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"Running Eagle Takes Her Enemy" by Artist Terrance Guardipee

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Know Your Enemy: Local Taxation and Tax Agreements in Indian Country

Anthony S. Broadman¹

Intergovernmental disputes between tribes and their neighbors have educated states about tribal sovereignty. What many state governments have learned, through litigation, political battle, and intergovernmental dispute, is that even when states have “won” tax disputes, they have lost.² This dependably pyrrhic result has driven rational state actors—state taxing authorities acting consistently with their own best fiscal interests—to pursue negotiated agreements. Today, state-tribal tax compacts, while often controversial,³ are commonplace.

Counties and cities, on the other hand, with some admirable exceptions, have yet to learn, or heed, lessons from inter-local tax disputes. As it stands, tribes must be prepared for future battles over local taxation in Indian Country, particularly in regard to real or personal property owned by tribes. But as counties and municipal governments slowly learn the lessons already learned by the states, tribes should also be ready to negotiate intergovernmental solutions to inter-local tax disputes.

The Backdrop in Brief

Disputes between states and tribes are not a recent phenomenon. Indeed, in 1831, the seminal *Cherokee Nation v. Georgia*,⁴ which involved Georgia’s involuntary formation of “Cherokee County,” set the parameters of state-tribal relations adhered to today. By 1885, in *Utah & Northern Railway v. Fisher*,⁵ the U.S. Supreme Court had embarked on the county-tribe property tax dispute odyssey—one that has usually harmed tribes. While high profile tribal-state disputes continue to occur, a new generation of intergovernmental fights may soon outnumber them. States’ local components—counties, cities, and municipalities—do not yet understand tribal sovereignty. And as local

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² See, e.g., *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162 (1980) where the Court suggested that states are limited in their recourse when operating on reservation. In *Colville*, the Court noted that “[i]t is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries.” *Id.*; see also STUART THRONSON, INTERGOVERNMENTAL TAX AGREEMENTS: WASHINGTON STATE’S EXPERIENCE WITH CIGARETTE TAX COMPACTS 4 (2006) (noting the “hollow victory” of *Colville*) (on file with author)..

³ See *Automotive United Trades Organization v. Washington*, No. 10-5584, 2010 WL 4365576 (W.D. Wash. Oct. 28, 2010) (Complaint available at <http://www.autowa.org/pdf/Complaint.pdf>).

⁴ 30 U.S. 1 (1831).

⁵ 116 U.S. 28 (1885).

governments, now more than ever, struggle to fund operations, county-tribe disputes will arise.⁶

The tribal-federalist system puts tribes in the awkward position of possessing a right to sovereign-to-sovereign relations with the United States and the individual states, but still needing, at times, to act as local governments.⁷ Not surprisingly, the jurisdictional overlap with other local governments drives tax disputes and can sour local relationships. Within these inter-local tax disputes, it has been clear that local governments often fail to perceive tribes as sovereigns.

Historically, counties have asserted taxing power over tribes in the property context.⁸ This is doubly problematic for tribal governments because tribal governments have a very different connection to tribal land than counties do to county land. In addition, property taxation is philosophically difficult for tribal governments because tribal land is thought of as being tax exempt; however, as the Court has noted, “[g]eneralizations on this subject have become particularly treacherous.”⁹ The exceptions to the general rule of tax-exempt tribal land have formed the U.S. Supreme Court’s treatment of local taxation in Indian Country.

For tribes, the wheels came off (or rather, the Court took them off) in the property tax context over the course of several cases. In *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*¹⁰ and *City of Sherrill v. Oneida Indian Nation*,¹¹ the Court’s theory of interplay among local governments and tribes crystallized.

In *County of Yakima*, the Court reaffirmed the general rule that states may not tax reservation lands or reservation Indians unless Congress has authorized state taxation and “made its intention to do so unmistakably clear.”¹² But the Court went on to hold, nevertheless, that in the General Allotment Act,¹³ Congress made its intention to permit local taxation of fee land on the Yakima reservation unmistakably clear.¹⁴ The legal acrobatics employed to find “unmistakable clarity” in the Allotment Act illustrated exactly how far the Court will

⁶ These disputes have already arisen between local governments and the Oneida, Passamaquoddy, Cayuga, and other tribes.

⁷ See, e.g., Joseph Krist, *Seminole Tribe Bets on Taxability*, in THE HANDBOOK OF MUNICIPAL BONDS (Sylvan G. Feldstein & Frank J. Fabozzi eds., 2008) (discussing the issuance of government bonds by tribal governments).

⁸ See, e.g., *United States v. Rickert*, 188 U.S. 432 (1903). Counties have also asserted sales taxes on tribes. See, e.g., *County of Seneca v. Eristoff*, No. 3172-06, 2006 WL 6312833 (N.Y. Sup. Ct. Nov. 16, 2006).

⁹ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

¹⁰ 502 U.S. 251 (1992).

¹¹ 544 U.S. 197 (2005).

¹² *County of Yakama*, 502 U.S. at 258 (citing *Mescalero*, 411 U.S. at 148, and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985)).

¹³ 25 U.S.C. § 331 (repealed in part by the Indian Land Consolidation Act Amendments of 2000, Pub. L. 106-462, 114 Stat. 1991–2009).

¹⁴ *County of Yakama*, 502 U.S. at 258.

go to uphold state or county taxing authority. In fact, the Allotment Act was so unmistakably *unclear* in the taxation of on-reservation fee land that even the United States joined the tribe in *resisting* the local tax.¹⁵

In 2005, in *City of Sherrill*, the Court rejected the Oneida Nations' position that its reunification of interests in particular parcels made such land non-taxable. But when Madison County later sued Oneida to collect taxes, the tribe successfully enjoined collection based upon the doctrine of tribal sovereign immunity.¹⁶ What might have seemed like an appropriate assertion of tribal sovereign immunity put the tribe at a crossroads when the U.S. Supreme Court agreed to take Madison County's appeal last year.

Madison County v. Oneida: A Bullet Dodged

The Supreme Court decided to hear *Madison County v. Oneida* in 2011, in part, to determine “whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes.” The case spelled disaster for the tribe.

Madison and Oneida Counties argued in their merits brief that “[t]ribal sovereign immunity does not bar *in rem* foreclosure for nonpayment of real property taxes”¹⁷ The Counties synthesized *City of Sherrill* and *County of Yakima* into a proposed rule under which (1) the Court's strongest sovereign immunity cases were inapplicable as *in personam* rather than *in rem* cases¹⁸ and (2) that the Court had already allowed something like what the Counties were asking for when it found congressional authorization for taxation in *County of Yakima*.¹⁹ In effect, the Counties were proposing a wholly novel *in rem* exception to tribal sovereign immunity in the property tax context.

Had the Court heard the case and adopted the rule proposed by the Counties, states, counties, and other enemies of tribal self-governance might have still been barred from suing tribes. But the exception would have allowed the states and their younger siblings to judicially take and sell tribes' property. In adopting the rule, the Court would have destroyed the very purpose of sovereign immunity as universally applied—that is, to protect assets of many from depredation by few.

The Oneida Nation seems to have recognized what was at risk, and wisely mooted the dispute before the Roberts Court could rule on it by waiving its

¹⁵ Brief of the California State Association of Counties as Amicus Curiae in Support of Petitioners, *Madison County v. Oneida Indian Nation of New York*, 2010 WL 5178039 (U.S., 2010).

¹⁶ *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 (2nd Cir. 2010).

¹⁷ Brief for Petitioners, *Madison County v. Oneida Indian Nation of New York*, 2010 WL 4973153, at *13 (U.S., 2010).

¹⁸ Never mind sovereign immunity is a matter of subject matter jurisdiction.

¹⁹ Never mind that *County of Yakima* did not deal directly with sovereign immunity, let alone an *in rem* exception.

sovereign immunity for enforcement of real property taxation through foreclosure. As a result, in early January 2011, the Court remanded the case to the United States Court of Appeals for the Second Circuit.²⁰

Taxation v. Collection

As illustrated by *Madison County*, tribes have employed a second layer of defense in tax disputes: even when a federal court incorrectly upholds taxation in principle, taxing authorities may lack the ability to collect. This approach does not require a tribe to ignore a court's judgment, or disrespect federal court authority. Rather, independent barriers to collection prevent county taxmen from realizing their putative victories. Indeed, it is an approach that federal courts have implicitly endorsed, if not created.²¹

In *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*,²² the Court recognized that, notwithstanding the challenges posed to state taxing bodies by the tribal sovereign immunity doctrine, state and local governments possess many "adequate alternatives" to collect taxes from tribal governments.²³ In particular, the Court encouraged states to "enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection" of taxes.²⁴ Therefore the only practical route for local governments seeking to collect taxes from tribes is one that has received the U.S. Supreme Court's imprimatur.

Adequate Alternatives

Heeding the Court's direction, states have entered into compacts regarding taxation of tribal lands and businesses. The Indian Gaming Regulatory Act of 1988 has also made compacts part of the intergovernmental vernacular.²⁵ In this era of intergovernmental cooperation, the Washington State Department of

²⁰ *Madison County v. Oneida Indian Nation of New York*, 131 S.Ct. 704 (2011).

²¹ See *Colville* 447 U.S. at 162 ; see also *supra* note 2 and accompanying text.

²² 498 U.S. 505 (1991).

²³ *Id.* at 514. The Court's four exclusive options for the collection of state tobacco taxes on reservation lands is equally, if not more, forceful in the county property taxation context: (1) collect taxes from wholesalers off reservation; (2) collect taxes from wholesalers who supply to tribal stores; (3) enter into agreements with tribes to collect the tax in a mutually agreeable way; or (4) seek appropriate legislation from Congress. *Id.* at 514. Importantly, physical entrance on the reservation was not an option offered by the Court. See *id.*

²⁴ *Id.*; see also Anne Zimmermann, *Taxation of Indians: An Analysis and Comparison of New Mexico and Oklahoma State Tax Laws*, 41 TULSA L. REV. 91, 103, 112-14 (2005) (discussing the solution offered by *Potawatomi*, its adoption in the State of Oklahoma's tax code, and suggesting that other states adopt similar compacting policies).

²⁵ While IGRA requires states to negotiate compacts with tribes, Kenosha County and the Menominee Indian Tribe of Wisconsin at least contemplated a comprehensive agreement, taking tax disputes into account, which would have included gaming revenue sharing between the tribe and county. See INTERGOVERNMENTAL AGREEMENT BETWEEN THE MENOMINEE INDIAN TRIBE OF WISCONSIN AND THE CITY OF KENOSHA, WISCONSIN, available at <http://www.kenosha.org/casino/FIGA.pdf>.

Revenue, for instance, has recognized that while states have leverage over non-Indians for taxation purposes, “[t]ribal economic development involves doing business with non-Indians.”²⁶ For Washington State, the *Colville* case, which upheld taxes on nonmember tobacco buyers, was a “huge win on its face” but because it was “[s]ilent on methods to enforce collection of state taxes,” the state has recognized it was a “hollow victory.”²⁷ According to the Department of Revenue, the *Colville* case did not end conflict, did not increase collections, increased intergovernmental tensions, and generally worsened relationships with the tribes.²⁸ As a result, Washington began entering into cigarette compacts with tribes in 2001.

As opposed to the zero-sum *Colville* era,²⁹ a new and more dynamic state/tribal relationship exists today. As noted by Professor Matthew Fletcher,

States and tribes are beginning to smooth over the rough edges of federal Indian law—jurisdictional confusion, historical animosity between states and Indian tribes, competition between sovereigns for tax revenue, economic development opportunities, and regulatory authority—through cooperative agreements. In effect, a new political relationship is springing up all over the nation between states, local units of government, and Indian tribes.³⁰

Once local governments begin to see tribes as partners and governments, and the benefits of cooperative agreements become clear, the spring of this new political relationship will arrive. Unfortunately, it will fall to tribes to change this interpolitical paradigm and teach local governments that compacts can be mutually beneficial.

Successful Compacts between Tribes and Local Governments

Many tribes and states understand that the future of tribal-state relations involves government-to-government negotiation, accord, and agreement.³¹ In fact, “[n]early every state that has Indian lands within its borders has reached some type of tax agreement with the tribes.”³² Despite the examples that have winded

²⁶ THRONSON, *supra* note 2, at 4.

²⁷ *Id.* at 8.

²⁸ *Id.*

²⁹ Often, states would invoke their tax powers to purposefully exploit Indians and Indian tribes. See, e.g., JAMES M. MCCLURKEN, A VISUAL CULTURE HISTORY OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA GAH-BAEH-JHAGWAH-BUK: THE WAY IT HAPPENED 79 (1991) (noting that it was the policy of Emmett County, Michigan, to purposely tax Odawa Indians until they lost their lands).

³⁰ Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 74 (2007).

³¹ *Id.* at 83. This was made clear by the U.S. Commission on Tribal-State Relations as early as 1981. See generally EARL S. MACKEY & PHILIP S. DELORIA, STATE-TRIBAL AGREEMENTS: A COMPREHENSIVE STUDY (U.S. Comm’n. on Tribal-State Relations, 1981).

³² Judy Zelio, *Piecing Together the State-Tribal Tax Puzzle* (2005), <http://www.ncsl.org/default.aspx?tabid=12662> (last visited Jan. 29, 2012) (citing SUSAN JOHNSON,

their way up into the Court, many local governments are coming to recognize that intergovernmental accord offers an alternative to realizing nothing from tax disputes. Moreover, these agreements allow tribes to protect their interests against enemies of tribal self-governance by achieving certainty regarding inter-local relations. Ideally, this certainty will keep tribes out of the federal courts.

The Southern Ute Indian Tribe and the County of La Plata, Colorado, for example, have compacted to resolve property tax disputes. Under the terms of their 1996 compact,³³ the state and county agreed not to seek any tax on tribal non-trust property. "Property" under the terms of the compact refers to both real property and mineral lease interests, and applies to both ad valorem and severance taxes.³⁴ In recognition of the state and county relinquishment of taxing efforts, the tribe agreed to make annual voluntary payments of approximately one-third of the value of taxes that would have been collected if the property were not tribally owned. If a dispute arises under the compact, both parties have agreed to effectively waive their sovereign immunity by submitting to binding arbitration.³⁵

In addition, the Snoqualmie Tribe and the City of Snoqualmie in Washington State have entered into a successful inter-local agreement.³⁶ Under this agreement, the tribe pays the city for police, fire, and emergency medical services.³⁷ The tribe pays for any additional amenities required by these services, including the use of a jail cell or officer assistance.³⁸ The compact also provides for sewer lines to and from the tribe's property.³⁹

Moreover, in Louisiana, the Chitimacha Tribe and the Parish⁴⁰ of St. Mary have entered into a compact that exempts the tribe from parish tax.⁴¹ Essentially, this

JEANNE KAUFMAN, JOHN DOSSETT & SARAH HICKS, GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES (2002)).

³³ Colo. Rev. Stat. § 24-61-102 (1996).

³⁴ *Id.* at § 24-61-102.3.

³⁵ *Id.* at § 24-61-102.12.01.

³⁶ Agreement Between the City of Snoqualmie and the Snoqualmie Tribe for the Provision of Police, Fire, and Emergency Medical Services to the Snoqualmie Hills Project and Sewer Utility Service to the Tribe's Initial Reservation, *available at* www.awcnet.org/apps/ma/projects/2004SnoqualmieTribe.doc.

³⁷ *Id.* at §§ 2.2-2.3. Under the agreement, the city provides the tribe with police services in exchange for \$140,000 per year, plus \$50,000 for a new police cruiser. In addition, the city provides the tribe with fire and emergency medical services in exchange for \$150,000 per year. This amount covers the cost of two firefighters and 40% of the leasing expense for new ladder truck.

³⁸ *Id.* at § 2.2.

³⁹ *Id.* at § 2.6; *see also* Joe Kimball, *Mdewakanton Sioux Helping Pay for Road Construction in Scott County*, MINNPOST, Apr. 12, 2011, *available at* http://www.minnpost.com/politicalagenda/2011/04/12/27404/mdewakanton_sioux_helping_pay_for_road_construction_in_scott_county. The Shakopee Mdewakanton Sioux Community voluntarily contributing \$1.65 million for reconstruction of a busy intersection near its Mystic Lake Casino.

Id.

⁴⁰ Louisiana's equivalent to a county.

compact grants the tribe a status akin to that of a 501(c)(3) non-profit organization.

As illustrated by the three examples above, despite what local governments might claim, tax agreements are possible. While county lawyers will often cite (1) a general lack of authority to enter into such agreements and (2) a general lack of centralized taxing authority to execute such agreements, those agreements that exist suggest counties can find authority *when they want to*. Moreover, counties themselves receive millions in Payments in Lieu of Taxes (PILTS) every year from the federal government.⁴² Clearly, solutions are possible.

And they are desirable. Tax agreements provide, at minimum, “some level of predictable revenue” for both county and tribal governments.⁴³ Agreements also answer regulatory questions created by ambiguities in inter-local jurisdictional authority, reduce the need for costly and contentious intergovernmental litigation, and offer greater flexibility to accommodate the needs of state and tribal governments.⁴⁴ Further, intergovernmental tax compacts neatly fit on-the-ground realities of taxation involving Indian tribal communities. The purpose of local taxes is to “finance the activities of government in providing goods and services to the public. Only those who benefit from the goods and services should pay for them.”⁴⁵

In many, if not most regions, state and local governments are already aptly compensated for the services that they provide to tribal members.⁴⁶ Under the economics of “tax exporting,” it is frequently *tribal governments*—not state or

⁴¹ Sales Tax Exemption Certificate for Purchases of Motor Vehicles by the Chitimacha Indian Tribe or Its Tribal Government Agencies Compact Between the State and the Chitimacha Tribe, Form No. 1044(9/07), *available at* http://revenue.louisiana.gov/forms/taxforms/1044%289_07%29F.pdf.

⁴² See *generally* U.S. Dep’t of the Interior, Payments in Lieu of Taxes, <http://www.doi.gov/pilt> (last visited Jan. 29, 2012).

⁴³ Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 PITT. TAX REV. 93, 134 (2005).

⁴⁴ Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922, 929 (1999) [hereinafter *Intergovernmental Compacts*].

⁴⁵ *But see* Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 1016 (2010) (noting “[t]he inherent weakness with this type of argument is the amorphous nature of government-provided benefits, opportunities, and protections.”); Robert William Alexander, *The Collision of Tribal Natural Resource Development and State Taxation: An Economic Analysis*, 27 N.M. L. REV. 387, 389 (1997) (noting that “little actual economic analysis has been done to determine the probable effects and burdens of the taxation doctrine that has developed” between tribes and states).

⁴⁶ See VERONICA E. TILLER & ROBERT A. CHASE, ECONOMIC CONTRIBUTIONS OF INDIAN TRIBES TO THE ECONOMY OF WASHINGTON STATE (1998); Economic Development; S. Hrg. 105-572 Before the Sen. Comm. on Indian Affairs, 105th Cong. 129 (1998) (Prepared Statement of Robert F. Robinson, President, Center for Applied Research, Inc.). In addition to tribal compensation to state and local government, the federal government provides financial assistance to local educational agencies that educate children residing on Indian lands to offset any impact to local government caused by the a state’s inability to tax tribal lands. 20 U.S.C. §§ 7701, 7704(a).

local governments—who bear a disproportionate financial burden associated with taxation vis-à-vis local services rendered.⁴⁷ One study, for example, found that “[o]n most reservations, there are few retail stores and tribal members must go off reservation and pay state taxes on everything they buy. Nationwide, this amounts to \$246 million annually in tax revenues to state governments, while states expend only \$226 million annually on behalf of reservation residents.”⁴⁸ Intergovernmental tax compacting allows for taxation to be commensurate with services rendered, taking into account the unique relationships between tribes and their neighboring jurisdictions.⁴⁹

Conclusion

In the era of federal Indian self-determination, government-to-government tax compacts provide tribal governments with a “proactive assertion of their right to self government” that is necessary for economic and political independence.⁵⁰ By reorganizing their taxing and other relationships with local governments, as they have with states, and in turn exercising and strengthening tribal self-determination at the local level, tribal governments reduce their historic dependence on the federal government.⁵¹ And “[e]ach time a state or local government agrees to negotiate with an Indian tribe and . . . execute a binding agreement . . . that non-Indian government is recognizing the legitimacy of the tribal government,” and vice versa.⁵²

⁴⁷ See generally Alexander, *supra* note 45.

⁴⁸ Tax Fairness and Tax Base Protection: Hearing on H.R. 1168 Before the House Comm. on Resources, 105th Cong. (testimony of W. Ron Allen, President, National Congress of American Indians). Generally, tribes bring in much economic stability for the surrounding local government. One example is the Impact Aid Laws of 1950, which provides funding to local school districts who educate Indian Children. See Pub. L. No. 81-874, 64 Stat. 1100, as amended by Pub. L. No. 95-561, 92 Stat. 2315, 20 U.S.C. § 7704; see also STEPHEN CORNELL, JOSEPH KALT, MATTHEW KREPPS, & JONATHAN TAYLOR, AMERICAN INDIAN GAMING POLICY AND ITS SOCIO-ECONOMIC EFFECTS: A REPORT TO THE NATIONAL GAMBLING IMPACT STUDY COMMISSION 40–50 (1998) (noting that tribal gaming enterprises contribute significantly to the economic conditions of their surrounding non-tribal communities). States also gain large incomes from possessory interest taxes on Indian lands. See, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989).

⁴⁹ In some situations, states even give up their claims to tax in favor of a tribal tax “in order to support tribal economic development, similar to tax exemptions given to private businesses.” Zelio, *supra* note 32; see also Intergovernmental Compacts, *supra* note 44 at 929 (noting that “negotiated compacts offer greater flexibility to accommodate local needs and changed circumstances over time”). What is more, the phenomenon of intergovernmental agreements is also being carried out across the United States, between state, county and municipal jurisdictions. One study, for example, estimates that as of 1999, 45 states were using inter-local service and/or fee-for-service agreements as the mechanism by which to provide their citizens with public services. Anne F. Peterson, *The Utilization of Interlocal Service Agreements* (Aug. 7, 2008) (unpublished paper, William Mitchell College of Law) (on file with author). It is further estimated that over 50% of all cities and counties use such inter-local agreements. *Id.*

⁵⁰ Marren Sanders, *Ecosystem Co-Management Agreements: A Study of Nation Building or a Lesson or Erosion of Tribal Sovereignty?*, 15 BUFF. ENVTL. L.J. 97, 100 (2008).

⁵¹ See generally Stephen Cornell & Joseph Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J. 193 (1998).

⁵² Fletcher, *supra* note 30, at 87.

Tribes can and will fight inappropriate local government taxation in federal courts. But litigation should be the last resort. Not only are federal courts unfriendly to tribal interests, but, as compared to cities and counties, tribes have far more to lose on their own behalf and on that of their sister tribes. Government-to-government arrangements at the local level allow tribes to secure some measure of certainty by binding counties, cities, and their future leaders. The intergovernmental agreement may be commonplace with states, but it is difficult for their younger siblings to grasp.

Local governments may, at times, be the “deadliest enemies” of tribal self-governance.⁵³ But times are changing. As tribes become more politically active at the local and state government levels, there is a strong opportunity for them to support state political candidates who are savvy about the contours of Indian law, if not supportive of tribal sovereignty and self-governance.⁵⁴ As difficult as it may seem for tribes to stoop to the local governmental level, counties and cities will not educate themselves. It is up to tribes to teach local government actors how to behave like good neighbors, and secure the kind of jurisdictional and legal certainty necessary for sustainable economic growth in Indian Country.

⁵³ United States v. Kagama, 118 U.S. 375, 384 (1886).

⁵⁴ Ryan Dreveskracht, *In the Courts of Your Deadliest Enemy*, 19 INDIAN L. NEWSL. 4, 11 (2012).

Can Indian Tribes Sell or Encumber Their Fee Lands Without Federal Approval?

Mark A. Jarboe and Daniel B. Watts¹

“This Court has never determined whether the Indian Nonintercourse Act, which was enacted in 1834, applies to land that has been rendered alienable by Congress and later reacquired by an Indian tribe.”²

I. The Issue

A few years ago, an Indian tribe in the Pacific Northwest desired to purchase a hotel located on a parcel of land owned in fee by a non-Indian party and to finance the acquisition with a bank loan. The bank was willing to make the loan on terms acceptable to the tribe, including a requirement that the loan be secured by a mortgage on the hotel and site. The structuring and documentation of the loan overcame the normal hurdles and challenges until it hit an unforeseen obstacle: Could the tribe legally grant the required mortgage to the bank?

What caused the concern was one of the oldest federal statutes still in effect: 25 U.S.C. §177, referred to as the “Indian Nonintercourse Act” (the “INIA” or the “Act”). The INIA states:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the

¹ Mark A. Jarboe is a graduate of the University of Michigan and Harvard Law School and a member of the Bar of the State of Minnesota. He recently retired as a partner in Dorsey & Whitney LLP, in Minneapolis, Minnesota, where he was Chairman of the firm’s Indian Law Practice Group. Daniel B. Watts is a graduate of Bard College and Seattle University School of Law. Daniel is a staff attorney in the Office of Legal Counsel for the Nez Perce Tribe.

² Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 115 n.5 (1998).

Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.³

Although most tribal land holdings consist of trust land,⁴ the land at issue in this transaction was not. Rather, it was non-Indian owned fee land that the tribe was purchasing directly from a non-Indian owner.⁵ The question that the tribe and its lender faced was: Does the INIA apply to land acquired by a tribe in fee?

A. Confusion in the Authorities

Our examination of the INIA revealed several conflicting lines of authority. However, while there is considerable divergence in the discussion of the scope and reach of the Act,⁶ there is surprisingly little divergence as to its scope and reach in practice. We have not found any case in which a final decision has applied the INIA to land acquired and held by a tribe in fee⁷ so as to prevent a sale, transfer, or encumbrance. Nevertheless, judicial, congressional, and administrative authorities often speak as though the Act does apply to fee lands, with those authorities both ignoring each other and failing to consider the context in which the INIA arose.⁸ This has resulted in confusion and uncertainty for tribes and their business partners. We believe that the only practical way to eliminate that uncertainty is through a congressional enactment settling the issue.

B. Effects on the Tribes

As a policy matter, application of the INIA to tribally owned fee lands would be beneficial to tribes under certain circumstances and detrimental under others.

³ The INIA was first enacted in 1790, was amended and extended in 1793, 1796, 1799, 1802, and 1834. It was given its present form in 1875. Each of the first four enactments was in effect for three years at a time, thus triggering the periodic reenactments. Act of July 22, 1790, Pub. L. No. 1–33, § 4, 1 Stat. 137, 138; Act of March 1, 1793, Pub. L. No. 2–19, § 8, 1 Stat. 329, 330; Act of May 19, 1796, Pub. L. No. 4–30, § 12, 1 Stat. 469, 472; Act of March 3, 1799, Pub. L. No. 5–46, § 12, 1 Stat. 743, 746; Act of March 30, 1802, Pub. L. No. 7–13, § 12, 2 Stat. 139, 143; Act of June 30, 1834, Pub. L. No. 23–161, § 12, 4 Stat. 729, 730.

⁴ See STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 98 (3d ed. 2002).

⁵ Fee title to trust land is held by the United States of America in trust for the beneficial interest of the tribe. There are also individual trust lands held similarly for the benefit of individual Indians; those lands are not within the scope of this paper. Trust land cannot be encumbered or sold by the tribe without the approval of the federal government—the tribe doesn't hold the fee title to trust land and, as a fundamental principal of property law, only the fee owner of a parcel of land can transfer or encumber it—and the INIA is irrelevant to trust land as a result. Trust land is also not subject to state or local property taxation because it is property of the United States of America.

⁶ For example, Felix S. Cohen's Handbook, the bible of federal Indian law, states on the subject: "If land is purchased by tribes without federal involvement ... the express terms of the statute seem to apply, but its application is uncertain owing to a series of tax decisions." FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 15.06[4] (2005) (citations omitted) [hereinafter COHEN].

⁷ Other than in the case of the former Spanish Pueblos, as discussed below in Section IV.A.

⁸ See § IV. C, *infra*.

Restriction of tribally owned fee lands from transfer would reduce the chance of their removal from tribal ownership and control through involuntary means (for example, property taxation and execution on a judgment). However, that same restriction would prevent voluntary transfers and encumbrances, thereby reducing—or eliminating—a tribe's ability to derive economic benefit from the land by obtaining a mortgage for the purpose of acquiring the land or using the land as collateral for a loan to finance the construction of improvements.⁹ A clarification of the INIA's original purpose and a limitation of the Act to its original scope would, likewise, be beneficial to tribes under some circumstances and detrimental under others. Tribes would be unrestricted in their ability to transfer and encumber fee lands voluntarily but they would also be vulnerable to the involuntary loss of fee land.

As discussed below, in some jurisdictions courts have held that the INIA does not restrict the taxation, and subsequent involuntary loss, of tribal fee land but in those same jurisdictions there have been no assurances that the INIA does not restrict voluntary transfers or encumbrances of that same land. As a result, the tribes in those jurisdictions suffer both detrimental interpretations of the INIA.

C. Changes in the Nature of Tribal Land Holdings

Although the core language of the INIA has changed little over the past 220 years, the world of tribal land ownership has changed much. In 1790, almost all of the land that now constitutes the United States was owned and possessed by the tribes.¹⁰ Title to nearly all of this aboriginal land has since been ceded to the United States, patented and resold to non-Indians.¹¹ Reservations—areas set aside from an aboriginal land cession and reserved for the sole use of the ceding Indians—were established,

⁹ For example, while considering what eventually became Public Law 106-217, which authorized the Lower Sioux Community to sell or encumber its fee lands, Rep. Don Sherwood (R-PA) remarked that “[t]he Lower Sioux Community has found this law [the INIA] to be a major detriment to economic development. The law puts the tribe at a distinct disadvantage, because it finds that it cannot develop or use land which it has acquired to its full advantage.” CONG. REC., H521 (Feb. 29, 2000). Mr. Sherwood was followed by Rep. David Minge (D-MN) who stated:

I would like to suggest to the subcommittee that it consider legislation that deals with this type of situation because I expect that the Lower Sioux community is not the only Native American group in the United States that faces this type of obstacle to the disposition of land that it has purchased which has not been in trust status which is off of its reservation area.

