 U.S.C. § 177; Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 305 n.7, 117 S. Ct. 2028, 2052, 138 L. Ed. 438, 472 (1997). See also, Imperial Granite Company v. Pala Band of Mission Indians, 940 F.2d 1269 (9th Cir. filed Aug. 1, 1991) in which the court held that Indian trust land could not be acquired for a road of necessity by prescription, or adverse possession. It is unclear whether tribal sovereign immunity is a bar to *in rem* suits such as a condemnation action involving fee land owned by a tribe. In Cass County Water Res. Dist. v. 1.43 Acres of Land in Highland Township, Cass County, N.D., 2002 N.D. 83, 643 N.W.2d 685 (N.D. 2002) the court held that an action to condemn fee simple land owned by tribe was an *in rem* action not barred by tribal sovereign immunity, relying on the Supreme Court's decision in Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687(1992). However, a recent U.S. Supreme Court decision overrules this holding on narrow grounds. In Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 200 L. Ed. 2d 931 (2018), the Court considered a quiet title action invoking the doctrines of adverse possession and mutual acquiesce. The Court held that that lower court erred when it rejected the tribe's sovereign immunity defense by citing *Yakima* for the principle that tribal sovereign immunity does not apply to *in rem* suits. The Court stated that *Yakima* merely interpreted the Indian General Allotment Act of 1887 and did not resolve anything about tribal sovereign immunity. *Id*. at 935.

[573] U.S. v. Oklahoma Gas and Electric Co., 127 F.2d 349 (10th Cir. 1942) (affirmed by the U.S. Supreme Court which impliedly endorsed the view that the provisions of § 357 provide a separate and distinct process for acquisition of rights-of-way. U.S. v. Oklahoma Gas and Electric Co., 318 U.S. 206, 214, 63 S. Ct. 534, 538, 87 L. Ed. 716, 722 (1943)); Nicodemus v. Washington Water Power Company, 264 F.2d 614 (9th Cir. 1959); *Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. filed Nov. 14,1977); Yellowfish v. City of Stillwater, 691 F.2d 926 (10th Cir. 1982), cert denied, 103 S.Ct. 2087 (1983); Southern California Edison Company v. Rice, 685 F.2d 354 (9th Cir. 1982); Nebraska Public Power District v. 100.95 Acres, 719 F.2d 956 (8th Cir. 1983).

[574] State of Minnesota v. United States, 305 U.S. 382, 59 S. Ct. 292, 83 L. Ed. 235 (1939); U.S. v. City of McAlester, 604 F.2d 42 (10th Cir. 1979).

[575] United States v. Clarke, 445 U.S. 253, 100 S. Ct. 1127, 63 L. Ed. 2d 373 (1980).

that § 357 does not authorize condemnation of allotted lands once a tribe obtains an interest in the land.[576]

I. FEDERAL HIGHWAY PROGRAMS INVOLVING INDIAN LANDS

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 the Federal Highway Administration (FHWA) is to administer the Federal-Aid Highway Program in partnership with the SHA. 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.[577] States typically select and develop specific transportation projects, award construction contracts, and are responsible for maintenance. With the receipt of federal-aid dollars, states take on numerous responsibilities with regard to 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.[578] Similar tribal government and Department of the Interior consultation is required in the preparation of the State Transportation Improvement Program (STIP).[579]

It is not uncommon for states to use Federal-Aid Highway Program funds for state and county owned roads running near, through, or entirely on, a reservation. States constructing roads totally within a reservation are not constrained by federal-aid matching requirements; 100 percent federal funding is permitted.[580] However, should a state wish to construct a project within a reservation without the 100 percent funding, a tribe is permitted to use funds provided under a self-determination contract to meet any cost sharing requirements should additional funds be needed.[581] Although these are federal funds, they represent an exception to the rule that federal funds cannot be used to match other federal funds. This is because the ISDEAA provides express statutory authority to use funds provided under a self-determination contract to meet the non-federal matching share.[582]

[576] Public Service Co. of New Mexico v. Barboan, 857 F.3d 1101 (10th Cir. 2017); Nebraska Public Power Dist. v. 100.95 Acre of Land in County of Thurston, Nebraska, 719 F.2d 956 (8th Cir. 1983); Public Service Company of New Mexico v. Approx. 15.49 Acres of Land in McKinley County, 167 F. Supp. 3d 1248 (D.N.M 2016).

[577] 23 U.S.C. § 302.

[578] 23 U.S.C. § 135.

[579] *Id.*

[580] 23 U.S.C. § 120(f).

[581] Section 5325(j) of the ISDEAA (25 U.S.C. § 5325 j–l (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."

[582] 25 U.S.C. § 5325(j).

2. Tribal Transportation Program (Formerly Indian Reservation Road Program)

a. History of the Program

The federal government's role with respect to road projects on Indian lands originates from a 1928 Act[583] now codified in Title 25.[584] This Act authorized the Secretary of Agriculture (that had responsibility for federal roads at that time) to survey, construct, reconstruct, and maintain Indian reservation roads serving Indian lands.[585] The Federal-Aid Highway Act of 1944[586] required the Public Roads Administration to approve the location, type, and design of all Indian Reservation Road 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 Indian Reservation Roads (IRR) program. In 1958, the laws related to highways were revised, codified, and reenacted as Title 23, U.S.C.[587] Since that time, there have been other interagency agreements to carry out FHWA and BIA duties and responsibilities.[588] 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 identified as the BIA's responsibility, or should have been identified as the 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 Federal-Aid Highway Act of 1973, [589] 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

[583] An Act to Authorize an Appropriation for Roads on Indian Reservations, Pub. L. No. 70-520, 45 Stat. 750 (May 26, 1928); (codified at 25 U.S.C. § 318a).

[584] 25 U.S.C. § 318a.

[585] *Id.*

[586] Pub. L. No. 521, 58 Stat. 838, § 10(c).

[587] Pub. L. No. 85-767, 72 Stat. 885 (Aug. 27, 1958).

[588] 23 Surface Transportation Act of 1982, Pub L. No. 97-424, 96 Stat. 2115, tit. 1, § 126 (d) (Jan. 6, 1983).

[589] Pub. L. No. 93-87, 87 Stat. 250.

Federal-aid system for which financial aid is available under 23 U.S.C. 104.[590]

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 the Surface Transportation Assistance Act (STAA),[591] 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 was 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.

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[592] in response to a new Title 23 provision[593] that provided an exemption, if in the public 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 Intermodal Surface Transportation Efficiency Act of 1991 (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 fiscal years 1984 to 1986.[594] In 1986, the Surface Transportation and Uniform Relocation Assistance Act (STURAA) was passed.[595] While the level of funding dropped to $80 million per year for fiscal years 1987 to 1991, 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.[596] This six-year transportation bill placed a significant emphasis on state transportation planning and the involvement of tribal governments via consultation.[597] IRR funding increased to $159 million for the 1992 fiscal year and $191 million for fiscal years 1993 to 1997.[598] ISTEA made changes to the IRR bridge program[599] 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.[600] In addition, ISTEA allowed tribes to use their planning funds pursuant to the ISDEAA.[601]

In 1998, the new highway reauthorization, the Transportation Equity Act for the 21st Century (TEA-21), again addressed the IRR program.[602] 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.[603] It established an Indian Reservation Roads Bridge Program (IRRBP), under which a minimum of $13 million of IRR program funds was set aside for a nationwide priority program for improving deficient IRR bridges.[604] The IRR funding level was increased to $1.6 billion for fiscal years 1998 to 2003 ($275 million per year).[605] Following TEA-21, the U.S. DOT issued an order to ensure that programs, policies, and procedures administered by DOT were responsive to the needs and concerns of American Indians, Alaska Natives, and tribes.[606] Finally, TEA-21 required that the federal government (with representatives from DOI and DOT) enter into negotiated rulemaking with tribal governments to develop IRR program procedures and a funding formula to allocate IRR funds.[607] The Negotiated Rulemaking Committee was required to develop proposed regulations for the IRR program to implement the applicable portions of TEA-21 and established a funding formula for the fiscal year 2000 and subsequent years 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;

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[590] *See*, CRS Highways and Highway Safety on Indian Lands, R44359, p. 2, (Feb. 2, 2016), https://www.everycrsreport.com/files/20160202_R44359_38af583fdef681edc7b5d4daeeeb5bc506a4f919.pdf

[591] Pub. L. No. 97-424, 96 Stat. 2097 (1983).

[592] Act of June 25, 1910, 25 U.S.C. § 47 (2005), Pub. L. No. 60-104, 35 Stat. 71; *see also* 25 U.S.C. § 13.

[593] 23 U.S.C. § 204(a)(5)(b).

[594] Pub. L. No. 97-424, 96 Stat. 2097, 2099, §105(a)(3) (1993).

[595] Pub. L. No. 100-17, 101 Stat. 132 (Apr. 2, 1987).

[596] Pub. L. No. 102-240, 105 Stat. 1914 (Dec. 18, 1991).

[597] *Id.* § 1025.

[598] *Id.* § 1003.

[599] *Id.* § 1028.

[600] *Id.*

[601] *Id.* now codified at 23 U.S.C. § 202.

[602] TEA-21, Pub. L. No. 105-178, 112 Stat. 107 (June 9, 1998).

[603] *Id.* § 1115.

[604] *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.

[605] *Id.* § 1101(a)(8).

[606] DOT Order 5301.1, Nov. 16, 1999.

[607] 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.

and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources.[608] 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.[609]

The committee arrived at a new distribution formula, known as the Tribal Transportation Allocation Methodology.[610] The new distribution formula for IRR funds was 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.

The 2005 highway reauthorization, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), contained many new provisions affecting the IRR program as well as other transportation issues and needs in Indian country. However, the IRR program remained a program jointly administered by BIA and FHWA's Federal Lands Highway with the duties and responsibilities of each described in a Memorandum of Agreement between the two agencies. Each fiscal year FHWA determined the amount of funds available for construction which were then allocated to the BIA. Prior to the implementation of the new Final Rule on IRR Funding, Policies, and Procedures in November 2004,[611] 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. The 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. Because of the new rule discussed above, the procedure and distribution of funds changed markedly.

The 2005 highway legislation, SAFETEA-LU, made significant changes to the IRR program.[612] While TEA-21 had a level $275 million per year for the IRR program, SAFETEA-LU provided greatly increased funding, from $300 million in fiscal year 2005 with steady increases up to $450 million for fiscal year 2009. An additional $14 million per year of contract authority was 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. It provided for FHWA to fund IRR directly at the request of an 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 could be used to carry out, in accordance with ISDEA,[613] contracts and agreements for planning, research, design, engineering, construction, and maintenance relating to the IRR program or project. In addition, SAFETEA-LU codified existing policy, namely that IRR funds shall only be expended on projects identified in a transportation improvement program approved by the Secretary of Transportation.[614] However, it also provided that tribal governments could approve plans, specifications, and estimates and commence construction with IRR funds if certifications were provided that applicable health and safety standards were met.[615]

Because the Tribal Transportation Allocation Method (tribal shares funding formula) is in large part driven by the IRR inventory, SAFETEA-LU required a comprehensive National Tribal Transportation Facility Inventory within two years of enactment.[616] Finally, although BIA retained primary responsibility for IRR maintenance programs through DOI appropriations, SAFETEA-LU provided that up to 25 percent of a tribe's IRR funds could be used for the purpose of road and bridge maintenance.[617] In addition, the legislation provided that an Indian tribe could enter into a road maintenance agreement with a state to assume the state's responsibilities for roads in, and providing access to, Indian reservations. SAFETEA-LU also required that these maintenance agreements be tracked and reported on to Congress.[618]

In 2012, Moving Ahead for Progress in the 21st Century Act (MAP-21)[619] replaced the Indian Reservation Roads program with the Tribal Transportation Program (TTP).[620] MAP-21 provided a new funding formula based on tribal population, road mileage, and average tribal shares of funding under SAFETEA-LU IRR funding. This new funding formula was to be phased in over four years. MAP-21 provided that TTP and Federal Lands Transportation Program funds could be used for the non-federal share of projects funded under Title 23 of the U.S. Code if the project provides access to, or is within, federal or tribal land. MAP-21 also set aside funding for tribes for specific safety activities and projects as part of a new Tribal Safety Program. Additionally, MAP-21 included a new Tribal High Priority Program (THPP) which was similar to the already existing Indian Reservation Roads High Priority Program.[621]

In 2014, the Fixing America's Surface Transportation (FAST) Act[622] continued the Tribal Transportation Program with few changes. It continued the funding formula included in MAP-21 without change and included provisions permitting TTP and Federal Lands Transportation Program funds to be used for the non-federal share of projects funded under Title 23 of the U.S. Code if the project provides access to, or is within, federal or tribal land. However, it did not provide funding for the MAP-21 Tribal High Priority Projects Program. The FAST Act also

608 *Id.*

609 *Id.*

610 Indian Reservation Program Roads, 69 Fed. Reg. 43,090, subpt. C at 43,115 (July 19, 2004).

611 *Id.*

612 *See* SAFETEA-LU §§ 110l(a)(9) and 1119(e).

