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Teacher's Memorandum to accompany

Getches, Wilkinson, Williams, Fletcher & Carpenter

FEDERAL INDIAN LAW, 7th ed.

Prepared by:

Matthew L.M. Fletcher

Professor, Michigan State University College of Law

Director, Indigenous Law and Policy Center

INTRODUCTION

The Seventh Edition of this casebook was released in 2017. This teacher's memorandum includes additional Nation Building and Lawyering Notes, some of which are much lengthier than Notes included in the book (*Carcieri* and labor relations), others involving issues not resolved until the conclusion of the book (*Patchak* and Dakota Access Pipeline), and a pending issue (Bears Ears).

The memorandum also includes materials on *Lewis v. Clarke*, *Upper Skagit Indian Tribe v. Lundgren*, *Washington Dept. of Revenue v. Cougar Den*, and *Herrera v. Wyoming*, recent Supreme Court decisions touching upon tribal immunity. We also highlight materials from the Supreme Court's non-decision in the so-called culverts case, the latest matter in the long-running *United States v. Washington* fishing rights litigation, and *Carpenter v. Murphy*, the capital murder case involving the Muscogee (Creek) Nation's reservation that the Court quietly set for reargument in the 2019 Term.

We have also included materials from *Brackeen v. Bernhardt*, reversing the federal district court decision from the fall of 2018 that rocked Indian country by striking down the Indian Child Welfare Act by rejecting foundational federal Indian law principles. We are happy to excerpt the Fifth Circuit's opinion confirming the constitutionality of the Indian Child Welfare Act.

At the request of an intrepid law teacher, we have included material cut from the Seventh edition on federal-tribal relations involving leasing, timber management, and the Interior Department's trust duties to Indian tribes.

Comments on the memorandum and on the 7th edition are most welcome and appreciated, and can be directed to Matthew L.M. Fletcher, Michigan State University College of Law, East Lansing, Michigan at matthew.fletcher@law.msu.edu. Permission is hereby granted to reproduce any or all of this memorandum for teacher or student use in any course that is based upon **GETCHES, WILKINSON, WILLIAMS, FLETCHER, AND CARPENTER CASES AND MATERIALS ON FEDERAL INDIAN LAW (7th ed. 2017)**.

Matthew Fletcher
East Lansing, Mich.
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CHAPTER 5

THE FEDERAL-TRIBAL RELATIONSHIP

SECTION A.

TRIBAL PROPERTY INTERESTS

Add to end of notes on page 321:

INDIAN LAWYERING NOTE:

THE *CARCIERI* PROBLEM*

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 5308 (formerly 25 U.S.C. § 465), authorizes the Secretary of the Interior to acquire land in trust for the benefit of Indians and Indian tribes:

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

Section 7 authorized the Interior Secretary to declare new reservations on acquired trust lands. 25 U.S.C. § 5101 (formerly § 467) ("The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.").

Section 5 authorizes the Interior Secretary to acquire land in trust for "Indians," a term of art defined a later section of the IRA as "all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*. . . ." 25 U.S.C. § 5129 (formerly § 479).

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court held that the Interior Secretary may not acquire land in trust for the benefit of the Narragansett Indian Tribe. Id. at 382-83, 395-96. The State of Rhode Island challenged the Secretary's decision to take land into trust on the ground that the tribe, which the federal government recognized as an Indian tribe in 1983, was not under federal jurisdiction in 1934, the date of the enactment of the IRA. The federal government and the tribe argued that "now" meant at the time of the Interior Secretary's decision to acquire land in trust. The Court agreed with the state.

* Materials in this Note are derived from Matthew L.M. Fletcher, Federal Indian Law § 7.3 (2016).

The Court undertook statutory construction under which it concluded that the definition of "Indian" was unambiguous. The Court looked to the "ordinary meaning of the word 'now,' " and located contemporaneous dictionary definitions of the word that suggested the word "ordinarily" refers to a "present" time or moment. *Carcieri*, *supra*, at 388. The Court pointed to a statement made by John Collier, architect of the IRA and the Commissioner of Indian Affairs, in 1936, two years after the IRA's enactment: "Section 19 of the Indian Reorganization Act . . . provides, in effect, that the term 'Indian' as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe *that was under Federal jurisdiction at the date of the Act*. . . ." Id. at 390 (quoting Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936)) (emphasis in original). The Court concluded by noting that no party ever claimed the Narragansett Indian Tribe was under federal jurisdiction in 1934, and shut the door to further proceedings by declaring that it would hear no evidence to the contrary.

Justice Breyer's concurrence argued that "now" in § 479 [currently codified at 25 U.S.C. § 5129] might be more inclusive of tribes than it appears from the *Carcieri* facts. Id. at 397. While the Interior Department compiled a list of 258 tribes it recognized in 1934, Breyer suggested that in fact there might have been many, many more that "the Department did not know [about] at the time." Id. at 398.

Professor Bill Rice argued that the decision throws a monkey wrench in modern Indian affairs:

> This decision will create a cloud upon the trust title of every tribe first recognized by Congress or the executive branch after 1934, every tribe terminated in the termination era that has since been restored, and every tribe that adopted the IRA or [Oklahoma Indian Welfare Act] and changed its name or organizational structure since 1934. It will also result in incessant litigation to determine which of the over 500 tribes fall within its terms and prohibit future trust acquisitions for such tribes as are finally found to be within its net.

G. William Rice, The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri "Fix": Updating the Trust Land Acquisition Process, 45 Idaho L. Rev. 575, 594 (2009).

On March 12, 2014, the Interior Solicitor issued an opinion on the definition of "under federal jurisdiction" for IRA purposes. Dept. of Interior, Office of the Solicitor, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, M–37029 (March 12, 2014). The Solicitor opined that there is no plain meaning of "under federal jurisdiction." The Solicitor then concluded that whether an Indian tribe was "under federal jurisdiction" in 1934 is a two-part inquiry:

> Thus, having closely considered the text of the IRA, its remedial purposes, legislative history, and the Department's early practices, as well as the Indian canons of

> construction, I construe the phrase "under federal jurisdiction" as entailing a two-part inquiry. The first question is to examine whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, i.e., whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Some federal actions may in and of themselves demonstrate that a tribe was, at some identifiable point or period in its history, under federal jurisdiction. In other cases, a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction.
>
> * * *
>
> Once having identified that the tribe was under federal jurisdiction prior to 1934, the second question is to ascertain whether the tribe's jurisdictional status remained intact in 1934. For some tribes, the circumstances or evidence will demonstrate that the jurisdiction was retained in 1934. In some instances, it will be necessary to explore the universe of actions or evidence that might be relevant to such a determination or to ascertain generally whether certain acts are, alone or in conjunction with others, sufficient indicia of the tribe having retained its jurisdictional status in 1934.

Id. at 19.

Litigation challenging the Secretary of the Interior's authority to acquire land in trust for tribes more recently federally recognized since 1934 has exploded. E.g., Confederated Tribes of Grand Ronde Community of Oregon v. Jewell, 830 F.3d 552 (D.C. Cir. 2016), cert. petition filed sub nom., Citizens Against Reservation Shopping v. Zinke (July 29, 2016) (No. 16-572); Upstate Citizens for Equality, Inc. v. United States, 841 F.3d 556 (2d Cir. 2016); Poarch Band of Creek Indians v. Hildreth, 656 Fed.Appx. 934 (11th Cir. 2016); Big Lagoon Rancheria v. State of California, 789 F.3d 947 (9th Cir. 2015); KG Urban Enterprises, Inc. v. Patrick, 693 F.3d 1 (1st Cir. 2012); No Casino in Plymouth v. Jewell, 136 F.Supp.3d 1166 (E.D. Cal. 2015).

The litigation involving the trust land acquisition for the Grand Traverse Band of Ottawa and Chippewa Indians is instructive. The Grand Traverse Band is a signatory to treaties with the United States in 1836 and 1855, but suffered through "administrative termination," whereby the Department of the Interior refused to acknowledge the tribe from the 1870s until 1980 based on a misreading of the treaty language. The Interior Board of Indian Appeals held that the tribe remained "under federal jurisdiction" in 1934 even though the tribe did not enjoy federal recognition, largely because of its retained treaty rights:

> We agree with the Regional Director that the historical record supports his finding that the Tribe was under Federal jurisdiction in 1934. The Tribe is the successor to the Grand Traverse Ottawas and Chippewas, who signed treaties with

> the United States reserving commercial and subsistence fishing rights. Grand Traverse Band of Chippewa and Ottawa Indians v. Director, Michigan DNR, 971 F. Supp. 282, 285, 288 (W.D. Mich. 1995) (Tribe's rights under 1836 and 1855 treaties), aff'd, 141 F.3d 635 (6th Cir. 1998). The treaty-reserved fishing rights included a servitude, or easement of access over land surrounding the Indians' traditional fishing grounds, that remained in effect even after the land became privately owned. 141 F.3d at 639. When the United States took action in the 1970s to protect the tribal treaty-reserved rights, it did so on its own behalf and on behalf of, i.e., as trustee for, the tribes whose rights were subject to Federal protection. See United States v. Michigan, 471 F. Supp. 192, 203 (W.D. Mich. 1979). The Board has previously recognized that when the United States continues to hold land in trust for a tribe or its members, it cannot reasonably be disputed that the tribe is under Federal jurisdiction. See Village of Hobart, 57 IBIA at 20 n.23. In the present case, in 1934, the Tribe undoubtedly held a reservation of Federally protected fishing rights and other associated property rights, and those legal rights could be neither diminished nor terminated by the Secretary's improper de facto "termination" of the Federal government's relationship with the Tribe, based on his erroneous interpretation of the 1855 treaty. See Grand Traverse Band, 369 F.3d at 968. In our view, the existence of hunting and fishing rights, reserved in and protected by Congressionally ratified treaties, and for which the United States continued to have an obligation, is as compelling and dispositive evidence to demonstrate that the Tribe was under Federal jurisdiction in 1934 as would be the case if the United States had held land in trust for the Tribe.

Grand Traverse County Board of Commissioners v. Midwest Regional Director, Bureau of Indian Affairs, 61 IBIA 273, 281-82 (2015). It seems that extant treaty rights provide considerable evidence that an Indian tribe was "under federal jurisdiction" in 1934, but what about tribes that are not signatories to treaties with the United States?

For detailed commentary on the issues arising from *Carcieri*, see William Wood, Indians, Tribes, and (Federal) Jurisdiction, 65 U. Kan. L. Rev. 415 (2016). For broader discussion of pressures on reservation lands during the Trump administration, see Kristen A. Carpenter and Angela R. Riley, *Privatizing the Reservation?*, 71 Stan. L. Rev. 791 (2019).

INDIAN LAWYERING NOTE:

THE *PATCHAK* PROBLEM

Prior to 2012, once the Secretary of the Interior exercised discretion to acquire land in trust for Indians or tribes, the Quiet Title Act (QTA) barred any challenges to that discretion. 28 U.S.C. § 2409a(a). The QTA is actually a waiver of federal sovereign immunity allowing persons to sue the United States to quiet title to disputed property, but the Act bars any such challenges to Indian trust lands:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands . . . .

Id.

In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), the Supreme Court held that individuals challenging the authority of the Secretary of the Interior to acquire land in trust for the benefit of Indian tribes under 25 U.S.C. § 5108 [formerly 25 U.S.C. § 465] are not barred by the Quiet Title Act, 28 U.S.C. § 2409a(a) & (d), from bringing suit. The challenger had wanted to bring a *Carcieri* challenge to the trust acquisition after the land had already been acquired. In 2014, Congress enacted the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113–179, Sept. 26, 2014, 128 Stat.1913, confirming the authority of the Secretary to take land into trust for the tribe, ratifying the trust acquisition, and stripping the federal courts of jurisdiction over the *Patchak* remand and other potential challenges to the tribe's trust lands:

> (a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed.Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

Pub. L. No. 113–179, § 2. The statute was the brainchild of the tribe's general counsel, Zeke Fletcher, who quietly worked behind the scenes on Capitol Hill to secure its passage.

In *Patchak v. Zinke*, 138 S. Ct. 897 (2018), a sharply divided Supreme Court affirmed the validity of the Gun Lake Trust Land Reaffirmation Act from a separation of powers challenge. While normally the Court looks askance at efforts by Congress to strip federal courts of jurisdiction over pending cases, in this instance Congress was merely affirming the Secretary's decision and therefore eliminated all challenges to the Secretary's authority by doing so, as Justice Breyer's concurrence explains:

> Congress then enacted the law here at issue. Gun Lake Trust Land Reaffirmation Act, Pub.L. 113–179, 128 Stat. 1913. * * * The first part "reaffirm[s]," "ratifie[s]," and "confirm[s]" the Secretary's "actions in taking" the Bradley Property "into trust," as well as the status of the Bradley Property "as trust land." § 2(a). The second part says that actions "relating to" the Bradley Property "shall not be filed or maintained in a Federal court and shall be promptly dismissed." § 2(b). Read together, Congress first made certain that federal statutes gave the Secretary the authority to take the Bradley Property into trust, and second tried to dot all the I's by adding that federal courts shall not hear cases challenging the land's trust status. The second part, the jurisdictional part, perhaps gilds the lily, perhaps simplifies judicial decisionmaking (the judge need only determine whether a lawsuit relates to the Bradley Property), but, read in context, it does no more than provide an alternative legal standard for courts to apply that seeks the same real-world result as does the first part: The Bradley Property shall remain in trust.
>
> The petitioner does not argue that Congress acted unconstitutionally by ratifying the Secretary's actions and the land's trust status, and I am aware of no substantial argument to that effect. See * * * Brief for Federal Courts and Federal Indian Law Scholars as Amici Curiae 6–11 (citing numerous examples of tribe-specific Indian-land bills). The jurisdictional part of the statute therefore need not be read to do more than eliminate the cost of litigating a lawsuit that will inevitably uphold the land's trust status.
>
> This case is consequently unlike United States v. Klein, 13 Wall. 128, 20 L.Ed. 519 (1872), where this Court held unconstitutional a congressional effort to use its jurisdictional authority to reach a result (involving the pardon power) that it could not constitutionally reach directly. Id., at 146; see Bank Markazi v. Peterson, 578 U.S. ——, ——, and n. 19, 136 S.Ct. 1310, 1324, and n. 19, 194 L.Ed.2d 463 (2016). And the plurality, in today's opinion, carefully distinguishes from the case before us other circumstances where Congress' use of its jurisdictional power could prove constitutionally objectionable. Ante, at 906, and n. 3, 918, n. 6. Here Congress has used its jurisdictional power to supplement, without altering, action that no one has challenged as unconstitutional. Under

these circumstances, I find its use of that power unobjectionable. And, on this understanding, I join the plurality's opinion.

Patchak, 138 S. Ct. at 910-11.

SECTION B.

THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF FEDERAL POWER

PART 2. TREATY ABROGATION

Add to the end of the note on *Indian Treaty Abrogation and Congressional Intent* on page 361:

NATION BUILDING NOTE:

TRIBAL LABOR RELATIONS

Indian tribal gaming operations employ about 450,000 non-Indians. Most gaming operations are relatively modest affairs, with a few on either extreme of the bell curve generating an enormous windfall for tribes or losing money. The bigger, more successful casinos tend to employ few tribal members, in large part, because there are simply not enough tribal members to staff a sizeable casino. Most casinos can be staffed by a significant plurality, or even a majority, of tribal members. Non-Indian gaming operations are often unionized, and it was only a matter of time before labor unions began organizing Indian casino employees.

The key federal labor relations law is the National Labor Relations Act of 1935 (NLRA), 29 U.S.C. § 151 et seq., administered and enforced by the National Labor Relations Board (NLRB). Labor can file grievances against management through processes established by the NLRB. State and federal government employers are protected from certain labor organizing techniques, most notably strikes. Tribal governments are not mentioned in either the statute or the legislative history. Notably, the NLRA was enacted a year after the Indian Reorganization Act of 1934, 25 U.S.C. § 5301 et seq. (formerly 25 U.S.C. § 461 et seq.).

The Sixth Circuit recently decided two cases involving the NLRB's assertion of jurisdiction over two Michigan Indian tribes. In the first, *NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015), cert. denied, 136 S.Ct. 2508 (2016), a split panel held that the National Labor Relations Act could be asserted against the tribal casino operation. The court first concluded that federal statutes of general applicability should apply to Indian nations – as in the *Coeur d'Alene* framework, see page 359 – because tribal authority over nonmembers is limited:

> Comprehensive federal regulatory schemes that are silent as to Indian tribes can divest aspects of inherent tribal sovereignty to govern the activities of non-members. We do not doubt that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." Wheeler, 435 U.S. at 323, 98 S.Ct. 1079. Yet,

> such residual sovereignty is "unique and limited." Id. As explained above, the Supreme Court has held several aspects of tribal sovereignty to regulate the activities of non-members to be implicitly divested, even in the absence of congressional action, and it is axiomatic that tribal sovereignty is "subject to complete defeasance" by Congress. It would be anomalous if certain aspects of tribal sovereignty—namely, specific powers to regulate some non-member activities—are implicitly divested in the absence of congressional action, see generally Cohen's Handbook § 4.02(3), at 226–42, but those same aspects of sovereignty could not be implicitly divested by generally applicable congressional statutes.

Id. at 549. The court therefore applied the *Coeur d'Alene* framework:

> We find that the *Coeur d'Alene* framework accommodates principles of federal and tribal sovereignty. . . . [T]here is a stark divide between tribal power to govern the identity and conduct of its membership, on the one hand, and to regulate the activities of non-members, on the other. The *Coeur d'Alene* framework begins with a presumption that generally applicable federal statutes also apply to Indian tribes, reflecting Congress's power to modify or even extinguish tribal power to regulate the activities of members and non-members alike. See 751 F.2d at 1115; cf. Montana, 450 U.S. at 557, 101 S.Ct. 1245. The exceptions enumerated by *Coeur d'Alene* then supply Indian tribes with the opportunity to show that a generally applicable federal statute should not apply to them. The first exception incorporates the teachings of *Iowa Mutual* and *Santa Clara Pueblo* that if a federal statute were to undermine a central aspect of tribal self-government, then a clear statement would be required. By this mechanism, the *Coeur d'Alene* framework preserves "the unique trust relationship between the United States and the Indians." *Grand Traverse Band*, 369 F.3d at 971 (quoting Blackfeet Tribe, 471 U.S. at 766, 105 S.Ct. 2399). We therefore adopt the *Coeur d'Alene* framework to resolve this case.

Id. at 551. The court's application of that framework placed the onus on the tribe to get out from under the federal statute:

> Under the *Coeur d'Alene* framework, since there is no treaty right at issue in this case, the NLRA applies to the Band's operation of the casino unless the Band can show either that the Board's exercise of jurisdiction "touches exclusive rights of self-governance in purely intramural matters" or that "there is proof by legislative history or some other means that Congress intended [the NLRA] not to apply to Indians on their reservations."

Id. Though the tribe argued that the Act and the Board's assertion of jurisdiction effectively abrogated the tribe's internal self-governance authority:

> The Band forwards two arguments for its contention that application of the NLRA undermines its right of self-governance: first, the regulations targeted by the Board's order protect the net revenues of the casino, which, pursuant to the IGRA, fund its tribal government. Second, the Band stresses that application of the NLRA would invalidate a regulation enacted and implemented by its Tribal Council.

Id. at 552. The court systematically rejected all those claims. Id. at 552-55.

In dissent, Judge McKeague slammed the majority's reasoning, referring to the *Couer d'Alene* framework based on the Supreme Court's *Tuscarora* decision as a "house of cards":

> So what changed to justify the NLRB's new approach? Congress has not amended the NLRA or in any other way signaled its intent to subject Indian tribes to NLRB regulation. Nor has the Supreme Court recognized any such implicit intent. The NLRB "adopted a new approach" and "established a new standard" based on its recognition that some courts had begun to apply other generally applicable federal laws to Indian tribes notwithstanding Congress's silence. San Manuel, 341 NLRB at 1055, 1057, 1059. These courts, the NLRB observed, found support for this new approach in a single statement in a 1960 Supreme Court opinion, Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960): "[I]t is now well-settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." The statement buttressed the Court's holding, but was not essential to it. While the Tuscarora statement has blossomed into a "doctrine" in some courts in relation to some federal laws, closer inspection of the Tuscarora opinion reveals that the statement is in the nature of dictum and entitled to little precedential weight. In reality, the Tuscarora "doctrine," here deemed to grant the NLRB "discretionary jurisdiction," is used to fashion a house of cards built on a fanciful foundation with a cornerstone no more fixed and sure than a wild card.

Id. 557-58.

A few weeks later, a different panel of the Sixth Circuit – also split 2-1 – applied the *Little River* holding in *Soaring Eagle Casino and Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015), cert. denied, 136 S.Ct. 2509 (2016), to reach the same result in a matter involving the Saginaw Chippewa Indian Tribe. Unlike *Little River*, the tribe directly tied its authority over nonmembers to its treaty right to exclude persons from its reservation.

The court first rejected the tribe's claim that its general, treaty-reserved power to exclude persons from its reservation precluded application of the National Labor Relations Act:

> Although, given the protective language employed by the Supreme Court when assessing tribal treaty rights, the question is a close one, ultimately we conclude that a general right of exclusion, with no additional specificity, is insufficient to bar application of federal regulatory statutes of general applicability. Unless there is a direct conflict between a specific right of exclusion and the entry necessary for effectuating the statutory scheme, we decline to prohibit application of generally applicable federal regulatory authority to tribes on the existence of such a treaty right alone. . . . The 1864 Treaty states that the Isabella reservation land would be "set apart for the exclusive use, ownership, and occupancy [by the Tribe]." 14 Stat. 657. . . . [T]he 1864 Treaty language establishes a general right of exclusion for the Tribe. The treaty language does not, however, give the Tribe the specific power to condition authorization and entry of government agents . . . . Nor does it detail with any level of specificity the types of activities the Tribe may control or in which it may engage. . . . Although, as explained below, the existence of the Treaties remains relevant to our analysis of the Tribe's right of inherent sovereignty, we do not find that the general right to exclude described in the 1855 and 1864 Treaties, standing alone, bars application of the NLRA to the Casino.

Id. at 661.

The court then rejected the *Little River* panel's reasoning in adopting the *Coeur d' Alene* framework, proposing one of its own that would have mandated a contradictory outcome:

> The *Little River* majority concluded that the NLRA applies to on-reservation casinos operated on trust land. *Little River*, 2015 WL 3556005, at *13–17. Given the legal framework adopted in Little River and the breadth of the majority's holding, we must conclude in this case that the Casino operated by the Tribe on trust land falls within the scope of the NLRA, and that the NLRB has jurisdiction over the Casino. We do not agree, however, with the *Little River* majority's adoption of the *Coeur d'Alene* framework, or its analysis of Indian inherent sovereignty rights. We thus set out below the approach that we believe is most consistent with Supreme Court precedent and Congress's supervisory role over the scope of Indian sovereignty, and why we respectfully disagree with the holding in *Little River*.

Id. at 662. The *Soaring Eagle* panel focused its analysis on the *Montana-Hicks* line of cases, see pages 602-605 (*Montana*), 631-638 (*Hicks*), in which the Supreme Court held that tribal civil jurisdiction over nonmembers is limited, even on tribally owned lands. Id. at 662-67. The court

then adopted a presumption that statutes of general applicability apply to Indian tribes absent a clear statement from Congress that they do not apply. Id. at 666-67. Even so, the court would have concluded that the Act *does not* apply under the *Montana-Hicks* framework:

> We believe that the weight of these factors supports our conclusion that the NLRA should not apply to the Casino. We consider relevant: (1) the fact that the Casino is on trust land and is considered a unit of the Tribe's government; (2) the importance of the Casino to tribal governance and its ability to provide member services; and (3) that Lewis (and other nonmembers) voluntarily entered into an employment relationship with the Tribe. We recognize that our determination would have inhibited the Board's desire to apply the NLRA to all employers not expressly excluded from its reach. But Congress retains the ability to amend the NLRA to apply explicitly to the Casino, if it so chooses. See Bay Mills, 134 S.Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity.") We note, however, that to the extent Congress already has acted with respect to Indian sovereignty and Indian gaming, it has shown a preference for protecting such sovereignty and placing authority over Indian gaming squarely in the hands of tribes. In the same year Congress enacted the NLRA, it also passed the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § [5301] et seq., to strongly promote Indian sovereignty and economic self-sufficiency, and to move federal policy away from a goal of assimilation. . . . Thus, although Congress was silent regarding tribes in the NLRA, it was anything but silent regarding its contemporaneously-stated desire to expand tribal self-governance. And, more recently, Congress enacted the IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," and "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702; see also id. § 2710(b)(2)(B)(i) (requiring that "net revenues from any tribal gaming" are only be used, inter alia, "to fund tribal government operations or programs," "to provide for the general welfare of the Indian tribe and its members," and "to promote tribal economic development"); id. §§ 2710(b)(2)(F),(d)(1)(A)(ii) (describing required contents of tribal ordinances or tribal-state compacts regarding employment practices of gaming employers); Bay Mills, 134 S.Ct. at 2043 (Sotomayor, J., concurring) ("And tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues." (internal quotation marks omitted)).

Id. at 668-69. But since the *Little River* panel decision was first, the *Soaring Eagle* court's analysis could not control. En banc petitions were denied, despite the fact that four of the five active Sixth Circuit judges to have heard these cases disagreed with the controlling framework

adopted by the *Little River* panel and the NLRB acquiesced to the cases being reheard. The Supreme Court, short a justice, denied petitions for ceriorari in 2016.

In a third case, the National Labor Relations Board refused jurisdiction over the casino owned by the Chickasaw Nation of Oklahoma based on the treaty rights argument made by the tribe, *Chickasaw Nation d/b/a Winstar World Casino*, 362 NLRB No. 109 (June 4, 2015). The relevant treaty provision guaranteed the tribe's right to be free of federal legislation and control without its consent:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation . . . the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Nation]; . . . the U.S. shall forever secure said [Nation] from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

7 Stat. 333. The Chickasaw Nation became a party to this treaty in 1837. Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 465 fn. 15 (1995).

This specific treaty language certainly bars a federal statute that is silent as to its application to Indian tribes and is not otherwise an "Indian Affairs" statute: "These obligations include securing the Nation from and against all laws except (as relevant here) those passed by Congress under its authority over Indian affairs." *Chickasaw Nation d/b/a Winstar World Casino, supra*, at 4.

Other recent tribal challenges to NLRB jurisdiction – and to the jurisdiction of other federal agencies such as the Consumer Financial Protection Board – have not been successful. *E.g.*, *Casino Pauma v. National Labor Relations Board*, 888 F.3d 1066 (9th Cir. 2018); *CFPB v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir.), *cert. denied*, 138 S. Ct. 555 (2017).

Many tribes have or will adopt the regressive strategy of adopting "right-to-work" laws, which are laws that are intended to undermine labor union recruiting and organizing strategies. Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. Rev. 691, 725 (2004). Other tribes are more interested in welcoming labor activity, so long as the activity is conducting in accordance with tribal laws that treat casino employees as governmental employees. But, as with the case of the Little River Band, one labor union can undo this regime by persuading the NLRB that the mere existence of a tribal ordinance is a violation of the NLRA. What should tribes do?

