Indian Law Newsletter

Published by the Indian Law Section of the Washington State Bar Association

Volume 19 | Summer 2011 | Number 2

Greetings from the WSBA Indian Law Section Chair

By Christina Parker

Greetings! The WSBA Indian Law Section has had a busy winter and spring. As we now enter the summer months, the section is as active as ever, with roughly 80% of the Section utilizing the listserve. I encourage you to utilize the listserve for posting upcoming Indian Law and Tribal Law events.

The WSBA has recently revamped section websites, and the Indian Law Section is now easy to navigate, and a great resource for staying updated regarding section activity.

It's hard to believe that we needed coats so recently, as the Pacific Northwest summer heats up, but it's important to recognize the Section's amazing response to the Holiday Coat Drive, co-sponsored with Foster Pepper. I hope the Section can continue to give back to our community – even outside the holiday season.

In other news, our membership has increased and we continue to provide greater access to legal education and the bar exam (check out the website http://www.wsba.org/Legal-Community/Sections/Indian-Law-Section for more information on Bar Exam Stipends and the Indian Legal Scholars Program). The Section hosted a successful edition of the Annual Indian Law CLE last month.

To top it all off, in February, WSBA Board of Governors voted to retain Indian Law on the bar exam. As always, the Section is what you make of it. If you would like to become more involved, or volunteer for Section work, please don't hesitate to contact me, or any of the officers or Trustees.

Indian Lawyers in the News

Governor Christine Gregoire appointed **Raquel Montoya-Lewis**, Associate Professor of Law at Fairhaven College of Interdisciplinary Studies, to serve on the Washington Partnership Council for Juvenile Justice.

Raquel Montoya-Lewis

Rob Roy Smith was made a shareholder of Ater Wynne LLP. Rob Roy advises Indian tribal clients and others regarding doing business in Indian Country.

Patricia Paul is once again working with Brazilian anthropologist Adolfo de Oliveria, PhD, as co-conveners of a symposium for the International Congress of the Americanists (ICA) regarding transformative cultures.

Rob Roy Smith

Amy Pivetta Hoffman has opened a practice focusing on business law and estate planning. She was also recently named Rising Star of 2011 by the Pierce County Democrats.

U.S. Attorney General Eric Holder appointed **Brent Leonhard**, Deputy Attorney General for the Confederated Tribes of the Umatilla Indian Reservation, to the Violence Against Women Federal and Tribal Prosecution Task Force. Within the first year, the task force will produce a trial practice manual on the federal prosecution of violence against women offenses in Indian country. Brent's article, The Adam Walsh Act and Tribes: One Lawyer's Perspective, was published in the April/May 2011 issue of the *Sex Offender Law Report* (Vol. 12, No. 3).

Lisa Atkinson

Lisa Atkinson, **Gabe Galanda**, **Chris Masse** and **Rob Roy Smith** were named Rising Stars in the area of Native American Law, by *Super Lawyer* magazine.

In This Issue

Indian Law News You Can Use

A Coqui Frog[1] in the Well: Why the Akaka Bill Is a Hollow Echo of Native Hawaiian Self-Determination

By Dan Watts

Introduction

In April the Senate Indian Affairs Committee, chaired by Senator Daniel Akaka of Hawaii, passed a bill sponsored by Senator Akaka that purports to give Native Hawaiians aboriginal rights similar to that of Native Americans and Alaska natives. The bill has been a career-long labor of love for Senator Akaka, and his efforts to protect the rights of native Hawaiians have educated politicians and lay people alike about the crimes that have been, and continue to be, committed against the aboriginal people of the Hawaiian archipelago. Daniel Akaka retires next year and leaves behind a largely unsung legacy of political courage in the face of widespread ignorance about the origins of U.S. annexation of Hawaii. Unfortunately, the Akaka bill[2] fails to acknowledge the natural resource rights that belong to the Kanaka Maoli.[3] The bill purports to officially reaffirm the special historical and legal relationship between Native Hawaiians and the U.S., and it has been controversial since it was first introduced in 1999.[4] Proponents argue that the bill will allow Native Hawaiians to enjoy the entitlements enjoyed by other Native Americans, including the right to self-determination.[5] Most opponents argue that the bill is racist, expensive, and in violation private property rights.[6] But many Kanaka Maoli also oppose the bill.[7] These activists believe that conceding to the Akaka bill will, in effect, legitimize the decidedly illegal 1893 overthrow of the Hawaiian constitutional monarchy, eliminating their domestic and international land claims, and preserving colonial interests into perpetuity.

> The federal Indian consultation obligation arises from numerous federal statutes, regulations, and presidential orders; case law; and international legal norms. In these ways, the federal Indian consultation is both a sword and a shield that tribal governments should deploy when necessary to guard and protect their sovereignty. A paper tiger the right is not.

In many ways the bill is a step in the right direction because it begins a dialogue between the Kanaka Maoli and the U.S. concerning the disposition of indigenous rights in Hawaii, and provides the two nations with an opportunity to distribute natural resources and political power in a more equitable manner. What is unfortunate is that the dialogue is taking place against a backdrop of existing U.S., state, and private property interests – and not against a backdrop of precolonial and international Native Hawaiian land rights. This predisposes the conversation between the U.S. and Native Hawaiians to one where all property rights flow from the U.S. to the Kanaka Maoli in the form of a tenancy at suffrage, whereas, legally, the Kanaka Maoli retain inherent property rights to their ancestral lands and natural resources, and what the U.S. is or should be entitled to has not been determined. Arguably, it is inappropriate to engage in a discussion of de jure natural resource rights in the face of de facto U.S., state, and private property occupation. But, this paper asserts that meaningful reform cannot proceed by any means unless the de jure disposition of property rights is at least acknowledged and, to some degree, defined.

Part I of this article provides a brief history of the U.S. occupation and annexation of Hawaii. Part II explores Native Hawaiian land rights in the contexts of both domestic and international law. Part III concludes that the Akaka bill fails to recognize the legal landscape of Native Hawaiian

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Indian Law News You Can Use

The Road to Alternative Energy in Indian Country: Is It a Dead End?

By Ryan Dreveskracht

Using solar and wind alone, Indian country has the capacity to produce more than four times the amount of electricity generated annually in the United States.[1] At the same time, states are passing renewable energy portfolio standards with fervor – without the capacity to meet these targets on their own.[2] The economic benefits of tribal energy development are painfully obvious – in FY2010, clean energy investments grew by 30 percent, to $243 billion.[3] An estimated $1 trillion in revenue is possible were Indian country to fully develop its energy resources.[4] With tribes already feeling the brunt of global warming,[5] the environmental benefits of using alternative energies to support the next generation are increasingly being explored.[6] Where unemployment levels are disproportionately high in Indian country,[7] perhaps equally important is that alternative energies are job-creating hothouses.[8]

Yet, as of February 2011, only one commercial scale renewable energy project is operating in Indian country.[9] What gives?

On April 1, 2011, the U.S. House of Representatives, Committee on Natural Resources, set out to find the answer.[10] In his opening statement, Committee Chairman Don Young set the tone for testimony to follow: "[B]ecause of outdated or duplicative federal regulations and laws, tribes often feel that the federal government is treating them unfairly…. These rules and policies often slow energy development and discourage businesses to invest on tribal lands."[11] Tribal officials identified the following impediments:

- Erroneous Bureau of Indian Affairs (BIA) records, which cause significant delay in the preparation of environmental documents and overall land records necessary for the approval of business transactions.[12]
- A lack of BIA staffing necessary to review and approve the required instrumentalities within a timely fashion.[13]
- The inability to enter into long-term fixed price contracts necessary to underpin the commercial framework needed for long-term projects.[14]
- A lack of standardization and coordination between Department of the Interior (DOI) offices.[15]
- A lack of DOI communication with state and local governments – with tribes bearing the brunt of the cost via legal attacks on their sovereignty.[16]
- General apprehension to issue National Environmental Protection Act (NEPA) compliance decisions at the Environmental Protection Agency, likely due to fear of litigation.[17]
- BIA delays in approving Rights-of-Way.[18]
- The practical inability to tax non-Indian energy developments on leased lands due to state and local governments in many instances already taxing the project.[19]
- Tribes', as owners, inability to take advantage of the production/investment tax credits and accelerated depreciation incentives available to non-Indian project investors.[20]

Stripped down, many the hindrances referred to in Hearing testimony are a direct result of the federal approval process. Pursuant to 25 U.S.C. § 415, transactions involving the transfer of an interest in Indian trust land must be approved by the BIA.[21] But even where the tribe structures the project without leasing its land, 25 U.S.C. § 81 requires that the BIA approve contracts that could "encumber" Indian lands for a period of seven or more years.[22] Secretarial approval is also necessary for rights-of-way on Indian lands.[23] In these instances the BIA approval process constitutes a "federal action," which triggers a slew of federal laws that the BIA must comply with.[24] This includes NEPA, the National Historic Preservation Act, and the Endangered Species Act, among others. Compliance with NEPA alone can take over 12 years to complete and can generate millions of dollars in additional cost[25] – not to mention the inevitable litigation that will ensue.[26] Although there has been some headway in removal of the outdated tribal energy regime, according to recent congressional testimony there is much work to be done.

> "[A]s of February, 2011, only one commercial scale renewable energy project is operating in Indian country. What gives?"

The Road to Nowhere

Congress began to address the development of renewables in Indian country in the early nineties. Such legislation included the EPAct of 1992,[27] which authorized the Department of Energy (DOE) to provide grants and loans to tribes wishing to develop solar and wind energy; the Indian Energy Resource Development Program,[28] which awarded development grants, federally-backed loans, and purchasing preferences to Indian tribes pursuing energy development projects[29]; culminating in the Indian Energy

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Indian Law News You Can Use

Recent Developments in Federal Indian Consultation

By Gabriel S. Galanda

In the Winter 2010-2011 edition of *Indian Law Newsletter*, I published "The Federal Indian Consultation Right: A Frontline Defense Against Federal Sovereignty Incursion," suggesting that the battle line in the ongoing war between federalism and tribalism could (or should) first be drawn in tribal council chambers, through federal-tribal consultation.[1]

Federal agencies have an obligation to "meaningfully consult" with Indian tribes if there is any possibility that a federal action, on or off reservation, would upset the United States' Indian trust responsibility or adversely affect a tribes' land, resources or treaty or usufructuary rights.[2] If a preemptive consultation strike proves insufficient to protect tribal sovereignty and Indian ways of life against federal encroachment, tribal governments should escalate the battle to the U.S. District Court, where the federal Indian consultation right can be wielded in search of an injunction or writ of mandamus to halt threatened federal action.

Since that article published, there have been a series of significant federal legal and political developments concerning the Indian consultation right, all of which are discussed in this follow-up piece. Through such developments, and as tribal governments recognize and exercise their power, the inherent sovereign Indian right of consultation grows stronger by the day. To be clear, the burgeoning federal Indian right is not a privilege. Nor is it charity bestowed upon tribes by the federal government. Nor is the federal Indian right "just words." It is a right, rooted in the U.S. Constitution; intrinsic to Indian treaties; required by Indian trust doctrine; affirmed by federal common law, statutes, regulations and policies; and embodied in international legal norms.

As I remarked in the first article, President Obama's November 2009 Executive Memorandum on tribal consultation "may represent one of the Obama Administration's most important federal Indian policy accomplishments to date," particularly insofar as federal agencies are mandated to get with the Indian consultation program.[3] The Administration should be heralded for its commitment to interfacing with tribal governments, as governments, and for its recent endorsement of the United Nations Declaration on the Rights of Indigenous Peoples. As discussed below, the Declaration resounds with a *profound* nation-state commitment to consultation with indigenous peoples.

But Indian Country cannot ignore the reality that on President Obama's watch, federal agency bureaucrats, counsel and line staff still all too frequently fail to meaningfully consult with tribal governments about proposed federal actions that threaten Indian sovereignty and ways of life. In the last year, Federal District Courts have held both the U.S. Department of Agriculture (USDA) and Interior's Bureau of Land Management (BLM) in breach of the federal Indian consultation right for those agencies' failure to meaningfully consult with affected tribes.[4]

Indian Country must stand prepared to forge new battle lines in defense against United States encroachment, beginning each potential fight with consultation. Indeed, it would be naïve for tribes to think that in the minds and hearts of the Feds, consultation always means collaboration and/or conciliation.

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Quechan Tribe v. U.S. Department of Interior

Last November, the Quechan Tribe of the Fort Yuma Indian Reservation filed suit for a preliminary injunction to void the Department of Interior's approval of a 709-megawatt solar farm planned for over 6,000 acres of public land in California's Imperial Valley. Those lands, which are managed by BLM, contain an estimated 459 "cultural resources," most of which are of significance to the Quechan People.[5] The United States did not dispute the legitimacy of the cultural resources or that the lands had a "history of extensive use by Native American groups."[6] The tribe alleged that Interior had "reached its approval decision prior to evaluating the eligibility of cultural resources identified in the Project area and without engaging in required consultation with tribes" as required by law. The District Court agreed, issuing a preliminary injunction enjoining the solar power project from proceeding on December 15, 2010.