613 25 U.S.C. § 5304-5421.

614 SAFETEA-LU § 1119.

615 *Id.* § 1119(e).

616 *Id.* § 1119(f).

617 *Id.* § 1119(i).

618 *Id.* § 1119(k).

619 Pub. L. No. 112-141, 126 Stat. 405 (2012).

620 MAP-21 §1119.

621 *Id.*

622 Pub. L. No. 114-94, 129 Stat. 1312 (2015).

required entities carrying out TTP projects to provide certain information to the DOT and DOI including the name, description, and status of the project along with an estimate of the number of jobs created or retained by the project.[623]

b. Tribal Transportation Program (TTP) Today

The Tribal Transportation Program provides funding for tribes for transportation planning, safety, and bridge projects. The amount of funding a tribe receives under the program is based on tribal population, road mileage, and tribal shares of SAFETEA-LU IRR funding.[624] The program is administered by FHWA through its Office of Federal Lands Highway and by the BIA as described in a memorandum of understanding between the two agencies. Tribes have the option of working directly with the FHWA to administer their program rather than working through the BIA; tribe's that want to exercise this option enter into a Tribal Transportation Program Agreement (TTPA) with FHWA. Two or more tribes may choose to pool TTP funds as a "consortium" and enter into a TTPA with FHWA. Tribes may use TTP funds for specified planning and design and construction and maintenance activities identified in the FHWA-approved Transportation Improvement Program (TIP).[625] The federal regulations for the TTP are located at 25 C.F.R. Part 170. FHWA has also issued a *Tribal Transportation Program Delivery Guide* to provide guidance to tribes with a TTPA.[626]

3. The IRR Bridge Program

Prior to TEA-21, IRR bridges were part of the highway bridge replacement and rehabilitation program.[627] Under this program, a small percentage of bridge funds from each of the 50 states was used for IRR bridge repair. The IRRBP authorized under TEA-21[628] was a national priority program designed to improve deficient IRR bridges. Both the IRRBP statute and its legislative history[629] 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.[630] SAFETEA-LU, provided an additional $14 million from the Highway Trust Fund for fiscal years 2005 to 2009 for IRRBP. Unlike TEA-21, where IRRBP funds were a set-aside from the program, these funds were in addition to the annual IRR program funding level. In addition, SAFETEA-LU explicitly allowed these funds to be used for planning and design in addition to engineering and construction activities.[631]

MAP-21[632] added requirements for the inspection of public bridges—including tribal bridges—and required that data on these bridge inspections be reported to FHWA for inclusion in its National Bridge Inspection System. Under MAP-21, two percent of funding was set aside for a tribal bridge program. The IRR Bridge Program continued to operate as established under SAFETEA-LU with the same regulations in place. The FAST Act[633] included a three percent set-aside for bridges. The federal regulations governing the IRR Bridge Program can be found at 23 C.F.R. Part 661.

4. Emergency Relief Program for Federally Owned Roads

FHWA operates the Emergency Relief for Federally Owned Roads (ERFO) program.[634] The Office of Federal Lands Highways is responsible for management oversight and accountability of the ERFO program.[635] This program provides disaster assistance for federal roads and tribal transportation facilities.[636] "'Tribal transportation facility' means a public highway, road, bridge, trail, or transit system that is located on or provides access to tribal land and appears on the national tribal transportation facility inventory."[637] Tribal transportation facilities are eligible for a 100 percent federal share.[638] The U.S. Department of Transportation's *Emergency Relief for Federally Owned Roads Disaster Assistance Manual* provides more details on this program.

5. Federal Lands Highway Program (23 U.S.C. § 204)

MAP-21[639] established the Federal Lands Access Program which was continued under the FAST Act.[640] The purpose of the program is "to improve transportation facilities that provide access to, are adjacent to, or are located within Federal lands." Indian tribes can apply for funding through this program for roads

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[623] *Id.* The annual reports compiling this information can be found here: https://flh.fhwa.dot.gov/programs/ttp/port/ (accessed July 7, 2018).

[624] 23 USC § 202(b).

[625] 25 CFR §§ 170.111, 170.112, 170.204.

[626] FHWA Tribal Transportation Program Delivery Guide, https://flh.fhwa.dot.gov/programs/ttp/guide/documents/full-guide.pdf (accessed July 7, 2018).

[627] 23 U.S.C. § 144.

[628] *Id.* § 202 was amended by § 1115(b)(4) of TEA-21, Pub. L. No. 105-178, 112 Stat. 107 (June 9, 1998).

[629] S. REP. No. 105-95, at 13, Summary, § 1122; H. R. REP. No. 105-550, at 416–17.

[630] *Id.*

[631] SAFETEA-LU §. 1119(g).

[632] Pub. L. No. 112-141, 126 Stat. 405 (2012).

[633] Pub. L. No. 114-94, 129 Stat. 1312 (2015).

[634] 23 U.S.C. §§ 120 and 125. *See also* 23 C.F.R. § 668.201-.215.

[635] Fed. Highway Admin., Emergency Relief For Federally Owned Roads, Disaster Assistance Manual (Publication No.: FHWA-FLH-15-001) (2014), : https://flh.fhwa.dot.gov/programs/erfo/documents/erfo-2015.pdf (accessed July 7, 2018).

[636] 23 U.S.C. § 125.

[637] *Id.* § 101(a)(31).

[638] *Id.* § 120(e)(2).

[639] Pub. L. No. 112-141, 126 Stat. 405 (2012).

[640] Pub. L. No. 114-94, 129 Stat. 1312 (2015).

or facilities owned or operated by the tribe that provide access to federally owned land. This does not include tribal lands generally, but does include, for example, a tribe-owned road providing access to a national forest.[641]

6. Tribal Technical Assistance Program

ISTEA[642] provided statutory authorization and funding for Tribal Technical Assistance Programs (TTAP) to provide technical assistance to tribes; authorization and funding continues today through the FAST Act.[643] The federal share is 100 percent for Tribal Technical Assistance Program centers. Services provided through these centers are managed by FHWA through cooperative agreements. In 1992, TTAP centers were established in Colorado, Michigan, Montana, and Washington.[644] In 1995 centers were added in Oklahoma, California, and Alaska. Currently there is also a national TTAP headquarters in Virginia that provides online training.[645]

J. FEDERAL TRANSIT PROGRAMS INVOLVING INDIAN TRIBES

The Federal Transit Administration (FTA) is one of the modal administrations in the U.S. DOT. FTA provides financial and technical assistance for public transportation systems including buses, rail, and trolleys. FTA oversees grants to state and local transit providers. The grantees are responsible for managing their programs in compliance with federal requirements, and FTA is responsible for ensuring that grantees follow federal mandates along with statutory and administrative requirements.[646]

Prior to SAFETEA-LU, FTA's statutory authority, regulations, and policy guidance did not establish any specific programs for Indian tribes or tribal entities as such, but it was clear that an "Indian tribe" was eligible to become a grant recipient.[647] Title III of SAFETEA-LU greatly enlarged the role of public transportation in Indian country with the Public Transportation on Indian Reservations Program (Tribal Transit Program).[648] Significantly, the Act explicitly defined "recipients" to include a state or Indian tribe that receives a federal transit program grant from the federal government.[649] The Act provided for $45 million for Indian tribe transit grants for fiscal years 2005 to 2009.[650] The change of words from "mass" to "public" reflects the broader applicability of transit systems beyond urban areas.[651] The former planning requirements were amended,[652] and required 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.[653] The Act further required 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 was to be developed in consultation with the tribal government and the Secretary of the Interior.[654] Similarly, the statewide public transportation improvement program, which is updated at least every four years, also required appropriate tribal government consultation under Title II of SAFETEA-LU.[655]

MAP-21[656] and the FAST Act[657] continued the Tribal Transit Program. Funding for the program is a set-aside from the Formula Grants for Rural Areas Program. Under the program, federally recognized tribes are eligible to be both a direct recipient and a sub-recipient of the state. Funds received through the program can be used for administrative expenses, planning, operations, and capital. The program includes both a competitive grant and a formula-based grant calculated based on revenue miles and the number of low income individuals residing on tribal lands. The formula-based grant does not require a lo-

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[641] 23 U.S.C. § 2014; Federal Highway Administration, Implementation Guidance for the Federal Lands Access Program, *available at*: https://flh.fhwa.dot.gov/programs/flap/documents/FLAP%20Implem%20Guidance.pdf (accessed July 7, 2018).

[642] Pub. L. No. 102-240, 105 Stat. 1914 (Dec. 18, 1991).

[643] Pub. L. No. 114-94, 129 Stat. 1312 (2015); see 23 U.S.C. § 504(b).

[644] FHWA Center for Local Aid and Support, Tribal Technical Assistance Program (TTAP), https://www.fhwa.dot.gov/innovativeprograms/centers/local_aid/ttap/ (accessed Sept. 20, 2018).

[645] Tribal Technical Assistance Program (Home Page), https://ttap-center.org/ (accessed July 7, 2018).

[646] Federal Transit Administration, About, *available at*: https://www.transit.dot.gov/about-fta (accessed June 30, 2018) and Federal Transit Administration, Funding and Finance Resources, *available at* https://www.transit.dot.gov/funding/funding-finance-resources/funding-finance-resources (accessed June 30, 2018).

[647] 49 U.S.C. § 5302(10): Local governmental authority. The term "local governmental authority" includes—

1. a political subdivision of a State;

2. an authority of at least 1 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.

[648] SAFETEA-LU §§. 3001-3051, entitled "Federal Public Transportation Act of 2005."

[649] *Id.* § 3013(a)(a)(1).

[650] *Id.* § 3013(c)(c)(1).

[651] H. Rept. 109-203-Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Conference Report on H.R. §3002 (July 28, 2005)

[652] 49 U.S.C. § 5304.

[653] SAFETEA-LU § 3006(9)(e)(2).

[654] *Id.* § 3006(e)(2) and (f)(2)(C).

[655] *Id.* § 3006(g)(1)(C).

[656] Pub. L. No. 112-141, 126 Stat. 405 (2012).

[657] Pub. L. No. 114-94, 129 Stat. 1312 (2015), Section 5311(j).

cal match; the competitive grant requires a 10 percent local match.[658]

K. PLANNING AND PROJECT DEVELOPMENT ACTIVITIES

1. Planning[659]

a. Transportation Planning to Include Tribal Governments[660]

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 the jurisdiction of Indian tribal governments. Congress underscored this component of transportation planning when it enacted ISTEA,[661] first by defining "public authority" to include "Indian tribe,"[662] and second by adding new statewide planning requirements which mandate 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."[663] In addition, with respect to areas of the state under Indian tribal government jurisdiction, ISTEA required that the long-range transportation plan be developed in consultation with the tribal government and the Secretary of the Interior.[664] Finally, ISTEA added the requirement that the STIP be developed in similar consultation for areas of the state under the jurisdiction of an Indian tribal government.[665] The planning requirements for states and Indian tribal governments coupled with increased funding for the IRR program—$191 million for years 1991to 1995—greatly increased the visibility of transportation issues in Indian country.

Federal transportation bills in subsequent years continued to emphasize the importance of consultation with tribal governments in the development of transportation plans. U.S. DOT regulations which apply to both FHWA and FTA programs provide guidance on these requirements.[666]

> For each area of the State under the jurisdiction of an Indian Tribal government, the State shall develop the long-range statewide transportation plan and STIP in consultation with the Tribal government and the Secretary of the Interior. States shall, to the extent practicable, develop a documented process(es) that outlines roles, responsibilities, and key decision points for consulting with Indian Tribal governments and Department of the Interior in the development of the long-range statewide transportation plan and the STIP.[667]

> For each area of the State under the jurisdiction of an Indian Tribal government, the State shall develop the long-range statewide transportation plan in consultation with the Tribal government and the Secretary of the Interior consistent with §450.210(c).[668]

> In carrying out the statewide transportation planning process, each State shall, at a minimum: […] Consider the concerns of Indian Tribal governments that have jurisdiction over land within the boundaries of the State….[669]

> For each area of the State under the jurisdiction of an Indian Tribal government, the STIP shall be developed in consultation with the Tribal government and the Secretary of the Interior.[670]

> Where established, a [Regional Transportation Planning Organization (RTPO)] shall be a multijurisdictional organization of nonmetropolitan local officials or their designees who volunteer for such organization and representatives of local transportation systems who volunteer for such organization. […] The duties of an RTPO shall include: […] (vii) Considering and sharing plans and programs with neighboring RTPOs, MPOs, and, where appropriate, Indian Tribal Governments.[671]

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[658] Federal Transit Administration, Public Transportation on Indian Reservations Program; Tribal Transit Program, https://www.transit.dot.gov/tribal-transit (accessed June 30, 2018).