For an argument that tribal labor laws create a form of healthy disruption to existing labor relations archetypes by potentially discarding the adversarial relationship assumed to be predominant by federal law, see Matthew L.M. Fletcher, Kathryn E. Fort, and Wenona T. Singel, *Tribal Disruption and Tribal Relations*, *available at* https://ssrn.com/abstract=2401711.

SECTION C.

THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF INDIAN RIGHTS

PART 2. EXECUTIVE AGENCY CONFLICTS IN THE ADMINISTRATION OF FEDERAL TRUST RESPONSIBILITY TO INDIANS

Add to the end of notes on page 402:

INDIAN LAWYERING NOTE:

THE DAKOTA ACCESS PIPELINE*

Starting April 2016, American Indian people led by members of the One Mind Youth Movement began to gather on the shores of Lake Oahe on the Standing Rock Indian Reservation in North Dakota in an effort to stop the completion of the Dakota Access Pipeline (DAPL). See Saul Elbein, *The Youth Group That Launched a Movement at Standing Rock*, N.Y. Times, Jan. 31, 2017. By the end of the year, thousands of American Indians and others had gathered there, establishing permanent camps on federal and tribal lands, and for the most part successful in temporarily stopping the construction of the pipeline by putting enormous political pressure on the Obama Administration.

DAPL is a 1,172 mile pipeline running from the Bakken oil shale fields of western North Dakota to oil terminals in Illinois. The pipeline originally was to run near the City of Bismarck, North Dakota, but the pipeline owners chose to route the pipeline under Lake Oahe. Lake Oahe was formed in the 1960s when the United States Army Corps of Engineers and the Bureau of Reclamation established several dams on the Missouri River under the Pick-Sloan dam project. The United States condemned over 200,000 acres of reservation lands owned by the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe for the project, lands that are now flooded. See generally *South Dakota v. Bourland*, 508 U.S. 679 (1993).

Because the DAPL would run underneath a portion of the Lake Oahe federal public lands (the confiscated reservation lands), and the Missouri River, the Army Corps had an obligation to review and decide whether to authorize the construction of the pipeline through the issuance of an easement. The tribes retain hunting and fishing rights, and perhaps *Winters* rights to

* Portions of this Note derive from commentaries published in Law360.com by Matthew L.M. Fletcher.

groundwater and a homeland at Lake Oahe. Additionally, as many as 18 million Americans depend on the groundwater in the Oglalla Acquifer.

In *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, the Standing Rock Sioux Tribe lost an initial federal court challenge to DAPL in September 2016, only to learn minutes later that the Obama Administration would dramatically reverse its position and delay the issuance of the final easement required to complete the pipeline. In a few short months, three federal agencies (Interior, Army, and Justice) issued a report, Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions, *available at* https://bia.gov/cs/groups/public/documents/document/idc2-060030.pdf, intended to address the lack of adequate consultation between the Army Corps and tribal stakeholders.

However, the Trump Administration effectively ordered the Army Corps to issue the easement in the early weeks of the new administration, which the Corps did. Litigation restarted. Montana law professor Monte Mills helpfully described the key legal arguments:

> Religious Freedom and Restoration Act
>
> According to the Cheyenne River Sioux Tribe, oil running through the pipeline would represent the fulfillment of a generations-old prophesy, passed down through the oral traditions of tribal members, that warned of a Black Snake coming to defile the sacred waters necessary to maintain the tribes' ceremonies. Beyond the environmental concerns often at the center of the pipeline protests, the tribe's motion for an injunction squarely defines final authorization of the pipeline by the Corps as an existential threat: destruction of the tribes' religion and way of life.
>
> The Constitution's First Amendment guarantees the exercise of religion free from governmental interference. But the Supreme Court, in *Lyng v. Northwest Indian Cemetery Protection Association*, in 1988 upheld the Forest Service's approval of a road across an area on federal land sacred to local tribes even while recognizing the road could have devastating effects on their religion.
>
> Then in 1993, Congress enacted the Religious Freedom and Restoration Act (RFRA), which requires that the government demonstrate a compelling interest and use the least restrictive means to achieve that interest if its actions will substantially burden religious practice.
>
> In other words, even if approving the Dakota Access Pipeline served a compelling governmental interest, RFRA may require the U.S. Army Corps of Engineers to show that the pipeline easement under Lake Oahe would have the least impact on tribal religion. That approach would be consistent with the Supreme Court's broad application of RFRA in a 2014 case not involving tribal

interests or federal lands and may pose a significant challenge to the corps, which considered but rejected a different route that did not pose the same threat to the tribes.

Both the Corps and company behind the Dakota Access Pipeline argue that the risk of spill from the pipeline is minimal and that the tribes failed to raise these religious concerns in a timely manner. In addition, the Corps contends that, consistent with the Lyng case, governmental action on federal land should not be restricted because of religious concerns raised by local tribes.

Thus, resolution of the case will turn upon whether the court recognizes the legitimacy of the tribal religious concerns and broadly applies RFRA or, instead, chooses to prioritize federal authority over federal land to the detriment of those concerns. ***

Arbitrary or capricious decisions?

In addition to their religious concerns, the Sioux Tribes challenge the Corps' decisions based on the rights they reserved in treaties made with the federal government in 1851 and 1868.

The Constitution recognizes treaties as the "supreme law of the land" and, according to a 2016 analysis done by the Solicitor of the U.S. Department of the Interior, both the Standing Rock and Cheyenne River Sioux retain treaty-reserved water, hunting, and fishing rights in Lake Oahe.

Before reversing course in February, the Corps refused to issue the easement last year in order to further understand and analyze those treaty rights.

Importantly, federal law generally allows courts to set aside arbitrary or capricious agency decisions. In a February 14th filing, the Standing Rock Sioux Tribe asks the court to review the Corps' about-face under that standard and argues that the federal trust responsibility, recognized by the Supreme Court since the early 1800's, demands more than just a cursory review of tribal treaty rights.

Monte Mills, How will Native tribes fight the Dakota Access Pipeline in court?, The Conversation, Feb. 15, 2017, *available at* https://theconversation.com/how-will-native-tribes-fight-the-dakota-access-pipeline-in-court-72839.

Recent decisions from the Ninth Circuit may bolster the tribal claims. In the *United States v. Washington* culverts subproceeding (see page 923), 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided Court*, 138 S.Ct. 1832 (2018), the court held that off-reservation hunting and fishing rights impliedly included the right to a healthy fisheries habitat. And in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir.

2017), the court held that *Winters* rights (see page 819) include the right to groundwater. These precedents may be helpful to the Lakota tribes fighting against DAPL.

On March 7, 2017, Judge Boasberg denied the tribes' motion for a preliminary injunction. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 239 F. Supp. 3d 77 (D.D.C. 2017), *appeal dismissed*, 2017 WL 4071136 (D.C. Cir., May 15, 2017). However, on June 14, 2017, Judge Boasberg held that the Army Corps did not comply with the National Environmental Policy Act, and ordered review. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 255 F. Supp. 3d. 101 (D.D.C. 2017). However, the court ultimately rejected the challenges on the merits. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 301 F. Supp. 3d 50 (D.D.C. 2018).

Oil began to flow in June 2017.

CHAPTER 6

TRIBAL SOVEREIGNTY AND THE CHALLENGE OF NATION-BUILDING

SECTION A.

FEDERAL INDIAN LAW AND POLICY IN CONTEMPORARY PERSPECTIVE

Add to the end note 3 on pages 462-63:

4. In *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), the Supreme Court held that state law claims brought against tribal employees in their individual or personal capacities are not barred by tribal sovereign immunity. The case involved an accident allegedly caused by a limousine driver employed by the Mohegan Tribe. The driver was on the clock for the tribe at the time. The accident occurred on non-Indian lands. The plaintiffs brought suit in state court for state law tort more than one year after the accident. The Mohegan Tribe had waived its immunity for such claims in tribal court, with a one year statute of limitations and a damages cap more limited than that under Connecticut law.

The first critical holding in the decision was that individual capacity suits against tribal employees do not implicate tribal sovereignty:

> This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which "will not require action by the sovereign or disturb the sovereign's property." *Larson v. Domestic and Foreign Commerce Corp*., 337 U.S. 682, 687, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). We are cognizant of the Supreme Court of Connecticut's concern that plaintiffs not circumvent tribal sovereign immunity. But here, that immunity is simply not in play. Clarke, not the Gaming Authority, is the real party in interest.

Id. at 1292.

The tribe fervently argued that tribal sovereignty actually *is* implicated when tribal employees are sued for money damages for actions they take on company time. The Mohegan

Tribe had adopted a law that it would indemnify any tribal employee for damages awarded against the employee for actions taken during that employment. The Court rejected that claim, holding that the tribe's laws did not affect the underlying individual capacity doctrine:

> Here, the Connecticut courts exercise no jurisdiction over the Tribe or the Gaming Authority, and their judgments will not bind the Tribe or its instrumentalities in any way. The Tribe's indemnification provision does not somehow convert the suit against Clarke into a suit against the sovereign; when Clarke is sued in his individual capacity, he is held responsible only for his individual wrongdoing. Moreover, indemnification is not a certainty here. Clarke will not be indemnified by the Gaming Authority should it determine that he engaged in "wanton, reckless, or malicious" activity. Mohegan Tribe Code § 4–52. That determination is not necessary to the disposition of the Lewises' suit against Clarke in the Connecticut state courts, which is a separate legal matter.

Id. at 1294. The Court did state that tribal employees may still be cloaked in sovereign immunity when they act in an official capacity, the same as federal and state employees. Id. at 1295 ("In sum, although tribal sovereign immunity is implicated when the suit is brought against individual officers in their official capacities, it is simply not present when the claim is made against those employees in their individual capacities.").

Whether a tribal employee is acting within the scope of official authority rather than in an individual capacity apparently will now be left to federal and state courts.* The precursor to Lewis was the Ninth Circuit's decision in *Maxwell v. County of San Diego* (page 471). There, the court held that individual capacity suits against tribally employed emergency responders could proceed, even where the responders arrived on the scene in accordance with an intergovernmental public safety agreement. The affected tribe vigorously argued that their employees' exposure to liability could undermine recently established Indian country governance relationships, but to no avail.

The initial area in which tribal exposure to liability may be expanded under *Lewis* is in state courts. Indian tribes that had been able to limit damages and time frames, and govern the venue, for even off-reservation torts and other possible damages claims through tort claims ordinances may face state courts suits. State tort law is, unlike most other areas of the common law, fairly local. Some states have restrictive liability exposure and others more expansive. Tribes, who have no say in state tort laws whatsoever, may be forced into state tort regimes against their will when they choose to indemnify their employees. *Lewis* could also give plaintiffs two cracks at deep pockets, meaning that a plaintiff might suit both the tribe under a tort claims ordinance and the tribal employee in state court. Tribes may reconsider their tort

* The following is excerpted from Matthew L.M. Fletcher, A Look at the Impact of Lewis v. Clarke Thus Far," Law360.com, May 16, 2017, *available at* https://www.law360.com/nativeamerican/articles/924746/a-look-at-the-impact-of-lewis-v-clarke-thus-far.

claims ordinances, a potentially very regressive move under established nation-building theory. Tribes that have purchased liability insurance with the parameters set by their tort claims ordinances may be forced to renegotiate with their insurer.

Lewis involved an off-reservation incident, but the court's reasoning does not limit individual liability suits to off-reservation actions. For reservations in Public Law 280-type states, which constitute about 70 percent of all reservations, that might not be significant expansion, as every tort claim against a tribal employee could be brought in state court. But for the remaining tribes, precedents like *Williams v. Lee* (see page 418) generally bar state court jurisdiction over civil suits brought against Indians or tribes arising in Indian country. Or do they, post-Lewis? Indian tribes may soon be defending a rise in individual capacity suits against nonmember tribal employees.

The next area of potential new exposure is in the area of official capacity actions. State and federal officials are governed by official immunity and qualified official immunity doctrines. Whether tribal officials have the same protections remains open after the Lewis decision. Imagine a heated tribal council meeting where one elected official makes a statement that potential defames another elected official. An analogous case is currently pending in the California Court of Appeals based on *Maxwell*. Before Lewis, the tribal elected official who made the statement could assert the general federal Indian law principle that state and federal courts have no jurisdiction over the internal affairs of the tribal government. A federal or state official making the same statement likely would be governed by official immunity. But, potentially, the federal Indian law bar might dissipate in an individual capacity suit because the tribe's interests are not the same as an individual's interest.

5. In *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), the Supreme Court vacated a Washington Supreme Court decision interpreting *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), to mean that Indian tribes do not possess immunity from *in rem* suits. In *Upper Skagit*, the tribe had purchased fee land upon which ancestors who had died from smallpox were buried "with an eye to asking the federal government to take the land into trust and add it to the existing reservation next door." *Id*. at 1652. Upon completing a survey of the boundaries, the tribe discovered that a barbed wire fence owned by its neighbors, the Lundgrens, crossed into its territory and informed the Lundgrens of its intent to tear down the fence. The Lundgrens brought a quiet title action.

The Supreme Court, in Justice Gorsuch's first Indian law opinion, remanded the case back to the Washington Supreme Court to address the so-called "immovable property" exception to sovereign immunity:

> At common law, [the Lundgrens] say, sovereigns enjoyed no immunity from actions involving immovable property located in the territory of another sovereign. As our cases have put it, "[a] prince, by acquiring private property in a

> foreign country, ... may be considered as so far laying down the prince, and assuming the character of a private individual." Schooner Exchange v. McFaddon, 7 Cranch 116, 145, 3 L.Ed. 287 (1812). Relying on this line of reasoning, the Lundgrens argue, the Tribe cannot assert sovereign immunity because this suit relates to immovable property located in the State of Washington that the Tribe purchased in the "the character of a private individual."
>
> The Tribe and the federal government disagree. They note that immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes. See Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751, 756 * * * (1998) ("[T]he immunity possessed by Indian tribes is not coextensive with that of the States"). And since the founding, they say, the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country. * * *
>
> We leave it to the Washington Supreme Court to address these arguments in the first instance. * * * Determining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes, not just the one before us; and the alternative argument for affirmance did not emerge until late in this case. In fact, it appeared only when the United States filed an amicus brief in this case—after briefing on certiorari, after the Tribe filed its opening brief, and after the Tribe's other amici had their say. * * *
>
> The dissent is displeased with our decision on this score, but a contradiction lies at the heart of its critique. First, the dissent assures us that the immovable property exception applies with irresistible force—nothing more than a matter of "hornbook law." Post, at 1657 – 1661 (opinion of THOMAS, J.). But then, the dissent claims that allowing the Washington Supreme Court to address that exception is a "grave" decision that "casts uncertainty" over the law and leaves lower courts with insufficient "guidance." Post, at 1657, 1662 – 1663. Both cannot be true. If the immovable property exception presents such an easy question, then it's hard to see what terrible things could happen if we allow the Washington Supreme Court to answer it. Surely our state court colleagues are no less versed than we in "hornbook law," and we are confident they can and will faithfully apply it. And what if, instead, the question turns out to be more complicated than the dissent promises? In that case the virtues of inviting full adversarial testing will have proved themselves once again. Either way, we remain sanguine about the consequences.

Id. at 1653-54.

CHAPTER 7

TRIBAL SOVEREIGNTY AND JURISDICTION

SECTION A.

THE ARENA OF FEDERAL AND TRIBAL JURISDICTION: "INDIAN COUNTRY"

PART 2. Post-*Solem* Reservation Boundary Cases

After note on page 531, add a note:

In *Royal v. Murphy*, 875 F.3d 986 (10th Cir. 2017), the court held that the State of Oklahoma did not possess criminal jurisdiction over a Muscogee (Creek) Nation tribal citizen for crimes committed within the historic Muscogee reservation because the reservation had never been disestablished by Congress.

The Supreme Court granted certiorari, with Justice Gorsuch recused from the matter. 138 S.Ct. 2026 (2018). With the case now captioned *Carpenter v. Murphy*, the Court heard oral argument on November 27, 2018 from Oklahoma and the United States on one side and Mr. Murphy and the Muscogee (Creek) Nation on the other side. After oral argument, the Court asked the parties to submit supplemental briefs

> addressing the following two questions: (1) Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status. (2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U. S. C. §1151(a).

The 2018 Term ended without a decision from the Supreme Court. The case has been ordered to be reargued.

CHAPTER 8

TRIBAL AND STATE CONFLICTS OVER CIVIL REGULATORY AND ADJUDICATORY JURISDICTION

SECTION C.

PREEMPTION OF STATE LAW

After note 4 on page 683, add:

Washington State Department of Licensing v. Cougar Den, Inc.

United States Supreme Court, 2019

__ U.S. __, 139 S.Ct. 1000

Justice BREYER announced the judgment of the Court, and delivered an opinion, in which Justice SOTOMAYOR and Justice KAGAN join.

The State of Washington imposes a tax upon fuel importers who travel by public highway. The question before us is whether an 1855 treaty between the United States and the Yakama Nation forbids the State of Washington to impose that tax upon fuel importers who are members of the Yakama Nation. We conclude that it does, and we affirm the Washington Supreme Court's similar decision.

I

A

A Washington statute applies to "motor vehicle fuel importer[s]" who bring large quantities of fuel into the State by "ground transportation" such as a "railcar, trailer, [or] truck." Wash. Rev. Code §§ 82.36.010(4), (12), (16) (2012). The statute requires each fuel importer to obtain a license, and it says that a fuel tax will be "levied and imposed upon motor vehicle fuel licensees" for "each gallon of motor vehicle fuel" that the licensee brings into the State. §§ 82.36.020(1), (2)(c). Licensed fuel importers who import fuel by ground transportation become liable to pay the tax as of the time the "fuel enters into this [S]tate." § 82.36.020(2)(c); see also §§ 82.38.020(4), (12), (15), (26), 82.38.030(1), (7)(c)(ii) (equivalent regulation of diesel fuel importers).

But only those licensed fuel importers who import fuel by ground transportation are liable to pay the tax. §§ 82.36.026(3), 82.36.020(2)(c). For example, if a licensed fuel importer

brings fuel into the State by pipeline, that fuel importer need not pay the tax. §§ 82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Similarly, if a licensed fuel importer brings fuel into the State by vessel, that fuel importer need not pay the tax. §§ 82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Instead, in each of those instances, the next purchaser or possessor of the fuel will pay the tax. §§ 82.36.020(2)(a), (b), (d). The only licensed fuel importers who must pay this tax are the fuel importers who bring fuel into the State by means of ground transportation.

B

The relevant treaty provides for the purchase by the United States of Yakama land. See Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951. Under the treaty, the Yakamas granted to the United States approximately 10 million acres of land in what is now the State of Washington, i.e., about one-fourth of the land that makes up the State today. Art. I, id., at 951–952; see also Brief for Respondent 4, 9. In return for this land, the United States paid the Yakamas $ 200,000, made improvements to the remaining Yakama land, such as building a hospital and schools for the Yakamas to use, and agreed to respect the Yakamas' reservation of certain rights. Arts. III–V, 12 Stat. 952–953. Those reserved rights include "the right, in common with citizens of the United States, to travel upon all public highways," "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory," and other rights, such as the right to hunt, to gather roots and berries, and to pasture cattle on open and unclaimed land. Art. III, id., at 953.

C

Cougar Den, Inc., the respondent, is a wholesale fuel importer owned by a member of the Yakama Nation, incorporated under Yakama law, and designated by the Yakama Nation as its agent to obtain fuel for members of the Tribe. App. to Pet. for Cert. 63a–64a; App. 99a. Cougar Den buys fuel in Oregon, trucks the fuel over public highways to the Yakama Reservation in Washington, and then sells the fuel to Yakama-owned retail gas stations located within the reservation. App. to Pet. for Cert. 50a, 55a. Cougar Den believes that Washington's fuel import tax, as applied to Cougar Den's activities, is pre-empted by the treaty. App. 15a. In particular, Cougar Den believes that requiring it to pay the tax would infringe the Yakamas' reserved "right, in common with citizens of the United States, to travel upon all public highways." Art. III, 12 Stat. 953.

* * * [The Washington Supreme Court], agreeing with Cougar Den, upheld the Superior Court's determination of pre-emption. Id., at 69, 392 P.3d at 1020.

The Department filed a petition for certiorari asking us to review the State Supreme Court's determination. And we agreed to do so.

II

A

The Washington statute at issue here taxes the importation of fuel by public highway. The Washington Supreme Court construed the statute that way in the decision below. That court wrote that the statute "taxes the importation of fuel, which is the transportation of fuel." Ibid. It added that "travel on public highways is directly at issue because the tax [is] an importation tax." Id., at 67, 392 P.3d at 1019.

* * *

In sum, Washington taxes travel by ground transportation with fuel. That feature sets the Washington statute apart from other statutes with which we are more familiar. It is not a tax on possession or importation. A statute that taxes possession would ordinarily require all people who own a good to pay the tax. A good example of that would be a State's real estate property tax. That statute would require all homeowners to pay the tax, every year, regardless of the specifics of their situation. And a statute that taxes importation would ordinarily require all people who bring a good into the State to pay a tax. A good example of that would be a federal tax on newly manufactured cars. That statute would ordinarily require all people who bring a new car into the country to pay a tax. But Washington's statute is different because it singles out ground transportation. That is, Washington does not just tax possession of fuel, or even importation of fuel, but instead taxes importation by ground transportation.

The facts of this case provide a good example of the tax in operation. Each of the assessment orders that the Department sent to Cougar Den explained that Cougar Den owed the tax because Cougar Den traveled by highway. See App. 10a–26a; App. to Pet. for Cert. 55a. As the director explained, Cougar Den owed the tax because Cougar Den had caused fuel to enter "into this [S]tate at the Washington-Oregon boundary on the Highway 97 bridge" by means of a "tank truck" destined for "the Yakama Reservation." Ibid. The director offers this explanation in addition to quoting the quantity of fuel that Cougar Den possessed because the element of travel by ground transportation is a necessary prerequisite to the imposition of the tax. Put another way, the State must prove that Cougar Den traveled by highway in order to apply its tax.

* * *

III

A

In our view, the State of Washington's application of the fuel tax to Cougar Den's importation of fuel is pre-empted by the treaty's reservation to the Yakama Nation of "the right, in common with citizens of the United States, to travel upon all public highways." We rest this conclusion upon three considerations taken together.

First, this Court has considered this treaty four times previously; each time it has considered language very similar to the language before us; and each time it has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855. *See Winans*, 198 U.S. at 380–381, 25 S.Ct. 662; *Seufert Brothers Co. v. United States*, 249 U.S. 194, 196–198, 39 S.Ct. 203, 63 L.Ed. 555 (1919); *Tulee*, 315 U.S. at 683–685, 62 S.Ct. 862; *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 677–678, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979).

The treaty language at issue in each of the four cases is similar, though not identical, to the language before us. The cases focus upon language that guarantees to the Yakamas "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Art. III, para. 2, 12 Stat. 953. Here, the language guarantees to the Yakamas "the right, in common with citizens of the United States, to travel upon all public highways." Art. III, para. 1, ibid. The words "in common with" on their face could be read to permit application to the Yakamas of general legislation (like the legislation before us) that applies to all citizens, Yakama and non-Yakama alike. But this Court concluded the contrary because that is not what the Yakamas understood the words to mean in 1855. *See Winans*, 198 U.S. at 379, 381, 25 S.Ct. 662; *Seufert Brothers*, 249 U.S. at 198–199, 39 S.Ct. 203; *Tulee*, 315 U.S. at 684, 62 S.Ct. 862; *Fishing Vessel*, 443 U.S. at 679, 684–685, 99 S.Ct. 3055.

The cases base their reasoning in part upon the fact that the treaty negotiations were conducted in, and the treaty was written in, languages that put the Yakamas at a significant disadvantage. *See, e.g., Winans*, 198 U.S. at 380, 25 S.Ct. 662; *Seufert Brothers*, 249 U.S. at 198, 39 S.Ct. 203; *Fishing Vessel*, 443 U.S. at 667, n. 10, 99 S.Ct. 3055. The parties negotiated the treaty in Chinook jargon, a trading language of about 300 words that no Tribe used as a primary language. App. 65a; *Fishing Vessel*, 443 U.S. at 667, n. 10, 99 S.Ct. 3055. The parties memorialized the treaty in English, a language that the Yakamas could neither read nor write. And many of the representations that the United States made about the treaty had no adequate translation in the Yakamas' own language. App. 68a–69a.

Thus, in the year 1905, in *Winans*, this Court wrote that, to interpret the treaty, courts must focus upon the historical context in which it was written and signed. 198 U.S. at 381, 25 S.Ct. 662; *see also Tulee*, 315 U.S. at 684, 62 S.Ct. 862 ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council"); *cf. Water Splash, Inc. v. Menon*, 581 U.S. ——, ——, 137 S.Ct. 1504, 1511, 197 L.Ed.2d 826 (2017) (noting that, to ascertain the meaning of a treaty, courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties") (internal quotation marks omitted).

The Court added, in light of the Yakamas' understanding in respect to the reservation of fishing rights, the treaty words "in common with" do not limit the reservation's scope to a right

against discrimination. *Winans*, 198 U.S. at 380–381, 25 S.Ct. 662. Instead, as we explained in *Tulee*, *Winans* held that "Article III [of the treaty] conferred upon the Yakimas continuing rights, *beyond those which other citizens may enjoy*, to fish at their 'usual and accustomed places' in the ceded area." *Tulee*, 315 U.S. at 684, 62 S.Ct. 862 (citing *Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089; emphasis added). Also *compare, e.g.*, *Fishing Vessel*, 443 U.S. at 677, n. 22, 99 S.Ct. 3055 ("Whatever opportunities the treaties assure Indians with respect to fish are admittedly not 'equal' to, but are to some extent greater than, those afforded other citizens" (emphasis added)), *with* post, at —— (KAVANAUGH, J., dissenting) (citing this same footnote in *Fishing Vessel* as support for the argument that the treaty guarantees the Yakamas only a right against discrimination). Construing the treaty as giving the Yakamas only antidiscrimination rights, rights that any inhabitant of the territory would have, would amount to "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *Winans*, 198 U.S. at 380, 25 S.Ct. 662.

Second, the historical record adopted by the agency and the courts below indicates that the right to travel includes a right to travel with goods for sale or distribution. See App. to Pet. for Cert. 33a; App. 56a–74a. When the United States and the Yakamas negotiated the treaty, both sides emphasized that the Yakamas needed to protect their freedom to travel so that they could continue to fish, to hunt, to gather food, and to trade. App. 65a–66a. The Yakamas maintained fisheries on the Columbia River, following the salmon runs as the fish moved through Yakama territory. Id., at 62a–63a. The Yakamas traveled to the nearby plains region to hunt buffalo. Id., at 61a. They traveled to the mountains to gather berries and roots. Ibid. The Yakamas' religion and culture also depended on certain goods, such as buffalo byproducts and shellfish, which they could often obtain only through trade. Id., at 61a–62a. Indeed, the Yakamas formed part of a great trading network that stretched from the Indian tribes on the Northwest coast of North America to the plains tribes to the east. Ibid.

