

# TRIBAL DISRUPTION AND FEDERALISM

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## I. INTRODUCTION

Legal and political commentators Richard Epstein and Mario Loyola argue that modern constitutional federalism has turned state governments “into mere field offices of the federal government, often against their will, in turn creating a host of structural problems.”<sup>1</sup> The values of federalism—“diversity . . . innovation [and] local choice”—are, for Epstein and Loyola, replaced with “heavy-handed, [one]-size-fits-all solutions” dictated by the federal government.<sup>2</sup> Professor Epstein and Mr. Loyola appear to argue that the Sixteenth Amendment’s authorization of a federal income tax started decades of “new federalism,” which amounts to nothing more than improper “[f]ederal dominance.”<sup>3</sup>

American Indian nations and their members and citizens in the modern era<sup>4</sup> have been making similar arguments about state governments for decades.<sup>5</sup> Tribal populations are usually too small and too poor to affect state-wide elections, rendering them invisible to state-elected officials. Occasionally, a tribal member wins an election to a state legislature or a state-wide office like Attorney General,<sup>6</sup> but these instances are rare. Indian nations have limited national and no state representation; organizations like the National Governor’s Association or the National League of Cities rarely, if ever, include Indian nations. Typically state and local governments confronted by tribal and individual Indian advocates seeking government assistance on anything from snow plowing to law enforcement respond by tell-

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1. Richard A. Epstein & Mario Loyola, *The United State of America: Washington Is Expanding Its Power by Turning State Governments into Instruments of Federal Policy*, The Atlantic (July 31, 2014), <http://perma.cc/XM6A-D7MN> (<http://www.theatlantic.com/politics/archive/2014/07/the-federal-take-over-of-state-governments/375270/>) [hereinafter Epstein & Loyola, *Washington Expanding*]; see also Richard A. Epstein & Mario Loyola, *Saving Federalism*, National Affairs, <http://perma.cc/4VXG-JKY9> (<http://www.nationalaffairs.com/publications/detail/saving-federalism>) (Summer 2014) [hereinafter Epstein & Loyola, *Saving Federalism*].

2. Epstein & Loyola, *Washington Expanding*, *supra* n. 1.

3. *Id.*

4. As always, I borrow from Charles Wilkinson’s declaration that the Supreme Court’s decision in *Williams v. Lee*, 358 U.S. 217 (1959), marks the beginning of the modern era of federal Indian law. Charles F. Wilkinson, *American Indians, Time, and the Law* 1 (Yale U. Press 1987).

5. This paper leaves tribal-federal disputes for another day.

6. Larry Echo Hawk, a Pawnee Nation member, served as Idaho’s attorney general in the early 1990s.

ing tribes and Indians to seek assistance from the federal government: their trustee. For a century, the Supreme Court has often assumed that states and their citizens were the “deadliest enemies” of Indian people.<sup>7</sup>

Indian nations, as the Supreme Court repeatedly points out, were not invited to the Constitutional Convention and do not have the same status as states under the Constitution.<sup>8</sup> There are benefits for Indian nations to being outside of the constitutional polity—retention of tribal immunity from suit for example<sup>9</sup>—but the negatives are substantial. In contrast, as the Supreme Court hoped in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>10</sup> states can be very effective at advancing state and local interests through Congress.<sup>11</sup>

Politically, tribal interests usually turn to the United States, as the trustee of billions of dollars in tribal and Indian assets around the nation and a partner in hundreds of Indian treaties and agreements with over 560 Indian nations.<sup>12</sup> But the federal government is a poor trustee. The Bureau of Indian Affairs in the Department of Interior is obligated to manage vast tribal and Indian resources and has never been effective or efficient at its task. Politically and legally, federal agencies often take positions directly contrary to their duties as the tribal trustee, which is acceptable to the Supreme Court because, while the government is a trustee with fiduciary duties to Indians and tribes, it must also contend with its duties as the national government.<sup>13</sup>

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7. *U.S. v. Kagama*, 118 U.S. 375, 384 (1886) (“[Indian communities] owe no allegiance to the States and receive from them no protection. Because of the local ill feeling the people of the States where they are found are often their deadliest enemies.”); see also Br. for Petr., *Alaska v. Native Village of Venetie Tribal Govt.*, 1997 WL 523883 at \*4 (Aug. 21, 1997) (No. 96-1577) (quoting *Kagama*, 118 U.S. at 384 (“At the same time, because their means of subsistence had fallen prey to westward expansion, reservation Indians were almost entirely dependent upon the federal government for food, clothing, and protection, and were often ‘dead[ly] enemies’ of the States.”)).

8. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) (citing *Okla. Tax Commn. v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (describing the Constitutional Convention as “a convention to which [tribes] were not even parties”)); *Mich. v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2031 (2014) (citing *Blatchford*, 501 U.S. at 782).

9. *Bay Mills Indian Community*, 134 S. Ct. at 2031–2032; *Okla. Tax Commn.*, 498 U.S. at 509.

10. 469 U.S. 528 (1985).

11. See John E. DuMont, *State Immunity from Federal Regulation—before and after Garcia: How Accurate Was the Supreme Court’s Prediction in Garcia v. SAMTA that the Political Process Inherent in Our System of Federalism Was Capable of Protecting the States against Unduly Burdensome Federal Regulation?* 31 Duq. L. Rev. 391, 397 (1993) (noting that Congress enacted an exemption under the Fair Labor Standards Act to benefit states, undoing the impact of the *Garcia* decision).

12. See generally David H. Getches, *Remarks of David H. Getches: Federal Bar Association Indian Law Conference (April 7, 2011)*, 84 U. Colo. L. Rev. 201 (2013).

13. *E.g. U.S. v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2326 (2011) (“[T]he Government exercises its carefully delimited trust responsibilities in a sovereign capacity to implement national policy respecting the Indian tribes.”).

To be sure, the federal and state governments frequently respond effectively to calls for assistance by Indian nations and individual Indians; but all too often Indian nations and their constituents are left behind. Indian poverty is around 23%.<sup>14</sup> Gaming has helped the economic conditions of many Indian reservations, but not enough: “the absolute difference between conditions on reservations and those nationwide continues to be very large. Indeed, at recent rates of economic growth it would take decades for per capita income in Indian Country to converge with that in the rest of the US.”<sup>15</sup>

Worse yet, crime rates in Indian country are soaring. The Indian Law and Order Commission’s 2013 report, “A Roadmap for Making Native America Safer,” painstakingly detailed the everyday tragedies of Indian country crime and the largely ineffective federal, state, and tribal responses.<sup>16</sup>

Tribal reservation governance is also hamstrung by the presence of many thousands of nonmembers over which Indian nations have limited authority. Supreme Court cases in the modern era have recognized restrictions on tribal authority to regulate land use,<sup>17</sup> adjudicate personal injury claims against nonmember tortfeasors arising in Indian country,<sup>18</sup> adjudicate and regulate property foreclosures of Indian-owned lands by nonmember banks,<sup>19</sup> tax nonmember economic activities,<sup>20</sup> and criminally prosecute non-Indian lawbreakers.<sup>21</sup> Indian people typically have to travel long distances to state courts to bring even the simplest claims against nonmembers. Worse, nonmembers know that Indian nations usually cannot do much to prevent illegal nonmember activities and that the federal and state govern-

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14. U.S. Dept. of Int., Off. of Asst. Sec.—Indian Affairs, *2013 American Indian Population and Labor Force Report* 11 (Jan. 16, 2014) (available at <http://perma.cc/J58P-W3HS> (<http://www.bia.gov/cs/groups/public/documents/text/idc1-024782.pdf>)) (cited in *Bay Mills Indian Community*, 134 S. Ct. at 2045 (Sotomayor, J., concurring)).

15. Randall K.Q. Akee & Jonathan B. Taylor, *Social and Economic Change on American Indian Reservations: A Databook of the US Censuses and the American Community Survey 1990–2010*, at 15 (May 15, 2014) (available at <http://perma.cc/VS96-37HJ> (<http://static.squarespace.com/static/52557b58e4b0d4767401ce95/t/5379756ce4b095f55e75c77b/1400468844624/AkeeTaylorUSDatabook2014-05-15.pdf>)).

16. Indian L. & Or. Commn., *A Roadmap for Making Native America Safer* (Nov. 2013) (available at <http://perma.cc/5AYZ-47WS> ([http://www.aisc.ucla.edu/iloc/report/files/A\\_Roadmap\\_For\\_Making\\_Native\\_America\\_Safer-Full.pdf](http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf))).

17. *E.g. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning); *S.D. v. Bourland*, 508 U.S. 679 (1993) (recreational licensing).

18. *E.g. Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

19. *Plains Commerce Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316 (2008).

20. *E.g. Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

21. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (non-Indians); *see also Duro v. Reina*, 495 U.S. 676 (1990) (nonmember Indians); *but see U.S. v. Lara*, 541 U.S. 193 (2004) (affirming Congressional “fix” of *Duro* decision).

ments are not effective in responding, thus making much of Indian country effectively ungovernable.

As with any entity barred from the political process or ineffective in changing the political landscape, Indian nations and individual Indians have taken the rational step of pursuing their interests through litigation. Only in the most recent half-century have Indian nations had the financial capacity and, in some cases legal capacity, to assert their interests and the interests of their tribal memberships in the halls of Congress and the state legislatures, the federal and state administrative agencies, and in the courts. In the modern era, many of the most dramatic tribal victories have occurred in court; but far more often tribal interests do not prevail in court.<sup>22</sup> The Supreme Court, in virtually all historical periods except the Marshall, Warren, and Burger Court eras, has been especially unreceptive to tribal interests.<sup>23</sup>

Many of these dramatic disputes involve jurisdictional disputes between the tribes and states and/or local governments. States and local governments, thanks to numerous federal Indian affairs initiatives over the years, claim jurisdictional prerogatives over nonmembers and nonmember-owned land in Indian country. As a result, there is conflict between tribal and state interests. For example, tribes and states often disagree about land use and environmental regulation of Indian country. As a policy matter, tribes often demand tighter controls over polluters than states. States and local governments routinely object to tribal efforts to expand tribal land holdings. States, local governments, and tribes also conflict over taxes in Indian country.

In these instances, states seem to be concerned over potential impacts on the state and local tax base, with a secondary concern about jurisdictional confusion. To be sure, tribes are also concerned about their tax base, but tribes usually are more interested than states and local governments in good governance over Indian country lands and people, as well as cultural and religious concerns. This is not to denigrate state and local governments as mere one-dimensional tax collectors, but states and local governments that most strenuously object to tribal activities ultimately cite impacts on their tax base as their foremost concern.<sup>24</sup>

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22. See Sarah Krakoff, *Law, Violence, and the Neurotic Structure of American Indian Law*, 49 Wake Forest L. Rev. 743, 747 (2014) (available at <http://perma.cc/FJS8-MQYR> (<https://turtletalk.files.wordpress.com/2014/10/wfu-krakoff-article-copy.pdf>)).

23. See generally David E. Wilkins & K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (U. of Okla. Press 2001).

24. See Ian Ayres, *Report of Ian Ayres on the Cayuga Nation's Land in Trust Application* 1–2 (Feb. 2006) (available at <http://perma.cc/4ADQ-RH4Q> ([http://www.dec.ny.gov/docs/legal\\_protection\\_pdf/iareport.pdf](http://www.dec.ny.gov/docs/legal_protection_pdf/iareport.pdf))) (“The loss of property tax revenues places fiscal burdens on state and local governments. The parcel by parcel exercise of sovereignty by the CIN burdens the regulatory control of state and local government with regard to public safety, land use controls and a host of other state and local regulations.