[659] *See* FHWA Website for Tribal Planning, *available at* https://flh.fhwa.dot.gov/programs/ttp/planning/ (accessed June 30, 2018).

[660] At present, the FHWA/FTA environmental regulations in 23 C.F.R. Part 771, which prescribe the procedures for compliance with NEPA (42 U.S.C. §§ 4321-4347) exempt "regional" transportation plans from preparation of environmental analysis. 23 C.F.R. § 771.109(a)(1). 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." 40 C.F.R. § 1501.2. Given the importance to many 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 commitment of resources, any firm commitments prior to full NEPA compliance must be avoided. *See* Metcalf v. Daley, 214 F.3d 1135 (9th Cir. filed June 9, 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* Robert Miller, *Exercising Cultural Self- Determination: The Mahah Indian Tribe Goes Whaling*, 25 Am. Indian L. Rev. 165 (2001).

[661] Pub. L. No. 102-240, 105 Stat. 1914 (Dec. 18, 1991).

[662] *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."

[663] *Id.* § 1025(a), amending 23 U.S.C. § 135. Codified at 23 U.S.C. § 135(e)(2).

[664] 23 U.S.C. § 135(f)(2)(D).

[665] *Id.* § 135(f)(2)(C).

[666] *Id.* Part 450; 49 C.F.R. Part 613.

[667] 23 C.F.R. § 450.210(c).

[668] *Id.* § 450.216(i).

[669] *Id.* § 450.208.

[670] *Id.* § 450.218(d).

[671] *Id.* § 450.210(d).

> When the [Metropolitan Planning Area] includes Indian Tribal lands, the [Metropolitan Planning Organization] shall appropriately involve the Indian Tribal government(s) in the development of the metropolitan transportation plan and the TIP.[672]

C.F.R. Section 450.104 defines the key terms "consultation," "cooperation," and "coordination," for purposes of the planning process as follows:

> Consultation means that one or more parties confer with other identified parties in accordance with an established process and, prior to taking action(s), considers the views of the other parties and periodically informs them about action(s) taken. This definition does not apply to the "consultation" performed by the States and the Metropolitan Planning Organizations (MPOs) in comparing the long-range statewide transportation plan and the metropolitan transportation plan, respectively, to State and tribal conservation plans or maps or inventories of natural or historic resources.[673]
>
> Cooperation means that the parties involved in carrying out the transportation planning and programming processes work together to achieve a common goal or objective.[674]
>
> Coordination means the cooperative development of plans, programs, and schedules among agencies and entities with legal standing and adjustment of such plans, programs, and schedules to achieve general consistency, as appropriate.[675]

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.[676]

(1) Statement of Indian Policy of January 24, 1983[677]—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.[678]—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 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.[679] 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.[680]

(3) FHWA Indian Task Force Report (February 4, 1998)[681]—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 "Federal-aid Tribal Planning and Environmental Issues," includes the following statement:[682]

> 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

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[672] *Id.* § 450.316(c).

[673] *See id.* §§ 450.216(j), 450.324(g)(1) and (g)(2).

[674] *Id.* § 450.104.

[675] *Id.*

[676] "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, *infra* note 870, at 33.

[677] Presidential Indian Policy Initiatives, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983).

[678] Title 3-The President, Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (May 4, 1994).

[679] Memorandum 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 (Dec. 12, 1994).

[680] Memorandum 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 (Feb. 24, 1998).

[681] *Id.*

[682] *Id.* at 5.

> 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.[683]—This first consultation and coordination Executive Order 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 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 Indian communities.

(5) Presidential Executive Order 13175 of November 6, 2000: Consultation and Coordination with Indian Tribal Governments.[684]—This Executive Order revoked and replaced Executive Order 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[685].—This Executive Order 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.

(7) Presidential Memorandum of November 5, 2009: Memorandum for the Heads of Executive Departments and Agencies.[686] —This Memorandum directed agency heads to submit detailed plans of action to implement Executive Order 13175 in consultation with Indian tribes along with annual reports on the status of each plan. It required agencies to designate an official to coordinate implementation of the plan and prepare the required progress reports. Additionally, it required a report within a year from the Office of Management and Budget on the implementation of Executive Order 13175 across the executive branch based on the agency plans and status reports.

[683] Title 3-the President, Consultation and Coordination with Indian Tribal Governments, 3 Fed. Reg. 27,655 (May 19, 1998).

[684] Title 3-the President, Consultation and Coordination with Indian Tribal Governments 65 Fed. Reg. 67,249 (Nov. 9, 2000).

[685] Presidential Executive Order 13336, 69 Fed. Reg. 25,294 (Apr. 30, 2004)

[686] Tribal Consultation, 74 Fed. Reg. 57,879 (Nov. 9, 2009).

2. Environmental and Related Issues[687]

a. General

In most instances federal law applies in Indian country. (See section C.2 for further discussion on federal jurisdiction in Indian country.) The BIA routinely addresses environmental matters as a part of its trust responsibility. There has been a great deal of litigation based on federal environmental law between states and tribes, often related to jurisdictional issues.[688] Do not assume that a state environmental law is enforceable in Indian country. When evaluating the applicability of a state environmental law in Indian country consider the jurisdictional complexities involved in enforcing state law in Indian country; these complexities are discussed at section C.3

b. NEPA Compliance[689]

The National Environmental Policy Act (NEPA) establishes a national policy for the protection and enhancement of the human environment. One of the continuing responsibilities of federal agencies under the Act is to "preserve important historic, cultural, and natural aspects of our national heritage."[690] It requires an agency to prepare an Environmental Impact Statement (EIS) for all "proposals for legislation and other major federal actions significantly affecting the quality of the human environment."[691] The Council on Environmental Quality (CEQ) regulations implementing NEPA provide agencies with specific guidelines for compliance.[692] 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

[687] *See generally*, Deskbook, *supra* note 15, chap. 10, Environmental Regulation, at 687-739.

[688] *See generally*, B. Kevin Gover and Jana L. Walker, *Tribal Environmental Regulation*, 36 Fed. B.J. 438 (1989); Deskbook, *supra* note 15, chap. 10, at 687-739. See also, State of Wash. Dep't of Ecology v. U.S. Envtl. Prot. Agency, 752 F.2d 1465 (9th Cir. 1985), which addressed the issue of whether the Resource Conservation and Recovery Act (RCRA) authorizes state authority over tribal lands.

[689] FHWA guidance can be found at FHWA's Environmental Review Toolkit, https://www.environment.fhwa.dot.gov/nepa/nepa_projDev.aspx (accessed July 7, 2018).

[690] 42 U.S.C. § 4331(b)(4).

[691] 42 U.S.C. § 4332(2)(C).

[692] *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.

country, since only federal approvals were involved. In *Davis v. Morton*,[693] 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."[694]

After this ruling, the BIA, in cooperation with the various Indian tribes, began preparing environmental analyses in compliance with NEPA. The 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. Generally, 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.[695] The CEQ regulations mandate that the lead agency invite "the participation of…any affected Indian tribe" in the scoping process.[696] A tribe, although lacking approval authority, may still be a cooperating agency, which would assure its direct involvement throughout the NEPA process.[697]

The following cases dealing with NEPA compliance relative to Indian lands are noteworthy:

- *Manygoats v. Kleppe*:[698] holding that individual members of an Indian tribe can challenge the adequacy of an EIS without joinder of the tribe.[699]

- *County of San Diego v. Babbitt*[700] examined the CEQ regulation requiring agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives."[701] The county challenged the adequacy of an EIS for construction of a solid waste disposal facility on the Campo Band of Mission Indians Reservation for, among other things, the failure to consider alternative sites off of 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."[702] 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.[703]

- *Muckleshoot Indian Tribe v. U.S. Forest Service*[704] was a challenge to a land exchange in which the Forest Service would transfer to the Weyerhaeuser Company land used historically and presently by the Tribe for cultural, religious, and resource purposes. The Tribe 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. The court held that "…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."[705]

- *Colorado River Indian Tribes v. Marsh*[706] was a challenge to a permit the U.S. Army Corps of Engineers issued 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 Army Corps 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. The court held that, "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."[707]

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[693] 469 F.2d 593 (10th Cir. 1972).

[694] *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).

[695] 40 C.F.R. pt 1500, §§ 1501.5, 1501.6.

[696] *Id.* § 1501.7(a).

[697] *See Id*. § 1508.5, which provides, in part: "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."

[698] 558 F.2d 556 (10th Cir. 1977).

[699] 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…." *Id.* at 559.

[700] 847 F. Supp. 768 (S.D. Cal. 1994).

[701] 40 C.F.R. § 1502.14.

[702] *Babbitt*, 847 F. Supp. at 776.

[703] *Id*.

[704] 177 F.3d 800 (9th Cir. filed May 19, 1999).

[705] *Id.* at 811–12.

[706] 605 F. Supp. 1425 (C.D. Cal. 1985).

[707] *Id.* at 1433.

c. Laws Addressing Cultural and Religious Concerns[708]

In addition to environmental laws, the following federal laws and legal issues should be considered when planning a project on or near Indian lands. Consultation with the Indian tribe is either mandated or recommended in each instance.[709]

(1) *American Indian Religious Freedom Act (AIRFA) and First Amendment Free Exercise and Establishment Issues*.[710]—AIRFA provides:

> 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.

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."[711] 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 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]."[712]

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.[713]

In *Wilson v. Block*,[714] the Court of Appeals for the D.C. Circuit further interpreted AIRFA in the context of NEPA compliance.[715] In that case, the Hopi and Navajo Indian Tribes challenged the Forest Service's permitted expansion of the government-owned Snow Bowl ski area on the San Francisco Peaks in Coconino National Forest on the grounds that it would interfere with the 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."[716] 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 [Final Environmental Statement] and were given due consideration in the evaluation of the alternative development schemes proposed for Snow Bowl.[717]

The Supreme Court addressed AIRFA in *Lyng v. Northwest Indian Cemetery Protective Association*,[718] in which the Forest Service's road building and timber harvesting decisions were challenged by an Indian organization, individual Indians, a

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[708] *See generally*, Canby, *supra* note 5, at 391-403; 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 Plight: Protection and Preservation of Sacred Sites*, 8 Widener L. Symp. J. 443 (2002) (hereinafter Johnston). 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).

[709] The National Park Service is in the process of developing an online tool for Native American Graves Protection and Repatriation Act (NAGPRA), Pub. L. 101-601, 104 Stat. 3048 (codified at 25 U.S.C. §§3001-3012), consultation. While that tool is being developed, the National Park Service website links to the Bureau of Indian Affairs Tribal Leaders Directory and the National Park Service's Tribal Historic Preservation Officer databases as well as a NAGPRA tribal contacts website. This information can be accessed at: https://www.nps.gov/nagpra/onlinedb/index.htm (accessed June 23, 2018).

[710] 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.

[711] Petoskey, *supra* note 709, at 221.

[712] Canby, *supra* note 5, at 391.

[713] Crow v. Gullet, 541 F. Supp. 785, 793 (D.S.D. 1982), (citing Hopi Indian Tribe v. Block, 8 ILR 3073, 3076(D.D.C. 1981)), *affirmed*, 706 F.2d 856 (8th Cir. 1983). Canby, *supra* note 5, at 392-93, 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).

[714] Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983).

[715] *Id.* at 747.

[716] *Id.* at 745.

[717] *Id*. at 747.

[718] 485 U.S. 439, 108 S. Ct. 1319, 99 L. ed. 2d 534 (1988).

nature organization, and others based on alleged violations of the First Amendment's Free Exercise Clause. The road project covered a six-mile paved segment through the Chimney Rock section of the Six Rivers National Forest and was situated between two other portions of the road which had already been completed.[719] 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.[720] 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 located as far as possible from the sites used by contemporary Indians for specific spiritual activities.[721]

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]owhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights."[722]

In addressing the First Amendment challenge, the Court's ruling rejected balancing of interests as inappropriate. 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, do not 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…. Whatever 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.[723]

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.[724]"

Executive Order No. 13007, "Indian Sacred Sites,"[725] 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."[726] This Executive Order is said to have filled a gap in AIRFA "by requiring federal agencies to avoid harming the physical integrity of such sacred sites."[727] 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."[728]

The protection of Indian cultural and religious sites can lead to challenges based on the First Amendment's Establishment Clause. For example, in *Bear Lodge Multiple Use Association v. Babbitt*,[729] the Court reviewed an Establishment Clause challenge brought by a climbers' group to a National Park Service plan to ask the public to voluntary refrain from 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 dismissed the claim for lack of standing because the climbing group could not show injury in fact, thus effectively upholding the policy. The district court decision under review had 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."[730]

Cholla Ready Mix v. Civish[731] was an Establishment Clause challenge in a highway case. The decision upholds the efforts of the Arizona Department of Transportation (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. ADOT had previously allowed materials mined from the Butte to be used in state highway construction projects

[719] *Id*. at 442.