CONG. REC., H521-H522 (Feb. 29, 2000).

Some commentators have argued that even the federal restrictions on encumbrances of trust lands should be revisited for these same reasons. See, e.g., *United States Senate Committee on Indian Affairs, Oversight Hearing on Economic Development*, May 10, 2006 (testimony of Mr. Lance Morgan, CEO of Ho-Chunk, Inc), available at http://www.indian.senate.gov/public/_files/Morgan051006.pdf.

¹⁰ Felix Cohen, *Original Indian Title*, in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 278–279 (Lucy Kramer Cohen ed., 1970); see also *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

¹¹ See *Indian Reservations in the Continental United States* (map), available at <http://www.nps.gov/nagpra/DOCUMENTS/ResMap.htm>.

then broken up, allotted and sold, mostly to non-Indians. Some tribes are actively reacquiring land within their reservations or other historical areas, and other tribes are acquiring or reacquiring land outside of those areas. Contemporary tribal land ownership now includes trust and fee land both within and outside reservation boundaries. None of these situations were present—or even envisioned—at the time the INIA was enacted, but the language “[n]o purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians” still remains.

D. Outline of this Paper

Part II of this paper provides the history and legal underpinnings of the INIA. Part III explores the few early interpretations of the INIA. Part IV explores 20th and 21st century judicial, congressional, and administrative interpretation of the INIA. Next, because the authors recognize that tribes and the business community will not be willing to rest the legitimacy of their transactions on the persuasiveness of even a well-written law journal article, Part V proposes the consideration of a Congressional enactment to confirm the original reach and scope of the INIA. Finally, Part VI offers a conclusion.

II. Underlying Legal Theory of the INIA – Aboriginal Title and the Doctrine of Preemption

“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 landowners. . . . 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.”¹²

The INIA codifies one of the most important concepts of federal and tribal relations: the doctrine of aboriginal title, a doctrine older than the United States itself. This doctrine served as the foundation for both the original enactment of the INIA and its subsequent revisions and is implicit in the application of the Act.¹³ The concept of

¹² Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34–35 (1947).

¹³ FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS* 139–144 (1970).

aboriginal title is entwined with the European doctrine of preemption; aboriginal title consists of a tribe's right to possession of its land subject to the preemptive right of the sovereign to acquire the land if and when the tribe decided to sell.¹⁴

The doctrine of preemption evolved as European nations, discovering more of the New World, sought a theory both to explain their relationship with the native occupiers of the land and to prevent competing nations from intruding in their respective areas of interest.¹⁵ The theory, stated briefly, is that the discovering nation, by virtue of its discovery, obtained dominion and sovereignty over the land discovered.¹⁶ The Indian tribes, as native occupiers of the land, continued to hold the right of possession to the land, but did so subject to the sovereignty of the discovering nation.¹⁷ And the discovering nation—the sovereign—had the exclusive right to acquire the interests of the tribe in the land if and when the tribe decided to part with it.¹⁸ As Chief Justice Marshall explained:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.¹⁹

When the United States became independent following the Revolution, the sovereignty over the land, and the right of preemption as to Indian lands, moved from

¹⁴ *Johnson v. M'Intosh*, 21 U.S. 543, 572–584 (1823).

¹⁵ PRUCHA, *supra* note 13, at 139–144.

¹⁶ *Id.*

¹⁷ See the extensive historical discussion by Chief Justice Marshall in *Johnson*, 21 U.S. at 572–584. One of the seminal decisions of federal Indian law, the case involved claims of title to aboriginal lands purported to be conveyed to private individuals by the chiefs of two tribes in 1773 and 1775, prior to the Revolution and prior to the enactment of the INIA. The Court held that the purported transfer was ineffective as it was in violation of the government's right of preemption.

¹⁸ The right of pre-emption resided in the sovereign—the discovering nation—and not its individual subjects. Only the sovereign itself could acquire title from the aboriginal inhabitants. That principal was made clear, as to the English colonies of North America, in the Royal Proclamation of October 7, 1763.

¹⁹ *Johnson*, 21 U.S. at 574.

the English Crown to the new government.²⁰ The first Congress enacted the first version of the INIA in the year following the adoption of the Constitution, thus confirming the federal government's position as to the successor to the Crown as holder of the right of preemption and its control over the acquisition of lands from the tribes as the new nation grew and expanded.

The history of its enactment leaves little question that the INIA was intended only to apply to the original acquisition of aboriginal title from the tribes. That is, the INIA was intended to protect the federal government's preemptive right to acquire aboriginal title from tribes, preventing other countries, the states, or individuals from doing so. As we shall see, however, as tribal land holdings expanded to include trust and fee lands the broad language of the INIA began to be applied—at least in word—to those lands as well.

III. Early Authorities

There is little 19th century authority interpreting the INIA. The first authority specifically addressing the effect of the INIA on fee patented lands held by a tribe is a May 14, 1857 opinion of U.S. Attorney General Jeremiah Black.²¹ In that matter, the 1854 treaty between the United States and the Delaware Indians, by which the Delaware ceded lands to the United States, contemplated the sale and patenting of certain of those lands to the “Christian Indians.”²² The Christian Indians had settled within the aboriginal territory of the Delawares and had made improvements to the lands they occupied.²³ During the treaty making negotiations between the Delawares and the United States the parties contemplated a sale of the lands to the Christian Indians at \$2.50/acre.²⁴ The Secretary of the Interior posed several questions regarding the nature of the title that would be held by the Christian Indians to Attorney General Black, who provided the following opinion:

[A]fter these lands shall be confirmed to the Christian Indians by patent they will not hold them by the usual Indian title. The usual Indian title was in the Delawares. It was extinguished by the first article of the treaty, and an absolute title vested in the United States. The United States will convey their right to the Christian Indians by the patent, and

²⁰ After a period of uncertainty under the Articles of Confederation, when there was disagreement as to whether that sovereignty and right flowed to the national government or to the individual states as successors to the former colonies, see COHEN at § 15.06[1], the issue was settled in the Constitution of 1789 which vested in the Congress the power “to regulate Commerce . . . with the Indian Tribes,” U.S. Const., art. I, § 8.

²¹ Christian Indians, 9 Op. Att’y. Gen. 24 (1857).

²² *Id.* at 2.

²³ *Id.* at 2.

²⁴ *Id.* at 2–3.

they will hold, like any other purchaser, from the Government.²⁵

The phrase “like any other purchaser” leaves little doubt that the Christian Indians took title to the lands in fee simple. Nevertheless, in the opinion of the Attorney General, the lands would be subject to the INIA and the Christian Indians would require federal approval to sell the lands freely:

I cannot think that it [the INIA] applies merely to those Indian tribes who hold their lands by the original Indian title. The words are broad enough to include a tribe holding lands by patent from the United States, and the purpose of the statute manifestly requires it to receive that construction.²⁶

Twenty-eight years later, Attorney General Augustus Hill Garland was asked to determine whether the INIA required federal approval of surface leases of tribal trust land to non-Indian ranchers on three reservations in what was then the Indian Territory.²⁷ Attorney General Garland took a similarly sweeping view of the applicability of the INIA to Indian land transactions.²⁸ He concluded that:

This statutory provision [the INIA] is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee simple, or a right of occupancy merely, is not material; in either case the statute applies. . . . Whatever the right or title may be, each of these tribes or nations is precluded, by the force and effect of the statute, from either alienating or leasing any part of its reservation, or imparting any interest or claim in or to the same, without the consent of the Government of the United States.²⁹

Although Attorney General Garland’s words follow the thinking of his predecessor, the context of his opinion involved reservation lands—lands set aside for the tribes by act of the United States.³⁰ As a federal set-aside, those lands belonged to the United States and federal approval of their sale or encumbrance would have been required by virtue of that fact alone; recourse to the INIA was not necessary and the

²⁵ *Id.* at 4.

²⁶ *Id.* at 6–7.

²⁷ Lease of Indian Lands for Grazing Purposes, 18 Op. Att’y. Gen. 235 (1885).

²⁸ *Id.*

²⁹ *Id.* at 4–5.

³⁰ *Id.* at 1.

opinion's language goes beyond what is necessary to reach the proper result. Notwithstanding that, the little authority that there is from the 19th century reads the INIA literally and applies it to any lands held by a tribe under any form of title.

IV. 20th and 21st Century Authorities

In the 20th and 21st centuries courts began to address the scope of the INIA. The modern cases arose in a number of different contexts due both to the varying historical contexts in which tribal lands were set aside and to the growing diversity of the nature of tribal land ownership. First came the Pueblo fee land cases, in which Pueblos in former Spanish territory held land nominally in fee but subject to restraints on alienation under Spanish law. Next we consider the cases dealing with the condemnation of lands of the Tuscarora Nation in New York, which are sometimes cited as standing for the proposition that the INIA applies to tribal fee lands but in fact do not. We then look at cases that state that the INIA applies to tribal fee lands and find that that conclusion is dicta. Finally, we look at the most recent cases which do not apply the INIA to tribal fee lands.

A. Pueblo Fee Land Cases

The analysis of 20th century cases starts with a series of decisions known as the Pueblo fee land cases. These cases, two from the Supreme Court and one from the Tenth Circuit, have been read to stand for more than what they actually hold. The Pueblo fee land cases addressed the status of lands held by Indian pueblos in the southwest United States in the area formerly held by Spain, then by Mexico after its independence, then acquired by the United States in 1848 under the Treaty of Guadalupe Hidalgo.³¹ They have often been cited for the proposition that the INIA applies to lands held by tribes in fee, which is superficially correct.³² However the nature of that fee title as it originated under Spanish law is an anomaly which the courts concluded to be the functional equivalent of aboriginal or trust title elsewhere in the country.³³ The application of the INIA to those lands, once they came under the jurisdiction of the United States, necessarily followed in order to apply the same protections and restrictions to those lands as applied to aboriginal lands under United States law.

The first of these cases, *United States v. Sandoval*, 231 U.S. 28 (1913), involved not the INIA but the application of federal statutes restricting the introduction of intoxicating liquor into Indian country in New Mexico. The Court traced the nature of the

³¹ See *infra* pp. 8–10. The Treaty of Guadalupe Hidalgo, formerly known as the Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, was signed on February 2, 1848 and proclaimed on July 4, 1848. 9 Stat. 922.

³² *Id.*

³³ *United States v. Sandoval*, 231 U.S. 28, 39–40 (1913).

land holdings of the New Mexico pueblos which originated in grants from the Spanish Crown.³⁴ These grants were reserves made in fee simple status but subject to restraints on alienation under Spanish law and official supervision by the Crown.³⁵ That status continued upon acquisition of the territory by the United States and confirmation of the Spanish grants by Congress.³⁶ Therefore, although the pueblos in what was formerly a Spanish possession held their land in fee simple, that fee was granted to them by the Spanish crown under a guardian/wardship concept similar to the trust concept that developed in the United States (where the fee itself is held by the United States).³⁷ *Sandoval* thus established the basic nature of pueblo fee title.

The next case in the line is *United States v. Candelaria*, 271 U.S. 432 (1926). This case involved an action brought by the United States “to quiet in the Indian Pueblo of Laguna the title to certain lands alleged to belong to the pueblo in virtue of a grant from Spain, its recognition by Mexico and a confirmation and patent by the United States.”³⁸ The Court specifically held that the INIA applied to lands held by the pueblos based on the guardian/ward relationship previously identified.³⁹ The Court stated:

Under the Spanish law Pueblo Indians, although having full title to their lands, were regarded as in a state of tutelage and could alienate their lands only under governmental supervision. . . . Thus it appears that Congress in imposing a restriction on the alienation of these lands, as we think it did, was but continuing a policy which prior governments had deemed essential to the protection of such Indians.⁴⁰

In short, under Spanish law the pueblos were unable to alienate their land without governmental consent, even though the fee title held by the pueblos, and that restriction carried over when the land involved became part of the United States. That restriction could not be applied through the concept of trust title, because fee title was held by the pueblos rather than the United States. The legal vehicle used to accomplish the result was the INIA.

The final case of the three, *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), *cert. denied* 355 U.S. 940 (1958) also involved a quiet title action brought by the United States with respect to property owned in fee by the Pueblo of Laguna. Two statutes were at issue in *Alonzo*, the INIA and Section 17 of the Pueblo Lands Act of

³⁴ *Id.* at 39.

³⁵ *Id.*

³⁶ *Id.* at 40.

³⁷ *Id.*

³⁸ *United States v. Candelaria*, 271 U.S. 432 (1926).

³⁹ *Id.* at 437.

⁴⁰ *Id.* at 442 (citations omitted).

1924, which explicitly imposed a requirement of federal approval with respect to any conveyance of pueblo lands in New Mexico.⁴¹

In *Alonzo*, different parcels of the property involved had different histories: (a) 51,578.19 acres had been held by the Pueblo in fee since the time of Mexican sovereignty, (b) 4,693.36 acres consisted of land which initially had been confirmed in the Pueblo by the United States, but which it later lost to the holders of superior title and then purchased from those holders, and (c) 480 acres consisted of land adjacent to the land in (a) and which the Pueblo purchased in fee in the 20th century.⁴² The court held that all of the lands at issue were subject to federal restrictions on transfer, and did not distinguish between the lands held by the Pueblo prior to the Treaty of Guadalupe Hidalgo, the lands within those lands lost and then acquired by the Pueblo, and the small tract adjacent to the Pueblo's aboriginal lands purchased by the Pueblo.⁴³ However, given Section 17 of the Pueblo Lands Act there would likely be no difference in outcome.

What is central, in reviewing *Sandoval*, *Candelaria*, and *Alonzo* is that they involve tribal fee titles held by pueblos under grants originating from the Spanish Crown and restricted under Spanish law. While these cases are frequently cited for the proposition that the INIA applies to land held by tribes in fee,⁴⁴ the nature of the fee titles in these cases is particular to the pueblos. Restricted fee title held by a pueblo is treated similarly to aboriginal title as that title is understood in those parts of the country that had not been under Spanish rule. The cases did not address land that was in the public domain, patented to non-Indians, and later purchased by a tribe.⁴⁵

B. The Tuscarora Cases

Before proceeding further, we must note that a number of decisions (for example, *Lummi Indian Tribe v. Whatcom County*⁴⁶ and *Tonkawa Tribe of Oklahoma v.*

⁴¹ *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957). Section 17 of the Pueblo Lands Act read: No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

For a discussion of the essential provisions of the Pueblo Lands Act, see *Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985).

⁴² *Alonzo*, 249 F.2d at 438–439.

⁴³ *Id.* at 443–444.

⁴⁴ See the discussion at IV.C, *infra*.

⁴⁵ With the possible exception of the 480 acres in *Alonzo* that was not separately addressed by the court.

⁴⁶ *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994).

Richards,⁴⁷ both discussed below) refer to the Tuscarora cases⁴⁸ as standing for the proposition that the INIA applies to tribal fee lands. That is simply incorrect. The Tuscarora cases involved the condemnation, for purposes of a reservoir for a hydroelectric project on the Niagara River, under the authority of Section 21 of the Federal Power Act, 16 U.S.C. § 814, of land acquired by purchase by the Tuscarora Nation and held by the Nation in fee.⁴⁹ The Nation argued that the INIA prohibited the condemnation.⁵⁰ The courts, however, did not address whether the INIA applied to the property; they held, instead, that even if the INIA did so apply it would not stand in the way of the condemnation:

[W]e must hold that Congress, by the broad general terms of § 21 of the Federal Power Act, has authorized the Federal Power Commission's licensees to take lands owned by Indians, as well as those of all other citizens, when needed for a licensed project, upon the payment of just compensation; that the lands in question are not subject to any treaty between the United States and the Tuscaroras; and that 25 U. S. C. § 177 does not apply to the United States itself nor prohibit it, or its licensees under the Federal Power Act, from taking such lands in the manner provided by § 21, upon the payment of just compensation.⁵¹

In the Tuscarora cases neither the Court of Appeals nor the Supreme Court held that the INIA applied to the lands held by the Nation in fee.

C. Authority that the INIA Applies to Tribal Fee Lands

There have been a few courts that have held that the INIA applies to land acquired by a tribe and held in fee, but we have not been able to find a case where that conclusion has controlled the result. As such, the conclusions are dicta. A prime example is *Jicarilla Apache Tribe v. County of Rio Arriba*, 883 P.2d 136 (N.M. 1994). This case addressed the scope of the INIA in the context of the question of whether 28 U.S.C. 1360(b)⁵² deprived a state court of jurisdiction to adjudicate the existence of an

⁴⁷ *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996).

⁴⁸ *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885 (2nd Cir. 1958), *cert.denied*, 358 U.S. 841 (1958), *vacated as moot sub nom.*, *McMorran v. Tuscarora Nation of Indians*, 362 U.S. 608 (1960); *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

⁴⁹ *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d at 887.

⁵⁰ *Id.* at 888.

⁵¹ *Federal Power Commission*, 363 U.S. at 123–124.

⁵² 28 U.S.C. 1360(b) states that: “Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property . . . belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation

easement over fee lands acquired by the tribe.⁵³ The tribe argued that, under the INIA, the fee land became subject to a federal restriction upon alienation when it was acquired by the tribe and, as a result, the state court was without jurisdiction to adjudicate the existence of the claimed easement.⁵⁴ The New Mexico Court of Appeals agreed with the Tribe, holding that “[u]nder federal case law . . . the [land in question] became subject to federal restrictions against alienation under the INIA when it was purchased in fee simple by the Tribe in June 1985, and was subject to these restrictions at the initiation of this lawsuit.”⁵⁵ However, with the exception of an earlier edition of Felix S. Cohen’s Handbook, the authorities cited by the court consisted of the three Pueblo fee land cases (*Candelaria*, *Sandoval*, and *Alonzo*), a case involving trust lands (*United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (5th Cir. 1938)), and a case under 25 U.S.C. 81 which specifically reserved the question of the applicability of the INIA (*Narragansett Indian Tribe v. RIBO, Inc.*, 686 F.Supp. 48 (D.R.I. 1988)).⁵⁶ None of these authorities provided support for the Court of Appeals’ conclusion. On review, the New Mexico Supreme Court, referring to the same edition of Cohen’s Handbook, stated: “We . . . agree that the [land in question] became subject to a restriction against alienation imposed by the United States when it was purchased by the Tribe.”⁵⁷ However, the New Mexico Supreme Court went on to conclude that that restriction did not deprive it of jurisdiction to adjudicate the claimed easement and, as a result, the conclusion did not control the result in the case.⁵⁸

In *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039 (5th Cir. 1996), the court cited the 1885 opinion of Attorney General Garland,⁵⁹ *Alonzo*, the Tuscarora cases, and situations of aboriginal, treaty, or trust title as authority for its conclusion that “[t]he Nonintercourse Act protects a tribe’s interest in land whether that interest is based on aboriginal right, purchase, or transfer from a state.”⁶⁰ However, the court found that the tribe had no interest in the land in question to be protected by the Act.⁶¹ Again, the conclusion that the INIA applied to the land did not control the result.

imposed by the United States; . . . or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.”

⁵³ *Jicarilla Apache Tribe v. County of Rio Arriba*, 862 P.2d 428, 432 (N.M.App. 1993).

⁵⁴ *Id.*

⁵⁵ *Id.* at 435.

⁵⁶ *Id.* at 53, n.1.

⁵⁷ *Jicarilla Apache Tribe v. County of Rio Arriba*, 883 P.2d 136, 140 (N.M. 1994).

⁵⁸ *Id.* at 140–141.

⁵⁹ *See supra* Part III.

⁶⁰ *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996).

⁶¹ *Id.* at 1047.

D. Authority that the INIA Does Not Apply to Tribal Fee Lands

Although, as we have seen, the INIA has often been read broadly, no case has applied the Act to tribal fee lands⁶² so as to invalidate a transfer or encumbrance of those lands. To the contrary, there are a number of decisions holding that the Act does not apply to property that had been placed in the public domain, patented to non-Indians and then purchased by a tribe, whether within or outside the boundaries of the tribe's reservation. Unlike the cases discussed in the immediately preceding section, here the conclusion as to the reach of the INIA did control the results.

The lead case in this section is *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994). *Lummi* involved an attempt by Whatcom County, Washington, to impose ad valorem property taxation on land located within the Tribe's reservation that had been allotted, and patented in fee to Lummi tribal members under the Treaty of Point Elliot of 1855, and later acquired by the Tribe.⁶³ The Tribe contended that once the land was acquired by it, the INIA rendered the lands inalienable and protected from taxation, citing the Tuscarora cases, *7,405.3 Acres of Land*, and the Pueblo fee land cases.⁶⁴ The court rejected the argument based on the facts that (1) the federal government had previously removed any restraints on the alienation of the land in question, and (2) the government created a procedure through which tribes can convert their fee lands to trust.⁶⁵ The Court said that:

No court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable. To the contrary, courts have said that once Congress removes restraints on alienation of land, the protections of the Nonintercourse Act no longer apply. Moreover, the statutory authorization for the sale of Indian land following proper government approval makes no mention of reimposing restrictions should a tribe reacquire the land. Rather, the broad statutory language suggests that, once sold, the land becomes forever alienable. We

⁶² Excluding Pueblo fee lands for the reasons given above. *See supra* Part IV.A.

⁶³ *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1356 (9th Cir. 1993). The ability of a state or local government to tax tribal fee lands involves many issues in addition to the issue of the application of the INIA that are far beyond the scope of this paper. We address here only those decisions in which the courts have addressed the applicability of the INIA as a defense against taxation. We also note that taxation and condemnation cases raise the issue of whether the INIA applies to involuntary transfers, given the Act's reference to "purchase, grant, lease, or other conveyance." Some courts have concluded that the Act "applies only to voluntary conveyances by the tribes themselves and not to involuntary conveyances by the state for nonpayment of taxes." *See, e.g., Bay Mills Indian Community v. State*, 626 N.W.2d 169, 173 (Mich.App. 2001).

⁶⁴ *Lummi*, 5 F.3d at 1358–1359.

⁶⁵ *Id.*

hold that the parcels of land approved for alienation by the federal government and then reacquired by the Tribe did not then become inalienable by operation of the Nonintercourse Act.⁶⁶

A similar result, also in the context of taxation, was reached in *Saginaw Chippewa Tribe v. State of Michigan*, 882 F.Supp. 659 (E.D. Mich. 1995), *rev'd on other grounds* 106 F.3d 130 (6th Cir. 1997), *cert. granted and judgment vacated sub. nom. Michigan v. United States*, 524 U.S. 923 (1998).⁶⁷ The court reached the same conclusion as the Ninth Circuit and held that the INIA did not apply to land that had been patented and later acquired by a tribe:

[I]f all land held by Indian tribes were automatically restricted by operation of the Nonintercourse Act, then the Tribe would not have to submit to the cumbersome and lengthy process the United States referred to in oral argument and in its briefs whereby Tribes may petition the Department of the Interior to place lands owned by them into trust. If return to trust status were automatic via the Nonintercourse Act, a petitioning process to return land to trust status would be superfluous.⁶⁸

The same conclusion was reached, not in the taxation context, in *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379 (Wash. 1996). That case involved an action to quiet title to 80 acres of land within the Quinault reservation that had been patented in 1958 and in which the Quinault Nation subsequently acquired a one-sixth undivided interest in fee.⁶⁹ The court relied upon *Lummi* and *Saginaw Chippewa* in reaching its conclusion that the INIA does not apply to land as to which the United States had removed restraints on alienation by patent and which was then reacquired by a tribe.⁷⁰

⁶⁶ *Id.* at 1359 (citations omitted).

⁶⁷ This case demonstrates the point made in footnote 63. The Section 177 argument was only addressed in the District Court; the Sixth Circuit's reversal (in turn, vacated by the Supreme Court) was based on a question of Congressional intent as to the taxability of the lands in question.

⁶⁸ *Id.* at 676. For practitioners of federal Indian law, loose language such as this is highly frustrating. Applying the INIA to tribal fee lands would not result in those lands becoming trust lands. Title to trust lands is in the United States with the tribes having the beneficial interest; restricting the alienation of tribal fee lands wouldn't result in a transfer of the fee from the tribe to the federal government. It is true, however, that the practical consequences of the application of the INIA to fee lands would be similar to a conversion to trust status.

⁶⁹ *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379, 381 (Wash. 1996).

⁷⁰ *Id.* at 387.

These three decisions—*Lummi*, *Saginaw Chippewa*, and *Anderson & Middleton*—have been followed by other decisions in which courts have had little difficulty dismissing claims of the application of the INIA to tribal fee lands when those lands had been patented, owned by non-Indian parties, and then acquired by a tribe.⁷¹

E. Congressional and Administrative Interpretations

While some cases have generated confusion because of their failure to analyze the application of the INIA in its proper historical context, that confusion has been compounded by actions in the Congressional and Administrative areas. A number of tribes seeking to sell or encumber their tribal fee lands, including the Navajo Nation,⁷² the Rumsey Indian Rancheria,⁷³ the Eastern Band of Cherokee Indians,⁷⁴ the Mississippi Band of Choctaw Indians,⁷⁵ the Lower Sioux Indian Community,⁷⁶ the Coushatta Tribe of Louisiana,⁷⁷ and the Shakopee Mdewakanton Sioux Community⁷⁸ have sought and obtained Congressional authorization to do so through legislation. The legislative history of these acts generally makes little reference to the court decisions but simply refers to the plain wording of the INIA. A typical example is found in the legislative history of the Lower Sioux act as it was being considered in the House of Representatives, where Mr. Sherwood (R-PA), in speaking in favor, said that:

[e]xisting Federal law enacted in 1834 provides that an Indian tribe may not lease, sell, or otherwise convey land which it has acquired unless conveyance is approved by Congress. This antiquated law applies even though the land was purchased by the tribe with its own money, and even though the land is located outside the tribe's reservation, and even though the land has never been taken into trust for the tribe.⁷⁹

Sometimes this conclusion makes it into the legislation itself. For example, among the findings in the legislation authorizing the Rumsey Indian Rancheria to sell a tribally-owned fee parcel located 125 miles away from the tribe's trust lands is the

⁷¹ See, e.g., *Bay Mills Indian Community v. State*, 626 N.W.2d 169 (Mich.App. 2001) (taxation); *Cass Co. Joint Water Resource District v. 1.43 Acres of Land*, 643 N.W.2d 685 (N.D. 2002) (condemnation); and *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin*, Case No. 06-C-1302 (E.D. Wisc. March 28, 2008) (condemnation).

⁷² Pub. L. 86-505, § 1.

⁷³ Pub. L. 101-630, Title I.

⁷⁴ Pub. L. 101-379, § 11.

⁷⁵ Pub. L. 102-497, § 4.

⁷⁶ Pub. L. 106-217.

⁷⁷ Pub. L. 106-568, § 301.

⁷⁸ Pub. L. 108-204, § 126.

⁷⁹ CONG. REC., H521 (Feb. 29, 2000).

following statement: “Section 2116 of the Revised Statutes (25 U.S.C. 177) prohibits the conveyance of any lands owned by Indian tribes without the consent of Congress.”⁸⁰

Administratively, the regulations of the Department of the Interior addressing the sale, exchange, or conveyance of tribal lands provide:

Lands held in trust by the United States for an Indian tribe, lands owned by a tribe with Federal restrictions against alienation and any other land owned by an Indian tribe may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the Act of Congress authorizing sale provides that approval is unnecessary.⁸¹

Thus, the recent Congressional and Administrative authority, to the extent that it exists, supports the proposition that the INIA applies to tribal fee lands but does so without analysis and without addressing the numerous court decisions holding otherwise.

V. Proposed Legislative Solution

We have found two lines of authority, which do not refer to each other. The 19th century Attorney General opinions, the legislative history, occasional Congressional findings, and the Department of the Interior regulations lead to the conclusion that the INIA applies to tribal fee lands just as it does to any other tribal lands, but none of those authorities refer to the judicial decisions. Conversely, recent cases in both federal and state courts hold that, once land has been patented and placed in the public domain, the acquisition of that land by a tribe does not render it subject to the Act, but none of those cases refer to the Congressional findings or the legislative history of the various acts authorizing the sale or encumbrance of tribal fee lands, nor do they discuss the Attorney General opinions or the Interior Department regulations. There are also recent cases that support a broader application of the Act, but those cases did not lead to an invalidation of any transfer (and even those cases did not discuss the Congressional or Administrative authorities). The result is confusion.

If we go back to the reason for the enactment of the INIA in the first instance—to confirm the doctrine of preemption in United States law following the Revolution and to protect tribal landholdings from the grasping hands of ambitious states and settlers—there appears to be little justification in applying the Act to land patented, placed in the public domain, and then acquired in fee by a tribe. As to that land—land not part of a

⁸⁰ Pub. L. 101–630, § 101.

⁸¹ 25 C.F.R. 152.22(b).

tribe's aboriginal or trust holdings—a tribe should be able to buy, sell, mortgage, and otherwise deal with it as would any other landowner. The present, conflicting authorities impair the tribes' ability to deal with their fee land as other landowners, regardless of whether the land in question is within or outside the tribe's reservation boundaries.

In order to resolve the uncertainties over a tribe's ability to sell or encumber its fee lands, the authors propose the consideration by Congress of a statute of general application similar to those that have been enacted on a case-by-case basis for individual tribes. In doing so, we are mindful of the different considerations that must be given to lands acquired in fee by a tribe within its reservation boundaries (often as part of a program of land restoration) and lands acquired elsewhere.⁸² While the considerations of a tribe's ability to use financing in order to acquire land initially, and its ability to derive economic value from such land after acquisition, apply to lands located within a reservation as well as lands located elsewhere, the risk of a possible repeat loss of reacquired reservation lands might lead tribal leaders to prefer not to have any confirmation of conveyance authority apply to on-reservation fee lands.⁸³

We propose the following language, with square brackets indicating options to be considered in the context of the on-reservation/off-reservation issue noted above:

APPROVAL OF TRANSACTIONS BY INDIAN TRIBES WITH RESPECT TO CERTAIN LANDS

(a) In General.--Notwithstanding any other provision of law, without further approval, ratification, or authorization by the United States, any Indian tribe may lease, sell, convey, warrant, or otherwise transfer all or any part of such tribe's interest in any real property that is--

(1) [not located within the exterior boundaries of the reservation of such tribe;

(2)] not held in trust by the United States for the benefit of the tribe; and

⁸² For example, in discussing the application of the INIA to tribal fee lands, the Solicitor of the Department of the Interior has said that it “appears to [be] ... the litigating position of the United States” that there is a distinction as to applicability between fee lands located within and those located without a reservation, “unless some extenuating circumstances exist.” Opinion of the Solicitor of the Department of the Interior M-37023 (Jan. 18, 2009). The uncertain nature of the conclusion in the opinion—which did not cite the Department's own regulation on the subject—is indicative of the extent of the problem.