In holding that Interior acted arbitrarily and capriciously, the court found that, among other abuses, the agency violated the general imperative that "federal agencies owe a fiduciary duty to all Indian tribes, and that at a minimum this means agencies must comply with general

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Indian Law News You Can Use

The IRS "Fresh Start" Program: New Tax Collection Remedies for Individual Tribal Members and Their Small Businesses

By Wendy S. Pearson

There is new relief available for individual tribal members and any small business owner facing collection actions from the Internal Revenue Service. If you have received a lien or levy notice, or are negotiating payment of back taxes, take note. The Internal Revenue Service (IRS) announced on February 24, 2011, a series of new steps to help individuals and small businesses get a fresh start with their tax liabilities. IR 2011-20. Specifically, the IRS is instituting new policies and programs to help taxpayers pay back taxes and avoid tax liens and to make it easier to comply with the tax laws. The changes are being made to both the IRS lien process, as well as its Offer in Compromise program. "We are making fundamental changes to our lien system and other collection tools that will help taxpayers and give them a fresh start," IRS Commissioner Doug Shulman said. "These steps are good for people facing tough times, and they reflect a responsible approach for the tax system."

> "None of these actions may be taken against an individual Indian or their business without prior top-level approval within the Indian Tribal Governments division of the IRS."

The new procedures outlined in this article do not alter the rights enjoyed by tribal members and their individual businesses from unwarranted and illegal actions by the IRS against their property. For instance, land held in trust is still protected from seizure by the IRS. However, wages may be garnished, property held in fee may be seized, monies in bank accounts may be seized, per capitas may be seized, and federal tax refunds may be kept by the IRS. None of these actions may be taken against an individual Indian or their business without prior top-level approval within the Indian Tribal Governments Division of the IRS. More importantly, the first line of defense is always to confirm the validity of any IRS lien or levy; the IRS must have legal authority for the particular action and no action can be taken by the IRS without giving you proper Notice (e.g., Notice of Intent to Levy, Notice of Your Collection Due Process Rights, etc.). A complete recitation of all the laws applicable to IRS enforced collection actions affecting tribes and their members is beyond the scope of this article. However, if you presently face imminent threat of enforced collection action or are struggling to work out payment terms for back taxes, these are timely and important new rights about which you should be aware.

Tax Lien Thresholds

The IRS' Fresh Start Initiative increases the dollar thresholds when liens are generally filed. Previously, liens were filed if the unpaid tax liability is $5000 or more and filing of the lien was determined to be in the best interests of the IRS. An internal IRS Memorandum issued in March 2011 instructs IRS revenue officers that they may no longer file tax liens unless the assessed tax balance due is $10,000 or more. There is an exception if the taxpayer is in bankruptcy or there are other exigent circumstances warranting a lien. The new dollar amount is intended to be in keeping with inflationary changes.

A federal tax lien gives the IRS a legal claim to a taxpayer's property for the amount of an unpaid tax debt. Filing a Notice of Federal Tax Lien is necessary to establish priority rights against certain other creditors, because the government is usually not the only creditor to whom the taxpayer owes money. A lien informs the public that the U.S. government has a claim against all property, and any rights to property, of the taxpayer. This includes property owned at the time the notice of lien is filed and any acquired thereafter. A lien will adversely affect a taxpayer's credit rating.

Tax Lien Withdrawals

1. Lien Withdrawals Easier After Tax Is Paid

Liens will now be withdrawn once full payment of taxes is made ***if*** the taxpayer requests it. Thus, taxpayers should take affirmative steps to clear their credit history of IRS liens once back taxes have been paid. Request a lien withdrawal on Form 12277 (downloadable from www.irs.gov). The IRS is also establishing streamlined procedures to allow IRS collection personnel to initiate lien withdrawals. But, taxpayers should not assume the IRS will take steps to clear any liens without being asked to do so.

2. Direct Debit Installment Agreements to Avoid Liens

The IRS is making other fundamental changes to liens in cases where taxpayers enter into a Direct Debit Installment Agreement (DDIA). For taxpayers with unpaid assessments of $25,000 or less, the IRS will now allow lien withdrawals if a taxpayer on a regular Installment Agreement converts to a Direct Debit Installment Agreement. Generally, a request for withdrawal under this provision will be approved if all of the following conditions are met:

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Indian Law News You Can Use

State v. Jim Amici Brief

The following selection from an *amici curiae* brief filed in *State of Washington v. Lester Ray Jim* before the Washington State Supreme Court provides useful insight into tribal and state P.L 280-jurisdiction on Indian Country acquired after 1968. *Amici curiae* were Confederated Tribes of the Umatilla Indian Reservation (represented by M. Brent Leonhard), Confederated Tribes of the Warm Springs Reservation of Oregon (represented by John W. Ogan), Nez Perce Tribe (represented by Julie S. Kane and David J. Cummings), and Confederated Tribes and Bands of the Yakama Nation (represented by Julio Carranza).

[…]

I. RCW 37.12.010 DOES NOT APPLY IN THIS CASE WITHOUT A MAJORITY VOTE OF THE *AMICI* TRIBES' CITIZENS

A. Washington's jurisdiction in Indian country acquired after 1968 requires tribal consent

In 1953 Congress enacted Public Law 280, which mandated state criminal jurisdiction over Indian country in some states and left open an option for other states to assert jurisdiction if they so desired. 67 Stat. 588 §7. Washington was not a "mandatory 280" state, but in 1957 it chose to exercise the option to assert jurisdiction over Indian country in a limited context. Laws of 1957, Ch. 240. Under the 1957 laws, the State did not assert jurisdiction unless and until a tribe expressly authorized an extension of the State's jurisdiction over its lands. *Arquette v. Schneckloth*, 56 Wash. 2d 178 (1960). The State's law was amended in 1963 to exclude the tribal consent requirement. Laws of 1963, Ch. 36; RCW 37.12.010. In 1968, consistent with the newly adopted federal policy of self-determination and pursuant to the Indian Civil Rights Act, the United States amended Public Law 280 to require option states to obtain tribal consent prior to assertion of jurisdiction. 25 U.S.C. § 1321(a); Goldberg, *Public Law 280: The Limits Of State Jurisdiction Over Reservation Indians*, 22 UCLA Law Review 535, 546, 549 (1974). This limitation was not retroactive, leaving intact jurisdiction assumed by the State prior to the Act's passage. 25 U.S.C. § 1323(b)("… such repeal shall not affect any cession of jurisdiction made … prior to its repeal."); *State v. Hoffman*, 116 Wash. 2d 51, 68-69, 804 P.2d 577 (1991).

At no point have any of the *amici* tribes consented to the exercise of Washington's jurisdiction in their Indian country lands. *Arquette* at 183. On the contrary, the Yakama Nation has rigorously fought against a non-consensual extension of state jurisdiction into its Indian country lands. *See, e.g., Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 465-66, 99 S.Ct. 740 (1979).

Washington is obligated to obtain consent for any Indian country established after 1968. 25 U.S.C. § 1326.[1] The 1968 amendment to Public Law 280 provides:

> State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses… shall be applicable in *Indian country* only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose.

25 U.S.C. § 1326 (italics added). The plain language of the 1968 amendment requires tribal consent to jurisdiction assumed after 1968. *State v. Hoffman*, 116 Wn.2d 51, 68-69, 804 P.2d 577 (1991). Liberally construing this language with all ambiguities in the tribes' favor, the amendment prevents extension of state criminal jurisdiction into Indian country established after 1968. *State v. Eriksen*, --- Wn.2d. ---, 241 P.3d 399 (2010)(stating Indian law canon of construction). The lands in question in this case were set aside for the four *amici* tribes by Congress in 1988. At no time did any of the citizens of the four *amici* tribes for whom the land was set aside vote to permit the extension of state jurisdiction.

> As required by the 1968 amendments to Public Law 280, and because Washington is a Public Law 280 option state, Washington must first obtain the consent of the *Amici* tribes by majority vote of their citizens before the state can assert jurisdiction over this site. 25 U.S.C. § 1321; 25 U.S.C. § 1326. At no point have any of the *Amici* tribes consented to the State of Washington's assertion of criminal jurisdiction over the Maryhill Site, let alone conducted a vote of their membership as required by federal law.

B. *State v. Cooper* is in accord

This court, in *State v. Cooper*, 130 Wn.2d 770, 928 P.2d 406 (1996), recognized that the 1968 amendment requires tribal consent for Indian country established after its adoption. Among the arguments Mr. Cooper asserted was that the land in question was not subject to Washington authority because the Nooksack Tribe had not agreed to the as-

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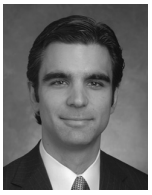
Indian Law News You Can Use

Slander and the Sovereign: Shifting Defamation Law in Indian Country

By Anthony S. Broadman



The legal treatment of expression differs drastically depending on whether tribal or non-tribal defamation laws apply. Tribal courts sometimes treat reputational torts like slander and libel, structurally, like their non-tribal counterparts, generally requiring proof of fault, falsity and harm. For instance, in many ways the Little River Band of Ottawa Indians defamation statute mirrors the standards of proof and structures of non-tribal defamation common law. On the other hand, at least one tribal court has recognized a traditional cause of action for defamation under tribal law, complete with novel privileges and standards. As media interests increasingly collide with tribal governmental and commercial interests, tribal laws on expression will be tested. The results, as shown in a recent case from the Ho-Chunk Nation courts, will test the ongoing viability of defamation law in Indian country.

As media interests increasingly collide with tribal governmental and commercial interests, tribal laws on expression will be tested. The results … will test the ongoing viability of defamation law in Indian country.

Libel and slander are curious species of lawsuits, since they involve a person writing or speaking his mind and being sued for it. In non-tribal courts, plaintiffs who are public figures face a high burden of proof. But because U.S. Constitutional standards are not imported into tribal defamation law, speech laws take on very different shapes in Indian country. In 2008, an ordinance passed and quickly rescinded by the Tribal Business Counsel of the Chippewa Cree of Rocky Boy's Reservation in Montana made it a crime to defame a tribal official. And earlier this year, a Ho-Chunk Nation Trial Court applied a tribal military veteran's privilege that, as it is recognized, existed nowhere besides Ho-Chunk.

In a careful treatment of tribal-specific defamation law, the Ho-Chunk Trial Court recently held that a "veteran privilege" existed, protecting certain defamation defendants from liability. The court noted that although it "does not exist in any other jurisdiction," the Ho-Chunk veteran privilege resembles that possessed by legislators, which shields certain legislative speech.

The suit stemmed from an Indian military veteran's criticism of a tribal health department employee and an incorrect statement that the plaintiff had been terminated from employment. Outside of Ho-Chunk, the case might have been dealt with using traditional indicia of fault. Typically, public officials suing their defamers must prove knowing or reckless falsehood. In *Gardner*, had such a rule been applied and had defendants simply negligently defamed the plaintiff, no liability would exist.

Instead, the court found that the publication at issue had in fact "defamed the plaintiff," suggesting that perhaps under the Nation's laws, even public officials are entitled to the lower private-person standard for fault. But the court dismissed claims against certain defendants, holding that they enjoyed a privilege from defamation suit. The privilege, it held, arose because the publishers of such defamatory communications were combat veterans, and their *duty* to speak on behalf of tribal members carried with it *protections* for such speech. The court wrote that it had specifically looked to Ho-Chunk traditions and customs, and "the cultural, engrained and embodied warrior society." Having already asked the Nation's separate Traditional Court whether defamation existed under tribal law, the court held that:

> Warriors return to their respective community with experiences that make them valued members of their society, and maintain a duty to protect the Ho-Chunk people.

As one veteran-defendant put it, "he ha[d] a duty *and a right* to stand up as a warrior and voice the concerns of the people" (emphasis added). Non-tribal defamation law would have likely ignored the veteran-defendants' particular contributions to the governmental process. In the Ho-Chunk court, however, the privilege barred suit – even though other avenues to the same result were available.

Rocky Boy's 2008 Ordinance mirrored Montana's criminal defamation statute, which remained on the books despite probably being unconstitutional. The Rocky Boy's Business Council, apparently reacting to allegations of corruption, had drawn from state law, adding the enforcement mechanism of exclusion from the reservation. The ordinance made it an "offense for any person to engage in communication that harms the reputation or integrity of another." Under the law, if slander or libel was directed against the Council or any Tribal employee, the publisher was subject to a 5-year exclusion from Rocky Boy's Reservation and a fine of up to $5,000.

The ordinance appeared to be a direct attempt to stifle political dissent. Under non-tribal law, the rule would likely be unconstitutional since it contains no requirement that a public figure plaintiff prove constitutional malice. Even in the civil context, a public official as plaintiff who

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A Coqui Frog in the Well: Why the Akaka Bill Is a Hollow Echo of Native Hawaiian Self-Determination *from page 2*

land and natural resource rights. By denying the de jure posture of the relevant parties in favor of their de facto relations, the Akaka bill unlawfully constricts Native Hawaiians' rights of self-determination and sets a troubling precedent for future relations between the Kanaka Maoli and the U.S. Moreover, the bill indulges in a colonial narrative of the disposition of land and natural resource rights that threatens all indigenous groups in the United States.