The United States' representatives at the treaty negotiations well understood these facts, including the importance of travel and trade to the Yakamas. Id., at 63a. They repeatedly assured the Yakamas that under the treaty the Yakamas would be able to travel outside their reservation on the roads that the United States built. Id., at 66a–67a; see also, e.g., id., at 66a (" '[W]e give you the privilege of traveling over roads' "). And the United States repeatedly assured the Yakamas that they could travel along the roads for trading purposes. Id., at 65a–67a. Isaac Stevens, the Governor of the Washington Territory, told the Yakamas, for example, that, under the terms of the treaty, "You will be allowed to go on the roads, to take your things to market, your horses and cattle." App. to Brief for Confederated Tribes and Bands of the Yakama Nation as Amicus Curiae 68a (record of the treaty proceedings). He added that the Yakamas "will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation." Ibid. Governor Stevens further urged the Yakamas to accept the United States' proposals for reservation boundaries in part because the proposal put the Yakama Reservation in close

proximity to public highways that would facilitate trade. He said, " 'You will be near the great road and can take your horses and your cattle down the river and to the [Puget] Sound to market.' " App. 66a. In a word, the treaty negotiations and the United States' representatives' statements to the Yakamas would have led the Yakamas to understand that the treaty's protection of the right to travel on the public highways included the right to travel with goods for purposes of trade. We consequently so construe the relevant treaty provision.

Third, to impose a tax upon traveling with certain goods burdens that travel. And the right to travel on the public highways without such burdens is, as we have said, just what the treaty protects. Therefore, our precedents tell us that the tax must be pre-empted. In *Tulee*, for example, we held that the fishing right reserved by the Yakamas in the treaty pre-empted the application to the Yakamas of a state law requiring fishermen to buy fishing licenses. 315 U.S. at 684, 62 S.Ct. 862. We concluded that "such exaction of fees as a prerequisite to the enjoyment of " a right reserved in the treaty "cannot be reconciled with a fair construction of the treaty." Id., at 685, 62 S.Ct. 862. If the cost of a fishing license interferes with the right to fish, so must a tax imposed on travel with goods (here fuel) interfere with the right to travel.

We consequently conclude that Washington's fuel tax "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." Ibid. Washington's fuel tax cannot lawfully be assessed against Cougar Den on the facts here. Treaties with federally recognized Indian tribes—like the treaty at issue here—constitute federal law that pre-empts conflicting state law as applied to off-reservation activity by Indians. *Cf. Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–149, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973).

* * *

C

Although we hold that the treaty protects the right to travel on the public highway with goods, we do not say or imply that the treaty grants protection to carry any and all goods. Nor do we hold that the treaty deprives the State of the power to regulate, say, when necessary for conservation. To the contrary, we stated in *Tulee* that, although the treaty "forecloses the [S]tate from charging the Indians a fee of the kind in question here," the State retained the "power to impose on Indians, equally with others, such restrictions of a purely regulatory nature ... as are necessary for the conservation of fish." 315 U.S. at 684, 62 S.Ct. 862. Indeed, it was crucial to our decision in *Tulee* that, although the licensing fees at issue were "regulatory as well as revenue producing," "their regulatory purpose could be accomplished otherwise," and "the imposition of license fees [was] not indispensable to the effectiveness of a state conservation program." Id., at 685, 62 S.Ct. 862. *See also Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 402, n. 14, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968) ("As to a 'regulation' concerning the time and manner of fishing outside the reservation (as opposed to a 'tax'), we said that the

power of the State was to be measured by whether it was 'necessary for the conservation of fish' " (quoting *Tulee*, 315 U.S. at 684, 62 S.Ct. 862)).

Nor do we hold that the treaty deprives the State of the power to regulate to prevent danger to health or safety occasioned by a tribe member's exercise of treaty rights. The record of the treaty negotiations may not support the contention that the Yakamas expected to use the roads entirely unconstrained by laws related to health or safety. See App. to Brief for Confederated Tribes and Bands of the Yakama Nation as Amicus Curiae 20a–21a, 31a–32a. Governor Stevens explained, at length, the United States' awareness of crimes committed by United States citizens who settled amongst the Yakamas, and the United States' intention to enact laws that would restrain both the United States citizens and the Yakamas alike for the safety of both groups. See id., at 31a.

Nor do we here interpret the treaty as barring the State from collecting revenue through sales or use taxes (applied outside the reservation). Unlike the tax at issue here, which applies explicitly to transport by "railcar, trailer, truck, or other equipment suitable for ground transportation," see supra, at ——, a sales or use tax normally applies irrespective of transport or its means. Here, however, we deal with a tax applicable simply to importation by ground transportation. Moreover, it is a tax designed to secure revenue that, as far as the record shows here, the State might obtain in other ways.

IV

To summarize, our holding rests upon three propositions: First, a state law that burdens a treaty-protected right is pre-empted by the treaty. See supra, at —— – ——. Second, the treaty protects the Yakamas' right to travel on the public highway with goods for sale. See supra, at —— – ——. Third, the Washington statute at issue here taxes the Yakamas for traveling with fuel by public highway. See supra, at —— – ——. For these three reasons, Washington's fuel tax cannot lawfully be assessed against Cougar Den on the facts here. Therefore, the judgment of the Supreme Court of Washington is affirmed.

It is so ordered.

Justice GORSUCH, with whom Justice GINSBURG joins, concurring in the judgment.

The Yakamas have lived in the Pacific Northwest for centuries. In 1855, the United States sought and won a treaty in which the Tribe agreed to surrender 10 million acres, land that today makes up nearly a quarter of the State of Washington. In return, the Yakamas received a reservation and various promises, including a guarantee that they would enjoy "the right, in common with citizens of the United States, to travel upon all public highways." Today, the parties offer dueling interpretations of this language. The State argues that it merely allows the

Yakamas to travel on public highways like everyone else. And because everyone else importing gasoline from out of State by highway must pay a tax on that good, so must tribal members. Meanwhile, the Tribe submits that the treaty guarantees tribal members the right to move their goods to and from market freely. So that tribal members may bring goods, including gasoline, from an out-of-state market to sell on the reservation without incurring taxes along the way.

Our job here is a modest one. We are charged with adopting the interpretation most consistent with the treaty's original meaning. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534–535, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991). When we're dealing with a tribal treaty, too, we must "give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999). After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen. Nor is there any question that the government employed that power to its advantage in this case. During the negotiations "English words were translated into Chinook jargon ... although that was not the primary language" of the Tribe. *Yakama Indian Nation v. Flores*, 955 F.Supp. 1229, 1243 (ED Wash. 1997). After the parties reached agreement, the U.S. negotiators wrote the treaty in English—a language that the Yakamas couldn't read or write. And like many such treaties, this one was by all accounts more nearly imposed on the Tribe than a product of its free choice.

When it comes to the Yakamas' understanding of the treaty's terms in 1855, we have the benefit of a set of unchallenged factual findings. The findings come from a separate case involving the Yakamas' challenge to certain restrictions on their logging operations. Id., at 1231. The state Superior Court relied on these factual findings in this case and held Washington collaterally estopped from challenging them. Because the State did not challenge the Superior Court's estoppel ruling either in the Washington Supreme Court or here, these findings are binding on us as well.

They also tell us all we need to know to resolve this case. To some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to the same taxes and regulations as everyone else. Post, at —— – —— (KAVANAUGH, J., dissenting). But that is not how the Yakamas understood the treaty's terms. To the Yakamas, the phrase " 'in common with' ... implie[d] that the Indian and non-Indian use [would] be joint but [did] not imply that the Indian use [would] be in any way restricted." *Yakama Indian Nation*, 955 F.Supp. at 1265. In fact, "[i]n the Yakama language, the term 'in common with' ... suggest[ed] public use or general use without restriction." Ibid. So "[t]he most the Indians would have understood ... of the term[s] 'in common with' and 'public' was that they would share the use of the road with whites." Ibid. Significantly, there is "no evidence [to] sugges[t] that the term 'in common with' placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads." Id., at 1247. Instead, the evidence suggests that the Yakamas understood the right-to-travel provision to provide them "with the right to travel on all public

highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods." Id., at 1262.

Applying these factual findings to our case requires a ruling for the Yakamas. As the Washington Supreme Court recognized, the treaty's terms permit regulations that allow the Yakamas and non-Indians to share the road in common and travel along it safely together. But they do not permit encumbrances on the ability of tribal members to bring their goods to and from market. And by everyone's admission, the state tax at issue here isn't about facilitating peaceful coexistence of tribal members and non-Indians on the public highways. It is about taxing a good as it passes to and from market—exactly what the treaty forbids.

A wealth of historical evidence confirms this understanding. The Yakama Indian Nation decision supplies an admirably rich account of the history, but it is enough to recount just some of the most salient details. "Prior to and at the time the treaty was negotiated," the Yakamas "engaged in a system of trade and exchange with other plateau tribes" and tribes "of the Northwest coast and plains of Montana and Wyoming." Ibid. This system came with no restrictions; the Yakamas enjoyed "free and open access to trade networks in order to maintain their system of trade and exchange." Id., at 1263. They traveled to Oregon and maybe even to California to trade "fir trees, lava rocks, horses, and various species of salmon." Id., at 1262–1263. This extensive travel "was necessary to obtain goods that were otherwise unavailable to [the Yakamas] but important for sustenance and religious purposes." Id., at 1262. Indeed, "far-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture." Id., at 1238. Travel for purposes of trade was so important to the "Yakamas' way of life that they could not have performed and functioned as a distinct culture ... without extensive travel." Ibid. (internal quotation marks omitted).

Everyone understood that the treaty would protect the Yakamas' preexisting right to take goods to and from market freely throughout their traditional trading area. "At the treaty negotiations, a primary concern of the Indians was that they have freedom to move about to ... trade." Id., at 1264. Isaac Stevens, the Governor of the Washington Territory, specifically promised the Yakamas that they would " 'be allowed to go on the roads to take [their] things to market.' " Id., at 1244 (emphasis deleted). Governor Stevens called this the " 'same libert[y]' " to travel with goods free of restriction " 'outside the reservation' " that the Tribe would enjoy within the new reservation's boundaries. Ibid. Indeed, the U.S. representatives' "statements regarding the Yakama's use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors." Id., at 1265. Before the treaty, then, the Yakamas traveled extensively without paying taxes to bring goods to and from market, and the record suggests that the Yakamas would have understood the treaty to preserve that liberty.

None of this can come as much of a surprise. As the State reads the treaty, it promises tribal members only the right to venture out of their reservation and use the public highways like

everyone else. But the record shows that the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation. In fact, the millions of acres the Tribe ceded were a prize the United States desperately wanted. U.S. treaty negotiators were "under tremendous pressure to quickly negotiate treaties with eastern Washington tribes, because lands occupied by those tribes were important in settling the Washington territory." Id., at 1240. Settlers were flooding into the Pacific Northwest and building homesteads without any assurance of lawful title. The government needed "to obtain title to Indian lands" to place these settlements on a more lawful footing. Ibid. The government itself also wanted to build "wagon and military roads through Yakama lands to provide access to the settlements on the west side of the Cascades." Ibid. So "obtaining Indian lands east of the Cascades became a central objective" for the government's own needs. Id., at 1241. The Yakamas knew all this and could see the writing on the wall: One way or another, their land would be taken. If they managed to extract from the negotiations the simple right to take their goods freely to and from market on the public highways, it was a price the United States was more than willing to pay. By any fair measure, it was a bargain-basement deal.

Our cases interpreting the treaty's neighboring and parallel right-to-fish provision further confirm this understanding. The treaty "secure[s] ... the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953 (emphasis added). Initially, some suggested this guaranteed tribal members only the right to fish according to the same regulations and subject to the same fees as non-Indians. But long ago this Court refused to impose such an "impotent" construction on the treaty. *United States v. Winans*, 198 U.S. 371, 380, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). Instead, the Court held that the treaty language prohibited state officials from imposing many nondiscriminatory fees and regulations on tribal members. While such laws "may be both convenient and, in [their] general impact, fair," this Court observed, they act "upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Tulee v. Washington*, 315 U.S. 681, 685, 62 S.Ct. 862, 86 L.Ed. 1115 (1942). Interpreting the same treaty right in *Winans*, we held that, despite arguments otherwise, "the phrase '*in common with* citizens of the Territory' " confers "upon the Yak[a]mas continuing rights, *beyond those which other citizens may enjoy*, to fish at their 'usual and accustomed places.' " *Tulee*, 315 U.S. at 684, 62 S.Ct. 862 (citing *Winans*, 198 U.S. at 371, 25 S.Ct. 662; emphasis added). Today, we simply recognize that the same language should yield the same result.

With its primary argument now having failed, the State encourages us to labor through a series of backups. It begins by pointing out that the treaty speaks of allowing the Tribe "free access" from local roads to the public highways, but indicates that tribal members are to use those highways "in common with" non-Indians. On the State's account, these different linguistic formulations must be given different meanings. And the difference the State proposes? No surprise: It encourages us to read the former language as allowing goods to be moved tax-free

along local roads to the highways but the latter language as authorizing taxes on the Yakamas' goods once they arrive there. See also post, at —— (KAVANAUGH, J., dissenting).

The trouble is that nothing in the record supports this interpretation. Uncontested factual findings reflect the Yakamas' understanding that the treaty would allow them to use the highways to bring goods to and from market freely. These findings bind us under the doctrine of collateral estoppel, and no one has proposed any lawful basis for ignoring them. Nor, for that matter, has anyone even tried to offer a reason why the Tribe might have bargained for the right to move its goods freely only part of the way to market. Our job in this case is to interpret the treaty as the Yakamas originally understood it in 1855—not in light of new lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact.

If that alternative won't work, the State offers another. It admits that the Yakamas personally may have a right to travel the highways free of most restrictions on their movement. See also post, at —— (ROBERTS, C.J., dissenting) (acknowledging that the treaty prohibits the State from "charg[ing] ... a toll" on Yakamas traveling on the highway). But, the State continues, the law at issue here doesn't offend that right. It doesn't, we are told, because the "object" of the State's tax isn't travel but the possession of fuel; the fact that the State happens to assess its tax when fuel is possessed on a public highway rather than someplace else is neither here nor there. And just look, we are told, at the anomalies that might arise if we ruled otherwise. A tribal member who buys a "mink coat" in a Washington store would have to pay the State's sales tax, but a tribal member who purchases the same coat at market in Oregon could not be taxed for possessing it on the highway when reentering Washington. See post, at —— – ——.

This argument suffers from much the same problem as its predecessors. Now, at least, the State may acknowledge that the Yakamas personally have a right to travel free of most restrictions. But the State still fails to give full effect to the treaty's terms and the Yakamas' original understanding of them. After all and as we've seen, the treaty doesn't just guarantee tribal members the right to travel on the highways free of most restrictions on their movement; it also guarantees tribal members the right to move goods freely to and from market using those highways. And it's impossible to transport goods without possessing them. So a tax that falls on the Yakamas' possession of goods as they travel to and from market on the highway violates the treaty just as much as a tax on travel alone would.

Consider the alternative. If the State could save the tax here simply by labeling it a fee on the "possession" of a good, the State might just as easily revive the fishing license fee *Tulee* struck down simply by calling it a fee on the "possession" of fish. That, of course, would be ridiculous. The Yakamas' right to fish includes the right to possess the fish they catch—just like their right to move goods on the highways embraces the right to possess them there. Nor does the State's reply solve the problem. It accepts, as it must, that possessing fish is "integral" to the right to fish. Post, at ——, n. 2 (ROBERTS, C.J., dissenting). But it stands pat on its assertion that the treaty protects nothing more than a personal right to travel, ignoring all of the facts and

binding findings before us establishing that the treaty also guarantees a right to move (and so possess) goods freely as they travel to and from market. Ibid.

What about the supposed "mink coat" anomaly? Under the terms of the treaty before us, it's true that a Yakama who buys a mink coat (or perhaps some more likely item) at an off-reservation store in Washington will have to pay sales tax because the treaty is silent there. And it is also true that a Yakama who buys the same coat right over the state line, pays any taxes due at market there, and then drives back to the reservation using the public highways is entitled to move that good tax-free from market back to the reservation. But that is hardly anomalous—that is the treaty right the Yakamas reserved. And it's easy to see why. Imagine the Yakama Reservation reached the Washington/Oregon state line (as it did before the 1855 Treaty). In that case, Washington would have no basis to tax the Yakamas' transportation of goods from Oregon (whether they might be fuel, mink coats, or anything else), as all of the Yakamas' conduct would take place outside of the State or on the reservation. The only question here is whether the result changes because the Tribe must now use Washington's highways to make the trek home. And the answer is no. The Tribe bargained for a right to travel with goods off reservation just as it could on reservation and just as it had for centuries. If the State and federal governments do not like that result, they are free to bargain for more, but they do not get to rewrite the existing bargain in this Court.

Alternatively yet, the State warns us about the dire consequences of a ruling against it. Highway speed limits, reckless driving laws, and much more, the State tells us, will be at risk if we rule for the Tribe. See also post, at —— – —— (ROBERTS, C.J., dissenting). But notice. Once you acknowledge (as the State and primary dissent just have) that the Yakamas themselves enjoy a right to travel free of at least some nondiscriminatory state regulations, this "problem" inevitably arises. It inevitably arises, too, once you concede that the Yakamas enjoy a right to travel freely at least on local roads. See post, at —— (KAVANAUGH, J., dissenting). Whether you read the treaty to afford the Yakamas the further right to bring goods to and from market is beside the point.

It turns out, too, that the State's parade of horribles isn't really all that horrible. While the treaty supplies the Yakamas with special rights to travel with goods to and from market, we have seen already that its "in common with" language also indicates that tribal members knew they would have to "share the use of the road with whites" and accept regulations designed to allow the two groups' safe coexistence. *Yakama Indian Nation*, 955 F.Supp. at 1265. Indeed, the Yakamas expected laws designed to "protec[t]" their ability to travel safely alongside non-Indians on the highways. See App. to Brief for Confederated Tribes and Bands of the Yakama Nation as Amicus Curiae 21a, 31a. Maybe, too, that expectation goes some way toward explaining why the State's hypothetical parade of horribles has yet to take its first step in the real world. No one before us has identified a single challenge to a state highway speed limit, reckless driving law, or other critical highway safety regulation in the entire life of the Yakama treaty.

Retreating now, the State suggests that the real problem isn't so much about the Yakamas themselves traveling freely as it is with their goods doing so. We are told we should worry, for example, about limiting Washington's ability to regulate the transportation of diseased apples from Oregon. See also post, at —— (ROBERTS, C.J., dissenting). But if bad apples prove to be a public menace, Oregon and its localities may regulate them when they are grown or picked at the orchard. Oregon, its localities, and maybe even the federal government may regulate the bad apples when they arrive at market for sale in Oregon. The Tribe and again, perhaps, the federal government may regulate the bad apples when they arrive on the reservation. And if the bad apples somehow pose a threat to safe travel on the highways, even Washington may regulate them as they make their way from Oregon to the reservation—just as the State may require tribal members to abide nondiscriminatory regulations governing the safe transportation of flammable cargo as they drive their gas trucks from Oregon to the reservation along public highways. The only thing that Washington may not do is reverse the promise the United States made to the Yakamas in 1855 by imposing a tax or toll on tribal members or their goods as they pass to and from market.

Finally, some worry that, if we recognize the potential permissibility of state highway safety laws, we might wind up impairing the interests of "tribal members across the country." See post, at —— (ROBERTS, C.J., dissenting). But our decision today is based on unchallenged factual findings about how the Yakamas themselves understood this treaty in light of the negotiations that produced it. And the Tribe itself has expressly acknowledged that its treaty, while extending real and valuable rights to tribal members, does not preclude laws that merely facilitate the safe use of the roads by Indians and non-Indians alike. Nor does anything we say here necessarily apply to other tribes and other treaties; each must be taken on its own terms. In the end, then, the only true threat to tribal interests today would come from replacing the meaningful right the Yakamas thought they had reserved with the trivial promise the State suggests.

Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.

[The dissenting opinions of the CHIEF JUSTICE and Justice KAVANAUGH are omitted.]

SECTION D.

THE INDIAN CHILD WELFARE ACT OF 1978

After note 3 on page 713, add:

Brackeen v. Bernhardt

United States Fifth Circuit Court of Appeals, 2019

__ F.3d __, 2019 WL 3759491

JAMES L. DENNIS, Circuit Judge:

This case presents facial constitutional challenges to the Indian Child Welfare Act of 1978 (ICWA) and statutory and constitutional challenges to the 2016 administrative rule (the Final Rule) that was promulgated by the Department of the Interior to clarify provisions of ICWA. Plaintiffs are the states of Texas, Indiana, and Louisiana, and seven individuals seeking to adopt Indian children. Defendants are the United States of America, several federal agencies and officials in their official capacities, and five intervening Indian tribes. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction, but the district court denied the motion, concluding, as relevant to this appeal, that Plaintiffs had Article III standing. The district court then granted summary judgment in favor of Plaintiffs, ruling that provisions of ICWA and the Final Rule violated equal protection, the Tenth Amendment, the nondelegation doctrine, and the Administrative Procedure Act. Defendants appealed. Although we AFFIRM the district court's ruling that Plaintiffs had standing, we REVERSE the district court's grant of summary judgment to Plaintiffs and RENDER judgment in favor of Defendants.

BACKGROUND

I. The Indian Child Welfare Act (ICWA)

Congress enacted the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 et seq., to address rising concerns over "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 . . . (1989). Recognizing that a "special relationship" exists between the United States and Indian tribes, Congress made the following findings:

> Congress has plenary power over Indian affairs. 25 U.S.C. § 1901(1) (citing U.S. CONST. art. I, section 8, cl. 3 ("The Congress shall have Power ... To regulate Commerce ... with the Indian Tribes.")).
>
> "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children ...." Id. at § 1901(3).
>
> "[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." Id. at § 1901(4).
>
> "States exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." Id. at § 1901(5).

In light of these findings, Congress declared that it was the policy of the United States "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." Id. at § 1902.

ICWA applies in state court child custody proceedings involving an "Indian child," defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." Id. at § 1903(4). In proceedings for the foster care placement or termination of parental rights, ICWA provides "the Indian custodian of the child and the Indian child's tribe [ ] a right to intervene at any point in the proceeding." Id. at § 1911(c). Where such proceedings are involuntary, ICWA requires that the parent, the Indian custodian, the child's tribe, or the Secretary of the United States Department of the Interior (Secretary or Secretary of the Interior) be notified of pending proceedings and of their right to intervene. Id. at § 1912. In voluntary proceedings for the termination of parental rights or adoptive placement of an Indian child, the parent can withdraw consent for any reason prior to entry of a final decree of adoption or termination, and the child must be returned to the parent. Id. at § 1913(c). If consent was obtained through fraud or duress, a parent may petition to withdraw consent within two years after the final decree of adoption and, upon a showing of fraud or duress, the court must vacate the decree and return the child to the parent. Id. at § 1913(d). An Indian child, a parent or Indian custodian from whose custody the child was removed, or the child's tribe may file a petition in any court of competent jurisdiction to invalidate an action in state court for foster care placement

or termination of parental rights if the action violated any provision of ICWA §§ 1911–13. Id. at § 1914.

ICWA further sets forth placement preferences for foster care, preadoptive, and adoptive proceedings involving Indian children. Section 1915 requires that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." Id. at § 1915(a). Similar requirements are set for foster care or preadoptive placements. Id. at § 1915(b). If a tribe establishes by resolution a different order of preferences, the state court or agency effecting the placement "shall follow [the tribe's] order so long as the placement is the least restrictive setting appropriate to the particular needs of the child." Id. at § 1915(c).

The state in which an Indian child's placement was made shall maintain records of the placement, which shall be made available at any time upon request by the Secretary or the child's tribe. Id. at § 1915(e). A state court entering a final decree in an adoptive placement "shall provide the Secretary with a copy of the decree or order" and information as necessary regarding "(1) the name and tribal affiliation of the child; (2) the names and addresses of the biological parents; (3) the names and addresses of the adoptive parents; and (4) the identity of any agency having files or information relating to such adoptive placement." Id. at § 1951(a). ICWA's severability clause provides that "[i]f any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby." Id. at § 1963.

II. The Final Rule

ICWA provides that "the Secretary [of the Interior] shall promulgate such rules and regulations as may be necessary to carry out [its] provisions." 25 U.S.C. § 1952. In 1979, the Bureau of Indian Affairs (BIA) promulgated guidelines (the "1979 Guidelines") intended to assist state courts in implementing ICWA but without "binding legislative effect." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979). The 1979 Guidelines left the "primary responsibility" of interpreting certain language in ICWA "with the [state] courts that decide Indian child custody cases." Id. However, in June 2016, the BIA promulgated the Final Rule to "clarify the minimum Federal standards governing implementation of [ICWA]" and to ensure that it "is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families." 25 C.F.R. § 23.101; Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,868 (June 14, 2016). The Final Rule explained that while the BIA "initially hoped that binding regulations would not be necessary to carry out [ICWA], a third of a century of experience has confirmed the need for more uniformity in the interpretation and application of this important Federal law." 81 Fed. Reg. at 38,782.

The Final Rule provides that states have the responsibility of determining whether a child is an "Indian child" subject to ICWA's requirements. 25 C.F.R. §§ 23.107–22; 81 Fed. Reg. at 38,778, 38,869–73. The Final Rule also sets forth notice and recordkeeping requirements for states, see 25 U.S.C. §§ 23.140–41; 81 Fed. Reg. at 38,778, 38,875–76, and requirements for states and individuals regarding voluntary proceedings and parental withdrawal of consent, see 25 C.F.R. §§ 23.124–28; 81 Fed. Reg. at 38,778, 38,873–74. The Final Rule also restates ICWA's placement preferences and clarifies when they apply and when states may depart from them. See 25 C.F.R. §§ 23.129–32; 81 Fed. Reg. at 38,778, 38,874–75.

III. The Instant Action

A. Parties

1. Plaintiffs

Plaintiffs in this action are the states of Texas, Louisiana, and Indiana,2 (collectively, the "State Plaintiffs"), and seven individual Plaintiffs—Chad and Jennifer Brackeen (the "Brackeens"), Nick and Heather Libretti (the "Librettis"), Altagracia Socorro Hernandez ("Hernandez"), and Jason and Danielle Clifford (the "Cliffords") (collectively, "Individual Plaintiffs") (together with State Plaintiffs, "Plaintiffs").

a. The Brackeens & A.L.M.