⁸³ We note that not applying the proposed statute to on-reservation fee lands would not change the result of the taxation cases discussed above, and that, as a result, reacquired fee lands even with a reservation would likely continue to be exposed to taxation, condemnation or conveyance to the extent that such cases are followed.

[(2)][(3)] not real property owned in fee by an Indian Pueblo on July 4, 1848[, continuously owned by such Indian Pueblo since that date,] and located within the area formerly part of the Republic of Mexico and made part of the United States of America under the Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico.

(b) [Trust][Certain] Land Not Affected.--Nothing in this section is intended or shall be construed to--

(1) authorize any Indian tribe to lease, sell, convey, warrant, or otherwise transfer all or any part of an interest in any real property that is [located within the exterior boundaries of the reservation of the tribe or] held in trust by the United States for the benefit of the tribe; or

(2) affect the operation of any law governing leasing, selling, conveying, warranting, or otherwise transferring any interest in such [trust] land.

VI. Conclusion

In the hotel acquisition transaction described at the beginning of this article, neither the tribe's nor the bank's attorneys could conclude with confidence that the tribe could grant a mortgage on the fee land that it planned to acquire. The parties were able to solve the problem with the cooperation of the seller of the hotel by placing the encumbrance on the land prior to its acquisition by the tribe. In a series of preplanned steps, the seller granted a mortgage on the parcel to the bank in order to secure the tribe's obligations to the bank under the loan documents; the tribe then used the proceeds of the loan to acquire the land and hotel from the seller subject to the existing mortgage; the tribe then assumed the obligations of the mortgagor under the mortgage instrument; and the bank then released the seller from liability under the mortgage. At the end of the series of transactions the tribe owned the land and hotel in fee, subject to a mortgage that was in place at the time of acquisition. Through this process, there was no "purchase, grant, lease, or other conveyance" of any interest in the site by the tribe; the encumbrance was already existing when the tribe took title.

This procedure worked in that particular transaction because the tribe did not start out with any interest in the land and the three parties—tribe, bank, and seller—were willing to work together to solve the problem. In particular, the cooperation of the seller (who had to start the chain of events by placing a mortgage on his land prior to being paid for it) was essential. Not all real estate transactions involving tribal fee lands will take place in such favorable environs. In order to address the problem, and to

enable tribes to enter into desirable commercial real estate transactions without hindrance from an unclear law, the authors recommend consideration of the proposed legislative solution described above.

The Public Nature of Indian Reservation Roads

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For those who live on, or work for a tribe that has, a checkerboard reservation¹ the problem of right-of-way access is common place and often insidious. It is not unusual for someone to throw up a gate and block road access to various lands claiming that they have not granted a right-of-way to others who regularly use that road. In addition to the actions of individuals, a tribe may have a good reason to block access to certain areas. Unfortunately, in these situations it is most likely that there is no easily discernable record of the road beyond a few maps, and there may be no recorded easement at the BIA Title Plant or with the county.²

The public nature of Indian Reservation Roads (IRR) can play a role in helping to resolve these kinds of right-of-way disputes on reservations. This article proposes a workable approach to that task.³ In analyzing the public nature of IRR system roads, this article discusses two key propositions. The first proposition is that IRR system roads are public. The impact of this proposition is that if a given road is on the IRR system, then it is presumptively public.⁴ The second proposition is that a road can be public, and placed on the IRR inventory, without a recorded easement. This proposition is developed by looking at the history of reservations that led to their checkerboard nature, the history of the IRR system, the definition of a “public road” under IRR laws,

¹ The term “checkerboard” refers to the subdivision of land that occurred on many reservations after various allotment acts were implemented in the late 1800s. See *e.g.*, The Indian General Allotment Act, 25 U.S.C. § 331 (1887) (repealed 1951). The result of this Act was a checkerboard pattern of Indian and non-Indian ownership of reservation lands. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 16.03, at 1039-1057 (2005 ed.).

² It is unusual to only have to deal with access issues where the public record immediately resolves the issue. Those who find themselves in this position can count their lucky stars.

³ The Confederated Tribes of the Umatilla Indian Reservation have developed a general policy for dealing with these, and other, right-of-way disputes. Development of that policy took an analytical approach to the handling of these disputes. First and foremost in that structure is determining whether a road in question is public. The public nature of Indian Reservation Roads discussed in this article plays a key role in making that determination and, consequently, in resolving these disputes.

However, the reader should be aware that the comments in this article may be significantly different from opinions expressed by the BIA or the approach taken by other tribes. Indian law is notoriously difficult, not simply because of the merger of different areas of American common and statutory law within the context of a single subject matter, but also because the history and context of its development has, from time to time, made those mergers seemingly incoherent. Furthermore, when faced with unchartered territory and complex problems, it is not unusual for different attorneys to approach the same problem in different ways. This is especially true when applying property law analysis in Indian country. Combining the inevitable differences of opinion on how to tackle a given legal question with the seemingly inherent incoherence of Indian law, it is inevitable to get differences of opinion on a given topic—sometimes radically divergent differences. My discussion about IRR system roads may well be one of those radically divergent differences of opinion.

⁴ It is possible for a road to erroneously be placed on the IRR system when it is actually a private road. This can occur when the underlying road in question was created with private, rather than public, money. Consequently, the public inference should be treated as a rebuttable presumption.

and the common law analysis of public vs. private rights-of-way. The conclusion one reaches from these two propositions, if true, is that Tribes can put roads on the IRR system, thereby requiring that they be treated as public, without a recorded easement. Nonetheless, having a recorded document showing the existence of a public easement is preferable—but it is not always necessary.

A. Indian Reservation Roads are public roads

There can be no doubt but that a road on the IRR system is public. In 1982 the Surface Transportation Assistance Act incorporated the IRR program into the Federal Lands Highway Program.⁵ The primary consequence of this incorporation was to allow the IRR program to be funded by the Highway Trust Fund.⁶ But, for purposes of this article, the Act had another important result: it amended the federal statutory definition of an IRR.⁷ The term Indian reservation roads, as it appeared in 23 U.S.C. 101(a)(12) was amended by striking out, "Indian reservation roads and bridges" and inserting, "Indian reservation roads" means public roads." An Indian reservation road is now defined as:

[A] public road that is located within or provides access to an Indian reservation or Indian trust land or restricted Indian land.⁸

Buttressing this definition of an IRR system road as public is Congress' expressed reason for establishing the Federal Lands Highways program:

Recognizing the need for all Federal roads which are public roads to be treated under the same uniform policies as roads which are on the Federal-aid systems, there is established a coordinated Federal lands highways program which shall consist of ... Indian reservation roads as defined in section 101 of this title.⁹

It is possible to object that even if an IRR is public by definition—that in order to qualify as an IRR it must be a public road—it does not mean a given road becomes public by putting it on an IRR inventory. This is true, and is addressed more specifically in an analysis of the second proposition. Setting this objection aside for the moment, the next section looks at the consequence of a road being on an IRR inventory in a real life situation.

1. *Brendale and the Yakama Nation.*¹⁰

Philip Brendale is a not a member of the Yakama Nation. However, his mother was.¹¹ Consequently, despite being a non-member, he inherited an interest in fee land

⁵ Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2106.

⁶ Federal Lands Highways Program, 23 U.S.C. § 204 (1972).

⁷ Surface Transportation Assistance Act, *supra* note 5, at § 126 (c)(2).

⁸ 23 U.S.C. § 101(a)(12).

⁹ 23 U.S.C. § 204 (a)(1).

¹⁰ Apologies to any member of the Yakama Nation, or anyone working for the Yakama Nation, if the story related in this article is inaccurate. The information presented is based on the record contained in various court documents, which, as any attorney that has litigated cases in court knows, may miss the mark compared to the facts and what actually occurred.

within the Yakama Nation reservation. His land lies within a “closed” portion of the reservation, the Nation having passed a resolution in 1954 declaring a large portion of the reservation “to remain closed to the general public” in order to “protect the [Closed Area's] grazing, forest and wildlife resources.”¹² To access his property, Mr. Brendale had to use a BIA road running through the closed area.¹³

On May 3, 1972, the Yakama BIA Agency issued a public notice closing non-member public travel to most of the roads in the area where Mr. Brendale owned property.¹⁴ Instead, a non-member had to obtain a permit to use the road.¹⁵ Nonetheless, permits would be issued to property owners in the area, but those permits came with conditions. Among the conditions was an agreement not to carry firearms. Mr. Brendale refused to abide by that condition and the United States sued to enjoin him from using the BIA roads. The federal district court granted the injunction concluding that the restriction was reasonable.¹⁶ Mr. Brendale didn't take the injunction sitting down. In 1978, he filed an action claiming that he had an implied easement by necessity over Indian lands. This time, in an abysmal opinion,¹⁷ the court concluded that Mr. Brendale had an easement by implication and that he could use the BIA road so long as the use was consistent with reasonable use of his land and there were no other restrictions placed on the road as authorized by former 25 C.F.R. § 170.8(a).¹⁸ Unfortunately, the court did not discuss whether the road in question was public, thereby obviating the need to find an implied easement by necessity.

The story picked up again in the 1980s. The Yakama Nation had its own comprehensive zoning ordinance that it applied to all lands within the Nation's boundaries. At the same time, Yakima County had a zoning ordinance that it deemed to apply to fee lands within the reservation. Mr. Brendale eventually sought to subdivide some of his land to build summer cabins through the county's process. The Yakama Nation opposed the request claiming that the county didn't have authority over lands within the reservation. The Nation prevailed at the district and appellate court levels.¹⁹ While the matter was working its way up the system,²⁰ Mr. Brendale applied for a road

¹¹ *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 440 (1989).

¹² *Id.* at 438.

¹³ See *Brendale v. Olney*, No. C-78-145 (E.D. Wash., March 3, 1981).

¹⁴ *Id.* at Ex. A.

¹⁵ *Id.*

¹⁶ *Id.* at 2; See also *United States v. Brendale*, No. C-74-197 (E.D. Wash., September 30, 1977).

¹⁷ For a detailed discussion of why there are no implied easements over trust lands, see M. Brent Leonhard, *There Are No Implied Easements Over Trust Lands*, 33 AM. INDIAN L. REV. 457 (2009).

¹⁸ *Brendale v. Olney*, *supra* note 13.

¹⁹ *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987) (affirmed in part, and overruled in part, see generally *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, *supra* note 11).

²⁰ The result of the process, of course, was the unfortunate United States Supreme Court decision, *supra* note 11. In that case the United States Supreme Court, in a highly fractured decision, held that tribes do not usually have authority to zone fee lands owned by non-members within Indian country, although the Yakama Nation had this authority with respect to Mr. Brendale because the land in question was in a closed area of the reservation. *Id.* at 409.

use permit from the BIA to access various lands he had sold so the new owners could access their property.²¹

In 1985, the request was denied by the BIA area agency on the basis that Mr. Brendale was not compliant with the Tribes' zoning laws.²² The BIA reasoned that despite the 1981 federal district court decision, the implied easement was conditioned on reasonable use of his property—and violating zoning laws was not a reasonable use.²³ Mr. Brendale, consistent with his nature, appealed that decision to the Acting Assistant Secretary for the Bureau of Indian Affairs.

On April 8, 1988, the Acting Assistant Secretary issued a letter decision in the matter. After referring to the federal district court decision, the opinion stated:

The Court, however, did not address the fact that the BIA regulations mandate “free public use” of BIA roads. 25 CFR § 170.8(a). After the court ruled, Congress provided in 1983 that federally-funded Indian reservation roads must be public roads. 23 U.S.C. § 101(a). If a road is a public road a traveler (sic) need not have an easement in order to use it. See *Grosz v. Andrus*, 556 F.2d 972 (9th Cir. 1977); *United States v. 10.0 Acres*, 533 F.2d 1092 (9th Cir. 1976); *United States v. City of Tacoma*, 330 F.2d 153 (9th Cir. 1964).

The only reasons for which the BIA may close a public road or restrict access to it are set out in 25 CFR § 170(a).

Significantly, the only federal court cases of which we are aware in which the court upheld a BIA closure of a public road involved closures for one of the purposes listed in § 170.8(a). In *Superior Oil Co. v. United States*, the public road was closed to prevent damage to an unstable roadbed. In *United States v. Brendale*, No. C-74-197 (U.S.D.C. E.D. Wash., September 30, 1977), persons who were not authorized to hunt game were prohibited from carrying firearms on BIA roads.

Because the enforcement of tribal zoning laws is not among the permissible reasons for the BIA to restrict access to a public road listed in § 170.8(a), the decisions of the Area Director and the Superintendent to prohibit your clients from using BIA roads to gain access to their property are reversed. This decision is final for the Department.²⁴

Finally, the BIA got it right. The road was a BIA road and on the IRR system. As such, it must be public. People do not need recorded easements to use public roads. Furthermore, IRR system roads can only be closed for specifically enumerated reasons set out in the Code of Federal Regulations (CFR). Unfortunately, this decision and analysis came seven years after a federal district court had already issued a memorandum order finding, wrongly, an implied easement by necessity over Indian lands. Granted, the federal statutes did not explicitly declare IRR and BIA roads to be

²¹ See *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, *supra* note 11. See also Letter from James S. Bergmann, Acting Assistant Secretary, Indian Affairs, April 8, 1988, reprinted in Appellate Brief.

²² See Letter from James S. Bergmann, *supra* note 21.

²³ *Id.*

²⁴ *Id.*

public until 1982, after the district court had issued its opinion. However, the Assistant Secretary opinion letter shows the importance of initially analyzing whether or not a given disputed right-of-way is public. Furthermore, since the opinion letter has been issued and the federal statutes amended to declare IRR system roads public, resolution of the public nature of the road could be as simple as determining if it is on the IRR inventory. So long as it remains on the list, it should be treated as public, and the BIA has no authority to restrict access.

This conclusion cuts both ways in that a tribe may generally desire public access, but not always. In some circumstances a Tribe may want a road open to public access in order to ensure the free flow of traffic throughout portions of a reservation. On the other hand, as in *Brendale*, there may be very legitimate reasons why a Tribe may want to restrict access. One way a Tribe might accomplish this, and certainly ought to if closure of a road is being challenged on the basis that it is public, is by working with the BIA to remove the road from the IRR inventory and BIA road system via a resolution vacating the public right-of-way. The Tribe could then begin treating the road as a private right-of-way. After all, municipalities and counties vacate public rights-of-way all the time.²⁵ There is little reason to assume a Tribe, through a process that removes a road from a federal IRR and BIA system list, cannot do the same.²⁶ Consequently, despite cutting both ways, the IRR program can be used as a tool to both keep public access routes open when obstructed and to close routes from public access when necessary.

B. A road can be public and placed on the IRR inventory without a recorded easement

When dealing with right-of-way access issues it is always ideal to have a recorded easement. However, the reality is that there are many reservation roads throughout the United States that have no recorded easements.²⁷ Furthermore, no Tribe has money to buy up easements throughout its reservation. But these things should not preclude a Tribe from managing the roads that already exist, have been opened for general use by the public (both members and non-members), and no doubt were built by the BIA or otherwise built with public money to provide access throughout a reservation.

A recorded easement is not necessary for a road to be public or to place it on the IRR inventory. When venturing into the realm that is federal Indian law, it often helps to consider the history of the development of Indian law to distinguish it from what one might expect to encounter off reservation. To this end, the next section will briefly discuss the history of reservations that led to their checkerboard nature, as well as the

²⁵ Googling “petition to vacate public right-of-way” will result in over 1 million hits and many examples of such petitions.

²⁶ 25 C.F.R. § 170.813(c) states, “[c]ertain IRR transportation facilities owned by the tribes or BIA may be permanently closed when the tribal government and the Secretary agree. Once this agreement is reached, BIA must remove the facility from the IRR System.”

²⁷ I dare to venture a guess that there aren’t just “many” roads without recorded easements, but that most roads on reservations do not have recorded easements.

history of the IRR system. With this context established, the discussion then turns to how the federal law defines the phrase, “open to the public” and looks at various factors courts consider when determining if a given road is public or private off-reservation. In traversing this trail, it will become clear why a recorded easement is not necessary for a road to be either public or placed on the IRR inventory.

1. *Where the checkerboard comes from*

From its inception until 1871, the United States negotiated agreements with tribal nations through the use of nation-to-nation treaties.²⁸ In the Pacific Northwest, many of those treaties came into existence in the 1850s.²⁹ Through the treaties, Tribes gave up certain rights and retained whatever rights they did not give up.³⁰ For the purposes of this article, the key right that Tribes gave up was a right to large portions of land. Tribes ceded massive amounts of land to the United States and received certain assurances in return. A consequence of cession was the creation of initial reservation boundaries.

Not long after entering into these treaties, the United States decided to take more land from the Tribes. One of the primary vehicles for doing so was the enactment of various Allotment Acts. The General Allotment Act itself was passed in 1887—thirty to forty years after reservations were initially established by treaty in the Pacific Northwest.³¹ These acts opened parts of treaty reservations to further settlement by non-Indians. The government set aside small portions of land for individual ownership by tribal members, but it kept them in trust for a certain number of years under the guise of assimilating the members into the White culture. After the period of time set aside for holding the land in trust ran, the land was to pass to tribal members in fee.³² After the government parceled out land to tribal members, the “surplus” was often either sold to settlers in fee or the reservation boundaries were diminished.³³ The reality was that these laws were designed to effectively take all land away from Tribes and put the land in fee status like any other non-public lands throughout the United States.

The result of these laws was the massive loss of land to both Tribes as governmental entities and as individual tribal members. It was an abysmal failure—

²⁸ See e.g. Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13; Treaty with the Wyandot, Etc., Jan. 21, 1785, 7 Stat. 16; Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putatwatimes, Miamis, Eel-river, Weeas, Kickapoos, Piankashaws, and Kaskaskias, Aug. 3, 1795, 7 Stat. 49; Act of Mar. 3, 1871, c. 120 §1, 16 Stat. 566.

²⁹ See *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 179 (1977) (Brennan, J., dissenting in part).

³⁰ *United States v. Winans*, 198 U.S. 371, 381 (1905) (“[T]he treaty was not a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted.”).

³¹ *Id.*

³² For a description of this process, See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 16.03 [2][b], at 1041-1042 (2005 ed.).

³³ See e.g. *Solem v. Bartlett*, 465 U.S. 463 (1988) (surplus); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (reservation diminishment).

Indian lands were slashed from 138 million acres in 1887 to 48 million in 1934.³⁴ In 1934, Congress passed the Indian Reorganization Act and put a stop to the Allotment Acts.³⁵ Land still in trust would remain in trust; land not sold would be transferred to tribal governments and held in trust. Consequently, the geographic makeup of reservations became a mixture of fee lands, individually allotted trust lands, and tribal trust lands—in short, a checkerboard. This wholesale theft of tribal government lands has led to inevitable access disputes. In the meantime, roads were created by the BIA to provide access throughout reservations, with little or no records being kept.³⁶

2. History of Indian reservation roads.

On May 26, 1928, Congress gave birth to the IRR system when it enacted what is now 25 U.S.C. § 318(a). That statute reads:

Appropriations are hereby authorized out of any money in the Treasury . . . for . . . improvement, construction, and maintenance of Indian reservation roads not eligible to (sic) Government aid under the Federal Highway Act.

While the Act clearly authorized appropriation of federal public monies for Indian reservation roads, there was no requirement that the improvement, construction, or maintenance of those roads be documented. Furthermore, it wasn't until 1948 that Congress even required the BIA to obtain consent from beneficial trust owners before granting rights-of-way to *others*.³⁷ It comes as no wonder then that the BIA may have expended public funds constructing roads throughout reservations to meet tribal access needs, but it never kept a record of its activities or recorded a public easement to document the creation of those roads.

After passage of the 1928 Act, the BIA partnered with the Federal Highway Administration (FHWA) in 1930 when the Secretary of Agriculture was allowed to cooperate with State highway departments and the Department of Interior in the construction and maintenance of IRR system roads.³⁸ Moreover, the Federal-Aid Highway Act of 1936 required the FHWA to approve IRR system roads.³⁹ This involvement of the FHWA in construction and maintenance of roads by the BIA is telling

³⁴ See e.g. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 138 (1982 ed.); LEONHARD, *supra* note 17, at 488.

³⁵ Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (2006)).

³⁶ I suspect there was no BIA Title Plant system to keep records for some time. Furthermore, the BIA acting as trustee for Tribes and having control over trust lands did not necessarily have to keep records—it was the public authority with both jurisdiction and maintenance responsibility. In addition, anyone wanting to build a road on trust lands with private funds would have to seek BIA permission to do it—which, one would assume, would create a paper trail (consequently, if there is no paper trail, there is further reason to believe a given road is public rather than private).

³⁷ 25 U.S.C. § 324.

³⁸ Statement of Robert Baracker, Director, Southwest Regional Office, Bureau of Indian Affairs, before the Senate Committee on Indian Affairs Oversight Hearing on Indian Reservation Roads and the Transportation Equity Act in the 21st Century (TEA-21) (October 20, 1999), *available at* <http://www.doi.gov/ocl/tea.htm>.

³⁹ *Id.*; see also Federal-aid Highway Act of 1936, Pub. L. No. 686 §6.

with regard to the public nature of such roads, as that agency focused on the development of the nation's public roadways.

The FHWA is an agency within the federal Department of Transportation. It is responsible for ensuring the safety, efficiency, and economy of the *Nation's* highway transportation system. It does this through two programs: the Federal-Aid Highway Program and the Federal Lands Highway Program, of which the IRR system is now a part. The whole point of these programs is to provide adequate public transportation systems. Congress' intent in passing the Federal Lands Highway Program was quoted above, and under the Federal-Aid Highway Program Congress has declared, "that it is in the national interest to accelerate the construction of Federal-aid highway systems . . . because many of the highways (or portions of the highways) are inadequate to meet the needs of local and interstate commerce for the national and civil defense."⁴⁰ Clearly, involvement of the FHWA with the BIA in construction and maintenance of reservation roads was for the purpose of providing adequate roadways to meet the *public's* needs.

In 1958, the laws relating to highways throughout the United States were reenacted as Title 23 of the United States Code.⁴¹ The original definition of Indian reservation roads came from this enactment, and Congress has since amended the Title to make it explicit that these roads are public.

Between 1928 and 1982, IRR funds were appropriated through the Department of Interior's appropriation acts, and these funds were consequently funneled to the BIA.⁴² Despite being BIA appropriations, given the history of the development of the IRR program up to that point and in particular the involvement of the FHWA, it is reasonable to assume Congress' purpose in appropriating the public funds was to meet a public need.

In 1982, Congress passed the Surface Transportation Assistance Act of 1982. This Act incorporated the IRR program into the Federal Lands Highway Program thereby providing funding from the Highway Trust Fund.⁴³ The Act also explicitly made IRR system roads public by definition.⁴⁴ Since 1982, there have been various enactments affecting the IRR program, but none of them have curbed the public nature of roads in the IRR system.

3. The definition of a "public road" under the IRR system

Nothing in the statutory or regulatory body of IRR system laws explicitly requires that a road have a recorded public easement before being placed on the IRR system.

⁴⁰ 23 U.S.C. § 101(b)(1).

⁴¹ Pub. L. No. 85-767.

⁴² Baracker SCIA Testimony, *supra* note 38.

⁴³ *Id.*

⁴⁴ 23 U.S.C. § 101(a).

An IRR system road is a “public road” by definition,⁴⁵ but the question remains as to what exactly a “public road” is, and if it requires a recorded easement. After all, it is possible for a Tribe or the federal government to mistakenly place a road on the IRR inventory that is not actually a “public road”. This section examines this issue a bit more closely.

Section 101(a) of Title 23 of the United States Code not only defines an Indian reservation road as public, but goes on to define the term “public road” as follows:

The term “public road” means any road or street under the jurisdiction of and maintained by a public authority and open to public travel.⁴⁶

Nothing in this definition requires the existence of a recorded easement. The three factors are simply that a given road be under the jurisdiction of a public authority, be maintained by that authority, and be open to public travel. Given the history of the creation of reservations, the role of the BIA as trustee for Tribes, and the origin and public nature of funds appropriated for the creation and maintenance of roads on reservations, there is good reason to believe many roads on reservations qualify as “public roads” for purposes of being listed on the IRR system despite the lack of a recorded public easement.

It goes without saying that the BIA is a public authority. It also is fairly uncontroversial that, in so far as trust lands are concerned, the BIA exercises jurisdiction over roads that cross those lands. The remaining issue to be addressed is whether a given road in question is “open to public travel.”

If BIA funds were used to establish or maintain a given road, for the reasons mentioned above, it is reasonable to assume it was created and maintained for the public’s needs using public funds. Private driveways may not have been created to serve the public, but certainly it is not far-fetched to assume that, absent explicit evidence to the contrary, the roads that were created by the BIA to serve multiple properties, or that connect multiple road systems together, were created to serve the general reservation population and not just an individual trust allottee—that is to say, they were open to public travel.

While the federal statutes use the phrase “open to public travel” in various places, they do not give an explicit definition of what it means for a road to be open to public travel. Despite statutory silence, however, federal regulations do define the phrase:

Open to public travel means that the road section is available, . . . passable by four-wheel standard passenger cars, and open to the general public for use without restrictive gates, prohibitive signs, or regulation other than restrictions based on size, weight, or class of registration.⁴⁷

⁴⁵ *Id.*

⁴⁶ 23 U.S.C. § 101(a)(27).

⁴⁷ 23 C.F.R. § 460.2(c).

Consequently, if a given reservation road that was created with BIA funds is open, passable by a four-wheel vehicle, and there are no gates, signs, or regulations in place restricting access by the general public, it qualifies as a public road for placement on the IRR inventory. There is no requirement for a recorded easement, nor should there be. As discussed below, these factors are consistent with those that courts use when determining whether or not a given non-reservation road is public or private.

Despite the fact that there is no requirement for a recorded easement, some roads that fit the regulatory definition may nonetheless be private.⁴⁸ If there is evidence that a given road was created with private money, maintained by private parties, or has been systematically closed to public travel by way of a locked gate, posted signs, or other regulation, then it is possible that the road is private. In that circumstance, depending on the weight of the evidence and absent any evidence showing that the road was created by the BIA or with federal funds, it would be advisable to remove the road from the IRR inventory and treat it as private. That is, the road should be removed from the IRR inventory unless the Tribe plans on purchasing a right-of-way to open it up to public travel.⁴⁹

4. Common law analysis of public vs. private roads

Outside of Indian country, American courts have often addressed the issue of whether a given road or alley is public or private. In doing so, these courts have looked at various factors to determine the true nature of the road. The absence of a recorded easement is not among those factors. Typically, the critical factor is how the road in question was actually used.

The Supreme Court of Alabama, in *Valenzuela v. Sellers*,⁵⁰ considered a case involving an alleyway. Thirty years prior to the action there was a single owner of a large tract of land. She divided the land up into smaller parcels and in so doing created an alleyway between the lots. That alley not only provided access to several parcels, it also connected two streets. The court noted that, given these facts, it was clear that the alley was open to the public and recognized as such for more than twenty years.⁵¹ In essence, the evidence showed the alley was dedicated to the public and to abutting property owners.

One of the owners erected a fence along part of the alley cutting off access, which resulted in a nuisance action. In defense, that owner argued the alley had been abandoned. The court noted that it was clear the alley had been open to use for more than twenty years, uninterrupted by the abutting property owners and the public at

⁴⁸ At common law, it may be that a road meeting these requirements would be considered public by some implied easement theory. However, that is not the case with respect to easements over trust lands. See LEONHARD, *supra* note 17.

⁴⁹ THE BUREAU OF INDIAN AFFAIRS MANUAL ON ROAD CONSTRUCTION § 1.3B(1) (1992). Section 1.3B(1) effectively states that roads the BIA plans to obtain a legal right-of-way over can be placed on the IRR inventory.

⁵⁰ See *Valenzuela v. Sellers*, 246 Ala. 329, 20 So. 2d 469 (1945).

⁵¹ *Id.* at 330.

large.⁵² While the court noted the alley may not have been used by the public to any great extent, it was the character rather than the amount of use that was the controlling factor.⁵³

In 2006, the Supreme Court of Vermont, in *Town of South Hero v. Wood*,⁵⁴ dealt with what essentially was an implied easement issue. While implied easements do not run against federal lands, and certainly not against Indian trust lands,⁵⁵ the case is interesting because of the factors the court looked to in determining the intent of various private land owners.

Since 1819, maps depicted that there was a road running along a bay in South Hero, Vermont. However, no doubt due in part to its age, there was no formal process used to lay out the road. Over the years the shoreline eroded and the road was moved further inland. In 2000, there was a need to move it yet again, this time about 160 feet further inland from its original location. Private owners objected, as it encroached on their property.

The town claimed the private land owners had essentially dedicated the right of way to public use long ago and that the adjustment was permissible. The issue became whether the landowners had intended to dedicate their lands for public use—i.e., dedicated their lands for the public usage of the meandering road in question. When addressing the issue of intent the court focused on the public use of the road, despite the fact that it was seasonal and only sporadically used due to weather, and on the fact that the road was maintained with public funds.⁵⁶ Based on these factors, the court found a public dedication had occurred.⁵⁷

The Vermont court's use of the above factors to determine whether or not private individuals intended to dedicate their lands to public use for a roadway is useful for our purposes. Even though the BIA or individual beneficiary owners of trust lands cannot have their interests divested by mere implication, the question of intent is important in determining whether a given reservation road was actually created for public use in absence of formal documentation to that effect. The fact that a road was created by the BIA, serves multiple lots, connects various roads, is maintained by the BIA, and is used by the general public all bode strongly in favor of the road having been created as a public road—regardless of the existence of a recorded easement.