Part I. Hawaii's History

Mariners from the Marquesas Islands discovered Hawaii sometime between 300 and 500 A.D.[8] The society that subsequently developed was completely self-sufficient, supporting a population of roughly one million people.[9] All members of society were given access to necessities, as the natural resources were abundant.[10] The islands were divided into triangular parcels of land that followed drainages from spring to sea, called ahupua'a.[11] Lands were communally held.[12] Decision-making was consensual.[13] Politics and religion were united around a principle of love for the land.[14] High chiefs[15] controlled the ahupua'a and were answerable to kings who governed over entire islands along the archipelago.[16]

Western whaling crews brought disease and missionaries in the late eighteenth century.[17] Furthermore, these mariners did not respect the local laws and customs, which disrupted indigenous life on the archipelago.[18] In 1810, as a matter of survival, Hawaii united under one King.[19] Hawaii and the U.S. began negotiating the first of four treaties in the 1820s,[20] which opened Hawaii's ports to U.S. mariners and the navy in exchange for a promise of perpetual peace and friendship.[21] Similarly, the 1849 Treaty with Hawaii on Friendship, Commerce and Navigation promised perpetual peace and amity with the Hawaiian monarch, his heirs and successors.[22]

This was a tumultuous time for Hawaii. Disease continued to rush through the ahupua'a, wiping out hundreds of thousands of the Kanaka Maoli. As waves of settlers brought exclusionary western land tenure to an otherwise communal system,[23] many Hawaiians discovered that they were cut off from the natural resources necessary to sustain themselves on the ahupua'a and migrated to ghettos in the urban centers.[24] By this time, westerners had taken over the King's Privy Council,[25] which pressured the King to initiate a land "reform" program.[26]

Subsequently, communal lands were divided into private property belonging either to the King, the high chiefs, or to homesteaders.[27] The King agreed to the restructuring, known as the Ka Mahele, under the condition that foreigners would not be able to own the land.[28] But, in 1850, the King passed the Kuleana Act, which allowed private property owners to alienate their lands.[29] During the following forty years, whites were able to leverage their wealth against the Kanaka Maoli to gain control of most of the privately owned lands.[30] One missionary observed, "While the natives stand confounded and amazed at their privileges and doubting the truth of the changes on their behalf, the foreigners are creeping in among them, getting their largest and best lands, water privileges, building lots, etc., etc."[31]

The consolidation of economic power allowed westerners to coerce the King into accepting a new constitution (the "Bayonet Constitution"), which virtually eliminated power of the King in favor of a legislature dominated by whites,[32] with willing political support from the U.S. minister to Hawaii, John Stevens.[33]

However, a subsequent sovereign, Queen Lili'uokalani, was prepared to overturn the Bayonet Constitution and reinstate the rule of the monarchy.[34] The events that followed were catalogued by President Cleveland following a thorough investigation.

> And so it happened that on the 16th day of January, 1893, between four and five o'clock in the afternoon, a detachment of marines from the United States Steamer Boston, with two pieces of artillery, landed at Honolulu. … This military demonstration upon the soil of Honolulu was of itself an act of war, unless made either with the consent of the Government of Hawaii or for the bona fide purpose of protecting the imperilled [sic] lives and property of citizens of the United States. But there is no pretense of any such consent on the part of the Government of the Queen, which at that time was undisputed and was both the de facto and the de jure government … There is as little basis for the pretense that such forces were landed for the security of American life and property. … The peril they saw was an anticipation growing out of guilty intentions on their part and something which, though not then existing, they knew would certainly follow their attempt to overthrow the Government of the Queen without the aid of the United States forces.[35]

What Cleveland's letter showed most clearly was that Stevens was well aware of the patent illegality of his actions.[36] Cleveland's successor, McKinley, annexed Hawaii in 1898.[37]

Part II. De Jure Legal Rights

In 1993, the U.S. Congress passed PL 103-150, apologizing for the "illegal overthrow of the Kingdom of Hawaii."[38] The U.S. also expressed "its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for the

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A Coqui Frog in the Well: Why the Akaka Bill Is a Hollow Echo of Native Hawaiian Self-Determination *from previous page*

reconciliation between the United States and the Native Hawaiian people."[39] This apology, though long overdue, did not identify the nature, extent, or even existence of ramifications. Native Hawaiians are nevertheless entitled to some redress as a matter of both domestic and international law, but the practical meaning of this entitlement is unknown.

A. Domestic Law Theory – Aboriginal Title

Under domestic law, indigenous people retain "aboriginal" title[40] which is an inherent and exclusive right to possess their ancestral lands and reap the benefits of the natural resources. In brief, Discovery provides the discoverer the exclusive right to extinguish aboriginal title to the land.[41] But Discovery does not, by itself, extinguish aboriginal title.[42] The discoverer can extinguish aboriginal title only by purchase or Conquest.[43] Therefore, lands that were transferred out of indigenous possession by legally insufficient means are subsequently liable for existing aboriginal title.[44]

The scope of aboriginal title was initially adjudicated by Chief Justice Marshall in *Johnson v. M'Intosh* (1823), which is largely regarded the fountainhead of Indian jurisprudence.[45] Subsequently, the Supreme Court has held that neither the Secretary of the Interior nor Congress has the right to ignore aboriginal title;[46] aboriginal title is inherent and does not depend on federal recognition of the right by treaty, executive order, or Congressional act;[47] aboriginal title exists wherever indigenous people are still in possession of the lands at the time of U.S. Discovery;[48] and finally, aboriginal title does not become extinguished by the simple passage of time.[49]

Despite the broad enforceability of aboriginal title, such claims have not jeopardized non-Indian title on a vast scale because, in general, the federal government conscientiously extinguished aboriginal title to most lands through purchase.[50] As Felix Cohen wrote in 1947:

> Every schoolboy is taught to believe that the lands of the United States were acquired by purchase or treaty from Britain, Spain, France, Mexico, and Russia …. Notwithstanding this prevailing mythology, the historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners. … What we did acquire from Napoleon was not the land, which was not his to sell, but simply the power to govern and tax, the same sort of power that we gained with the acquisition of Puerto Rico or the Virgin Islands a century later.[51]

Cohen's observation begs the question, what of the extra-continental territories subsequently acquired by the U.S. where indigenous people were still in possession of the lands – particularly Alaska and Hawaii? This question reached the Supreme Court in 1955 in *Tee-Hit-Ton Indians v. United States*,[52] which involved the removal and sale of timber from lands occupied by the Tee-Hit-Ton.[53] Ultimately, Justice Reed held that aboriginal title was not sufficient to maintain the suit, absent recognition by Congress that the Tee-Hit-Ton possessed legal rights to the land in question.[54] This articulation of the law is inconsistent with the jurisprudence that sprang from Chief Justice Marshall's observation that indigenous people are "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it."[55] The perniciousness of Justice Reed's opinion lies in the subtle reversal of aboriginal title from an inherent right to one granted at the sufferance of the U.S. As Nell Jessup Newton observed in 1980, "Tee-Hit-Ton implicitly authorizes congressional confiscation of Indian land …. [and] prevents many tribes from fully litigating existing claims against the government."[56]

> [T]HE COLONIAL FORCES THAT OVERRAN HAWAII HAVE OBSCURED HISTORICAL FACT WITH THE DIN OF THEIR OWN REVISIONIST NARRATIVE.

Tee-Hit-Ton was decided during an era of federal termination policy.[57] During this period, the federal government sought to renounce Indian treaty entitlements, liquidate the assets of the tribes, and terminate the existence of the tribal governments.[58] Standing in the way of this policy was one-hundred years of contrary Indian law jurisprudence. There was only one treatise on Indian law available at that time: Felix Cohen's Handbook of Federal Indian Law.[59] Cohen's work recognized aboriginal title and the inherent sovereignty of the tribal governments.[60] For these reasons, it was taken out of print and purposefully rewritten to emphasize the federal government's plenary power over the tribes.[61] The inherent rights and sovereignty of the tribes were literally written out of this narrative.[62] So, to accuse the federal government and the Supreme Court of adopting a revisionist narrative in order to justify their actions is not merely a rhetorical flourish.

Under any responsible reading of aboriginal title jurisprudence, the Kanaka Maoli are entitled to compensation for their property rights. When the U.S. overtook the archipelago in 1893, more than 2.5 million acres of the island belonging to the King and high chiefs were occupied by the Kanaka Maoli.[63] No purchase of the aboriginal title was ever made. Conquest occurred, but it had long ago ceased to be a legitimate form of extinguishing title because the U.S. willfully entered into Peace and Amity treaties with the

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Hawaiian Royal government.[64] Therefore, under domestic law, Native Hawaiians have an inherent and compensable right to retain possession of their lands.

Considering the current atmosphere in the Supreme Court, an aboriginal title claim would be an inappropriate means to pursue aboriginal rights. In fact, an indigenous land claim arising from different circumstances was recently adjudicated in the Supreme Court in an opinion written by junior Justice Alito[65] who was conspicuously disposed towards the myth that indigenous property rights derive from the sufferance of the government and not from the inherent sovereignty of the indigenous people.[66]

However, there is no reason why Native Hawaiians should accept this revisionist narrative from Congress, which has officially adopted a policy of aboriginal self-determination.[67] The Akaka bill should be evaluated against a background of aboriginal title – a vital legal right benefitting Native Hawaiians. And Native Hawaiians should not enter into negotiations with the U.S. government if the Akaka bill presupposes a revisionist structure of land rights.

B. International Legal Theory – Self-Determination

Following the passage of PL 103-150, Francis Boyle, an international attorney and professor of law, delivered an opinion to members of one of Hawaii's native sovereignty organizations indicating the potentiality of reinstatement of the Kingdom of Hawaii.[68] Since Hawaiian lands were taken illegally, in derogation of treaty, and by force, the U.S. was not authorized to annex until peace treaties had been established.

Professor Boyle's opinion on the significance of PL 103-105 has emboldened the Hawaiian native sovereignty movement.[69] But it is more of a point of departure for further study than a destination. Troubling legal and practical questions remain unresolved. Generations of settlers from all over the world have moved to Hawaii. What is to be made of their "settled expectations"?[70] In 1959, Hawaiians overwhelmingly voted to join the Union. Did this not remedy the illegal overthrow of the Hawaiian government and the subsequent annexation? Resolution of these issues is beyond the scope of this article, but suffice it to say they will require the guidance of international law.

Thankfully Jim Anaya, one of the foremost scholars of indigenous rights, has already analyzed the rights of the Kanaka Maoli under the international doctrine of self-determination.[71] Self-determination has both substantive and remedial implications for Hawaiians.[72] Substantively, self-determination requires both that governments be derived from a constitutional process guided by the will of the people governed, and that the resulting government be one under which the people may live and develop freely.[73] Remedially, "self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation."[74]

The Kanaka Maoli have been denied the rights to create and access their own government. This right is primarily procedural in nature and does not guarantee any specific outcome, except that the will of the people be reflected.[75] However, forced incorporation with an occupying military force is a decidedly illegitimate procedure. Furthermore, self-determination entitles Native Hawaiians "to freely pursue their economic, social, and cultural environment."[76] This pursuit may take many forms, but it excludes forced assimilation practices such as outlawing native languages and religious ceremony.[77] From 1898 until 1959, Hawaii was a U.S. territory. During most of this time, the federal government's official policy on indigenous people was assimilatory.[78] On the continent, tribalism and communal land tenure were assaulted by the Dawes Act, which, like the Ka Mahele, privatized tribal land.[79] Conditions for the Kanaka Maoli were similar, as were the results.[80] The Kanaka Maoli fell into a rapid economic decline from which they have never recovered.[81]

Chapter XI, Article 73 of the U.N. Charter obligates U.N. members responsible for the administration of territories where people have not attained self-government[82]

> a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement[83]

Hawaii was considered a non-self-governing territory until it was annexed in 1959.[84] Following statehood,[85] the U.S. took the position that the vote to join the U.S. gave Hawaiians the opportunity to establish self-government. However, Anaya argues that the processes used to establish statehood make it an illegitimate remedy.[86] First, the plebiscite procedures allowed the settler population to overpower the Native Hawaiian vote, whereas international practice does not allow settler participation in plebiscite procedures.[87] Second, the vote itself provided Native Hawaiians with a Hobson's choice between occupation and statehood, failing altogether to contemplate Native Hawaiian self-government.[88]

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Furthermore, in terms of ensuring the "political, economic, social, and educational advancement"[89] of the Kanaka Maoli, statehood has been an unmitigated failure. Native Hawaiians are the poorest human group on the archipelago; they have no recognized governmental structure; they suffer disproportionately high rates of unemployment, poor health, and poverty;[90] their schools were overtaken by foreigners during the annexation period;[91] and they suffer from disproportionately low high school graduation rates.[92]

The palpability of native Hawaiian poverty and despair led the U.S. Congress, in 1921, to declare them a "dying race" and to set aside 200,000 acres of land as homelands.[93] But incompetent government administration put most of the homelands into the possession of non-Hawaiians.[94] This illusory restoration can hardly be said to have provided the land base necessary for the Kanaka Maoli to "freely pursue their economic, social and cultural development."[95] Sacred sites are still degraded and made inaccessible.[96] Ususfructory rights remain severely curtailed.[97] And Native Hawaiians remain functionally landless.