At the time their initial complaint was filed in the district court, the Brackeens sought to adopt A.L.M., who falls within ICWA's definition of an "Indian Child." His biological mother is an enrolled member of the Navajo Nation and his biological father is an enrolled member of the Cherokee Nation. When A.L.M. was ten months old, Texas's Child Protective Services ("CPS") removed him from his paternal grandmother's custody and placed him in foster care with the Brackeens. Both the Navajo Nation and the Cherokee Nation were notified pursuant to ICWA and the Final Rule. A.L.M. lived with the Brackeens for more than sixteen months before they sought to adopt him with the support of his biological parents and paternal grandmother. In May 2017, a Texas court, in voluntary proceedings, terminated the parental rights of A.L.M.'s biological parents, making him eligible for adoption under Texas law. Shortly thereafter, the Navajo Nation notified the state court that it had located a potential alternative placement for A.L.M. with non-relatives in New Mexico, though this placement ultimately failed to materialize. In July 2017, the Brackeens filed an original petition for adoption, and the Cherokee Nation and Navajo Nation were notified in compliance with ICWA. The Navajo Nation and the Cherokee Nation reached an agreement whereby the Navajo Nation was designated as A.L.M.'s tribe for purposes of ICWA's application in the state proceedings. No one intervened in the Texas adoption proceeding or otherwise formally sought to adopt A.L.M. The Brackeens entered into a settlement with the Texas state agency and A.L.M.'s guardian ad litem specifying that, because no one else sought to adopt A.L.M., ICWA's placement preferences did not apply. In January 2018, the Brackeens successfully petitioned to adopt A.L.M. The Brackeens initially

alleged in their complaint that they would like to continue to provide foster care for and possibly adopt additional children in need, but their experience adopting A.L.M. made them reluctant to provide foster care for other Indian children in the future. Since their complaint was filed, the Brackeens have sought to adopt A.L.M.'s sister, Y.R.J. in Texas state court. Y.R.J., like her brother, is an Indian Child for purposes of ICWA. The Navajo Nation contests the adoption. On February 2, 2019, the Texas court granted the Brackeens' motion to declare ICWA inapplicable as a violation of the Texas constitution, but "conscientiously refrain[ed]" from ruling on the Brackeens' claims under the United States Constitution pending our resolution of the instant appeal.

b. The Librettis & Baby O.

The Librettis live in Nevada and sought to adopt Baby O. when she was born in March 2016. Baby O.'s biological mother, Hernandez, wished to place Baby O. for adoption at her birth, though Hernandez has continued to be a part of Baby O.'s life and she and the Librettis visit each other regularly. Baby O.'s biological father, E.R.G., descends from members of the Ysleta del sur Pueblo Tribe (the "Pueblo Tribe"), located in El Paso, Texas, and was a registered member at the time Baby O. was born. The Pueblo Tribe intervened in the Nevada custody proceedings seeking to remove Baby O. from the Librettis. Once the Librettis joined the challenge to the constitutionality of the ICWA and the Final Rule, the Pueblo Tribe indicated that it was willing settle. The Librettis agreed to a settlement with the tribe that would permit them to petition for adoption of Baby O. The Pueblo Tribe agreed not to contest the Librettis' adoption of Baby O., and on December 19, 2018, the Nevada state court issued a decree of adoption, declaring that the Librettis were Baby O.'s lawful parents. Like the Brackeens, the Librettis alleged that they intend to provide foster care for and possibly adopt additional children in need but are reluctant to foster Indian children after this experience.

c. The Cliffords & Child P.

The Cliffords live in Minnesota and seek to adopt Child P., whose maternal grandmother is a registered member of the White Earth Band of Ojibwe Tribe (the "White Earth Band"). Child P. is a member of the White Earth Band for purposes of ICWA's application in the Minnesota state court proceedings. Pursuant to ICWA section 1915's placement preferences, county officials removed Child P. from the Cliffords' custody and, in January 2018, placed her in the care of her maternal grandmother, whose foster license had been revoked. Child P.'s guardian ad litem supports the Cliffords' efforts to adopt her and agrees that the adoption is in Child P.'s best interest. The Cliffords and Child P. remain separated, and the Cliffords face heightened legal barriers to adopting her. On January 17, 2019, the Minnesota court denied the Cliffords' motion for adoptive placement.

2. Defendants

Defendants are the United States of America; the United States Department of the Interior and its Secretary Ryan Zinke, in his official capacity; the BIA and its Director Bryan Rice, in his official capacity; the BIA Principal Assistant Secretary for Indian Affairs John Tahsuda III, in his official capacity; and the Department of Health and Human Services ("HHS") and its Secretary Alex M. Azar II, in his official capacity (collectively the "Federal Defendants"). Shortly after this case was filed in the district court, the Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians (collectively, the "Tribal Defendants") moved to intervene, and the district court granted the motion. On appeal, we granted the Navajo Nation's motion to intervene as a defendant3 (together with Federal and Tribal Defendants, "Defendants").

B. Procedural History

Plaintiffs filed the instant action against the Federal Defendants in October 2017, alleging that the Final Rule and certain provisions of ICWA are unconstitutional and seeking injunctive and declaratory relief. Plaintiffs argued that ICWA and the Final Rule violated equal protection and substantive due process under the Fifth Amendment and the anticommandeering doctrine that arises from the Tenth Amendment. Plaintiffs additionally sought a declaration that provisions of ICWA and the Final Rule violated the nondelegation doctrine and the Administrative Procedure Act (APA). Defendants moved to dismiss, alleging that Plaintiffs lacked standing. The district court denied the motion. All parties filed cross-motions for summary judgment. The district court granted Plaintiffs' motion for summary judgment in part, concluding that ICWA and the Final Rule violated equal protection, the Tenth Amendment, and the nondelegation doctrine, and that the challenged portions of the Final Rule were invalid under the APA.4 Defendants appealed. A panel of this court subsequently stayed the district court's judgment pending further order of this court. In total, fourteen amicus briefs were filed in this court, including a brief in support of Plaintiffs and affirmance filed by the state of Ohio; and a brief in support of Defendants and reversal filed by the states of California, Alaska, Arizona, Colorado, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Jersey, New Mexico, Oregon, Rhode Island, Utah, Virginia, Washington, and Wisconsin.

* * *

DISCUSSION

* * *

II. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. 14, § 1. This clause is implicitly incorporated into the Fifth Amendment's guarantee of

due process. *See Bolling v. Sharpe*, 347 U.S. 497, 499 . . . (1954). We apply the same analysis with respect to equal protection claims under the Fifth and Fourteenth Amendments. . . . In evaluating an equal protection claim, strict scrutiny applies to laws that rely on classifications of persons based on race. See id. But where the classification is political, rational basis review applies. See *Morton v. Mancari*, 417 U.S. 535, 555 . . . (1974). The district court granted summary judgment on behalf of Plaintiffs, concluding that section 1903(4)—setting forth ICWA's definition of "Indian Child" for purposes of determining when ICWA applies in state child custody proceedings—was a race-based classification that could not withstand strict scrutiny. On appeal, the parties disagree as to whether section 1903(4)'s definition of "Indian Child" is a political or race-based classification and which level of scrutiny applies. "We review the constitutionality of federal statutes de novo." . . .

A. Level of Scrutiny

We begin by determining whether ICWA's definition of "Indian child" is a race-based or political classification and, consequently, which level of scrutiny applies. The district court concluded that ICWA's "Indian Child" definition was a race-based classification. We conclude that this was error. Congress has exercised plenary power "over the tribal relations of the Indians ... from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 . . . (1903). The Supreme Court's decisions "leave no doubt that federal legislation with respect to Indian tribes ... is not based upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977). "Literally every piece of legislation dealing with Indian tribes and reservations ... single[s] out for special treatment a constituency of tribal Indians living on or near reservations." *Mancari*, 417 U.S. at 552, 94 S.Ct. 2474. "If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." Id.

* * *

The district court construed *Mancari* narrowly and distinguished it for two primary reasons: First, the district court found that the law in *Mancari* provided special treatment "only to Indians living on or near reservations." Second, the district court concluded that ICWA's membership eligibility standard for an Indian child does not rely on actual tribal membership as did the statute in *Mancari*. The district court reasoned that, whereas the law in *Mancari* "applied 'only to members of 'federally recognized' tribes which operated to exclude many individuals who are racially to be classified as Indians,' " ICWA's definition of "Indian child" extended protection to children who were eligible for membership in a federally recognized tribe and had a biological parent who was a member of a tribe. The district court, citing the tribal membership

laws of several tribes, including the Navajo Nation, concluded that "[t]his means one is an Indian child if the child is related to a tribal ancestor by blood."

We disagree with the district court's reasoning and conclude that *Mancari* controls here. As to the district court's first distinction, *Mancari*'s holding does not rise or fall with the geographical location of the Indians receiving "special treatment." See *Mancari*, 417 U.S. at 552, 94 S.Ct. 2474. The Supreme Court has long recognized Congress's broad power to regulate Indians and Indian tribes on and off the reservation. See e.g., *United States v. McGowan*, 302 U.S. 535, 539 . . . (1938) ("Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States."); *Perrin v. United States*, 232 U.S. 478, 482 . . . (1914) (acknowledging Congress's power to regulate Indians "whether upon or off a reservation and whether within or without the limits of a state").

Second, the district court concluded that, unlike the statute in *Mancari*, ICWA's definition of Indian child extends to children who are merely eligible for tribal membership because of their ancestry. However, ICWA's definition of "Indian child" is not based solely on tribal ancestry or race. ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). As Defendants explain, under some tribal membership laws, eligibility extends to children without Indian blood, such as the descendants of former slaves of tribes who became members after they were freed, or the descendants of adopted white persons. Accordingly, a child may fall under ICWA's membership eligibility standard because his or her biological parent became a member of a tribe, despite not being racially Indian. Additionally, many racially Indian children, such as those belonging to non-federally recognized tribes, do not fall within ICWA's definition of "Indian child." Conditioning a child's eligibility for membership, in part, on whether a biological parent is a member of the tribe is therefore not a proxy for race, as the district court concluded, but rather for not-yet-formalized tribal affiliation, particularly where the child is too young to formally apply for membership in a tribe.

Our conclusion that ICWA's definition of Indian child is a political classification is consistent with both the Supreme Court's holding in *Mancari* and this court's holding in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1212 (5th Cir. 1991). In *Mancari*, the hiring preference extended to individuals who were one-fourth or more degree Indian blood and a member of a federally recognized tribe. See 417 U.S. at 554, 94 S.Ct. 2474. Similarly, in *Peyote Way*, this court considered whether equal protection was violated by federal and state laws prohibiting the possession of peyote by all persons except members of the Native American Church of North America (NAC), who used peyote for religious purposes. See 922 F.2d at 1212. Applying *Mancari*'s reasoning, this court upheld the preference on the basis that membership in NAC "is limited to Native American members of federally recognized tribes who have at least 25% Native American ancestry, and therefore represents a political classification." Id. at 1216. ICWA's "Indian child" eligibility provision similarly turns, at least in part, on whether the child

is eligible for membership in a federally recognized tribe. See *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (federal recognition "is a formal political act" that "institutionaliz[es] the government-to-government relationship between the tribe and the federal government."); 25 U.S.C. § 1903(4).

The district court concluded, and Plaintiffs now argue, that ICWA's definition "mirrors the impermissible racial classification in *Rice* [*v. Cayetano*, 528 U.S. 495 . . . (2000)], and is legally and factually distinguishable from the political classification in *Mancari*." * * *

Rice is distinguishable from the present case for several reasons. Unlike *Rice*, which involved voter eligibility in a state-wide election for a state agency, there is no similar concern here that applying *Mancari* would permit "by racial classification, [the fencing] out [of] whole classes of [a state's] citizens from decisionmaking in critical state affairs." See 528 U.S. at 518–22 . . . . Additionally, as discussed above, ICWA's definition of "Indian child," unlike the challenged law in *Rice*, does not single out children "*solely* because of their ancestry or ethnic characteristics." See id. at 515 . . . (emphasis added). Further, unlike the law in Rice, ICWA is a federal law enacted by Congress for the protection of Indian children and tribes. See *Rice*, 528 U.S. at 518 . . . (noting that to sustain Hawaii's restriction under *Mancari*, it would have to "accept some beginning premises not yet established in [its] case law," such as that Congress "has determined that native Hawaiians have a status like that of Indians in organized tribes"); see also *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (rejecting an equal protection challenge brought by Native Hawaiians, who were excluded from the U.S. Department of the Interior's regulatory tribal acknowledgement process, and concluding that the recognition of Indian tribes was political). Additionally, whereas the OHA elections in *Rice* were squarely state affairs, state court adoption proceedings involving Indian children are simultaneously affairs of states, tribes, and Congress. See 25 U.S.C. § 1901(3) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."). Because we find *Rice* inapplicable, and *Mancari* controlling here, we conclude, contrary to the district court's determination, that ICWA's definition of "Indian child" is a political classification subject to rational basis review. See *Mancari*, 417 U.S. at 555 . . . .

B. Rational Basis Review

Having so determined that rational basis review applies, we ask whether "the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." *Mancari*, 417 U.S. at 555 . . . . Given Congress's explicit findings and stated objectives in enacting ICWA, we conclude that the special treatment ICWA affords Indian children is rationally tied to Congress's fulfillment of its unique obligation toward Indian nations and its stated purpose of "protect[ing] the best interests of Indian children and [ ] promot[ing] the stability and security of Indian tribes." See 25 U.S.C. §§ 1901–02; see also *Mancari*, 417 U.S. at 555 . . . . ICWA section 1903(4)'s definition of an "Indian child" is a political classification that does not violate equal protection.

III. Tenth Amendment

The district court concluded that ICWA sections 1901–2312 and 1951–5213 violated the anticommandeering doctrine by requiring state courts and executive agencies to apply federal standards to state-created claims. The district court also considered whether ICWA preempts conflicting state law under the Supremacy Clause and concluded that preemption did not apply because the law "directly regulated states." Defendants argue that the anticommandeering doctrine does not prevent Congress from requiring state courts to enforce substantive and procedural standards and precepts, and that ICWA sets minimum procedural standards that preempt conflicting state law. We examine the constitutionality of the challenged provisions of ICWA below and conclude that they preempt conflicting state law and do not violate the anticommandeering doctrine.

A. Anticommandeering Doctrine

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Congress's legislative powers are limited to those enumerated under the Constitution. *Murphy v. Nat'l Collegiate Athletic Ass'n*, ––– U.S. ––––, 138 S. Ct. 1461, 1476 . . . (2018). "[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." Id. The anticommandeering doctrine, an expression of this limitation on Congress, prohibits federal laws commanding the executive or legislative branch of a state government to act or refrain from acting. Id. at 1478 (holding that a federal law prohibiting state authorization of sports gambling violated the anticommandeering rule by "unequivocally dictat[ing] what a state legislature may and may not do"); *Printz v. United States*, 521 U.S. 898, 935 . . . (1997) (holding that a federal law requiring state chief law enforcement officers to conduct background checks on handgun purchasers "conscript[ed] the State's officers directly" and was invalid); *New York v. United States*, 505 U.S. 144, 175–76 . . . (1992) (holding that a federal law impermissibly commandeered states to implement federal legislation when it gave states "[a] choice between two unconstitutionally coercive" alternatives: to either dispose of radioactive waste within their boundaries according to Congress's instructions or "take title" to and assume liabilities for the waste).

1. State Courts

Defendants argue that because the Supremacy Clause requires the enforcement of ICWA and the Final Rule by state courts, these provisions do not run afoul of the anticommandeering doctrine. We agree. The Supremacy Clause provides that "the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. In setting forth the anticommandeering doctrine, the Supreme Court drew a

distinction between a state's courts and its political branches. The Court acknowledged that "[f]ederal statutes enforceable in state court do, in a sense, direct state judges to enforce them, but this sort of federal "direction" of state judges is mandated by the text of the Supremacy Clause." *New York*, 505 U.S. at 178–79 . . . (internal quotation marks omitted). Early laws passed by the first Congresses requiring state court action "establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907 . . . . State courts were viewed as distinctive because, "unlike [state] legislatures and executives, they applied the law of other sovereigns all the time," including as mandated by the Supremacy Clause. Id. Thus, to the extent provisions of ICWA and the Final Rule require state courts to enforce federal law, the anticommandeering doctrine does not apply. See id. at 928–29 . . . (citing *Testa v. Katt*, 330 U.S. 386 . . . (1947), "for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause").

2. State Agencies

Plaintiffs next challenge several provisions of ICWA that they contend commandeer state executive agencies, including sections 1912(a) (imposing notice requirements on "the party seeking the foster care placement of, or termination of parental rights to, an Indian child"), 1912(d) (requiring that "any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."), 1915(c) (requiring "the agency or court effecting [a] placement" adhere to the order of placement preferences established by the tribe), and 1915(e) (requiring that "the State" in which the placement was made keep a record of each placement, evidencing the efforts to comply with the order of preference, to be made available upon request of the Secretary or the child's tribe). See 25 U.S.C. §§ 1912, 1915. Plaintiffs argue that ICWA's requirements on state agencies go further than the federal regulatory scheme invalidated in *Printz* and impermissibly impose costs that states must bear. Defendants contend that the challenged provisions of ICWA apply to private parties and state agencies alike and therefore do not violate the anticommandeering doctrine.

In *Printz*, the Supreme Court affirmed its prior holding that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program," and "Congress cannot circumvent that prohibition by conscripting the State's officers directly." 521 U.S. at 925, 935 . . . (quoting *New York*, 505 U.S. at 188 . . .). The *Printz* Court, rejecting as irrelevant the Government's argument that the federal law imposed a minimal burden on state executive officers, explained that it was not "evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments," but rather a law whose "whole object ... [was] to direct the functioning of the state executive." Id. at 931–32 . . . . Expanding upon this distinction, the Court in *Murphy* discussed

Reno v. Condon, 528 U.S. 141 . . . (2000), and *South Carolina v. Baker*, 485 U.S. 505 . . . (1988), and held that "[t]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." 138 S. Ct. at 1478.

In *Condon*, the Court upheld a federal regulatory scheme that restricted the ability of states to disclose a driver's personal information without consent. 528 U.S. at 151 . . . . In determining that the anticommandeering doctrine did not apply, the Court distinguished the law from those invalidated in *New York* and *Printz*:

> [This law] does not require the States in their sovereign capacity to regulate their own citizens. The [law] regulates the States as the owners of [Department of Motor Vehicle] data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.

Id. In *Baker*, the Court rejected a Tenth Amendment challenge to a provision of a federal statute that eliminated the federal income tax exemption for interest earned on certain bonds issued by state and local governments unless the bonds were registered, treating the provision "as if it directly regulated States by prohibiting outright the issuance of [unregistered] bearer bonds." 485 U.S. at 507–08, 511 . . . . The Court reasoned that the provision at issue merely "regulat[ed] a state activity" and did not "seek to control or influence the manner in which States regulate private parties." Id. at 514 . . . . "That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." Id. at 514–15 . . . . "[S]ubstantial effort[s]" to comply with federal regulations are "an inevitable consequence of regulating a state activity." Id. at 514 . . . .

In light of these cases, we conclude that the provisions of ICWA that Plaintiffs challenge do not commandeer state agencies. Sections 1912(a) and (d) impose notice and "active efforts" requirements on the "party" seeking the foster care placement of, or termination of parental rights to, an Indian child. Because both state agencies and private parties who engage in state child custody proceedings may fall under these provisions, 1912(a) and (d) "evenhandedly regulate[ ] an activity in which both States and private actors engage." See *Murphy*, 138 S. Ct. at 1478. Moreover, sections 1915(c) and (e) impose an obligation on "the agency or court effecting the placement" of an Indian child to respect a tribe's order of placement preferences and require that "the State" maintain a record of each placement to be made available to the Secretary or child's tribe. These provisions regulate state activity and do not require states to enact any laws or regulations, or to assist in the enforcement of federal statutes regulating private individuals. . . . To the contrary, they merely require states to "take administrative ... action to comply with federal standards regulating" child custody proceedings involving Indian children, which is permissible under the Tenth Amendment. . . .

B. Preemption

Defendants argue that, to the extent there is a conflict between ICWA and applicable state laws in child custody proceedings, ICWA preempts state law. The Supremacy Clause provides that federal law is the "supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Conflict preemption occurs when "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Murphy*, 138 S. Ct. at 1480. For a federal law to preempt conflicting state law, two requirements must be satisfied: The challenged provision of the federal law "must represent the exercise of a power conferred on Congress by the Constitution" and "must be best read as one that regulates private actors" by imposing restrictions or conferring rights. Id. at 1479–80. The district court concluded that preemption does not apply here, as ICWA regulates states rather than private actors. . . .

Congress enacted ICWA to "establish[ ] minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902. Defendants contend that these minimum federal standards preempt conflicting state laws. Plaintiffs contend that preemption does not apply here because ICWA regulates states and not individuals, and nothing in the Constitution gives Congress authority to regulate the adoption of Indian children under state jurisdiction.

ICWA specifies that Congress's authority to regulate the adoption of Indian children arises under the Indian Commerce Clause as well as "other constitutional authority." 25 U.S.C. § 1901(1). The Indian Commerce Clause provides that "[t]he Congress shall have Power To ... regulate Commerce ... with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has repeatedly held that the Indian Commerce Clause grants Congress plenary power over Indian affairs. See [*United States v.*] *Lara*, 541 U.S. [193,] 200 [(2004)] (noting that the Indian Commerce and Treaty Clauses are sources of Congress's "plenary and exclusive" "powers to legislate in respect to Indian tribes"); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 . . . (1982) (discussing Congress's "broad power ... to regulate tribal affairs under the Indian Commerce Clause"); *Mancari*, 417 U.S. at 551–52 . . . (noting that "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from," inter alia, the Indian Commerce Clause). Plaintiffs do not provide authority to support a departure from that principle here.

Moreover, ICWA clearly regulates private individuals. See *Murphy*, 138 S. Ct. at 1479–80. In enacting the statute, Congress declared that it was the dual policy of the United States to protect the best interests of Indian children and promote the stability and security of Indian families and tribes. 25 U.S.C. § 1902. Each of the challenged provisions applies within the context of state court proceedings involving Indian children and is informed by and designed to

promote Congress's goals by conferring rights upon Indian children and families. See H.R. REP. No. 95-1386, at 18 (1978) ("We conclude that rights arising under [ICWA] may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion." (quoting *Second Employers' Liability Cases*, 223 U.S. 1, 59 . . . (1912))). Thus, to the extent ICWA's minimum federal standards conflict with state law, "federal law takes precedence and the state law is preempted." See *Murphy*, 138 S. Ct. at 1480.

IV. Nondelegation Doctrine

Article I of the Constitution vests "[a]ll legislative Powers" in Congress. U.S. CONST. art. 1, § 1, cl. 1. "In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). The limitations on Congress's ability to delegate its legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." See *United States v. Mazurie*, 419 U.S. 544, 556–57 . . . (1975). ICWA section 1915(c) allows Indian tribes to establish through tribal resolution a different order of preferred placement than that set forth in sections 1915(a) and (b).18 Section 23.130 of the Final Rule provides that a tribe's established placement preferences apply over those specified in ICWA. The district court determined that these provisions violated the nondelegation doctrine, reasoning that section 1915(c) grants Indian tribes the power to change legislative preferences with binding effect on the states, and Indian tribes, like private entities, are not part of the federal government of the United States and cannot exercise federal legislative or executive regulatory power over non-Indians on non-tribal lands.

Defendants argue that the district court's analysis of the constitutionality of these provisions ignores the inherent sovereign authority of tribes. They contend that section 1915 merely recognizes and incorporates a tribe's exercise of its inherent sovereignty over Indian children and therefore does not—indeed cannot—delegate this existing authority to Indian tribes.

The Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine. See *Mazurie*, 419 U.S. at 557, 95 S.Ct. 710 ("[I]ndependent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce ... with the Indian tribes.' ") . . . . "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Mazurie*, 419 U.S. at 557 . . . . Though some exercises of tribal power require "express congressional delegation," the "tribes retain their inherent power to determine tribal membership [and] to regulate domestic relations among members ...." See *Montana v. United States*, 450 U.S. 544, 564 . . . (1981); see also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 . . . (1982) ("tribes retain the power to create substantive law governing internal tribal affairs" like tribal citizenship and child custody).

In *Mazurie*, a federal law allowed the tribal council of the Wind River Tribes, with the approval of the Secretary of the Interior, to adopt ordinances to control the introduction of alcoholic beverages by non-Indians on privately owned land within the boundaries of the reservation. See 419 U.S. at 547, 557 . . . . The Supreme Court held that the law did not violate the nondelegation doctrine, focusing on the Tribes' inherent power to regulate their internal and social relations by controlling the distribution and use of intoxicants within the reservation's bounds. Id. Mazurie is instructive here. ICWA section 1915(c) provides that a tribe may pass, by its own legislative authority, a resolution reordering the three placement preferences set forth by Congress in section 1915(a). Pursuant to this section, a tribe may assess whether the most appropriate placement for an Indian child is with members of the child's extended family, the child's tribe, or other Indian families, and thereby exercise its "inherent power to determine tribal membership [and] regulate domestic relations among members" and Indian children eligible for membership. See *Montana*, 450 U.S. at 564 . . . .

State Plaintiffs contend that *Mazurie* is distinguishable because it involves the exercise of tribal authority on tribal lands, whereas ICWA permits the extension of tribal authority over states and persons on non-tribal lands. We find this argument unpersuasive. It is well established that tribes have "sovereignty *over both their members and their territory*." See *Mazurie*, 419 U.S. at 557, 95 S.Ct. 710 (emphasis added). For a tribe to exercise its authority to determine tribal membership and to regulate domestic relations among its members, it must necessarily be able to regulate all Indian children, irrespective of their location. See *Montana*, 450 U.S. at 564 . . . (tribes retain inherent power to regulate domestic relations and determine tribal membership); *Merrion*, 455 U.S. at 170 . . . (tribes retain power to govern tribal citizenship and child custody). Section 1915(c), by recognizing the inherent powers of tribal sovereigns to determine by resolution the order of placement preferences applicable to an Indian child, is thus a "deliberate continuing adoption by Congress" of tribal law as binding federal law. . . . 25 U.S.C. § 1915(c); 81 Fed. Reg. at 38,784 (the BIA noting that "through numerous statutory provisions, ICWA helps ensure that State courts incorporate Indian social and cultural standards into decision-making that affects Indian children"). We therefore conclude that ICWA section 1915(c) is not an unconstitutional delegation of Congressional legislative power to tribes, but is an incorporation of inherent tribal authority by Congress. See *Mazurie*, 419 U.S. at 544 . . . .

***

For these reasons, we conclude that Plaintiffs had standing to bring all claims and that ICWA and the Final Rule are constitutional because they are based on a political classification that is rationally related to the fulfillment of Congress's unique obligation toward Indians; ICWA preempts conflicting state laws and does not violate the Tenth Amendment anticommandeering doctrine; and ICWA and the Final Rule do not violate the nondelegation doctrine. We also conclude that the Final Rule implementing the ICWA is valid because the ICWA is constitutional, the BIA did not exceed its authority when it issued the Final Rule, and the agency's interpretation of ICWA section 1915 is reasonable. Accordingly, we AFFIRM the

district court's judgment that Plaintiffs had Article III standing. But we REVERSE the district court's grant of summary judgment for Plaintiffs and RENDER judgment in favor of Defendants on all claims.

NOTES

1. The Fifth Circuit reversed *Brackeen v. Zinke*, 338 F.Supp.3d 514 (N.D. Tex. 2018), which had struck down the Indian Child Welfare Act on a wide variety of questionable constitutional grounds.