Federalism is often foremost in the minds of observers when analyzing tribal claims in light of state and local prerogatives, but federalism theories and precedents are often unhelpful in reaching useful outcomes.<sup>25</sup> After all, Indian nations are not part of the dual-sovereignty structure of states and the federal government. The Commerce Clause, and how the Supreme Court interprets it, sets tribes apart from states and foreign nations.<sup>26</sup>

Indian tribal governments and their constituents (what I have been referring to as tribal interests) are unlike other American governments in important ways. Most tribes are small in population, and many tribal members live in the same places as their ancestors and will not move. Elected tribal officials tend to be much more accountable to individual tribal citizens, many of whom are blood relatives or close friends who have voted in blocs to elect them. Elected tribal officials are also uniquely aware of the history of their homelands more so (in my experience) than elected local officials because the lands upon which an Indian nation is located are riddled with terrible histories of land dispossession and violence. Many Indian people stay where they are because their relatives are buried on their lands and they want the same for themselves. Not only are their relatives buried on these lands, but places of worship and ceremony are located there as well. As a result, elected tribal officials are often concerned with protecting tribally and Indian-owned lands at any cost. This is the impetus for the efforts of many tribes to intervene in state and local government-aided economic development initiatives.

Moreover, tribal officials are interested in the restoration of tribal land holdings that have fallen out of tribal and Indian ownership. In part because of the relatively recent histories of illegal land dispossession by non-Indians,<sup>27</sup> many tribal officials are absolutely driven to restore their lands to tribal and Indian ownership. Indian ancestors and sacred sites are often located on nonmember owned lands as well. As a result, some local governments and private property owners perceive these tribes to be enormous threats. Many state and local governments expend enormous resources to defend their interests—such as hiring Yale Law School faculty as consul-

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The exemption from taxes and regulation, or heightened difficulties in enforcement of economic regulation, creates an unlevel playing field that would burden non-tribal business—especially with regard to potential cigarette, gasoline and gaming revenues. These economic and regulatory disruptions would grow exponentially if BIA established a precedent that allowed the CIN to convert any future open-market purchase of land into trust land.”).

25. E.g. Wenona T. Singel, *The First Federalists*, 62 Drake L. Rev. 775 (2014).

26. U.S. Const. art. I, § 8, cl. 3; see also *Cherokee Nation v. Ga.*, 30 U.S. 1, 17–18 (1831) (“domestic dependent nations”).

27. Matthew L.M. Fletcher, “Now What the Hell You Gonna Do in Those Days?” *A Research Note on Practical Barriers to Indian Land Claims* (Mich. St. U. Leg. Stud. Research, Working Paper No. 06-07, May 2, 2008) (available at <http://perma.cc/RKK8-J993> (<http://ssrn.com/abstract=1128153>)).

tants—even though very few tribal governments have the resources needed to purchase land and restore the reservation status of that land.

In recent years, state and local governments have been unusually effective in quelling tribal claims in federal courts by arguing that tribal initiatives are disruptive to local governance. In some cases the mere allegation that a tribal claim is disruptive serves to justify summary dismissal of the tribal claim without any analysis of the underlying tribal claim.<sup>28</sup>

States and tribes routinely disagree on Indian child welfare. Child welfare usually is understood to be the exclusive province of the states under the Constitution,<sup>29</sup> but Congress intervened in the context of Indian children by imposing different standards for state courts to apply and allowing an expansion of tribal control over Indian child welfare decisions.<sup>30</sup> Here, state agencies and state courts rejecting or circumventing federal standards and mandates appear to do so because of inertia, that is, the institutional economics opposing change.

The very presence of Indian nations within the borders of the United States and its territories has always been, from the Founding, disruptive. Indian nations are disruptive, but as I will argue, they are disruptive in the best possible manner. This paper describes several ongoing tribal-state disputes throughout the nation, acknowledging that the tribal claims are disruptive, but that tribal disruption is not inherently harmful.

## II. TRIBAL DISRUPTION THEORY

Tribal disruption theory draws from ecological theory. As my colleagues and I wrote recently, ecological disruption theory provides that the destruction of a local ecological system might be devastating in the short run, but creates long-term advantages that outweigh the negatives. Specifically:

Imagine a wildfire clearing a forest of many of its trees and undergrowth creating a massive disruption with wide-ranging consequences. While the initial impact might appear drastic and be perceived negatively the long-term effects could be very beneficial. Disturbances redistribute resources such as nutrients and reorganize biological communities in ways that build ecosystem resilience. To analyze the outcomes of disturbance events it is important to

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28. *E.g. Onondaga Nation v. N.Y.*, 500 F. Appx. 87, 89 (2d Cir. 2012) (“The disruptive nature of the claims is indisputable as a matter of law.”), *cert. denied*, 134 S. Ct. 419 (2013); *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 542 (2011); *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006); *contra Saginaw Chippewa Indian Tribe of Mich. v. Granholm*, 2008 WL 4808823 at \*\*19–21 (E.D. Mich. Oct. 22, 2008).

29. Recent scholarship strongly suggests that this simply is not true. Jill Elaine Hasday, *Family Law Reimagined* 17–66 (Harv. U. Press 2014).

30. *See generally* Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (2012).

carefully consider these events' spatial and temporal scale and intensity. Ecologically beneficial disturbances are often low intensity and occur at small localized spatial scales. Their full effects are perceivable only at a landscape scale where many localized disturbances collectively create a diverse ecological patchwork.<sup>31</sup>

Tribal disruption theory posits that tribal governance initiatives that interfere with state and local governance may generate short-term harms that are abated by long-term comparative advantage. As my colleagues and I wrote in a recent paper:

Indian claims often create an analogous disturbance—short term disruption and even destabilization followed by long term improvements in governance. Consider the experience of my own tribe, the Grand Traverse Band of Ottawa and Chippewa Indians and its governmental center, Peshawbestown, Michigan. From the 19th century until 1980, the federal government did not acknowledge the sovereignty of the Grand Traverse Band, with whom it had a treaty relationship dating back to at least 1836. The State of Michigan and local governments, ironically, did acknowledge the Indian status of the Peshawbestown Indians and generally refused to provide governmental services to the reservation. By the 1970s, the tribal land base had shrunk to just a few acres, with many Indians landless, unemployed, and literally homeless. After the Department of Interior acknowledged the tribe in 1980, Grand Traverse Band governmental and economic activity exploded over the next 15 years. Leelanau County, Suttons Bay Township, and the State of Michigan were reeling, barely able to respond to the sudden presence of a tribal government all had formerly disregarded. A flurry of lawsuits and political disputes followed GTB federal recognition over law enforcement jurisdiction, land use and zoning, tribal trust land acquisitions, and Indian gaming. Now the dust has largely settled, and tribal police are cross-deputized to enforce state law in Leelanau County, the reservation is incorporated into the county land use plan, and local units of government share—and depend on—tribal gaming revenues, the Peshawbestown Indians *and* the non-Indian citizens of Leelanau County are governed in a better manner.<sup>32</sup>

#### A. *The Saginaw Chippewa Reservation Boundaries Claim*

In our writings, we have identified several instances of highly disruptive tribal governance initiatives. Foremost among them, in my view, is the successful litigation and negotiation of continuing governance of the Isabella Indian Reservation of the Saginaw Chippewa Indian Tribe in Michi-

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31. Matthew L.M. Fletcher, Kathryn E. Fort & Nicholas J. Reo, *Tribal Disruption and Indian Claims*, 112 Mich. L. Rev. First Impressions 65, 71–72 (Jan. 2014), <http://perma.cc/5D2U-K76U> ([http://www.michiganlawreview.org/assets/fi/112/Tribal\\_Disruption\\_and\\_Indian\\_Claims.pdf](http://www.michiganlawreview.org/assets/fi/112/Tribal_Disruption_and_Indian_Claims.pdf)).

32. Matthew L.M. Fletcher, Kathryn E. Fort & Wenona T. Singel, *Tribal Disruption and Labor Relations* 9 (Mich. St. U. Legal Studies Research Paper No. 12-2, 2014) (available at <http://perma.cc/6BXL-BCD7> (<http://ssrn.com/abstract=2401711>)) (citing Matthew L.M. Fletcher, *The Eagle Returns: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians* 87–107 (Mich. St. U. Press 2012)).

gan.<sup>33</sup> The reservation, established by treaty, included much of Isabella County and the City of Mount Pleasant, home to Central Michigan University. The tribe brought federal litigation seeking a declaratory judgment that the tribe's reservation boundaries were still intact—a judgment that would have re-categorized Isabella County and Mount Pleasant as Indian country.<sup>34</sup>

The State of Michigan, the county, and the city sought to dismiss the claims under a theory derived from the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*.<sup>35</sup> The Court in *Sherrill* rejected the tribe's claim to immunity from the local property tax under federal Indian law due to the enormous passage of time since the land had been in tribal or Indian ownership<sup>36</sup> and the disruption inherent in immunizing tribal land holdings from local taxation.<sup>37</sup> Similarly, the state defendants in the Saginaw Chippewa matter argued that if the tribe prevailed the outcome would be to "alter the long existing pattern of jurisdiction over the Tribe and its members."<sup>38</sup> The *Saginaw Chippewa* court did not directly address the merits of the disruption claims made by the state, instead holding that the *Sherrill* defense did not apply to claims made under Indian treaties.<sup>39</sup> Ultimately, the tribe and the state, county, and municipal defendants settled the matter in a broad omnibus series of intergovernmental agreements.<sup>40</sup>

As the court did not directly address the jurisdictional questions on the merits, we should look to the Saginaw Chippewa Indian tribe's complaint, the defendants' responses, and the settlement to assess the underlying dispute. In its complaint the tribe alleged that the defendants refused to acknowledge the validity of the reservation boundaries and attempted to enforce state and local laws against tribal members inside of the Isabella In-

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33. *Saginaw Chippewa Indian Tribe of Mich. v. Granholm*, 2008 WL 4808823 (E.D. Mich. Oct. 22, 2008); Fletcher, Fort & Reo, *supra* n. 31, at 70.

34. "Indian country" is a term of art in federal Indian law codified at 18 U.S.C. § 1151 (2012).

35. 544 U.S. 197 (2005).

36. *Id.* at 214 (characterizing the tribal tax immunity claim as "rekindling embers of sovereignty that long ago grew cold").

37. *Id.* at 215 n. 9 ("The relief OIN seeks—recognition of present and future sovereign authority to remove the land from local taxation—is unavailable because of the long lapse of time during which New York's governance remained undisturbed and the present-day and future disruption such relief would engender.").

38. St. Defs.' Response to Pl. Saginaw Chippewa Indian Tribe's Mot. to Strike Defenses or Limit Discovery, *Saginaw Chippewa*, 2008 WL 2383282 (E.D. Mich. Apr. 28, 2008) (No. 05-10296-BC).

39. *Saginaw Chippewa*, 2008 WL 2383285 at \*23 ("The disruption at issue in *Sherrill* would have arisen from the Court's task of fashioning a judicial remedy for the ancient wrongs. In the immediate case, if a remedy is appropriate, any disruption will follow from the treaties themselves and any act of diminishment thereafter by Congress.").

40. Matthew L.M. Fletcher, Turtle Talk Blog, *Saginaw Chippewa Reservation Boundaries Settlement Materials*, <http://perma.cc/RQT9-SQSY> (<http://turtletalk.wordpress.com/2010/11/10/saginaw-chippewa-reservation-boundaries-settlement-materials/>) (Nov. 10, 2010).



dian Reservation.<sup>41</sup> The tribe alleged that the state imposed state income taxes on tribal members residing on the reservation in violation of federal law.<sup>42</sup> The tribe also alleged that the state attempted to enforce state traffic, child welfare, and other laws on tribal members within the reservation in violation of federal law.<sup>43</sup> The strength of the tribe's allegations was that the Supreme Court had long recognized the immunity of reservation Indians from state control.<sup>44</sup> The weakness was that the Supreme Court had more recently recognized that states do, in fact, have jurisdiction over reservation Indians that leave the reservation.<sup>45</sup>

The state defendants, as noted above, relied on the *Sherrill* defenses. The State argued the tribe "owns very little property in the alleged 'historical Isabella reservation' today."<sup>46</sup> Isabella County argued that the lands in question were "overwhelmingly populated by non-Indians."<sup>47</sup> Moreover, the county argued that if the tribe prevailed, the result would create "a situation that would significantly disrupt the uniform application of zoning and other land use regulations, and would seriously disrupt the justifiable expectations of non-Indian landowners."<sup>48</sup> The county argued that the tribe waited an entire century to challenge state criminal jurisdiction over the lands within the reservation.<sup>49</sup> Similarly, the City of Mount Pleasant brought forth evidence that only the City, and not the tribe, had prosecuted

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41. Amend. Compl. for Decl. & Inj. Relief, *Saginaw Chippewa Indian Tribe of Mich. v. Granholm*, 2006 WL 1036784 at ¶ 8 (E.D. Mich. Mar. 21, 2006) (No. 05-10296) ("[D]efendants collectively have sought to enforce Michigan state laws and regulations against the Tribe and its members on non-trust lands within the historic Isabella Reservation. Plaintiff alleges that defendants' actions are in violation of federal law and must be curtailed.").