Ultimately, as with the factors mentioned in the code of federal regulations, the determining factor between a private or public road is the use to which it is actually put. The Colorado Court of Appeals stated, in *Lovvorn v. Salisbury*,⁵⁸ that;

⁵² *Id.* at 331.

⁵³ *Id.*

⁵⁴ See *Town of South Hero v. Wood*, 179 Vt. 417, 898 A.2d 756 (2006).

⁵⁵ See LEONHARD, *supra* note 17.

⁵⁶ *Town of South Hero v. Wood*, *supra* note 54, at 422.

⁵⁷ *Id.* at 426.

⁵⁸ See *Lovvorn v. Salisbury*, 701 P.2d 142 (1985).

[t]he ultimate distinction between a public road and a private easement, however acquired, is that the private easement can be, and is, limited to specific individuals and/or specific uses while a public road is open to all members of the public for *any* uses consistent with the dimensions, type of surface, and location of the roadway.⁵⁹

The Georgia Court of Appeals, in *Hood v. Spruill*,⁶⁰ put it this way: “use is the determinative factor in designating (a road) as ‘private’ or ‘public.’”⁶¹

Use is the ultimate factor. The existence of a recorded easement, while dispositive of the question, is not necessary. The real questions are who built the road, what funds were used, and whether it has been left open for use by the public. If all evidence suggests that a road was built and maintained by the BIA using public funds and the road has been left open for the public to use, then there is every reason to assume it is a public road.

C. Conclusion

Given the history of the development of Indian lands and the BIA’s involvement in building and maintaining roads throughout reservation lands, there is good reason to believe a given reservation road is public so long as evidence suggests it was built and maintained by the BIA and public access has never been restricted. There is no need for a recorded easement dedicating it to the public. There are no federal statutes or regulations requiring a recorded easement. Consequently, such roads can be placed on a tribe’s IRR inventory. Furthermore, any roads on the IRR inventory must be treated as public roads and the BIA has no authority to restrict access to those roads except as specifically enumerated in the Code of Federal Regulations. There may be times that a Tribe wants to close a public road, or allow private individuals to close an otherwise public road, and this can be accomplished by removing a road from the IRR and BIA system through an agreement with the Secretary of Interior⁶² and a resolution explicitly vacating the public right-of-way.⁶³ Thereafter, the vacated road should be posted and otherwise treated as private.

⁵⁹ *Id.* at 144.

⁶⁰ See *Hood v. Spruill*, 242 Ga.App. 44, 528 S.E.2d 565 (2000).

⁶¹ *Id.* at 566.

⁶² 25 C.F.R. § 170.813(c).

⁶³ To this end, a tribe will want to develop a procedure for vacating a public right-of-way that ensures notice goes to all property owners whose interests may be affected and gives them an avenue to voice their opinion on the matter.

Enhancing Tribal Sovereignty by Protecting Indian Civil Rights: A Win-Win for Indian Tribes and Tribal Members

Rob Roy Smith¹

I. Introduction

Imagine receiving a letter from the United States government informing you that you are no longer considered a United States citizen. “It couldn’t happen here,” you might say. However, with growing frequency across the country, citizens of federally recognized Indian tribes are told by their Indian tribal governments that they have been disenrolled (removed from their tribe’s membership rolls) or, worse, banished (disenrolled and barred from tribal lands and events).² Worse still, a growing number of tribal members find themselves deprived of their basic civil rights by their Indian tribal governments without any recourse to challenge their summary loss of tribal identity and loss of tribal services, including health care, education, and housing support.³ Tribal banishments and disenrollments have long been among the reserved sovereign powers of tribal governments,⁴ typically reserved for use against those who are not lawfully considered members or those members who have committed a heinous crime that

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² Individual Indian civil rights advocates claim that 1,500 people have been banished from twenty-three tribes nationwide between 1995 and 2006. Jason B. Johnson, *Former Pomo leader expelled from tribe*, SAN FRANCISCO CHRONICLE, May 1, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/05/01/BAG4AIIIF6H1.DTL>. Articles further suggest that as many as 4,000 people have been disenrolled from tribes in California since 2006. Michael Martinez, *Indians decry banishment by their tribes*, CHICAGO TRIBUNE, Jan. 14, 2006, http://articles.chicagotribune.com/2006-01-14/news/0601140134_1_tribal-casino-american-indians-gaming-profits. For instance, the Temecula Band of Luiseño Mission Indians of the Pechanga Indian Reservation of California has disenrolled about 15 percent of its members. *LaMere v. Super. Ct.*, 31 Cal. Rptr. 3d 880 (Cal. Ct. App. 2005). Heated enrollment and banishment disputes continued in 2009. See, e.g., *More than 700 removed from Chukchansi Tribe*, INDIANZ.COM, Mar. 2, 2009, <http://www.indianz.com/News/2009/013364.asp>; Lynda V. Mapes, *Snoqualmie banishment case ripping apart tribe*, SEATTLE TIMES, Feb. 20, 2009, http://seattletimes.nwsourc.com/html/localnews/2008765115_snoqtrial20m0.html. There is also the related issue of the disenrollment of the Cherokee Freedmen. See Alex Kellogg, *Cherokee Nation Faces Scrutiny For Expelling Blacks*, NPR, Sept. 19, 2011, <http://www.npr.org/2011/09/19/140594124/u-s-government-opposes-chokeee-nations-decision>; James Dao, *In California, Indian Tribes With Casino Money Cast Off Members*, N.Y. TIMES, Dec. 12, 2011, <http://www.nytimes.com/2011/12/13/us/california-indian-tribes-eject-thousands-of-members.html?pagewanted=all>.

³ *Id.*

⁴ See generally *United States v. Wheeler*, 435 U.S. 313 (1978).

seriously offends their respective Indian tribe's culture, traditions, or laws.⁵ Recently, however, tribal banishments and disenrollments appear to be increasingly used to bar speech, prevent political confrontations, and to limit the scope of tribal benefits.⁶ The actions of these tribal governments threaten more than just the individual rights of tribal members. The very nature of tribal sovereignty and tribal self-governance is at risk.

The question is whether individual Indian civil rights and tribal sovereignty can coexist. For centuries, Indian tribes have banished their members as punishment for serious offenses, and some advocates believe that imposing Anglo-style civil rights protections on Indian cultural practices amounts to continued paternalism.⁷ Indian tribal governments, however, are not and should not be immune to shifting legal doctrines that afford greater rights to tribal members. Providing the basic protections of the Indian Civil Rights Act (ICRA),⁸ such as due process and equal protection of laws, benefits both Indian tribes and individual tribal members. Ensuring the protection of civil rights of tribal members promotes trust in tribal institutions, avoids litigation, Bureau of Indian Affairs (BIA) interference, and negative media publicity, and, most importantly, strengthens tribal sovereignty by allowing tribes to craft tribal institutions that will protect tribal members' rights in a manner that best comports with tribal laws, customs, and traditions.

Tribes can and should take action now to adopt procedures that provide tribal members with meaningful due process rights to challenge tribal governmental actions that threaten their Indian civil liberties. An administrative process and a tribal court is not too much to ask when the alternative is considered: costly and embarrassing litigation, in addition to possible Congressional intervention. Indeed, two recent cases, *Sweet v. Hinzman*⁹ and *Jeffredo v. Macarro*,¹⁰ provide important examples of litigation arising out of questionable tribal government decisions affecting their members' civil liberties. The former, an egregious case involving the Snoqualmie Tribe in Washington State, signifies the dangers of unilateral tribal government decisions when banishments are made without oversight or review procedures. The latter provides a scenario wherein the Pechanga Band of Luiseño Indians in California tribal government walked a fine line before the Ninth Circuit Court of Appeals, ultimately prevailing in the case but also receiving a warning from the panel's dissent that disenrollment by a tribe could be gravely harmful to its former members.

⁵ See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963) (citations and internal quotation marks omitted).

⁶ The Dry Creek Band of Pomo Indians in California is considering a "code of conduct" that could lead to fines and banishment for members who criticize the tribe. Tribal leaders came up with the idea in hopes of protecting tribal businesses. The conduct code is proposed at a time when more than 140 members are facing disenrollment. *Dry Creek Band delays action on "code of conduct,"* INDIANZ.COM, Mar. 31, 2009, <http://64.38.12.138/News/2009/013855.asp>.

⁷ See, e.g., Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 166-67 (1995).

⁸ 25 U.S.C. §§ 1301-1303.

⁹ *Sweet v. Hinzman*, 634 F.Supp.2d 1196 (W.D. Wash. 2008).

¹⁰ *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2009).

This article provides an overview of the struggles faced by both individual tribal members and tribal governments as they come to terms with growing demands for greater protection of the rights and freedoms of individual tribal members from what is perceived to be arbitrary governmental actions, much of which is being subjected to the harsh light of non-Indian media scrutiny. Part II provides a brief overview of the ICRA. Part III discusses banishment litigation as it relates to the ICRA. Part IV explores the first ever banishment trial under the ICRA held in federal court in Washington State in 2009, challenging a tribal banishment action. Part V discusses a 2009 decision from the Ninth Circuit Court of Appeals rejecting Pechanga tribal member efforts to challenge a disenrollment action. Finally, Part VI discusses due process requirements under the ICRA, and suggests a meaningful framework that Indian tribes can follow to provide their members with civil rights protections in a manner that avoids future judicial and media defeats where issues of race and citizenship in Indian country meet.

II. Overview Of The Indian Civil Rights Act

ICRA was passed by Congress in 1968 to impose upon tribal governments certain restrictions and protections afforded by the US Constitution's Bill of Rights.¹¹ ICRA represents a significant congressional intrusion into the internal affairs of Indian tribes prompted in part by US Supreme Court cases such as *Talton v. Mayes*, which confirmed that Indian tribes were not bound by the guarantee of individual rights found in the Fifth Amendment.¹² However, ICRA did not impose all of the protections afforded by the Bill of Rights to Indian tribes. Specifically, the act did not impose the establishment clause, the guarantee of a republican form of government, the requirement of a separation of church and state, the right to a jury trial in civil cases, or the right of indigent defendants to appointed counsel in criminal cases upon tribes.¹³ Tribes may adopt other protections as part of a tribal "Bill of Rights" if they so choose.¹⁴

¹¹ One of the main purposes of ICRA was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (quoting S. REP. NO. 90-841, at 5-6 (1967)).

¹² 163 U.S. 376 (1896) (holding that individual rights protections, which limit federal, and later, state governments, do not apply to tribal governments).

¹³ 25 U.S.C. § 1302. ICRA was amended in 1986 to increase the sentencing limitations in § 1302(a)(7). This provision originally limited tribes to imposing sentences for a single offense to no greater than six months imprisonment or a fine of \$500, or both. ICRA was amended again as part of the Tribal Law and Order Act of 2010 to provide further tribal court criminal sentencing enhancements under certain circumstances. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

¹⁴ Many Indian tribes responded to ICRA by adopting similar provisions as a "Bill of Rights" in their tribal constitutions. See, e.g., SNOQUALMIE TRIBE OF INDIANS CONST. art. XI, available at <http://www.snoqualmiation.com/Documents/Constitution.pdf>. Some tribal constitutions, such as that of the Cahto Tribe of Laytonville Rancheria in California, require enrollment ordinances to be approved by the United States Bureau of Indian Affairs (BIA). When a disenrollment occurs under these circumstances, the BIA is vested with the authority to review the disenrollment for compliance with Tribal law. See *Cahto Tribe of the Laytonville Rancheria v. Dutschke*, No. 2:10-CV-0136-GEB-GGH, 2011 WL 4404149 (E.D. Cal. Sept. 22, 2011) (affirming BIA decision reversing disenrollment action against Sloan family). However, such tribal constitutional provisions are the exception and not the rule. Therefore, most tribal disenrollment decisions are not reviewable by the federal courts. Federal courts generally lack

While ICRA imposed some limitations on tribes, ICRA did not represent a windfall for tribal members. Congress severely limited the ability tribal members have to compel Indian tribes to provide the promised individual civil rights to members. Congress only provided that the “privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”¹⁵ Filing a petition for a writ of habeas corpus, and meeting the requirements for issuance of such a writ, are thus the only means provided to individual tribal members to challenge such an action in federal court.

Initially, it appeared that the habeas limitation might not be so narrow after all. Following the passage of ICRA until 1978, federal courts heard eighty cases involving the application of ICRA, addressing tribal election disputes, tribal government employee rights, tribal membership and voting, and the conduct of tribal council members and council meetings.¹⁶ However, the idea that ICRA vested federal courts with the power to broadly hear claims of civil rights violations committed by tribal governments changed in 1978, with the seminal US Supreme Court decision in *Santa Clara Pueblo v. Martinez*.¹⁷

Santa Clara involved a challenge to a tribal ordinance denying tribal membership to children of female (but not male) members who married outside the tribe as a violation of ICRA’s equal protection provision.¹⁸ The court rejected the claim, finding that tribal common law sovereign immunity prevented a suit against the tribe and that Congress did not create a private cause of action in ICRA; rather, relief could only be available through a writ of habeas corpus.¹⁹ The court also erected another hurdle to such cases by agreeing with the tribe that it had not waived its inherent sovereign immunity to the suit by Ms. Martinez.²⁰

Tribal members seeking relief under ICRA have had limited access to the federal courts and limited remedies since.²¹ ICRA neither permits a tribal member whose rights are violated to collect money damages against the tribal government, nor does it authorize an injunction.²²

jurisdiction to consider any appeal from the decision of an Indian tribe to disenroll one of its members. See *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

¹⁵ 25 U.S.C. § 1303.

¹⁶ See, e.g., *Indian Civil Rights Act*, TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org/lists/icra.htm> (last visited Feb. 1, 2012).

¹⁷ 436 U.S. at 62 (noting that the habeas provision was designed to strike a balance between two competing objectives: to strengthen “the position of individual tribal members vis-à-vis the tribe” and “to promote the well-established federal ‘policy of furthering Indian self-government.’”).

¹⁸ *Id.* at 51.

¹⁹ *Id.* at 59, 62.

²⁰ *Id.* at 59.

²¹ FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 14.02[2], at 956–57 (2005 ed.); see also *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 892 (2d Cir. 1996) (discussing similar habeas cases).

²² *Santa Clara Pueblo*, 436 U.S. at 64–70 (discussing legislative history of ICRA).

III. Post-*Santa Clara* Indian Civil Rights Act Litigation

Santa Clara dealt a severe blow to tribal members' ability to sue under ICRA. This is because the writ of habeas corpus is an extraordinary remedy available only where there is a criminal sanction, some element of detention, and all other available remedies have been exhausted.²³ As a result, there are only three post-*Santa Clara* ICRA cases brought by tribal members in federal courts that have survived motions to dismiss to reach a decision on the merits of their claims. These cases highlight the inability of tribal members to protect their rights except in the most egregious of circumstances (such as banishment without recourse in tribal court) and the risks that Indian tribes face when their tribal processes are opened to federal court scrutiny.

The leading case with respect to the availability of writs of habeas corpus under ICRA is *Poodry v. Tonawanda Band of Seneca Indians*.²⁴ In *Poodry*, five members of the Tonawanda Band of Seneca Indians petitioned for writs of habeas corpus under ICRA, challenging the legality of orders summarily issued by members of the tribal council purporting to convict them of "treason" and sentencing them to permanent "banishment" from the tribe's reservation without any hearing.²⁵ There was no applicable tribal court. The Second Circuit held that federal courts have subject matter jurisdiction to entertain applications for writs of habeas corpus to afford "petitioners access to a federal court to test the legality of their 'convict[ion] and subsequent 'banishment' from the reservation."²⁶ The court reasoned that "banishment" was sufficiently akin to a criminal sanction for habeas relief to be warranted and "actual physical custody is not a jurisdictional prerequisite for federal habeas review."²⁷ Banishment is the most extreme punishment in Indian country, usually reserved for capital crimes such as murder or drug dealing.²⁸ The banished lose all rights to enter tribal land, to receive tribal benefits, or even to claim Indian identity.²⁹

Following the *Poodry* decision, a California federal district court exercised jurisdiction in 2004 to hear a habeas due process challenge to a summary tribal disenrollment and banishment action in *Quair v. Sisco*.³⁰ The court in *Quair* held that banishment is a "detention in the sense of a severe restriction on petitioners' liberty not

²³ *Poodry*, 85 F.3d at 890–93.

²⁴ *Id.* at 874.

²⁵ *Id.* at 874–79.

²⁶ *Id.* at 879, 897.

²⁷ *Id.* at 889–891, 893. The court found that the fact that there was no criminal proceed per se irrelevant because allegations of "treason" and "actions to overthrow the government" were such that the court reasoned these to represent "criminal conduct," for which banishment was a sanction "punitive in nature." The court further stated that a focus on "custody" or detention was misplaced; instead, the court focused upon "the 'severity' of an actual or potential restraint on liberty." The court found that the tribe was not implicated by the case against individual tribal council members whom were alleged to have acted outside the scope of their lawful authority so tribal sovereign immunity did not apply. *Id.* at 894, 899–900.

²⁸ Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1103 (2007); Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 88–89 (2007).L. REV. 85, 88 (2007).

²⁹ See, e.g., *Jeffredo v. Macarro*, 590 F.3d 751, 764–65 (9th Cir. 2009).

³⁰ 359 F.Supp.2d 948 (E.D. Cal. 2004).

shared by other members of the Tribe,” and exercised its jurisdiction because all available tribal remedies had been exhausted.³¹

The key fact in both cases—the same fact that allowed the federal court’s jurisdiction—was the manner in which the summary banishments took place. For example, if the tribes in *Poodry* and *Quair* had provided, at minimum, due process or a functioning tribal court, the federal courts would likely not have had habeas jurisdiction under ICRA to hear the cases. Likewise, if the tribes had only disenrolled the members without banishing them, the federal courts might not have had jurisdiction to hear the ICRA claims.³² Indeed, the litigation avenues provided to tribal members under ICRA are limited; however, this should not mean that tribes should consider themselves to have *carte blanche* to act with respect to tribal member rights when banishments and disenrollments take place. A prime example of what can happen when an Indian tribe banishes tribal members without regard for tribal law or procedures is the Snoqualmie banishment dispute in Washington State.

IV. The Snoqualmie Banishments

In late 2007, a government control and voting dispute erupted within the Snoqualmie Indian Tribe.³³ After an April 27, 2008 banishment meeting, on May 9, 2008, the tribal council passed a resolution summarily banishing nine Snoqualmie tribal members, including the former chairman, former members of the tribal council, and some of their relatives, for alleged “treasonous” crimes, including meeting with the BIA and, in one instance, saying a prayer that offended the tribal leadership.³⁴ The nine tribal members were never allowed to contest the banishments, partly because the tribe has no tribal court.³⁵ In May 2008, the banished tribal members sought a writ of habeas corpus to challenge the banishments by suing the individual tribal council members who executed the banishment resolution.³⁶ They sought relief from the unlawful restraint on liberty imposed by the banishment sentence that stripped the members of their tribal membership, deprived them of access to vital tribal services, and excluded them from tribal lands.³⁷

Soon after the case was lodged, the tribal council filed two motions to dismiss. The council argued, among other things, that that it was immune from suit and that there were forums available for Petitioners to exhaust, even though there was no tribal court at the time of the banishment.³⁸ Among the many arguments attempting to recast Petitioners’ writ as challenging elections and other internal tribal actions that are not subject to federal court review, the tribal council’s sovereign immunity was asserted

³¹ *Id.* at 971.

³² *See, e.g.,* *Hendrix v. Coffey*, No. 08-6161, 305 Fed.Appx 495 (10th Cir. 2008) (affirming dismissal for lack of subject matter jurisdiction challenging disenrollment action under ICRA).

³³ *Sweet v. Hinzman*, 634 F.Supp.2d 1196, 1198 (W.D. Wash. 2008).

³⁴ Petition for Writ of Habeas Corpus, *Sweet v. Hinzman*, No. CV8-844JLR, 2008 WL 7195729 (W.D. Wash. 2008).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Sweet v. Hinzman*, 634 F.Supp.2d 1196, 1198–1200 (W.D. Wash. 2008).

vigorously and expansively as a way to block Petitioners from accessing federal courts to hear the substance of the due process claims.³⁹

On September 8, 2008, Judge Robart of the United States District Court for the Western District of Washington denied the two motions to dismiss filed by the Snoqualmie tribal council member respondents.⁴⁰ The court held that *Poodry* is both “well-reasoned” and “persuasive,” and therefore “adopts the reasoning and holding of the *Poodry* decision” to reject Respondents’ first effort to have the case dismissed on sovereign immunity and other grounds.⁴¹ The court also held that tribal sovereign immunity did not shield Respondents, who were sued in their official capacity for unlawful acts, from Petitioners’ ICRA claims, and that all necessary parties were before the court.⁴² Respondents had argued that Petitioners needed to join, but could not join, the entire tribal general membership (all voters) as parties.⁴³

Importantly, as in *Poodry*, the Snoqualmie tribal members did not challenge the ability of the tribe to exercise its sovereign right to banish tribal members; rather, the tribal members challenged the manner in which the banishments were executed by the tribal council members.⁴⁴ The only issue before the court was the legality of the way in which the banishments were carried out. This distinction is critical. The fact that the challenge was procedural, and not to the substance of the Snoqualmie Tribe’s law, traditions, and custom of banishment, enabled the court to review the tribe’s actions. Any challenge to the underlying tribal law would have faltered under the principle that federal courts will not sit in review of internal membership decisions of the tribe.⁴⁵

Upon the completion of discovery, the *Sweet* case went to trial over two days, on February 18 and February 19, 2009, to hear the merits of the Snoqualmie tribal members’ due process, equal protection, and confrontation clause claims under ICRA.⁴⁶ This was the first trial ever held in federal court concerning a tribal banishment action. The trial testimony focused primarily on the Petitioners’ procedural due process claims and, in particular, whether the banished members received the required notice and opportunity to be heard that procedural due process under the ICRA requires for a banishment to be procedurally lawful.

Numerous legal and factual issues were at play. First and foremost was the question of what standards apply to judge the notice and opportunity to be heard required by ICRA. Petitioners argued that the inclusion of the rights secured by ICRA as part of the Snoqualmie Tribe’s Constitution (the Constitution’s language mirrors that of

³⁹ Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State A Claim Upon Which Relief Can Be Granted, *Sweet v. Hinzman*, No. CV8-844JLR, 2008 WL 7195733 (W.D. Wash. 2008).

⁴⁰ *Sweet*, 634 F.Supp.2d at 1202.

⁴¹ *Id.* at 1199.

⁴² *Id.* at 1201–1202.

⁴³ *Id.*

⁴⁴ *Id.* at 1199.

⁴⁵ “A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.” *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *see, e.g., Red Bird v. United States*, 203 U.S. 76 (1906).

⁴⁶ *Sweet v. Hinzman*, No. CO8-844JLR, 2009 WL 1175647, at *1 (W.D. Wash. Apr. 30, 2009).

the ICRA) results in the same rights under the United States' legal system and the Snoqualmie system.⁴⁷ Therefore, "federal constitutional standards are employed in determining whether the challenged procedure[s] violate [ICRA]."⁴⁸ Respondents argued that tribal traditions and customs, including a series of banishments in the preceding twenty years, should play a role in determining the level of process provided, notwithstanding the inclusion of a "Bill of Rights" in the Snoqualmie Indian Tribe's Constitution.⁴⁹ In particular, Respondents suggested at trial that the Petitioners were lucky, as traditionally those accused of the crime of treason would have been sent over the Snoqualmie falls in a canoe.⁵⁰

Second, Petitioners needed to carry the burden of proving their procedural due process claims. For Petitioners to prove a claim under ICRA § 1302(8) for denial of procedural due process, they needed to show that they did not receive adequate notice or an opportunity to be heard with respect to the April 27, 2008 banishment meeting that deprived petitioners of "liberty" interests within the meaning of the Due Process Clause.⁵¹ As a threshold matter, Petitioners argued that their liberty interests were substantial because banishment is an extremely harsh penalty, ultimately meaning that Petitioners were barred from tribal lands and events, were removed from tribal rolls, were no longer eligible for any tribal benefits and were no longer considered Snoqualmie tribal members.⁵² These substantial liberty interests, argued Petitioners, required Respondents to provide Petitioners with more, not less, procedural due process.⁵³

After laying this ground work, Petitioners argued that their procedural due process rights were violated by Respondents in four respects: (a) by not providing adequate formal notice of the April 27, 2008 banishment meeting to Petitioners; (b) by making false charges against Petitioners; (c) by not providing an opportunity for the Petitioners to be heard at the April 27, 2008 banishment meeting; and (d) by not

⁴⁷ *Id.* at *8–9.

⁴⁸ *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988).

⁴⁹ Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State A Claim Upon Which Relief Can Be Granted, *Sweet v. Hinzman*, No. CV8-844JLR, 2008 WL 7195733 (W.D. Wash. 2008); Proposed Finding for Federal Acknowledgement of the Snoqualmie Indian Tribe, 58 Fed. Reg. 27162-01 (May 6, 1993) (discussing prior banishments).

⁵⁰ Transcript of Record, *Sweet*, 2009 WL 1175647.

⁵¹ *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951). Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "[D]ue process requires the government to 'provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

⁵² *Sweet*, 2009 WL 1175647, at *1.

⁵³ "The more serious the deprivation, the more formal the notice." *Flaim v. Medical College of Ohio*, 418 F.3d 629, 638 (6th Cir. 2005) (citing *Goss v. Lopez*, 419 U.S. 565, 584 (1975)).

following their own procedures for voting on banishment.⁵⁴ With respect to notice, Petitioners argued that the notice was not adequate under ICRA. Petitioners received a single certified mailing, sent April 18, 2008, containing a Resolution of Discipline and a letter dated April 8, 2008.⁵⁵ The Resolutions refer only to a “April membership meeting” that remained vague as to date, time, and location.⁵⁶ The April 8, 2008 letter indicated that a “vote on the recommended banishment . . . will be held at the April 26, 2008 Special Membership meeting in Issaquah, WA.”⁵⁷ The “26th” was crossed out and written over it was “27” with the initials “MAH.”⁵⁸ The letter did not provide a specific location within Issaquah or a time for the meeting.⁵⁹ Thus, Petitioners reasoned that in considering the “liberty interest that was deprived—tribal identity and a geographic restriction on movement—more formal notice was required to . . . apprise interested parties of the pendency of the action and to clearly invite Petitioners into the meeting and afford them an opportunity to present their objections.”⁶⁰

With respect to opportunity to be heard, Petitioners were never allowed into the room where the banishment meeting was held (or even the lobby of Hilton Garden Inn in Issaquah where the meeting was held) to plead their innocence of the charges against them.⁶¹ Petitioners argued that the opportunity to be heard was not sufficient under ICRA. Petitioners did not have the new “ID cards” required for entry into the meeting.⁶² And, Petitioners were physically prohibited from entering the Hilton Garden Inn at the direction of the Respondents, as well as the hotel manager, tribal security staff, and two uniformed and armed Issaquah police officers hired by Respondents.⁶³ Given these facts and the substantial liberty interests burdened by banishment, Petitioners argued that they were entitled to more process than being kept outside on a chilly April day, without information from inside the meeting, for almost four hours.⁶⁴

On April 30, 2009, the court issued its findings and conclusions in the case, emphatically ruling that the petitioners had been denied procedural due process,

⁵⁴ Petitioners’ Trial Brief, *Sweet v. Hinzman*, No. CV8-844 JLR, 2009 WL 4464850 (W.D. Wash. 2009).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Sweet v. Hinzman*, No. CO8-844JLR, 2009 WL 1175647, at *2 (W.D. Wash. Apr. 30, 2009).

⁵⁸ *Id.* “MAH” is Respondent Mary Ann Hinzman.

⁵⁹ *Id.*

⁶⁰ Petitioners’ Trial Brief, *Sweet*, 2009 WL 4464850.

⁶¹ *Sweet*, 2009 WL 1175647, at *3. “Due process requires that a party affected by government action be given ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’” *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 807 (9th Cir. 2002) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)); see also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (“We have described the ‘root requirement’ of the Due Process Clause as being ‘that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.” (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original))).

⁶² *Sweet*, 2009 WL 1175647, at *4.

⁶³ *Id.* at *3.

⁶⁴ *Id.* at *5. See Lynda V. Mapes, *Snoqualmies banish 8, disenroll 60*, SEATTLE TIMES, Apr. 28, 2008, http://seattletimes.nwsourc.com/html/localnews/2004377888_snoqvote28m.html; Lynda V. Mapes, *A tribe divided: Snoqualmie members fight for control of government, casino*, SEATTLE TIMES, Apr. 25, 2008, http://seattletimes.nwsourc.com/html/localnews/2004372482_snoqualmie25m.html.

vacating the banishment, and granting the requested writ of habeas corpus.⁶⁵ The court was careful to note that it “does not believe it should delve into the inner workings of the banishment process”⁶⁶ because the *Sweet* petitioners did not challenge the ability of the tribe to impose the sanction, merely the process by which the sanction was issued. Thus, the court concluded that “Petitioners have demonstrated a violation of their right to due process.”⁶⁷ The court made clear that “Petitioners have exhausted all available tribal remedies,”⁶⁸ and that “banishment affects the liberty interests of Petitioners,”⁶⁹ such that “under traditional notions of due process, notice and opportunity to be heard, the facts combined demonstrate a denial of Petitioners’ right to due process under ICRA.”⁷⁰ As a result, for the first time in the post-*Santa Clara* era of Indian civil rights litigation, the court granted the petition and issued the writ,⁷¹ effectively vacating the Snoqualmie Tribal Council’s action.

V. Post-Snoqualmie Decisions

In December 2009, eight months after the *Sweet* decision, sixteen former tribal members who had argued their civil rights were violated by disenrollment from the Pechanga Band of Luiseño Indians in California had their claim rejected by the Ninth Circuit Court of Appeals.⁷² *Jeffredo v. Macarro* involved a challenge to a 2006 decision of the Pechanga Band to disenroll certain tribal members. The disenrollment meant that those members lost numerous important benefits that were available to tribal members within the community.⁷³ At the time of their 2006 disenrollment from the tribe, every adult Pechanga member received a per capita benefit of more than \$250,000 per year, court papers noted.⁷⁴ Rather than challenge the decision by the tribe’s enrollment committee, which was upheld by the tribal council, the disenrolled members filed a petition for a writ of habeas corpus contending that their disenrollment was “tantamount to an unlawful detention,” under ICRA.⁷⁵

A sharply divided Ninth Circuit panel disagreed with the tribal members and upheld a lower court’s dismissal of the lawsuit, stating: “Despite the novelty of this approach, we nonetheless lack subject matter jurisdiction to consider this claim, because Appellants were not detained.”⁷⁶ The court proceeded to reject the disenrolled members claims on a number of grounds. First, the court disagreed with the claim that the denial of access to the Senior Citizens’ Center, health clinic, and a denial of the ability of their children to attend tribal school amounted to unlawful detention.⁷⁷ Citing

⁶⁵ *Sweet*, 2009 WL 1175647, at *10.