The briefs are here: https://turtletalk.blog/icwa/texas-v-zinke-documents-and-additional-materials/texas-v-zinke-fifth-circuit-document/.

2. Conservative advocacy groups and others have brought an onslaught of litigation designed to undermine ICWA and state statutes implementing ICWA. So far, all of these efforts have failed. E.g., *Carter v. Tahsuda*, 743 Fed. Appx. 823 (9th Cir. 2018); *Doe v. Piper*, 165 F. Supp. 3d 789 (D. Minn. 2016); *National Council for Adoption v. Jewell*, 156 F. Supp. 3d 727 (E.D. Va. 2015), *vacated as moot*, 2017 WL 9440666 (4th Cir., Jan. 30, 2017).

CHAPTER 9

THE NATION-BUILDING CHALLENGE: MODERN TRIBAL ECONOMIES

SECTION A.

TRIBAL ECONOMIC DEVELOPMENT

The following material is from the Sixth edition of the Getches casebook and is included here by popular request. It has not been updated since the publication of that volume.

After the end of Section A on page 734, add:

1. LAND LEASING IN INDIAN COUNTRY

Indian tribal and allotted lands are leased for a variety of purposes. Agricultural and business leases can provide tribes and individual Indian allottees with significant revenues. Rights of way and other surface leases also provide a source of income for tribal governments. Oil, gas, coal, and other mineral leases are discussed in the next subsection.

Leasing of Indian lands is authorized by 25 U.S.C. § 415(a), originally enacted in 1955, which allows leases of surface resources on the following terms:

> Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land located outside the boundaries of Indian reservations in the State of New Mexico, and leases of land on [several listed reservations] which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

REID PEYTON CHAMBERS & MONROE E. PRICE, REGULATING SOVEREIGNTY: SECRETARIAL DISCRETION AND THE LEASING OF INDIAN LANDS

26 Stan.L.Rev. 1061, 1061–68 (1974).

Indian trust land can be leased by its tribal or individual owner only after the Secretary of the Interior has approved the transaction. Surface leasing of Indian land is governed principally by 25 U.S.C. § 415; enacted in 1955, section 415 permits leasing for a wide range of purposes—"public, religious, educational, recreational, residential or business."[2] The basis for the leasing statute and its requirement of approval by the Secretary is in part the commerce clause, which authorizes Congress "[t]o regulate Commerce . . . with the Indian tribes." More broadly, statutes such as section 415, which wholly or partially restrain the alienation of Indian lands, have been sustained as exercises of the federal guardianship or trust responsibility to "protect" the Indians. But while the trust responsibility serves as a source for the Secretary's approval power, it is unclear whether and to what extent it furnishes standards which limit his discretion in administrative exercise of that power.

* * *

Between 1890 and 1955, lease terms were limited, by and large, to periods of 5 or 10 years; although business leases were not formally prohibited, the effect was to discourage commercial development and use of Indian trust lands by non-Indians. Under section 415, the lease period may be up to 25 years, with an option to renew for another 25–year period. Subsequent to 1955, section 415 has been amended, and other statutes have been enacted, to extend 99–year leasing authority to * * * tribes.

* * *

When lease terms were limited, it was rare that a particular lease had great cultural or political effects on the tribe. Surface leases were short-term, normally agricultural; mistakes were reversible because the leases were not of great permanence. There was debate, particularly in the late 19th century, as to whether leasing rather than working the land was in the best interests of the individual Indian, and there could be some question about the quality of the bargain struck by the lessor. But the Secretary's concerns about the impact of leasing did not often go beyond those areas. This is no longer the case. The issues that come before the Secretary in the context of approval of long-term business leases are of enormous significance in terms of the lawmaking power of the tribe and its cultural and political future. Some leases may bring large numbers of non-Indians onto the reservation or may entice states to attempt to exercise regulatory and taxing powers over reservations. More than the landscape may be changed: an influx of non-Indians or state authority may interfere with tribal control over the reservation and continuation of tribal culture.

* * *

In order to determine the appropriate standards for exercise of the Secretary's approval power, a judgment must be made as to which policy goals are to be furthered by his leasing supervision. If the goal of leasing is merely the production of income, the Secretary's function could be limited to ensuring that the tribe or individual beneficiary receives fair financial value for the lease. If other policies are of equal or greater importance, however, more could be required: for example, the Secretary could be viewed as having some trust responsibility to preserve a reservation land base, to protect the tribe's continued political existence and governmental self-sufficiency, to preserve the environment of the reservation, to encourage development of a viable economic and social structure on the reservation, to ensure equitable participation in the enterprise by the lessor, or to determine what law (state, tribal, or federal)

[2] 25 U.S.C. § 415(a).

should apply to disputes that arise from the lease enterprise. Perhaps the Secretary's trusteeship could even include an obligation to ensure that the lease is consistent with a broad, coherent rehabilitative strategy of the federal government.

These are not always exclusive or necessary considerations in the exercise of the approval power with regard to any particular lease. But there has been virtually no analysis of how the Secretary should resolve these often competing considerations. * * *

* * *

NOTES

1. Should leasing policy be different when allotted lands are involved? The amendment to the Allotment Act permitting leasing was controversial. See pages ___–___, supra. Many felt that it would defeat the purpose of training the Indians themselves to be farmers. Nevertheless, the debate was won by those arguing that the land base must somehow be made productive for Indians who, by reason of age or physical condition, could not work the land.

There have been recent outreach efforts by the U.S. Department of Agriculture (USDA) to offer its services to Indian farmers and ranchers. USDA's 2007 Census of Agriculture, released and updated in 2009, reports that between 2002 and 2007, there was a 124 percent increase in the number of Indians who were the principal operators of a farm or ranch, with close to 80,000 Indian principal operators nationwide. USDA, Census of Agriculture, 2007, Summary and State Data,Volume 50, Geographic Area Series, Part 51, AC–07–A–51.

2. Restrictions on lease terms and oversight of rentals and other provisions by BIA officials are intended to protect Indian interests. Nevertheless, complaints of unfairness and sharp dealing abound. Experience under the Crow Allotment Act of 1920, 41 Stat. 751, is illustrative.

Congress allotted land suitable for agriculture and grazing to individual Crows. An amendment to the Act allowed competent allottees to negotiate leases of their trust lands without BIA supervision but limited the lease term to five years. The following method was used by leasing agents for non-Indian ranchers to circumvent the limitation. An initial five-year lease with an Indian lessee was executed and the rancher prepaid the entire rent. About a year later, documents were executed that cancelled the lease at a specified future date and created a new five-year lease to begin on the future date. Rent for the added term was paid on execution. The Interior Solicitor ruled that the *in futuro* leases violated the Act's restriction. See also United States v. Labbitt, 334 F.Supp. 665 (D.Mont.1971).

After the *Labbitt* case, a similar practice with the same objective was developed. Five-year leases were executed and the full rents were prepaid. After the first year the leases were simultaneously cancelled and new five-year leases executed effective immediately. Payment for the added term was then made. Crows, many of whom are poor, were induced to go along with the cancellation and re-lease practice in order to get an annual income from the land which they would not have received if the five-year prepaid lease were to run its course. Several allottees sued the leasing agents to set aside such arrangements. They argued that they were locked into the practice by economic necessity and therefore were deprived of being able to have their land free of encumbrances at least once every five years as Congress intended. The disadvantageous leases were perpetuated unless a Crow was fortunate enough to be able to go without income for the five-year term. The practice was upheld because there was inadequate evidence that they were forced by economic pressures to re-lease land to the same ranchers. Stray Calf v. Scott Land and Livestock Co., 549 F.2d 1209 (9th Cir.1976).

3. In the American Indian Agricultural Resources Management Act of 1993, 25 U.S.C. §§ 3701–3745, Congress reaffirmed the Secretary's authority to approve leases on farm and range land for terms up to 25 years. In order to promote tribal self-determination over agricultural lands management on the reservation, tribes may develop 10–year agricultural resource management plans under the Act to govern tribal as well as federal management of agricultural lands. Consistent

with the federal trust obligation and federal law, the Secretary is required under the Act to manage agricultural lands in compliance with tribal environmental, historic, or cultural preservation, land use, and other laws. Significantly, the Act directs the Secretary to establish civil penalties for trespass on agricultural lands such as rangelands, and gives tribes the ability to enforce the Secretary's agricultural trespass regulations in tribal court. The Act specifically entitles those tribal court judgments to full faith and credit in federal and state courts.

4. In Yavapai–Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir.1983), cert. denied 464 U.S. 1017 (1983), the tribe obtained the approval of the Secretary of the Interior for a lease pursuant to 25 U.S.C. § 415, for a tract of land as an automobile dealership for a term of 25 years with an option to renew for an additional 25 years. Interior Department's regulations accompanying 25 U.S.C. § 415 (now codified at 25 CFR 162.1) require the Secretary to participate in the cancellation of the lease in the event of a breach. The lease approved by the Secretary in *Yavapai–Prescott*, however, provided that the tribe "and/or" the Secretary had the power to terminate in the event of the automobile dealership's default on the lease obligations. When the dealership arranged to sublet the land and sell the business to a partnership, the tribe disapproved of the sublease as a breach of the lease agreement and terminated the lease without the Secretary's approval.

In holding that the tribe could not validly cancel the lease without the Secretary's approval, the court took the view that eliminating the Secretary's approval requirement, while clearly enhancing tribal power to eliminate the unfavorable aspects of a lease, "increases the risk of there being lease terms not consistent with the long-run interests of the tribe." Id. at 1075.

> It is difficult to be certain about how the balance should be struck between the risk of improvidence and the enhancement of tribal power. However, we choose to reduce the risk—a cautious approach admittedly. To some extent our level of anxiety is less than it otherwise might be because, whatever our choice, it lies within the power of the Secretary to set aside our choice at least with respect to the future. Were we to enhance tribal power by recognizing under the circumstances of this case the power of the Tribe to terminate the lease unilaterally, it is likely that the Secretary could nullify the effect of our decision by henceforth approving only leases that required his approval for termination. On the other hand, following our decision in this case the Secretary could abandon his position by changing the regulation to recognize to the extent desired the unilateral power of a tribe to terminate a commercial lease. We believe it is more consistent with the judicial process to accept the Secretary's present choice with respect to the proper balance between enhanced tribal power and increased risks of improvidence and to leave to that office the task of altering that choice.

Id.

5. The Secretary may cancel a lease where a previous approval was not in accord with applicable regulations. It has been held that this does not deprive the lessee of any vested property rights. Gray v. Johnson, 395 F.2d 533 (10th Cir.1968), cert. denied 392 U.S. 906 (1968). Equities favoring the lessee are not considered.

6. In 1970, the Tesuque Pueblo of New Mexico and the Sangre de Cristo Development Company entered into a lease to develop a substantial portion of the tribal lands for residential purposes. The lease was approved by the Department of the Interior. Seven years later at the request of the pueblo, the Department of the Interior disapproved the lease. James Joseph, Undersecretary of the Department, explained:

> The reasons for my disapproval are that the potential development of a subdivision of 16,000 persons in close proximity to the Pueblo of 300 persons poses too great a risk of social, economic and political upheaval for the Pueblo inhabitants to be offset by the benefits they might derive. The presence of 16,000 non-members of the Tribe on the reservation, I believe, poses perhaps insurmountable jurisdictional problems, especially regarding the Tribe and this Department's authority and responsibility over those persons. A subdivision of the magnitude proposed also poses environmental risks that may not be

adequately minimized. There are serious questions concerning the quantity, quality and treatment of water that the residents of the subdivision would be otherwise faced with resolving. The lands themselves do not seem to be well suited to a subdivision on the scale and density proposed, especially in view of the soils, their steepness and the semi-arid climate of the area. If a smaller scale project were proposed, the Tribe would not receive the substantial benefits predicted at first; or, the sale of subleases may now simply not be successful, so that fewer benefits will be derived by the Tribe. All of these concerns, in our view, point out that the project as it is proposed is unworkable. Finally, the Pueblo is now firmly and unalterably opposed to the development and has rescinded its approval of the lease.

Letter dated August 24, 1977, from James Joseph, Undersecretary, to Governor Joe M. Romero, Tesuque Pueblo. The Department's disapproval was upheld against a challenge by the lessee in Sangre de Cristo Development Co., Inc. v. United States, 932 F.2d 891 (10th Cir.1991), cert. denied 503 U.S. 1004 (1992).

7. In Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031 (8th Cir.2002), a non-Indian lessee had entered into a lease with the tribe to construct a pork production facility on the reservation. A new tribal council was then elected, which opposed the project, and despite the fact that approximately five million dollars had already been expended on construction by the lessee, the BIA voided the lease. The BIA took this action after tribal members and environmental groups filed their own lawsuit to cancel the lease, charging that the BIA had failed to comply with federal environmental law in approving the hog production project. The non-Indian lessee then brought suit against the BIA for voiding the lease. The Eighth Circuit ruled that the non-Indian lessee lacked standing to sue the BIA for voiding the lease. Finding that the leasing statutes relied upon by the lessee to bring suit against the BIA "were enacted to protect Indian interests," the court reasoned that it would be legally inconsistent to interpret these acts "as giving legally enforceable rights to non-tribal or non-governmental parties whose interests conflict with the tribes' interests." Id. at 1037.

8. In Seva Resorts, Inc. v. Hodel, 876 F.2d 1394 (9th Cir.1989), a resort developer sought an injunction to compel the Secretary of the Interior to sign concession and lease agreements for the development of a marina and recreational resort along Lake Powell in the Glen Canyon National Recreation Area on lands belonging to the Navajo Nation and the federal government. The agreements had been negotiated by the tribe with the developer, but subsequent to the negotiations, the tribe began to voice concerns about the developer's ability to complete the $30 million project. The Secretary refused to approve the agreements based on the concerns raised by the Navajo. The Ninth Circuit concluded that the Secretary did not abuse his discretion under 25 U.S.C. § 415 in refusing to approve the lease agreements on Indian lands. The court distinguished *Yavapai–Prescott* by noting that its decision in that case concerned the cancellation of a lease of Indian land without the Secretary's approval.

How does the Secretary's broad discretion to cancel or refuse approval of a lease agreement favored by a tribe affect the willingness of non-Indians to do business with Indians? What effect is it likely to have on the rents that lessees are willing to pay? What advice would you give to a non-Indian client proposing to lease Indian land?

2. MINERAL DEVELOPMENT

Large quantities of fossil fuel and other mineral resources are located on numerous Indian reservations. Coal and lignite deposits on Indian lands have been estimated at 44.2 billion short tons. Indian Mineral Resources Horizons, BIA Division of Energy and Natural Resources (May 1992). Much of the coal is low-sulfur, which means that it can be burned with less pollution and thus its value increases with stricter air pollution controls. The coal resource is heavily concentrated on a few reservations.

In 2009, tribes received $389.5 million in mineral revenues from royalties, rents, and other fees, including $85.4 million in oil royalties, $166.4 million in gas royalties, and $85.5 million in

coal royalties. Royalties from minerals other than oil, gas, and coal were $42.1 million. All Reported Revenues, Fiscal Year 2009, U.S. Department of Interior, Bureau of Ocean Energy Management, Regulation and Enforcement. In 2003, the U.S. Department of Interior reported administering 3,772 mineral leases, licenses, permits, and applications on 2.3 million acres of Indian land, 3,625 of which were oil and gas leases on 1.7 million acres of Indian land. Mineral Revenues 2000, Report on Receipts from Federal and Indian Leases, U.S. Dept. of the Interior, Minerals Management Service, p. 83–84.

The Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a–396g, superseded prior legislation and authorized leases approved by the Secretary after competitive bidding supported by a tribal resolution. Leases under the Act are for a ten-year term that can be extended if there is production, in which case they continue for "as long thereafter as minerals are produced in paying quantities." 25 U.S.C. § 396a. The 1938 Act was intended to give tribes control over mineral leasing decisions. In fact, they were often relegated to granting or withholding consent, merely playing a passive role as recipients of royalties under a lease negotiated between the Bureau of Indian Affairs and the mineral developers. The Secretary of the Interior has promulgated extensive regulations to govern mineral leasing. 25 C.F.R. parts 211–14, 216–17 (1985).

The 1938 Act was an inflexible model for developing Indian minerals. The Act and its attendant regulations were designed to protect tribes and individuals against non-Indian exploitation of Indian mineral estates. But this protective approach did not lead to optimal mineral development of Indian lands. A number of tribes found that they could negotiate operating agreements, joint ventures, or other arrangements with mineral developers that were more advantageous than leases. An agreement conveying rights in a portion of the mineral estate in tribal land, however, was within the scope of the Nonintercourse Act and thus arguably not valid unless authorized or ratified by Congress.

During the Self–Determination Era new legal arrangements for pursuing mineral development have been authorized by Congress that allow tribes greater flexibility and autonomy to tailor deals that fit their particular situations. The Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C. §§ 2101–2108, specifically authorized individual Indians and tribes to negotiate and enter into non-lease mineral agreements. The IMDA is intended to promote Indian self-determination and to maximize financial returns. See *United States v. Navajo Nation I*, page ___, supra. While standard leasing procedures under the 1938 Indian Mineral Leasing Act allow only a narrow range of conditions and types of compensation, the IMDA imposes no restrictions on the terms or types of agreements. For a tribe with the ability to risk some losses and provide development capital, a joint venture agreement might be appropriate. A tribe without its own resource management program might well choose a negotiated lease agreement with fewer risks. The Secretary must approve or disapprove the transaction within 180 days after its submission, considering the best interests of the individual Indian or tribe, as well as the economic return and the potential environmental, social, and cultural effects. The Secretary is also responsible, to the extent of available resources, for providing Indians with advice, assistance, and information during the negotiation of a minerals agreement.

In 2005, Congress passed the Indian Tribal Energy Development and Self–Determination Act (ITEDSA), 25 U.S.C.A. §§ 3501–3506. This statute, unlike IMDA, does not require tribes to obtain the Secretary's approval for each individual action it undertakes in entering into agreements for energy resource development. Rather, it allows tribes to enter into tribal energy resource agreements (TERA) with the Department of Interior that permit tribes to enter into agreements for energy resource development, including rights of way for pipelines and similar actions, without the need for individual approval by the Secretary. See Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral*

Resources, 29 Tulsa L.Rev.541 (1994), for a comprehensive treatment of the history of federal regulation of mineral development in Indian country.

NOTES

1. Many leases under the Indian Mineral Leasing Act of 1938 remain in force, and raise continuing problems of construction for the courts. Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir.1982), involved a tribe's effort to invalidate four sales of oil and gas leases on the Jicarilla Apache Indian Reservation on a number of grounds, including the Secretary's failure to comply with regulations on notice and bidding procedures under the 1938 Act, and failure to comply with the National Environmental Policy Act (NEPA). While the Tenth Circuit did find a technical violation of the regulation on notice procedures, it affirmed the district court's decision to decline to order outright cancellation. Instead, the court allowed the lessees to avoid cancellation by paying adjusted bonuses to the tribe. The court also found that the tribe had unreasonably delayed asserting its NEPA claim as a ground for attacking the leases.

> The Tribe commenced the action in April 1976. The four lease sales were held beginning in April 1970 and concluding in September 1972. During the period of lease sales, the law was unclear as to applicability of NEPA to the approval of lease sales by the BIA. In November 1972, however, this court held that NEPA was applicable to Government approval of a 99–year lease of Indian lands in New Mexico. Davis v. Morton, 469 F.2d 593, 597–98 (10th Cir.). It was more than three years after that decision when the Tribe brought this action.
>
> * * *
>
> We feel the trial judge could reasonably find, as he did, that the Tribe was not motivated by good faith concerns for the environmental impact of oil and gas development, that it was motivated by its desire to obtain the maximum possible compensation for the development, and that it was unjust and inequitable to allow the Tribe to use NEPA as a device solely for economic gain.

Id. at 1338, 1340.

2. The Secretary's refusal to approve a mining plan without tribal consent was held a taking in United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed.Cir.1990). United Nuclear Corporation was awarded leases by the Navajo Tribe and they were approved by the Secretary. The company spent over $5 million for exploration. As required by the lease, the company submitted a mining plan that conformed to the Secretary's regulations but the Secretary refused to approve the plan without tribal consent. Part of the majority analysis turned on a belief that the tribe was holding out for more money. The dissent by Chief Judge Nies reframed the dispute as between the Navajo and United Nuclear, and said tribal law should be applied to decide the case in tribal court. Judge Nies refused to base his judgment on assumptions about the tribe's motives.

3. Does the IMLA of 1938 give rise to a fiduciary duty on the part of the Secretary enforceable in monetary damages? The Supreme Court has twice held no. First, in United States v. Navajo Nation (I), 537 U.S. 488 (2003), supra, at pp. 334–339 the Navajo Nation alleged that the Secretary breached his fiduciary duty to the tribe by approving a lease that caused the tribe to receive less than market value royalty rates on a coal lease. The Court held that the IMLA did not contain an express and unequivocal statement of a trust duty, thus, no fiduciary duty existed. On remand, the Federal Circuit found that while the IMLA did not contain an express statement of a trust duty on the part of the Secretary, the "network of statutes and regulations" applicable to coal mining on Navajo land and federal control of the mining did in fact create a trust relationship upon which the Navajo were entitled to damages for breach of that trust. Navajo Nation v. United States, 501 F.3d 1327, 1340–45 (Fed. Cir. 2007). In 2009, the Supreme Court reversed this decision, finding that the IMLA controlled and its lack of express trust language barred the Navajo from obtaining money

damages for the alleged breach. See *United States v. Navajo Nation II*, supra, at pp. 339–340, supra ___.

4. Some of the nation's major energy companies held extensive permits and leases for the exploration and strip mining of the rich coal deposits under the Northern Cheyenne and Crow Indian Reservations in Montana. At first, the tribes encouraged these leases, but as the associated environmental and cultural disruptions became apparent, tribal opinion changed and the tribes sought cancellation of the leases. The Secretary of the Interior responded to a petition of the Northern Cheyenne Tribe by ordering the energy companies and the tribe to conform their leases to a 2,560 acre limitation contained in mineral leasing regulations. This limitation (which the Secretary has authority to waive) effectively canceled the leases, since it was not economically feasible to mine tracts of that size. The Secretary further ruled that the National Environmental Policy Act (NEPA), which had been enacted after the leases, was applicable and ordered the preparation of an environmental impact statement. The Secretary's decision, dated June 4, 1974, contained the following explanation: "As trustee I take cognizance of my responsibility to preserve the environment and culture of the Northern Cheyenne Tribe and will not subvert these interests to anyone's desires to develop the natural resources on that Reservation." In 1976, the Secretary determined that Crow Reservation leases also must conform to the acreage limitations and NEPA. The Crows also brought a suit urging the invalidity of the lease and permits by reason of the Secretary's failure to follow his own regulations in approving them. The court ruled that violations of the acreage limitation were unlawful. Crow Tribe v. Andrus, No. CV–76–10–BLG (D.Mont.1978) (order granting partial summary judgment).

5. The Tenth Circuit Court of Appeals has confronted the difficult task of reconciling the federal government's trust responsibility in managing Indian lands with the contractual obligations arising from mineral leases on those lands in a series of cases involving communitization agreements. Under this type of agreement, lands overlying an established oil field are treated as part of a unit. Drilling operations conducted anywhere within the unit area are deemed to occur on each lease within the communitized area and production anywhere within the unit is considered to be produced from each tract within the unit.

A frequent practice of mineral lessees is to avoid termination of the lease for failure to produce minerals in paying quantities by applying to the Secretary to include the leased lands in a communitization agreement. Under standard lease terms, such approval keeps the lease in force. Failure by the Secretary to approve the agreement, however, means the Indian mineral holder is free to negotiate a new lease, perhaps with better economic terms. See Kenai Oil & Gas, Inc. v. Department of the Interior, 522 F.Supp. 521 (D.Utah 1981), affirmed and remanded, 671 F.2d 383 (10th Cir.1982).

In *Kenai*, a lessee attempted to obtain the BIA Superintendent's approval of a communitization agreement on the eve of the expiration of the ten-year lease term. No production had occurred on Indian lands, but non-Indian lands that would have been included in the communitized area were producing. Had the agreement been approved, all the tracts would have been deemed to be "producing." The court upheld the Superintendent's refusal to sign the agreement based on his judgment as to the best interests of the Indians.

In Cheyenne–Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583 (10th Cir.1992), cert. denied, 507 U.S. 1003 (1993), the Secretary of Interior was found to have breached his trust responsibilities to the tribe by failure to examine all relevant factors, including recent market conditions, before approving the communitization agreement. Then, an en banc panel of the Tenth Circuit Court of Appeals held in Woods Petroleum Corporation v. Department of Interior, 47 F.3d 1032 (10th Cir.1995), cert. denied *sub nom*. Spottedwolf v. Woods Petroleum, 516 U.S. 808 (1995), that the Secretary acted arbitrarily and abused his discretion when he rejected a proposed oil and gas communitization agreement for the sole purpose of causing the expiration of a valid Indian mineral lease and allowing the Indian lessors to enter into new, more lucrative, but identical leases,

which Interior then approved. The court offered the Secretary the following guidance in approving or disapproving communitization agreements for Indian mineral interests:

> The power to manage and regulate Indian mineral interests carries with it the duty to act as a trustee for the benefit of the Indian landowners. Yet, as with any trustee-beneficiary relationship, the Secretary's fiduciary duty to the Indians * * * is not boundless and cannot be exercised in a manner that exceeds or flouts the authorizing statute and regulations. When the Secretary deviates from firmly established procedures, or exceeds the limits of his fiduciary duty, we have found an abuse of discretion and have reversed the Secretary.
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> * * *
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> * * * This is not to say that the Secretary may not reject a communization agreement either because an analysis of all relevant factors fairly leads to the conclusion that the particular agreement is not advantageous to the Indians, or because the Secretary determines that it is in the Indian lessor's best interests to forego communization altogether. However, it is to say that the process of evaluating a communization agreement is not a sham process but rather must be exercised in good faith, and the Secretary may not act arbitrarily and inconsistently in exercising his approval powers.

47 F.3d at 1038–1040.

The two judge dissent in *Woods Petroleum* noted the Secretary's "precarious position" when confronted with a decision on approving a communitization agreement for Indian mineral interests:

> If he is presented with a communization agreement that operates to extend underlying leases, he must still consider whether it would be more beneficial to the Indian owners to allow the leases to expire and to negotiate new leases. If he does not consider the market value and marketability of new leases, he breaches his fiduciary duty under *Cheyenne–Arapaho*, supra and the federal law that establishes his obligations to Indian mineral owners. However, if he determines that disapproval of the agreement and the negotiation of new leases is in the best interests of the Indian owners, then he may have acted unreasonably and arbitrarily under the majority's holding here. Moreover, under the majority's reasoning, whether the Secretary's disapproval of a communization agreement is unreasonable and arbitrary depends on a course of events that follows his initial decision and that the Secretary may not be able to predict. Thus, according to the majority, if a communization agreement is disapproved, new leases are negotiated, and a new communization agreement establishing the same unit area as the rejected agreement is submitted to the Secretary, his approval of the second agreement makes his disapproval of the first one unreasonable. However, if the Secretary disapproves an agreement and new leases are negotiated but, for reasons that the Secretary may not been aware of at the time of the disapproval, a new communization agreement is not submitted (or a substantially different communization agreement is submitted), then the disapproval of the first agreement apparently would pass the majority's reasonableness test.