42. *Id.* at ¶ 9 (alleging that the state taxing authority "has attempted to impose Michigan state income taxes against members of the Tribe who live and work on non-trust land within the boundaries of the historic Isabella Reservation, in violation of federal law").

43. *Id.* at ¶ 10 (alleging that local authorities attempted to enforce "state traffic laws, child welfare laws, and other laws within such lands, in violation of federal law").

44. *Worcester v. Ga.*, 31 U.S. 515, 561 (1832) ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.").

45. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–149 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.").

46. St. Defs.' Response to Intervenor-Pl. U.S.'s Mot. in Limine to Strike Defs.' Witnesses Relating to Their Eq. Defs. & Mot. for P.S.J. at 5, *Saginaw Chippewa Indian Tribe of Mich. v. Granholm*, 2008 WL 2383284 (E.D. Mich. Apr. 28, 2008) (No. 05-10296-BC).

47. Isabella Co.'s Combined Response to the U.S. & the Saginaw Chippewa Indian Tribe's Mots. to Strike & the U.S.'s Mot. for P.S.J. at 9, *Saginaw Chippewa Indian Tribe of Mich. v. Granholm*, 2008 WL 2383283 (E.D. Mich. Apr. 28, 2008) (No. 05-10296-BC).

48. *Id.* at 10.

49. *Id.* at 12 ("The County of Isabella has hundreds of records of unchallenged state prosecutions over tribal defendants for crimes which took place in the townships in question throughout the 1960's, 1970's, 1980's, 1990's, and 2000's.").

tribal members within the reservation boundaries from 1950 to 1970.<sup>50</sup> The state added that there could be additional impacts on environmental regulation.<sup>51</sup> The state's brief summarized all of these claims.<sup>52</sup>

Importantly, the county further alleged that what the tribe was really after was the land, arguing that the tribe's request for relief amounted to a possessory land claim.<sup>53</sup> The county's argument was an effort to further wrap the tribe's claim into the *Sherrill* framework by characterizing tribal governance claims as back-door efforts to reclaim Indian lands.

Ultimately, the tribe and the defendants settled the matter in a series of about a dozen individual agreements covering multiple jurisdictional subject areas.<sup>54</sup> One agreement involved the application of the Indian Child Welfare Act<sup>55</sup> with the state agreeing to "cooperate and collaborate" with the tribe "before taking actions that could disrupt a Saginaw Chippewa Indian Tribe Child's relationship to her or his family and tribe."<sup>56</sup> Formal coordination with an Indian tribe prior to taking any action in accordance with the Act is not required under the Act and this agreement appears to be unique in American Indian law.<sup>57</sup> The defendants did not allege that a practice of this kind would create any disruption, although to be sure it does impose additional burdens on state child welfare agencies.

The parties also entered into a series of law enforcement agreements that authorized the cross-deputization of state, local, and tribal police; created a protocol for communication and cooperation; and ended state and

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50. City of Mt. Pleasant's Response to Saginaw Chippewa Indian Tribe's Mot. to Strike Defs. or Limit Discovery at 19, *Saginaw Chippewa Indian Tribe of Mich. v. Granholm*, 2008 WL 2383285 (E.D. Mich. Apr. 28, 2008) (No. 05-10296-BC).

51. St. Defendants' Response to Intervenor-Pl. U.S.'s Mot. in Limine to Strike Defs.' Witnesses Relating to Their Eq. Defs. & Mot. for P.S.J. at 9, *Saginaw Chippewa*, 2008 WL 2383284 ("The effect of the Tribe's desired relief on environmental laws would be equally disruptive. It does not matter where the pollution comes from. If a tribal member discharges untreated wastewater to a stream, river, or lake, then the stream, river, or lake is polluted for all.").

52. *Id.* at 9–10.

53. Isabella Co.'s Combined Response to the U.S. and the Saginaw Chippewa Indian Tribe's Mots. to Strike and the U.S.'s Mot. for P.S.J. at 16–17, *Saginaw Chippewa*, 2008 WL 2383283.

54. Fletcher, *supra* n. 40 (The court approved the settlement in December 2010. Or. Granting Jt. Mot. for "Or. for Judm.," *Saginaw Chippewa Indian Tribe of Mich. v. Granholm*, 2010 WL 5185114 (E.D. Mich. Dec. 17, 2010) (No. 05-10296-BC)).

55. 25 U.S.C. §§ 1901–1963.

56. Indian Child Welfare Act Agreement between the Saginaw Chippewa Indian Tribe of Michigan and the Michigan Department of Human Services 14 (Nov. 9, 2010) (available at <http://perma.cc/53LP-UVKK> (<http://turtletalk.files.wordpress.com/2010/11/exhibit-b-icwa-agreement.pdf>)) (included as Exhibit B in the Joint Motion to Enter Order for Judgment upon Completion of a Public Comment Period and Opportunity for the Parties to Respond, *Saginaw Chippewa Indian Tribe of Mich. v. Granholm*, 2010 WL 4784257 (E.D. Mich. Nov. 9, 2010) (No. 05-10296-BC)).

57. See generally Conference of Western Attorneys General, *American Indian Law Deskbook* §§ 14.26–14.60, 1052–1071 (4th ed., U. Press of Colo. 2014) (surveying exhaustively the types of inter-governmental agreements in use in Indian country).

local prosecution of tribal members within the reservation.<sup>58</sup> Cooperative agreements between Indian tribes and state and local governments are not rare in Indian country<sup>59</sup> and most especially not rare in Michigan.<sup>60</sup> The parties reached agreements on land use and regulation as well. The tribe and the state entered into a memorandum of understanding on environmental regulation.<sup>61</sup> The tribe, the city, and the county entered into zoning agreements.<sup>62</sup> The state and the tribe also reached agreement on the application of the state income tax to tribal members residing on the Isabella Indian Reservation.<sup>63</sup>

In their pleadings the defendants vociferously argued that to share jurisdiction with the tribe would be deeply disruptive and well-nigh impossi-

58. Law Enforcement Agreement between the Michigan Department of State Police and the Saginaw Chippewa Indian Tribe of Michigan 1–2 (Nov. 9, 2010) (available at <http://perma.cc/6YCL-PGZT> (<http://turtletalk.files.wordpress.com/2010/11/exhibit-c-law-enforcement-agreement.pdf>)) (included as Exhibit C in Joint Motion to Enter Order for Judgment upon Completion of a Public Comment Period and Opportunity for the Parties to Respond, *Saginaw Chippewa*, 2010 WL 4784257); Law Enforcement Agreement between the City of Mt. Pleasant and the Saginaw Chippewa Indian Tribe of Michigan 1–2 (Nov. 9, 2010) (available at <http://perma.cc/LBH5-8T7R> (<http://turtletalk.files.wordpress.com/2010/11/exhibit-h-city-law-enforcement-agreement.pdf>)) (included as Exhibit H in Joint Motion to Enter Order for Judgment upon Completion of a Public Comment Period and Opportunity for the Parties to Respond, *Saginaw Chippewa*, 2010 WL 4784257); Law Enforcement Agreement between the County of Isabella and the Saginaw Chippewa Indian Tribe of Michigan 1–2 (Nov. 9, 2010) (available at <http://perma.cc/5P9M-PX9L> (<http://turtletalk.files.wordpress.com/2010/11/exhibit-l-county-law-enforcement-agreement.pdf>)) (included as Exhibit L in Joint Motion to Enter Order for Judgment upon Completion of a Public Comment Period and Opportunity for the Parties to Respond, *Saginaw Chippewa*, 2010 WL 4784257).

59. See generally Michael L. Barker & Kenneth Mullen, *Cross-Deputization in Indian Country*, 16 *Police Stud.: Intl. Rev. Police Dev.* 157 (1993); Conf. of W. Attys. Gen., *American Indian Law Deskbook* 633–635, 656 (4th ed., U. Press of Colo. 2008).

60. Matthew L.M. Fletcher, Kathryn E. Fort & Wenona T. Singel, *Indian Country Law Enforcement and Cooperative Public Safety Agreements*, 89 *Mich. B.J.* 42, 43–44 (Feb. 2010).

61. Memo. of Understanding between the State of Mich. Dept. of Nat. Resources & Env. & the Saginaw Chippewa Indian Tribe of Mich. (Nov. 9, 2010) (available at <http://perma.cc/CXZ6-T2QT> (<http://turtletalk.files.wordpress.com/2010/11/exhibit-f-conservation-mou.pdf>)) (included as Exhibit F in Joint Motion to Enter Order for Judgment upon Completion of a Public Comment Period and Opportunity for the Parties to Respond, *Saginaw Chippewa*, 2010 WL 4784257).

62. Zoning and Land Use Agreement between the City of Mt. Pleasant and the Saginaw Chippewa Indian Tribe of Michigan (Nov. 9, 2010) (available at <http://perma.cc/9FLE-ACTP> (<http://turtletalk.files.wordpress.com/2010/11/exhibit-g-city-zoning-agreement.pdf>)) (included as Exhibit G in Joint Motion to Enter Order for Judgment upon Completion of a Public Comment Period and Opportunity for the Parties to Respond, *Saginaw Chippewa*, 2010 WL 4784257); Zoning and Land Use Agreement between the County of Isabella and the Saginaw Chippewa Indian Tribe of Michigan (Nov. 9, 2010) (available at <http://perma.cc/F9TK-HRTS> (<http://turtletalk.files.wordpress.com/2010/11/exhibit-k-county-zoning-agreement.pdf>)) (included as Exhibit K in Joint Motion to Enter Order for Judgment upon Completion of a Public Comment Period and Opportunity for the Parties to Respond, *Saginaw Chippewa*, 2010 WL 4784257).

63. Memo. of Agreement Regarding Income-Tax Resolution between the State of Mich. & Saginaw Chippewa Indian Tribe of Mich. (Nov. 9, 2010) (available at <http://perma.cc/MF5L-G8AB> (<http://turtletalk.files.wordpress.com/2010/11/exhibit-e-income-tax-resolution.pdf>)) (included as Exhibit E in Joint Motion to Enter Order for Judgment upon Completion of a Public Comment Period and Opportunity for the Parties to Respond, *Saginaw Chippewa*, 2010 WL 4784257).

ble—and yet here are a series of workable agreements borrowing extensively from the experiences of other tribes.

Imagine similar disputes between the State of Michigan and the federal government—the stuff of American federalism. The United States, backed by the Supremacy Clause, usually dictates law enforcement activities in cases of federal criminal law—as seen in virtually every police procedural on TV. The same is largely true in environmental regulation and taxation areas of cooperative federalism.<sup>64</sup>

The Saginaw Chippewa reservation boundaries settlement involved negotiations between governments rewriting jurisdictional lines from a blank slate. It is apparent from the defendants' pleadings that no negotiation could have been as fruitful absent litigation and it is further apparent that the court's rejection of the defendants' disruption claims persuaded the defendants to reach an endgame in negotiations. In the end, the Saginaw Chippewa Indian Tribe got everything it stated that it wanted in its complaint—certainty about law enforcement, child welfare, and taxation. The defendants also got what they wanted—avoidance of jurisdictional complexity and confusion.