[720] *Id.* at 443.

[721] *Id.*

[722] *Id.* at 455.

[723] *Id.* at 450–53 (1988).

[724] *Id*. at 453-54 (Harlan J. dissenting).

[725] 61 Fed. Reg. 26,771 (May 24, 1996).

[726] *Id* at 26,771.

[727] Johnston, *supra* note 708, at 459, citing Grimm, *supra* note 708.

[728] Yablon, *supra* note 708, at 1638.

[729] 175 F.3d 814 (10th Cir. filed Apr. 26, 1999).

[730] Bear Lodge Multiple Use Association v. Babbitt, 2 F. Supp. 2d 1448, 1456 (D. Wyo. 1998).

[731] 382 F.3d 969 (9th Cir. 2004).

which had led to litigation involving the tribes, Cholla Ready Mix, ADOT, and the FHWA.[732] In 1999, ADOT promulgated new commercial source regulations, which required each applicant for a commercial source number to submit an environmental assessment that considered 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 Ready Mix's application for a new commercial source number because of the projected adverse effects on Woodruff Butte. Cholla Ready Mix filed suit alleging that the policy against using materials from the Butte in state construction projects violated its 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 that the Establishment Clause claim was premised on a flawed analysis of the governing law. In outlining the governing law the court stated this:

> 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. Kurtzmon, 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).[733]

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."[734] As to 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)."[735] 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."[736]

(2) *National Historic Preservation Act of 1966 (NHPA)*.[737]—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 on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object."[738] Section 106[739] 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 may be eligible in whole or in part because of historical importance to Native Americans, including traditional religious and cultural importance.[740] The 1992 Amendments to NHPA require all federal agencies to con-

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[732] According to Cholla Ready Mix'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 Section 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 for Section 106. *Id*. at 975-76.

[733] *Id*. at 975.

[734] 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 (1987) *Id*. at 975.

[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). *Id*.

[735] 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 [National Register of Historic Places], 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. *Id* at 976.

[736] 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." *Id*. at 976-77.

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"). *Id*. at 977.

[737] Pub. L. No. 89-665, 80 Stat. 915 (codified at 54 U.S.C. § 300101-320303).

[738] 54 U.S.C. § 300308 (formerly 16 U.S.C. § 470w).

[739] 54 U.S.C. § 306108 (formerly 16 U.S.C. § 470f).

[740] FHWA guidance on historic preservation, "Tribal Issues," *available at* http://environment.fhwa.dot.gov/histpres/tribal.htm (accessed June 16, 2018).

sult with Indian tribes[741] or Native Hawaiian organizations for undertakings that may affect properties of traditional religious and cultural significance on or off tribal lands. The Section 106 regulations[742] implementing the NHPA were last revised on December 12, 2000,[743] and reflect these requirements. Section 36 C.F.R. § 800.2(c)(2)(ii)(A) provides that

> The agency official[744] 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 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.

What consultation with the tribe looks like in the Section 106 process depends upon whether the undertaking is on tribal lands and whether the tribe has a Tribal Historic Preservation Officer (THPO). The federal regulations for the Section 106 process define "Tribal Historic Preservation Officer" as "the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO [State Historic Preservation Officer] for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2)[745] of the act."[746] "Tribal lands" for purposes of Section 106 are defined as "all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities."[747]

For undertakings on tribal lands where the tribe has a THPO, the THPO is consulted in lieu of the SHPO.[748] For undertakings on tribal lands where the tribe does not have a THPO, both the SHPO and the tribe's designated representative are consulted. A tribe without a THPO has the same right of consultation and concurrence as a tribe with a THPO.[749] An owner of property on tribal land that is not owned by a tribal member or held in trust for the tribe can request that the SHPO participate in the Section 106 process in addition to the THPO.[750] A programmatic agreement can only take effect on tribal lands when the THPO, tribe, or designated representative of the tribe signs the agreement.[751]

Off of tribal lands, the tribe must be consulted for any undertakings that affect a historic property the tribe attaches religious and cultural significance to.[752] The agency official has to make "a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effect and invite them to be consulting parties."[753] For undertakings off of tribal lands, the THPO does not take the place of the SHPO, but may serve as the tribe's designated representative in the consultation process if the tribe designates the THPO for this role.[754]

The following cases dealing with NHPA compliance relative to Indian lands are noteworthy:[755]

- *Apache Survival Coalition v. United States*[756] 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.[757] The court of appeals ruled that the laches standard used in NEPA cases applied to this NHPA claim.[758] It concluded "that the six year period between 1985 when the Tribe first was solicited for

[741] 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)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." (54 U.S.C. § 300309, formerly 16 U.S.C. § 470w).

[742] 36 C.F.R. pt. 800.

[743] Protection of Historic Properties, 65 Fed. Reg. 77698, 77725 (Dec. 12, 2000).

[744] 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…."

[745] 54 U.S.C. § 302702.

[746] 36 C.F.R. § 800.16 (w).

[747] *Id.* § 800.16 (x).

[748] *Id.* § 800.2 (c)(2)(i)(A).

[749] *Id.* § 800.2(c)(2)(i)(B).

[750] *Id.* § 800.3(c)(1).

[751] *Id.* § 800.14(b)(2)(iii).

[752] *Id.* § 800.2 (c)(2)(ii).

[753] *Id.* § 800.3(f)(2).

[754] The ACHP has a number of resources related to consultation with Indian tribes available on its website at www.achp.gov under the "Preservation Programs & Policies" section at the heading "Indian Tribes & Native Hawaiians."

[755] The consultation requirements of NHPA gained national attention recently in litigation over the Dakota Access Pipeline. The pipeline ran primarily over private land—not subject to federal permitting requirements or NHPA requirements—but did traverse some federal waters requiring limited federal permits and compliance with NHPA requirements in those areas. The route does not run through the Standing Rock Reservation but does run through areas of cultural significance to the tribe, thus necessitating tribal consultation in the areas subject to NHPA requirements. Claims that NHPA's consultation requirements had not been complied with were ultimately unsuccessful. The court's orders in these cases provide additional insight into the underlying dispute and NHPA's consultation requirements. *See*, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock I), 205 F. Supp. 3d 4, 12-15 (D.D.C. 2016); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock II), 239 F. Supp. 3d 77, 81 (D.D.C. 2017); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock III), 255 F. Supp. 3d 101 (D.D.C. 2017); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock IV), 282 F. Supp. 3d 91 (D.D.C. 2017); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock V), 280 F. Supp. 3d 187, (D.D.C. 2017); Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, 301 F. Supp. 3d 50 (D.D.C. 2018).

[756] 21 F.3d 895 (9th Cir. filed Apr. 8, 1994).

[757] 36 C.F.R. § 800.11(b)(2).

[758] *Apache Survival Coalition,* 21 F.3d at 906.

input, and the date of filing suit constitutes unreasonable delay," barring the claim for laches.[759] 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."[760]

- *Pueblo of Sandia v. United States* [761] considered 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."[762] The challenge was to the Forest Service undertaking to realign and reconstruct Las Huertas 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.[763] The Pueblo alleged that the Forest Service failed to comply with NHPA when it refused to evaluate the canyon as a traditional cultural property eligible for inclusion on the National Register of Historic Places (NRHP).[764] 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.[765]

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.[766]

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,"[767] holding that "the Forest Service did not make a good faith effort to identify historic properties in Las Huertas Canyon."[768]

- *Hoonah Indian Association v. Morrison*[769] dealt with what constitutes a historic "site" under NHPA. The question was whether the route, or routes, a 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.[770] 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."[771] The court of appeals found that "[t]he Forest Service followed the regulations and used the National Register criteria…[and] [t]hose criteria do not support the Tribe's position."[772] 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."[773]
- *Muckleshoot Indian Tribe v. U.S. Forest Service* [774] involved a challenged land exchange in the area of Huckleberry Mountain.[775] 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-mile historic aboriginal transportation route.[776] 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

[759] *Id*. at 910.

[760] *Id.* at 911–12.

[761] 50 F.3d 856 (10th Cir. 1995).

[762] 36 C.F.R. § 800.4(b).

[763] *Pueblo of Sandia,* 50 F.3d at 857.

[764] *Id*. at 858.

[765] *Id*. at 858–59.

[766] *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.

[767] *Id*. at 862.

[768] *Id.*

[769] 170 F.3d 1223 (9th Cir. filed Mar. 24, 1999).

[770] *Id.* at 1230.

[771] *Id*. at 1231. *See* 36 C.F.R. § 800.4(c)(3).

[772] *Id.*

[773] *Id*. at 1232.

[774] 177 F.3d 800, 804 (9th Cir. 1999).

[775] *Id*. at 804.

[776] *Id*. at 808.

the conduct of appropriate research…."[777] (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."[778] The Forest Service selected option 1, the tribe disagreed, and the court of appeals agreed with the tribe concluding "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."[779]

(3) *Section 4(f) of the Department of Transportation Act of 1966.*[780]—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 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*[781]— 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; 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. The Archaeological Resources Protection Act "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."[782]

(5) Native American Grave Protection and Repatriation Act (NAGPRA).[783]—NAGPRA provides a "process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated."[784] NAGPRA regulations apply to

> [I]dentification and appropriate disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are:
>
> (i) In Federal possession or control; or
>
> (ii) In the possession or control of any institution or State or local government receiving Federal funds; or (iii) Excavated intentionally or discovered inadvertently on Federal or tribal lands.[785]

"Tribal lands" for purposes of NAGRA means

> all lands which: (i) Are within the exterior boundaries of any Indian reservation including, but not limited to, allotments held in trust or subject to a restriction on alienation by the United States; or Comprise dependent Indian communities as recognized pursuant to 18 U.S.C. 1151; or (iii) Are administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920 and section 4 of the Hawaiian Statehood Admission Act (Pub.L. 86-3; 73 Stat. 6)."[786]

The statute defines "federal lands" as "any land other than tribal lands which are controlled or owned by the United States."[787] NAGPRA requires consultation with Indian tribes to address repatriation and disposition of remains and objects governed by the Act and requires consultation when remains or objects governed by the Act are intentionally excavated or inadvertently discovered.[788] FHWA offers the following information on NAGPRA as part of its Environmental Review Toolkit as related to Tribal Consultation:

> The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) requires agencies to consult with Indian tribes regarding planned activities on Federal and tribal land that might result in the excavation of Native American human remains or other cultural items as defined in NAGPRA. When there is an inadvertent discovery of human remains or cultural items on Federal or tribal lands, work in the area must cease, the land-managing agency must notify the appropriate tribe(s), and consultation must be initiated. On tribal lands, the consent of the appropriate Indian tribe is required for planned excavation or removal human remains and cultural items. Because FHWA is not a land-managing agency, it is not directly subject to the requirements of NAGPRA. In instances where a proposed project is funded through the Federal Aid Highway Program, the land-managing agency is ultimately responsible for compliance. NAGPRA also imposes requirements on entities that receive Federal funds from any source and have possession of Native American human remains and protected cultural items. In certain instances, State Transportation Agencies (STAs) that receive Federal Aid Highway funds may be

[777] *Id*. citing 36 C.F.R. § 800.9(c)(1).

[778] *Id*. citing 36 C.F.R. § 800.9(c)(3).

[779] *Id.* at 809.

[780] 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, (codified at 49 U.S.C. § 303).

[781] Pub. L. No. 96-95, 93 Stat. 721, (codified at 16 U.S.C. § 470aa–470mm.)

[782] 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).

[783] Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001–3013).

[784] *See* 43 C.F.R. § 10.1.

[785] *Id*. § 10.1(b).

[786] *Id*. § 10.2(f)(2). *See* Section C.1.c in this digest entitled "What is Indian Country?" that includes a discussion of land ownership in Indian country for relevant information.

[787] 24 U.S.C. § 3001(5).

[788] *See* federal regulations at 43 C.F.R. Part 10 for detailed requirements.

subject to this provision NAGPRA usually applied to museums and other institutions.[789]

d. Tribal Enforcement Authority of Federal Environmental Statutes Other than NEPA

In *State of Washington Department of Ecology v. United States Environmental Protection Agency*,[790] involving the 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.[791]

In that case, and in the earlier Ninth Circuit case *Nance v. Environmental Protection Agency*,[792] 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 interactions with Indian tribes on a government-to-government basis and encouraging Indian self-government on environmental matters, even though 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 tribe's such authority, which may be involved in the development or maintenance of a highway project are as follows:

1. Clean Air Act [793] (eligible tribes may assume primary responsibility for all assumable programs);
2. Safe Drinking Water Act [794](eligible tribes may assume primary responsibility for all assumable programs);
3. Federal Water Pollution Control Act (Clean Water Act)[795] (eligible tribes may 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 (CERCLA)[796] (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).