Id. at 1053. The cases are analyzed in Randolph L. Marsh, *Secretarial Discretion in Communitization of Indian Oil and Gas Leases: The Tenth Circuit Speaks With a Forked Tongue,* 32 Tulsa L.J. 779 (1997).

6. Should tribes be allowed to intervene in lawsuits between their mineral lessees and the federal government? What factors should be considered in deciding the issue? In Sanguine, Ltd. v. Department of the Interior, 736 F.2d 1416 (10th Cir.1984), nine Indian owners of oil and gas-producing Indian lands sought to intervene in a lawsuit brought by their lessee. The lessee alleged that the BIA had unlawfully changed its standard form for communitization agreements. The new form did not include a key provision under which production of oil and gas in paying quantities from any zone within the drilling and spacing unit is deemed produced from every zone on each lease within the unit. As a result, production in paying quantities on one lease would no longer serve as a "blanket" extension of the ten-year lease term for other leases in the same drilling unit. After the

district court enjoined the government from requiring the lessee to use the new communitization form, the parties entered a consent decree and the government accepted the lessee's standard form agreement. At that point, the Indian mineral owners (the lessors) moved to intervene. The district court denied the motion because it found that the government had adequately represented the Indians' interests. The Tenth Circuit Court of Appeals overruled the trial court, finding that the government failed to file a responsive pleading, did not make many significant arguments, and called no witnesses at the hearing. In short, the government "conceded the case at the outset." 736 F.2d at 1419. See generally Winifred T. Gross, Note, *Tribal Resources: Federal Trust Responsibility: United States Energy Development Versus Trust Responsibilities to Indian Tribes,* 9 Am. Indian L.Rev. 309 (1981).

7. Because tribes are sovereigns as well as landowners, they may seek to control lessees both by contract and by an exercise of the police or taxing power. See pages ___–___, supra. Mustang Production Co. v. Harrison, 94 F.3d 1382 (10th Cir.1996), cert. denied, 520 U.S. 1139 (1997), held that the Cheyenne–Arapaho Tribes of Oklahoma may impose a severance tax on oil and gas production on allotted lands held in trust for tribal members because such lands constitute Indian country over which the tribes have civil jurisdiction and the inherent power to enact and enforce their taxes.

In Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma, 725 F.2d 572 (10th Cir.1984), the tribe enacted several ordinances imposing certain licensing, organizational, and tax requirements on its oil and gas lessee some fifty years after the lease was negotiated. The tribe notified Tenneco that a petition for cancellation of the lease had been prepared for non-compliance with the new ordinances. Tenneco then filed suit in federal court seeking declaratory and injunctive relief. The tribal defendants claimed sovereign immunity and argued that the court had no jurisdiction. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), page ___, supra. *See generally*, William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz.L.Rev. 169 (1994). The Court of Appeals held that the tribe could itself claim sovereign immunity but that individually named tribal officials could not: if the tribe lacked the power to pass its mineral leasing ordinance, then any official enforcing it would be acting outside the scope of his or her authority and thus would be subject to suit. The court also held that the district court had federal question jurisdiction. See National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985), page ___, supra.

Should tribes have the power to legislate inequitable mineral leases out of existence? Does such power promote or hinder desirable Indian mineral development?

8. Royalties are typically a percentage of the "value" of production. The actual selling price of minerals is treated merely as evidence of value. In Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir.1986) (en banc), cert. denied 479 U.S. 970 (1986), the tribe filed suit claiming breach of various oil and gas leases executed twenty-five or thirty years earlier. The court of appeals upheld a district court decision that the Secretary had improperly calculated royalties because he failed to use the higher figure as between the amount actually realized by the seller of the final product and the price received at the wellhead. The lease allowed either method to be used. Adopting the dissenting opinion of Judge Seymour upon rehearing of an earlier court of appeals decision (728 F.2d 1555 (10th Cir.1984)), the court held that the Secretary had breached his fiduciary duty by failing to interpret the royalty terms favorably to the tribe, failing to ensure that lessees developed diligently according to lease terms, and failing to ensure protection of leased lands from drainage. See also Shoshone Indian Tribe of the Wind River Reservation v. United States, 56 Fed. Cl. 639 (2003) (holding that government had no fiduciary duty to "maximize" oil and gas revenue from such production; however, government did have a fiduciary duty to value the oil and gas properly upon which royalties were paid, citing 25 U.S.C.A. §§ 396a–396g, and Federal Oil and Gas Royalty Management Act of 1982, §§ 2–309, 30 U.S.C.A. §§ 1701–1757, and 30 CFR 206.103); Enos v. United States, 672 F.Supp. 1391 (D.Wyo.1987) (Secretary must act as fiduciary to Indians when managing oil and gas leasing of allotted lands); Pawnee v. United States, 830 F.2d 187 (Fed.Cir.1987), cert. denied 486 U.S. 1032 (1988) (royalties collected by Interior for the Pawnee Tribe for oil and gas

leases did not have to be based on the highest market value); Youngbull v. United States, 17 Indian L.Rep. 4001 (Cl.Ct.1990) (damages awarded for BIA abrogation of trust responsibilities by invalid patent of tribal land depriving tribe of oil and gas lease value of 320 acres).

9. Land patents issued to western settlers pursuant to the Coal Lands Act of 1909 and 1910 conveyed the land and everything in it, except the "coal," which was reserved to the United States. In 1938, the United States restored to the Southern Ute Indian Tribe, in trust, title to previously ceded reservation land interests still owned by the federal government, including the reserved coal in lands patented under the 1909 and 1910 Acts to non-Indian homesteaders.

At the time of the 1909 and 1910 Acts, coalbed methane gas (CBM gas) was considered a dangerous waste product of coal mining. Today, it is considered a valuable energy source. The Southern Ute reserved coal lands contain large quantities of CBM gas. Relying on a 1981 opinion by the Solicitor of the Department of the Interior that CBM gas was not included in the Acts' coal reservation, oil and gas companies entered into CBM gas leases with the individual landowners of some 200,000 acres of patented land in which the tribe owns the coal. The tribe filed suit seeking a declaration that CBM gas is coal reserved by the 1909 and 1910 Acts.

In Amoco Production Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999), the Supreme Court held that surface patentees owned the CBM gas contained in coal which the Southern Ute tribe owns equitable title to under the Coal Lands Acts of 1909 and 1910. The Court found that inasmuch as the common conception of coal in 1909 and 1910 did not include CBM gas, the tribe's right to the coal does not imply ownership of gas even if the right to mine coal in 1909 and 1910 implied the right to release gas incident to coal mining.

Before the Court rendered its decision adverse to the tribe's claim, counsel for the oil companies and the tribe had already negotiated a settlement with a practical solution that hedged the serious losses that either would have faced. The settlement essentially created a partnership with the tribe holding a 32% stake in over 250 CBM spacing units. The companies could keep a decade's worth of royalties that they might have lost if the decision went against them. See Electa Draper, "Amoco, Southern Utes Unite," The Denver Post, May 14, 1999. This compromise resulted in the tribe's mineral production company, Red Willow, reaping millions of dollars a year in revenues enabling further investment in mineral development on and off the reservation. Is this an example of a nation-building approach, good business sense, or both?

NOTE: *PROBLEMS IN FEDERAL MANAGEMENT OF INDIAN MINERAL RESOURCES AND REVENUES*

As early as the 1950s, reports of mismanagement of Indian mineral resources began to surface, but national attention did not focus on the issue until the early 1980s. In early 1982, responding to allegations that tribes and the federal government were losing millions of dollars in stolen oil and underpaid royalties for resources developed on both Indian and federal lands, the Secretary of the Interior appointed the Commission on Fiscal Accountability of the Nation's Energy Resources (better known as the Linowes Commission, after its chairman). The Linowes Commission identified severe problems in royalty management collection processes resulting in underpayment of royalties by as much as ten percent, as well as problems with theft and fraud. "The federal government had operated royalty collection and management on an industry 'honor system,' and that system had failed." Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources,* 29 Tulsa L.J. 541, 567 (1994). Following the Commission's report in 1982, the Interior Department abolished the old Conservation Division of the U.S. Geological Survey, which had been in charge of royalty collection for both federal and Indian lands, and replaced it with a new Minerals Management Service (MMS).

Congress responded as well by enacting the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§ 1701–1757. The Act provided new procedures for royalty management and added provisions for investigations, hearings, inspections, interest on late or deficient payments, penalties, and criminal and civil enforcement. It also authorized the Secretary to enter into

cooperative agreements with states and tribes to work together on inspection, auditing, investigation, and enforcement. Full authority to perform these functions could be delegated to the states but not the tribes. However, delegations to states could not extend over Indian lands without the consent of the tribe or allottee involved.

Despite the initial promise of these measures, Professor Royster notes that the initial effect on royalty collection management and resource theft was minimal because:

> * * * [T]he [FOGRMA] provision for tribal cooperative agreements was not drafted with tribes and their needs and limitations in mind. Interior assumed that tribes could provide staffing, technical expertise, and funding at the same levels as the states, an assumption unwarranted for many tribes. Moreover, the Minerals Management Service did not implement the cooperative program. By 1989, only four tribes had entered into cooperative agreements; even then, the federal government retained control of enforcement and ultimate authority to determine which leases would be audited.

Id. at 595–596.

Other royalty management improvements were similarly slow and insufficient. Some aspects of royalty management did improve during the 1980s: reporting errors were reduced, audits and inspections were conducted more regularly, and millions of dollars in royalties and penalties were collected. Nonetheless, by 1989 severe problems with theft and accounting errors remained.

These problems were investigated in 1989 by the specially-created Special Committee on Investigations of the Senate Select Committee on Indian Affairs, which issued a report on fraud, corruption, and mismanagement in American Indian affairs. The Committee found that the federal management of Indian natural resources was still costing the tribes millions of dollars in lost revenues from their non-renewable natural resource base. Special Committee on Investigations of the Senate Select Committee on Indian Affairs, Final Report and Legislative Recommendations: A New Federalism for American Indians, S.Rep. No. 216, 101st Cong., 1st Sess. (1989), pp. 3–23. According to the report:

> The Committee found that simple "smash-and-grab" theft—stealing entire tankfuls of crude oil by force—rarely occurs; but sophisticated and premeditated theft by mismeasuring and fraudulently reporting the amount of oil purchased has been the practice for many years of the largest purchaser of Indian oil in the United States and others. The Department of the Interior and its relevant agencies, charged with stewardship of federal and Indian land, have knowingly allowed this widespread oil theft to go undetected for decades, at the direct expense of Indian owners.
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> The Bureau of Land Management (BLM) of the Department of the Interior is the agency charged with being the "watchdog" to detect and prevent the theft of crude oil and natural gas from Indian land. * * *
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> * * * Inspectors have relied totally on industry reports and have instituted no competent back-gauging or surveillance program, which would be capable of detecting * * * fraudulent reporting. At the same time, BLM officials actually agreed with other expert witnesses before the Committee that the opportunity to steal crude oil from Indians by fraudulent mismeasurement and reporting is "wide open," a self-fulfilling prophecy given their complete lack of oversight.
>
> BLM officials even failed to report to appropriate law enforcement authorities the pitifully low incidence of theft they logged. Only in one or two instances did BLM simply telephone law enforcement officials, and still no report or file was forwarded, or any follow-up ever made.

* * *

> Robert Goodman, Director of BLM Oil and Gas Inspection for Eastern Oklahoma, testified that he failed to contact the FBI regarding oil theft because he "didn't have the proper telephone number." * * * [T]he result is that at least nine full-time BLM inspectors annually recorded only $20,490 in oil theft from Indian lands in nine years. By contrast, the Special Committee uncovered millions in oil theft after only two months of investigation.

Id. at 105, 113–15.

MMS collected approximately $500 million in Indian oil and gas royalties from 1983 through 1987, but during that same period the Senate Select Special Committee on Investigations estimated potential underpayments at up to $25 million. The Committee said this of MMS's efforts in collecting Indian royalties:

> The problem at MMS is not institutional incompetence as at BIA, or direct antagonism towards Indian interests as demonstrated by the callousness of BLM, but lack of a clear direction and mandate concerning Indians. For years, companies paying Indian royalties have been neither adequately audited by MMS nor sufficiently penalized when they fail to specially account for, and properly pay, Indian royalties. The problem is that Indian royalties comprise such a small part of MMS jurisdiction that they simply fail to be a priority, in part because Congress has not instructed the agency how much resources it should devote to Indian royalties.

Id. at 122.

The Committee did note one positive development. Tribes were becoming more active in the monitoring and oversight of their own oil and gas leases. For example, the Committee pointed to the Southern Ute Tribe's formation of a tribal Energy Resource Division in 1980, and its "formidable array" of professionals, including in-house geologists and a mineral accountant. The Division identified several instances of underpayments of royalties owed to the tribe. The Wind River tribes have installed a sophisticated computer system to evaluate production, sales, and valuation data from the tribes' numerous leases. In 1986 alone, the tribes were able to identify approximately $300,000 in underpayment of royalties through this system. Id. at 122–25.

Congress reacted to the findings of the Special Committee on Investigations by enacting the Indian Energy Resources Act of 1992 (IERA), 25 U.S.C.A. §§ 3501–3506. The Act's purpose is to promote tribal economic self-sufficiency through energy development and to further tribal control of such development. In addition to authorizing grants and technical assistance to the tribes for the purpose of developing tribal regulation of mineral resources, the Act called for the creation of an eighteen-member Indian Energy Resource Commission, charged with developing recommendations for royalty management reforms.

3. TIMBER MANAGEMENT

The evolution of ownership of tribal timber is traced in United States v. Cook, 86 U.S. (19 Wall.) 591 (1873), discussed at page ___, supra and United States v. Shoshone Tribe, 304 U.S. 111 (1938), page ___, supra; and the accompanying notes. In White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145–46 (1980), page ___, supra, the Court described current BIA management practices:

> * * * Under 25 U.S.C. §§ 405–407, the Secretary of the Interior is granted broad authority over the sale of timber on the reservation. * * * Sales of timber must "be based upon a consideration of the needs and best interests of the Indian owner and his heirs." 25 U.S.C. § 406. The statute specifies the factors which the Secretary must consider in making that determination.[13] In order to assure the continued productivity of timber-producing land on

[13] Those factors include "(1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and the best use of the land, including the advisability and

> tribal reservations, timber on unallotted lands "may be sold in accordance with the principles of sustained yield." 25 U.S.C. § 407. * * * He is authorized to promulgate regulations for the operation and management of Indian forestry units. 25 U.S.C. § 466.
>
> Acting pursuant to this authority, the Secretary has promulgated a detailed set of regulations to govern the harvesting and sale of tribal timber. Among the stated objectives of the regulations is the "development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform." 25 CFR § 141.3(a)(3).* The regulations cover a wide variety of matters: for example, they restrict clear-cutting, § 141.5; establish comprehensive guidelines for the sale of timber, § 141.7; regulate the advertising of timber sales, §§ 141.8–141.9; specify the manner in which bids may be accepted and rejected, § 141.11; describe the circumstances in which contracts may be entered into, §§ 141.12–141.13; require the approval of all contracts by the Secretary, § 141.13; call for timber cutting permits to be approved by the Secretary, § 141.19; specify fire protective measures, § 141.21; and provide a board of administrative appeals, § 141.23. Tribes are expressly authorized to establish commercial enterprises for the harvesting and logging of tribal timber. § 141.6.

448 U.S. at 145–48.

As the Court's opinion in *White Mountain* attests, "the Federal Government's regulation of the harvesting of Indian timber is comprehensive." Id. at 145. See also In re Blue Lake Forest Products, Inc. v. Hong Kong and Shanghai Banking Corporation, Ltd., 30 F.3d 1138, 1142 (9th Cir.1994) (noting that "federal interests are very extensive" and therefore normally prevail over state interests "in the regulation of timbering on Indian reservations.") Under an extensive federal regime of laws and regulations, for example, sustained yield timber management is required on Indian lands, see 25 U.S.C.A. § 406. Any harvesting of timber on the reservation should insure the future productivity of the land and cut-over areas should be reforested. Cf. 16 U.S.C.A. § 531(b) (Multiple–Use Sustained–Yield Act of 1960 applicable on national forest lands). These types of federally mandated management requirements, as well as significant investments of capital to construct roads and support facilities, means that the costs of Indian timber harvesting can be substantial in relation to revenues.

BIA management of Indian forest lands historically has been described as ranging from "mediocre to abysmal." Angelo A. Iadarola, Indian Timber: Federal or Self–Management? (1979). In United States v. Mitchell, 463 U.S. 206 (1983), the United States was held liable for decades of mismanagement of timber on Indian allotments on the Quinault Reservation in Washington. See also Menominee Tribe of Indians v. United States, 91 F.Supp. 917 (Ct.Cl.1950) (finding federal mismanagement of timber on tribal lands on the Menominee Reservation in Wisconsin).

The same congressional committee that identified massive fraud, corruption, and mismanagement by the federal government in Indian mineral resource development programs, the Special Committee on Investigations of the Senate Select Committee on Indian Affairs, see supra, page ___, found similar problems in the BIA's management of Indian forests. The Committee's hearings in 1989 identified losses to tribes of $330 million in the 1980s alone from the BIA's "poor management of their forests and woodlands." Senate Report 101–216, November 20, 1989, pages 138–140.

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practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs." 25 U.S.C. § 406(a).

* [Ed.] The regulations have been renumbered as 25 C.F.R. § 163, 3(b)(4).

The Committee's hearings led to passage by Congress of legislation in 1990 that significantly reformed management of Indian timber. The National Indian Forest Resources Management Act (NIFRMA), 25 U.S.C.A. § 3101 et seq., reaffirmed the federal government's trust responsibility for Indian forest resources, reshaped the statutory framework for the exercise of this trust responsibility, and provided a broadened role for tribes in the management of their own forest resources. Darla J. Mondou, *Our Land is What Makes Us Who We Are: Timber Harvesting on Tribal Reservations After the NIFRMA*, 21 Am. Indian L. Rev. 259 (1997). It is still too early to determine the NIFRMA's impact on Indian forest management. Senator John McCain of Arizona, who co-sponsored NIFRMA, expressed "dismay" at the BIA's "unconscionable" five-year delay in issuing final regulations implementing the Act. Following McCain's harsh criticism, the BIA issued regulations in October, 1995. 60 Fed. Reg. 52250 (1995).

The federal role in Indian timber, no matter how burdensome and poorly administered historically, still has an important part to play in modern tribal economic development efforts. After all, in *White Mountain* it was the extensive regulatory role of the BIA that pre-empted state taxation of the non-Indian businesses involved in on-reservation timber harvesting. The principles of federal Indian law provide reservation economic development with a variety of special rules that cut across the entire spectrum of Indian business dealings. For example, in the previously cited *In re Blue Lake Forest Products* case, supra, the court held that Indian law's principles of federal preemption overrode state commercial law which recognized a security interest in logs harvested on the reservation held by an off-reservation bank under the Uniform Commercial Code. Because of the federal regulations governing the harvesting of Indian timber, title to those logs remained with the United States as the tribe's trustee. The tribe, and not the off-reservation bank, was entitled to the proceeds from the sale of those logs.

Can you think of any other areas of Indian economic development, besides timber harvesting, where federal law, not state law, exclusively governs non-Indians involved in the transaction? Can you see any disadvantages for a tribe's economic development efforts once someone in the bank's position understands that its secured loans to a non-Indian company involved in harvesting tribal timber or other on-reservation business activities might be covered by the special rules of federal Indian law?

NOTE: *FEDERAL INCOME TAXATION OF RESERVATION ENTERPRISES*

For most businesses, federal income tax planning is a major consideration. Reduction or avoidance of tax liabilities can enhance profits or even make the difference between a profitable and losing enterprise. We have seen that the government role in resource management under federal law can be a mixed blessing. Federal income tax law offers particular advantages to tribal businesses and, under certain circumstances, to individual Indians. Because Indian tribes themselves are simply not among the entities made taxable under the Internal Revenue Code, their exemption from federal income taxation is normally not an issue for reservation economic and community development.

The non-taxability of tribes does not apply to individual Indians. Reservation Indians are treated like other "individuals" under the Internal Revenue Code. Although an Indian has no general exemption from federal income taxation simply by being an Indian, see, e.g., Lafontaine v. Commissioner, 533 F.2d 382 (8th Cir.1976), some tax exemptions in favor of individual Indians may be found in treaties and statutes.

The leading case is Squire v. Capoeman, 351 U.S. 1 (1956). Under Section 6 of the General Allotment Act, the Secretary of the Interior was empowered to issue a patent in fee simple to any Indian allottee, deemed "competent and capable of managing his or her affairs * * * and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." *Squire* involved the question of whether proceeds of the sale of standing timber on an Indian trust allotment should

be exempt from federal taxation. The government argued that the language in Section 6 was directed solely at permitting state and local taxation after a transfer in fee. Applying the general rule that exemptions from federal taxation should be clearly expressed in the statute, the government argued that since the statute was silent on the question of federal taxation of restricted allotments, the Indian allottee was responsible for the federal tax.

Interestingly, Section 6 antedated the federal income tax by ten years, a fact that could explain Congress' silence on the issue of federal taxation. Nonetheless, applying the rule that federal statutes should be liberally construed in favor of Indians, the Court held income derived directly from tribal trust and restricted Indian allotted lands is not subject to federal taxes: "The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted." Id. at 7–8.

Subsequent courts have been less than generous to allottees and other Indians asserting extensions of *Squire's* "derived directly" test. The cases have not allowed tax exemptions much beyond the basic income—from, for example, timber, grazing, and farming—derived directly from an allottee's own allotment. See, e.g., Holt v. Commissioner, 364 F.2d 38 (8th Cir.1966), cert. denied 386 U.S. 931 (1967) (Income of tribal member from cattle grazing on tribal trust land held taxable).

The Chickasaw Indian Nation sued the United States, seeking a refund of federal wagering and occupational excise taxes paid by the tribe in connection with its gambling operations. In Chickasaw Nation v. United States, 534 U.S. 84 (2001), instead of applying the Indian law canons of construction, the Supreme Court applied a competing canon that requires tax exemptions to be expressly stated and narrowly construed: "Nor can we say that the pro-Indian canon is inevitably stronger—particularly where the interpretation of a congressional statute rather than Indian treaty is at issue." Id. at 535–536. The Supreme Court refused to interpret the Indian Gaming Regulatory Act as granting tribes the same exemption from federal excise taxes that had been granted to states. See generally George Jackson III, *Chickasaw Nation v. United States and the Potential Demise of the Indian Canon of Construction,* 27 Am. Indian L.Rev. 399 (2002–2003).

4. THE ROLE OF TRIBAL SOVEREIGNTY IN THE MANAGEMENT AND CONTROL OF RESERVATION RESOURCES: A CASE STUDY ON INDIAN TRIBES AND THE ENDANGERED SPECIES ACT

Many Indian tribes have asserted that one of the most significant challenges to their sovereignty and to economic development on the reservation is undue interference by the federal government. This chapter has already discussed the pervasive control exercised historically by federal officials over reservation resources and economic development, with little to show for such efforts. As tribes entered the modern era determined to exercise their sovereignty to achieve self-sufficiency, decades of mismanagement and sometimes even outright corruption within federal agencies left many reservations worse than before, impeding their development efforts.

Many Indians have maintained that they could do a better job of developing and protecting the reservation environment and its resources than federal bureaucrats in Washington and BIA field offices. Popular stereotypes romanticize Indians as the "first environmentalists," but for many tribes, administration by federal agencies of the Endangered Species Act (ESA), one of the most important legislative achievements of the modern environmental movement, posed a threat to their sovereignty and economic self-sufficiency.

Some tribes have used the ESA to protect resources essential to their economic well-being and cultural survival. E.g., Carson–Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir.1984), cert. denied 470 U.S. 1083 (1985) (water releases from federal dam for Indian reservation fishery upheld under ESA). But at times the ESA has been enforced on Indian reservations by federal agencies in order to protect a threatened species of animal or plant life so as to frustrate or defeat a proposed tribal development project. Ironically, the peril of the species is often the result of major non-Indian development activities, causing tribal leaders to object to putting the burden of belated species protection on chronically underdeveloped reservations. As is so often the case when tribes contemplate strategies for economic development, the principles of federal Indian law provided no clear and unambiguous guidance on what their rights and responsibilities were under the legislation.

The U.S. Supreme Court has held that federal statutes do not abrogate Indian treaty rights unless there is "clear evidence" that Congress actually considered the issue and chose to abrogate the treaty. See pages ___–___, supra; United States v. Dion, page ___, supra. The ESA is silent as to its applicability to Indian tribes and Indian reservations, but the few decisions that did raise the question gave tribes serious concern. E.g., United States v. Billie, 667 F.Supp. 1485 (S.D.Fla.1987) (applying the Act to a Seminole Indian's non-commercial hunting of panther on the tribe's reservation in Florida). Although the lower court in *Dion* found that the ESA did not abrogate tribal treaty rights to take eagle feathers, the U.S. Supreme Court based its ruling in *Dion* on the Bald Eagle Protection Act and did not reach the general issue of the ESA's applicability in the face of treaty rights. See generally Robert J. Miller*, Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 Or.L.Rev. 543, 563–74 (1991); Tim Vollmann, *The Endangered Species Act and Indian Water Rights*, 11 Nat. Resources & Env't 39 (1996); Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance,* 25 Envtl. L. 733, 778–79 (1995).

Professor Charles Wilkinson describes the chain of events leading up to the tribal confrontation with federal officials over administration of the ESA in Indian country in his article, *The Role of Bilateralism in Fulfilling the Federal–Tribal Relationship: the Tribal Rights–Endangered Species Secretarial Order*, 72 Wash.L.Rev. 1063, 1065 (1997).

> During the 1970s, as Congress vastly expanded federal environmental laws, tribes had intermittent brushes with the enforcement of laws protecting animal species, notably eagles. By the mid–1990s, the ESA had become a major concern for tribes. Stresses on the environment had increased, especially in the West. The tribes had become much more active in resource management and development. The Act, fortified by the U.S. Supreme Court's ruling in Tennessee Valley Authority v. Hill, was administered strictly by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS). Although the environmental impacts had been created by non-Indian development, the tribes were facing considerable pressure from ESA enforcement over matters such as timber harvesting, building construction, water development, and salmon harvesting; tribal leaders strenuously objected to the federal officials' lack of respect for tribal sovereignty and resource management practices. In Congress, legislative proposals regarding ESA reauthorization were pending.

One of the leaders of this movement by Indian tribes challenging federal administration of the ESA in Indian country was Ronnie Lupe, the then Chairman of the White Mountain Apache Tribe of Arizona. In a 1992 speech, Lupe called the Ecological Services Branch of the United States Fish and Wildlife Service (one of the agencies with primary responsibility for enforcing the ESA), "a group of environmental extremists." He also declared, "I see the Endangered Species Act being used as the dominant society's most modern method of performing genocide on the Apache People." Ronnie Lupe, The Challenges of Leadership and Self–Government: A

Perspective from the White Mountain Apaches, delivered at Phillips Exeter Academy, October 7, 1992.