The Saginaw Chippewa reservation boundaries settlement is a model for other tribes and jurisdictions to follow—and a model of how tribal disruption theory works. Recently, the Oneida Indian Nation of New York entered into a massive agreement with the State of New York and Madison and Oneida Counties to conclude decades of vituperative litigation over land claims, property taxes, gaming, and other disputes.<sup>65</sup> Similarly, the St. Regis Mohawk Tribe entered into an agreement with the State of New York and St. Lawrence County, concluding land claims and resolving jurisdictional taxation and regulatory problems.<sup>66</sup>

### *B. The Onondaga Nation and Onondaga Lake*

The Saginaw Chippewa experience did not replicate itself in the dispute between the Onondaga Nation and the State of New York, Onondaga County, and the City of Syracuse. The Onondaga Nation's homelands center on Onondaga Lake—known at the time of the filing of the suit, as

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64. See generally Jonathan H. Adler, *When Is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 Harv. Envtl. L. Rev. 67 (2007).

65. Fletcher, Fort & Reo, *supra* n. 32, at 70–71; Memorandum-Decision & Order, *N.Y. v. Jewell*, 2014 WL 841764 at \*1 (N.D.N.Y. Mar. 4, 2014) (No. 6:08-CV-0644 (LEK/DEP)).

66. Memo. of Understanding between the County of St. Lawrence, the Saint Regis Mohawk Tribe, & N.Y. (May 28, 2014) (available at <http://perma.cc/MW3Y-35FZ> ([http://www.srmt-nsn.gov/\\_uploads/site\\_files/NYS-SRMT-SLC\\_MOU\\_Signed\\_5-28-14.pdf](http://www.srmt-nsn.gov/_uploads/site_files/NYS-SRMT-SLC_MOU_Signed_5-28-14.pdf))).

the “most polluted lake” in the United States.<sup>67</sup> The tribe unsuccessfully attempted, over many years, to deal with the state and local governments over how to properly regulate and clean the lake.<sup>68</sup> Eventually, the state negotiators informed the tribe that the only way to move forward was for the tribe to bring land claims on Onondaga Lake, which would force the state into negotiations and provide political cover for the state to make concessions to the tribe.<sup>69</sup>

The Onondaga Nation brought land claims in federal court arguing that the State of New York’s purchase of several parcels from the tribe in the nineteenth century violated the Nonintercourse Act<sup>70</sup> and was therefore void.<sup>71</sup> The tribe also sued local governments and businesses that occupied the lands.<sup>72</sup> Carefully, the tribe chose not to sue for recovery of the land or money damages from any of the defendants:

The Nation does not seek in this lawsuit and has never sought any remedy that dispossesses evicts or ejects any person, government, corporation, or entity owning land within the area taken by the State. This is not a possessory action. The Onondagas did not assert any legal theory that could be the basis for an award of money damages in any form. They did not ask for additional compensation or restitution. They did not ask for rent. They did not ask to be compensated for the widespread and serious environmental damage associated with the “development” of these lands by persons tracing their titles to the State.<sup>73</sup>

The tribe chose not to sue to avoid the so-called *Sherrill* defenses that led the Second Circuit to dismiss other land claims by New York tribes.<sup>74</sup>

The Second Circuit’s dismissal of the Onondaga claims was perfunctory and based entirely on three factors: (1) “the length of time at issue between a historical injustice and the present day;” (2) “the disruptive nature of claims long delayed;” and (3) “the degree to which these claims upset the justifiable expectations of individuals and entities far removed

67. Onondaga Nation, *Onondaga Lake—The Most Polluted Lake in America*, <http://perma.cc/A5NZ-BNSZ> (<http://www.onondaganation.org/land-rights/onondaga-lake/>) (accessed Sept. 1, 2014); David Chantry, NPR, *America’s “Most Polluted” Lake Finally Comes Clean*, <http://perma.cc/7G6D-KKF3> (<http://www.npr.org/2012/07/31/157413747/americas-most-polluted-lake-finally-comes-clean>) (July 31, 2012).

68. See generally Conference Transcript, *Heeding Frickey’s Call: Doing Justice in Indian Country*, 37 Am. Indian L. Rev. 347, 351–358 (2013).

69. I learned this in conversation with Onondaga Nation Attorney Joe Heath.

70. 25 U.S.C. § 177.

71. First Amend. Compl. for Declaratory Judm., *Onondaga Nation v. N.Y.*, 2005 WL 4136413 at ¶¶ 7–10 (N.D.N.Y. Aug. 1, 2005) (No. 05-CV-314 (LEK/DRH)).

72. *Id.* at ¶¶ 11–16.

73. Pet. for a Writ of Cert., *Onondaga Nation v. N.Y.*, 2013 WL 1771079 at \*9 (U.S. Apr. 22, 2013) (No. 12-1279).

74. See *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *Oneida Indian Nation of N.Y. v. Co. of Oneida*, 617 F.3d 114 (2d Cir. 2010).

from the events giving rise to the plaintiffs' injury."<sup>75</sup> Under the Second Circuit's reasoning, it was irrelevant that the tribe was unable to bring suit for many decades after the transactions—the 183 years between the transactions and the suit was too long as a matter of law: “[E]ven if the Onondaga showed after discovery that they had strongly and persistently protested, the ‘standards of federal Indian law and federal equity practice’ stemming from *Sherrill* and its progeny would nonetheless bar their claim.”<sup>76</sup> It was also irrelevant that the tribe merely sought a declaratory judgment: “[t]he disruptive nature of the claims is indisputable as a matter of law. It is irrelevant that the Onondaga merely seek a declaratory judgment. *Oneida* held that a declaratory judgment alone—even without a contemporaneous request for an ejectment—would be disruptive.”<sup>77</sup> In short, no evidence is necessary in the Second Circuit to dismiss Indian land claims under the Nonintercourse Act—a court may dismiss them as a matter of law. The Nation—having exhausted its national remedies—is now seeking relief before the Inter-American Commission on Human Rights.<sup>78</sup>

The tribe's efforts to negotiate failed. State interests would not negotiate with a non-owner of the property at issue, and the federal courts' refusal to allow the tribe's suit to move forward—which may have compelled the state to enter into negotiations—failed due to an expansive reading of a Supreme Court Indian taxation case.

As the Onondaga story demonstrates, not every tribal-state-local dispute will end well. But the Saginaw Chippewa agreements demonstrate that a great deal is possible and that tribal disruption can be beneficial in the long run toward resolving longstanding concerns between sovereigns.

### III. ONGOING CONFLICTS

There are numerous tribal-state conflicts brewing in Indian country at this time. In virtually all of these conflicts, the state interests argue that tribal claims are too disruptive to implement fairly and efficiently. In most instances, the law is behind state interests. But as Professor Singel demon-

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75. *Onondaga Nation v. N.Y.*, 500 Fed. Appx. 87, 89 (2d Cir. 2012) (quoting *Oneida*, 617 F.3d at 127), cert. denied, 134 S. Ct. 419 (2013).

76. *Onondaga*, 500 Fed. Appx. at 90 (quoting *Sherill*, 544 U.S. at 214). The tribe had offered the expert testimony of several leading legal historians. See e.g. Decl. of Lindsay G. Robertson in Opposition to Mots. to Dismiss, *Onondaga*, 2006 WL 6897840 (N.D.N.Y. Nov. 16, 2006) (No. 05-CV-314 (LEK/DRH)); Decl. of Anthony F.C. Wallace in Opposition to Defs.' Mots. to Dismiss, *Onondaga*, 2006 WL 6897838 (N.D.N.Y. Nov. 16, 2006) (No. 05-CV-314 (LEK/DRH)).

77. *Onondaga*, 500 Fed Appx. at 89 (citing *Oneida*, 617 F.3d at 138).

78. Petition to the Inter-American Commission on Human Rights submitted by the Onondaga Nation and the Haudenosaunee against the United States (Apr. 14, 2014) (available at <http://perma.cc/EZ6N-XS3Q> (<http://www.onondaganation.org/mediafiles/pdfs/un/Onondaga%20OAS%20Petition%204-14-14.pdf>)).

strates, much of what courts analyze in federal Indian law to resolve tribal-state disputes is well-nigh irrelevant to the underlying governance issues.<sup>79</sup>

### A. Land — Wind River Reservation

On December 19, 2013, the Environmental Protection Agency (EPA) approved an application by the two tribes that share the Wind River Indian Reservation in Wyoming to be treated as states under the Clean Air Act<sup>80</sup> for the purpose of monitoring air quality on the reservation.<sup>81</sup> The EPA has previously granted treatment-as-state (TAS) status under the Act to a few dozen Indian tribes nationally.<sup>82</sup> Monitoring authority is not the same as enforcement authority—a tribe might seek that authority but must go through a much more strenuous process.<sup>83</sup> As the EPA's decision document stated, "[t]he Tribes' application does not request, nor by this decision is the EPA approving, Tribal authority to implement any [Clean Air Act] regulatory programs or to otherwise implement Tribal regulatory authority under the Act."<sup>84</sup> Instead, the tribes are eligible to apply for a reduced funding match requirement for federal funding to submit written recommendations on permits that might affect reservation air quality and other governmental participation requirements.<sup>85</sup>

The two tribes that share the Wind River Indian Reservation, the Northern Arapaho Tribe and the Eastern Shoshone Tribe, have been inundated with pollution from fracking in recent years. National Public Radio reported that the EPA allegedly allowed toxic oil water from fracking to flow across tribal lands.<sup>86</sup> The EPA has a decades-long history of under-

79. Singel, *supra* n. 25, at 845 ("The Supreme Court rarely recognizes tribal contributions to effective governance within the nation's federal system. Frequently, the characteristics of governance that are celebrated as promoting federalism's values in the federal-state context are neglected or even portrayed as disadvantages in the tribal context.").

80. 42 U.S.C. §§ 7401–7671 (2012).

81. 78 Fed. Reg. 76829–02, 76829–76830 (Dec. 19, 2013).

82. EPA, *Tribal Air, Basic Information*, <http://perma.cc/PM7S-FHME> (<http://epa.gov/air/tribal/backgrnd.html>) (accessed Sept. 1, 2014) ("32 tribes have received eligibility determinations (TAS) under the Tribal Authority Rule").

83. 40 C.F.R. § 49.7 (2014).

84. EPA Region 8, *Decision Document 1* (Dec. 6, 2013) (available at <http://perma.cc/8TND-D7GS> ([http://www2.epa.gov/sites/production/files/documents/2012nwpcertification\\_montana.pdf](http://www2.epa.gov/sites/production/files/documents/2012nwpcertification_montana.pdf))).

85. *Id.* at 1–2.

86. Elizabeth Shogren, NPR, *Loophole Lets Toxic Oil Water Flow Over Indian Land*, <http://perma.cc/UR29-YJ8S> (<http://www.npr.org/2012/11/15/164688735/loophole-lets-toxic-oil-water-flow-over-in-dian-land>) (Nov. 15, 2012) [hereinafter Shogren, *Loophole*]; see also Elizabeth Shogren, NPR, *EPA Wants to Allow Continued Wastewater Dumping*, <http://perma.cc/JFM5-78A6> (<http://www.npr.org/2013/08/07/209832887/epa-wants-to-allow-continued-wastewater-dumping-in-wyoming>) (Aug. 7, 2013) [hereinafter Shogren, *Wastewater Dumping*].

regulating the reservation.<sup>87</sup> Even the state asked why the EPA had not acted.<sup>88</sup> In their application for TAS status, the tribes stated that there are several facilities on the reservation “with the potential to emit more than 100 tons per year of air pollutants.”<sup>89</sup> The Wind River tribes cannot stop fracking and its impacts on the reservation, especially on non-Indian lands, when the EPA authorizes it.