Note, however, that RCRA has not been amended to provide for tribal primacy. The court in *Washington Department of Ecology v. EPA*[797] interpreted RCRA as providing for federal EPA enforcement rather than state enforcement of the statute on tribal lands. The EPA directly implements RCRA in Indian country.[798]

L. CONSTRUCTION ACTIVITIES

1. Indian Employment Preferences and Contracting

a. General

Section 7(b) of ISDEAA provides authority for Indian preference in awarding federal 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 subgrant pursuant to this chapter, the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. 5342 et seq.], or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that 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 to 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.[799]

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[789] FHWA Environmental Toolkit, Legal Requirements and Directives to Consult with Indian Tribes. https://www.environment.fhwa.dot.gov/env_topics/tribal/tribal_consultation_guidelines.aspx (accessed July 7, 2018); *See also* Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (Filed Oct. 22, 1992). 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. *Id.* at 252.

[790] 752 F.2d 1465 (9th Cir. 1985).

[791] *Id*. at 1471.

[792] 645 F.2d 701 (9th Cir. 1981).

[793] Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified at 42 U.S.C. § 7401-31, 7470-79, 7491-92); *See id*. § 7601.

[794] Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified at 42 U.S.C. § 300f, -300j-27); *See id*. §§ 300j-11, 300h-1(e).

[795] Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1251-1275); *See id*. § 1377(e).

[796] Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. § 9601-9628).

[797] 752 F.2d 1465 (9th Cir. 1985)

[798] EPA, Land Environmental Protection in Indian Country, https://www.epa.gov/tribal/land-environmental-protection-indian-country (accessed June 23, 2018).

[799] 25 U.S.C. § 5307(b).

The Section 7(b) preference applies to all federal grants or contracts made pursuant to statutes or implementing regulations that expressly identify Indian organizations as potential grant recipients or contractors.[800] It also applies to federal 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. The BIA and the Indian Health Service are required to utilize the Section 7(b) preferences in administering their respective programs.[801] Other federal agencies have interpreted the 7(b) requirements in various ways. In January 2001, the Department of Justice, Office of Legal Counsel, issued a memorandum to the General Counsel for the Department of Agriculture.[802] The memorandum was in response to a request for an opinion concerning the applicability of Section 7(b) of the ISDEAA.[803] Several statutory 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.

b. In the Federal Highway Program

The ISDEAA 7(b) preference applies to all work performed under the Tribal Transportation Program.[804] As stated at 25 C.F.R. § 170.911:

> (a) Federal law gives hiring and training preferences, to the greatest extent feasible, to Indians for all work performed under the TTP.
>
> (b) Under 25 U.S.C. 450e(b), 23 U.S.C. 140(d), 25 U.S.C. 47, and 23 U.S.C. 202(a)(3), Indian organizations and Indian-owned economic enterprises are entitled to a preference, to the greatest extent feasible, in the award of contracts, subcontracts and sub-grants for all work performed under the TTP.

FHWA does not extend the 7(b) preference to the Federal-Aid Highway Program.[805] For FHWA, the Indian employment preference for Federal-Aid Highway Projects is permitted by 23 U.S.C. § 140(d) and 23 C.F.R. § 635.117(d).[806]

(1) *Indian Employment and Contracting Preference, 23 U.S.C. § 140.*— Section 122 of STURAA[807] 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 codi-

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[800] *See also,* 48 C.F.R. § 1426.7003, which provides that the § 7(b) preference clause Be inserted "in solicitations issued and contracts awarded by: (1) The Bureau of Indian Affairs; (2) 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, (3) 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 which might otherwise accrue to the general public. (b) The CO shall insert the clause at 1452.226-71, Indian Preference Program—Department of the Interior, in all solicitations issued and contracts awarded by a contracting activity which may exceed $50,000, which contain the clause required by paragraph (a) of this section and where it is determined by the CO, prior to solicitation, that the work under the contract will be performed in whole or in part on or near an Indian reservation(s). The Indian Preference Program clause may also be included in solicitations issued and contracts awarded by a contracting activity which may not exceed $50,000, but which contain the clause required by paragraph (a) of this section and which, in the opinion of the CO, offer substantial opportunities for Indian employment, training or subcontracting."

[801] In a 1982 Ninth Circuit case, the applicability of Section 7(b) was expanded in a case that involved the construction of U.S. Department of Housing and Urban Development (HUD) Indian housing. Alaska Chapter, Associated Gen. Contractors of America v. Pierce, 694 F.2d 1162 (9th Cir. 1982). 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.

[802] 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).

[803] 25 U.S.C. § 450-458ddd-2 (transferred).

[804] FHWA, Tribal Transportation Program Delivery Guide – 2018, at page 58, *available at* https://flh.fhwa.dot.gov/programs/ttp/guide/documents/full-guide.pdf (accessed June 23, 2018).

[805] Consider that public roads are open to all and FHWA has consistently refused to fund any roads through the IRR program that are not open to the general public. While 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.

[806] *See* 25 C.F.R. § 170.912:

> Does Indian employment preference apply to Federal-aid Highway Projects?
>
> (a) Tribal, State, and local governments may provide an Indian employment preference for Indians living on or near a reservation on projects and contracts that meet the definition of a Tribal transportation facility. (See 23 U.S.C. 101(a)(12) and 140(d), and 23 CFR 635.117(d).)
>
> (b) Tribes may target recruiting efforts toward Indians living on or near Indian reservations, Tribal lands, Alaska Native villages, pueblos, and Indian communities.
>
> (c) Tribes and Tribal employment rights offices should work cooperatively with State and local governments to develop contract provisions promoting employment opportunities for Indians on eligible federally funded transportation projects. Tribal, State, and local representatives should confer to establish Indian employment goals for these projects.

See also, FHWA, Contract Administration Core Curriculum Manual 2014 at page 72-73, *available at*: https://www.fhwa.dot.gov/programadmin/contracts/coretoc.cfm (accessed July 7, 2018).

[807] 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.

fied at 23 U.S.C. § 140(d). The 1987 amendment expressly permits (but does not require) an employment preference for Indians living on or near a reservation on projects and contracts on Indian reservation roads.[808] The legislative history of that provision specifically notes the goal of more Indian labor when building on or near reservations.[809] 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 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.[810] 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. The 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."[811] 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.[812] This position was reiterated in a 1994 Transportation Research Board paper.[813] Note also that the Indian employment preference provisions in Title 23 do not allow a preference based on tribal affiliation or place of enrollment on Federal-aid projects.[814]

(2) *FHWA Notice 4720.7 (1993), Indian Preference in Employment on Federal-Aid Highway Projects on and Near Reservations*[815]—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 Indian employment preference on Federal-aid projects on and near Indian reservations. This Notice, implementing regulations,[816] and subsequent legal guidance have all been consistent in the approach that the 23 U.S.C. § 140(d) Indian employment preference provision is permissive, not mandatory. However, despite the "permissive," not mandatory, interpretation, FHWA's policy has been to encourage, but not require, states to implement Indian employment preference in applicable contracts.

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."[817] The Notice provides the following guidance:

> (1) Applicability - eligible projects for Indian preference consideration are those projects which are on IRRs, (i.e., roads within or providing access to an Indian reservation or other Indian lands as defined under the term "Indian reservation roads" in Section 101 of Title 23, U.S.C., and regulations issued pursuant thereto), or are not on IRRs, but are near the boundaries of reservations and other Indian lands. BIA maps showing Indian Land Areas can be obtained from BIA Area Offices listed in the attachment. Roads "near" an Indian reservation are those within a reasonable commuting distance from the reservation.
>
> (2) Eligible Employees - All Indians are eligible for employment preference. However, recruiting efforts may be targeted toward those living on or near a reservation or Indian lands (as defined above). Indian employment preference is to be applied without regard to tribal affiliation or place of enrollment.
>
> (3) Indian Preference Goal
>
> (a) During project development, State and Tribal representatives are to confer to make determinations regarding Indian employment goals for the contractor's work force who are other than core crew members; and, if necessary, consider the impact of other work in the

[808] Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURRA), Pub. L. No. 100-17, 101 Stat, 132 §122 (Apr. 2, 1987).

[809] "[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).

[810] *Id.*

[811] FHWA Memorandum, Section 122, Surface Transportation and Uniform Relocation Assistance Act of 1987-Indian Employment Preference *available at* https://www.fhwa.dot.gov/construction/contracts/880218.cfm (accessed June 23, 2018).

[812] The Disadvantaged Enterprise Program was first authorized in § 105(f) of the Surface Transportation Assistance Act of 1982 (STAA). Pub. L. No. 97-424, 96 Stat. 2097 (1983), and has been in every highway reauthorization thereafter. The DBE regulations are found at 49 C.F.R. pt. 26. *See* 49 C.F.R. §§ 26.5 and 26.67, where "Native Americans" are presumed disadvantaged.

[813] Richard Jones, Legal Issues Relating To The Acquisition Of Right Of Way And The Construction And Operation Of Highways Over Indian Lands, LRD 30 , NCHRP, Transportation Research Board Washington, D.C.,1994, pt. C, at 11, (Exhibit 5).

[814] 23 C.F.R. § 635.117(d).

[815] *Available at*: https://www.fhwa.dot.gov/legsregs/directives/notices/n4720-7.cfm (accessed June 23, 2018).

[816] 23 C.F.R. § 635.117(d) is the implementing regulation on Indian employment preference.

[817] 41 C.F.R. § 60-1.5(a)(7). 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."

area on the available work force. A contractor's core crew is composed of full time employed individuals necessary to satisfy his/her reasonable needs for supervisory or specially experienced personnel to assure an efficient execution of the contract work. Any Indian already employed by a contractor shall be included in the core crew, regardless of job function, to avoid the unintended results of having a contractor lay-off or terminate an Indian employee to hire another under this provision.

(b) In setting reasonable Indian employment goals, consideration should be given to the availability of skilled and unskilled Indian workers, the type of work to be performed, the contractor's employment requirements, and, with regard to projects near reservations, unemployment rates prevailing among non-Indians. Also to be considered are the employment goals for minorities and women established for the area by the U.S. Department of Labor's Office of Federal Contract Compliance Programs pursuant to Chapter 41, Code of Federal Regulations, Part 60.4.

(c) Once established, the goals should only be changed by the State after consultation with the Indian Tribal government representative or TERO and the contractor; and, after consideration of the good faith efforts of the contractor together with the ability of the Tribal government or TERO to refer workers in numbers and in time for the contractor to meet the goal and perform the work.

(d) Within 1 week of the placement of a job order by the contractor, if the responsible Indian employee referral agency is unable to provide sufficient qualified or qualifiable applicants to meet the employment goal, the contractor, ensuring nondiscrimination and providing equal employment opportunity, may employ persons living off the reservation. The contractor shall give full consideration to all qualified job applicants referred by the TERO, Tribal Employment and Contracting Rights Office (TECRO), or designated tribal council representative. The contractor is not required to employ any applicant who, in the contractor's opinion, is not qualified to perform the classification of work required.

(e) When an Indian employment goal has been inserted in a contract, the State will follow normal contract compliance, or contract administration oversight procedures to effect compliance. The States may elect to invite TERO, TECRO, or designated tribal council representatives to assist their monitoring efforts in all or any part of its compliance process. The State should review the contractor's employment practices and take appropriate enforcement actions when the goal is not reached after consideration of good faith efforts. Sanctions for failure to meet the goal should be determined in advance and be made a part of the contract to facilitate enforcement.[818]

2. Tribal Employment Rights Ordinances

a. Background

TERO stands for Tribal Employment Rights Ordinance or Tribal Employment Rights Office. A Tribal Employment Rights Ordinance is a law passed by a tribe, which may include both an Indian hiring preference and a tax on entities doing work within the tribe's jurisdiction. The tax is often used to fund a Tribal Employment Rights Office which is often a part of the tribal government that monitors and enforces the tribe's employment ordinance, provides employment support for individuals, and connects Indian workers with entities doing business within the tribe's jurisdiction.

TERO began in the early 1970s following 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. 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.[819]

Although the federal Indian preference provisions are silent on TERO, the legislative history of STURAA is helpful because it formed the basis for FHWA'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.[820]

FHWA's current position on TERO taxes is contained in its FHWA Notice 4720.7 (1993), Indian Preference in Employment on Federal-Aid Highway Projects on and Near Reservations[821] which in relevant part states:

> 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. It has been FHWA's longstanding 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.