Chairman Lupe spoke more temperately in his testimony before the Senate panel considering reauthorization of the ESA in 1995 (referred to in Professor Wilkinson's article). Nonetheless, the chairman insisted that the ESA does not and should not apply to tribes and that Congress should amend the Act by specifically excluding tribes from its requirements.

TESTIMONY OF RONNIE LUPE, CHAIRMAN OF THE WHITE MOUNTAIN APACHE TRIBE PREPARED FOR THE U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS SUBCOMMITTEE ON DRINKING WATER, FISHERIES AND WILDLIFE

104th Cong., July 13, 1995.

* * *

FORT APACHE INDIAN RESERVATION

For those of you who are not familiar with our White Mountain Apache people and our land, our reservation homeland, known as the Fort Apache Indian Reservation, is comprised of some 1.6 million acres of lands ranging in elevation from 2,500 feet to over 11,400 feet. We have vast canyons and range land and over 700,000 acres of primarily ponderosa pine forest through which traverse 400 miles of rivers and streams. Our reservation is home to abundant game and fish, including the once endangered Apache trout, elk, bear, mountain lion, pronghorn antelope, deer, wild turkey, osprey and our nation's symbol, the bald eagle.

In pre-reservation days, we were entirely self-sufficient and healthy in mind, body and spirit. The sacred waters which arise on our reservation sustained us. We depended upon wildlife, native plants and our own agriculture for food, shelter and clothing. All life was held sacred and that tradition continues today. The first deer was never struck down during a hunt. We would let it pass so that there would always be one remaining in the forest. Prayers were always offered after the taking of any wildlife, giving honor to the sacrifice of that life for the survival of our families. Prayers are still offered today when animals are hunted and killed.

Apache people never saw ourselves as separate from the earth. We are one with the land. Hunting was not for sport and trophies but to provide food and clothing. Although we have been masters of our lands since time immemorial, the land and its fruits have never been simply for the taking but are elements of our responsibility for stewardship of the lands that the Creator has provided us. Our people have always been taught to respect the land and living things. Individual ownership of land was unknown to us but our responsibility to care for the land was taught to us from an early age.

Our tradition of stewardship continues to guide the natural resource management philosophy of the White Mountain Apache Tribe. Our lands were severely damaged due to mismanagement by the Department of Interior from the time the reservation was first established in 1871. We have since regained managerial control of our lands and are now in the process of repairing the extensive damages that were done to our grazing lands, forests and riparian areas. In the past ten years, the Tribal Council has voluntarily reduced our annual allowable timber harvest from 92 million board feet to 57 million board feet because of our concerns about overcutting our forest and damaging our environment. Included in this reduction has been the removal of several "old growth" timber sales because of our cultural and environmental concerns.

INITIAL EXPERIENCE WITH THE ENDANGERED SPECIES ACT

Despite the damages we have sustained, our reservation remains a refuge for many endangered and sensitive species, both listed and unlisted. Although the Endangered Species Act was passed in 1973, our Tribe had very little involvement with the Act or its implementation until recent years. Initially, we viewed the challenges by environmental groups and the regulatory actions of the U.S. Fish & Wildlife Service regarding endangered species as total hypocrisy. Those who sought to impose the ESA upon our Tribe and our aboriginal lands, made their challenges from cities where they had long ago exterminated native animals and plants and had erected cities of concrete and steel where prairies, wetlands and other wildlife habitat once existed. The species found on our reservation that are listed as "endangered" are rare because there are few healthy habitats elsewhere. Our reservation is home to many of these plants and animals because we have managed our lands well.

In our Apache tradition, we do not manage our lands for the benefit of a particular species. We strive to protect the land and all the life forms that it supports. Our homeland is too vast to manage for just one species. Our reservation traverses five life zones from Upper Sonoran to Sub–Alpine Forests. The diversity of our land provides habitat for a wide variety of plants and animals and each is important to us. The pressures of environmentalists and the Ecological Services Branch of the U.S. Fish and Wildlife Service to manage our lands for a single species was a contradiction to our view of life.

THE ENDANGERED SPECIES ACT DOES NOT APPLY TO INDIAN TRIBES

It has always been our view that the Endangered Species Act does not apply to the White Mountain Apache Tribe and Indian Tribes generally. Nowhere in the Act does it specify that the Act applies to Indian Tribes. Congress has the power to make the Act apply to Tribes but until it has spoken, it cannot be assumed that it applies or that the Tribe is bound by its dictates. In the past four years, we saw increasingly aggressive action by the U.S. Fish & Wildlife Service, perhaps because of lawsuits against that agency, to establish critical habitat and to list endangered species on our tribal lands. Nevertheless, having managed our land so well for hundreds of years, we were confident that the Act would not affect our lands or our people.

Then, one after another, critical habitats were proposed that would include our reservation lands for the loach minnow, Arizona willow, razorback sucker, and Mexican spotted owl. Because our reservation is a refuge for many endangered plants and animals it was probable that new proposals would be made in the future. It soon became apparent that the Congressional goals of tribal self-governance, tribal self-determination and economic self-sufficiency could be paralyzed by third parties filing lawsuits against the U.S. Fish & Wildlife Service to force the Service to declare critical habitat on our reservation. Such a designation would affect our sawmill, ski area, cattle industry, development of recreational facilities and our entire wildlife and land management philosophy. The prospect of our aboriginal lands being controlled by environmental activists living hundreds of miles from our homeland was too much to bear and so we adopted resolution 2–94–060, on February 24, 1994, which prohibits any federal or state agency from entering our Fort Apache reservation for the purpose of conducting any studies or sample collection of any kind whatsoever. We were particularly affronted by the implications that we were not capable of managing our lands.

NOTE

The tension between the tribe and the USFWS described by Chairman Lupe gave rise to an extraordinary series of negotiations between the Chairman and Director of the U.S. Fish & Wildlife Service, the late Mollie Beattie. Beattie was a forester by training, and the first woman to head the Fish & Wildlife Service. She had developed a reputation as an advocate for species conservation through her efforts at reintroducing gray wolves into Yellowstone National Park. Yet, in her negotiations with Lupe, Beattie proved a patient listener who respected the Apaches' strong

connection with the Earth. See Jeff Barker, *Indians Agree to Species Pact*, The Arizona Republic, A1, 12, June 5, 1997.

The negotiations between the Apache tribal chairman and the USFWS Director took place in Washington, D.C., but not at the Fish and Wildlife Services office. Chairman Lupe wanted to meet at a neutral site, outdoors, amidst, as he described it "the sound of trees and flowers, with the sounds of birds mingled with laughing children." One type of noise the parties agreed to do without, however: no attorneys were to be present during their meeting.

As a result of their negotiations, Chairman Lupe and Director Beattie agreed to set aside their legal concerns and work toward an improved relationship between the tribe and the Service. They each told their staffs not to be constrained by perceived legal constraints in designing this new type of relationship for federal-tribal cooperation on species and ecosystem management. The process led to the following "Statement of Relationship," signed by Chairman Lupe and Director Beattie in the Tribal Council Chambers in Whiteriver, Arizona on December 6, 1994.

STATEMENT OF THE RELATIONSHIP BETWEEN THE WHITE MOUNTAIN APACHE TRIBE AND THE U.S. FISH AND WILDLIFE SERVICE

(Dec. 6, 1994).

PURPOSE

Tribal sovereignty and Service legal mandates, as applied by the Service, have appeared to conflict in the past, but both the Tribe and the Service believe that a working relationship that reconciles the two within a bilateral government-to-government framework will reduce the potential for future conflicts.

I. GUIDING PRECEPTS

• The Tribe and the Service have a common interest in promoting healthy ecosystems.

• The Service recognizes the Tribe's aboriginal rights, sovereign authority, and institutional capacity to self-manage the lands and resources within the Fort Apache Indian Reservation as the self-sustaining homeland of the White Mountain Apache people.

• The Service's technical expertise in fish, wildlife, and plants establishes it as a significant resource for the Tribe's management of the ecosystems and associated sensitive species of the Reservation.

• The Service has a trust responsibility and is required to consult with the Tribe, as articulated in Order No. 3175 by the Secretary of the Interior, regarding any of its activities that may affect the Tribe's trust resources and the sustained yield of those resources. Such activities will support the Tribe's self-determination and economic self-sufficiency.

* * *

II. TRIBAL MANAGEMENT

• The Tribe is continuing to institutionalize internal processes for planning, review, regulation, and enforcement to ensure that economic activity on its reservation is consistent with traditional Apache values for living in balance with the natural world.

• The Tribe will complete integrated resource management plans on a watershed basis that promote tribal goals, including sustained yield. These plans will direct the assessment, management, and restoration of ecosystems in accordance with tribal values. * * *

III. COMMUNICATION

• The government-to-government relationship requires working with the White Mountain Apache Tribal Government and its resource management authorities, including the sharing of technical staffs and information, to address issues of mutual interest and common concern. Both the Tribe and the Service recognize, however, that release of tribal

proprietary, commercial, and confidential information may be restricted by either the Tribe or the Service.

* * *

• Whenever the Service considers a change in the status of a species that may exist on the Reservation now or in the future, it will promptly notify the Tribe's Endangered Species Coordinator. Concurrently, the Service will indicate what scientific information it presently has, the nature of the Service's concern, and what additional information and management would render unwarranted the elevation of the species to a more protected status or would encourage the delisting of the species.

* * *

IV. COORDINATION

* * *

• The Service and the Tribe will cooperatively develop and propose management practices based upon identified threats to sensitive species and their habitats for incorporation into the Tribal Management Plan (TMP), which consists of the portions of the Ecosystem Management Plan and integrated resource management plans which address sensitive species. This activity will initially take the form of lists of sensitive species, threats, and an assessment of commonality and severity of the threats.

NOTE: *THE SECRETARIAL ORDER ON "AMERICAN INDIAN TRIBAL RIGHTS, FEDERAL–TRIBAL TRUST RESPONSIBILITIES, AND THE ENDANGERED SPECIES ACT"*

In his Senate testimony in 1995, Chairman Lupe spelled out the benefits his tribe had received by negotiating over the ESA, rather than litigating:

> Before the Statement of Relationship, our staff spent many hours trying to negotiate the bureaucratic maze of the Fish & Wildlife Service, understand the nuances of the Endangered Species Act, and posturing for potential litigation. There was little time for active field work. But today we have programs in which we are protecting sensitive habitats using funds from the Service and the labors of our Tribal young. This approach seems to be more directly related to protection of endangered species than bureaucratic fighting and potential litigation.

Both Beattie and Lupe recognized that the approach they had negotiated for federal-tribal cooperation on the ESA could be used as a model for a broader agreement, applying to all federally recognized tribes. Lupe and other tribal leaders, along with tribal resource managers and tribal lawyers from across the country, convened a national meeting on the ESA in 1996 in Seattle, Washington. Out of this meeting, a working group, comprised of twenty-five representatives from all regions of the country, was organized to examine legislative and administrative alternatives and to make its recommendations. After considering various options involving litigation and legislation, the group increasingly focused on the approach taken in the Statement of Relationship that the White Mountain Apache Tribe and the USFWS signed in 1994, and decided to recommend to the tribes that they pursue a joint secretarial order by the Secretaries of the Interior and Commerce based on the concept of the White Mountain Apache–U.S. Fish and Wildlife Service Statement of Relationship.

Following a series of extensive negotiations between the tribal representatives and federal officials, the Secretaries of the Interior and Commerce (the cabinet-level departments with primary legislative authority for enforcing the ESA) issued Secretarial Order No. 3206, "American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act." Under the 1997 Secretarial Order, the departments will carry out their responsibilities under the Act "in a manner that harmonizes the federal trust responsibility to tribes, tribal sovereignty, and statutory

missions of the departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation." Section 1. The order also recognizes that "Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws." Section 4.

Section five sets out five principles that form the substantive basis for the order:

> Principle 1. The Departments shall work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems.
>
> Principle 2. The Departments shall recognize that Indian lands are not subject to the same controls as federal public lands.
>
> Principle 3. The Departments shall assist Indian tribes in developing and expanding tribal programs so that healthy ecosystems are promoted and conservation restrictions are unnecessary.
>
> Principle 4. The Departments shall be sensitive to Indian culture, religion and spirituality.
>
> Principle 5. The Departments shall make available to Indian tribes information related to tribal trust resources and Indian lands and, to facilitate the mutual exchange of information, shall strive to protect sensitive tribal information from disclosure.

The explanatory text accompanying the principles contains a number of important provisions. Principle 3(B) of the order, for example, states that "the Departments shall give deference to tribal conservation and management plans." Another important provision, growing out of the White Mountain Apache experience, states that departmental employees should generally seek tribal permission before entering Indian reservations. The order also encourages the use of dispute resolution processes, evidencing a shared determination on the part of tribes and federal officials to resolve disputes outside of court if possible. Finally, the order includes an appendix that sets out specific, detailed instructions to aid field personnel in on-the-ground administration. See Wilkinson, supra, at 1066, 1074–1085.

Professor Wilkinson, who participated in the negotiations as a tribal representative, makes the following assessment of what tribes achieved through the negotiations leading up to the Secretarial Order:

> These government-to-government negotiations, then, resulted in several advances for the tribes. The Order recognizes the unique characteristics of tribes and tribal lands. It establishes a special place for tribes, tailored to the characteristics of tribal sovereignty and the trust duty, in all the key areas of administration of the ESA. It is also a practical document that focuses on relationships in the field between tribal and federal resource managers. The Order does not accomplish what the tribes would cherish most—a definitive statement that the ESA does not restrict tribes. However, it is neutral on the issue of ESA coverage, gives explicit deference to tribal decisions, and establishes a number of significant procedural steps and substantive requirements before federal officials can seek to apply the ESA to tribes.

Id. at 1083–1084.

The Fish and Wildlife Service has continued to implement the policy outlined in the Secretarial Order. In 2000, the USFWS issued its Final Designation of Critical Habitat for the spikedace and loach minnow, two endangered species found on the White Mountain Apache Tribe's reservation. Under its ruling, the Service announced that it would defer to tribal management plans for the two species.

> The White Mountain Apache Tribe, which has currently occupied loach minnow habitat and potential loach minnow and potential spikedace habitat within its reservation

> boundaries, produced a Native Fishes Management Plan. After reviewing this plan, we determined that the tribe's management of the species will provide substantial protection for the relevant habitat areas, and that designation of critical habitat will provide little or no additional benefit to the species, particularly since the areas are occupied by the loach minnow. Conversely, designation of critical habitat would be expected to adversely impact our working relationship with the Tribe, the maintenance of which has been extremely beneficial in implementing natural resource programs of mutual interest. In 1994, the Fish and Wildlife Service and White Mountain Apache Tribe signed a Statement of Relationship which formalized our commitment to work cooperatively with the Tribe in promoting healthy ecosystems. Since that agreement, we have worked cooperatively with the Tribe to the significant benefit of threatened and endangered species. In addition to managing the habitats of the spikedace and loach minnow, these programs include management of the threatened Mexican spotted owl, management of healthy populations of threatened Apache trout, and other natural resource programs.

Rules and Regulations Department of the Interior Fish and Wildlife Service, 50 C.F.R. part 17 *Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Spikedace and the Loach Minnow*, 65 Fed. Reg. 24328–01, 24338 (April 25, 2000) (to be codified at 50 C.F.R. Pt. 17). After weighing the benefits of critical habitat designation on the tribe's reservation against what the ruling called, "the adverse impact on our cooperative natural resource programs," USFWS found that the benefits of excluding reservation lands, "in terms of the spikedace and loach minnow, as well as ecosystems in general, outweigh the benefits of including those areas as critical habitat." Id. See generally Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D.L.Rev. 381 (1998).

Elsewhere, the USFWS has entered into partnership with the Nez Perce Tribe of Idaho, which is the primary manager of the Grey Wolf Recovery Project on 13,000,000 acres in central Idaho. Beyond management, the tribe is also actively involved in outreach and education, research, and monitoring of the wolves' progress. See Patrick Impero Wilson, *Wolves, Politics, and the Nez Perce: Wolf Recovery in Central Idaho and the Role of Native Tribes*, 39 Nat. Resources J. 543, 553–554 (1999).

NOTE: *THE ROLE OF FEDERAL INDIAN LAW IN RESERVATION ECONOMIC DEVELOPMENT*

Tribal sovereignty as recognized by the Supreme Court includes all inherent powers of self-government not expressly taken away by Congress. What is the relation between this understanding of tribal sovereignty and the "de facto" sovereignty, defined as genuine decision-making control over reservation affairs, that the Cornell and Kalt research identifies as the "first key to economic development?" Have tribes like the White Mountain Apache and Nez Perce now acquired the type of "de facto" sovereignty necessary for economic development according to Professors Cornell and Kalt by mobilizing the concepts of Native nation-building and securing negotiated agreements and partnerships with the USFWS over the enforcement of the ESA and species recovery on their tribal lands?

Some commentators perceive the present majority of the Supreme Court, led by Chief Justice John Roberts, as being disinclined or at least disinterested in providing any meaningful clarification of tribal sovereignty which is necessary to support expanded tribal control over reservations. Thus, for the foreseeable future at least, they have urged tribes and their advocates at least to consider the potential advantages as well as the liabilities of negotiation and settlement as opposed to adjudication.

> In the last analysis, negotiation seems to promise to bring Indians into Indian law far better than does adjudication. Negotiation turns not on incoherent or misunderstood legal doctrines, but on practical realities. Negotiation gives people—including subordinated people—a piece of the legal action and a chance to own, if only partially, both the resolution

of particular disputes and a greater sense of the structure and efficacy of the long-term relationships between the parties.

Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 Harv.L.Rev. 1754, 1783–1784 (1997). See also Lorie Graham, *Securing Economic Sovereignty Through Agreement*, 37 New Eng.L.Rev. 523, 535–544 (2003); Oliver Kim, *When Things Fall Apart: Liabilities and Limitations of Compacts Between State and Tribal Governments*, 26 Hamline L.Rev. 48, 75–81 (2002); P.S. Deloria & Robert Laurence, *Negotiating Tribal–State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 Ga.L.Rev. 365, 373–74 (1994); David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding First Nations' Self–Government*, 1 Rev. of Constitutional Studies 120 (1993).

Consider the role of federal Indian law in the types of negotiation and consultation processes which led to the White Mountain Apache Statement of Relationship with the Fish and Wildlife Service and the Secretarial Order on "American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act." See page ___, supra. Both documents contain a number of references to the trust doctrine and tribal sovereignty—both judge-created principles of federal Indian law. How would the federal agencies involved in the negotiations that led to the approval of these agreements have gone about justifying their preferential treatment for tribes under the ESA without the special set of rules and principles of federal Indian law developed over the course of nearly two centuries by the Supreme Court, Congress, and the Executive Branch?

The question of whether tribes should pursue negotiation rather than litigation in order to secure their sovereignty and control over reservation development cannot be answered as simply as it is posed. But it cannot be answered at all without considering the principles of federal Indian law. There is, therefore, at least one very important challenge which Indian tribes and the field of Indian law itself share as tribes move into the next century along with the rest of United States society: Can this body of law be developed in a progressive manner, serving to provide a just set of principles for defining the degree of measured separatism that American Indian tribes need for their continued cultural development and survival?

CHAPTER 10

INDIAN RELIGION AND CULTURE

SECTION A.

PROTECTION OF AMERICAN INDIAN SACRED LANDS AND SITES

After the partial paragraph on page 788, add:

NATION BUILDING NOTE:

BEARS EARS NATIONAL MONUMENT

Congress enacted the Antiquities Act of 1906, 16 U.S.C. §§ 431-433, to protect archeological and Indian sacred sites on federal lands from the depredations of collectors and others. See generally Mark Squillace, *The Monumental Legacy of the Antiquities Act*, 37 Ga. L. Rev. 473 (2003).

In 2015, a coalition of five Indian tribes formally petitioned President Obama to invoke the Antiquities Act to create the Bears Ears National Monument. The highlights of the coalition's proposal identified cultural and environmental justifications for the proposal:

> The proposed Bears Ears National Monument is a place rich in history and culture. It is a place to connect, a place to heal, and a place where Native American Traditional Knowledge can be explored and nurtured so that it continues to inform and illuminate modern life. The Bears Ears Inter-Tribal Coalition, a consortium of five sovereign Indian nations—the Hopi, Navajo, Uintah & Ouray Ute, Ute Mountain Ute, and Zuni—has formally petitioned President Barack Obama to proclaim the Bears Ears National Monument in order to protect this extraordinary area for our Tribes, all Native people, and the nation.
>
> The proposed 1.9 million acre monument is a landscape of deep, carved canyons, long mesas, inspiring arches, and arresting red rock formations. The monument's namesake, the Bears Ears, are twin buttes in the heart of the landscape that rise high above the piñon-juniper forests and canyons that adorn the renowned and majestic Cedar Mesa. It lies in Southern Utah, north of the

> Navajo Nation and the San Juan River, east of the Colorado River, and west of the Ute Mountain Ute Reservation. Bears Ears is adjacent to Canyonlands National Park and is every bit the equal of Canyonlands and the other great parks and monuments of the Colorado Plateau.
>
> Ever since time immemorial, the Bears Ears area has been important to Native American people as a homeland. In the mid-1800s, Native Americans were forced fully and violently removed from the area and marched to reservations. But the Native bond to Bears Ears is strong and today is a place that embodies that history. Modern Native American people continue to use the Bears Ears area as a place for healing, ceremonies, and the gathering of firewood, plants, and medicinal herbs.
>
> When they return to Bears Ears today, Native American people feel the presence of their ancestors everywhere. This landscape records their ancestors' migration routes, ancient roads, great houses, villages, granaries, hogans, wikiups, sweat lodges, corrals, petroglyphs and pictographs, tipi rings, shade houses, and burial grounds. Our people are surrounded by the spirits of the ancestors, and embraced by the ongoing evolution of their culture and traditions. For Native American people, Bears Ears is a place for healing. It is also a place for teaching children—Native American children and the world's children—about meaningful and lasting connections with sacred and storied lands.
>
> All of this is threatened—by destructive land uses, such as mining and irresponsible off-road vehicle use and by the rampant looting and destruction of the villages, structures, rock markings, and gravesites within the Bears Ears landscape. The Bears Ears National Monument proposal is a bold and inspired plan to stem the tide of this erosion—and protect Bears Ears for the benefit of all.

Bears Ears Inter-Tribal Coalition, The Tribal Proposal to President Obama for the Bears Ears National Monument, Executive Summary (2015), *available at* http://www.bearsearscoalition.org/wp-content/uploads/2015/01/ExecutiveSummaryBearsEarsProposal.pdf.

On December 28, 2016, President Obama invoked the Antiquities Act, established the Bears Ears National Monument, and issued the following statement:

> Today, I am designating two new national monuments in the desert landscapes of southeastern Utah and southern Nevada to protect some of our country's most important cultural treasures, including abundant rock art, archeological sites, and lands considered sacred by Native American tribes. Today's actions will help protect this cultural legacy and will ensure that future generations are able to enjoy and appreciate these scenic and historic landscapes.

> Importantly, today I have also established a Bears Ears Commission to ensure that tribal expertise and traditional knowledge help inform the management of the Bears Ears National Monument and help us to best care for its remarkable national treasures.
>
> Following years of public input and various proposals to protect both of these areas, including legislation and a proposal from tribal governments in and around Utah, these monuments will protect places that a wide range of stakeholders all agree are worthy of protection. We also have worked to ensure that tribes and local communities can continue to access and benefit from these lands for generations to come.

Statement by the President on the Designation of Bears Ears National Monument and Gold Butte National Monument (Dec. 28, 2016).

The Trump Administration proposed shrinking Bears Ears by as much as 90 percent. Julie Turkewitz, Trump Slashes Size of Bears Ears and Grand Staircase Monuments, NEW YORK TIMES, Dec. 4, 2017. Indian tribes sued the federal government to stop that action. Complaint, *Hopi Tribe v. Trump*, No. 17-2590 (D.D.C.), *available at* https://turtletalk.files.wordpress.com/2017/12/doc-1-complaint-00184691x9d7f5.pdf.

CHAPTER 12

FISHING AND HUNTING RIGHTS

SECTION B.

OFF-RESERVATION FISHING AND HUNTING

Replace note 1 on page 935 with the following:

The Supreme Court granted cert in *Washington v. United States*, the state of Washington's appeal of the culverts injunction. Justice Kennedy, who as a Ninth Circuit judge, had participated in prior en banc proceedings in earlier incarnations of *United States v. Washington*, recused himself from the case. The court heard oral argument but did not issue an opinion, announcing that it was an equally divided court and affirmed the lower court decision. 138 S. Ct. 1832 (2018).

Add subsection 3 to end of page 953:

3. NORTHERN GREAT PLAINS AND ROCKIES

Herrera v. Wyoming

United States Supreme Court, 2019

__ U.S. __, 139 S.Ct. 1686

Justice SOTOMAYOR delivered the opinion of the Court.

In 1868, the Crow Tribe ceded most of its territory in modern-day Montana and Wyoming to the United States. In exchange, the United States promised that the Crow Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon" and "peace subsists ... on the borders of the hunting districts." Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), Art. IV, May 7, 1868, 15 Stat. 650. Petitioner Clayvin Herrera, a member of the Tribe, invoked this treaty right as a defense against charges of off-season hunting in Bighorn National Forest in Wyoming. The Wyoming courts held that the treaty-protected hunting right expired when Wyoming became a State and, in any event, does not permit hunting in Bighorn National Forest because that land is not "unoccupied." We disagree. The Crow Tribe's hunting right survived Wyoming's statehood,

and the lands within Bighorn National Forest did not become categorically "occupied" when set aside as a national reserve.

I

A

The Crow Tribe first inhabited modern-day Montana more than three centuries ago. *Montana v. United States*, 450 U.S. 544, 547, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). The Tribe was nomadic, and its members hunted game for subsistence. J. Medicine Crow, From the Heart of the Crow Country 4–5, 8 (1992). The Bighorn Mountains of southern Montana and northern Wyoming "historically made up both the geographic and the spiritual heart" of the Tribe's territory. Brief for Crow Tribe of Indians as Amicus Curiae 5.

The westward migration of non-Indians began a new chapter in the Tribe's history. In 1825, the Tribe signed a treaty of friendship with the United States. Treaty With the Crow Tribe, Aug. 4, 1825, 7 Stat. 266. In 1851, the Federal Government and tribal representatives entered into the Treaty of Fort Laramie, in which the Crow Tribe and other area tribes demarcated their respective lands. *Montana*, 450 U.S. at 547–548, 101 S.Ct. 1245. The Treaty of Fort Laramie specified that "the tribes did not 'surrender the privilege of hunting, fishing, or passing over' any of the lands in dispute" by entering the treaty. Id., at 548, 101 S.Ct. 1245.