The TAS decision resulted in a firestorm of opposition from public and private interests. Local news published stories about the decision under headlines such as: “EPA Moves 3 Wyoming Towns into an Indian Reservation;”<sup>90</sup> “EPA: Riverton part of the Wind River Indian Reservation;”<sup>91</sup> and “EPA overrides Congress, hands over town to Indian tribes.”<sup>92</sup> Opponents of the EPA’s decision even published an article suggesting the Obama Administration was moving on from Wyoming and planning to depopulate the entire State of Montana by redrawing the reservation boundaries of the Flathead Indian Reservation in Montana,<sup>93</sup> prompting an article on Snopes.com debunking the rumor.<sup>94</sup>

More seriously, the Wyoming Governor, Matthew H. Mead, published a letter to the editor arguing that the EPA’s decision undermined state tax-

87. Shogren, *Loophole*, *supra* n. 86 (“Outside the reservation, Western states decide how oil field waste is handled—and their rules are stricter than the EPA’s. For instance, off the reservation, the state of Wyoming requires companies to inject wastewater deep underground and out of harm’s way if they’ve added toxic chemicals to the wells. Other states have set tougher water quality standards that have nearly eliminated these releases. On the Wind River Reservation, these oil field wastewater streams have flowed for several decades without attracting much interest, even from the tribes, according to Wes Martel and other officials of the two tribes that share the reservation, the Eastern Shoshoni and Northern Arapaho.”).

88. *Id.* (“Even the state of Wyoming, which is known to be pro-industry, questioned the fact that the EPA’s requirements didn’t seem to protect aquatic life. The EPA’s response was that the tribes had not adopted their own water quality standards.”).

89. EPA, *Application for Treatment in a Manner Similar to a State under the Clean Air Act for Purposes of Section 1–5 Grant Program Affected State Status and Other Provisions for Which No Separate Tribal Program is Required* 16 (Dec. 17, 2008) (available at <ftp://ftp.epa.gov/r8/WindRiverConsideredDocuments/Application/EPAWR000002.pdf>).

90. Jennifer G. Hickey, *EPA Moves 3 Wyoming Towns into an Indian Reservation*, Newsmax (Jan. 16, 2014) (available at <http://perma.cc/L722-PZLN> (<http://www.newsmax.com/US/epa-wyoming-indian-reservation/2014/01/16/id/547503/>)).

91. Kyle Roerink, *EPA: Riverton Part of the Wind River Indian Reservation*, Casper Star Tribune (Dec. 10, 2013) (available at <http://perma.cc/3Q72-W3HA> ([http://trib.com/news/state-and-regional/epa-riverton-part-of-the-wind-river-indian-reservation/article\\_d476fc0c-9dc5-5660-bb52-eb9fff1639f8.html](http://trib.com/news/state-and-regional/epa-riverton-part-of-the-wind-river-indian-reservation/article_d476fc0c-9dc5-5660-bb52-eb9fff1639f8.html))).

92. Michael Bastach, *EPA Overrides Congress, Hands over Town to Indian Tribes*, The Daily Caller (Jan. 8, 2014) (available at <http://perma.cc/8CQU-QQEV> (<http://dailycaller.com/2014/01/08/epa-overrides-congress-hands-over-town-to-indian-tribes/>)).

93. Sorcha Faal, *Obama Plan to Depopulate Montana Raises Crisis Fears in Moscow*, WhatDoesItMean.com, <http://perma.cc/G9FZ-DSDN> ([www.whatdoesitmean.com/index1732.htm](http://www.whatdoesitmean.com/index1732.htm)) (Jan. 17, 2014).

94. Snopes.com, *Outboxing Helena*, <http://perma.cc/V3BE-D8KL> (<http://www.snopes.com/politics/conspiracy/montana.asp>) (updated Jan. 27, 2014).



ing and regulatory authority, law enforcement jurisdiction, and private property rights.<sup>95</sup> Serious news reports suggest that non-Indians and local government officials within the exterior are concerned that tribal law enforcement officers will begin ticketing nonmembers, or even will begin bringing criminal charges in tribal court against non-Indians.<sup>96</sup> The state attorney general alleged that tribal members incarcerated under state law might challenge their convictions on jurisdictional grounds, and that local food service facilities would go unregulated.<sup>97</sup> The Wyoming Congressional delegation proposed legislation to clarify the reservation status of the Wind River Indian Reservation, a proposal the tribes equate with termination.<sup>98</sup>

These questions can all be addressed through negotiation, as the tribes themselves have suggested.<sup>99</sup> The Saginaw Chippewa reservation boundaries settlement, as well as the Oneida and St. Regis Mohawk settlements, can serve as a template.

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95. Matthew H. Mead, Ltr. to the Ed., *EPA Action on Rez 'is Unlawful,'* The Ranger (Jan. 8, 2014) (available at <http://perma.cc/JB2A-WQCS> ([http://www.dailyranger.com/story.php?story\\_id=10738&headline=EPA-action-on-rez-%27is-unlawful%27](http://www.dailyranger.com/story.php?story_id=10738&headline=EPA-action-on-rez-%27is-unlawful%27))).

96. Irina Zhorov, *Wyoming's Reservation's Redrawn Borders Put Old Conflicts Back on Map*, Al Jazeera America (Feb. 6, 2014) (available at <http://perma.cc/9MKU-FJ4U> (<http://america.aljazeera.com/articles/2014/2/6/wyoming-reservationsredrawnlinesputoldconflictsbackonmap.html>)) (“Criminal-jurisdiction issues in particular are alarming to the local government. The reservation has high crime rates—including violent crime—and limited law-enforcement muscle. What law enforcement exists isn’t always trusted. In the past, the state didn’t want to permit Wind River officers to issue traffic citations to nontribal drivers on the reservation, not to mention handling more serious offenses. People like Thompson also fear that non-Native Riverton residents could end up in tribal rather than municipal court, though that doesn’t happen now on undisputedly tribal land.”).

97. *Id.* (“The concerns listed by Attorney General Peter Michael include potential outcomes ranging from the Wyoming Highway Patrol’s losing authority in the Riverton area to incarcerated tribal members’ challenging their sentences on jurisdictional grounds to Riverton food-service facilities’ operating without regulations.”).

98. County 10, *Wyoming Delegation Draft Bill Seeks to Clarify Boundaries of Wind River Reservation; Tribal leaders Say It's an Attack on Tribal Lands*, <http://perma.cc/C73L-9KAD> (<http://county10.com/2014/04/02/enzi-draft-bill-seeks-withdraw-1m-acres-wind-river-reservation-northern-arapaho-leaders-call-tribes-oppose-bill/>) (accessed Aug. 30, 2014).

99. Press Release, *Eastern Shoshone Tribe Response to EPA Issuing Partial Stay of Its Decision to Wyoming* (Feb. 13, 2014) (available at <http://perma.cc/FL55-DTCG> (<http://turtletalk.files.wordpress.com/2014/02/2014-02-13-press-release-re-epa-issues-stay.pdf>)) (“The partial stay is a benefit to the Tribe because it gives the Shoshone and Arapaho Tribes a chance to have meaningful discussions with the State of Wyoming, the Fremont County Commissioners, and the Riverton City Government, about all the issues Wyoming raised in its request to EPA for the stay. We, as responsible governments and stewards of the land, can approach our issues in a reasonable and calm way and try to resolve any disputes without fear and misinformation.”).

*B. Economic Development — Sault Ste. Marie Tribe  
of Chippewa Indians*

Northern Michigan Indian tribes have attempted to establish Indian gaming facilities in the more populous southern portion of the state for decades. The Sault Ste. Marie Tribe of Chippewa, which once owned a casino in Detroit that it lost in bankruptcy, began the process of opening two facilities, one in Lansing, Michigan, and one near the Detroit Metropolitan Airport.<sup>100</sup> In general, though they might not characterize it this way, the Michigan tribes and the State of Michigan are business partners in the gaming business. They are parties to a dozen Class III gaming compacts under the Indian Gaming Regulatory Act (IGRA)<sup>101</sup>—all of which implement substantial revenue sharing of gaming profits between the tribes, the state, and local governments.<sup>102</sup> Moreover, Michigan and the tribes all entered into an agreement in 2005 to cooperate on economic development issues.<sup>103</sup>

The Sault Tribe's proposals circumvent the normal protocol for off-reservation gaming—the so-called “two-part determination” provided for in IGRA.<sup>104</sup> The two-part determination is incredibly difficult to complete, and only a small handful of tribes have been successful in navigating the process to open a tribal gaming facility in a metropolitan market.<sup>105</sup> The tribe here argues that the proposal is not an off-reservation gaming proposal at all, but instead is an on-reservation proposal—or will be, once the Interior Secretary agrees to acquire the relevant land in trust for the tribe in

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100. Matthew L.M. Fletcher, Turtle Talk Blog, *Sault Tribe Lansing Casino Trust Application Documents*, <http://perma.cc/5HB4-M852> (<http://turtletalk.wordpress.com/2014/06/11/sault-tribe-lansing-casino-trust-application-documents/>) (June 11, 2014) [hereinafter Fletcher, *Sault Tribe Lansing Casino Documents*]; Matthew L.M. Fletcher, Turtle Talk Blog, *Sault Tribe Huron Township, Wayne County Trust Application Documents*, <http://perma.cc/5HB4-M852> (<http://turtletalk.wordpress.com/2014/06/11/sault-tribe-huron-township-wayne-county-trust-application-documents/>) (June 11, 2014) [hereinafter Fletcher, *Sault Tribe Huron Township Documents*].

101. 25 U.S.C. §§ 2701–2721.

102. To view the compacts, see Michigan Gambling Control Board, *Tribal-State Compacts in Michigan*, <http://perma.cc/W66Y-XW5A> ([http://www.michigan.gov/mgcb/0,1607,7-120-1380\\_1414\\_2182\\_00.html](http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_2182_00.html)) (accessed Aug. 31, 2014).

103. Intergovernmental Accord between the Tribal Leaders of the Federally Recognized Indian Tribes in Michigan and the Governor of the State of Michigan Concerning Economic Development Interests (May 13, 2005) (available at <http://perma.cc/7CAD-W5UJ> ([http://www.michigan.gov/documents/som/2005\\_Econ\\_Accord\\_-SOS-OGC\\_195714\\_7.pdf?20140801145021](http://www.michigan.gov/documents/som/2005_Econ_Accord_-SOS-OGC_195714_7.pdf?20140801145021))).

104. 25 U.S.C. § 2719(b)(1)(A).

105. Memo. from Ken Salazar, Assistant Secretary-Indian Affairs, to Walter Echohawk, *Decisions on Indian Gaming Applications 2* (June 18, 2010) (available at <http://perma.cc/9XWP-V3CU> (<http://www.doi.gov/tribes/upload/Salazar-Echohawk-Memo-gamin-June-18.pdf>)).

accordance with the Michigan Indian Land Claims Settlement Act.<sup>106</sup> It's a stretch,<sup>107</sup> but a plausible argument.

Michigan<sup>108</sup> and at least two downstate tribes<sup>109</sup> staunchly oppose the Sault Tribe's initiative. According to news reports, the state and their tribal allies oppose the downstate casinos because they would violate the terms of the gaming compacts between all of the tribes.<sup>110</sup> The two tribes have argued that the Sault Tribe is leaving its own traditional territories and would undermine their market share; the state similarly has mentioned its interest in the three Detroit casinos, all of which pay large amounts of taxes to the state.<sup>111</sup> In short, though the state may not say so publicly, the goal of each party is to maximize revenues for governmental purposes<sup>112</sup> (which is important because the three Detroit casinos are not public entities and are not, technically, involved in this dispute).

The obvious answer for an outside observer, unbiased by political and other leanings, is to identify the dispute in terms of simple dollars. The three Detroit casinos paid out over \$109 million in state taxes in calendar

106. Pub. L. No. 105-143, § 108(f), 111 Stat 2652, 2661-2662 (1997) (according to the tribe, the statute mandates the Interior Secretary to acquire tribal lands in trust so long as the tribe purchased the lands with settlement funds: "Any lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the tribe.").

107. Matthew L.M. Fletcher, Turtle Talk Blog, *City Pulse: Fletcher's Four Barrier[s] to the Lansing Casino Proposal (and Additional Commentary)*, <http://perma.cc/Z96V-MSCE> (<http://turtletalk.wordpress.com/2012/01/27/city-pulse-fletchers-four-barrier-to-the-lansing-casino-proposal-and-additional-commentary/>) (Jan. 27, 2012).