Note that this statement actually discusses two separate TERO fees, a TERO fee (tax) for on-reservation projects and a negotiated fee for services for off-reservation projects.

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 was

[818] *See also*, FHWA, Contract Administration Core Curriculum Manual 2014 at page 72-73, *available at*: https://www.fhwa.dot.gov/programadmin/contracts/coretoc.cfm (accessed July 7, 2018).

[819] For a thorough discussion, *see* Richard Jones, Legal Issues Relating To The Acquisition Of Right Of Way And The Construction And Operation Of Highways Over Indian Lands (NCHRP 1994).

[820] Senate Committee on Environment and Public Works, S. REP. NO. 100-4 (1987).

[821] March 15, 1993 notice *available at*: https://www.fhwa.dot.gov/legsregs/directives/notices/n4720-7.cfm (accessed June 23, 2018).

without legal authority on state-owned rights-of-way.[822] The language at issue was 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.[823] 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. 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 took a similar position regarding state highway rights-of-way and TERO fees,[824] 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 language at issue 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[825] and encourages states to utilize Tribal Employment Rights Office (TERO or TECRO) representatives to set Indian employment goals.

b. Jurisdictional Complexities and TERO

As discussed in section C of this digest, jurisdiction in Indian country is a complex matter. States, tribes, and contractors may interpret the law differently and have different ideas about the extent of a government entity's jurisdiction. There may also be instances where a tribal law requires an Indian employment preference, but a state questions whether applying the tribal law would violate other laws applicable to the state. Tribal TERO laws are one instance where this plays out.

Take for example, the states of Alaska and California. In Alaska, the state's Attorney General's Office issued a memorandum[826] addressing two questions from the Department of Transportation, "1. May the Metlakatla Indian Community enforce its TERO against a non-Indian state contractor within a 25 U.S.C. § 323 right-of-way located in the Annette Island Reserve? 2. May DOT&PF lawfully require a state contractor to give hiring preferences to Alaska Natives?" The conclusion was as follows:

> Under the specific terms of the ferry terminal easement, we conclude that the land within the easement is "Indian land" within which the tribe may enforce its TERO tax and hiring preferences. State action requiring a state contractor to pay the tribal tax would be constitutional. However, if DOT&PF were to require a state contractor to comply with the TERO Native hiring preference, there is a significant risk that the preference would be declared unconstitutional as a violation of the Equal Protection Clause of the Alaska Constitution. In the absence of evidence demonstrating a pattern of past discrimination against Alaska Natives in their individual employment on state construction projects, a state enforced Native hiring preference may also violate the Equal Protection Clause of the U.S. Constitution. Therefore, the state may lawfully require a state contractor to pay the TERO tax (and may lawfully reimburse the contractor for payment of the tax), but the state may not require a state contractor to comply with the TERO Native hiring preferences.[827]

In 1996, the State of California passed Proposition 209, which added to the state's constitution[828] language prohibiting preferential treatment in public employment, public education, or public contracting. In March of 2010, the California Attorney General's Office issued an opinion addressing the intersection of the new language in the constitution with Indian employment preferences for the state's Department of Transportation. The opinion specifically addressing these four questions:

1. Does article I, section 31, of the California Constitution bar the Department of Transportation from including hiring preferences, established by Tribal Employment Rights Ordinances and permitted by federal law, as part of its contracts for highway construction and maintenance work performed on Indian tribal lands?

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[822] South Dakota v. Mineta, 278 F. Supp. 2d 1025 (D.S.D. filed Aug. 21, 2003).

[823] 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.

[824] Letter from Arthur Waskey, General Counsel, New Mexico State Highway and Transportation Department to former Chief Counsel Jim Rowland (Jan. 16, 2003) (available at the Office of the Chief Counsel of FHWA).

[825] *Mineta,* 278 F. Supp. 2d at 1029.

[826] Prior to this memorandum the Alaska Supreme Court, in Malabed v. North Slope Borough, 70 P.3d 416 (Alaska 2003), held "that the borough's hiring preference [which granted a preference to members of federally recognized Indian tribes] 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." *Id*. at 427-28. But *see also*, Morton v. Mancari 417 U.S. 535, 553 n. 24, 94 S. Ct. 2474, 2484, 41 L. Ed. 2d 290, 303 (1974); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 480, 96 S. Ct. 1634, 1644-45, 48 L. Ed. 2d 96, 110 (1976); United States v. Antelope, 430 U.S. 641, 645, 97 S. Ct. 1395, 1398, 51 L. Ed. 2d 701, 706-07 (1977); Greene v. Comm'r of the Minn. Dep't of Human Servs., 733 N.W.2d 490 (Filed June 19, 2007).

[827] State of Alaska, Department of Law, Metlakatla Ferry Terminal TERO, July 23, 2003, *available at*: http://law.alaska.gov/pdf/opinions/opinions_2003/03-013_665020113.pdf (accessed June 23, 2003).

[828] Cal. Const. art. I, § 31.

2. If the Department of Transportation is not constitutionally prohibited from including such hiring preferences as part of its contracts, does it have existing statutory authority to do so?

3. Is the Department of Transportation subject to, and authorized to pay, tribal taxes established by Tribal Employment Rights Ordinances for highway work performed within Department rights of way on tribal lands?

4. Where such highway work within Department rights of way is conducted by private contractors and subcontractors of the Department of Transportation, rather than by Department employees, are such contractors and subcontractors subject to taxes established by Tribal Employment Rights Ordinances?

The opinion provided the following conclusions in response to each of the four questions:

1. Article I, section 31, of the California Constitution does not prohibit the Department of Transportation from including Indian hiring preferences, established by Tribal Employment Rights Ordinances and permitted by federal law, as part of its contracts for highway construction and maintenance work performed on Indian tribal lands, as a matter of government-to-government agreement.

2. Under its existing statutory authority, the Department of Transportation may include such hiring preferences as part of its contracts for highway construction and maintenance work performed on or near tribal lands.

3. The Department of Transportation is not required to pay taxes established by Tribal Employment Rights Ordinances for highway work performed on roads located within Department rights of way on tribal lands, but neither is the Department prohibited by law from voluntarily paying Tribal Employment Rights Ordinances fees or taxes if the Department, in its reasonable exercise of discretion, concludes that such payments further its authorized purposes.

4. Where such highway work within Department rights of way on tribal land is performed by private contractors and subcontractors of the Department of Transportation rather than by Department employees, the tribes lack jurisdiction to require the state's contractors and subcontractors to pay taxes established by Tribal Employment Rights Ordinances.[829]

Complex jurisdictional questions related to TERO ordinances also played out in the courts in the following cases:

• *FMC v. Shoshone-Bannock Tribes* [830]: This case addressed the tribe's jurisdiction to enforce an Indian employment preference in a TERO Ordinance on FMC, which operated a plant manufacturing elemental phosphorous on fee land within reservation boundaries. 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 a civil case in tribal court. FMC immediately challenged the tribal court's jurisdiction in federal district court and got an injunction halting 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 found that the tribes had jurisdiction over FMC and held that the company had violated the TERO. The Tribal Appellate Court affirmed those rulings and entered 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 must 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 the compliance order, and, in April 1988, it reversed the Tribal Appellate Court. The case then went to the Ninth Circuit Court of Appeals. In its review of tribal jurisdiction[831], the court of appeals relied on Montana noting the two exceptions in which tribes have 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.[832]

The court of appeals found that FMC had entered into "consensual relationships" with the tribe or its members and thus that Montana's first exception was applicable. The court noted:

> 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 involved…. 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).[833]

The court of appeals disagreed with the district court and FMC that these connections between the company and the

[829] 93 Ops.Cal.Atty.Gen. 19. *available at*: https://oag.ca.gov/system/files/opinions/pdfs/07-304.pdf (accessed June 23, 2018).

[830] 905 F.2d 1311 (9th Cir. 1990).

[831] *See* section C.4 in this digest for additional information on tribal jurisdiction in Indian country.

[832] *Shoshone-Bannock Tribes,* 905 F.2d at 1314 (9th Cir. 1990), citing Montana v. United States, 450 U.S. 544, 565–66, 101 S. Ct. 1245,1258 67 L. Ed. 2d 493, 510 (1981).

[833] *Id*.

tribes, although substantial, did not provide a sufficiently close "nexus" to employment to support application of the TERO to FMC, citing *Cardin v. De La Cruz*,[834] and pointing out that Cardin contained no explicit nexus requirement.[835]

• *Duncan Energy Co. v. Three Affiliated Tribes of the Ft. Berthold Reservation* [836]: This case addressed the jurisdiction of the tribe to apply its TERO Ordinance (that required an Indian employment preference and a one percent tax) on an energy company operating oil and gas wells on the reservation pursuant to a lease with a non-Indian landowner. In reviewing the lower court's decision holding that the tribe could not enforce the TERO ordinance on the energy company, the Eighth Circuit Court of Appeals directed the lower court to consider whether the second Montana exception was applicable to the case (i.e., whether the conduct at issue threatened or had some direct effect on the political integrity, economic security, or the health and welfare of the tribe). Noting that the tribe would have a "heavy burden" to show that the second Montana exception was applicable, the court of appeals remanded the case for an analysis of the specific facts.

• *State of Montana Department of Transportation v. King* [837]: In this case, the Montana Department of Transportation sued the tribe arguing that the tribe could not impose the requirements of its TERO ordinance on work that the DOT (rather than its contractor) was doing on the right-of-way. The tribe's TERO ordinance required an Indian employment preference and a two-percent tax. A State of Montana law required private contractors to comply with Indian employment preference, but that law did not apply to the State. The court found that the state's easement did not create a consensual relationship with the tribe and that the DOT's conduct did not threaten or have a direct effect on the political integrity, economic security, or health and welfare of the tribe (i.e., neither of the Montana exceptions applied) and so the tribe could not impose its TERO ordinance on the state DOT's work. The court, however, also stated the following:

> Courts are often poor forums for resolving difficulties between Indian tribes and States. While we are parsing the nuances of jurisdiction and immunity, poverty continues unabated on the reservation, and the State's highways are left unrepaired. However, solutions to these problems rest with the political branches of each sovereign. Montana has already expressed concern for the welfare of the Community by requiring private contractors to comply with Indian preferences policies for work done on the Reservation. See Mont. Code Ann. S 18-1-110(1) (1997). We can but express the hope that cooperation between these two governments will continue and that they will work together to solve these pressing problems without further judicial intervention.[838]

[834] 671 F.2d 363 (9th Cir. 1982).

[835] *Shoshone-Bannock Tribes*, 905 F.2d at 1315. *See*, however, Atkinson Trading Co. v. Shirley, 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001), in which the Supreme Court discusses the nexus requirement.

[836] 27 F.3d 1294 (8th Cir. 1994).

[837] 191 F.3d 1108 (9th Cir. filed Sept. 9, 1999).

[838] *Id.* at 1115.

M. 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 C.5.a. of this digest, entitled "State Traffic and Motor Vehicle Statutes."

2. Jurisdictional Issues Carrying Out Federal Programs

a. Sign Control on Indian Lands Under the Highway Beautification Act

The Highway Beautification Act (HBA)[839] at 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 HBA 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 are 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,[840] were required to enact laws that would provide for "effective control"

[839] Pub. L. No. 98-285, 79 Stat. 1028 (1965) (codified at 23 U.S.C. §131).

[840] 23 U.S.C. § 131(g) provides, in part, 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 Act of 1965*, 71 Mich. L. Rev. 1295, 1309–26 (1973).

of outdoor advertising as described in federal law[841] and as set out in agreements to be entered into with the Secretary of Commerce (now with the Secretary of Transportation).[842] While legally the states can choose not to provide for 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.[843]

The dilemma posed for enforcement of the HBA—and state laws enacted pursuant to the Act to provide for "effective control"—is found at Subsection 131(h) of Title 23, U.S.C., which remains unchanged from its original enactment by Congress in 1965. It reads: "(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."[844] Subsection 131(h) is written in the passive voice, making it unclear whether states or the federal government have responsibility and authority to enforce it. In addition, 131(h) is not clear as to whether it applies 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 the law 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 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.

Researchers have 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 the HBA applies to Indian country.[845] It is also unclear

[841] 23 U.S.C. § 131(c) provides, in part, 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.

[842] 23 U.S.C. § 131(d) provides, in part, 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 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… (emphasis added).

[843] 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 per centum 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….

[844] 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.