Under International customary law, the position of indigenous people has been recognized as distinct from other colonized peoples insofar as they are culturally cohesive groups that have lost the connection to natural resources necessary for them to live and develop freely within their traditional homelands.[98] Like other oppressed human groups, indigenous people are entitled to full and equal participation in the creation and management of their governmental institutions and to control their own political destiny. But the decolonization of indigenous people, in particular, requires a sober recognition of indigenous land and natural resource rights. Under the emerging constellation of indigenous self-determination in international customary law, "special measures" must be taken to restore and protect natural, and cultural resources.[99]

According to Jim Anaya, "the international norms concerning indigenous peoples, which thus elaborate upon the requirements of self-determination, generally fall within the following categories: cultural integrity, lands and resources, social welfare and development, and self-government."[100] Each of these elements relies on the others for satisfaction. For the purposes of this article the focus is on land and natural resources. But obviously, cultural integrity cannot be protected without protecting religious sites and traditional land uses; social welfare and development cannot proceed without the natural-resources from which to subside and develop economies; and self-government requires, at the very least, a land base over which to exert territorial jurisdiction.

Property is an established international human right both as a means of subsistence and as the site of traditional cultural activity.[101] Furthermore, it is widely recognized that land and natural resources are the source of indigenous peoples' economies.[102] Pragmatically, this requires that indigenous people have meaningful opportunities to participate in the management and conservation of their lands and natural resources. Likewise, indigenous people are entitled to adequate legal procedures by which to remedy their legitimate claims to ownership of their ancestral lands and access to their natural resources.[103]

Part III. Conclusion

Section 9 of the Akaka bill contains the salient portion of the bill and provides that "upon reaffirmation of the political and legal relationship between the United States and the Native Hawaiian governing entity," the U.S., Native Hawaiians, and the State will enter into negotiations.[104] These negotiations contemplate the "transfer of State of Hawaii lands and Federal surplus lands, natural resources, and other assets, including land-use" to Native Hawaiians.[105] This proviso appears to be restorative. But it assumes that the de facto state of affairs is legitimate and the Kanaka Maoli have no aboriginal title to the land. That is, by assuming that the state and the federal surplus lands are held in clear title, and by assuming that the lands and natural resources are theirs to give to Native Hawaiians, the bill reverses the de jure legal posture and adopts the revisionist narrative.

Moreover, section 9 specifically states that

> [N]othing in this Act alters existing law, including case law, regarding obligations of the United States or the State of Hawaii relating to events or actions that occurred prior to recognition of the Native Hawaiian governing entity. In addition, this Act does not create, enlarge, revive, modify, diminish extinguish, waive, or otherwise alter any claim or cause of action against the United States or its officers, or the state of Hawaii and its officers.[106]

Again, this appears to be a favorable proviso for Native Hawaiians because it provides for the resolution of existing claims against the U.S. and the state of Hawaii, including the illegal overthrow of the Kingdom of Hawaii. But, in context, the effect of the proviso preserves the de facto legal landscape. That is, case law in particular has recently established that PL 103-150, which acknowledged the illegal overthrow of the Kingdom of Hawaii, did not "create substantive rights" upon which Native Hawaiians could base a land claim, and, therefore, no such rights exist.[107] There again, the court adopted a revisionist narrative wherein indigenous land rights emanate from the sufferance of the U.S. Congress, instead of from inherent rights

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recognized by both domestic and international law. In effect, the Akaka bill preserves this narrative and forestalls any claim based on inherent rights that predate the state of Hawaii or on rights emanating from international laws of indigenous self-determination.

Western land use and settlement has overrun the archipelago with coqui frogs. These frogs chirp loudly enough to damage the hearing of those in earshot. Like the coqui frog, the colonial forces that overran Hawaii have obscured historical fact with the din of their own revisionist narrative. Further, like the parable of the frog in the well, these revisionists have come to believe that no international law or custom exists outside of their narrow, historically inaccurate view.

It is unfortunate to oppose the Akaka bill alongside those for whom the revisionist narrative is strongest. However for the reasons enumerated above, the Akaka bill is not an appropriate starting point from which to begin negotiating Native Hawaiian rights. Unless and until the bill acknowledges that the Kanaka Maoli have inherent rights to land and natural resources that are now illegitimately occupied by U.S., state, and private parties, the Akaka bill will be nothing more than another instrument in a long history of instruments of subjugation, legitimizing arbitrary federal actions against indigenous people.

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1 In Hawaii, coqui frogs are an invasive species that has adapted well to Hawaii's tropical environment and overrun the archipelago. *See* the University of Hawaii, College of Tropical Agriculture and Human Resources website, *available at* http://www.ctahr.hawaii.edu/coqui/index.asp.

2 Native Hawaiian Government Reorganization Act of 2009, S. 1011, 111th Cong. (2010). *See also*, S. Rep. 111-162, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:sr162.111.pdf. The bill passed the house in March and is currently under Senate consideration.

3 "Kanaka Maoli" is the proper name for Native Hawaiians.

4 *See*, S. Rep. 111-162, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:sr162.111.pdf, at 1.

5 Mark Niesse, *Native Hawaiian Government May Become Reality*, The Seattle Times, March 13, 2010.

6 *Id.* See also S. Rep. 111-162, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:sr162.111.pdf, 40–45.

7 Mark Niesse, *Native Hawaiian Government May Become Reality*, The Seattle Times, March 13, 2010.

8 David Barnard, *Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaiians*, 16 Temp. Pol. & Civ. Rts. L. Rev. 1, 5 (2006).

9 *Id*, at 7.

10 *Id*, at 6.

11 *Id.*

12 S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 Ga. L. Rev. 309, 313 (1994).

13 *Id.*

14 Barnard, *supra* note 8, at 6.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 S. Rep. 111-162, *supra*, note 2, at 3.

20 Treaty of Commerce, U.S.-Haw., Dec. 23, 1826, *available at* Hawaiian Independence Homepage, Legal Documents Index, http://www.hawaii-nation.org/treatylist.html.

21 *Id*, and Apology to Native Hawaiians, S.J. Res. 19, 103d Cong., 1st Sess., 107 Stat. 1510 (1993).

22 Treaty of Friendship, Commerce, and Navigation, U.S.-Haw., Dec. 20, 1849, 103 Consol. T.S. 391.

23 Barnard, *supra* note 8, at 7.

24 *Id*, at 8.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id*, at 9.

32 Anaya, *supra*, note 12, at 314. *See also*, President's Message Relating to the Hawaiian Islands, H. Exec. Doc. No. 53–47, at xv (1893).

33 *Id.*

34 Barnard, *supra*, note 8, at 10.

35 President's Message Relating to the Hawaiian Islands, *supra*, note 32.

36 *Id.*

37 Barnard, *supra*, note 8, at 11.

38 Apology to Native Hawaiians, *supra*, note 21.

39 *Id.*

40 Felix Cohen, *Original Indian Title*, in The Legal Conscience: Selected Papers of Felix S. Cohen 273 (Lucy Kramer Cohen ed., 1970) (1960); *see also* Johnson v. M'Intosh, 21 U.S. 543, 5 L.Ed. 681 (1823).

41 *Johnson v. M'Intosh*, *supra*, note 40, at 562.

42 *Id.*

43 Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 Hastings L. J. 1215, 1219 (1980).

44 Cohen, *supra*, note 40, at 274.

45 *Johnson v. M'Intosh*, *supra*, note 40.

46 Cohen, *supra*, note 40, at 274; Jones v. Meehan, 175 U.S. 1 (1899).

47 Cohen, *supra*, note 40, at 274; Cramer v. U.S., 261 U.S. 219 (1923).

48 Cohen, *supra*, note 40, at 278; U.S. v. Santa Fe Pacific R.R., 314 U.S. 339 (1941).

49 County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985).

50 Cohen, *supra*, note 40, at 279.

51 Cohen, *supra*, note 40, at 279–280.

52 *Tee-Hit-Ton v. U.S.*, 348 U.S. 272 (1955).

53 Tee-Hit-Tons are Alaska Natives who belong to the Tlingit Nation.

54 *Tee-Hit-Ton v. U.S.*, *supra*, note 52, at 277.

55 *Johnson v. M'Intosh*, *supra*, note 40, at 574.

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56 Newton, *supra*, note 43, at 1216.

57 *See generally*, Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 Am. Ind. L. Rev. 139 (1977).

58 *Id.*

59 Felix Cohen et al., Cohen's handbook of Federal Indian Law §21.01 (LexisNexis 2005) (1941).

60 *Id*, at § 15.04.

61 *Id*, Forward to the 1971 edition.

62 *Id.*

63 Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Pol'y Rev. 95, 102 (1998).

64 Francis Anthony Boyle, *Restoration of the Independent Nation State of Hawaii Under International Law*, 7 St. Thomas L. Rev. 723, 728 (1995).

65 Hawaii v. Office of Hawaiian Affairs, 129 S.Ct. 1436 (2008).

66 *Id*, at 1439.

67 *See generally*, Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, 91st Cong., (2d Sess. 1970).

68 Boyle, *supra*, note 64.

69 William H. Rogers, Jr., *The Sense of Justice and the Justice of Sense: Native Hawaiian Sovereignty and the Second "Trial of the Century,"* 71 Wash. L. Rev. 379, 385 (1996).

70 *See* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 200 (2009) ("When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations.").

71 Anaya, *supra*, note 12.

72 *Id*, at 320.

73 *Id.*

74 *Id.*

75 *Id*, at 326.

76 International Covenant on Economic Social and Cultural Rights, art. 1, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, art. 1, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966).

77 Eric K. Yamamoto et al., *Indigenous People's Human Rights in U.S. Courts, in* Moral Imperialism: A Critical Anthology 301 (Berta Esperanza Hernandez-Truyol ed., 2002).

78 Delos Sacket Otis, History of the Allotment Policy, Hearings on H.R. 7902 before the House Comm. On Indian Affairs, 73rd Cong., 2nd Sess., pt. 9, at 428-85 (1934).

79 *Id.*

80 Yamamoto, *supra*, note 77.

81 S. Rep. 111-162, *supra*, note 2, at 2.

82 U.N. Charter, art. 73.

83 *Id.*

84 Anaya, *supra*, note 12, at 333–334.

85 *Id*, at 333.

86 *Id* at 334.

87 *Id,* at 334–335.

88 *Id.*

89 *See,* U.N. Charter, *supra*, note 82.

90 S. Rep. 111-162, *supra*, note 2, at 2.

91 Yamamoto, *supra*, note 77.

92 Anaya, *supra*, note 12, at 317–318

93 S. Rep. 111-162, *supra*, note 2, at 10.

94 Anaya, *supra*, note 12, at 316.

95 International Covenant on Economic Social and Cultural Rights, *supra*, note 76.

96 Huanani-Kay Trask, From a Native Daughter: Colonialism and Sovereignty in Hawaii 2–4 (University of Hawaii Press, 1999).

97 William H. Rogers, Jr., Environmental Law in Indian Country 127 (Thompson-West 2005).

98 The Problem of Discrimination Against Indigenous Populations, E.S.C. Res. 1589(L), U.N. ESCOR, 50th Sess., Supp. No. 1, at 16, U.N. Doc. E/5044 (May 21, 1971).

99 Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), International Labour Conference, June 27, 1989, reprinted in 8 Ariz. J. Int'l & Comp. L. 205 (1991).

100 Anaya, *supra*, note 12, at 342.

101 Universal Declaration of Human Rights, art. 17, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., pt. 1, 138th plen. Mtg. at 135, U.N. Doc. A/810, at 71 (1948).

102 *Id.*

103 Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), *supra*, note 99, at art. 14(1).

104 Native Hawaiian Government Reorganization Act of 2009 § 9, *supra*, note 2.

105 *Id.*

106 *Id.*

107 *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436, 1438 (2008).

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Act of 2005 (IEA),[30] the most comprehensive Indian-specific energy legislation to date.