108. *Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075 (6th Cir. 2014) (Michigan lost the case on tribal sovereign immunity grounds, and withdrew its petition for writ of certiorari after losing *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), which involved substantially the same issues); Matthew L.M. Fletcher, Turtle Talk Blog, *Michigan Withdraws Cert Petition in Michigan v. Sault Tribe*, <http://perma.cc/K98W-UM84> (<http://turtletalk.wordpress.com/2014/06/03/michigan-drops-cert-petition-in-michigan-v-sault-tribe/>) (June 3, 2014).

109. Br. of Amicus Curiae Saginaw Chippewa Indian Tribe of Mich. in Support of Appellee to Uphold the Prelim. Inj., *Sault Ste. Marie Tribe*, 2013 WL 3296413 at \*2 (6th Cir. June 24, 2013) (No. 13-1438); Amicus Curiae Br. of the Nottawseppi Huron Band of the Potawatomi on Behalf of the St. of Mich., *Sault Ste. Marie Tribe*, 2013 WL 3296411 at \*\*2-3 (6th Cir. June 21, 2013) (No. 13-1438) (The Saginaw Chippewa Indian Tribe and the Nottawseppi Huron Band of the Potawatomi both filed briefs in support of the State of Michigan.).

110. Lindsay VanHulle, *U.P. tribe plans casinos near Detroit Metro Airport, Lansing*, Det. Free Press (June 11, 2014) (available at <http://perma.cc/ZYA2-9SHR> (<http://www.freep.com/article/20140611/NEWS06/306110134/indian-casino-airport-Lansing>)) ("Opponents, including other Michigan tribes, say the Sault tribe's plans violate a gaming compact it signed with the state that require revenue-sharing agreements from other in-state tribes before opening a casino.").

111. Mich. Gaming Control Bd., *Detroit Casino Revenues*, <http://perma.cc/NYS6-6F9T> ([http://www.michigan.gov/mgcb/0,1607,7-120-1380\\_57134\\_57590---,00.html](http://www.michigan.gov/mgcb/0,1607,7-120-1380_57134_57590---,00.html)) (accessed Aug. 31, 2014). In calendar year 2013, the Detroit casinos paid over \$109 million in state wagering taxes to the state. Mich. Gaming Control Bd., *Detroit Casino Revenues, Calendar Year 2013*, <http://perma.cc/NY5Q-7JG2> ([http://www.michigan.gov/documents/mgcb/revstaxes\\_2013\\_414056\\_7.pdf](http://www.michigan.gov/documents/mgcb/revstaxes_2013_414056_7.pdf)) (accessed Aug. 31, 2014).

112. 25 U.S.C. § 2710(b)(2)-(3), (d)(2)(A) (requiring tribal gaming "net revenues" to be used exclusively for governmental purposes).

year 2013,<sup>113</sup> and are likely to replicate that number in calendar year 2014.<sup>114</sup> Of course, that amount is substantially lower than in years past:

2012 – \$114 million;<sup>115</sup>  
 2011 – \$115 million;<sup>116</sup>  
 2010 – \$99 million;<sup>117</sup>  
 2009 – \$122 million;<sup>118</sup>  
 2008 – \$121 million;<sup>119</sup>  
 2007 – \$157 million;<sup>120</sup>  
 2006 – \$157 million;<sup>121</sup>  
 2005 – \$148 million.<sup>122</sup>

The Saginaw Chippewa Indian Tribe's casino revenues (as opposed to profit)—and accompanying two percent payments to local units of government respectively—have also declined during the same period:

2013 – \$2.54 billion and \$5.08 million;  
 2012 – \$2.91 billion and \$5.83 million;  
 2011 – \$2.91 billion and \$5.86 million;  
 2010 – \$3.09 billion and \$6.18 million;  
 2009 – \$3.37 billion and \$6.73 million;  
 2008 – \$3.68 billion and \$7.36 million;

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113. Mich. Gaming Control Bd., *Detroit Casino Revenues, Calendar Year 2013*, <http://perma.cc/SL68-FXK3> ([http://www.michigan.gov/documents/mgcb/revstaxes\\_2013\\_414056\\_7.pdf](http://www.michigan.gov/documents/mgcb/revstaxes_2013_414056_7.pdf)) (accessed Aug. 31, 2014).

114. Mich. Gaming Control Bd., *Detroit Casino Revenues, Calendar Year 2014*, <http://perma.cc/PE2N-NEXH> ([http://www.michigan.gov/documents/mgcb/revstaxes\\_2014\\_448832\\_7.pdf](http://www.michigan.gov/documents/mgcb/revstaxes_2014_448832_7.pdf)) (accessed Aug. 31, 2014) (demonstrating that in the first six months of calendar year 2014, the Detroit casinos paid out over \$54 million).

115. Mich. Gaming Control Bd., *Detroit Casino Revenues, Calendar Year 2012*, <http://perma.cc/Q2DZ-BZTD> ([http://www.michigan.gov/documents/mgcb/revstaxes\\_2012\\_377293\\_7.pdf](http://www.michigan.gov/documents/mgcb/revstaxes_2012_377293_7.pdf)) (accessed Aug. 31, 2014).

116. Mich. Gaming Control Bd., *Detroit Casino Revenues, Calendar Year 2011*, <http://perma.cc/QNX9-4DLH> ([http://www.michigan.gov/documents/mgcb/revstaxes\\_2011\\_345700\\_7.pdf](http://www.michigan.gov/documents/mgcb/revstaxes_2011_345700_7.pdf)) (accessed Aug. 31, 2014).

117. Mich. Gaming Control Bd., *Detroit Casino Revenues, Calendar Year 2010*, <http://perma.cc/6VRE-L8EY> ([http://www.michigan.gov/documents/mgcb/revstaxes\\_2010\\_311200\\_7.pdf](http://www.michigan.gov/documents/mgcb/revstaxes_2010_311200_7.pdf)) (accessed Aug. 31, 2014).

118. Mich. Gaming Control Bd., *Detroit Casino Revenues, Calendar Year 2009*, <http://perma.cc/9TMM-X9NA> ([http://www.michigan.gov/documents/mgcb/revstaxes\\_2009\\_267050\\_7.pdf](http://www.michigan.gov/documents/mgcb/revstaxes_2009_267050_7.pdf)) (accessed Aug. 31, 2014).

119. Mich. Gaming Control Bd., *Detroit Casino Revenues, Calendar Year 2008*, <http://perma.cc/3K48-6LAM> ([http://www.michigan.gov/documents/mgcb/revstaxes\\_2008\\_225481\\_7.pdf](http://www.michigan.gov/documents/mgcb/revstaxes_2008_225481_7.pdf)) (accessed Aug. 31, 2014).

120. Mich. Gaming Control Bd., *Detroit Casino Revenues, Calendar Year 2007*, <http://perma.cc/SZ62-XQB3> ([http://www.michigan.gov/documents/mgcb/revstaxes\\_2007\\_186949\\_7.pdf](http://www.michigan.gov/documents/mgcb/revstaxes_2007_186949_7.pdf)) (accessed Aug. 31, 2014).

121. Mich. Gaming Control Bd., *Detroit Casino Revenues, Calendar Year 2006*, <http://perma.cc/SVF7-YFT6> ([http://www.michigan.gov/documents/revstaxes\\_2006\\_150388\\_7.pdf](http://www.michigan.gov/documents/revstaxes_2006_150388_7.pdf)) (accessed Aug. 31, 2014).

122. Mich. Gaming Control Bd., *Detroit Casino Revenues, Calendar Year 2005*, <http://perma.cc/GA4V-3MPM> ([http://www.michigan.gov/documents/revstaxes\\_2005\\_116383\\_7.pdf](http://www.michigan.gov/documents/revstaxes_2005_116383_7.pdf)) (accessed Aug. 31, 2014).

2007 – \$3.66 billion and \$7.90 million;  
 2006 – \$3.95 billion and \$7.73 million;  
 2005 – \$3.86 billion and \$7.73 million.<sup>123</sup>

Also, compare the revenue stream and two percent payments of the Nottawaseppi Huron Band of the Potawatomi, which has only been gaming since mid-2009:

2013 – \$2.63 billion and \$5.27 million;  
 2012 – \$2.47 billion and \$4.95 million;  
 2011 – \$2.43 billion and \$4.87 million;  
 2010 – \$2.43 billion and \$4.86 million;  
 2009 – \$96.68 million and \$1.93 million.

Finally, compare the revenue stream and two percent payments of the Sault Ste. Marie Tribe of Chippewa Indians during this period, using the same method:

2013 – \$86.76 million and \$1.74 million;  
 2012 – \$89.23 million and \$1.78 million;  
 2011 – \$90.99 million and \$1.82 million;  
 2010 – \$90.24 million and \$1.80 million;  
 2009 – \$87.51 million and \$1.75 million;  
 2008 – \$96.99 million and \$1.94 million;  
 2007 – \$97.56 million and \$1.95 million;  
 2006 – \$99.11 million and \$1.98 million;  
 2005 – \$98.04 million and \$1.96 million.

The differences between the lower peninsula tribes (Saginaw Chippewa and Nottawaseppi Huron Band) and the upper peninsula tribe (Sault Tribe) is drastic.<sup>124</sup> It makes some sense that the northern tribe would attempt to enter the downstate gaming market. Using market studies, and assuming those market studies were reasonably accurate, the three tribes could reach an understanding of the economic impact of new casinos in Lansing and near the Detroit Metro airport and how those casinos would affect the downstate casinos. Politics and other factors aside, the three tribes

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123. Mich. Gaming Control Bd., *2% of Slot Revenue Payments to Local Units of Government*, <http://perma.cc/K7KM-HXAM> ([http://www.michigan.gov/documents/2\\_percent\\_Payments\\_76617\\_7.pdf](http://www.michigan.gov/documents/2_percent_Payments_76617_7.pdf)) (accessed Aug. 31, 2014) (figures are derived from the state's reporting of the tribe's payments of slot revenue to local units of government).

124. I have not even mentioned the Bay Mills Indian Community, victorious in a major Supreme Court confrontation, *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), preserving the tribe's immunity from a state suit to close the tribe's off-reservation casino in Vanderbilt, Michigan. Bay Mills' leadership has discussed proposing a casino in Port Huron, Michigan, and perhaps elsewhere in southeastern Michigan. Matthew L.M. Fletcher, Turtle Talk Blog, *1500-Slot Casino Planned for Port Huron if BMIC Vanderbilt Casino Succeeds*, <http://perma.cc/999N-SS77> (<http://turtletalk.wordpress.com/2010/11/28/1500-slot-casino-planned-for-port-huron-if-bmic-vanderbilt-casino-succeeds/>) (Nov. 28, 2010).

might come to an accord on how to mitigate the new casinos' impact on the current casinos through a form of intertribal revenue sharing.<sup>125</sup>

The state's interests are far more complicated. Assuming for a moment, and this is a big assumption, that the state is only interested in governmental revenue maximization, then the state will need to analyze the same market studies involving the impacts of new casinos on the current tribal casinos downstate, and then add in market studies on the impacts of the new casinos on the three Detroit casinos. It may be that new downstate casinos will not generate enough new revenue for the state to justify not fighting the Sault Tribe casino proposal. Schumpeterian economics, for example, suggests that new casinos are not the type of economic disruption that would generate new economic growth.<sup>126</sup> New casinos might not do much more than move money around from old casinos to new casinos in a zero-sum game. If that's the case, then the Detroit casinos might lose market share to the new Sault Tribe casinos. Michigan's incentives to fight would be apparent.

The Sault Tribe must know this is a possible concern, and perhaps the state knows as well that there could be little benefit to letting the tribes negotiate amongst themselves. Even so, this is an ongoing issue, and I suspect the parties have been negotiating quietly for some time. Lansing is an open market, and the Detroit airport is located further from the wealthy Oakland County suburbs that likely constitute the meat of the downtown Detroit casino market.