[845] Richard O. Jones, Application Of Outdoor Advertising Controls On Indian Land, LRD No. 41, NCHRP, Transportation Research Board of Washington, D.C., 1998. This section provides a synopsis of the information contained in LRD No. 41, *see* that document for a more detailed discussion of 23 U.S.C. § 131(h), federal agency interpretations and /positions, and case law.

which governmental entities have jurisdiction to enforce the Act on public lands or reservations. In most instances federal laws of general applicability apply to all persons throughout the United States, including Indians and non-Indians in Indian country.[846] However, the HBA requires states to create state laws to provide for "effective control' and leaves enforcement up to the states on the basis of their inherent police power and eminent domain authority and state eminent domain power on Indian reservations is lacking. [847]

In 1976, FHWA, the federal agency charged with implementing the HBA, concluded that because the Act does not give either FHWA or the Department of the Interior (DOI) explicit authority to implement the Act on Indian reservations, the HBA is not applicable on Indian reservations. Attempts to obtain control through DOI, using its general regulatory powers, proved unsuccessful. The BIA followed the 1979 ruling of the Interior Board of Indian Appeals (IBIA), which held that Congress did not intend to cover Indian reservations in the HBA and that the states could not control outdoor advertising on Indian reservations without express authority.[848] The California Supreme Court, in a 1985 decision, found the IBIA interpretation "debatable," but found it unnecessary to resolve that issue because "it does not follow that Congress has authorized state enforcement of the act on such reservations."[849] FHWA attempted to amend the HBA in 1986, to provide that "effective control" of outdoor advertising on Indian reservations would be a federal responsibility.[850] 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 2006, FHWA issued a non-regulatory supplement addressing this question which stated as follows:

> **OUTDOOR ADVERTISING CONTROL ON INDIAN LANDS (23 CFR 750.704 AND 750.705).** Title 23 U.S.C. 131(h) does not delegate to either FHWA or DOT the explicit authority to implement the Highway Beautification Act of 1965 on Indian Reservation Lands. In those limited instances where a State has indicated that it does have jurisdiction in such matters, FHWA expects the State to control outdoor advertising signs on Indian Lands. If a State does not have such jurisdiction, a legal opinion, preferably from the State Attorney General, should be provided to FHWA. The matter of regulation and enforcement of the Act's provisions on Indian Lands in those States

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[846] *See* section C.2 of this digest, entitled "Civil Jurisdiction-Federal Jurisdiction in Indian Country".

[847] *See* section H.3 of this digest, entitled "State Eminent Domain Powers and Indian Land."

[848] The IBIA is an appellate review body that has delegated authority to issue final decisions for the Department of the Interior on Indian matters. *See* Appeal of the Morongo Band of Mission Indians v. Area Director, BIA, 7 IBIA 299, 86 I.D. 680 (Dec. 13, 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." *Id*. at 687.

[849] *See* People v. Naegele Outdoor Adver. Co. of Cal., 38 Cal. 3d 509, 517, 213 Cal. Rptr. 247, 251, 698 P.2d 150, 154 (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….Id.* at 520, 213 Cal. Rptr. at 253, 698 P.2d at 156. (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 added). *Id*. at 522, 213 Cal. Rptr. at 254-55, 698 P.2d at 158.

Consider also, these later cases discussing the applicability of the HBA in Indian country:

> Blunk v. Arizona DOT, 177 F.3d 879 (9th Cir. filed May 21, 1999): This was a suit to challenge the right of the State of Arizona to regulate Plaintiff Blunk's commercial use of non-reservation 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. The state told Blunk he would have to take down the billboards and apply for a permit. Blunk refused and sued, seeking declaratory judgment that the state's attempted regulation violated federal preemption and Navajo sovereignty. The court held:
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> 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….
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> Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966 (10th Cir. filed Nov. 9, 2005): The 10th Circuit Court of Appeals held that the State of Utah could not regulate outdoor advertising on off-reservation tribal trust land. It followed the California Supreme Court's reasoning in *Naegele* and held that even if Congress meant to enforce HBA on tribal trust land it did not mean for states to enforce outdoor advertising laws on this type of land. The court found that the State could not enforce its outdoor advertising law on off-reservation trust land because the state law was federally preempted because the interests of the tribe and federal government were stronger than the state's interest in enforcing the law.

[850] 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.

indicating they do not have such jurisdiction will be coordinated by the Washington Headquarters Office of Real Estate Services (HEPR) with the Bureau of Indian Affairs.[851]

b. Application of the Federal Motor Carrier Safety Regulations (FMCSRs)[852] to Indian Tribes

The Federal Motor Carrier Safety Administration provides the following guidance related to Indian tribes:

> Question 12: What is the applicability of the FMCSRs to school bus operations performed by Indian Tribal Governments?
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> Guidance: Transportation performed by the Federal Government, States, or political subdivisions of a State is generally excepted from the FMCSRs. This general exception includes Indian Tribal Governments, which for purposes of §390.3(f) are equivalent to a State governmental entity. When a driver is employed and a bus is operated by the governmental entity, the operation would not be subject to the FMCSRs, with the following exceptions: The requirements of part 383 as they pertain to commercial driver licensing standards are applicable to every driver operating a CMV, and the accident report retention requirements of part 390 are applicable when the governmental entity is performing interstate charter transportation of passengers.
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> Question 20: Do the FMCSRs apply to Indian Tribal Governments?
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> Guidance: Under §390.3(f)(2), transportation performed by the Federal Government, States, or political subdivisions of a State is generally exempt from the FMCSRs. Indian Tribal Governments are considered equivalent to a State governmental entity for purposes of this exemption. Thus, when a driver is employed by and is operating a CMV owned by a governmental entity, neither the driver, the vehicle, nor the entity is subject to the FMCSRs, with the following exceptions:
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> (1) The requirements of part 383 relating to CMV driver licensing standards;
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> (2) The drug testing requirements in part 382;
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> (3) Alcohol testing when an employee is performing, about to perform, or just performed safety-sensitive functions. For the purposes of alcohol testing, safety-sensitive functions are defined in §382.107 as any of those on-duty functions set forth in §395.2 On-Duty time, paragraphs (1) through (6), (generally, driving and related activities) and;
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> (4) The accident report retention requirements of §390.15 are applicable when the governmental entity is performing interstate charter transportation of passengers.
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> Question 23: Is transportation within the boundaries of a State between a place in an Indian Reservation and a place outside such reservation interstate commerce?
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> Guidance: No, such transportation is considered to be intrastate commerce. An Indian reservation is geographically located within the area of a State. Enforcement on Indian reservations is inherently Federal, unless such authority has been granted to the States by Congressional enactment, accepted by the States where appropriate, and consented to by the Indian tribes.[853]

c. Application of Preemption Provisions of HMTA to Indian Tribes

The Hazardous Materials Transportation Act (HMTA)[854] 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 as follows:

> [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 requirement…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 after the date of the publication of the notice of having received such application, or the Secretary shall publish a statement in the Federal Register of the reason why the Secretary's decision on the application is delayed, along with an estimate of the additional time necessary before the decision is made. After notice is published, an applicant may not seek judicial relief on the same or substantially the same issue until the Secretary takes final action on the application or until 180 days after the application is filed, whichever occurs first.
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> * * *
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> (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.

A tribal ordinance to control shipment of nuclear materials was held preempted under HMTA and enjoined in *Northern States Power Company v. The Prairie Island Mdewakanton Sioux Indian Community*.[855] The tribal nuclear radiation control ordinance required transporters to obtain a tribal license for each shipment of nuclear materials across 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 coun-

[851] FHWA, Office Of Planning, Environment & Realty, Federal-Aid Policy Guide, Non-Regulatory Supplement, February 16, 2006, Outdoor Advertising Control On Indian Lands, *available at*: https://www.fhwa.dot.gov/real_estate/policy_guidance/non-regulatory_supplements/0750gsu1.cfm (accessed July 7, 2018).

[852] *See* 49 C.F.R. Parts 300-399.

[853] Federal Motor Carrier Safety Administration, Section § 390.3: General Applicability. Guidance And Q & A. *available at*: https://www.fmcsa.dot.gov/regulations/title49/part/390 (accessed June 24, 2018).

[854] 49 U.S.C. § 5125 (formerly 49 U.S.C. § 1811).

[855] 991 F.2d 458 (8th Cir. 1993).

cil 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) 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.[856] NSP brought suit for declaratory judgment following a ruling by the Interior Board of Indian Appeals[857] that it lacked authority to enjoin a tribe from enforcing a tribal ordinance.[858] The tribe and tribal officials appealed the district court's grant of a preliminary injunction halting enforcement of the tribal ordinance, arguing 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."[859] 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)].[860]

The U.S. Ninth Circuit Court of Appeals, in *Public Service Co. of Colorado v. Shoshone-Bannock Tribes,*[861] also held that the HMTA abrogates tribal immunity from suit in federal court.[862]

d. Highway Maintenance Responsibility

Maintenance of state highways is a statutory responsibility of the states and political subdivisions of the states not the federal government. 23 U.S.C. § 116, provides as follows:

> (b) It shall be the duty of the State transportation department or other direct recipient to maintain, or cause to be maintained, any project constructed under the provisions of this chapter [23 U.S.C. §§ 101 et seq.] or constructed under the provisions of prior Acts.
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> . . .
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> (c) Agreement.- In any State in which the State transportation department or other direct recipient is without legal authority to maintain a project described in subsection (b), the transportation department or direct recipient shall enter into a formal agreement with the appropriate officials of the county or municipality in which the project is located to provide for the maintenance of the project.

This maintenance responsibility extends to state, county, and municipal roads on Indian lands when the road is owned by one of these entities or one of these entities has agreed to maintain the road. A tribe may also use Tribal Transportation Program (TTP) funds for maintenance of public facilities included on the National Tribal Transportation Facility Inventory (this limitation does not apply to road sealing activities); this is in addition to any DOI funds a tribe may receive for maintenance purposes.[863]

N. GOVERNMENT-TO-GOVERNMENT COOPERATION[864]

1. General

As earlier sections of this document have made clear, the relationship between tribes and states is a complex one. The sharing of "adjacent lands, resources and citizens…has historically created conflict and uncertainty, often leading to expensive and lengthy litigation…[which] has not proven the best means to resolve the core uncertainties and distrust between states and tribes."[865] Many commentators view this 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.[866]

Professor Frank Pommersheim 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

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[856] *Id.* at 459.

[857] An appellate review body that has delegated authority to issue final decisions for the Department of the Interior on Indian matters.

[858] *Id*. at 459–60.

[859] *Id* at 460.

[860] *Id.* at 462–64.

[861] 30 F.3d 1203 (9th Cir. filed July 27, 1994).

[862] *Id.* at 1207.

[863] 25 C.F.R. § 170.800.

[864] *See generally*, Frank Pommersheim, *Tribal–State Relations: Hope for the Future?*, 36 S.D. L. Rev. 239 (1991) (hereinafter Pommersheim); Joel H. Mack and Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 Pepp. L. Rev. 1295 (1993)(hereinafter Mackand Timms); Deskbook, *supra* note 15, at 1009-71, State-Tribal Cooperative Agreements; CTC & Associates, Wisconsin Dot RD&T Program: State Dots And Native American Nations (Jan. 27, 2004) (hereinafter CTC & Associates).

[865] Deskbook, *supra* note 15, at 1083.

[866] Mack and Timms, *supra* note 864, 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.

and advancement."[867] 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.[868]

A joint project between the National Conference of State Legislatures (NCSL) and the National Congress of American Indians (NCAI) published the guide, *Government to Government: Understanding State and Tribal Governments* (2000),[869] which is intended to help states and tribes understand each other and begin the process of exploring new avenues for improving government services for the citizens of tribes and states. This guide suggests that new intergovernmental 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 continue to exist, as they may with any neighboring government. 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 states and tribes to understand each other and resolve conflict.

The NCSL and NCAI, in a later publication, *Government to Government: Models of Cooperation Between States and Tribes*,[870] 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:[871]

- A Commitment to Cooperation;
- Mutual Understanding and Respect;
- Consistent 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 intergovernmental relationships:

- State Legislative Committees
- State Commissions and Offices
- State–Tribal Government-to-Government Agreements and Protocols
- Tribal Delegates in State Legislatures
- Dedicated Indian Events at the Legislatures
- Individual Legislator Efforts
- State Recognition of Native Cultures and Governments
- Training for Legislators and Tribal Leaders on Respective Government Processes.
- Other Potential Legislative Mechanisms.
- Intertribal Organizations (Membership organizations representing some or all tribes in a state or region).[872]

The NCSL/NCAI report states that at the time approximately 34 states had 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:[873]

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[867] Pommersheim, *supra* note 864, at 251.

[868] *Id.* at 298. Professor Pommersheim noted at p. 266, that information from the states, together with analysis of available data at that time, 1991, showed that the majority of tribal–state agreements could 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

[869] 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 (2009) (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."

[870] 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).

[871] *Id.* at 7-10.

[872] *Id.* at 16-57

[873] Colo. Rev. Stat. 24-44-101.

> 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 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 and Indian people.