Until 2005, much of the federal push for energy development had focused on creating incentives for investment rather than a restructuring of the antiquated legal structures involved.[31] Much of the IEA, however, was devoted to the creation of a new framework for the management and oversight of energy development in Indian country – the Tribal Energy Resource Agreement (TERA).[32] This section of the IEA allowed a tribe to enter into a master agreement (the TERA) with the Secretary of the Interior, granting the tribe the ability to enter into leases and other business agreements and to grant rights of way across tribal lands *without Secretarial approval*.[33]

To date, however, no tribe has entered into a TERA. For many tribes, the cost simply outweighs the benefits[34] – TERAs allow tribes the leeway to skip secretarial approval for specific projects, "but only on terms dictated by the federal government rather than on the tribes' own terms."[35] First, in applying for the TERA, the tribe must consult with the director of the DOI before submitting the application.[36] The director must hold a public comment period on the proposed TERA application and may conduct a NEPA review of the activities proposed.[37] Thereafter, the DOI has 270 days to approve the TERA.[38] Second, the TERA requires that tribes create a NEPA-like environmental review process.[39] This "tribal NEPA" must have a procedure for public comment and for "consultation with affected States regarding off-reservation impacts" of the project.[40] Third, the TERA must include a clause guaranteeing that the tribe and its partner will comply "with all applicable environmental laws."[41] In so doing, tribes must allow the Secretary to review the tribe's performance under the TERA – annually for the first three years and biannually thereafter.[42] If in the course of such a review the Secretary finds "imminent jeopardy to a physical trust asset," the Secretary is allowed to take any action necessary to protect the asset, including assuming responsibility over the project.[43] Fourth, the TERA must address public availability of information and record keeping by designating "a person … authorized by the tribe to maintain and disseminate to requesting members of the public current copies of tribal laws, regulations or procedures that establish or describe tribal remedies that petitioning parties must exhaust before instituting appeals …."[44] Finally, agreements for developing alternative energies are subject to a 30-year limit, renewable only once for another 30-year term.[45]

Roadblocks

Commentators have noted that the TERA imposes more stringent environmental standards upon tribes than non-Indian developers elsewhere.[46] But even where a tribe is compelled to go through the burdensome TERA process – which may still be a good idea[47] – many tribes simply do not have the resources necessary to fulfill the TERA requirements. The regulations impose an extremely heavy burden on tribal governments to demonstrate that they have the requisite expertise, experience, laws, and administrative structures in place to assume the responsibility of a TERA. "Few tribes at present have the in-house geologists, engineers, hydrologists, and other experts, or the financial wherewithal to hire or train them," in order to provide the tribe with the capacity necessary to obtain secretarial approval under the TERA regulations.[48]

The irony is that those tribes with TERA capacity are likely in a position to skip the approval process altogether by implementing alternative energy projects on their own, which do not require secretarial approval.[49] Where no lease, contract, or right-of-way is involved, the approval process – and the insurmountable burdens of federal law that come along with it – is not necessary.[50] The majority of tribes, however – tribes that are most in need of economic development and would most benefit from the implementation of an alternative energy project – have to seek an outside partner, which puts them "at a terrific disadvantage for developing their own resources."[51]

The Road Ahead

The doctrine of self-determination acknowledges that tribal control over development is the best way to strengthen tribal governance and improve economic self-sufficiency.[52] According to much of the testimony offered at the recent Hearing before the Subcommittee on Indian and Alaska Native Affairs, self-determination must also include freedom from the yoke of federal *energy* oversight and regulation.

On May, 4-5, 2011, the U.S. Department of Energy (DOE) held its first Tribal Summit.[53] The goal of the Summit, much like that of the most recent Hearing, is to identify and "break down bureaucratic barriers that have prevented tribal nations from developing clean energy with the ultimate goal of prosperity and energy security for both Indian country and the nation as a whole."[54] For many, the Summit reflects the nation's "continued commitment to partnering with Native Americans to support the development of clean energy projects on tribal lands …."[55] But will it be enough?

Having identified "unnecessary laws and regulations" hindering alternative energy development in Indian country, it is now time for Congress to write necessary legislation to allow tribes to pursue energy self-determination.[56] If the words of Doc Hastings, Chairman of the House Committee on Natural Resources, hold any bearing, the current regulation of energy resources in Indian country

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may soon be upset: "Tribes know best how to meet their own land management objectives."[57] This axiom should not be lost. Indeed, in order to effectively realize the twin goals of promoting tribal self-determination and encouraging the efficient development of tribal energy resources,[58] it will be *necessary* to emphasize the former to bring about the latter.

1 National Indian Energy Group, *Native American Tribal Lands Could Produce 17.5 Trillion Kilowatt Hours of Electricity from Wind and Solar Power*, Updates From the National Indian Energy Group, Feb. 9, 2011, *available at* http://nationalindianenergy.com/news/?paged=2.

2 These laws require utility companies to purchase a mandated amount of their energy from renewable sources. California's recently passed Senate Bill X1-2, for example, increases the California renewable portfolio standard to a 33 percent target by 2020. In his most recent State of the Union address, President Obama proposed a Clean Energy Standard to require that 80 percent of the nation's electricity come from renewable resources by 2035. President Barack Obama, State of the Union Address (Jan. 25, 2011), *available at* http://www.whitehouse.gov/state-of-the-union-2011.

3 Darius Nassiry & David Wheeler, *A Green Venture Fund to Finance Clean Technology for Developing Countries* 3 (Center for Global Dev't, Working Paper No. 245, 2011). New financial investment worldwide in the first quarter of 2011 totaled $31.1 billion, however, down by a third from the record $47.1 billion recorded in the fourth quarter of last year. Sarah Feinberg, *Policy Uncertainties in Development Economies Dampen Clean Energy Investment in Q1*, Bloomberg New Energy Finance, Apr. 15, 2011, *available at* http://bnef.com/Download/pressreleases/150/pdf-file. In a large part, weaker investment was the result of policy uncertainties. *Id.*

4 Jefferson Keel, President, National Congress of American Indians, Sovereign Indian Nations at the Dawn of a New Era, State of Indian Nations Address (Jan. 27, 2011).

5 Ryan Dreveskracht, *Economic Development, Native Nations, and Solar Projects*, 34 J. Energy & Dev. 141, 146 (2011).

6 *See* Carol Berry, *Future Resources Are Key to Planning for Ute Tribes*, Indian Country Today, May 3, 2011 (noting the installation of a 230 kilovolt transmission line in order to facilitate the future expansion of solar energy).

7 *See* Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity Into Indian Country as a Domestic Emerging Market*, 80 U. Colo. L. Rev. 285, 287 (2009) ("(T)he unemployment rate still hovers around fifty percent for Indians who live on reservations, nearly ten times that for the nation as a whole.").

8 Robert Glennon & Andrew M. Reeves, *Solar Energy's Cloudy Future*, 1 Ariz. J. Env. L. & Pol. 91, 93-94 (2010).

9 Van Jones, Bracken Hendricks, & Jorge Madrid, *Clearing the Way for a Native Opportunity in America's "Sputnik Moment,"* Native American Times, Jan. 28, 2011, *available at* http://www.nativetimes.com/index.php?option=com_content&view=article&id=4853:clearing-the-way-for-a-native-opportunity-in-americas-sputnik-moment&catid=46&Itemid=22.

10 *Tribal Development of Energy Resources and the Creation of Energy: Jobs on Indian Lands: Oversight Hearing Before the Subcomm. on Indian and Alaska Native Affairs*, 112th Cong. (2011) (hereinafter Energy Hearing).

11 *Id.* (statement of Rep. Young).

12 *Id.* (statement of Scott Russell, Secretary, Crow Nation's Executive Branch).

13 *Id.*

14 *Id.*; *see also id.* (statement of Irene C. Cuch, Ute Tribal Business Committee Member, Ute Indian Tribe of the Uintah and Ouray Reservation).

15 *Id.* (statement of Tex G. Hall, Chairman, Mandan, Hidatsa, and Arikara Nation of the Fort Berthold Reservation).

16 *Id.*; *see also id.* (statement of Irene C. Cuch, Ute Tribal Business Committee Member, Ute Indian Tribe of the Uintah and Ouray Reservation).

17 *Id.* (statement of Tex G. Hall, Chairman, Mandan, Hidatsa, and Arikara Nation of the Fort Berthold Reservation).

18 *Id.* (statement of Irene C. Cuch, Ute Tribal Business Committee Member, Ute Indian Tribe of the Uintah and Ouray Reservation).

19 *Id.* (statement of Michael L. Connolly, President, Laguna Resource Services, Inc.); *see also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (creating a double taxation scheme that discriminates against Indian commerce); Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 Tax Law. 897, 1165-91 (2010) (discussing *Cotton Petroleum*).

20 Energy Hearing, *supra* note 10 (statement of Michael L. Connolly, President, Laguna Resource Services, Inc.).

21 Some tribes, however, such as the *Tulalip Tribes of Washington, are permitted* to lease tribal land for up to 75 years without BIA approval. 25 *U.S.C.* §415(b).

22 25 U.S.C. § 81.

23 25 U.S.C. §§ 323, 324. Secretarial approval is also necessary for minerals agreements related to energy or minerals. 25 U.S.C. § 2102.

24 Sangre de Cristo Dev. Co. v. United States, 932 F.2d 891 (10th Cir. 1991); Davis v. Morton, 469 F.2d 593 (10th Cir. 1972).

25 *See* Katie Kendall, Note, *The Long and Winding "Road": How NEPA Noncompliance for Preservation Actions Protects the Environment*, 69 Brook. L. Rev. 663, 664 (2004).

26 *See* R. Timothy McCrum, *NEPA Litigation Affecting Federal Mineral Leasing and Development*, 2 Nat. Resources & Env't 7, 58 (1986) (noting the "inevitable litigation and delay associated with (NEPA's) wasteful (and) unproductive" approval process); *see also* Sarah Pizzo, *When Saving the Environment Hurts the Environment: Balancing Solar Energy Development With Land and Wildlife Conservation in a Warming Climate*, 22 Colo. J. Int'l Envtl. L. & Pol'y 123, 144-49 (2011) (describing the numerous ways that a solar project can be shut down due to NEPA litigation); *see e.g.* Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior, No. 10-2241, 2010 WL 5113197 (S.D. Cal. Dec. 15, 2010).

27 25 U.S.C. § 3503(a).

28 Public Law 102-486, tit. XXVI (codified at 25 U.S.C. §§ 3501-06).

29 25 U.S.C. § 3502(d).

30 Pub. L. No. 109-58, §§ 501-506, 119 Stat. 594, 763-79 (2005).

31 *See* Ronald H. Rosenberg, *Diversifying America's Energy Future: The Future of Renewable Wind Power*, 26 Va. Envtl. L.J. 505, 532 (2008).

32 25 U.S.C. § 3504 (regulations at 25 C.F.R. § 224 (2008)).

33 25 U.S.C. § 3504 (a)-(b).

34 *See* Thomas H. Shipps, *Tribal Energy Resource Agreements: Commentary on the Proposed Regulations*, Native Am. Resources Committee Newsl. (ABA Section of Env't, Energy, and Res., Chi., Ill.), May 2007.

35 Kathleen R. Unger, *Change is in the Wind: Self-Determination and Wind Power Through Tribal Energy Resource Agreements*, 43 Loy. L.A. L. Rev. 329, 358 (2009).

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The Road to Alternative Energy in Indian Country: Is it a Dead End? *from previous page*

36 25 C.F.R. § 224.51.

37 25 C.F.R. § 224.67.

38 25 C.F.R. § 224.74.

39 25 C.F.R. § 224.63(c)(1). Some tribes have already implemented this requirement independent of a TERA. *See* Oglala Sioux Tribal Environmental Review Code (2002).

40 25 C.F.R. § 224.63(c)(3), (4), & (d)(10).

41 25 C.F.R. § 224.63(d)(6) & (7).

42 25 U.S.C. § 3504(e)(2)(E).

43 25 U.S.C. § 3504(e)(2)(D)(ii).

44 25 C.F.R. § 224.63(g).

45 25 C.F.R. § 224.86(a)(1).

46 *See e.g.* Tribal Energy Resource Agreements under the Indian Tribal Energy Development and Self-Determination Act: Final Rule, 73 Fed. Reg. 12,808, 12,814 (Mar. 10, 2008); Unger, *supra* note 35, at 358 ("(T)he TERA framework as changed the federal role in tribal resource development without necessarily reducing it or shifting true control to tribes.").

47 *See generally* Judith V. Royster, *Practical Sovereignty, Political Sovereignty and the Indian Tribal Energy Development and Self-Determination Act* (Univ. of Tulsa College of Law, Research Paper No. 2011-01, 2008).

48 *Id.* at 1083.

49 149 Cong. Rec. S15335-01 (2003) (statement of Sen. Campbell).

50 *Id.*

51 149 Cong. Rec. S7679-02 (daily ed. Jun. 11, 2003) (statement of Sen. Campbell). *See also generally* Elizabeth Bewley, *Tribes Push to Remove Red Tape from Energy Development*, Great Falls Tribune, Apr. 1, 2011, *available at* http://www.greatfallstribune.com/article/20110402/BUSINESS/104020305/Tribes-push-remove-red-tape-from-energy-development.

52 S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 Transnat'l L. & Contemp. Probs. 131 (1993).

53 Press Release, U.S. Department of Energy, Department of Energy Tribal Summit: Winning Our Energy Future (Apr. 19, 2011), *available at* http://www.energy.gov/indianenergy/tribalsummit.htm.