If the negotiations fail, or perhaps never happen, then the parties will eventually litigate over the nuances of the Michigan Indian Land Claims Settlement Act,<sup>127</sup> IGRA,<sup>128</sup> and the Interior Secretary's authority to acquire land in trust for Indian nations<sup>129</sup>—perhaps first in the federal administrative process, before proceeding to federal court. The process is likely to take most of a decade.

IGRA is a federalism statute, implemented through Congressional powers under the Commerce Clause, which significantly restricts state authority over Indian gaming operations.<sup>130</sup> But the statute is a compromise law, assuring states that Indian tribes cannot open up Vegas-style casinos

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125. See Matthew L.M. Fletcher, Turtle Talk Blog, *Toward Intertribal Revenue Sharing*, <http://perma.cc/SRZ6-XSY9> (<http://turtletalk.wordpress.com/2011/09/08/toward-intertribal-revenue-sharing/>) (Sept. 8, 2011).

126. Matthew L.M. Fletcher, *Indian Tribal Businesses and the Off-Reservation Market*, 12 Lewis & Clark L. Rev. 1047, 1059–1060 (2008).

127. Pub. L. 105–143, 111 Stat. 2652 (1997).

128. 25 U.S.C. §§ 2701–2721.

129. 25 U.S.C. § 465.

130. Frank Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 Ariz. St. L.J. 99, 182–183 (2010).

anywhere they want outside of Indian country.<sup>131</sup> The regime all but guaranteed that Indian nations closer to gaming markets would enjoy a major windfall, leaving Indian nations located far from metropolitan areas at a severe market disadvantage. The Sault Tribe's efforts to move downstate are efforts to disrupt IGRA's regime.

### C. People — Oglala Sioux Tribe

The Indian Child Welfare Act (ICWA)<sup>132</sup> is a terrifically unusual statute. It implicates federalism concerns<sup>133</sup> in a manner even more intrusive on state police powers than the federal Indian gaming act, intended by Congress to undo incredible state administrative and judicial discrimination against American Indian parents.<sup>134</sup> ICWA, enacted in 1978, was an enormous disruption to the status quo of child welfare. Congress mandated that state courts and agencies notify Indian nations whenever Indian parents' rights could be terminated, or an Indian child could be placed in foster care; granted Indian nations the right to intervene in these state court matters; allowed for the transfer of these cases to tribal courts; and imposed different standards for state courts to apply.<sup>135</sup> State courts and agencies have resisted ICWA from its inception—sometimes overtly and sometimes not.<sup>136</sup> Many court-appointed guardians ad litem disagree with the goals of the statute and seek to undermine it.<sup>137</sup> Many state courts, state workers, and even attorneys are simply unaware of the statute.<sup>138</sup>

Even so, several states have codified versions of ICWA, including for example, California,<sup>139</sup> Iowa,<sup>140</sup> Michigan,<sup>141</sup> and Nebraska.<sup>142</sup> For several

131. Heidi McNeil Staudenmaier, Kathryn R.L. Rand, Gabriel S. Galanda, D. Michael McBride, III, & Steven J. Zweig, *Native American Off-Reservation Gaming*, 16 Gaming L. Rev. & Econ. 338 (2012).

132. 25 U.S.C. §§ 1901–1963.

133. See generally Jill Hasday, *Family Law Reimagined* (Harv. U. Press 2014) (To be sure, there is significant scholarly authority for the proposition that the federal government has been engaged in family law for much of American history, contrary to the assumption by courts and perhaps others that family law is the exclusive province of the states.).

134. Lorie Graham, *Reparations and the Indian Child Welfare Act*, 25 Legal Stud. Forum 619, 624–626 (2001).

135. B.J. Jones, Mark Tilden & Kelly Gaines-Stoner, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children* (2d ed., ABA 2008); Native Am. Rights Fund, *A Practical Guide to the Indian Child Welfare Act* (2007) (available at <http://perma.cc/ZV7T-43GC> (<http://narf.org/icwa/>)).

136. See generally Barbara Ann Atwood, *Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587 (2002).

137. See generally Matthew L.M. Fletcher & Kathryn E. Fort, *Indian Children and Their Guardians ad Litem*, 93 B.U. L. Rev. Annex 59 (2013), <http://perma.cc/K5JR-7ZNQ> (<http://www.bu.edu/bulawreview/files/2013/11/FLETCHER-AND-FORT.pdf>).

138. Hilary N. Weaver & Barry J. White, *Protecting the Future of Indigenous Children and Nations: An Examination of the Indian Child Welfare Act*, 10 J. Health & Soc. Policy 35, 35–36 (1999).

139. Cal. Welfare & Instns. Code Ann. § 224 (West 2014).

140. Iowa Indian Child Welfare Act, Iowa Code Ann. § 232B (West 2014).

children's rights organizations, ICWA is a best-practices statute that should serve as a model for how all state child welfare statutes should protect children.<sup>143</sup>

According to pleadings in *Oglala Sioux Tribe v. Van Hunnik*,<sup>144</sup> South Dakota judges, allegedly under the influence of one judge,<sup>145</sup> have conducted a run-around of the statute's requirement that "emergency removal or placement [of an Indian child by a state court] terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child."<sup>146</sup> As the plaintiffs pointed out in a recent motion for summary judgment:

Section 1922 is a uniquely important vehicle for keeping Indian children out of foster care, and yet Defendants routinely violate it. Specifically, Defendants were ordered by this Court to produce the transcripts of every third 48-hour hearing conducted since January 1, 2010, *see* Order Granting Motion for Expedited Discovery (Docket 71), resulting in the production of more than 120 hearing transcripts. In more than 90 percent of those hearings, the court entered orders granting the request of the Department of Social Services ("DSS") for continued custody of the Indian children involved in the case. 5 SUF ¶ 2. Thus, each year, Defendants remove approximately 150 children from their families. *Id.* If Defendants would stop viewing § 1922 as a statute of deferment and start complying with it, the number of Indian children in foster care would likely decrease significantly.<sup>147</sup>

In a second motion for summary judgment, the plaintiffs alleged massive due process violations covering hundreds of cases:

All of the 48-hour hearings conducted by Defendants since January 1, 2010 have violated the Due Process Clause of the Fourteenth Amendment in most,

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141. Michigan Indian Family Preservation Act, Mich. Comp. Laws Ann. § 712b (West 2014).

142. Nebraska Indian Child Welfare Act, Neb. Rev. Stat. Ann. §§ 43-15012 to 43-1516 (West 2013).

143. *See* Br. of Casey Family Programs, Child Welfare League of Am., Children's Defense Fund, Donaldson Adoption Inst., N. Am. Council on Adoptable Children, Voice for Adoption, and Twelve Other Natl. Child Welfare Orgs. as Amici Curiae in Support of Respt. Birth Father, *Adoptive Couple v. Baby Girl*, 2013 WL 1279468 (U.S. Mar. 28, 2013) (No. 12-399).

144. 993 F. Supp. 2d 1017 (D.S.D. 2014).

145. Or. Denying Mots. to Dismiss at 20-21, *Oglala Sioux Tribe* (D.S.D. Jan. 28, 2014) (No. 5:13-cv-5020-JLV) (Judge Davis allegedly established a series of guidelines applicable to Indian child welfare cases: plaintiffs claim Judge Davis has instituted six of his own policies, practices, and customs for 48-hour hearings which violate the Due Process Clause and ICWA. These include: not allowing Indian parents to see the ICWA petition filed against them; not allowing the parents to see the affidavit supporting the petition; not allowing the parents to cross-examine the person who signed the affidavit; not permitting the parents to present evidence; placing Indian children in foster care for a minimum of 60 days without receiving any testimony from qualified experts related to "active efforts" being made to prevent the break-up of the family; and failing to take expert testimony that continued custody of the child by the Indian parent or custodian is likely to result in serious emotional or physical damage to the child.); Pls.' Response to Def. Davis' Mot. to Dismiss, *Oglala Sioux Tribe*, 2013 WL 2647100 (D.S.D. June 6, 2013) (No. 5:13-cv-05020-JLV).

146. 25 U.S.C. § 1922.

147. Pls.' First Mot. for P.S.J. re: Violations of 25 U.S.C. § 1922 at 5-6, *Oglala Sioux Tribe*, 2014 WL 3509236 (D.S.D. July 7, 2014) (No. 5:13-cv-05020-JLV).



if not all, of the five respects discussed below, thereby causing significant and irreparable injuries to the two Tribal Plaintiffs and the Plaintiff Class of Indian parents. These five areas of constitutional violations are:

(1) Defendants have failed to give parents adequate notice of the claims against them, the issues to be decided, and the State's burden of proof;

(2) Defendants have denied parents the opportunity to present evidence in their defense;

(3) Defendants have denied parents the opportunity to confront and cross-examine adverse witnesses;

(4) Defendants have failed to provide indigent parents with the opportunity to be represented by appointed counsel; and

(5) Defendants have removed Indian children from their homes without basing their removal orders on evidence adduced in the hearing, and then subsequently issued written findings that bore no resemblance to the facts presented at the hearing.

Defendants' 48-hour hearings are so fundamentally unfair and one-sided that they amount to nothing more than a charade. As recently as June 23, 2014, for instance, Judge Davis conducted a 48-hour hearing in Case No. A14-444, where the only questions he asked the mother before removing her two children were whether she understood her rights and whether she wanted an attorney. No adverse allegations were made against the mother. Nor did the state introduce any evidence indicating (much less proving) that the children would be at risk if returned to the mother. Nor was the mother asked if she wanted to present any evidence or make a statement. Judge Davis simply took away her children.<sup>148</sup>

The Oglala Sioux Tribe and the Rosebud Sioux Tribe originally brought the suit as a class action as *parens patriae*.<sup>149</sup> The tribes noted that tribal members and Indian nations have an unusually close relationship:

The Tribes bring this action as *parens patriae* to vindicate rights afforded to their members by the Due Process Clause of the Fourteenth Amendment and by ICWA. The Tribes and their members have a close affiliation, indeed kinship, with respect to the rights and interests at stake in this litigation. The future and well-being of the Tribes is inextricably linked to the health, welfare, and family integrity of their members.<sup>150</sup>

Undoubtedly, indigent individual tribal member parents facing these circumstances likely have insufficient resources to bring a broad challenge to the practices of the South Dakota court system.

So far in this matter, the state court defendants have argued that the tribes' legal theories are incorrect.<sup>151</sup> Federalism issues abound—the plain-

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148. Pls.' Second Mot. for P.S.J.: Due Process Violations at 7–8, *Oglala Sioux Tribe*, 2014 WL 3509239 (D.S.D. July 7, 2014) (No. 5:13-cv-05020-JLV).

149. Class Action Compl. for Declaratory & Injunctive Relief at 4, *Oglala Sioux Tribe*, 2013 WL 1178660 (D.S.D. Mar. 21, 2013) (No. 5:13-cv-05020-JLV).

150. *Id.*

151. Defs.' Response [to] Pls.' Mot. for S.J. re: 25 U.S.C. § 1922, *Oglala Sioux Tribe*, 2014 WL 4447163 (D.S.D. Sept. 5, 2014) (No. Civ. 13-5020-JLV); Defs.' Response to Pls.' Mot. for P.S.J. re: Due Process, *Oglala Sioux Tribe* (D.S.D. Sept. 5, 2014) (No. Civ. 13-5020-JLV).

tiffs are asking a federal court to intervene in the policies and practices of state court judges.