⁶⁶ *Id.* at *9.

⁶⁷ *Id.* at *10.

⁶⁸ *Id.* at *5.

⁶⁹ *Id.* at *8.

⁷⁰ *Id.* at *9.

⁷¹ *Id.* at *10.

⁷² *Jeffredo v. Macarro*, 590 F.3d 751, 756 (9th Cir. 2009).

⁷³ *Id.* at 757.

⁷⁴ *Id.* at 761 n.1.

⁷⁵ *Id.* at 753, 756–57.

⁷⁶ *Id.* at 753.

⁷⁷ *Id.* at 757.

Poodry, the court found that the ICRA “does require ‘a severe actual or potential restraint on liberty’” and that the denial of access to certain facilities does not pose a severe actual or potential restraint on liberty:

Appellants have not been banished from the Reservation. Appellants have never been arrested, imprisoned, fined, or otherwise held by the Tribe. Appellants have not been evicted from their homes or suffered destruction of their property. No personal restraint (other than access to these facilities) has been imposed on them as a result of the Tribe's actions. Their movements have not been restricted on the Reservation.⁷⁸

In addition, the court emphatically rejected the disenrolled members’ claims that *Poodry* applied equally to their facts: “This is not *Poodry*. In *Poodry*, the petitioners were convicted of treason, sentenced to permanent banishment, and permanently lost any and all rights afforded to tribal members. . . . Appellants have not been convicted, sentenced, or permanently banished.”⁷⁹

The court further rejected the claim that a living “under a continuing threat of banishment/exclusion” is sufficient to satisfy the detention requirement of Section 1303 of ICRA.⁸⁰ The court also rejected arguments that disenrollment, the act of stripping the disenrolled members of their Pechanga citizenship, is enough of a significant restraint on their liberty to constitute a detention. The court stated: “While we have the most sympathy for this argument, we find no precedent for the proposition that disenrollment alone is sufficient to be considered detention under § 1303,” acknowledging that the court’s power to review “relations between and among tribes and their members [is] correspondingly restrained.”⁸¹

Finally, the court rejected jurisdiction on two other grounds. First, the court noted that it was without jurisdiction to review a direct appeal of a tribal decision regarding disenrollment of members, noting that the disenrolled members failed to exhaust tribal administrative remedies.⁸² Second, the court rejected a claim that the disenrollment was tantamount to a criminal proceeding.⁸³ The disenrollments, under the court’s analysis, were a civil matter, and a federal court’s intervention would circumvent tribal sovereignty.⁸⁴

The dissent took a different view. In addition to disagreeing that the ICRA only vested a federal court with jurisdiction to review a tribal criminal proceeding, not a civil proceeding,⁸⁵ the dissent focused on the deprivations being suffered by the disenrolled members as a whole, noting: “The combination of the current and potential restrictions

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 757–58.

⁸¹ *Id.* at 758 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978)).

⁸² *Id.* at 759.

⁸³ *Id.*

⁸⁴ *Id.* at 759–60.

⁸⁵ *Id.* at 761.

placed upon Appellants and the loss of their life-long Pechanga citizenship constitutes a severe restraint on their liberty.”⁸⁶ The dissent made clear that “[a]lthough with disenrollment Appellants retain their United States citizenship and will not be physically stateless, they have been stripped of their life-long citizenship and identity as Pechagans. This is more than just a loss of a label, it is a loss of a political, ethnic, racial and social association.”⁸⁷ The dissent, as a matter of policy, hits the mark. Banishment and disenrollment decisions directly affect the social interactions, cultural identity, and, to the extent the actions end tribal benefits, economic well-being of tribal people.

The *Jeffredo* decision did not reference the *Sweet* case, possibly because of the timing of the two decisions. However, both *Sweet* and *Jeffredo* rely on the same cases—*Poodry* and *Quair*—to reach starkly different results. *Sweet* and *Jeffredo*, in some respects, are outliers. Whereas *Sweet* offered shocking facts of refusal to allow an opportunity to be heard and no available tribal forum to challenge a banishment, *Jeffredo* presented a tribal forum to review a disenrollment and tribal government actions that seem to have struck a majority of one Ninth Circuit panel, at least, as less offensive under principles of due process. Yet, it is possible to square the two cases and develop an analytic framework for what tribal government actions with respect to internal membership decisions may trigger federal court habeas review under ICRA.

First, it is clear that the action that the Indian tribe takes must amount to a detention or serve as a restraint on liberty, and thus, must still approach the level of banishment. While the dissent in *Jeffredo* makes an impassioned plea for a more expansive view of liberty interests, that view, while fair, is not the law. The loss of access to services or profits, taken alone or together, remains insufficient to make a claim of civil rights violations under ICRA. Second, it appears that the way the membership action is cast can affect the tribal members’ ability to seek review. Where a tribe casts the action as a criminal proceeding—using the term “treason” in the *Sweet* case, federal courts will be more willing to entertain habeas jurisdiction as a typical “criminal” proceeding. However, disenrollment remains a civil action. It remains unclear as to whether a banishment that only amounted to a civil infraction would be sufficiently akin to a criminal action to support federal court jurisdiction, and the murky distinction drawn between civil and criminal actions for purposes of habeas actions seems ripe for further refinement given the strong dissent in *Jeffredo*. Third, federal court jurisdiction can be avoided through sufficient tribal procedures or the failure of the tribal member litigants to exhaust their available remedies within the tribe.

Indeed, it is this final consideration—internal tribal processes and procedures for addressing the very real and substantial grievances of some tribal members that have suffered disenrollment or banishment decisions—where tribes can take affirmative steps to strengthen their tribal sovereignty, avoid future ICRA challenges, and provide meaningful civil rights to their members.

⁸⁶ *Id.* at 763.

⁸⁷ *Id.* at 764.

VI. Strengthening Tribal Sovereignty

Sweet will be a landmark case with respect to tribal government practices under ICRA. Simply by getting to trial, the *Sweet* Petitioners developed a framework for other individual tribal members deprived of the liberties guaranteed to them by Congress under ICRA to follow in future cases. The case also highlights the risk that tribal leaders take when they value expediency and/or political retribution over the civil rights of their members. Moreover, while *Jeffredo* marks a procedural victory for the tribal governments seeking to disenroll members, the dissent's stern warnings and the negative publicity associated with the case, even in victory, should be a cause for concern among Indian tribes who might be considering similar membership actions. Neither case should be read as a blank check to engage in membership decisions without consideration for the individual members' Indian civil rights. Now is the time for tribes to act, before the growing banishments, disenrollments, and the Cherokee Freedmen debate force Congress to take action.⁸⁸

Indeed, cases such as *Sweet* and *Jeffredo* can and should be avoided by both tribal members and Indian tribes. Both sides can be deemed guilty of complacency: tribal members by not acting through the ballot box to remove tribal leaders who fail to protect civil rights, and tribal leaders for waiting until federal courts intervene to reconsider the issues. Neither should the *Sweet* case be viewed as an infringement on tribal sovereignty. Rather, Indian civil rights provide Indian tribes with an opportunity to bolster tribal sovereignty and respect for tribal institutions by ensuring that tribal members receive meaningful due process and an ability to challenge actions of tribal governments within the tribal system. The best way to avoid ICRA litigation and the resulting intrusion into tribal affairs is to protect individual tribal member rights in the first instance.

The *Poodry*, *Quair*, and *Sweet* cases have common themes. Federal courts have no choice but to intervene and review tribal government compliance with the implementation of ICRA's civil liberty protections when tribal members are banished and stripped of their tribal identity by the actions of tribal councils without any recourse to any judicial or administrative forum to meaningfully contest the tribal council's action. Of course, even after such intervention, the remedy provided to such aggrieved tribal members is procedural: there is nothing that can stop the tribe from simply taking the action again, only this time providing the due process that was denied in the first

⁸⁸ Congress's plenary authority with respect to Indian affairs would enable Congress to amend ICRA to provide, for instance, a private right of action under the ICRA that would allow aggrieved tribal members to more easily sue in federal court without having to clear the hurdles imposed by Section 1303's habeas corpus requirement. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). As the US Supreme Court in *Santa Clara Pueblo* noted, "Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions." 436 U.S. 49, 71 (1978). Circumstances have changed since 1968, and the policies underlying the limitation on remedies, including the absence of tribal resources to provide for such forums to resolve these disputes, no longer exist. "Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302," might no longer "be at odds with the congressional goal of protecting tribal self-government." *Id.* at 64. See *supra* note 2 citing to articles discussing the Cherokee Freedman situation.

instance. However, this outcome is best viewed as an opportunity for both tribes and their members to create fundamental positive change as to how these actions are dealt with in the tribal government system.⁸⁹

These cases teach us that Indian tribes can take three easy steps to avoid ICRA litigation in federal court:

- (1) make membership decisions transparent to avoid equal protection allegations;
- (2) provide administrative review to allow tribal members to contest tribal council actions through an informal review process; and
- (3) ensure the existence of a fully functioning independent tribal court system to review any administrative decisions.

There is no one-size-fits-all approach to providing individual tribal members with sufficient due process and equal protection. Indian tribes can and should take care to craft provisions that reflect tribal traditions and customs, while still adhering to the formalities imposed by ICRA. However, at a bare minimum, an administrative review process should provide the following: written notice and an opportunity to be heard; a prohibition on ex parte communications; written procedures for administrative hearings; written opinions or orders from decision-makers; and an opportunity for appeal to tribal court. While existing tribal courts can be used, lawyers and law trained judges need not be required. Tribal elders can be involved to the extent tribal leaders seek to foster a sense of community justice. Where such procedures are provided, the entire process can be contained within the tribal system. More importantly, the process itself will be viewed with respect by tribal member litigants.

There is good reason for Indian tribes to take these proactive steps. The increasing number of banishments and disenrollments within Indian country might give Congress reason to amend ICRA to impose further limitations on Indian tribes. Congress could also empower the BIA to take a more active role with respect to what are now considered internal and unreviewable decisions of tribes. Tribes can avoid further federal interference by working with tribal members and their advocates to create impartial forums to fairly decide tribal disputes within the tribe. Such accountability is needed not just because these disenrollment and banishment actions invite public criticism and possible federal interference in tribal internal affairs, but because it is the right thing to do to ensure tribal government integrity and the protection of civil liberties for tribal members.

⁸⁹ In fact, the Snoqualmie Tribal Council attempted to banish the *Sweet* petitioners against after the federal court decision. However, because notice and opportunity to speak was provided the second time, the tribe's general members overwhelming voted against the tribal council's decision and directed that the Sweet family members be returned to tribal member status. The Sweet family, however, remains in membership limbo due to subsequent tribal government disputes that have paralyzed the tribe. Interviews with Carolyn Lubenau, Petitioner in *Sweet v. Hinzman* (2008–2009).

Tribal sovereignty can thus be used as both a shield and a sword. Regardless of how it is used with respect to tribal members, sovereignty must be wielded in a responsible manner that protects both the tribe and its members.⁹⁰ This is the time for tribes to be creative in how they provide forums for their members to seek to resolve disputes within the tribal governmental structure in a fair and impartial way. Tribal sovereignty is strengthened when the members subjected to tribal powers are provided a way to participate in a system that is created by the tribe for its members.

VII. Conclusion

At the time of its passage, Congress noted that ICRA “should not be considered as the final solution to the many serious constitutional problems confronting the American Indian.”⁹¹ This statement rings true today. The question now is: who will offer the solution—Indian tribes or Congress? Indian civil rights and tribal sovereignty should go hand-in-hand. The best way for Indian tribes to avoid adverse ICRA decisions is to provide protections for their own members’ basic civil rights within their tribal systems. Such processes will boost respect for tribal institutions, protect tribal sovereignty by eliminating unnecessary federal court review, and will help secure basic civil liberties for tribal members—results everyone can celebrate.

⁹⁰ See Cedric Sunray, *Disenrollment Clubs*, INDIAN COUNTRY TODAY MEDIA NETWORK, Oct. 14, 2011, http://indiancountrytodaymedianetwork.com/ict_sbc/disenrollment-clubs (stating “If the decision of Indian country is to place sovereignty over humanity, then we all stand condemned”).

⁹¹ *Santa Clara Pueblo*, 436 U.S. at 71 (citing 113 CONG. REC. 13473 (1967) (statement of Sen. Ervin)).

Of Justice Sotomayor and the Jicarilla Apache Nation: Slouching Toward Intellectual Honesty and the Canons of Construction

Jeremy Stevens¹

“[O]ur treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.”²

“Never regard something as doing you good if it makes you betray a trust or lose your sense of shame or makes you show hatred, suspicion, ill-will or hypocrisy or a desire for things best done behind closed doors.”⁸

Since 1831, the United States Supreme Court has recognized the existence of a general trust relationship between the United States and Indian tribes.⁴ Over the past century in fact, the Court has repeatedly reaffirmed this “distinctive obligation of trust incumbent upon the Government” in its dealings with Indians.⁵ The US Congress also has recognized the “general trust relationship” between the United States and Indian tribes; indeed, nearly “every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal Government.”⁶ Within the framework of this “general trust relationship,” Congress has enacted scores of statues defining the contours of the United States’ fiduciary responsibilities vis-à-vis its management of Indian tribal property and other trust assets.⁷ In assessing claims of the breach of this general trust relationship over the past thirty years,⁸ the federal circuit and Supreme Court, once finding the existence of a trust, have imported common-law trust principles to aid “in drawing the inference that Congress intended damages to remedy a breach.”⁹ Ostensibly, the special trust relationship extant between Indian tribes and the federal government in its best and purest form represents the federal government’s “humane and self-imposed policy . . .

¹ J.D. candidate, 2012, Seattle University School of Law. Special thanks to Heidi Adams for her attention to detail, to Barbara Swatt Engstrom for her technical help, to Seattle University School of Law’s Center for Indian Law & Policy for the great work they do, and to Eric Eberhard for educating us all.

² Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

³ MARCUS AURELIUS, *MEDITATIONS*, III. 7 (Gregory Hays, trans., Modern Library 2002) (ca. 175).

⁴ See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

⁵ See *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942); see *United States v. Mitchell*, 463 U.S. 206, 225–26 (1983) (noting “the undisputed existence of a general trust relationship between the United States and the Indian people”).

⁶ FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 5.04[4][a], at 420–21 (2005 ed.).

⁷ See, e.g., *United States v. Mitchell*, 463 U.S. 206, 224 (1983).

⁸ *Id.*; see generally *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); and see generally *United States v. Navajo Nation*, 537 U.S. 488 (2003); see also Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115 (1997).

⁹ *United States v. Navajo Nation*, 556 U.S. 287 (2009) (quoting *White Mountain Apache Tribe*, 537 U.S. at 477). Note that Justice Scalia penned the majority opinion in *Navajo Nation*, then later disregarded his own writing in *Jicarilla Apache Nation*. See 131 S. Ct. 2313 (2011). See also *infra* Part II.

[of] charg[ing] itself with moral obligations of the highest responsibility and trust,”¹⁰ obligations “to the fulfillment of which the national honor has been committed.”¹¹

But a recent Supreme Court decision and outlier among breach of trust opinions threatens to insulate the federal government from liability for breaching its trust duty to tribes. It is to that decision, *United States v. Jicarilla Apache Nation*,¹² that this article is directed; specifically, this article is directed toward negating the Court’s judicial fiat by applying the well-established canons of construction of federal Indian law.

Part I presents an overview of the trust relationship between the federal government and American Indian tribes, including a discussion of federal management and trusteeship of Indian-owned monies. Next, Part II summarizes the *Jicarilla* breach of trust case and the Court’s 7–1 majoritarian fiat in favor of the federal government, and also summarizes Justice Sonia Sotomayor’s brave and honest dissent. Finally, Part III addresses the canons of construction in federal Indian jurisprudence and the entire Court’s disregard of the canons in *Jicarilla*, concluding with the importance of these canons and the grave consequences of sweeping them aside.

I. The Special Trust Relationship Between the Federal Government and Indian Tribes

Whatever may have been the founders’ intentions in penning the Indian commerce clause,¹³ the US Constitution contains very little express delineation of any relationship between the US government and those whose government it supplanted. The genesis of the trust relationship, then, is best understood as a judicial conjuring. In 1831, Chief Justice John Marshall characterized Indian tribes as “domestic dependent nations”¹⁴ whose right to occupy their ancestral lands existed at the sufferance of the United States. “Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”¹⁵ Notwithstanding the Chief Justice’s literary or philosophical effect, he made no attempt to codify the strictures of any guardian-ward relationship. Nevertheless, his statement provided the conceptual basis on which, fifty years later, the Supreme Court would uphold the Major Crimes Act.¹⁶

In *United States v. Kagama*,¹⁷ the Court maintained that Indians, as “wards of the nation,” depended upon the United States “largely for their daily food” and their “political rights.”¹⁸ Indeed, from the Indians’ “weakness and helplessness” arose “the duty of

¹⁰ *Seminole Nation*, 316 U.S. at 296–97.

¹¹ *Heckman v. United States*, 224 U.S. 413, 437 (1912).

¹² 131 S. Ct. 2313 (2011).

¹³ U.S. CONST. art. I, § 8, cl. 3 (granting Congress the authority to “regulate Commerce . . . with the Indian tribes”).

¹⁴ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

¹⁵ *Id.*

¹⁶ Originally enacted in 1885, the Major Crimes Act has been amended numerous times and now places federal jurisdiction specifically over thirteen major crimes when committed by an Indian against another Indian in Indian country. 18 U.S.C. § 1153.

¹⁷ 118 U.S. 375 (1886).

¹⁸ *Id.* at 383–84.

protection”¹⁹ incumbent upon the federal government. Yet this “duty of protection,” this trust responsibility, was not only to be used as a shield protecting the Indians from various ills (the states and themselves, for example), but it would similarly be used as a sword for the US government. It comes as no surprise, then, that seventeen years later in *Lone Wolf v. Hitchcock*²⁰ the Court upheld a statute that distributed Kiowa tribal lands in modern-day Oklahoma in violation of an 1867 treaty that required three-fourths of the reservation’s adult males to validate any cession of tribal land,²¹ and did so pursuant to its trust responsibility. Congress had paramount authority over Indian property, began the Court; and casting aside prior decisions that supported Indian occupation of tribal lands, the Court held that Congress’s power was in fact plenary over the sum of Indian affairs.²² Congress thus had the *right* to effect by fiat “mere change[s] in the form of investment of Indian tribal property.”²³ Whereas once the Kiowa had occupied and held lands long sacred to them, because the US Congress believed it consistent with its plenary authority over Indians and its trust responsibility to them, the Kiowa now had money.²⁴

The idea of federal management/trusteeship of Indian-owned funds²⁵ began with congressional enactments in the early nineteenth century, which directed the government to hold and manage Indian tribal funds in trust.²⁶ As a result, the United States has come to manage nearly \$3 billion in tribal funds, collecting and maintaining annually some \$380 million on behalf of tribes.²⁷ Today, scores of statutes outline the “Federal Government’s obligations as trustee in managing Indian trust funds;”²⁸ and Congress has set forth a “nonexhaustive list of the Secretary of the Interior’s trust responsibilities,”²⁹ among them, an array of accounting, auditing, disclosure, and general management obligations.³⁰ Regarding these obligations, the Court held in 1942 that where a treaty required the federal government to pay tribal members, the

¹⁹ *Id.* at 384.

²⁰ 187 U.S. 553 (1903).

²¹ *Id.* at 554 (referencing Treaty with the Kiowa and Comanche, U.S.-Confederated Tribes of Kiowa and Comanche Indians, art. XII, Oct. 21, 1867, 15 Stat. 581).

²² *Lone Wolf v. Hitchcock*, 187 U.S. 353, 565 (1903).

²³ *Id.* at 568.

²⁴ The federal government entered into an agreement (arguably induced by fraud) to pay the tribes \$ 2 million to allot 2 million acres of the reservation for settlement by non-Indians. The federal government valued the land at one dollar per acre because it found that such an arrangement served its trust responsibility to the Kiowa Tribe. *Id.* at 555–56.

²⁵ Trust fund monies are “comprised mainly of money received through the sale or lease of trust lands and include timber stumpage, oil and gas royalties, and agriculture fees,” as well as “judgment funds awarded to tribes.” H.R. REP. NO. 103-778, at 10 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3467, 3468.

²⁶ *See, e.g.*, Act of Jan. 9, 1837, 5 Stat. 135. *See also* MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS’ MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. REP. NO. 102-449, at 6 (1992).

²⁷ FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 5.03[3][b] at 407(2005 ed.). *See supra* note 25.

²⁸ *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2334 (2011) (Sotomayor J., dissenting).

²⁹ *Id.* at 2335.

³⁰ *See* 25 U.S.C. § 162a(d).

government was more than a “mere contracting party” and was to “be judged by the most exacting fiduciary standards.”³¹

Called upon to address breach of trust obligations based on timber management statutes,³² in *United States v. Mitchell*³³ (*Mitchell II*) the Court held that actual control over tribal resources by the federal government gives rise to a breach of trust claim.³⁴ When the government “assumes . . . elaborate control over forests and property belonging to Indians[, a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).”³⁵ When this trust relationship exists, continued the Court, “it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.”³⁶ Thus, a statute creates a right capable of grounding a claim for breach of trust duties only if the statute “can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.”³⁷ Sufficient to support liability for a breach of trust claim is that the statute creating the right “be reasonably amenable to the reading that it mandates a right of recovery in damages.”³⁸ A damages remedy is proper when it would “[further] the purposes of the statutes and regulations” that impose the responsibility.³⁹

The threshold inquiry, then, in assessing whether a tribe may state an actionable breach of trust claim is whether the tribe can “identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed

³¹ See *Seminole Nation v. United States*, 316 U.S. 286, 296–97. The federal government in *Seminole Nation* was obliged to pay each tribal member. Instead, the federal government had been paying the tribal government that was known to be misappropriating the individual members’ money.

³² *E.g.* 25 U.S.C. §§ 406–407, 466.

³³ *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). In *Mitchell II*, the Court addressed breach of trust claims of 1,400 Quinault Indians who, defeated by the Supreme Court just three years earlier in *United States v. Mitchell* (445 U.S. 535 (1980) (*Mitchell I*)), sought money damages for the mismanagement of timber on reservation lands held in trust. The aggrieved 1,400 claimed breach based upon sundry timber management statutes and regulations imposed by the Department of the Interior. *Mitchell II*, 463 U.S. at 225. Concerning *Mitchell II* and other trust cases herein cited or addressed, the Indian Tucker Act, 28 U.S.C. § 1505, grants Indian tribes access to federal courts if some other statute or common law doctrine creates a substantive right enforceable against the United States. As for a federal waiver of sovereign immunity, “a waiver is readily apparent in claims founded upon ‘any express or implied contract with the United States.’” *Mitchell II*, 463 U.S. at 215 (quoting 28 U.S.C. § 1491). This waiver applies categorically to claims founded upon “executive regulations[, . . .] claims found upon contracts and claims founded upon other specified sources of law.” *Mitchell II*, 463 U.S. at 216.

³⁴ See *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1375 (Fed. Cir. 2001) (The “language of *Mitchell II* makes quite clear that control alone is sufficient to create a fiduciary relationship.”); see also Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 804 (1992) (“As long as the Government . . . has actual control over the management of a resource, the exercise of this control can create a trust claim”).

³⁵ *Mitchell II*, 463 U.S. at 225.

³⁶ *Id.* at 226.

³⁷ *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (quoting *Mitchell II*, 463 U.S. at 217, 218).

³⁸ *Id.* at 473.

³⁹ *Mitchell II*, 463 U.S. at 226-27.

faithfully to perform those duties.”⁴⁰ The tribe need not justify each of any claimed trust responsibility by pointing to a specific statute; instead, if a relevant statutory framework “bears the hallmarks of a conventional fiduciary relationship,” the Court consistently looks to common law general trust principles to flesh out the government’s fiduciary obligation.⁴¹ If the tribe meets this threshold, a reviewing court must then assess whether the relevant substantive source of law “can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties . . . impose[d].”⁴² Further, the “existence of a general trust relationship between the United States and the Indian people” can “reinforce” the imposition of fiduciary duties,⁴³ but the general trust relationship *alone* is insufficient to support the imposition of fiduciary duties. Accordingly, analyzing whether a federal court will find a breach of trust “must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.”⁴⁴ And the relevant substantive source of law need not *expressly* guarantee an injured tribe the right to common law damages; indeed, the Court has made clear while weaving the tapestry of its seminal breach of trust opinions that any such right to damages may also be *implied* by a relevant statutory framework.⁴⁵

II. *United States v. Jicarilla Apache Nation*

The United States holds about 900,000 acres of reservation land in trust for the people of the Jicarilla Apache Nation, land rich with timber, gravel, oil, and gas resources, “developed pursuant to statutes administered by the Department of the Interior.”⁴⁶ Funds derived from these natural resources the government holds in trust for the Jicarilla.⁴⁷ In 2002, the Jicarilla Apache Nation sued the United States for an alleged breach of fiduciary duties concerning its management of the tribe’s trust land.⁴⁸ The phase of that litigation relevant to *Jicarilla Apache Nation* involves the government’s accounting, management, and investment of these trust funds from 1972 to 1992.⁴⁹

⁴⁰ *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (citing *Mitchell II*, 463 U.S. at 216–17, 219).

⁴¹ *United States v. Navajo Nation*, 556 U.S. 287 (2009) (quotation marks omitted) (citing *White Mountain Apache Tribe*, 537 U.S. at 473). *See White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) (construing the government’s duties by reference to “elementary trust law”); *see also* *Seminole Nation v. United States*, 316 U.S. 286, 296 (relying on general trust principles to conclude that the government had common law trust fiduciary duties to prevent misappropriation of tribal funds); *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (stating that although the “general ‘contours’ of the government’s obligations” are defined by statute, the “interstices must be filled in through reference to general trust law” (citing *Mitchell II*, 463 U.S. at 224)).

⁴² *Mitchell II*, 463 U.S. at 219.

⁴³ *Id.* at 225.

⁴⁴ *Navajo Nation*, 537 U.S. at 490.

⁴⁵ *Mitchell II*, 463 U.S. at 217 n.16 (quotation marks omitted). *See also Navajo Nation*, 537 U.S. at 506 (“Those prescriptions need not . . . expressly provide for money damages; the availability of such damages may be inferred”).

⁴⁶ *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2318 (2011).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 2318–19. The tribe’s claims arise under 25 U.S.C. §§ 161, 161a, 161b, 162a, and the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001– 61, which recognizes and codifies the existing and relevant trust relationship. These statutes expressly refer to the United States as “trustee of the various Indian tribes,” *id.* § 161, and to the accounts here at issue as “tribal trust funds.” *Id.* § 162a. The statutes also recognize the United States’ control over the management and investment of

Over the course of more than five years worth of alternative dispute resolution, the tribe identified 226 documents—memoranda concerning trust administration exchanged between attorneys within the Department of the Interior (DOI), Office of the Solicitor, various agency personnel within the DOI including the Bureau of Indian Affairs (BIA), the Department of the Treasury, and even the government’s “accounting firm”⁵⁰—that had been withheld by the government on the basis of the attorney-client privilege and attorney work-product protections. At the tribe’s request, in 2008 the case was restored to the active litigation docket.⁵¹ The Court of Federal Claims (CFC) divided the case into various phases for trial and “set a discovery schedule.”⁵² During the discovery process of the first phase of litigation—the phase dealing with management of the Jicarilla Apache Nation’s trust accounts from 1972 to 1992—the government refused to provide these 226 documents.⁵³ Responding to the tribe’s motion to compel the government to produce the documents, the government produced seventy-one and withheld 155, resolute in its assertion of the attorney-client privilege and attorney work-product protections.⁵⁴ After reviewing *in camera* the remaining 155 documents, the CFC granted in part the tribe’s motion to compel discovery, but allowed the government to withhold those documents that the CFC found to be attorney work product.⁵⁵ The government then petitioned the Court of Appeals for the Federal Circuit “for a writ of mandamus directing the CFC to vacate its production order.”⁵⁶ The Court of Appeals, though, sided with the CFC, holding that

the United States cannot deny an Indian tribe’s request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications.⁵⁷

the tribal trust funds and acknowledge the “[t]rust responsibilities of the Secretary of the Interior,” explicitly stating that they “shall include (but are not limited to)” providing “adequate systems for accounting for and reporting trust fund balances.” *Id.* § 162a(d). Because these statutory “prescription[s] bear] the hallmarks of a conventional fiduciary relationship,” *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009), it seems readily apparent that the trust relationship present in *Mitchell II* is similarly present here. Yet the Court did not address this issue head on and made no categorical statement either for or against the existence of a trust relationship in this case. It seems reasonable to presume that the Court accepted the existence of a trust relationship concerning the statutes here at issue; nevertheless, in light of the question the Court was here called upon to answer and in light of its answer to that question, whether or not a trust relationship actually exists is irrelevant. And though I have presented an outline of what in fact creates the trust relationship in *supra* Part I, the remainder of this article and my analysis has very little if anything to do with finding or not finding the existence of a trust relationship. Much has been written on the subject and I likely have little to add.

⁵⁰ *Jicarilla Apache Nation*, 131 S. Ct. at 2319.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 2320.

⁵⁷ *In re United States*, 590 F.3d 1305, 1313 (Fed. Cir. 2009).