54 *Id.*

55 *Department of Energy to Hold Tribal Summit*, The Arctic Sounder, Apr. 26, 2011, *available at* http://www.thearcticsounder.com/article/1117department_of_energy_to_hold_tribal_summit. According to the DOE, the May 4-5, 2011, Summit is "intended to be a touchstone for ongoing policy development. Post Summit roundtables throughout the country are anticipated as well as future summits." Office of Indian Energy Policy and Programs, Frequently Asked Questions, http://www.energy.gov/indianenergy/iepp_faqs.htm (last visited Apr. 29, 2011).

56 Energy Hearing, *supra* note 10 (statement of Rep. Young).

57 *Questions From the Tribal Business Journal for Incoming HCNR Chairman Doc Hastings*, Tribal Business Journal, Winter, 2011, at 3. "(A) new federal paradigm ought to be explored to give tribes and individual Indian landowners the option – at their discretion – of enjoying the freedom, risk, responsibility, and reward of managing their lands without obtrusive BIA involvement." *Id.*

58 Andrea S. Miles, Note, *Tribal Energy Resource Agreements: Tools for Achieving Energy Development and Tribal Self-Sufficiency or an Abdication of Federal Environmental and Trust Responsibilities*, 30 Am. Indian L. Rev. 461. 462 (2006) (noting "the dual goals of (the IEA): to encourage the efficient development of energy minerals on tribal land and to promote tribal self-determination, at least in the context of energy development").

Got an Indian Legal Announcement?

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Recent Developments in Federal Indian Consultation *from page 4*

regulations and statutes ….”[7] Although the court found that the agency did consult with other tribes, and did meet with the Quechan – primarily via “informational meetings where the Tribe’s opinions were not sought” – the court found that this manner of “consultation” did not amount to the “government-to-government” consultation required by law: “In other words, that BLM did a lot of consulting in general doesn’t show that its consultation with the Tribe was adequate under the regulations.”[8]

The United States’ own court made clear: “The consultation requirement is not an empty formality; rather, it ‘must recognize the government-to-government relationship between the Federal Government and Indian tribes’ and is to be ‘conducted in a manner sensitive to the concerns and needs of the Indian tribe’”[9]

For now, the solar farm development appears dead, and the *Quechan* preliminary injunction ruling stands as the most sweeping common law affirmation of the federal Indian consultation right to date – a decision that must be consulted by any tribe or tribal lawyer defending against federal encroachment.

U.N. Declaration on the Rights of Indigenous Peoples

On December 16, 2010, President Obama took his efforts to “promote more consultation with the tribal nations”[10] one step further by formally endorsing the United Nations Declaration on the Rights of Indigenous Peoples.[11] Adopted by the United Nations General Assembly in 2007, the endorsement of the Declaration is a “stated commitment to improve the conditions of Native Americans and to address broken promises.”[12] One of these “promises” – already found in various federal laws – is made explicit in Articles 10, 11, 19, 28 and 32, and requires that “before adopting and implementing legislative or administrative measures that may affect [indigenous peoples]” and “prior to the approval of any project … affecting their land,” the federal government must obtain a tribes’ “free, prior and informed consent.”[13]

A subsequent announcement by the U.S. State Department elaborated on its understanding of “free, prior, and informed consent” as “call[ing] for a process of meaningful consultation with tribal leaders” and “continu[ing] to consult and cooperate in good faith with federally recognized tribes and, as applicable, Native Hawaiians, on policies that directly and substantially affect them and to improve our cooperation and consultation processes ….”[14] This statement could be read to water down the legal notion of informed consent, which is certainly more robust of a right than that of consultation and cooperation. Still, the United States’ long-awaited endorsement of the Declaration stands as a bold international commitment to execute what has been recognized as the primary objective of the international indigenous rights movement: the indigenous right to exercise a high level of control over an indigenous people’s traditional lands and a specific procedural method to enforce that right.[15] The Declaration should now be added to every American tribe’s consultation war chest.

ATNI Resolution No. 11-23 & NCAI Resolution No. ECWS 11-012

On February 3, 2011, the 57 tribal governments from Oregon, Idaho, Washington, Southeast Alaska, Northern California and Western Montana that comprise the Affiliated Tribes of Northwest Indians (ATNI), passed a resolution, reciting that:

> [T]he federal Indian consultation right requires the United States and its agencies, as well as states and local governments,[16] to meaningfully consult with tribal governments, on a government-to-government basis, regarding any matter of tribal implication, in order to allow any affected tribal government to express its views and assert its rights in advance of any non-tribal governmental action or decision-making.

Following ATNI’s lead, NCAI did the same during its Winter Session in late February and early March 2011.

In reference to President Obama’s Executive Memorandum, both ATNI and NCAI proclaimed:

> [M]any federal agencies have yet to comply with President Obama’s Memorandum by promulgating a detailed plan of action to implement Executive Order 13175 and in turn honor the federal Indian consultation right; and …
>
> [M]any federal agencies, as well as state and local governments, continue to breach the federal Indian consultation right, as well as related Treaty, trust and other guaranteed tribal rights and federal responsibilities, by failing to meaningfully consult with tribal governments regarding matters of tribal implication.[17]

ATNI and NCAI resolved to “immediately request that the White House, including the Domestic Policy Council and Office of Intergovernmental Affairs, cause any federal agency that has not yet complied with President Obama’s Memorandum by promulgating a detailed plan of action to implement Executive Order 13175, to do so immediately.” Tribal leaders in turn reached out to the Obama Administration, which I am told rejoined that all of its Departments had adhered to President Obama’s Executive Memorandum by submitting their respective plans of action to the Office of Financial Management in 2010.

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Recent Developments in Federal Indian Consultation *from previous page*

What became clear is that the Administration and some of its departments (like Treasury) believe that submitting to OMB a consultation "plan of action" – i.e., a list of the steps a department is taking to generally consult with tribes – satisfies the President's mandate; while Indian Country and some U.S. departments (like Interior, *infra*) believe that Obama mandated the promulgation of department consultation plans – i.e., an enforceable policy setting forth how the department and its agencies will consult with affected tribes when necessary. Unlike laudatory action plans, consultation plan-policies are far more helpful in setting federal and tribal expectations regarding consultation and should still be encouraged of all U.S. departments.[18]

Better yet, in keeping with the spirit of the ATNI and NCAI Resolutions, both of which affirm and further shape the consultation right as a matter of inter-tribal policy, tribal governments should promulgate their own consultation laws, regulations and policies.[19] Imagine the power of the federal Indian consultation right, bolstered by *tribal* consultation law, and tribal remedies.

Interior's Tribal Consultation Policy

On May 17, 2011, the Department of Interior published its Policy on Consultation with Indian Tribes for tribal comment in the Federal Register. The Policy is part of Interior's fulfillment of President Obama's Executive Memorandum that directs all federal departments and agencies to develop a "plan of actions" to implement tribal consultation per President Clinton's Executive Order 13175.[20] Although undoubtedly a step in the right direction, the first and last sections of Interior's Policy are contradictory. According to the Preamble:

The obligation for federal agencies to engage with Indian Tribes on a government-to government basis is based on the Constitution, treaties, statutes, executive orders, and policies. Federal agencies meet that obligation though consultation with Indian Tribes.[21]

Yet the Policy ends with a pronounced "DISCLAIMER":

> Except to the extent already established by law, this Policy is intended only to improve the internal management of the Department, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the Department or any person. The Department also does not waive any applicable privilege that it may hold by virtue of this Policy.[22]

How can the federal Indian consultation right exist under the highest laws of the land, yet not be enforceable at law? Although an obvious attempt by Interior to insulate the Department and its agencies (like BLM) from liability for failing to meaningfully consult with affected tribes (like Quechan), the disclaimer falls short in accomplishing that purpose.

Both President Obama's and President Clinton's directives contained similar disclaimers[23] – but neither disclaimer has prevented Federal District Courts from enjoining illegal federal actions resulting from agencies' failure to consult. In *Confederated Tribes and Bands of the Yakama Nation v. U.S. Dept. of Agriculture*, for instance, Yakama utilized both the Clinton Executive Order and Executive Memorandum, in conjunction with several other federal laws, to enjoin the USDA from permitting a low-bid private contractor to move garbage imported from Hawaii over and into Yakama's Treaty-protected lands in Washington state.[24] Neither President's liability disclaimer resulted in USDA being absolved of liability. Because the presidential documents merely order federal agencies to carry out an existing Indian right, guaranteed by the U.S. Constitution, treaties, federal case law, statute and regulation, and now, international law, it should come as no surprise that clever disclaimer language falls short as a matter of law, and equity.

If a tribe can show that an Interior agency has not acted in conformity with its own consultation regulations, the agency will be enjoined for acting arbitrarily and capriciously per the federal Administrative Procedures Act – regardless of any disclaimer in the Policy.[25] The ability of tribes to use Interior's own consultation policies against the agency was pronounced in *Yankton Sioux Tribe v. Kempthorne*.[26] There, the Department's Office of Indian Education Programs (OIEP) attempted to restructure the administration and supervision of tribal schools operated under BIA grants. The tribe sought an injunction to prevent the restructuring, alleging that "OIEP failed to meaningfully consult with the tribes as required by statute and BIA policy."[27]

The court found that although OIEP held three rounds of "consultation meetings" with the tribe, the BIA ultimately failed to inform the tribe about a change in funding policies as a part of the reorganization.[28] Citing to President Clinton's Executive Order – inclusive of the liability disclaimer – as the force-giving factor behind the BIA's consultation policies,[29] the court held that where a federal agency "has established a policy requiring prior consultation with a tribe, and therefore created a justifiable expectation that the tribe will receive a meaningful expectation to express its views before policy is made, that opportunity must be given."[30] The court issued the requested injunction.

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Thankfully, it *is* "just words" for a federal department or agency to disclaim liability for its failure to honor the federal Indian consultation right.

Tribal Member Consultation Right

On June 1, 2010, Interior announced that it would commence consultation with both tribal governments, and tribal members in the *Cobell* class, regarding Indian land consolidation, as contemplated by the *Cobell* settlement.[31] In doing so, Interior recognized that the United States' substantive duty to consult with Indians about matters of tribal implication extends to tribal members. Further, Interior acknowledged that this is especially true in regard to individual Indian-owned allotments or undivided interests therein.

Pursuant to the Indian Land Consolidation Act, and Interior's current Indian Land Consolidation Plan: "Interior may acquire land from individual Indian owners to consolidate fractional ownership interests and thereby 'lessen the number of owners.'"[32] Sales of allotted land interests are governed by 25 C.F.R. § 152. "The common feature of all these kinds of Part 152 sales is that they require communication between individual Indian trust-land owners and agents of Interior."[33] More generally, "[c]onsultations … can roughly be understood as communication by Indian beneficiaries of their desires to the federal trustees who make ultimate determinations about what happens with the lands Indians occupy."[34] This duty is triggered when an agency decision impacts the "value, use, or enjoyment" of Indian trust assets.[35]

Although much focus is now given to federal consultation with tribes, that focus may also be appropriate in regard to individual Indians, especially when the United States threatens to take any action that impacts the value, use or enjoyment of an Indian's allotted lands or undivided interest therein.

***

The federal Indian consultation right is alive and well. Even in the face of the types of United States tribal consultation transgressions that have borne out in the *Quechan* and *Yakama* litigation – or perhaps as a result of those federal transgressions – the right of Indian consultation is taking hold nationwide and beyond. The more tribal governments and members exercise the right, the more prevalent and stronger the right, and all that is tribal sovereignty, will become – especially in relationship to growing federalism.

In closing, consider the words of ancient Chinese military general Sun Tzu, from *Art of War*:

> So it is said that if you know your enemies and know yourself, you can win a hundred battles without a single loss. If you only know yourself, but not your opponent, you may win or may lose. If you know neither yourself nor your enemy, you will always endanger yourself.

For a tribe or tribal member, the revitalized federal Indian consultation right is most certainly a way to know your enemies, and to know yourself. It is only with the continued vigilance in exercise of that guaranteed right that the rest of this proverb will be secured for Indian Country.

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1 See Gabriel S. Galanda, The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion, 19 Indian L. Newsl. 2 (2010).

2 *See Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995) (citing *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (9th Cir. 1987)) (defining "meaningful" consultation).

3 President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009) (hereinafter Obama Memorandum).

4 *Confederated Tribes and Bands of Yakama Nation v. U.S. Dept. of Agriculture*, No. 10-3050, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010); *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, No. 10-2241, 2010 WL 5113197 (S.D. Cal. Dec. 15, 2010).

5 *Quechan Tribe*, 2010 WL 5113197, at *1.

6 *Id.*

7 *Id.*, at *4 (citing *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006); 36 C.F.R. § 800.2(c)(2)(ii)(B)).

8 *Id.* at *6.

9 *Id.* at *3 (quoting 36 C.F.R. § 800.2(c)(2)(ii)(C)).

10 Press Release, President Barack Obama, Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference.

11 U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (hereinafter UNDRIP).

12 S. James Anaya, *UN Expert Welcomes United States' Endorsement of the Declaration on the Rights of Indigenous Peoples*, http://unsr.jamesanaya.org/docs/statements/2010_statement_unsr_us_support_declaration.pdf (last visited Jan. 26, 2011).