The duties of the Colorado Commission of Indian Affairs are typical of the duties of other such state commissions or councils.[874] The NCSL/NCAI report states that many of these offices are called "Governor's Office of Indian Affairs," but most commissions are established through legislation with a mix of Indian and non-Indian members.[875]

However, 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 previously noted, may be as important as who leads it. 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.[876]

[874] *See* Colo. Rev. Stat. § 24-44-103: (1) It is the duty of the commission:

> (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 facilitate the provision of 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 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; and
>
> (f) To employ and fix the compensation of an executive director of the commission, who shall carry out the responsibilities of the commission.

[875] NCAI/NCSL Models of Cooperation, *supra* note 870, at 24–25.

[876] Pommersheim, *supra* note 864, at 269.

2. State Approaches and Experiences[877]

a. Arizona

Arizona has 22 federally recognized tribes. Tribal lands make up about 28 percent of the State's land base. In 1999, the Arizona Department of Transportation (ADOT) established its Arizona 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. In 2006, ADOT adopted a tribal consultation policy. ADOT has three federal-state-tribal transportation partnerships each with the following partners:

- Hopi Tribe/BIA/FHWA/ADOT/Coconino County/Navajo County/Navajo Nation/Navajo DOT Partnership
- Navajo Nation/Navajo DOT/ADOT/BIA/FHWA/Hopi Tribe/ Coconino County/Navajo County/Apache County Partnership
- San Carlos Apache Tribe/White Mountain Apache Tribe / State / Federal / Counties / Railroad /Private Organization Partnership

Each of these partnerships has unique missions, goals, and objectives. ADOT also has a tribal liaison.[878]

b. California[879]

California has 109 federally recognized tribes. Caltrans has established a Native American Liaison Branch to serve as a liaison between Caltrans and tribal governments. A Native American Advisory Committee advises Caltrans management about transportation issues in the State. Caltrans also has District Native American Liaisons and a tribal consultation policy.[880]

c. Minnesota

Minnesota's state–tribal "Government-to-Government Transportation Accord" was executed on April 1, 2002. Signatories were the Minnesota Department of Transportation (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

[877] CTC & Associates, *supra* note 864.

[878] *Id.* at 3–4; Arizona Department of Transportation, Arizona Tribal Transportation Website, http://www.aztribaltransportation.org/ (accessed July 1, 2018).

[879] *Id.* at 3.

[880] Caltrans, Native American Liaison Branch, http://www.dot.ca.gov/transplanning/osp/nalb.html (accessed July 1, 2018).

> 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.[881]

In April 2003, subsequent to completion of the Transportation Accord, Minnesota Governor Pawlenty 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."[882] This Executive Order provided:

> 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.[883]

A similar executive order, Executive Order 13-10, was issued by the Minnesota Governor Dayton in August of 2013 which required certain executive branch agencies—in consultation with tribes—to develop a tribal consultation policy.[884] Subsequently, the Minnesota Department of Transportation's developed a "Minnesota Tribal Nations Government-to-Government Relationship with MnDOT" policy.[885]

d. New Mexico

The New Mexico Department of Transportation (NMDOT) has a tribal liaison who is charged with maintaining government-to-government relationships as described in the State's State-Tribal Collaboration Act.[886] NMDOT has completed Memoranda of Agreement and Joint Powers Agreements with all the pueblo and tribal nations in the State.[887]

e. Washington

The 1989 Washington Centennial Accord between 28 federally recognized Washington Indian tribes and the State of Washington[888] was initiated by the Governor's proclamation of January 3, 1989, and was signed by the Governor and a representative of each tribe. It "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:

> 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 developed by a combined tribal and state task force. WSDOT implemented these guidelines with its WSDOT Centennial Accord Plan (2003).[889] WSDOT also has a Tribal Communication and Consultation Protocol for Statewide Policy issues.[890] In addition, WSDOT has a tribal liaison and held a tribal-state transportation conference in 2016.[891]

f. Wisconsin

There are eleven federally recognized tribes in Wisconsin. The Wisconsin Department of Transportation (WisDOT) has a tribal affairs office which co-hosts an annual tribal transportation conference and consultation event with the WisDOT Inter-Tribal Task Force.[892] WisDOT along with the FHWA Wisconsin Division and the state's eleven federally recognized tribes entered into a partnership agreement in 2010 to "continue to create and define the processes by which the Wisconsin Department of Transportation (WisDOT) and the Wisconsin Division-Federal Highway Administration (FHWA) will work in

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[881] Minnesota Government-to-Government Transportation Accord III, Purposes and Objectives, *available at*: http://www.dot.state.mn.us/mntribes/pdf/accord2002.pdf (accessed July 1, 2018).

[882] Executive Order 03-05, dated April 9, 2003, filed with the Secretary of State, April 11, 2003.

[883] *Id.*

[884] Executive Order 13-10, Affirming the Government-to Government Relationship Between the State of Minnesota and the Minnesota Tribal Nations, Providing for Consultation, Coordination, and Cooperation, Rescinding Executive Order 03-05 (Aug. 8, 2013), *available at*: https://mn.gov/gov-stat/images/EO-13-10.pdf (accessed July 1, 2018).

[885] Minnesota DOT, Minnesota Tribal Nations Government-To-Government Relationship With MnDOT, MnDOT Policy AD005, effective Feb. 25, 2014, *available at*: http://www.dot.state.mn.us/policy/admin/ad005.html (accessed July 1, 2018).

[886] N. M. Stat. Ann. §§ 11-18-1 to 11-18-5.

[887] New Mexico Department of Transportation Native American Tribal Liaison, http://dot.state.nm.us/content/nmdot/en/Planning.html#TL (accessed July 1, 2018).

[888] The State of Washington Governor's Office of Indian Affairs Centennial Accord, *available at* https://goia.wa.gov/relations/centennial-accord (accessed September 23, 2018).

[889] The WSDOT Centennial Accord Plan Implementation Guidelines, *available at*: https://goia.wa.gov/relations/millennium-agreement/implementation-guidelines (accessed Sept 18, 2018).

[890] WSDOT Communication Protocol, June 2011, *available at*: http://www.wsdot.wa.gov/sites/default/files/2004/06/25/WSDOT_TribalCommunicationandConsultationProtocolsf.pdf (accessed July 1, 2018).

[891] WSDOT, 2016 Tribal State Transportation Conference, *available at:* http://www.wsdot.wa.gov/tribal/2016Conference.htm (accessed Sept. 18, 2018).

[892] WSDOT, Tribal Affairs, http://wisconsindot.gov/Pages/doing-bus/civil-rights/tribalaffairs/default.aspx (accessed July 1, 2018).

collaboration with the eleven federally recognized tribes (tribes) of Wisconsin."[893]

3. 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.[894] While properly drafted tribal–state cooperative agreements should be developed based upon general contract principles and designed to be enforceable in court, the extent of their enforceability as contracts is unclear due to the paucity of case law dealing with the issue.[895] The discussion and recommendations appearing in section G on contracting with Indian tribes and tribal entities should be considered if 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 Public Law 280 entered into cross-deputization agreements between tribal law enforcement and state patrol.[896] Pommersheim 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.[897]

Cooperative agreements were also addressed by Congress in the Indian Child Welfare Act (1978)[898] and Indian Gaming Regulatory Act,[899] 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 Potawatomi Indian Tribe of Oklahoma.*[900] 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."[901]

The Montana legislature responded to the Supreme Court's suggestion in 1993 by amending its State–Tribal Cooperative Agreement Act[902] 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[903] 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 col-

[893] The Partnership Agreement, Oct. 26, 2010, *available at*: http://wisconsindot.gov/Documents/doing-bus/civil-rights/tribalaffairs/20120209100322502.pdf (accessed July 1, 2018).

[894] Mack and Timms, *supra* note 864, at 1305.

[895] *Id*. *See also* State of Minnesota v. Manypenny, 662 N.W.2d 183 (Minn. filed June 3, 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." *Id*. at 187. In the earlier case of State of Minnesota v. Stone, 572 N.W.2d 725 (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." *Id*. at 732.

[896] Pommersheim, *supra* note 864, at 239, n.184. The Indian Law Enforcement Reform Act, Pub. L. No. 101-379, 104 Stat. 473 (1990) (codified at 25 U.S.C. §§ 2801-2815), was enacted by Congress to provide authority for cross-deputization agreements involving enforcement offederal or tribal laws by states in Indian country.

[897] *Id*., note 152, at 260. *See also* Mack and Timms, *supra* note 864, 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.

[898] Pub. L. No. 95-608, 92 Stat. 3069 (1978).

[899] Pub. L. No. 100-497, 102 Stat. 2467 (1988).

[900] 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991).

[901] *Id*. at 514.

[902] Mont. Code Ann. §§ 18-11-101, *et seq*.

[903] *See* Mont. Code Ann. § 18, ch. 625, L. 1993.

lection 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 added).

b. State's Legal Authority for Intergovernmental Agreements with Tribes

Practitioners advising state transportation agencies should consider whether state statutory authority exists to enter into cooperative agreements with tribal governments either from statutes specifically addressing such agreements or other applicable statutes authorizing state agency actions. There are numerous 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. Take for example, the following state laws:

- 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."[904] The statute authorizes "joint powers agreements," and specific provisions which must be in these agreements.[905]
- The State of New Mexico has a similar Joint Powers Agreement Act[906] 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 Indian nation, tribe or pueblo to enter into joint powers agreements directly with the state."[907]
- Minnesota has expressly authorized its department of transportation to enter into agreements with tribal authorities for highway work on tribal lands. Minn. Stat. § 161.368(a) provides:

  On behalf of the state, the commissioner may enter into 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 expressly limited as follows:

  (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 federally 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.[908]
- Montana enacted its State–Tribal Cooperative Agreement Act in 1981 "to promote cooperation between the

[904] 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.

[905] Wash. Rev. Code 39.34.030.

[906] N.M. Stat. Ann. §§ 11-1-1 through 1-7.

[907] N.M. Stat. Ann. § 11-1-2.

[908] Cal Sts. & High. Code § 94.

state or public agency and a sovereign tribal government in mutually beneficial activities and services."[909]

- Nebraska enacted its State-Tribal Cooperative Agreements Act in 1989.[910]

O. CONCLUSION

Indian law is best understood in historical perspective because it reflects national Indian policy, which has been constantly changing. Federal policy has shifted from regarding tribes as sovereign equals, to relocating tribes, to attempts to exterminate or assimilate tribes, to encouraging tribal self-determination. Running on a parallel track with the legislative and executive policies, but not always consistent with such policies, are the opinions of the federal judiciary. Chief Justice John Marshall's Indian trilogy established the foundational principles of American Indian law. The enduring principles of the Marshall Trilogy are three-fold: (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 tribes' dependence on the United States, the federal government has a trust responsibility relative to Indians and their lands.[911] For over 100 years, the federal judiciary held close to the principles of Chief Justice Marshall's opinion in *Worcester v. Georgia*,[912] prohibiting states from asserting power over Indian affairs. As late as 1959, in the unanimous decision in *Williams v. Lee*,[913] 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… [914]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.[915]

But, in 1973, the Court would recognize that Chief Justice Marshall's view had 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.[916]

Supreme Court decisions in subsequent years further limited tribal jurisdiction, particularly over non-Indians.[917] Some commentators have even referred to the modern-era as the era of judicial termination.[918] Nevertheless, there are instances in which tribes can exercise jurisdiction over non-Indians and there are many instances where state laws cannot be enforced in Indian country, particularly upon enrolled members of a tribe. The jurisdictional complexities involved in Indian law require a careful reading of case law and a background understanding of land ownership in Indian country and history. Even a careful reading of the case law will leave many unanswered questions. In light of this, many states, local governments, and tribes have tried to resolve the complexities with cooperative agreements rather than costly and time-consuming litigation that leaves decision-making authority to the courts.

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[909] Mont. Code Ann. 18-11-101 through 121. Section 103 provides as follows:

> (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.

[910] Neb. Rev. Stat. §§ 13-1501-09.

[911] Deskbook, *supra* note 15, at 8.

[912] 31 U.S. 515, 8 L. Ed. 483 (1832).

[913] 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

[914] *Id.* at 220, 79 S. Ct. at 271, 3 L. ED. at 256.

[915] 358 U.S. at 223, 79 S. Ct. at 272 3 L. Ed. 2d at 255.

[916] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148, 93 S. Ct. 1267, 1270, 36 L. Ed. 2d 114, 119 (1973).

[917] *See* section C.4.

[918] Richard Guess, *Motherhood and Apple Pie" Judicial Termination and the Roberts Court*, 56 Fed. Law., Mar./Apr. 2009, available at: http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2009/The%20Federal%20Lawyer%20-%20MarchApril%202009/Columns/Focus-On-Chapter-7-Trustee-Removal.aspx?FT=.pdf (accessed July 1, 2018).

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