Because the government “had not alleged that the legal advice in this case related to such conflicting interests,” the CFC did not discuss how the fiduciary exception might apply in that situation.⁵⁸ The government then filed a petition for a writ of certiorari to the Supreme Court, and the Court granted it to answer “[w]hether the attorney-client privilege entitle[d] the United States to withhold from an Indian tribe confidential communications between the government and government attorneys implicating the administration of statutes pertaining to property held in trust for the tribe.”⁵⁹ On January 7, 2011, the Supreme Court granted the government’s petition for certiorari⁶⁰ and heard oral arguments on April 22, 2011. Less than two months later on June 13, the Court issued Justice Alito’s 7–1 majority opinion, finding for the government.⁶¹

a. Justice Alito’s 7–1 Majority Opinion

“The attorney-client privilege,” began Justice Alito, “ranks among the oldest and most established evidentiary privileges known to our law. The common law, however, has recognized an exception to the privilege when a trustee obtains legal advice related to the exercise of fiduciary duties.”⁶² But the common law—its constraints and strictures on the nature of a trusteeship—is but an “analogy” that “cannot be taken too far.”⁶³ Indeed the “trust obligations of the United States to the Indian tribes,” wrote Justice Alito, “are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.”⁶⁴

Despite the fact that “trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law,” Justice Alito began with Rule 501 of the *Federal Rules of Evidence*, which states that evidentiary privileges “shall be governed by the principles of the common law . . . in the light of reason and

⁵⁸ *Jicarilla Apache Nation*, 131 S. Ct. at 2320. Under long-established common law principles, a trust beneficiary is entitled to “such information as is reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust.” RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. a(2) (2007). Under the fiduciary exception to the attorney-client privilege, this includes legal advice provided to the trustee about management of the trust. Note that Congress has “[p]lenary authority” over the sum of Indian affairs, *Lone Wolf v. Hitchcock*, 187 U.S. at 553, 565 (1903), and has never explicitly exempted the government from these principles.

⁵⁹ Petition for a Writ of Certiorari at 1, *United States v. Jicarilla Apache Nation*, 2010 WL 3641207 (Sept. 20, 2010) (No. 10-382).

⁶⁰ *United States v. Jicarilla Apache Nation*, 131 S. Ct. 856 (2011) (No. 10-382) (granting cert.).

⁶¹ 7–1. Justice Sotomayor dissented; Justice Kagan took no part in the case. *Jicarilla Apache Nation*, 131 S. Ct. at 2313.

⁶² *Jicarilla Apache Nation*, 131 S. Ct. at 2318.

⁶³ *Id.*

⁶⁴ *Id. But cf.* *United States v. Navajo Nation*, 556 U.S. 287, 290–91 (2009) (stating that once a tribe has identified a “substantive source of law that establishes specific fiduciary or other duties . . . principles of trust law might be relevant in drawing the inference that Congress intended damages to remedy a breach”) (quotation marks omitted); and *United States v. White Mountain Apache Tribe*, 537 U.S. at 474–76 (2003) (stating that a “fair inference that the Government is subject to duties as a trustee and liable in damages for breach” supports the importation “of the fundamental common-law dut[y] on the part of a trustee . . . to preserve and maintain trust assets”).

experience.”⁶⁵ Justice Alito then referenced two common law criteria, imported from English courts, “justifying the fiduciary exception.”⁶⁶ First, because a trustee has the fiduciary obligation to act in the best interest of the trust’s beneficiary, the trust’s beneficiary is the “real client”⁶⁷ of any attorney who advises the trustee regarding trust-related matters; accordingly, the attorney-client privilege belongs more properly to the beneficiary than to the trustee. Second, a trustee’s “fiduciary duty to furnish trust-related information”⁶⁸ to the beneficiary outweighs the trustee’s interest in the attorney-client privilege. More information helps a trust’s beneficiary to monitor the trustee’s management of the trust and disclosure, and is therefore a “weightier public policy than the preservation of confidential attorney-client communications.”⁶⁹ But the government, noted the Court, “of course, is not a private trustee.”⁷⁰

Whereas the strictures of a common-law trusteeship exist between two private parties, the general trust relationship extant between Indian tribes and the federal government is a “sovereign function subject to the plenary authority of Congress.”⁷¹ It was therefore error for the Court of Appeals to analogize the government to a private trustee in finding for the tribes.⁷² The government “consents to be liable to private ‘parties and may yield this consent upon such terms and under such restrictions as it may think just.’”⁷³ The organization and management of any general trust between the government and Indian tribes is subject to the plenary authority of Congress, waxed the Court, and because the “Indian trust relationship represents an exercise of that authority,”⁷⁴ the government’s interest in the trust relationship is “vested in it as a sovereign.”⁷⁵ Accordingly, the maintenance and the strictures of any trust relationship extant due to the plenary authority of Congress is distinctly an interest of the United States,⁷⁶ and the government assumes trust responsibilities “only to the extent it expressly accepts those responsibilities by statute.”⁷⁷ Thus, the Court held that in order to access privileged information from the government against the government’s wishes, the Jicarilla must “point to a right conferred by statute or regulation” in order to do so.⁷⁸ Notwithstanding the categorical non-relevance of a common law trustee’s duties to a beneficiary, the Court then, after making this pronouncement, did not perform any rigorous statutory analysis in order to assess whether the tribe can “point to a right

⁶⁵ *Jicarilla Apache Nation*, 131 S. Ct. at 2320 (quoting FED. R. EVID. 501).

⁶⁶ *Id.* at 2326.

⁶⁷ *Id.*

⁶⁸ *Id.* at 2322.

⁶⁹ *Id.* at 2322 (quoting *Riggs Nat’l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 714 (Del. Ch. 1976)).

⁷⁰ *Id.* at 2323.

⁷¹ *Id.*

⁷² *In re United States*, 590 F.3d 1305, 1313 (Fed. Cir. 2009).

⁷³ *Jicarilla Apache Nation*, 131 S. Ct. at 2323 (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 283 (1855)).

⁷⁴ *Id.* at 2324.

⁷⁵ *Id.* (quoting *United States v. Minnesota*, 270 U.S. 181, 194 (1926)).

⁷⁶ *Id.* (citing *Heckman v. United States*, 224 U.S. 413, 437 (1912)).

⁷⁷ *Id.* at 2325. *See also* case cited *supra* note 63.

⁷⁸ *Jicarilla Apache Nation*, 131 S. Ct. at 2325.

conferred by statute or regulation.”⁷⁹ After essentially pronouncing the issue outside the realm of the common law, the Court nevertheless weighed the two common law features that justify the fiduciary exception, and found each wanting.⁸⁰

As noted earlier, the two features of the common law that justify the fiduciary exception to the attorney-client privilege are the beneficiary’s status as the concerned attorney’s real client and the trustee’s duty to disclose information about the trust.⁸¹ Citing the “leading American case on the fiduciary exception,”⁸² the Court observed that “Courts look to the source of funds as a strong indicator of precisely who the real clients were and a significant factor in determining who ought to have access to the legal advice.”⁸³ Because the attorneys here at issue were paid out of congressional appropriations at no expense to the tribe, the “payment structure confirms” the Court’s view “that the Government seeks legal advice in its sovereign capacity.”⁸⁴

As for a fiduciary’s duty to disclose to a beneficiary all information related to trust management, the Court cursorily addressed the relevant statutes—that the Secretary must supply the trustees with, *inter alia*, “periodic statements of their account performance”⁸⁵—and concluded that common-law theory of a fiduciary’s duty to disclose is not to be used to illuminate whether the relevant statutes can fairly be interpreted as mandating compensation for damages because the “common law of trusts does not override the specific trust-creating statute and regulations that apply here. Those provisions define the Government’s disclosure obligation to the Tribe.”⁸⁶ The statutes do not say that the government assumes the common-law duty to disclose information related to the administration of Indian trusts and which is protected by the attorney-client privilege: thus, the Court declined to read a “catchall provision” that would impose it.⁸⁷

⁷⁹ *Id.* *Cherokee Nation, Mitchell II, White Mountain Apache, and Navajo Nation* taken together create the framework explained at the end of *supra* Part I: first, identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the government has failed faithfully to perform those duties; then assess whether the relevant substantive source of law can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties imposed. Recognize all the while and be guided by “principles of trust law [that] might be relevant in drawing the inference that Congress intended damages to remedy a breach.” *United States v. Navajo Nation*, 556 U.S. 287, 290–91 (2009). But here the Court conflates the analysis by first taking the trust relationship extant and relevant here out of the realm of the common law trusteeship of which Justice Scalia wrote in *Navajo Nation*, because the United States’ duties to the Indian tribes are “governed by statute rather than the common law.” *Jicarilla Apache Nation*, 131 S. Ct. at 2320. But the established cases noted in this footnote do not present a zero sum equation: instead, the common law is to guide the determination of whether the relevant substantive source of law can fairly be interpreted as mandating compensation for damages. Justice Sotomayor addresses this very conflation in her dissent, discussed *infra* Part IIb.

⁸⁰ See *Jicarilla Apache Nation*, 131 S. Ct. at 2326.

⁸¹ See *id.*

⁸² *Riggs Nat’l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976).

⁸³ *Jicarilla Apache Nation*, 131 S. Ct. at 2326 (citing *Riggs Nat’l Bank*, 355 A.2d at 712).

⁸⁴ *Jicarilla Apache Nation*, 131 S. Ct. at 2326.

⁸⁵ *Id.* at 2329 (quoting the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 162a(d)(5)).

⁸⁶ *Id.* at 2329–30.

⁸⁷ *Id.* at 2330. This is another of the Court’s intellectual sleights of hand: the Court decided that the common law duty to disclose did not apply to the government because the government does not have the “same common-law disclosure obligations as a private trustee,” and declined to include a “catchall

Whereas past Courts were to be guided by the common law rubric of trust management once a statutory framework created a fiduciary duty on the part of the United States to the tribes,⁸⁸ here and now, this Court would not consider common law trust principles in assessing the government's liability because the relevant statutory framework⁸⁹ does not specifically say that these principles apply.

b. Justice Sotomayor's Dissent

Justice Sotomayor called the Court's chicanery for what it is and argued for *stare decisis*.⁹⁰ Whereas the majority held that the common law has no application to the current context, Justice Sotomayor repeated the established maxim⁹¹ that once a statutory scheme "establishes a conventional fiduciary relationship, the Government's duties include fiduciary obligations derived from common-law trust principles."⁹²

Citing the framework established by the Court's own opinions in its seminal trust decisions, Sotomayor wrote that the statutes here at issue "give the United States full responsibility to manage Indian trust fund accounts for the benefit of the Indians."⁹³ Under the relevant statutory regime then, "the Government has extensive managerial control over Indian trust funds, exercises considerable discretion with respect to their investment, and has assumed significant responsibilities to account to the tribal beneficiaries."⁹⁴ In deference to precedent, having found a trust relationship between the United States and the tribe, Sotomayor imported principles of common-law trust management to assess the government's reliance on the attorney-client privilege to withhold the 155 documents that related to trust management.

Beginning with FRE 501, Sotomayor notes that the attorney-client privilege is "a limited exception to the usual rules of evidence requiring full disclosure of relevant information."⁹⁵ When a trustee obtains "legal advice relating to his administration of the trust, and not in anticipation of adversarial legal proceedings against him, the beneficiaries of the trust ha[ve] the right to the production of that advice."⁹⁶ And

provision" to "impose general obligations. *Jicarilla Apache Nation*, 131 S. Ct. at 2329–30. But the appropriate framework, if relevant statutes establish specific fiduciary duties, is to import the common law to guide the determination of whether the relevant substantive source of law can fairly be interpreted as mandating compensation for damages. *See supra* note 79. The Court thus rejects established breach of trust doctrine in favor of judicial fiat, but fails to state with any clarity whether (a) the Court is revising the existing framework, or (b) what any revised framework ought to look like. But such considerations are beyond the scope of this article.

⁸⁸ *See supra* note 79.

⁸⁹ *See supra* note 49.

⁹⁰ *Jicarilla Apache Nation*, 131 S. Ct. at 2331–43.

⁹¹ *See supra* note 79.

⁹² *Jicarilla Apache Nation*, 131 S. Ct. at 2331 (Sotomayor, J., dissenting). There is very little to say about Justice Sotomayor's dissent that she herself did not say. Indeed, I can locate no intellectual errors that need explanation or remedy; accordingly, I will only provide an overview of her dissent and an analysis of the canons of construction with regard to the issue at hand.

⁹³ *Id.* at 2335 (quoting *United States v. Mitchell*, 463 U.S. 206, 224 (1983) (*Mitchell II*)).

⁹⁴ *Id.*

⁹⁵ *Id.* at 2332.

⁹⁶ *Id.* (quoting *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007)).

justifying this common-law fiduciary exception to the attorney-client privilege are two rationales, each of which the majority, even for its refusal to import common-law trust principles, addressed and found wanting. Justice Sotomayor also addressed each in turn, and found each compelling.

As a fiduciary for the tribal trust—in this case, the approximately 900,000 acres of land—the government’s management of the trust must be judged by the “most exacting fiduciary standards.”⁹⁷ Among the most fundamental of fiduciary obligations of a trustee is “to administer the trust solely in the interest of the beneficiaries.”⁹⁸ The government is therefore legally required “to administer the trust solely in the interest of the beneficiaries,” and its conduct vis-à-vis its trust obligation cannot be anything distinct from its responsibilities as a fiduciary.⁹⁹ Consequently, while the majority argued that the government’s interest in the trust relationship is “vested in it as a sovereign,”¹⁰⁰ in reality, waxed Sotomayor, “any uniquely sovereign interest the Government may have in other contexts of its trust relationship with Indian tribes does not exist in the specific context of Indian trust fund administration.”¹⁰¹ Therefore, the interests of the government in seeking advice for purposes of the fiduciary exception are entirely aligned with the interests of the nation. The real client served by the documents exchanged by attorney and trustee was therefore the beneficiary of the trust: the tribe.

Regarding a trustee’s duty to disclose all relevant matters to the beneficiary, Sotomayor recognized the policy behind the duty: that “preserving the full disclosure necessary in the trustee-beneficiary relationship is . . . ultimately more important than the protection of the trustees’ confidence in the attorney for the trust.”¹⁰² Because the relevant statutes required the government to act as a conventional fiduciary, the common-law duty a fiduciary possesses of keeping the trust’s beneficiary informed of matters “relating to trust administration included the concomitant duty to disclose attorney-client communications relating to trust fund management.”¹⁰³ Each justification for the fiduciary exception to the attorney-client privilege in this instance therefore supports disclosing the 155 withheld documents.

Having found that the fiduciary exception to the attorney-client privilege applied to the facts at issue, Sotomayor then addressed the majority’s chief legal error. While the majority maintained that the government “assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute,”¹⁰⁴ Sotomayor stated the obvious:

We have never held that all of the Government’s trust responsibilities to Indians must be set forth expressly in a specific statute or regulation. To

⁹⁷ *Id.* at 2336 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942)).

⁹⁸ *Id.* (quoting AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* § 170 (4th ed. 1987)).

⁹⁹ *Id.* at 2324, 2336.

¹⁰⁰ *Id.* at 2324.

¹⁰¹ *Id.* at 2337.

¹⁰² *Id.* at 2338 (quoting *Riggs Nat’l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 714 (Del. Ch. 1976)).

¹⁰³ *Id.* at 2339.

¹⁰⁴ *Id.* at 2325.

the contrary, where, as here, the statutory framework establishes that the relationship between the Government and an Indian tribe bears the hallmarks of a conventional fiduciary relationship, . . . we have consistently looked to general trust principles to flesh out the Government's fiduciary obligations. . . . Accordingly, although the general contours of the government's obligations' are defined by statute, the interstices must be filled in through reference to general trust law.¹⁰⁵

Indeed, the very text of the relevant statutes supports this determination. Section 162a(d) of the American Indian Trust Fund Management Reform Act of 1994 sets forth eight "trust responsibilities of the United States,"¹⁰⁶ and states that the Secretary of the Interior's "proper discharge of the trust responsibilities of the United States shall include (but are not limited to)" those eight specified duties. By expressly including the parenthetical language, argues Justice Sotomayor, "Congress recognized that the Government has pre-existing trust responsibilities that arise out of the broader statutory scheme governing the management of Indian trust funds. . . . That conclusion accords with common sense as not even the Government argues that it had no disclosure obligations with respect to Indian trust funds prior to the enactment of the 1994 Act."¹⁰⁷

Yet perhaps most prescient and haunting of Sotomayor's various critiques is her prognostication that the Court's majority opinion may very well serve to reject "the use of common-law principles to inform the scope of the Government's fiduciary obligations to Indian tribes."¹⁰⁸ What lies down that road is greater than the diminution of tribal sovereignty; what lies down that road is the Supreme Court's systematic countenancing of the federal government's duplicitous, self-serving, and disingenuous application of statutes ultimately intended to inure to the benefit of Indians. Indeed, to combat just such a possibility, courts past fashioned the canons of construction.

III. Applying the Canons of Construction of Federal Indian Law

In order to address the disadvantaged state at which the treaty-making process placed tribes and to more satisfactorily affect the federal trust responsibility, the Supreme Court has fashioned the canons of construction.¹⁰⁹ The canons originally applied only to the interpretation of United States-Indian treaties, but over time the Court has extended the canons to federal regulations, so long as the regulation was passed for the benefit of a tribe.¹¹⁰ Chief among the canons is the rule of sympathetic construction. Under this rule, "statutes passed for the benefit of the dependent Indian

¹⁰⁵ *Id.* at 2339, 2340 (citing *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009), and *Cobell v. Norton*, 240 F.3d 1081, 1101 (2001)).

¹⁰⁶ 25 U.S.C. § 162a(d).

¹⁰⁷ *Jicarilla Apache Nation*, 131 S. Ct. at 2341 (Sotomayor J., dissenting).

¹⁰⁸ *Id.* at 2342

¹⁰⁹ See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (2005 ed.).

¹¹⁰ *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (stating that when "we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit'" (quoting *Montana v. Blackfoot Tribe*, 471 U.S. 759, 766 (1985))).

tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.”¹¹¹

Yet for all her intellectual honesty, Justice Sotomayor’s lone dissenting voice and the Court’s 7–1 majoritarian fiat each fail to mention even the whisper of the canons. Justice Sotomayor was chiefly motivated by *following* precedent, not by *re-establishing* precedent. She therefore took aim at the Court’s intellectual prestidigitations vis-à-vis the importation of common-law principles of trust management; and because none of the seminal trust opinions¹¹² mentions the application—let alone the existence—of the canons, within the framework of precedent violated here by the Court, the canons were irrelevant to her dissent.¹¹³

But the canons are not irrelevant—in fact the canons should be the lynchpin of the Court’s analysis. After all, the canons are “rooted in the unique trust relationship between the United States and the Indians,”¹¹⁴ and the Trust Fund Management Reform Act sets forth procedures so that, *inter alia*, “the best interests of the Indians will be promoted.”¹¹⁵ Accordingly, the initial inquiry in determining the applicability of the canons—that the relevant federal regulation must be passed for the benefit of Indians in order for the canons to apply—is an inquiry easily and satisfactorily answered by the tribe.

But in order to apply the rule of sympathetic construction, the concerned regulations passed for the benefit of the tribe must also be ambiguous. Are they? This is a troublesome inquiry because at issue in *Jicarilla* is not whether a specific statute or “expression” is ambiguous but whether the common-law itself is: (a) applicable to the government’s trusteeship of the tribe’s 900,000 acres of resource-rich land, and (b) if relevant, whether the fiduciary exception to the attorney-client privilege applies.

Justice Sotomayor effectively answered these questions while complying with the Court’s precedent, but the Court has also held in the past that “[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.”¹¹⁶ Thus, notwithstanding the fact that there is no single specific statutory ambiguity at issue in *Jicarilla*, this discrete issue of “federal law”—the applicability of the fiduciary exception to the federal trust responsibility—is capable of differing interpretations.¹¹⁷ The Court of Federal Claims, the Court of Appeals, and Justice Sotomayor disagree with seven current members of the Supreme Court of the United States; each is presumptively reasonable, and what they disagree about is not a question of constitutional law. If this

¹¹¹ Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 89 (1918).

¹¹² See *supra* note 79.

¹¹³ The logical inquiry which, alas, is beyond the scope of this article is just how, *how really*, does the Court decide to apply the canons of construction to its determination of questions of federal Indian law.

¹¹⁴ County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985).

¹¹⁵ 25 U.S.C. § 161.

¹¹⁶ White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980).

¹¹⁷ Black’s Law Dictionary defines “ambiguity” as “An uncertainty of meaning or intention, as in a contractual term or statutory provision.” BLACK’S LAW DICTIONARY 93 (9th ed. 2009).

had been the case and the issue here were one of constitutional import, the Supreme Court would of course have final say notwithstanding any potential ambiguity.¹¹⁸ But here the Court addressed an issue concerning the government's trust responsibility, a rubric of judicial conjuring. It was precisely to more satisfactorily affect this responsibility that the applicability of the canons (also a judicial conjuring¹¹⁹) were extended to statutes from treaties.¹²⁰ Thus, the canons' prerequisite that there exist an ambiguity is also a threshold easily satisfied. Accordingly, applying the canons to the question of whether the act imports the common-law's fiduciary exception to the attorney-client privilege buttresses Justice Sotomayor's conclusion, and further dilutes the integrity of the majority's 7–1 opinion.

For its part, it may very well be that the majority did not mention the canons for two reasons: first, none of the seminal trust opinions included the canons in their analyses; and second, applying the canons to the question at issue here leads inexorably to a ruling against the government and for the tribes, thus posing “significant and damaging consequences for the government . . . [in] over 90 pending trust cases brought by Indian tribes in which the question [here] presented could arise.”¹²¹ It may very well be that as Justice Sotomayor opines, *this* Court's “disregard of . . . [its] settled precedent that looks to common-law trust principles to define the scope of the Government's fiduciary obligations to Indian tribes”¹²² will reinvigorate the position of “reject[ing] the use of common-law principles to inform the scope of the Government's fiduciary obligations to Indian tribes.”¹²³ Down that road awaits ruin and a desire for things “done behind closed doors.”¹²⁴ Yet to combat just such an unhappy eventuality, courts past have fashioned the canons of construction and extended their application to federal statutes and regulations meant to inure to the benefit of Indians. Indeed, applying the canons of construction to illuminate the government's trust responsibility comports with “traditional notions of sovereignty and . . . the federal policy of encouraging tribal independence.”¹²⁵ Would that the Court were true to its own pronouncements; would that Justice Sotomayor's intellectual honesty were the rule and not the exception. The ability of Indian tribes to keep the government accountable for honoring its trust responsibilities to them may very well depend upon it.

¹¹⁸ See *Marbury v. Madison*, 5 U.S. 137 (1803).

¹¹⁹ See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 2.02 (2005 ed.).

¹²⁰ See *id.* See also *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918) (applying the canons of construction to liberally construe an ambiguous provision of a statute carving out reservation land use); *Bryan v. Itasca County*, 426 U.S. 373, 392–93 (1976) (resolving ambiguity in PL-280, a statute that was not necessarily passed for the benefit of Indians, in favor of Indians); *Connecticut v. U.S. Dep't of the Interior*, 228 F.3d 82, 92–93 (2d Cir. 2000) (applying the canons even when a tribe has become wealthy and powerful).

¹²¹ *Petition for a Writ of Certiorari at 9, United States v. Jicarilla Apache Nation*, 2010 WL 3641207 (Sept. 20, 2010) (No. 10-382). In these pending cases, the government's economic liability—and that which the tribes have to gain and may very well be their due—is tremendous.

¹²² *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2331–32 (Sotomayor J. dissenting).

¹²³ *Id.* at 2342.

¹²⁴ MARCUS AURELIUS, *MEDITATIONS*, III. 7 (Gregory Hays, trans., Modern Library 2002) (ca. 175).

¹²⁵ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–44 (1980).

Gas Tax Agreements in Indian Country

Jonathan White¹

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions. . . .

This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. . . .

For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. . . .

This situation should be reversed.²

---President Richard M. Nixon, July 8, 1970

Introduction

After nearly 200 years of a shifting and confusing federal policy toward its indigenous peoples, the United States embarked upon an ambitious new direction during the mid-1960s. Still smarting from the diminishment of both tribal sovereignty and the trust land base as a result of the government's previous policy of termination, Indian tribes, bolstered by several recent court decisions and a burgeoning civil rights movement, began to demand more self-determination. The federal government agreed, and the successive decades have seen a dramatic increase in tribal sovereignty. However, along with sovereignty came added visibility and new conflicts, as the 565 federally-recognized tribes began to assert themselves against their own members and their neighbors. "Ultimately, during the modern era, the tribes have used their sovereign status in numerous, pragmatic ways to rise from the termination era and gain a place, new though it may be, in the community of governments in the United States."³ This has given tribes some momentum, but it has also generated a great deal of resistance.

One of the areas in which tribes have been reasserting sovereignty is taxation authority. Since 1995, tribes in Washington have been entering into agreements with the state, providing a mechanism under which tribes may keep the majority of the usual state gas taxes levied on consumers. This program has grown significantly, to the point

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² H.R.DOC. NO. 91-363, (1970).

³ CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 54 (Yale University Press 1987).

where the majority of Washington tribes are now taking advantage of it. These agreements have provided millions of dollars of desperately needed revenue and jobs to Washington tribes, allowing tribes to provide much-needed transportation and police improvements within their respective reservations.

However, this cooperative form of shared sovereignty has also resulted in an incredible amount of controversy in the state, with non-tribal gas stations and conservative policy think-tanks alleging that the gas tax arrangement is illegal under the state Constitution and that the tribes are enjoying financial benefits which allow them to sell gasoline at greatly reduced rates. These reduced rates, argue opponents of the tax arrangements, allow tribes to undercut prices at gas stations operated by non-tribal members, putting them at a serious competitive disadvantage. The issue has generated additional heat since the beginning of the current economic recession and rise of the “tea party” movement, with many citizens complaining that the gas tax arrangements are nothing more than illegal giveaways of public funds to Indian tribes. The controversy has recently reached a tipping point, and in 2011 opponents of the gas tax agreements brought suit against the state and Governor Gregoire to challenge their constitutionality.⁴

This paper argues that gas tax agreements between the state and tribes cannot, and should not, be disturbed through legal actions undertaken by disaffected citizens. When challenging the legitimacy of government-to-government negotiations, the proper avenue for redress is the ballot box, not the court system. This paper will first discuss the legal background of taxation in Indian Country throughout the United States, showing how the United States Supreme Court has moved to sharply limit tribal sovereignty, especially in the area of taxation, over the past thirty years. The paper will next discuss the specifics of the Washington gas tax arrangements, including details of the provisions at stake in the case now before the Washington Supreme Court. The paper will then explain how cooperative taxation agreements between tribes and the state fit into the overall policy goals of the federal government, by allowing tribes to reassert sovereignty and provide needed services to their members. The paper will then discuss a current case, *Automotive United Trades Organization v. State of Washington*, first by identifying the parties to the case, and then by discussing the proceeding at court. The paper will briefly discuss the disposition of similar issues in other jurisdictions before concluding with analysis of the gas-tax-agreements issue in Washington and its relation to the larger goals of sovereignty and self-determination for Indian tribes.

Background – Taxation in Indian Country

The first major case dealing with the issue of taxation in Indian Country during the self-determination era was *Warren Trading Post v. Arizona State Tax Commission*.⁵ In that case, the state of Arizona levied a two percent tax on the gross proceeds, sales, and gross income of the plaintiff’s trading post, which sold goods to Indians on the

⁴ *Auto. United Trades Org. v. State*, No. 85661-3 (Wash. accepted for hearing and decision Sept. 7, 2011).

⁵ *Warren Trading Post Co. v. Arizona State Tax Comm’n*, 380 U.S. 685 (1965).

Navajo reservation.⁶ The Trading Post had been granted a federal license to trade with the Indians,⁷ and the Supreme Court looked specifically at the issue of whether Arizona had the authority to levy a tax on a business dealing with Indians in Indian Country.⁸ The Court then cited the agreement signed by Arizona upon its admission to the Union, in which the state expressly forfeited jurisdiction over Indian Country, in deference to the federal government, as a condition of admission.⁹

The Court relied on Justice John Marshall's famous holding in *Worcester v. Georgia*, in which he stated that the "treaties and laws of the United States contemplate that the Indian territory is completely separated from that of the states; and provide that all intercourse with them should be carried on exclusively by the government of the Union."¹⁰ The Warren Court then looked at specific regulations of Indian commerce, from the first statutes enacted under the Constitution, up to the present day, finding that the history of "these apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens."¹¹ The Court concluded with a strong reaffirmation of taxation as a positive method of promoting and strengthening tribal sovereignty:

Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. And in compliance with its treaty obligations the Federal Government has provided for roads, education and other services needed by the Indians . . . *This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed* (emphasis added), and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.¹²

⁶ *Id.* at 685.

⁷ 25 U.S.C. § 261 (giving the BIA commissioner "sole power" to appoint traders to the Indian tribes, and to regulate the manner in which they traded, including quantity of goods and pricing).

⁸ Warren Trading Post, *supra* note 4, at 685.

⁹ *Id.* at 686.

¹⁰ *Id.* at 687 (quoting *Worcester v. Georgia*, 31 U.S. 515, 557 (1832)).

¹¹ *Id.* at 690.

¹² *Id.* at 690-91.

Eight years later, the Supreme Court revisited the issue of the validity of state taxation in Indian Country in *McClanahan v. Arizona State Tax Commission*.¹³ In that case, the state of Arizona had withheld \$16.20 from the wages of an enrolled member of the Navajo tribe to cover her 1967 state income tax liability.¹⁴ The Arizona state courts had affirmed the tax even in light of the *Warren Trading Post* decision, holding that a state income tax levied upon an individual did not infringe upon a tribe's ability to govern itself.¹⁵

The Supreme Court reversed the Arizona courts, again applying *Worcester* to restate the doctrine that Indian nations were "distinct political communities" and that tribes had exclusive authority over all the lands within their territory.¹⁶ Employing a balancing test to weigh the interests of the federal government and tribes against those of the state, the Court thus reaffirmed the fact that, although there were some exceptions, state law had "no role to play" within reservation boundaries, absent an express act of Congress giving the state such authority.¹⁷ The Court also looked at the history of the treaties between the United States and the Navajo to find that the tribe had never expressly agreed to state authority; even if it had, the Court relied on the Indian Canons of Construction, which require treaty provisions to be construed "in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."¹⁸ Thus, federal and tribal interests prevailed over any state interest, and the Court accordingly held in favor of tribal authority to tax as a means of upholding sovereignty:

When this canon of construction is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area *was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision* (emphasis added). It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation.¹⁹

Seven years later, in *Washington v. Confederated Tribes of the Colville Reservation*, the Supreme Court took another major case involving issues of state taxation in Indian Country.²⁰ *Colville* dealt with a set of facts similar to the current gas taxation controversy: Indian retailers were marketing and selling cigarettes for significantly less than their non-tribal competitors, and those competitors sued, alleging

¹³ *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

¹⁴ *Id.* at 166.