13 UNDRIP, *supra* note 11.

14 Press Release, U.S. Department of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peo-

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ples (Dec. 16, 2010), *available at* http://indigenouspeoplesissues.com/attachments/article/8074/US-UNDRIP-Announcement.pdf.

15 Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility ad Accountability under International Law* 137, 141 (Fl. Int'l U. L. Res. Paper Series, Paper No. 11-01).

16 With state government and its little siblings – counties, cities and towns – representing the most imminent threat to tribal sovereignty, vis-à-vis regulatory authority and taxing power in Indian Country, it is time to advance and develop consultation law and policy that further compels state and local government to meaningfully consult with tribal governments. Ryan Dreveskracht and I are currently working on scholarship in this regard.

17 As the court noted in *Okanogan Highlands Alliance v. Confederated Tribes of the Colville Reservation*, No. 97-0806, 1999 WL 1029106 (D. Or. Jan. 12, 1999),

> In practical terms, the trust relationship gives rise to a procedural requirement that the federal government at the very least … investigate and consider the impact of its action upon a potentially affected Indian tribe….This duty requires the government to consult with an Indian tribe in the decision-making process ….

Id. at *16 (internal citations and quotations omitted). Importantly, the *Okanogan* court also distinguished between substantive and procedural trust obligation and ruled on the procedural trust issue, while finding the substantive trust issue not ripe for review. *Id.* at *16 n.7.

18 *See* Yankton Sioux Tribe v. Kempthorne, 442 F.Supp.2d 774, 784 (D.S.D. 2006) (citing Lower Brule, 911 F.Supp. at 399) ("(w)here a federal agency `has established a policy requiring prior consultation with a tribe, and therefore created a justifiable expectation that the tribe will receive a meaningful opportunity to express its views before policy is made, that opportunity must be given.'").

19 Gabriel S. Galanda, *The Federal Indian Consultation Right: Exercising It*, Presentation at the Affiliated Tribes of Northwest Indians Winter Conference, Feb. 2, 2011, at 26, *available at*: https://docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=0BxQL_nl5m1i9YTQwYzM3NzQtYzE3OS00OWUwLTg2NDgtZjE3ZGE5NzM2OWRk&hl=en.

20 *See* President William J. Clinton, Consultation and Coordination With Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,251 (Nov. 6, 2000) (hereinafter Clinton Order). This Executive Order was actually a supplement to President Clinton's Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994). This Memorandum was updated in 1998 with Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

21 Policy on Consultation With Indian Tribes, 76 Fed. Reg. 28446-01 (May 17, 2011).

22 *Id.*

23 *Compare* Clinton Order, *supra* note 20, at § 10,

> This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person (emphasis added).

with Obama Memoranda, *supra* note 3,

> This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Id. (emphasis added).

24 Yakama Nation, 2010 WL 3434091.

25 U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc., 235 F.R.D. 521, 528 (D.D.C. 2006); *see also* Doe v. Schachter, 804 F.Supp. 53, 63 (N.D. Cal. 1992) ("(W)hen a plaintiff alleges that an agency violated its own regulations, the regulations themselves may constitute the 'meaningful standard against which to judge the agency's exercise of discretion.'") (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)).

26 Yankton Sioux Tribe, 442 F.Supp.2d 774.

27 *Id.* at 781.

28 *Id.* at 785.

29 *Id.* at 783.

30 *Id.* at 784 (citing Lower Brule, 911 F.Supp. at 399); *see also Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (holding that "(i)t was an abuse of discretion not to order the Secretary to follow his own rules," where the Secretary's rules required that it "consult(with) Indian tribes").

31 Rob Capriccioso, *Interior Sets* Cobell *Land Consolidation Consultations*, Indian Country Today, June 6, 2011, *available at* http://indiancountrytodaymedianetwork.com/2011/06/interior-sets-cobell-land-consolidation-consultations.

32 Cobell v. Norton, 225 F.R.D. 41, 44 (D.D.C. 2004).

33 *Id.* at 45.

34 Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 Am. Ind. L. Rev. 21, 31 (2000).

35 U.S. Dep't of the Interior, Protection of Indian Trust Resources Procedures Manual 13 (1996).

The IRS "Fresh Start" Program *from page 5*

- The aggregate unpaid balance of assessments is $25,000 or less. The "unpaid balance of assessments" includes tax, assessed penalty and interest. It does not include accrued but unassessed penalties and interest;
- The total tax liability will be fully paid in 60 months, or the agreement will be fully paid prior to the Collection Statute Expiration Date, whichever comes first;
- The taxpayer requests the withdrawal in writing. Form 12277, Application for Withdrawal of Filed Notice of Federal Tax Lien, is the preferred format for the taxpayer's request; however, any written request that provides sufficient information may be used;
- The taxpayer is in compliance with other filing and payment requirements;
- At least three consecutive electronic payments (generally received on a monthly basis) have been processed under the DDIA and there have been no defaults in payment under this, or any previous, DDIA; and
- The taxpayer did not previously have a lien withdrawal for any of the tax periods included in the subject DDIA, unless the previous lien withdrawal was due to IRS error and improper lien filing.

Taxpayers can use the Online Payment Agreement application on IRS.gov to set-up Direct Debit Installment Agreements. The IRS is lowering user fees and making it easier to set up payment agreements in order to make taxpayer compliance easier.

These changes do not affect taxpayer's right to request a withdrawal for any other reason currently allowed by law (IRC 6323(j)) such as entering into other qualifying installment agreements that support the withdrawal of a lien.

Installment Agreements and Small Businesses

The IRS will also make streamlined Installment Agreements available to more small businesses. The payment program will raise the dollar limit to allow additional small businesses to participate. Effective March, 2011, small businesses with $25,000 or less in unpaid tax can participate. Previously, only small businesses with under $10,000 in liabilities could participate. The liabilities which may be included in this process are income, employment and trust fund taxes (trust fund taxes are imposed against individual officers/owners in charge of the business for the company's failure to pay employment taxes).

The streamlined Installment Agreements will be available for small businesses that file either as an individual or as a business. Small businesses with an unpaid assessment balance greater than $25,000 would qualify for the streamlined Installment Agreement if they pay down the balance to $25,000 or less. Small businesses will need to enroll in a Direct Debit Installment Agreement to participate and will have 24 months to pay.

For these streamlined Installment Agreements, the IRS will no longer make field visits to the business to verify assets. Also, no liens will be filed unless special circumstances warrant, such as the business being a repeat offender in failing to pay employment taxes. In addition, for unpaid employment taxes of $25,000 or less that involve the current or prior year only, the IRS will not pursue a trust fund penalty against the responsible officials of the company unless the company is a repeat offender.

Offers in Compromise

The IRS is also expanding a new streamlined Offer in Compromise (OIC) program to cover a larger group of struggling taxpayers. An OIC is an agreement between a taxpayer and the IRS that settles the taxpayer's tax liabilities for less than the full amount owed. Generally, an offer will not be accepted if the IRS believes that the liability can be paid in full as a lump sum or through a payment agreement. The IRS looks at the taxpayer's income and assets to make a determination regarding the taxpayer's ability to pay and to determine an acceptable offer in compromise.

The new streamlined OIC is being expanded to allow wage-earning or self-employed taxpayers (with gross receipts of $500,000 or less, or with no employees) who have annual household incomes up to $100,000 to participate. In addition, participants must have tax liability of less than $50,000, doubling the current limit of $25,000 or less.

The OIC process is streamlined principally by permitting the IRS personnel to communicate with the taxpayer by phone and fax if there are any questions or concerns about the offer documentation submitted by the taxpayer. Historically, all communication was by written correspondence with lengthy reply periods, which made OIC processing typically take upwards of a year or more to complete. Note, under Code Section 7122(f), an OIC will be deemed accepted if the IRS does not make a determination regarding whether to accept the OIC within two years. The streamlined process should reduce the determination time considerably and now make deemed acceptance unlikely.

The IRS will also streamline its investigation of taxpayer's finances by accepting oral testimony (in lieu of additional documentation and additional written requests) if the IRS finds a discrepancy between their internal sources for proving assets or income, and the taxpayer's representation of their assets and income on the financial statements (Form 433A/433B) submitted with the OIC.

These are all changes that will significantly reduce the processing time for OIC's and increase the likelihood of reaching a mutually agreeable offer.

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sertion of state jurisdiction. The court in *Cooper* recognized that the state does not have jurisdiction over the Nooksack Reservation because its creation in 1973 postdated the 1968 amendments to Public Law 280. *Cooper* at 776, 781 fn.6. The land where the incident occurred, however, was not a part of the Nooksack Reservation, but was allotted to an individual Indian in 1897. *State v. Cooper,* 81 Wash. App. 36, n.6, 912 P.2d 1075 (Div. 1 1996). The court noted that the State necessarily had jurisdiction over the Indian allotment in question because it existed in 1963 when Washington passed RCW 37.12.010. *Cooper,* 130 Wn.2d at 776. This was prior to the creation of the Nooksack Reservation and prior to the 1968 amendments to Public Law 280. *Id.*

C. *State v. Squally* is also in accord

Recognition of the necessity for tribal consent regarding after acquired Indian country land is also reflected in this court's analysis in *State v. Squally*, 132 Wash. 2d 333, 937 P.2d 1069 (1997). *Squally* involved lands of the Nisqually Indian Reservation. In 1957, shortly after the State adopted the 1957 Public Law 280 statute, the Tribe requested that the State assert criminal jurisdiction over "the peoples of the Nisqually Indian Community, and all persons being and residing upon the Nisqually Indian Reservation… particularly described as follows: (legal description)." *Squally* at 339. Based on this request, the governor issued a proclamation stating that, "[t]he criminal… jurisdiction of the State of Washington shall apply to the Nisqually Indian people, their reservation, territory, lands and country, and all persons being and residing therein." *Id.*

> "The decision below is consistent with well established terms of art in Indian law, and contrary to the State's claims, none of the decisions discussed above conflict with each other. Rather, they fit neatly within well established Indian law concepts[.]

After the 1968 amendments to Public Law 280, between 1979 and 1982, the tribe acquired additional lands and expanded its reservation by 36 acres. *Id.* at 340. Mr. Squally was accused of crimes committed on this after acquired property. He argued two things: that the State did not have criminal jurisdiction because the Nisqually Tribe's consent was limited to the original reservation boundaries given the legal description in the consent resolution, and that the tribe did not grant permission for exercise of jurisdiction after acquiring the new lands.

Recognizing that the application of the 1968 amendment required tribal consent for after acquired properties, this court held that the State retained jurisdiction. Relying on the Tribe's broad original request for State jurisdiction over the "[c]ommunity and all persons residing on the Nisqually Indian Reservation" and the governor's broad grant of authority in response to the Tribe's request, the court found that the Tribe had consented to state jurisdiction over the entire reservation, including after acquired properties. *Id.* at 343-345. Absent the broad tribal request and state proclamation, the State's jurisdiction would not have extended to the after acquired lands.

D. The Maryhill Site, being acquired in 1988, is after acquired property

The land in question in the present case is Indian country, and the state concedes this fact.[2] It was established by Public Law 100-581, November 1, 1988, 102 Stat. 2938, which in pertinent part reads as follows:

SEC. 401. (a) All Federal lands within the area described on maps numbered HR2677 sheets 1 through 12, dated September 21, 1988, and on file in the offices of the Secretary of the Interior, the Secretary of the Army and the Columbia River Gorge Commission shall, on and after date of the enactment of this Act, be administered to provide access to usual and accustomed fishing areas and ancillary fishing facilities for members of the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakima Indian Nation.

The Maryhill Treaty Fishing Access Site is federal land owned by the United States government and set aside for the use of *amici* tribes to exercise their treaty reserved fishing rights. It is not state land. It is not private land owned in fee simple absolute. It is not an individual Indian allotment. The federal government holds title, the land is managed by the U.S. Bureau of Indian Affairs, 25 C.F.R § 274, and the tribes have a statutory right to use the land for treaty fishing purposes. In short, it is Indian country established by the federal government in 1988 and specifically reserved for use by the *amici* tribes.

As required by the 1968 amendments to Public Law 280, and because Washington is a Public Law 280 option state, Washington must first obtain the consent of the *amici* tribes by majority vote of their citizens before the state can assert jurisdiction over this site. 25 U.S.C. § 1321; 25 U.S.C. § 1326. At no point have any of the *amici* tribes consented to the State of Washington's assertion of criminal jurisdiction over the Maryhill Site, let alone conducted a vote of their membership as required by federal law.

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II. NO CONFLICT EXISTS AMONG THE VARIOUS CASES

There is no conflict between the decision in the case below and *State v. Cooper*, *State v. Boyd*, *State v. Sohappy*, or *United States v. Sohappy*. Rather, the interplay of these cases provides an excellent roadmap to help explain what constitutes Indian country within the context of Indian criminal law and how Indian criminal jurisdiction works in Washington state.