After prospectors struck gold in Idaho and western Montana, a new wave of settlement prompted Congress to initiate further negotiations. See F. Hoxie, Parading Through History 88–90 (1995). Federal negotiators, including Commissioner of Indian Affairs Nathaniel G. Taylor, met with Crow Tribe leaders for this purpose in 1867. Taylor acknowledged that "settlements ha[d] been made" upon the Crow Tribe's lands and that their "game [was] being driven away." Institute for the Development of Indian Law, Proceedings of the Great Peace Commission of 1867–1868, p. 86 (1975) (hereinafter Proceedings). He told the assembled tribal leaders that the United States wished to "set apart a tract of [Crow Tribe] country as a home" for the Tribe "forever" and to buy the rest of the Tribe's land. Ibid. Taylor emphasized that the Tribe would have "the right to hunt upon" the land it ceded to the Federal Government "as long as the game lasts." Ibid.

At the convening, Tribe leaders stressed the vital importance of preserving their hunting traditions. See id., at 88 (Black Foot: "You speak of putting us on a reservation and teaching us to farm.... That talk does not please us. We want horses to run after the game, and guns and ammunition to kill it. I would like to live just as I have been raised"); id., at 89 (Wolf Bow: "You want me to go on a reservation and farm. I do not want to do that. I was not raised so"). Although Taylor responded that "[t]he game w[ould] soon entirely disappear," he also reassured tribal leaders that they would "still be free to hunt" as they did at the time even after the reservation was created. Id., at 90.

The following spring, the Crow Tribe and the United States entered into the treaty at issue in this case: the 1868 Treaty. 15 Stat. 649. Pursuant to the 1868 Treaty, the Crow Tribe ceded over 30 million acres of territory to the United States. See *Montana*, 450 U.S. at 547–548, 101 S.Ct. 1245; Art. II, 15 Stat. 650. The Tribe promised to make its "permanent home" a reservation of about 8 million acres in what is now Montana and to make "no permanent settlement elsewhere." Art. IV, 15 Stat. 650. In exchange, the United States made certain promises to the Tribe, such as agreeing to construct buildings on the reservation, to provide the Tribe members with seeds and implements for farming, and to furnish the Tribe with clothing and other goods. 1868 Treaty, Arts. III–XII, id., at 650–652. Article IV of the 1868 Treaty memorialized Commissioner Taylor's pledge to preserve the Tribe's right to hunt off-reservation, stating:

> "The Indians ... shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Id., at 650.

A few months after the 1868 Treaty signing, Congress established the Wyoming Territory. Congress provided that the establishment of this new Territory would not "impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty." An Act to Provide a Temporary Government for the Territory of Wyoming (Wyoming Territory Act), July 25, 1868, ch. 235, 15 Stat. 178. Around two decades later, the people of the new Territory adopted a constitution and requested admission to the United States. In 1890, Congress formally admitted Wyoming "into the Union on an equal footing with the original States in all respects," in an Act that did not mention Indian treaty rights. An Act to Provide for the Admission of the State of Wyoming into the Union (Wyoming Statehood Act), July 10, 1890, ch. 664, 26 Stat. 222. Finally, in 1897, President Grover Cleveland set apart an area in Wyoming as a public land reservation and declared the land "reserved from entry or settlement." Presidential Proclamation No. 30, 29 Stat. 909. This area, made up of lands ceded by the Crow Tribe in 1868, became known as the Bighorn National Forest. See App. 234; *Crow Tribe of Indians v. Repsis*, 73 F. 3d 982, 985 (CA10 1995).

B

Petitioner Clayvin Herrera is a member of the Crow Tribe who resides on the Crow Reservation in Montana. In 2014, Herrera and other Tribe members pursued a group of elk past the boundary of the reservation and into the neighboring Bighorn National Forest in Wyoming. They shot several bull elk and returned to Montana with the meat. The State of Wyoming charged Herrera for taking elk off-season or without a state hunting license and with being an accessory to the same.

In state trial court, Herrera asserted that he had a protected right to hunt where and when he did pursuant to the 1868 Treaty. The court disagreed and denied Herrera's pretrial motion to

dismiss. See Nos. CT–2015–2687, CT–2015–2688 (4th Jud. Dist. C.C., Sheridan Cty., Wyo., Oct. 16, 2015), App. to Pet. for Cert. 37, 41. Herrera unsuccessfully sought a stay of the trial court's order from the Wyoming Supreme Court and this Court. He then went to trial, where he was not permitted to advance a treaty-based defense, and a jury convicted him on both counts. The trial court imposed a suspended jail sentence, as well as a fine and a 3-year suspension of Herrera's hunting privileges.

Herrera appealed. The central question facing the state appellate court was whether the Crow Tribe's off-reservation hunting right was still valid. The U.S. Court of Appeals for the Tenth Circuit, reviewing the same treaty right in 1995 in *Crow Tribe of Indians v. Repsis*, had ruled that the right had expired when Wyoming became a State. 73 F. 3d at 992–993. The Tenth Circuit's decision in *Repsis* relied heavily on a 19th-century decision of this Court, *Ward v. Race Horse*, 163 U.S. 504, 516, 16 S.Ct. 1076, 41 L.Ed. 244 (1896). Herrera argued in the state court that this Court's subsequent decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999), repudiated *Race Horse*, and he urged the Wyoming court to follow *Mille Lacs* instead of the *Repsis* and *Race Horse* decisions that preceded it.

The state appellate court saw things differently. Reasoning that Mille Lacs had not overruled *Race Horse*, the court held that the Crow Tribe's 1868 Treaty right expired upon Wyoming's statehood. No. 2016–242 (4th Jud. Dist., Sheridan Cty., Wyo., Apr. 25, 2017), App. to Pet. for Cert. 31–34. Alternatively, the court concluded that the *Repsis* Court's judgment merited issue-preclusive effect against Herrera because he is a member of the Crow Tribe, and the Tribe had litigated the *Repsis* suit on behalf of itself and its members. App. to Pet. for Cert. 15–17, 31; App. 258. Herrera, in other words, was not allowed to relitigate the validity of the treaty right in his own case.

The court also held that, even if the 1868 Treaty right survived Wyoming's entry into the Union, it did not permit Herrera to hunt in Bighorn National Forest. Again following *Repsis*, the court concluded that the treaty right applies only on "unoccupied" lands and that the national forest became categorically "occupied" when it was created. See App. to Pet. for Cert. 33–34; *Repsis*, 73 F. 3d at 994. The state appellate court affirmed the trial court's judgment and sentence.

The Wyoming Supreme Court denied a petition for review, and this Court granted certiorari. 585 U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (2018). For the reasons that follow, we now vacate and remand.

II

We first consider whether the Crow Tribe's hunting rights under the 1868 Treaty remain valid. Relying on this Court's decision in *Mille Lacs*, Herrera and the United States contend that those rights did not expire when Wyoming became a State in 1890. We agree.

A

Wyoming argues that this Court's decision in *Race Horse* establishes that the Crow Tribe's 1868 Treaty right expired at statehood. But this case is controlled by *Mille Lacs*, not *Race Horse*.

Race Horse concerned a hunting right guaranteed in a treaty with the Shoshone and Bannock Tribes. The Shoshone-Bannock Treaty and the 1868 Treaty with the Crow Tribe were signed in the same year and contain identical language reserving an off-reservation hunting right. See Treaty Between the United States of America and the Eastern Band of Shoshonees [sic] and the Bannack [sic] Tribe of Indians (Shoshone-Bannock Treaty), July 3, 1868, 15 Stat. 674–675 ("[T]hey shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts"). The *Race Horse* Court concluded that Wyoming's admission to the United States extinguished the Shoshone-Bannock Treaty right. 163 U.S. at 505, 514–515, 16 S.Ct. 1076.

Race Horse relied on two lines of reasoning. The first turned on the doctrine that new States are admitted to the Union on an "equal footing" with existing States. Id., at 511–514, 16 S.Ct. 1076 (citing, e.g., *Lessee of Pollard v. Hagan*, 3 How. 212, 11 L.Ed. 565 (1845)). This doctrine led the Court to conclude that the Wyoming Statehood Act repealed the Shoshone and Bannock Tribes' hunting rights, because affording the Tribes a protected hunting right lasting after statehood would be "irreconcilably in conflict" with the power—"vested in all other States of the Union" and newly shared by Wyoming—"to regulate the killing of game within their borders." 163 U.S. at 509, 514, 16 S.Ct. 1076.

Second, the Court found no evidence in the Shoshone-Bannock Treaty itself that Congress intended the treaty right to continue in "perpetuity." Id., at 514–515, 16 S.Ct. 1076. To the contrary, the Court emphasized that Congress "clearly contemplated the disappearance of the conditions" specified in the treaty. Id., at 509, 16 S.Ct. 1076. The Court decided that the rights at issue in the Shoshone-Bannock Treaty were "essentially perishable" and afforded the Tribes only a "temporary and precarious" privilege. Id., at 515, 16 S.Ct. 1076.

More than a century after Race Horse and four years after *Repsis* relied on that decision, however, *Mille Lacs* undercut both pillars of *Race Horse*'s reasoning. *Mille Lacs* considered an 1837 Treaty that guaranteed to several bands of Chippewa Indians the privilege of hunting, fishing, and gathering in ceded lands " 'during the pleasure of the President.' " 526 U.S. at 177, 119 S.Ct. 1187 (quoting 1837 Treaty With the Chippewa, 7 Stat. 537). In an opinion extensively discussing and distinguishing *Race Horse*, the Court decided that the treaty rights of the Chippewa bands survived after Minnesota was admitted to the Union. 526 U.S. at 202–208, 119 S.Ct. 1187.

Mille Lacs approached the question before it in two stages. The Court first asked whether the Act admitting Minnesota to the Union abrogated the treaty right of the Chippewa bands. Next, the Court examined the Chippewa Treaty itself for evidence that the parties intended the treaty right to expire at statehood. These inquires roughly track the two lines of analysis in *Race Horse*. Despite these parallel analyses, however, the *Mille Lacs* Court refused Minnesota's invitation to rely on *Race Horse*, explaining that the case had "been qualified by later decisions." 526 U.S. at 203, 119 S.Ct. 1187. Although *Mille Lacs* stopped short of explicitly overruling *Race Horse*, it methodically repudiated that decision's logic.

To begin with, in addressing the effect of the Minnesota Statehood Act on the Chippewa Treaty right, the *Mille Lacs* Court entirely rejected the "equal footing" reasoning applied in *Race Horse*. The earlier case concluded that the Act admitting Wyoming to the Union on an equal footing "repeal[ed]" the Shoshone-Bannock Treaty right because the treaty right was "irreconcilable" with state sovereignty over natural resources. *Race Horse*, 163 U.S. at 514, 16 S.Ct. 1076. But *Mille Lacs* explained that this conclusion "rested on a false premise." 526 U.S. at 204, 119 S.Ct. 1187. Later decisions showed that States can impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation. Id., at 204–205, 119 S.Ct. 1187 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 682, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979); *Antoine v. Washington*, 420 U.S. 194, 207–208, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968)). "[B]ecause treaty rights are reconcilable with state sovereignty over natural resources," the *Mille Lacs* Court concluded, there is no reason to find statehood itself sufficient "to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." 526 U.S. at 205, 119 S.Ct. 1187.

In lieu of adopting the equal-footing analysis, the Court instead drew on numerous decisions issued since *Race Horse* to explain that Congress "must clearly express" any intent to abrogate Indian treaty rights. 526 U.S. at 202, 119 S.Ct. 1187 (citing *United States v. Dion*, 476 U.S. 734, 738–740, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986); *Fishing Vessel Assn.*, 443 U.S. at 690, 99 S.Ct. 3055; *Menominee Tribe v. United States*, 391 U.S. 404, 413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968)). The Court found no such " 'clear evidence' " in the Act admitting Minnesota to the Union, which was "silent" with regard to Indian treaty rights. 526 U.S. at 203, 119 S.Ct. 1187.

The *Mille Lacs* Court then turned to what it referred to as *Race Horse*'s "alternative holding" that the rights in the Shoshone-Bannock Treaty "were not intended to survive Wyoming's statehood." 526 U.S. at 206, 119 S.Ct. 1187. The Court observed that *Race Horse* could be read to suggest that treaty rights only survive statehood if the rights are " ' "of such a nature as to imply their perpetuity," ' " rather than " 'temporary and precarious.' " 526 U.S. at 206, 119 S.Ct. 1187. The Court rejected such an approach. The Court found the " 'temporary and precarious' " language "too broad to be useful," given that almost any treaty rights—which

Congress may unilaterally repudiate, see *Dion*, 476 U.S. at 738, 106 S.Ct. 2216—could be described in those terms. 526 U.S. at 206–207, 119 S.Ct. 1187. Instead, *Mille Lacs* framed *Race Horse* as inquiring into whether the Senate "intended the rights secured by the ... Treaty to survive statehood." 526 U.S. at 207, 119 S.Ct. 1187. Applying this test, *Mille Lacs* concluded that statehood did not extinguish the Chippewa bands' treaty rights. The Chippewa Treaty itself defined the specific "circumstances under which the rights would terminate," and there was no suggestion that statehood would satisfy those circumstances. Ibid.

Maintaining its focus on the treaty's language, *Mille Lacs* distinguished the Chippewa Treaty before it from the Shoshone-Bannock Treaty at issue in *Race Horse*. Specifically, the Court noted that the Shoshone-Bannock Treaty, unlike the Chippewa Treaty, "tie[d] the duration of the rights to the occurrence of some clearly contemplated event[s]"—i.e., to whenever the hunting grounds would cease to "remai[n] unoccupied and owned by the United States." 526 U.S. at 207, 119 S.Ct. 1187. In drawing that distinction, however, the Court took care to emphasize that the treaty termination analysis turns on the events enumerated in the "Treaty itself." Ibid. Insofar as the *Race Horse* Court determined that the Shoshone-Bannock Treaty was "impliedly repealed," *Mille Lacs* disavowed that earlier holding. 526 U.S. at 207, 119 S.Ct. 1187. "Treaty rights," the Court clarified, "are not impliedly terminated upon statehood." Ibid. The Court further explained that "[t]he *Race Horse* Court's decision to the contrary"—that Wyoming's statehood did imply repeal of Indian treaty rights—"was informed by" that Court's erroneous conclusion "that the Indian treaty rights were inconsistent with state sovereignty over natural resources." Id., at 207–208, 119 S.Ct. 1187.

In sum, *Mille Lacs* upended both lines of reasoning in *Race Horse*. The case established that the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied. Statehood is irrelevant to this analysis unless a statehood Act otherwise demonstrates Congress' clear intent to abrogate a treaty, or statehood appears as a termination point in the treaty. See 526 U.S. at 207, 119 S.Ct. 1187. "[T]here is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by implication at statehood." Ibid.

Even Wyoming concedes that the Court has rejected the equal-footing reasoning in *Race Horse*, Brief for Respondent 26, but the State contends that *Mille Lacs* reaffirmed the alternative holding in *Race Horse* that the Shoshone-Bannock Treaty right (and thus the identically phrased right in the 1868 Treaty with the Crow Tribe) was intended to end at statehood. We are unpersuaded. As explained above, although the decision in *Mille Lacs* did not explicitly say that it was overruling the alternative ground in *Race Horse*, it is impossible to harmonize *Mille Lacs*' analysis with the Courts prior reasoning in *Race Horse*.

We thus formalize what is evident in *Mille Lacs* itself. While *Race Horse* "was not expressly overruled" in *Mille Lacs*, "it must be regarded as retaining no vitality" after that

decision. . . . To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.

* * *

C

We now consider whether, applying *Mille Lacs*, Wyoming's admission to the Union abrogated the Crow Tribe's off-reservation treaty hunting right. It did not.

First, the Wyoming Statehood Act does not show that Congress intended to end the 1868 Treaty hunting right. If Congress seeks to abrogate treaty rights, "it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202, 119 S.Ct. 1187. "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.' " Id., at 202–203, 119 S.Ct. 1187 (quoting *Dion*, 476 U.S. at 740, 106 S.Ct. 2216); see *Menominee Tribe*, 391 U.S. at 412, 88 S.Ct. 1705. Like the Act discussed in *Mille Lacs*, the Wyoming Statehood Act "makes no mention of Indian treaty rights" and "provides no clue that Congress considered the reserved rights of the [Crow Tribe] and decided to abrogate those rights when it passed the Act." Cf. *Mille Lacs*, 526 U.S. at 203, 119 S.Ct. 1187; see Wyoming Statehood Act, 26 Stat. 222. There simply is no evidence that Congress intended to abrogate the 1868 Treaty right through the Wyoming Statehood Act, much less the " 'clear evidence' " this Court's precedent requires. *Mille Lacs*, 526 U.S. at 203, 119 S.Ct. 1187.4

Nor is there any evidence in the treaty itself that Congress intended the hunting right to expire at statehood, or that the Crow Tribe would have understood it to do so. A treaty is "essentially a contract between two sovereign nations." *Fishing Vessel Assn.*, 443 U.S. at 675, 99 S.Ct. 3055. Indian treaties "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians," *Mille Lacs*, 526 U.S. at 206, 119 S.Ct. 1187, and the words of a treaty must be construed " 'in the sense in which they would naturally be understood by the Indians,' " *Fishing Vessel Assn.*, 443 U.S. at 676, 99 S.Ct. 3055. If a treaty "itself defines the circumstances under which the rights would terminate," it is to those circumstances that the Court must look to determine if the right ends at statehood. *Mille Lacs*, 526 U.S. at 207, 119 S.Ct. 1187.

Just as in *Mille Lacs*, there is no suggestion in the text of the 1868 Treaty with the Crow Tribe that the parties intended the hunting right to expire at statehood. The treaty identifies four situations that would terminate the right: (1) the lands are no longer "unoccupied"; (2) the lands no longer belong to the United States; (3) game can no longer "be found thereon"; and (4) the Tribe and non-Indians are no longer at "peace ... on the borders of the hunting districts." Art. IV, 15 Stat. 650. Wyoming's statehood does not appear in this list. Nor is there any hint in the treaty that any of these conditions would necessarily be satisfied at statehood. See *Mille Lacs*, 526 U.S. at 207, 119 S.Ct. 1187.

The historical record likewise does not support the State's position. See *Choctaw Nation v. United States*, 318 U.S. 423, 431–432, 63 S.Ct. 672, 87 L.Ed. 877 (1943) (explaining that courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties" to determine a treaty's meaning). Crow Tribe leaders emphasized the importance of the hunting right in the 1867 negotiations, see, e.g., *Proceedings* 88, and Commissioner Taylor assured them that the Tribe would have "the right to hunt upon [the ceded land] as long as the game lasts," id., at 86. Yet despite the apparent importance of the hunting right to the negotiations, Wyoming points to no evidence that federal negotiators ever proposed that the right would end at statehood. This silence is especially telling because five States encompassing lands west of the Mississippi River—Nebraska, Nevada, Kansas, Oregon, and Minnesota—had been admitted to the Union in just the preceding decade. See ch. 36, 14 Stat. 391 (Nebraska, Feb. 9, 1867); Presidential Proclamation No. 22, 13 Stat. 749 (Nevada, Oct. 31, 1864); ch. 20, 12 Stat. 126 (Kansas, Jan. 29, 1861); ch. 33, 11 Stat. 383 (Oregon, Feb. 14, 1859); ch. 31, 11 Stat. 285 (Minnesota, May 11, 1858). Federal negotiators had every reason to bring up statehood if they intended it to extinguish the Tribe's hunting rights.

In the face of this evidence, Wyoming nevertheless contends that the 1868 Treaty expired at statehood pursuant to the *Mille Lacs* analysis. Wyoming does not argue that the legal act of Wyoming's statehood abrogated the treaty right, and it cannot contend that statehood is explicitly identified as a treaty expiration point. Instead, Wyoming draws on historical sources to assert that statehood, as a practical matter, marked the arrival of "civilization" in the Wyoming Territory and thus rendered all the lands in the State occupied. Brief for Respondent 48. This claim cannot be squared with *Mille Lacs*.

Wyoming's arguments boil down to an attempt to read the treaty impliedly to terminate at statehood, precisely as *Mille Lacs* forbids. The State sets out a potpourri of evidence that it claims shows statehood in 1890 effectively coincided with the disappearance of the wild frontier: for instance, that the buffalo were extinct by the mid-1870s; that by 1880, Indian Department regulations instructed Indian agents to confine tribal members " 'wholly within the limits of their respective reservations' "; and that the Crow Tribe stopped hunting off-reservation altogether in 1886. Brief for Respondent 47 (quoting § 237 Instructions to Indian Agents (1880), as published in Regulations of the Indian Dept. § 492 (1884)).

Herrera contradicts this account, see Reply Brief for Petitioner 5, n. 3, and the historical record is by no means clear. For instance, game appears to have persisted for longer than Wyoming suggests. See Dept. of Interior, Ann. Rep. of the Comm'r of Indian Affairs 495 (1873) (Black Foot: "On the other side of the river below, there are plenty of buffalo; on the mountains are plenty of elk and black-tail deer; and white-tail deer are plenty at the foot of the mountain"). As for the Indian Department Regulations, there are reports that a group of Crow Tribe members "regularly hunted along the Little Bighorn River" even after the regulation the State cites was in effect. Hoxie, *Parading Through History*, at 26. In 1889, the Office of Indian Affairs wrote to U.S. Indian Agents in the Northwest that "[f]requent complaints have been made to this

Department that Indians are in the habit of leaving their reservations for the purpose of hunting." 28 Cong. Rec. 6231 (1896).

Even assuming that Wyoming presents an accurate historical picture, the State's mode of analysis is severely flawed. By using statehood as a proxy for occupation, Wyoming subverts this Court's clear instruction that treaty-protected rights "are not impliedly terminated upon statehood." *Mille Lacs*, 526 U.S. at 207, 119 S.Ct. 1187.

Finally, to the extent that Wyoming seeks to rely on this same evidence to establish that all land in Wyoming was functionally "occupied" by 1890, its arguments fall outside the question presented and are unpersuasive in any event. As explained below, the Crow Tribe would have understood occupation to denote some form of residence or settlement. See *infra*, at 1701-1702. Furthermore, Wyoming cannot rely on *Race Horse* to equate occupation with statehood, because that case's reasoning rested on the flawed belief that statehood could not coexist with a continuing treaty right. See *Race Horse*, 163 U.S. at 514, 16 S.Ct. 1076; *Mille Lacs*, 526 U.S. at 207–208, 119 S.Ct. 1187.

Applying *Mille Lacs*, this is not a hard case. The Wyoming Statehood Act did not abrogate the Crow Tribe's hunting right, nor did the 1868 Treaty expire of its own accord at that time. The treaty itself defines the circumstances in which the right will expire. Statehood is not one of them.

III

We turn next to the question whether the 1868 Treaty right, even if still valid after Wyoming's statehood, does not protect hunting in Bighorn National Forest because the forest lands are "occupied." We agree with Herrera and the United States that Bighorn National Forest did not become categorically "occupied" within the meaning of the 1868 Treaty when the national forest was created.

Treaty analysis begins with the text, and treaty terms are construed as " 'they would naturally be understood by the Indians.' " *Fishing Vessel Assn.*, 443 U.S. at 676, 99 S.Ct. 3055. Here it is clear that the Crow Tribe would have understood the word "unoccupied" to denote an area free of residence or settlement by non-Indians.

That interpretation follows first and foremost from several cues in the treaty's text. For example, Article IV of the 1868 Treaty made the hunting right contingent on peace "among the whites and Indians on the borders of the hunting districts," thus contrasting the unoccupied hunting districts with areas of white settlement. 15 Stat. 650. The treaty elsewhere used the word "occupation" to refer to the Tribe's residence inside the reservation boundaries, and referred to the Tribe members as "settlers" on the new reservation. Arts. II, VI, id., at 650–651. The treaty also juxtaposed occupation and settlement by stating that the Tribe was to make "no permanent settlement" other than on the new reservation, but could hunt on the "unoccupied lands" of the

United States. Art. IV, id., at 650. Contemporaneous definitions further support a link between occupation and settlement. See W. Anderson, A Dictionary of Law 725 (1889) (defining "occupy" as "[t]o hold in possession; to hold or keep for use" and noting that the word "[i]mplies actual use, possession or cultivation by a particular person"); id., at 944 (defining "settle" as "[t]o establish one's self upon; to occupy, reside upon").

Historical evidence confirms this reading of the word "unoccupied." At the treaty negotiations, Commissioner Taylor commented that "settlements ha[d] been made upon [Crow Tribe] lands" and that "white people [were] rapidly increasing and ... occupying all the valuable lands." *Proceedings* 86. It was against this backdrop of white settlement that the United States proposed to buy "the right to use and settle" the ceded lands, retaining for the Tribe the right to hunt. Ibid. A few years after the 1868 Treaty signing, a leader of the Board of Indian Commissioners confirmed the connection between occupation and settlement, explaining that the 1868 Treaty permitted the Crow Tribe to hunt in an area "as long as there are any buffalo, and as long as the white men are not [in that area] with farms." Dept. of Interior, Ann. Rep. of the Comm'r of Indian Affairs 500.

Given the tie between the term "unoccupied" and a lack of non-Indian settlement, it is clear that President Cleveland's proclamation creating Bighorn National Forest did not "occupy" that area within the treaty's meaning. To the contrary, the President "reserved" the lands "from entry or settlement." Presidential Proclamation No. 30, 29 Stat. 909. The proclamation gave "[w]arning ... to all persons not to enter or make settlement upon the tract of land reserved by th[e] proclamation." Id., at 910. If anything, this reservation made Bighorn National Forest more hospitable, not less, to the Crow Tribe's exercise of the 1868 Treaty right.

Wyoming's counterarguments are unavailing. The State first asserts that the forest became occupied through the Federal Government's "exercise of dominion and control" over the forest territory, including federal regulation of those lands. Brief for Respondent 56–60. But as explained, the treaty's text and the historical record suggest that the phrase "unoccupied lands" had a specific meaning to the Crow Tribe: lack of settlement. The proclamation of a forest reserve withdrawing land from settlement would not categorically transform the territory into an area resided on or settled by non-Indians; quite the opposite. Nor would the restrictions on hunting in national forests that Wyoming cites. See Appropriations Act of 1899, ch. 424, 30 Stat. 1095; 36 CFR §§ 241.2, 241.3 (Supp. 1941); § 261.10(d)(1) (2018).

Wyoming also claims that exploitative mining and logging of the forest lands prior to 1897 would have caused the Crow Tribe to view the Bighorn Mountains as occupied. But the presence of mining and logging operations did not amount to settlement of the sort that the Tribe would have understood as rendering the forest occupied. In fact, the historical source on which Wyoming primarily relies indicates that there was "very little" settlement of Bighorn National Forest around the time the forest was created. Dept. of Interior, Nineteenth Ann. Rep. of the U.S. Geological Survey 167 (1898).

Considering the terms of the 1868 Treaty as they would have been understood by the Crow Tribe, we conclude that the creation of Bighorn National Forest did not remove the forest lands, in their entirety, from the scope of the treaty.

* * *

The judgment of the Wyoming District Court of the Fourth Judicial District, Sheridan County, is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[The dissenting opinion of Justice Alito is omitted.]