¹⁵ *Id.* at 165.

¹⁶ *Id.* at 170-71.

¹⁷ *Id.* at 168.

¹⁸ *Id.* at 174 (quoting *Carpenter v. Shaw*, 280 U.S. 363 (1930)).

¹⁹ *Id.* at 174-75.

²⁰ *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980).

the tribes were enjoying a competitive advantage.²¹ While reaffirming notions of sovereignty found in the preceding two cases, the Court distinguished this case from other cases involving similar issues, by discussing only the validity of the state's ability to impose the cigarette tax on non-tribal citizens.²² The Court quickly established the fact that the state had no authority to tax tribal members buying cigarettes on the reservation.²³ Thus, the main issue was whether the state could impose its own tax on its own citizens who went into the reservation to purchase cigarettes at a lower rate.

The Court found that taxes imposed by states on nonmembers do not frustrate federal interests because the federal courts could immediately strike down any taxes which they felt interfered with the trust relationship.²⁴ Next, the Court found that the state tax would indeed destroy the tribal competitive advantage, but at the same time, the Court did not think that any of the federal statutes passed for the benefit of Indians (Indian Reorganization Act, Indian Financing Act, etc.) granted tribes this advantage.²⁵ Next, the Court found that the state tax did not infringe on tribal self-government, because the tax only applied to sales to nonmembers.²⁶ The Court concluded that the cigarette tax did not "burden commerce" and that each sovereign government (the Colville Tribe and the state of Washington) was free to impose its own taxes without interfering with the other.²⁷

Colville represented a significant departure from the Court's previous jurisprudence on state taxation in Indian Country, as the Court began to use its own balancing test to favor state interests over those of the federal government and tribes. Nowhere in the Court's decision was there any discussion of the underlying fundamental principles of tribal sovereignty, as discussed in *Worcester*, which had informed so much of the basic rationale of the *Warren Trading Post* and *McClanahan* cases.²⁸ Instead, the Court focused primarily on the distinctions between tribal members and nonmembers or between trust lands and non-trust lands, as well as continually returning to the issue of the competitive advantage enjoyed by the tribal retailers.²⁹ While agreeing that tribes did have some legitimate reasons for such a taxation scheme, the Court ultimately held that "the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes."³⁰ A strongly written concurrence in part, and dissent in part, by then-Justice Rehnquist, gave an indication of the court's coming direction on the issues of sovereignty and taxation: "If Indians are to function as quasi co-sovereigns with the

²¹ *Id.*

²² *Id.* at 136.

²³ *Id.*

²⁴ *Id.* at 154 (citing *Oliphant v. Suquamish Tribe*, 435 U.S. 191 at 208-10 (1978); *United States v. Wheeler*, 435 U.S. 313 at 326 (1978)).

²⁵ *Id.* at 155-56.

²⁴ *See id.* at 156-57.

²⁷ *Id.* at 157-59.

²⁸ A noble dissent in part and concurrence in part from Justices Brennan and Marshall did attempt to invalidate the state tax based primarily on notions of tribal sovereignty and federal domination of the subject area. *Id.* at 164-73.

²⁹ *Id.* at *passim*.

³⁰ *Id.* at 161.

States, they like the States, must adjust to the economic realities of that status as every other sovereign competing for tax revenues, absent express intervention by Congress.”³¹

Justice Rehnquist would eventually have his say twenty-one years later, when, as Chief Justice, he wrote the unanimous opinion for the Court in *Atkinson v. Shirley*.³² While the facts of that case are not as applicable to the current controversy (it dealt with tribal taxation of a non-Indian owner of a hotel located within the boundaries of the Navajo reservation), the case did represent a significant setback for tribes as sovereigns and for the notion of taxation as a means of reinforcing that sovereignty. Relying on the arguably-inconsistent *Montana* test,³³ which states that tribes have no civil jurisdiction over non-Indians for activities taking place within non-Indian land except in situations where a consensual relationship or threat to tribal political integrity exists, the Court held that the modern notion of inherent sovereignty disallowed tribal jurisdiction over nonmembers, even if they were located within the reservation.³⁴ This was primarily based upon the status of the land in question (held in fee by the tribal non-member, and thus outside of the tribe’s trust land base), not upon whether creation of such a jurisdictional black hole would affect the tribe’s sovereignty.³⁵

This new direction from the Supreme Court, hinted at in Rehnquist’s dissent twenty five years prior in *Colville*, and ripened into a holding by way of *Atkinson*, further restricted notions of taxation as a means of supporting and encouraging tribal sovereignty. While purporting to treat tribes the same as states for the purposes of economic competition, the Court severely restricted their sovereign status by failing to equate it with that of a state (and arguably, by elevating the state in deeming state interests primary). Instead of giving tribes some leeway to develop a jurisdictional base through the implementation of one of the most basic functions of sovereignty (taxation and revenue generation), the Court instead poked large holes into the small amount of sovereignty tribes thought they had reserved, first by way of treaties, then by way of the precedents in *Warren Trading Post* and *Atkinson*. With the backing, or at least the implicit philosophical encouragement, of the highest court in the land, citizens and organizations have been challenging tribal sovereignty on several grounds in recent years. Because sovereign immunity prevents these plaintiffs from directly suing the tribes themselves, opponents of tribal sovereignty have instead directed their lawsuits at other targets, such as states.

³¹ *Id.* at 186.

³² *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 647 (2001).

³³ A discussion of the validity of the *Montana* test (derived from *Montana v. United States*, 450 U.S. 544 (1981)) is well beyond the subject or scope of this paper. Suffice it to say, for purposes of this paper, that the cases cited for its two famous “exceptions” do not necessarily support the propositions for which they are employed by the Court. The continued use of this test, under such circumstances, is a good example of one of the major problems within the realm of Federal Indian law: important and binding precedent is often casually discarded without reason or explanation, and new precedent is put in its place without much hindsight or policy-based justification.

³⁴ *Atkinson*, *supra* note 31, at 647.

³⁵ *Id.* at 654.

The Washington Gas Tax Agreements

Authority for the gas tax agreements between the state and the tribes is found in the Revised Code of Washington (RCW) and was most recently updated in 2007. Most of the current controversy comes from section 3 of the statute:

(3) If a new agreement is negotiated, the agreement must:

(a) Require that the tribe or the tribal retailer acquire all motor vehicle fuel only from persons or companies operating lawfully in accordance with this chapter as a motor vehicle fuel distributor, supplier, importer, or blender, or from a tribal distributor, supplier, importer, or blender lawfully doing business according to all applicable laws;

(b) Provide that the tribe will expend fuel tax proceeds or equivalent amounts on: Planning, construction, and maintenance of roads, bridges, and boat ramps; transit services and facilities; transportation planning; police services; and other highway-related purposes;

(c) Include provisions for audits or other means of ensuring compliance to certify the number of gallons of motor vehicle fuel purchased by the tribe for resale at tribal retail stations, and the use of fuel tax proceeds or their equivalent for the purposes identified in (b) of this subsection. Compliance reports must be delivered to the director of the department of licensing.³⁶

The State of Washington currently has gas tax arrangements, pursuant to RCW 82.36.450, with 22 of the 29 federally-recognized tribes in the state.³⁷

Under the terms of the agreements, the tribe collects the full amount of the State's current gas tax and submits the money to the State.³⁸ Of that revenue, 75 percent is then redistributed back to the tribe, which is legally obligated to use it for transportation purposes under section 3(b) of the RCW.³⁹ The state keeps the remaining 25 percent of the tax as its own revenue.⁴⁰ Tribes are then required to submit

³⁶ RCW 82.36.450. The legislative history behind this enactment contains an interesting note on legislative recognition and belief, which is applicable here:

"The legislature recognizes that certain Indian tribes located on reservations within this state dispute the authority of the state to impose a tax upon the tribe, or upon tribal members, based upon the distribution, sale, or other transfer of motor vehicle and other fuels to the tribe or its members when that distribution, sale, or other transfer takes place upon that tribe's reservation. While the legislature believes it has the authority to impose state motor vehicle and other fuel taxes under such circumstances, *it also recognizes that all of the state citizens may benefit from resolution of these disputes between the respective governments.*" [1995 c 320 § 1] [emphasis added].

³⁷ Wash. State Dep't of Licensing, *2010 Tribal Fuel Tax Agreement Report*, updated February 2011, <http://www.wsdot.wa.gov/NR/rdonlyres/97C37EB3-7DBC-4992-B790-CBAC914D7DDF/0/Apr192011Updated2010FuelTaxAgreementReport.pdf>.

³⁸ Scott Gutierrez, *Republicans want to revisit tribal gas tax refunds*, SEATTLEPI.COM (Mar. 16, 2011), <http://www.seattlepi.com/local/transportation/article/Republicans-want-to-revisit-tribal-gas-tax-refunds-1230552.php>.

³⁹ *Id.*

⁴⁰ *Id.*

annual reports to the state Department of Licensing (DOL) to show that they are complying with the regulation that they only using those funds for transportation-related purposes.⁴¹ However, these audit reports are exempt from public disclosure requirements, and the tribe is allowed to choose who can perform the audit.⁴² These agreements have generated significant funds for Washington tribes. According to the DOL, tribes received \$31.72 million from November 1, 2009, to December 31, 2010, under the gas tax agreements.⁴³

The Current Controversy and the Pending Case before the Washington Supreme Court

As can be expected in nearly every situation in which a tribe appears to be receiving a benefit that is not concurrently provided to all citizens, non-tribal entities have complained that tribes were getting special treatment. The issue was first raised by the Automotive United Trades Organization of Washington (AUTO), which bills itself as a “nonprofit trade association of motor fuel retailers and suppliers doing business in Washington state.”⁴⁴ AUTO, seeing the millions of dollars in reimbursements to tribes as lost potential revenue, contends that the money received by Washington tribes as a result of these gas tax agreements is being used for purposes other than what is strictly allowed in the statute.⁴⁵ Specifically, AUTO claims that tribes are using the money from the state reimbursements to subsidize fuel costs and permit tribal gas retailers to sell gas at a lower price than their non-tribal competitors.⁴⁶ In its brief, AUTO alleges constitutional violations and seeks an injunction on state refund payments to tribes under the gas tax agreements.⁴⁷

In its reply, the State immediately calls the challenge to the gas tax agreements an issue of sovereign immunity: “The effect of sovereign immunity, as with judicial or any other immunity, on a particular case may seem harsh, but *the recognition of immunities is a reflection of well established policy decisions*” (emphasis added).⁴⁸ In other words, while AUTO might have a legitimate complaint that its members are being treated unfairly, its recourse should be at the ballot box and not in the courts. “Implicitly recognizing the bar imposed by tribal sovereign immunity, the Plaintiff has sued only one of the parties to the agreement it seeks to eviscerate . . . [t]he reason Plaintiff has not included the Tribes in this suit is simple: the Tribes are immune from suit as sovereign governments.”⁴⁹

⁴¹ *Id.*

⁴² *Id.*

⁴³ Wash. State Dep’t of Licensing, *supra* note 36.

⁴⁴ AUTOMOTIVE UNITED TRADES ORGANIZATION HOME PAGE, <http://www.autowa.org/>.

⁴⁵ Brief of Appellant at 8-9, *Auto. United Trades Org. v. State*, No. 85661-3 (filed Apr. 15, 2011).

⁴⁶ *Id.*

⁴⁷ *Id.* at 1

⁴⁸ Memorandum in Support of State Defendants’ Motion to Dismiss First Amended Complaint For Failure to Join Indispensable Parties at 2, *Auto. United Trades Org. v. State*, No. 10-2-00599-1 (filed Nov. 12, 2010).

⁴⁹ Brief of Respondent at 3, *Auto. United Trades Org. v. State*, No. 85661-3 (filed June 24, 2011) (quoting *Okla. Tax Comm’n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 511 (1991)).

At trial, the case turned largely on procedural issues, with the trial court holding that tribes are necessary parties to any litigation which would deprive them of their contractually-expected fuel payments.⁵⁰ This decision was based on CR 19, which requires the joinder of necessary parties to any case that could affect their interests.⁵¹ Tribal sovereign immunity, which was never waived, prevented AUTO from joining the tribes as a defendant. When AUTO tried to amend its complaint to include the tribes, that motion was denied.⁵² In his motion to dismiss the case for lack of a necessary party, Grays County Superior Court Judge Gordon Godfrey lamented that the procedural issues raised by CR 19 did not allow him to decide the case on its merits: “I do find one thing repugnant in the whole situation, that in our system of government . . . there is no judicial remedy [for those wishing to challenge the legitimacy of such agreements]. I do believe that . . . this is an issue that needs to be addressed by our Supreme Court.”⁵³

On September 7, 2011, the Washington State Supreme Court agreed with Judge Godfrey, accepting review of the case.⁵⁴ The Supreme Court will ultimately decide whether sovereign immunity prevents the joinder of a tribe as a necessary party to litigation challenging government-to-government negotiations between two sovereign entities. The Supreme Court will need to overturn significant precedent if it holds that the tribes should be joined to the litigation, because two recent appellate decisions have upheld CR 19’s dismissal requirements in cases similar to the current case (see below). Both cases involved challenges to state/tribal agreements by individuals who were not parties to the negotiations and who were unhappy with how those negotiations turned out. But in both cases, the tribes were deemed necessary and indispensable parties, requiring that both cases be dismissed.

In *Matheson v. Gregoire*, a Puyallup tribal member brought suit against the tribe, seeking the nullification of taxation agreements between the tribe and the State regarding cigarettes.⁵⁵ A state statute, similar to those in the *AUTO* case, governed those agreements; the revenue-sharing agreements were also similar, with the State agreeing to refund 70 percent of revenue from cigarette taxes.⁵⁶ The tribe is then obligated to peg the tribal-imposed tax at the same level as that of the state, and to only buy cigarettes from state-licensed wholesalers.⁵⁷ The appellate court dismissed the

⁵⁰ *Id.* at 8.

⁵¹ Joinder of Persons Needed for Just Adjudication, WASH. CT. R. 19.

⁵² Order Denying Motion, Judge Gordon Godfrey, *Automotive United Trades Organization v. Washington; Christine Gregoire*. No. 10-2-00599-1, Grays County Superior Court, Feb. 15, 2011.

⁵³ Erik Smith, *Republicans Fume About Indian Gas-Tax Deal*, WASHINGTON STATE WIRE, Mar. 20, 2011, http://www.washingtonstatewire.com/home/8105-republicans_on_the_warpath_about_indian_gas_tax_money.htm.

⁵⁴ Letter Accepting Review of Case, *Auto. United Trades Org. v. State*, No. 85661-3 (filed Sept. 7, 2011).

⁵⁵ *Matheson v. Gregoire*, 139 Wn. App. 624, 627-28 (2007).

⁵⁶ *Id.*

⁵⁷ *Id.*

case, ultimately holding that “the tribal interest in immunity overcomes the lack of an alternative remedy or forum for plaintiffs.”⁵⁸

Two years later, a similar case, *Mudarri v. State*, involved a challenge, this time from a non-tribal business competitor, to agreements signed between the Puyallup tribe and the State, permitting the tribe to operate electronic scratch ticket games.⁵⁹ This case featured a nearly identical constitutional attack on the state-tribal agreements to the *AUTO* case. Again, the court dismissed, primarily on CR 19 grounds, but also because the Court found the tribe to be a necessary party to any action seeking to invalidate a contract to which the tribe is a party.⁶⁰ The Court took the additional step of holding that, because of sovereign immunity, the plaintiff’s claims could not be adequately adjudicated, and that therefore the entire matter should be dismissed.⁶¹

Matheson and *Mudarri* involved lawsuits that had the ultimate goal of effectively nullifying state-tribal agreements. But in both of those cases, the plaintiffs did not join the necessary parties (the tribes themselves). Under CR 19(a), whether a party is necessary depends on whether the absent party has a legally protected interest relating to the action.⁶² Such an absent party is necessary if the matter to be decided in its absence would “(A) as a practical matter impair or impede [its] ability to protect that interest, or (B) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations be reason of [its] claimed interest.”⁶³

The 9th Circuit supported reasoning similar to the holdings in *Matheson* and *Mudarri* through its decision in *Wilbur v. Locke*.⁶⁴ That case involved a cigarette tax agreement between the Swinomish tribe and the State that, like the agreements in the present case, provided the tribe with tax money that the tribe agreed to spend for “essential government purposes.”⁶⁵ Again, the plaintiffs (here, members of the tribe itself, who believed that *any* agreement on taxation between the state and the tribe was illegal under the Commerce Clause of the United States Constitution) did not join the tribe as a party to the suit. At trial in federal court, the State moved to dismiss pursuant to FRCP 19.⁶⁶ This motion was denied, because the district court held that the tribe was not a necessary party.⁶⁷ But the 9th Circuit reversed the district court, and dismissed the action, primarily on the basis that the tribe was a necessary and indispensable party.⁶⁸

⁵⁸ *Id.* at 636.

⁵⁹ *Mudarri v. State*, 147 Wn. App. 590, 594 (2008).

⁶⁰ *Id.* at 604.

⁶¹ *Id.* at 605.

⁶² WASH. CT. R. 19, *supra* note 50.

⁶³ *Id.*

⁶⁴ *Wilbur v. Locke*, 423 F.3d 1101, 1113-14 (9th Cir. 2005).

⁶⁵ *Id.* at 1104-05.

⁶⁶ Analogous to WASH. CT. R. 19, *supra* note 50.

⁶⁷ *Wilbur*, *supra* note 63, at 1105.

⁶⁸ *Id.* at 1114.

The Court held that “because the Tribe has an interest in retaining the rights granted by the tax agreement, the requirement of a ‘legally protected’ interest is satisfied.”⁶⁹

The *Matheson/Mударри/Wilbur* line of cases is practically indistinguishable from the *AUTO* case, both in terms of facts and in terms of relevant law. The trial court was well within its discretion dismissing *AUTO*’s suit, regardless of Judge Godfrey’s consternation in doing so. However, while this issue seems well settled in Washington, it is less settled elsewhere. Considering the United States Supreme Court’s recent moves to limit nearly all forms of tribal sovereignty to their bare minimum, a jurisdictional split between state or federal courts could easily lead to a situation in which the Supreme Court agrees to take another look at the whole state/tribal tax-sharing arena.

Very recently, in *Salton Sea Venture, Inc. v. Ramsey*, a federal district court had the opportunity to review a similar case from southern California.⁷⁰ In *Salton Sea*, the owners of a fuel station/convenience store brought suit against a tribally-operated gas station, alleging, among several other issues, that the tribe was selling gas at illegally low rates, which had a negative effect on the plaintiff’s business.⁷¹ In an opinion that continually relied on and referred to tribal sovereignty and immunity, Chief Judge Irma Gonzalez denied the plaintiffs’ motion for a preliminary injunction primarily on FRCP 19 grounds.⁷² Judge Gonzalez found that the first three factors of FRCP 19 weighed in favor of dismissal,⁷³ and that the only factor weighing in favor of the plaintiff was the lack of an alternative forum.⁷⁴ Relying on 9th Circuit precedent, Judge Gonzalez said that “tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.”⁷⁵

Conversely, in *StoreVisions v. Omaha Tribe of Neb.*, the Nebraska State Supreme Court recently issued an opinion limiting the effect, or at least the incidence, of sovereign immunity.⁷⁶ Although that case involved more of a contractual issue, and turned largely on issues of waiver of sovereign immunity (discussed in the *AUTO* and other Washington cases, *supra*, but not the key issue in those cases), the Nebraska

⁶⁹ *Id.* at 1112.

⁷⁰ *Salton Sea Venture, Inc. v. Ramsey*, No. 11cv1968-IEG (WVG), 2011 WL 4945072 (S.D. Cal. Oct. 18, 2011) *preliminary motion for injunction denied*.

⁷¹ *Id.* at 1.

⁷² *Id.* at *passim*.

⁷³ *Id.* at 8-9. “Plaintiff’s action seeks to place restrictions on the sale of fuel at the Red Earth Travel Center. Therefore, the Torres-Martinez tribe and the Selnak-is Corp. would suffer severe prejudice by not being parties to an action that challenges their ability to sell fuel at their travel center and raise revenue to support the tribal economy. In addition, because the sale of fuel at the Red Earth Travel Center is the focus of Plaintiff’s action, no partial remedy can be fashioned that would not implicate those interests or would eliminate the prejudice to those two non-parties. Further, adequate relief could not be awarded without including the Torres-Martinez tribe and the Selnak-is Corp. as part of the injunction because they own and control the travel center at issue. Accordingly, the first three factors likely all favor dismissal of the action.” *Id.* at 6.

⁷⁴ *Id.* at 9.

⁷⁵ *Id.* at 6, quoting *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002).

⁷⁶ *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 240 (2011), *cert. denied* 132 S.Ct. 1016 (2012).

Supreme Court's refusal to apply accepted Supreme Court precedent⁷⁷ led the Omaha Tribe to file a recent petition for certiorari to the United States Supreme Court, alleging that the "Nebraska Supreme Court erred in allowing StoreVisions to rely on the representations of two tribal council members, attribute those actions to being those of the tribe, and conclude the tribe had waived sovereign immunity."⁷⁸ Although the Supreme Court declined to grant certiorari in that case,⁷⁹ it is certainly an issue upon which advocates of tribal sovereignty and self-determination should remain focused.

Analysis and Conclusion

The United States has enjoyed the benefits and privileges—as well as the responsibilities—of self-determination for over two centuries. Roughly forty years ago, the nation embarked upon a policy designed to finally allow Indian tribes to experience many of the benefits of self-determination. President Nixon's call for the nation to finally live up to its promises was inspired at the time, and Indian tribes today have arguably never been better off. Borrowing a familiar form of nomenclature from Hollywood, the self-determination era might well be characterized as Promise II. But are we, as a nation, truly living up to Promise II?

General federal policy toward Indian self-determination should be reflected at the state level. Gas tax revenues support tribal sovereignty by allowing tribes to assume many of the responsibilities and obligations associated with sovereignty. Tribes receive the revenue from taxes imposed on gasoline sold on the reservation, and, like the state of Washington, tribes are constitutionally obligated to spend those revenues on transportation-related projects. Gas tax agreements generate significant revenue for tribes and help them to build and maintain critical infrastructure on their reservations. A cursory glance at the most recent report from the Washington Department of Licensing reveals some of the extensive transportation projects embarked on in just the past two years, including massive improvements to roads co-managed by the State and the tribes, mass transit/infrastructure development on several reservations, police services, and parking expansions.⁸⁰

Although AUTO complains that the revenues from the gas tax agreements have been improperly used to give the tribes an illegal competitive advantage in the highly regulated fuel sales market, AUTO does not include any substantive evidence of this practice in its complaint. Instead, AUTO includes among its exhibits such expenditures as a boat launch, hiking trail, and pedestrian tunnel, somehow claiming that these expenditures are unrelated to transportation.⁸¹ AUTO fails to include such important

⁷⁷ See *id.* at 245 (referring to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("a waiver of sovereign immunity cannot be implied but must be unequivocally expressed"); and see *also* *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 756 (1998) ("Tribal immunity is a matter of federal law and is not subject to diminution by the States.").

⁷⁸ Petitioner's Brief for Certiorari at 13, *StoreVisions v. Omaha Tribe of Neb.*, No. 11-508 (*cert. denied* Jan 09, 2012).

⁷⁹ *Omaha Tribe of Neb. v. StoreVisions*, 132 S.Ct. 1016 (2012) (mem).

⁸⁰ Wash. State Dep't of Licensing, *supra* note 36, at 5-6.

⁸¹ Brief of Appellant, *supra* note 44, at 9.

considerations as the fact that the tribes are subject to a regulated auditing and reporting requirement, which was made more stringent as a result of the 2007 amendments to RCW 82.36.450. Also, one of the most visible reasons for the controversy—the apparent difference in gas prices between tribal and non-tribal retailers as shown in a study by the Washington Policy Center⁸²—does not in itself prove that gas tax revenues are being used to subsidize prices. As the tribes argue, their prices are generally the same as other low-cost retailers such as Costco and Safeway.⁸³ Furthermore, tribes could be reducing costs through other mechanisms, such as charging lower rent to retailers, engaging loyal customers, lowering overhead costs, and providing fewer ancillary services. While the pricing discrepancy certainly engages the public on the issue, nobody is asking why AUTO is not suing Costco.

During a recession, everyone tends to focus on the cost issue, but it is also important to step back and take a look at the larger policy issue. Gas tax revenues, like revenues from Indian gaming and the sale of cigarettes, while obviously not the ideal methods of raising revenue, still help to fill the massive void created by over 200 years of broken treaty promises and failed federal policies toward Indians and Indian tribes. For example, the Swinomish tribe relinquished all claims to its traditional territory via treaty, and in exchange it was promised significant support from the United States.⁸⁴ Over the next 150+ years, the Swinomish struggled to provide crucial social resources and basic services to its members, as the support promised in the treaty never materialized. Today, the tribe owns and operates a very large Chevron station which has been highly successful.⁸⁵ In 2009 and 2010, the tribe used the proceeds from its gas station for the following transportation improvements:

WSDOT Roundabout Extension Project – The purpose of this \$2 million project is to construct a new roadway extension south of SR20 from an existing roundabout and interchange road that serves several economic enterprises located in the area. Activities included preliminary engineering, design, NEPA compliance, and federal permitting. Tribal Staff continue to work with federal, state, and county agencies on this important project.

Swinomish Village Road Improvements and Reconstruction – Work continued on various road improvement projects adjacent to tribal housing. Specifically, the Tribe supported improvements to correct deficiencies in the road-related storm-water drainage system in the Swinomish Village. Activities included preliminary engineering, design, NEPA, and right of way. Additionally, plans were completed for the reconstruction of Sahalie Drive, a residential roadway.

⁸² Amicus Curiae Memorandum of the Washington Policy Center in Support of Petition for Review at 4-5, *Auto. United Trades Org. v. State*, No. 85661-3 (filed Aug. 4, 2011).

⁸³ Keith Eldridge, *Study: Washington Tribes Taking Unfair Advantage of Gas Tax Rebate*, Oct. 6, 2011, 5:01 PM PST, <http://www.komonews.com/news/local/131299294.html?tab=video&c=y>.

⁸⁴ Treaty of Point Elliott, Jan. 22, 1855, http://www.historylink.org/index.cfm?DisplayPage=output.cfm&File_Id=2629.

⁸⁵ SWINOMISH TRIBAL COMMUNITY HOME PAGE, *see* Enterprises, Chevron, <http://www.swinomish.org/Enterprises/Chevron.aspx>.

Tribal Road Maintenance Projects - Work on these road maintenance projects continues with staff meeting with engineers on preliminary design and permitting for surface repair of Squi Qui Lane, and for surface overlays of selected roads within the Swinomish Village. Activities include mowing, brush cutting, ditch maintenance, patch repair, crack sealing, street sweeping, equipment maintenance, and signage.

Transportation Planning and Administration – Additional transportation planning work and administrative expenses related to future road projects.

Police Services - Including tribal and non-tribal local government police agencies that provide road patrol services.⁸⁶

Reading this report, it is difficult to find substance in AUTO's complaint.

However, even just a cursory glance through media commentary on the AUTO case reveals that the real issue is a classic misunderstanding of the fact that tribes are sovereign entities. For example, a recent KOMO "Problem Solvers" Investigation "revealed" nothing about the legal mechanisms designed to give tribes a chance to act as sovereigns. On the other hand, the report immediately cited the nebulous Washington Policy Center study (see above) and contained several quotes on the unfairness of the arrangement. "We're working on the skinniest margin we can, and they don't have to pay state tax. So that's their luck," said Mike Leake, general manager of a non-tribal gas station. "They use it to their advantage is what they do," said Gary Carpenter, a customer at a non-tribal gas station. "It's not fair."⁸⁷ A considerable number of other local stations and newspapers have filed similar stories and opinions, and none have discussed tribal sovereignty, instead preferring to focus on unfairness,⁸⁸ excessive state overreach,⁸⁹ and transparency.⁹⁰ It is not surprising, therefore, that this attitude has spread throughout the general public, who have already been conditioned by the media to be suspicious of anything the state of Washington does benefitting tribes.

Not surprisingly, the tribes are facing a well-funded and extremely resourceful adversary in the AUTO case: the Washington business establishment. A list of amicus briefs submitted on behalf of AUTO reads like a who's-who of big business in the state.⁹¹ Considering the amount of political influence these groups must have, it seems

⁸⁶ Wash. State Dep't of Licensing, *supra* note 36, at 10-11.

⁸⁷ ELDRIDGE, *supra* note 82.

⁸⁸ Erik Smith, *State Will Give Tribes \$427 Million in Gas Tax Money Over 10 Years, While Transportation Budget Runs a Billion Short*, WASHINGTON STATE WIRE, Apr. 4, 2011, http://www.washingtonstatewire.com/home/8565-state_will_give_tribes_427_million_in_gas_tax_money_over_10_years_while_transportation_budget_runs_a_billion_short.htm.

⁸⁹ *Id.*

⁹⁰ GUTIERREZ, *supra* note 37.