A. Indian country encompasses "Indian reservations," "dependent Indian communities," and "Indian allotments"

The United States has defined the term "Indian country" for purposes of federal Indian criminal jurisdiction at 18 U.S.C. § 1151. It is a federal statutory definition, but it is also helpful in understanding what types of Indian land are subject to Washington state criminal jurisdiction under RCW 37.12.010.

The federal statutory definition codified well-settled federal common law on the subject and served as a vehicle to resolve various uncertainties that existed within the federal common law at the time. Cohen's Handbook of Federal Indian Law § 3.04[2][c][ii] at 190 (2005). That definition includes three things: Indian reservations, dependent Indian communities, and Indian allotments. 18 U.S.C. § 1151. Each of these terms are themselves well settled terms of art in Indian law and while they are sometimes loosely used interchangeably by courts with the term "Indian country," they refer to very specific types of land. They are not identical, despite what the defense attempted to argue in *Cooper*. For our purposes we can focus on the terms of art "Indian reservation" and "Indian allotment."

B. *State v. Sohappy* and *U.S. v. Sohappy* apply the original understanding of the term "Indian reservation"

Pursuant to 18 U.S.C. § 1151(a) Indian country includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent…." The term "Indian reservation" is not defined in the statute, but is an established term of art as it was a term originally used in the Indian Major Crimes Act, 18 U.S.C. § 1153, prior to its amendment in 1948 to use the then statutorily defined term "Indian country." At one point, the term "Indian reservation" referred to land tribes reserved for themselves when they ceded other lands to the federal government by treaty and over which they never extinguished title. Cohen at 189; *Donnelly v. United States*, 228 U.S. 243, 269, 33 S.Ct. 449 (1913). In the mid-1800s it began to be used in a manner that included lands held in the public domain that is reserved for Indian use and benefit. *Id*. This is the type of land at the Maryhill Site – land in the public domain that was set aside for the *amici* tribes in fulfillment of their treaty reserved fishing rights. Presently, the term "Indian reservation" generally refers to federally protected Indian tribal lands regardless of origin. Cohen at 189.

The United States Supreme Court has held that land declared by Congress to be held in trust by the federal government for the benefit of Indians is a reservation for purposes of criminal jurisdiction. *United States* v. *John*, 437 U.S. 634, 649, 98 S.Ct. 2541 (1978). Similarly, the United States Supreme Court has held that land "validly set apart for the use of Indian as such, under the superintendence of the Government" is reservation land. *United States v. Pelican*, 232 U.S. 442, 449, 34 S.Ct. 396 (1914).[3] For this reason, and relying on these cases, the Ninth Circuit in *United States v. Sohappy* correctly held that the land set aside by the federal government for use by certain tribes to exercise treaty fishing rights at Cooks Landing and Celilo were "Indian reservations" for the purposes of federal criminal jurisdiction. *United States v. Sohappy*, 770 F.2d 816, 822-823 (1985), *cert. denied*, 477 U.S. 906, 106 S. Ct. 3278, 91 L.Ed. 2d 568 (1986).[4] Given the Ninth Circuit opinion, the Washington Supreme Court likewise held in *State v. Sohappy* that Cooks Landing constituted "Indian reservation" land under RCW 37.12.010. *State v. Sohappy*, 110 Wn.2d 907, 910-911, 757 P.2d 509 (1988). While this court's decision in *Sohappy* was limited to the specific facts of that case, the decision was nonetheless correct and consistent with how that term of art has been used in the federal Indian criminal law context.

C. *State v. Boyd* and RCW 37.12.010 illustrate pre-1948 notions of an "Indian reservation"

The common law definition of an "Indian reservation" was expanded by 18 U.S.C. 1151(a) by including "all land… notwithstanding the issuance of any patent." These additional terms effectively include all federal land located within Indian reservations that are reserved, not for the benefit of Indians, but for an independent federal governmental purpose. In addition, and contrary to the pre-1948 developed common law, it includes all unrestricted fee simple lands lying within an Indian reservation. *Clairmont v. United States*, 225 U.S. 551, 558-559, 32 S.Ct. 787 (1912); *Dick v. United States*, 208 U.S. 340, 358-359, 28 S.Ct. 399 (1908); *Cohen* at 190. The added language, which expands and clarifies pre-existing federal common law, helps to highlight the manner in which Washington's assertion of criminal jurisdiction in Indian country differs from the federal statutory construct.

Pursuant to RCW 37.12.010, Washington retains criminal jurisdiction over lands within an Indian reservation that are not either "tribal lands or allotted lands" or land

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"held in trust by the United States or subject to a restriction against alienation imposed by the United States.…" This statutory language is in keeping with the pre-1948 common law notion of the term "Indian reservation" as excluding federal lands not acquired for the benefit of Indians. It also resolves the unrestricted fee simple land question in favor of state jurisdiction as opposed to the federal statute's resolution in favor of tribal and federal jurisdiction.[5] *State v. Boyd* is an excellent example of these distinctions. *State v. Boyd,* 109 Wash. App. 244, 34 P.3d 912 (2001).

In *Boyd,* the defendant's actions occurred at the Rogers Bar Campground, which is federal land condemned as part of the Grand Coulee Dam project and within the boundaries of the Colville Indian Reservation. *Id.* at 247. Importantly, this condemned land was not set aside for the benefit or use of the Colville Tribe or its members; nor was it tribal, trust, or allotted lands. Its condemnation purpose was specific to the Grand Coulee Dam project. *Id.* Since, the campground was not held in trust by the United States or subject to a restriction against alienation imposed by the United States for the benefit of the Colville Tribe, the campground was subject to state criminal jurisdiction.[6]

In contrast, the Maryhill Site is federal land specifically set aside by an act of Congress for the use of the members of the *amici* tribes. Alienation of this property would require a similar act of Congress. Unlike the Rogers Bar Campground, the Maryhill Treaty Fishing Access Site is not open to public use. The site is managed by the Bureau of Indian Affairs "for the exclusive use of members of the [*amici* tribes]." 25 C.F.R. § 274.2(b). Consistent with the legislative intent of the Treaty Fishing Access Sites, "[t]he general public or people fishing who do not belong to the tribes listed above cannot use [the Maryhill Site]." 25 C.F.R. § 247.3(b). For these reasons *Boyd* is not in conflict with the appellate court's decision in this case, *State v. Sohappy* or the Ninth Circuit's decision in *United States v. Sohappy*.

D. *State v. Cooper* highlights the difference between an "Indian allotment" and an "Indian reservation"

The federal statutory definition of "Indian country" also includes "Indian allotments." 18 U.S.C. § 1151(c). As with the term "Indian reservation," "Indian allotment" is a well defined term of art in federal Indian law. At common law it was deemed part of Indian country. *United States v. Sutton,* 215 U.S. 291, 30 S.Ct. 116 (1909); *Clairmont v. United States,* 225 U.S. 551, 558 (1912). Federal common law defines an Indian allotment as land owned by individual members of a tribe that is held in trust by the federal government or otherwise has a restriction on alienation. *United States v. Ramsey,* 271 U.S. 467, 446 S.Ct. 559 (1926); *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396 (1914); *United States v. Jackson*, 280 U.S. 183, 50 S.Ct. 143 (1930). The federal statute includes Indian allotments within the definition of Indian country separate and apart from Indian reservations. They are not identical. Just because a piece of land is an Indian allotment does not mean it is an Indian reservation. Likewise land within an Indian reservation may not be an Indian allotment. The court in *Cooper* was correct in so holding. *Cooper,* 130 Wn.2d at 778.

The impact of 18 U.S.C. § 1151(c), defining Indian allotment for purposes of federal criminal jurisdiction, is precisely in circumstances where an Indian allotment is not part of Indian reservation lands. There are many circumstances in which this can occur. Public domain allotments and Alaska Native allotments are among the many examples. 25 U.S.C. § 334; 25 U.S.C. § 336.[7]

State v. Cooper is also an excellent example of the difference between lands that are Indian allotments and lands that are Indian reservations. *Cooper* involved land that was allotted to a member of the Nooksack tribe. However, the land in question was placed into trust for the benefit of an individual Indian in 1897. *Cooper* at 81 Wn. App. 36, 41 n. 6. This was the case despite the fact that the Nooksack tribe itself was not federally recognized, or its reservation established, until 1973. *Id.* at 39. Since the Nooksack reservation did not exist until 1973, it did not include the 1897 allotted land. Consequently, the land at question in *Cooper* would not have been considered "Indian reservation" land at common law. Likewise, this court's decision in *Cooper* was correct in holding that an Indian allotment is not necessarily an Indian reservation and was factually correct in holding that the land in question did not constitute land within the Nooksack Tribe's Indian reservation lands. *Cooper,* 130 Wn. 2d at 772 n. 1, 776. This is true under both RCW 37.12.010 and 18 U.S.C. § 1151.

E. These cases fit within a well-established framework in Indian law

The decision below is consistent with well-established terms of art in Indian law, and contrary to the State's claims, none of the decisions discussed above conflict with each other. Rather, they fit neatly within well established Indian law concepts: *State v. Cooper* highlights how an Indian allotment is Indian country, but may not be an Indian reservation, *State v. Boyd* illustrates the pre-1948 common law definition of Indian reservation land as excluding unrestricted fee simple lands and lands set aside for a federal purpose other than that of Indians, and both *State v. Sohappy* and *United States v. Sohappy* apply the well established definition of Indian reservation land as constituting federal lands set aside for the benefit of Indian tribes.

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1 Because RCW 37.12.010 was adopted prior to the 1968 amendments Washington was not required to obtain tribal consent when it asserted jurisdiction over Indian country in 1963. Goldberg at 549.

2 For reasons explained in section 2 below, it is actually Indian reservation land.

3 The *Pelican* court uses the term "Indian country" when describing both lands set aside for use by Indians (reservation lands) and lands allotted to individual Indians (allotted lands).

4 It should be noted that failure to use the term "trust" in legislation setting aside land for the benefit of tribes does not effect this determination. In *United States v. Sohappy* the court noted that one tract in Celilo was purchased "*in trust for the use of* (the *amici* tribes)" while another tract was transferred to the Secretary of Interior "*for the use and benefit of* (the *amici* tribes)." *Id.* In the present matter the Maryhill Site is to "*be administered to provide access to usual and accustomed fishing areas and ancillary fishing facilities for* (the *amici* tribes)." 102 Stat. 2938. As such, it is set aside for the use and benefit of the *amici* tribes in fulfillment of the federal government's treaty obligations to provide the *amici* tribes with access to usual and accustomed fishing sites.

5 The unrestricted fee nature of the land is an important distinction. Some Indian country lands are held in fee, but not fee simple absolute. For example, there are two types of Indian allotments: trust allotments and restricted fee allotments. With restricted fee allotments, the individual Indian holds the land in fee but the government has restrained the ability to alienate the land without their consent; with trust allotments the government holds the fee title but the land is set aside specifically for the benefit of the Indian allotee. See *United States v. Ramsey,* 271 U.S. 467, 470, 46 S.Ct. 559 (1926).

6 The *Boyd* court also states that land held by the United States in fee simple is excluded from tribal jurisdiction. *Id.* at 252. It is important to understand this statement in the context of the previous footnote – it refers to unrestricted fee simple land that has not been set aside for the benefit of a tribe or individual Indian. Trust land *is* land set aside for the benefit of a tribe or individual Indian with the fee in the United States. *United States v. West*, 232 F.2d 694, 697 (1956).

7 With one exception, there are no reservations in Alaska. *Native Village of Venetie I.R.A. Council v. State of Alaska,* 522 U.S. 520, 118 S.Ct. 948 (1998).However, there can certainly be Indian allotments. Act of May 17, 1966, 34 Stat. 197. Disestablished reservation lands are another circumstance in which this arises. A reservation may be disestablished at a certain point in time, but this disestablishment does not eliminate the trust status of individual allotments previously within the Indian reservation. *DeCoteau v. District County Court,* 420 U.S. 425, 427 n. 2, 446 (1975); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 615 n. 48, 97 S.Ct. 1361 (1977). Prior to 1976 the federal statutes included an Indian homesteading law that could create such allotments outside of an Indian reservation. 23 Stat. 76. Fee lands purchased for individual Indians and converted to trust are also of this type, and was at issue in *City of Tacoma v. Andrus,* 457 F. Supp. 342 (DDC 1978).

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brings a suit against someone who has criticized him – especially with regard to his fitness for office – would need to show clear and convincing evidence of knowing or reckless falsity. While the Business Council rescinded the ordinance, when in place it exemplified the differing treatment of false speech in the tribal legal context.

Gardner suggests that tribal court practitioners and tribal defamation defendants should not be shy about asserting rules that actually mirror tribal law and values. If elders speak in certain ways that might be defamatory outside of the reservation, then a recognized, perhaps qualified, immunity could reflect that ideal. Tribal court treatment of defamation is a vital expression of tribal sovereignty. The Rocky Boy's ordinance applied different rules to those living under the authority of the Rocky Boy's Council. And the recent *Gardner* decision makes it abundantly clear that defamation will be treated differently under tribal law than it would be treated in state or federal court.

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