#### IV. FEDERALISM IMPLICATIONS

Academics continue to debate whether American federalism as envisioned in the Articles of Confederation and the Constitution had its origins in American Indian political theory, most notably that of the Haudenosaunee Confederacy. Gordon Wood's malicious take-down of Laura Nader in his controversial review of Alison LaCroix's *The Ideological Origins of American Federalism* indicates that there are very strong feelings about the Haudenosaunee contributions to American federalism.<sup>152</sup> Arguments aside, it is now clear that "federalism existed within tribal governing structures long before it was adopted within the U.S. Constitution."<sup>153</sup>

Courts and commentators have struggled with how to handle the presence of Indian nations in the American federalism structure since before the Framing. Though the Constitution creates a place for Indian nations, their placement is in direct opposition to the federal government and the states. The Constitution merely places Congress in the position to regulate commerce with Indian nations, and the executive branch in the position of negotiating with Indian nations via the treaty power. It is well understood that early American Indian affairs policies dealt with Indian nations and Indian people as competitors to land and resources.<sup>154</sup>

In the modern era, now that nearly all of the land and resources have fallen out of Indian and tribal hands, it is simple enough for many states and local governments—as well most federalism commentators<sup>155</sup>—to ignore Indian nations. Even in Michigan, where there are 12 federally recognized Indian tribes, tribal officials encounter constant turnover in state administrative officials, which forces tribal representatives to perpetually educate state officials about the basics of federal Indian law, Michigan Anishinaabe history, and modern Michigan tribal governments.<sup>156</sup>

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152. Gordon S. Wood, *Federalism from the Bottom Up*, 78 U. Chi. L. Rev. 705, 705–706 (2011) (reviewing Alison L. LaCroix, *The Ideological Origins of American Federalism* (Harv. U. Press 2010)).

153. Singel, *supra* n. 25, at 782 (citing Donald S. Lutz, *The Iroquois Confederations Constitution: An Analysis*, 28 *Publius* 99 (Spring 1998)).

154. Francis Paul Prucha, *American Indian Policy in the Formative Reason: The Indian Trade and Intercourse Acts, 1790-1834*, at 27 (Harv. U. Press 1962); Andrew McFarland Davis, *The Employment of Indian Auxiliaries in the American War*, 2 *English Historical Rev.* 709, 712 (1887) (describing the various methods, including massive fraud and violence, used by Americans to dispossess Indian lands).

155. Steven Paul McSloy, *Border Wars: Haudenosaunee Lands and Federalism*, 46 *Buff. L. Rev.* 1041, 1041–1042 (1998).

156. To be fair, thanks to American educators also ignoring Indian affairs history and politics, many tribal officials need the same education about their own tribes.

But Indian nations and their members and citizens remain governed,<sup>157</sup> and their relationships with states and the federal government are still mostly governed, by eighteenth century constitutional provisions and nineteenth century treaty terms. Congress has enacted hundreds of statutes governing those relationships, but despite notable successes like the Indian Self-Determination Acts,<sup>158</sup> relations between Indian nations and state and local governments are largely unregulated. Even where Congress has written rules governing states and tribes, in the so-called Public Law 280 states (and parallel states), the legislation often failed miserably.<sup>159</sup> In far too many parts of Indian country, conflicts reign.

It is helpful to start with Judge Skretny's dictum laying out the conflict between states and tribes before analyzing the implications of tribal disruption on federalism:

One of federalism's fundamental principles is that the States are primarily responsible for protecting the health, safety, and welfare of their citizens. As such, the State of New York has a legitimate and substantial interest in enacting laws and regulations pursuant to its historic police power. On the other hand, Indian tribes have a unique sovereign status, recognized by the Supreme Court and deeply rooted in traditions of tribal independence, which insulates them from state regulation in some respects.<sup>160</sup>

This characterization makes tribal-state relations appear to be a straight-up conflict between state police powers (impliedly protected by the structure of the Constitution and expressly by the Tenth Amendment) and tribal sovereignty (impliedly recognized by the Indian Commerce Clause and expressly protected nowhere in the Constitution). As Professor Singel persuasively argues, this characterization allows (and in fact encourages) courts to label tribal governance "dangerously foreign, destabilizing, and undemocratic."<sup>161</sup> Add in the fact that the Constitution is designed to guarantee a robust place for state governance in the context of the greater polity, and not tribes, it is all too easy for federal and state courts to undervalue tribal interests in disputes with states and local governments.

In line with Professor Epstein and Mr. Loyola's views, Professor Singel recommends that courts look instead at the well-established values of federalism: (1) checks and balances against actual tyranny; (2) demo-

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157. Joseph William Singer, *Double Bind: Indian Nations v. The Supreme Court*, 119 Harv. L. Rev. Forum 1, 2 (2005) ("Writing Indians out of the Constitution . . . would appear to be beyond the legitimate powers of the Court.").

158. E.g. Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450 *et seq.*; Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §§ 4101–4243.

159. See generally Duane Champagne & Carole Goldberg, *Captured Justice: Native Nations and Public Law 280* (Carolina Academic Press 2012); Indian L. & Or. Commn., *supra* n. 16.

160. *Ward v. N.Y.*, 291 F. Supp. 2d 188, 193 (W.D.N.Y. 2003).

161. Singel, *supra* n. 25, at 781 (citing Raymond D. Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance*, at xx (U. of Minn. Press 2009)).

cratic participation and accountability; (3) local autonomy; and (4) problem-solving capacity.<sup>162</sup>

I would add that disruption of the superior sovereign's preferences and initiatives could be a fifth important value of federalism—or at least in the context of what Professor Singel calls “tribal federalism.”<sup>163</sup> Professor Epstein and Mr. Loyola stridently argue the Supreme Court should undo its modern constitutional jurisprudence—and undo the New Deal with it:

There is no principled reason to show the Supreme Court's New Deal decisions more deference than the New Deal Court showed the precedents which time had handed down to it.

At the highest level of abstraction, the key task is for the Supreme Court to start undoing the major mistakes that started with the Progressive era a century ago. What that means concretely is that the Court must once again begin to protect the rights of all minority interests, including rights of property and economic liberty; to make sure that the power to tax and spend is really being used “for the general Welfare of the United States”; to preserve meaningful state sovereignty over some part of the purely internal commerce of the states; and to ensure the separation of state and federal government operations.<sup>164</sup>

Perhaps Professor Epstein and Mr. Loyola do not envision tribal interests as the type of “minority interests” they wish the Supreme Court to protect. But that is a red herring. Moreover, rethinking and perhaps undoing the New Deal-era's federalism jurisprudence is disruption at the highest level, analogous to restoring hundreds of millions of square miles of land to tribal and Indian ownership. It probably will not happen.

But disruption is the value here, not destruction. Indian nations and Indian people are uniquely situated to understand what true American tyranny and national government dominance looks like. Felix S. Cohen's *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*,<sup>165</sup> and similar works,<sup>166</sup> depict modern federal government abuses that go way beyond Professor Epstein and Mr. Loyola's nightmares. Mid-twentieth century federal Indian affairs administration was a horror show. Here are but a few examples:

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162. *Id.* at 821–826.

163. *Id.* at 817.

164. Epstein & Loyola, *Saving Federalism*, *supra* n. 1.

165. 62 Yale L. J. 348 (1953).

166. Congressional reports at the time of the enactment of the American Indian Religious Freedom Act, 42 U.S.C. § 1996, recognized deprivations of Indian freedoms ongoing as of 1978. See H.R. Rpt. 95-1308 (June 19, 1978) (available at 1978 WL 8715); Sen. Rpt. 95-709 (March 21, 1978) (available at <http://perma.cc/H2Y8-JHZY> ([http://docs.newsbank.com/openurl?ctx\\_ver=z39.88-2004&rft\\_id=info:sid/iw.newsbank.com:SERIAL&rft\\_val\\_format=info:ofi/fmt:kev:mtx:ctx&rft\\_dat=12BF21EEF1CC8900&svc\\_dat=Digital:ssetdoc&req\\_dat=5DDABDBCA22A4496942BEE4822966D07](http://docs.newsbank.com/openurl?ctx_ver=z39.88-2004&rft_id=info:sid/iw.newsbank.com:SERIAL&rft_val_format=info:ofi/fmt:kev:mtx:ctx&rft_dat=12BF21EEF1CC8900&svc_dat=Digital:ssetdoc&req_dat=5DDABDBCA22A4496942BEE4822966D07))).

*Military-style control:* “Administrators accustomed to exercising the powers of a military government were impatient of legal restraints as they undertook to govern all aspects of the lives of their subject peoples.”<sup>167</sup>

*Interference with tribal elections:* “When the Blackfeet Tribe held a referendum election on May 9, 1952, on a proposed amendment to the tribal constitution, the Interior Department ran a rival election, managed by Indian Bureau employees; called out its special Bureau police force; closed down one or more tribal polling places; seized tribal funds, without tribal consent, to pay some of the expenses of the Bureau election (notwithstanding Secretary Chapman’s assurance that no such action was contemplated); and, in order to validate its own election results, tried to strike more than 1,000 Blackfeet names from the list of eligible voters.”<sup>168</sup>

*Denial of the right to counsel:* “[D]uring more than a decade before [Indian Affairs Commissioner Dillon S.] Myer took office no Indian tribe had ever been denied the right to retain as its attorney any lawyer in good standing at the bar. Since Mr. Myer took office more than forty Indian tribes have complained of Bureau interference in the exercise of this right. The Secretary on January 24, 1952, announced appointment of a committee to look into this problem. At last reports, the committee had never met.”<sup>169</sup>

*Denial of the freedom of speech:* “Yet when the Oglala Sioux Tribe on September 28, 1950, petitioned Congress to cut wasteful expenditures of the Indian Bureau in its so-called ‘extension service’ in South Dakota, the Indians were advised that \$140,000 of credit funds allocated to the tribe several months earlier would be ‘frozen’ until the tribe withdrew its criticisms.”<sup>170</sup>

*Denial of the freedom of religion:* “Where native religious customs interfere with administrative convenience, Commissioner Myer has taken the position that Indian Bureau officials regularly maintained in the 1880’s and 1890’s: native custom must give way. For example, at one of the Rio Grande Pueblos, where ancient custom requires that no white person remain within the Pueblo at certain ceremonies, the Indian Bureau now insists that its employees will remain on the Pueblo grounds notwithstanding the objection of the Indian landowners to their presence.”<sup>171</sup>

That is a merely a small sample. The federal government has improved dramatically in the exercise of its trust responsibility toward Indian nations and Indian people in the past few decades, but Indian people who are alive are all too cognizant of a dramatically different state of affairs—they lived through federal tyranny of a kind contemporary Americans would not believe.<sup>172</sup>

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167. Cohen, *supra* n. 165, at 352.

168. *Id.* at 354.

169. *Id.* at 355–356.

170. *Id.* at 356.

171. *Id.* at 359.

172. Singel, *supra* n. 25, at 832–833 (“[Maine] child protective services had conducted continual surveillance of Maliseet families.”) (citation omitted) (Professor Singel details instances of *state* tyranny as well.).

Tribal governance, for all its flaws, is directed by American citizens who have faced down modern federal bureaucratic tyranny and are more driven to govern well than virtually all other Americans. Moreover, although it does happen in some communities, tribal elected officials rarely are beholden to political campaign contributors in the same way federal and state elected officials often are.

Consider the Wind River EPA dispute under Professor Singel's four-part rubric for analyzing the values of federalism—checks and balances against actual tyranny; democratic participation and accountability; local autonomy; and problem-solving capacity.<sup>173</sup> Recall that the EPA granted the Wind River tribes TAS status for the purpose of becoming eligible for receiving federal grants and for greater participation rights in permitting processes.<sup>174</sup> That the EPA's decision confers no regulatory authority on the tribes undermines the argument that the tribes' actions could undermine state and local authority.

But Wyoming and its political subdivisions look beyond, to perhaps a time when the EPA sees fit to recognize the Wind River tribes as states for purposes of regulating reservation point source polluters. It appears from the early rhetoric that state and local officials are worried that a tribal nation, unaccountable to the state and local electorate, will then make decisions that affect the daily lives of non-tribal members. Of course, Wind River tribal members can say the same thing, and to back their claims, the reservation may remain over-polluted and under-regulated for years to come. Yes, tribal regulatory jurisdiction over Indian and non-Indian lands within the Wind River jurisdiction will be disruptive—but disruption is not an inherent evil.

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173. Singel, *supra* n. 25, at 821–826.

174. EPA, *Approval of Application Submitted by the East Shoshone Tribe and North Arapaho Tribe for Treatment in a Similar Manner as a State for Purposes of Clean Air Act* (Dec. 6, 2013) (available at <http://perma.cc/Z6QH-3MUU> (<http://turtletalk.files.wordpress.com/2013/12/epa-approval.pdf>)).