⁹¹ See amicus briefs submitted on behalf of AUTO by Associated General Contractors of Washington, Association of Washington Business, National Federation of Independent Business, Washington Oil Marketers' Association, and Washington Policy Center. No amicus briefs have been submitted on behalf of the State. Wash. Courts Home page,

that they would have the resources to pursue a resolution to this issue through the proper forum: the ballot box. And, it seems, they have done so, as House Bill 2013 was introduced earlier in 2011,⁹² purporting to amend the RCW to require that the gas tax agreements conform to Washington constitutional standards requiring the use of highway revenue.⁹³ However, a detailed comparison of HB 2013 and Article 40 show no substantive difference in how sovereigns must spend highway revenue. Instead, HB 2013 differs from Article 40 by focusing on additional transparency, by forcing the state to choose an auditor in conjunction with the tribe (currently, the tribe chooses the auditor) and by removing the clause which currently protects the tribe's business records as personal information. Even the bill's own sponsor concedes that it will not pass: "I am not delusional," State Rep. Mike Armstrong, R-Wenatchee, said. "I know this bill isn't going to go anywhere. I introduced it just to have a discussion. And it sure has caused some discussion to take place."⁹⁴

Hopefully, as this discussion continues to take place, members of the Washington legislature will remember the "Promise II" President Nixon made to Indian people over forty years ago. The Supreme Court, while initially moving to uphold this promise through its strong affirmations of sovereignty, has changed direction in recent years. While Washington law appears solid on sovereign immunity through the consistent use of CR 19 by its courts, other jurisdictions are not so settled, and it is difficult to say how the United States Supreme Court would decide should the issue reach its docket again. Still, the underlying proposition embodied in Washington law is a strong one: disaffected citizens cannot sue sovereign entities engaged in government-to-government negotiations, just because they do not like the outcome of those negotiations. AUTO and its amicus supporters should direct their efforts and considerable resources toward the proper forum for an adjudication of their dispute: the legislature and the ballot box.

http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.briefsByTitle&courtId=A08&firstLetter=all, scroll to "Automotive United Trades Organization v. State of Washington et al."

⁹² H.B. 2013, 62nd Leg., Reg. Sess. (Wash. 2011), *available at*

<http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/2013.pdf>.

⁹³ See WASH. CONST. art. II, § 40.

⁹⁴ SMITH, *Republicans Fume*, *supra* note 52.

Justice Rehnquist's Theory of Indian Law: The Evolution from *Mazurie* to *Atkinson* – Where Did He Leave the Court?

Brenna Willott¹

"I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years."²

- Justice William Rehnquist, 1980

I. Introduction

Almost immediately upon taking his seat on the United States Supreme Court in 1972, Justice Rehnquist demonstrated an interest in Indian law, writing the opinion for the Court in the 1975 decision, *United States v. Mazurie*.³ In the following twenty-seven years on the Court, both as an associate justice and as chief justice, Rehnquist continued to demonstrate an interest in refining the Indian law jurisprudence of the Supreme Court. Rehnquist's opinions in his first eight years on the Court included eight majority opinions and four dissents in the field of Indian law.⁴ His impact on Indian law goes beyond what even his long tenure on the Court would suggest.⁵ Through consistency of ideology, sheer number of opinions authored, and eventually through seniority on the Court, Rehnquist built a body of law that introduced new limits on tribal sovereignty, and that stands as precedent for any future cases the Court takes in this area.

This paper will trace the evolution of Rehnquist's theory of Indian law and his use of precedent and history through a chronological analysis of the key majority decisions that he wrote, and also through two key opinions in which he participated but did not write for the majority. These opinions reflect Rehnquist's evolution from a theory of Indian law relatively affirming of tribal sovereignty, including the right of tribes to regulate the activities of non-Indians on tribal lands, to a theory of implied divestiture of tribal authority which gave regulatory power increasingly to the states. In his time on the Court, Rehnquist largely rewrote the foundational cases in Indian law, authored by Chief Justice John Marshall in the early 19th century.

¹ J.D. Candidate, 2012, Seattle University School of Law. I would like to thank Emily McReynolds for her excellent suggestions and help through the editing process, Professor Eric Eberhard for his guidance over the past two years and for his thoughtful review of multiple drafts of this paper, and the staff of the American Indian Law Journal for the opportunity to contribute to this important discussion.

² *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 176 (1980).

³ *United States v. Mazurie*, 419 U.S. 544 (1975).

⁴ David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573, 1632 (1996).

⁵ *Id.*

The foundational cases, known as the Marshall trilogy, include *Johnson v. McIntosh* (1823),⁶ *Cherokee Nation v. Georgia* (1831),⁷ and *Worcester v. Georgia* (1832).⁸ In *Johnson*, Marshall articulated the doctrine of discovery, where according to Marshall Indians had a right of occupancy on the land, however by discovery the Europeans gained “absolute ultimate title.”⁹ Marshall followed the *Johnson* opinion by writing *Cherokee*, where he found that the tribes are “domestic dependent nations.”¹⁰

In *Worcester v. Georgia*, Marshall made his most emphatic endorsement of tribal sovereignty. He used strong statements to carry his point, writing that “the several Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive,”¹¹ and that within those boundaries “the laws of Georgia can have no force.”¹² Professor David Getches has summarized Marshall’s “ringing, unmistakable” endorsement of tribal sovereignty by capturing the essential language Marshall used in *Worcester*, including references to “national character,” “right of self-government,” “nations capable of maintaining the relations of peace and war,” “distinct, independent political communities,” “Indian nations,” “political existence,” and “pre-existing power of the nation to govern itself.”¹³

Rehnquist took this precedent in a very different direction from Marshall, reflecting his focus on limiting the inherent sovereignty of tribes to internal matters. According to Rehnquist, the authority of a tribe could properly be exercised only over tribal members. Once a non-member entered the picture, Rehnquist shifted his stance to one of implied divestiture of tribal authority, meaning that a tribe could exert limited or no authority over non-Indian persons unless and until the federal government delegated that authority to the tribe. Otherwise, the exercise of tribal authority over non-Indians is inconsistent with the dependent status of the tribes.¹⁴ This shift also allowed Rehnquist leeway to assert his states’ rights perspective.

In addition to tracing Rehnquist’s theory of Indian law, this paper will also follow his use of history and precedent in applying his theory of implied divestiture. While early decisions authored by Rehnquist relied on prior case precedent, in later years he increasingly employed history and custom to make his point. Towards the end of his time on the Court, Rehnquist returned again to precedent, some of it in case law written by his own hand. Throughout, he relied on fact-specific analysis in order to reach his conclusions. Part II begins with consideration of Rehnquist’s early years on the Court.

⁶ *Johnson v. McIntosh*, 21 U.S. 543 (1823).

⁷ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

⁸ *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁹ *Johnson*, 21 U.S. at 592.

¹⁰ *Cherokee*, 30 U.S. at 2.

¹¹ *Worcester*, 31 U.S. at 557.

¹² *Id.* at 561.

¹³ Getches, *supra* note 3, at 1577 (citing *Worcester*, 31 U.S. at 547-62).

¹⁴ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978). “Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interest of this overriding sovereignty.” *Id.*

II. 1972 – 1980: Early Years on the Court

Justice Rehnquist's most dramatic transformation in the area of Indian law took place in the 1970s. As a relative newcomer to the Supreme Court, Rehnquist applied different techniques to reach decisions in Indian law cases, and his written opinions reflect this experimentation. His first opinion as an associate justice, *United States v. Mazurie*,¹⁵ was relatively supportive of tribal sovereignty, while his last authored opinion in this period, *Oliphant v. Suquamish Indian Tribe*,¹⁶ marks one of the most profound limitations on tribal sovereignty in the history of the Court.

A. *Mazurie* and *Moe*: The Beginning of the Implied Divestiture Theory

In the 1975 decision *United States v. Mazurie*, the Court addressed the question of whether the Wind River Tribes could require that a bar owner on fee land within the boundaries of the reservation obtain both a State of Wyoming license and a tribal license in order to sell liquor.¹⁷ In a unanimous decision, the Court upheld the power of Congress to delegate its regulatory authority to the Wind River Tribes.¹⁸ Rehnquist explained that “Congress has the constitutional authority to control the sale of alcoholic beverages by non-Indians on fee-patented land within the boundaries of an Indian reservation, and . . . Congress could validly make a delegation of this authority to a reservation's tribal council.”¹⁹

This holding is relatively unique in Rehnquist opinions, as it was supportive of tribal authority despite attempts by the Mazuries to establish that the “State of Wyoming had jurisdiction over non-Indians and their lands within the reservation.”²⁰ In support of his reasoning Rehnquist revisited early Indian law cases, including cases in support of the proposition that “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory,”²¹ and that tribes are a “‘separate people,’ possessing ‘the power of regulating their internal and social relations.’”²²

In reaching this conclusion, Rehnquist relied heavily on fact-specific analysis of the location of the bar within the reservation of the Wind River Tribes. Indeed, the case largely turned on whether the bar's location could be considered “Indian Country,” and among other factors, the Court considered the proportion of Indian families in the area, the number of Indian students in the state school nearby, and even the testimony of the

¹⁵ *Mazurie*, 419 U.S. 544 (1975).

¹⁶ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

¹⁷ *Mazurie*, 419 U.S. at 546.

¹⁸ *Id.* at 558.

¹⁹ *Id.* at 546.

²⁰ *Id.* at 552.

²¹ *Id.* at 557 (citing *Worcester*, 31 U.S. at 557).

²² *Id.* (citing *United States v. Kagama*, 118 U.S. 375, 381-82 (1886), and *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973)).

bar owner, indicating that the bar served both Indian and non-Indian patrons: “We are kind of out there by ourselves, you know.”²³

Justice Rehnquist’s next majority opinion, *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*,²⁴ followed quickly after *Mazurie* in 1976 and is Rehnquist’s first articulation of his theory of implied divestiture. Like *Mazurie*, *Moe* was a unanimous decision by the Court. This was the first opinion by Rehnquist relating to taxation, answering specifically the question of whether reservation sales of cigarettes to Indians were subject to taxation by the State of Montana. Relying on *McClanahan v. Arizona State Tax Commission*,²⁵ the Court upheld the District Court finding that sales to Indians were not subject to the state tax, but that the tax must be imposed on sales to non-Indians.²⁶

In the opinion, Rehnquist differentiated between what he saw as the inherent power of the tribe to govern its internal affairs,²⁷ and the power of the state to tax the activities of non-members within its boundaries, even if those activities occur on a reservation. He began by citing to *McClanahan* for the proposition that “[i]n the special area of state taxation . . . there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.”²⁸ However, the state’s sales tax may be imposed on non-Indian purchases because it is a “minimal burden designed to avoid the likelihood [that] non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax.”²⁹

The *Moe* opinion is thus a significant departure from Chief Justice Marshall’s view of tribal sovereignty as found in *Worcester v. Georgia*. In *Worcester*, Marshall wrote that the laws of the state have no force within the reservation;³⁰ in *Moe*, Rehnquist found that since the burden on the tribe in collecting the tax from non-Indians was minimal, the state law could apply on the reservation.³¹ He commented: “We see nothing in this burden which frustrates tribal self-government.”³²

Mazurie and *Moe* thus represent initial attempts by Rehnquist at defining a doctrine of Indian law. Most notably his theory of implied divestiture is first articulated in *Moe*, where he found that a state could reach across the borders of the reservation to collect tax from sales to non-Indians without infringing on the right of the tribe to govern

²³ *Id.* at 551.

²⁴ *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976).

²⁵ *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

²⁶ *Moe*, 425 U.S. at 483. “[T]he State may require the Indian proprietor simply to add the tax to the sales price.” Rehnquist relies on *McClanahan* throughout the opinion, beginning with a reference to the decision of the District Court. *Id.* at 468.

²⁷ Such as sales of cigarettes to tribal members.

²⁸ *Moe*, 425 U.S. at 475-76 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (summarizing *McClanahan*)).

²⁹ *Id.* at 483.

³⁰ *Worcester*, 31 U.S. at 561.

³¹ *Moe*, 425 U.S. at 483.

³² *Id.* (citing *Williams v. Lee*, 358 U.S. 217, 219-220 (1959)).

the reservation. In both cases, he relied on prior Supreme Court precedent for his authority, an approach that would begin to shift in his next two decisions.

B. *Rosebud* and *Oliphant*: History and Culture Replace Precedent

While Rehnquist is perhaps best known for his use of history as a basis for the Court's holding in *Oliphant v. Suquamish Indian Tribe*,³³ his first attempt at this approach may be found in *Rosebud Sioux Tribe v. Kneip*.³⁴ Written in 1977, a year before *Oliphant*, *Rosebud* addressed the question of whether the original boundaries of the reservation had been diminished by three acts of Congress passed in 1904, 1907, and 1910 respectively.³⁵ The Court affirmed the original District Court holding that these acts "did clearly evidence congressional intent to diminish the boundaries of the Rosebud Sioux Reservation."³⁶

At the outset of the opinion, Justice Rehnquist set out the basis for his statutory analysis, writing that "[a] congressional determination to terminate [an Indian reservation] must be expressed on the face of the Act or be clear from the *surrounding circumstances and legislative history*."³⁷ Rehnquist began by describing the original 1889 reservation boundaries. He then shifted to the well-established principle that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith,"³⁸ before declaring that the "mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status."³⁹

Moving from basic principles to a discussion of the 1904, 1907, and 1910 Acts, Rehnquist used history and legislative intent to show that the reservation had in fact been diminished in a lawful manner. He traced the history of the three bills through Congress, relying on the floor discussion by the sponsor of one Act, and the historical record showing the representations of the Secretary of the Interior, while ignoring the constitution of the Rosebud Sioux Tribe that Secretary of the Interior had approved in 1935.⁴⁰ Justice Thurgood Marshall's dissent drew on the language of the tribe's constitution providing that "[t]he jurisdiction of the Rosebud Sioux Tribe . . . shall extend to the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889."⁴¹ Rehnquist may have been responding to Justice Marshall's dissent when he replied, "[W]e cannot remake history."⁴²

³³ *Oliphant*, 435 U.S. 191 (1978).

³⁴ *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

³⁵ *Id.* at 584.

³⁶ *Id.* at 587.

³⁷ *Id.* at 586 (citing *Mattz v. Arnett*, 412 U.S. 481, 505 (1973) (emphasis added)).

³⁸ *Id.* at 586 (citing *McClanahan*, 411 U.S. at 174).

³⁹ *Id.* at 586-87 (citing *Mattz*, 412 U.S. at 505).

⁴⁰ *Id.* at 616 n.1 (Marshall, J., dissenting).

⁴¹ *Id.* (Marshall, J., dissenting) (citing the constitution of the Rosebud Sioux Tribe, App. 1396-1397, Art. I).

⁴² *Id.* at 615 (citing *DeCoteau v. District County Court*, 420 U.S. 425, 449 (1975)).

Rehnquist more fully developed the historical approach in the 1978 decision *Oliphant v. Suquamish Indian Tribe*, which addressed the issue of whether Indian tribal courts have criminal jurisdiction over non-Indians.⁴³ In finding that tribal courts do not have jurisdiction over non-Indians, Rehnquist's analytical approach was very similar to *Rosebud Sioux*. According to Professor Getches, what is "most remarkable, though, is not the thin historical record on which the [*Oliphant*] Court relied; rather, it is the fact that conjectures about the past were used to justify a legal principal fixing the limits of tribal sovereignty."⁴⁴ Certainly, Rehnquist's choice of history was selective and could be considered misleading.

Rehnquist began his analysis by noting the fact that twelve Indian tribes besides the Suquamish Tribe had enacted ordinances giving the tribes criminal jurisdiction over non-Indian defendants.⁴⁵ He drew, however, on the authority of the Attorney General in 1834, rather than case precedent, in asserting that "tribal criminal jurisdiction over non-Indians, is *inter alia*, inconsistent with treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation and the dependence of the Indians on the United States."⁴⁶

Most of the rest of the opinion is devoted to historical references, including treaties signed by Indian tribes in Washington in the 1850s, the 1834 Western Territory Bill, the 1891 Supreme Court decision *In re Mayfield*, and a 1960 Senate report.⁴⁷ For example, Rehnquist found the Court's holding in the 1891 case *In re Mayfield* instructive because "the policy of Congress had been to allow the inhabitants of the Indian country 'such power of self government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization."⁴⁸

Rehnquist cited to little case precedent in *Oliphant*. While the opinion by Chief Justice Marshall in *Worcester v. Georgia* is most often cited in support of tribal sovereignty, in this opinion, Rehnquist instead referred twice to *Cherokee Nation v. Georgia* as precedent for limitations on tribal authority. Rehnquist cited *Cherokee* for the propositions (1) that tribes do retain "elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government,"⁴⁹ and (2) that foreign nations may not form political connections with tribes because tribes are "completely under the sovereignty and dominion of the United States."⁵⁰ He relied on *Worcester* only for the proposition that "Indian nations were, from their situation, necessarily dependent on [the United States] . . . for their protection from lawless and injurious intrusions into their country."⁵¹ Rehnquist also

⁴³ *Oliphant*, 435 U.S. at 195.

⁴⁴ Getches, *supra* note 3, at 1597.

⁴⁵ *Oliphant*, 435 U.S. at 196.

⁴⁶ *Id.* at 199. The Attorney General's opinion in 1834 would not have been controlling precedent in the way that *Worcester*, decided in 1832, would be considered precedent for future Court decisions.

⁴⁷ *Id.* at 197-206.

⁴⁸ *Id.* at 204 (citing *In re Mayfield*, 141 U.S. 107, 115-116 (1891)).

⁴⁹ *Id.* at 208.

⁵⁰ *Id.* at 209.

⁵¹ *Id.* at 207 (citing *Worcester*, 31 U.S. at 555).

cited to the first case of the Marshall trilogy, *Johnson v. McIntosh*, to show that tribes' rights "to complete sovereignty, as independent nations [are] necessarily diminished."⁵²

Another notable citation in *Oliphant* is to a dissenting opinion by Justice Johnson in the 1810 Supreme Court decision *Fletcher v. Peck*,⁵³ which Rehnquist incorrectly categorized as a concurrence with the majority.⁵⁴ He referred to *Fletcher* for what he termed the "intrinsic" limitations on Indian tribal authority, and which he believed were not "restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty."⁵⁵ He chose the following passage from *Fletcher* to quote directly:

[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves.⁵⁶

This citation shows that Rehnquist's theory of implied divestiture draws in part from a dissenting opinion in an 1810 case. Rehnquist's belief that Indian tribes only have authority to govern themselves, first seen in *Moe*, was most clearly set forth here in *Oliphant*.

Oliphant has been roundly criticized because of Rehnquist's unconventional use of the Marshall trilogy in support of the holding.⁵⁷ His use of history also makes *Oliphant* remarkable in its departure from previously established principles of tribal sovereignty. The next section considers Rehnquist's support for Justice Thurgood Marshall's opinion in *Santa Clara Pueblo v. Martinez*⁵⁸ as a test of ideological consistency with the *Oliphant* opinion.

C. Santa Clara Pueblo: Making Sense of Rehnquist's Joining in Marshall's Majority

Santa Clara Pueblo, decided in 1978, limited the negative impact of *Oliphant*. In addressing the question of whether a federal court may review the validity of a tribal ordinance denying membership to the children of certain female tribal members,⁵⁹ the Court answered in the negative, strongly affirming inherent tribal authority.⁶⁰ In Part II of the opinion, Justice Marshall relied on *Worcester v. Georgia* in asserting that tribes are "'distinct, independent political communities, retaining their original natural rights' in

⁵² *Id.* at 210.

⁵³ *Id.* at 209 (citing *Fletcher v. Peck*, 10 U.S. 87 (1810)).

⁵⁴ *Id.* Justice Johnson clearly indicates he is writing a dissent, see *Fletcher*, 10 U.S. at 145.

⁵⁵ *Id.*

⁵⁶ *Id.* at 209 (quoting Justice Johnson in *Fletcher v. Peck*, 10 U.S. 87, 147 (1810), emphasis added by Rehnquist).

⁵⁷ See e.g., Getches, *supra* note 3, at 1595.

⁵⁸ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

⁵⁹ *Id.* at 51.

⁶⁰ *Id.* at 52.

matters of local self government.”⁶¹ He continued: “As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”⁶²

Justice Rehnquist joined in all Parts of the Court’s opinion, with the exception of Part III. Part I describes the procedural posture of the case, while Part II references precedent generally affirming tribal sovereignty. In Part IV, Justice Marshall found that the Indian Civil Rights Act of 1968 did not provide a cause of action for the declaratory and injunctive relief asserted by the respondents.⁶³ Part V included the holding, and also referenced *Cherokee Nation v. Georgia*, although Marshall seemed to believe *Cherokee* was not entirely controlling:

Although we early rejected the notion that Indian tribes are ‘foreign states’ for jurisdictional purposes under Article III . . . we have also recognized that tribes remain quasi-sovereign nations which, by government structure, culture, and sources of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments.⁶⁴

Part III, which Rehnquist did not join, addressed in two short paragraphs the question of whether the tribes possess “common-law immunity from suit traditionally enjoyed by sovereign powers.”⁶⁵ In Part III, Justice Marshall concluded that “[i]n the absence here of any unequivocal expression of contrary legislative intent . . . suits against the tribe under the [Indian Civil Rights Act] are barred by its sovereign immunity from suit.”⁶⁶ Rehnquist, having introduced his theory of implied divestiture in *Moe*, here remained ideologically consistent in refusing to join the section of the *Santa Clara Pueblo* opinion that presumes immunity from suit until Congress indicates otherwise.⁶⁷

Because Rehnquist did not write the *Santa Clara Pueblo* opinion, any attempt at analysis is to some extent hypothesizing. Regardless, *Santa Clara Pueblo* serves as a useful test for ideological consistency against his written opinions. Moving into the 1980s, and his concurring/dissenting opinion in *Washington v. Confederated Tribes of*

⁶¹ *Id.* at 55 (citing *Worcester*, 31 U.S. at 559).

⁶² *Id.* at 56.

⁶³ *Id.* at 69.

⁶⁴ *Id.* at 71.

⁶⁵ *Id.* at 58. Part II introduces the question, which is considered in Part III.

⁶⁶ *Id.* at 59.

⁶⁷ Review of Rehnquist’s voting in later cases shows inconsistency on the question of sovereign immunity from suit. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) Rehnquist voted with five other justices to uphold sovereign immunity from suit on contracts. *Id.* at 760. In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001), Rehnquist voted with a unanimous court holding that the tribe waived its sovereign immunity from suit by signing a contract that included an arbitration clause. *Id.* at 423. Finally, he referred to the principle of sovereign immunity in *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991). See *infra* Part IV.

the Colville Indian Reservation,⁶⁸ Rehnquist would make his first attempt at a bright line rule for future Supreme Court decisions.

III. 1980s: Attempting a Bright Line Rule in *Washington v. Confederated Tribes of the Colville Indian Reservation*

Rehnquist became Chief Justice in 1986, after which point he came increasingly to rely on other justices to write most Indian law opinions for the majority.⁶⁹ Thus, the most representative illustration of Rehnquist's perspective in this period comes from the 1980 decision, *Washington v. Confederated Tribes of the Colville Indian Reservation*, where Rehnquist concurred in part and dissented in part from Justice White's majority opinion.

Justice White, writing for the majority in *Colville*, found that a state may tax the sale of cigarettes on the reservation to non-members of the tribe.⁷⁰ Justice Rehnquist wrote a separate opinion, concurring in part and dissenting in part, which continued his historical approach from *Rosebud* and *Oliphant* and also drew heavily upon precedent in supporting his position.⁷¹

Rehnquist began by noting that “[s]ince early in the last century, this Court has been struggling to develop a coherent doctrine by which to measure with some predictability the scope of Indian immunity from state taxation.”⁷² He made clear that he hoped his opinion would establish a bright line rule in the state taxation area of Indian law: “I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years.”⁷³

Moving into the analysis, Rehnquist delved into issues of state taxing power through precedent, in particular *McClanahan v. Arizona State Tax Commission*.⁷⁴ He noted that “*McClanahan* established a rule against finding that ‘ambiguous statutes abolish by implication Indian tax immunities.’”⁷⁵ He next moved to *Mescalero Apache Tribe v. Jones*,⁷⁶ the companion case to *McClanahan*.⁷⁷ *Mescalero* was important to Rehnquist because the Court “reviewed the tradition of sovereignty and found that no

⁶⁸ *Colville*, 447 U.S. 134 (1980).

⁶⁹ Getches, *supra* note 3, at 1634.

⁷⁰ Getches, *supra* note 3, at 1600.

⁷¹ *Id.* at 1605. Professor Getches notes that Rehnquist's opinion was originally written as a dissent to a majority opinion written by Justice Breyer. This may explain the detailed analysis found in Rehnquist's opinion.

⁷² *Colville*, 447 U.S. at 176.

⁷³ *Id.*

⁷⁴ *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

⁷⁵ *Colville*, 447 U.S. at 179.

⁷⁶ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

⁷⁷ *Colville*, 447 U.S. at 179.

tribal sovereign immunity for off-reservation activities had traditionally been recognized.”⁷⁸

Nowhere is Rehnquist’s states’ rights approach more apparent than in the beginning of Part II of his concurrence in *Colville*, where he noted that “[a]t issue here is not only Indian sovereignty, but also state sovereignty as well.”⁷⁹ He moved into a discussion of *Thomas v. Gay*, an 1898 case which allowed state taxation of cattle owned by non-Indians on land leased from the tribe.⁸⁰ This analysis of a late 19th century case formed part of the “‘backdrop’ which support[ed] Washington’s power to impose the tax in issue.”⁸¹

Rehnquist’s opinion in *Colville* is thus consistent with both his theory that tribes have inherent authority in governing internal affairs, but are impliedly divested of authority in all other areas, and with his deference to states’ rights, especially when a state is attempting to tax non-Indians with respect to goods purchased on a reservation. One of the next cases to address this issue came a little more than a decade later, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*.⁸²

IV. 1990 – 2001: Staying the Course in *Citizen Band Potawatomi* and *Atkinson*

Two decisions coming out of the 1990s and early 2000s are helpful to a discussion of Rehnquist’s theory of Indian law: *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (1991), and *Atkinson Trading Co., Inc. v. Shirley* (2001).⁸³

In *Citizen Band Potawatomi*, Rehnquist wrote for the majority to invalidate a state cigarette tax on tribal members who live in “Indian Country.” While this may at first seem inconsistent with prior opinions, careful examination reveals Rehnquist’s consistent application of his theory of implied divestiture. In the opinion, he relied on *Santa Clara Pueblo* (Part II), “Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.”⁸⁴ While the State of Oklahoma may not impose its tax on tribal members, Rehnquist found that the state may tax sales to non-members of the tribe.⁸⁵

Ten years after *Citizen Band Potawatomi*, Rehnquist wrote what would become his final opinion on Indian law, *Atkinson Trading Co., Inc. v. Shirley*. In *Atkinson*, the Court found that tribes lack civil authority to tax businesses operated by non-members

⁷⁸ *Id.*

⁷⁹ *Id.* at 181.

⁸⁰ Getches, *supra* note 3, at 1605 (discussing *Colville*, 447 U.S. at 182).

⁸¹ *Colville*, 447 U.S. at 183.

⁸² *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991).

⁸³ *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001).

⁸⁴ *Id.* at 509, (citing *Santa Clara Pueblo*, 436 U.S. at 58).

⁸⁵ *Id.* at 507.

on fee land within a reservation.⁸⁶ This decision implicated states' rights, in a manner consistent with Rehnquist's other taxation decisions.

In so finding, Rehnquist discussed both of the exceptions from *Montana v. United States*,⁸⁷ before finding that neither applied in this case. *Montana*, decided in 1981, reiterated the idea that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."⁸⁸ In *Montana*, the Court found two exceptions to this rule: (1) a tribe may regulate the "activities of non members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements,"⁸⁹ and (2) a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."⁹⁰ In considering these exceptions, Rehnquist found that neither had the non-members at issue in the case subjected themselves to tribal authority (exception 1), nor had they imperiled the welfare of the tribe (exception 2).

In *Atkinson*, Rehnquist returned again to Justice Johnson's dissenting opinion in the 1810 decision *Fletcher v. Peck*, in support of the idea that "Indian tribes have lost any 'right of governing every person within their limits except themselves.'"⁹¹ As extra support for this concept, Rehnquist returned to his first opinion written on the question of Indian law, *Mazurie*, for the proposition that: "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory,' but their dependent status generally precludes extension of tribal civil authority beyond those limits."⁹²

Atkinson relied less on history than earlier Rehnquist opinions, perhaps because by this point in time Rehnquist was able to cite to his own decisions as precedent. Rehnquist may also have known this would be one of his final opportunities to write an opinion in the area of Indian law, since the opinion appears carefully and intentionally consistent with his earlier work in this area.

V. Conclusion

Almost immediately upon taking his seat on the Supreme Court, Justice Rehnquist began to move the Court away from established Indian law jurisprudence which had stood largely intact since Chief Justice Marshall wrote the trilogy of *Johnson*, *Cherokee*, and *Worcester* in the early 19th century. In the area of taxation, his attempts to generate bright line rules turned instead into fact-specific analysis that emphasized states' rights. In the area of jurisdiction, he found that tribes do not have criminal

⁸⁶ *Atkinson*, 532 U.S. at 647.

⁸⁷ *Montana v. United States*, 450 U.S. 544 (1981).

⁸⁸ *Atkinson*, 532 U.S. at 651 (quoting *Montana*, 450 U.S. at 565).

⁸⁹ *Id.* (quoting *Montana*, 450 U.S. at 565).

⁹⁰ *Id.* (quoting *Montana*, 450 U.S. at 566).

⁹¹ *Id.* at 650 (quoting *Fletcher*, 87 U.S. at 147).

⁹² *Id.* at 658 (quoting *Mazurie*, 419 U.S. at 557).

jurisdiction over non-Indians on the reservation, and that tribes do not have civil jurisdiction over non-Indian activities on fee land within the reservation. His analysis of tribal sovereignty emphasized what he viewed as the dependent status of the tribes on the federal government. He developed analytical techniques that relied heavily on use of historical facts chosen to prove his point. And he relied heavily on a dissenting opinion from *Fletcher v. Peck*, which was written thirteen years before the first case in the Marshall trilogy.

While Rehnquist is no longer on the Supreme Court, his body of jurisprudence stands as precedent in any future Indian law cases the Court considers. Chief Justice Roberts, in *Plains Commerce Bank v. Long Family Land and Cattle Co.*,⁹³ cited *Atkinson* for the *Montana* rule, or the “general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”⁹⁴ It is likely that any future decision of the Court regarding the extent of tribal authority would need to address one or more opinions authored by Rehnquist, with the result that the trend away from the recognition of inherent tribal sovereignty in the Court’s jurisprudence may well continue for some time to come.

⁹³ *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S.Ct. 2709 (2008).

⁹⁴ *Id.* at 2720.