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**Teacher's Memorandum to accompany
Getches, Wilkinson, Williams, Fletcher & Carpenter
FEDERAL INDIAN LAW, 7th ed.**

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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 *United States v. Cooley* (page 90), *Yellen v. Confederated Chehalis Tribes* (page 152), *McGirt v. Oklahoma* (and its related case *Sharp v. Murphy*, formerly *Carpenter v. Murphy*) (page 68), *Lewis v. Clarke* (page 49), *Upper Skagit Indian Tribe v. Lundgren* (page 51), *Washington Dept. of Revenue v. Cougar Den* (page 96), and *Herrera v. Wyoming* (page 141). 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.

We have also included the per curiam opinion from *Brackeen v. Haaland* (page 110), the Fifth Circuit en banc decision on the constitutional challenges to the Indian Child Welfare Act. No part of the signed opinions "garnered an en banc majority" and so will not be reproduced here.

Last year we add new materials on Indian country voting rights (p. 21) and Indian country health care (p. 54).

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 (page 114).

In the international and comparative law arena, we added a brief mention of Canada's new legislation to align its national laws with the United Nations Declaration on the Rights of Indigenous Peoples.

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)**.

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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

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

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.

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., *Littlefield v. Mashpee Wampanoag Tribe*, 951 F.3d 30 (1st Cir. 2020); *Confederated Tribes of Grand Ronde Community of Oregon v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016); *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); *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199 (D.D.C. 2020); *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 Bethany C. Sullivan & Jennifer L. Turner, *Enough is Enough: Ten Years of Carcieri v. Salazar*, 40 Pub. Land & Resources L. Rev. 37 (2019), and 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 nonmembers. 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 *Couderd-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 certiorari 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 groundwater

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

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

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). 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.

However, in March 2020, the federal district court held that the federal government was required to prepare an environmental impact statement. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 440 F.Supp.3d 1 (D.D.C. 2020). In a subsequent opinion, the court vacated the permit issued for Dakota Access, over the objections of the pipeline company, which claimed catastrophic economic losses:

Dakota Access's central and strongest argument as to the second Allied-Signal prong is that shutting down the pipeline would cause it, and the industries that rely on it, significant economic harm, including substantial job losses. See, e.g., DA Remedy Br. at 32 (stating that shutdown would "pose an existential threat to DAPL" due to "massive" revenue loss). It submits declarations stating that DAPL could lose as much as \$643 million in the second half of 2020 and \$1.4 billion in 2021 if shut down pursuant to the Court's order. See ECF No. 509-9 (Declaration of Glenn Emery), ¶ 10. "All of these financial losses would be absorbed by the owners of Dakota Access," particularly Energy Transfer Partners, the current parent company of DAPL after a merger with Sunoco. See DA Remedy Br. at 33; *Standing Rock VI*, — F.Supp.3d at —, 2020 WL 1441923, at *10.

In addition, both Dakota Access and many amici argue, shutting the pipeline down would have serious repercussions for the entire North Dakota oil industry. "There is no viable pipeline alternative for transporting the 570,000 barrels of Bakken crude that DAPL is capable of carrying each day," Dakota Access states, and railroads do not have the capacity "to fill the breach." DA Remedy Br. at 35–36; see ECF No. 504 (Amicus Brief of State of North Dakota) at 11 ("An increase in crude by rail volumes sufficient to offset current pipeline deliveries by DAPL would take an unknown amount of time to assemble the required tank cars, engines, and crews, and to ensure market destinations would be prepared for a surge in rail volume."). Several states also argue that their grain farmers would be harmed by having to pay a premium for railroad cars once oil, which is more valuable by volume, enters that market and drives up prices. See ECF No. 514 (Amicus Brief

of IN, MT, AL, AR, IA, KS, KY, LA, NE, OH, SD, TX, UT, and WV) at 9–10. “[M]any North Dakota oil producers,” meanwhile, with no way to get their oil to market, “would have no choice but to respond by ‘shutting in’ some of their wells and ceasing production entirely,” with consequent effects on the workers at those wells. See DA Remedy Brief at 35 (citing ECF No. 509-11 (Declaration of Jeff D. Makhholm), ¶ 17; then citing Emery Decl., ¶¶ 14, 18). Specifically, Dakota Access estimates, “producers would have to shut-in between 3,460 and 5,400 wells, stranding up to 34.5% of North Dakota crude production.” *Id.* at 36; see also, e.g., North Dakota Br. at 8 (estimating that “[e]ach of those wells represents 1.6 full time jobs”) (citing ECF No. 504-2 (Declaration of Lynn Helms), ¶ 10). This would also have a reverberating effect on the state of North Dakota, whose economy derives a large part of its revenue from oil and gas taxes, largely from the Williston Basin, which includes the Bakken fields that supply DAPL. See North Dakota Br. at 2–3; DA Remedy Br. at 4; see also North Dakota Br. at 2 (explaining that “despite the small overall size of North Dakota’s economy, [it] is a large producer of oil and natural gas”).

The Tribes and other amici respond that these projected consequences are “wildly exaggerated” because, following “a precipitous collapse in oil prices, demand, and production” caused in part by the COVID-19 pandemic, “production in North Dakota has [already] plummeted.” ECF No. 527 (Tribes Remedy Brief) at 21–22; see also ECF No. 531 (Amicus Brief of Members of Congress) at 9 (“Since [the Court’s last remedy Opinion in this case in] 2017, the price and demand for oil has plummeted due to factors well beyond the operation of this pipeline.”); ECF No. 519 (Amicus Brief of North Dakota Petroleum Council) at 8 (“In recent weeks, of course, the coronavirus pandemic has turned the nation’s economy and the oil industry upside down.”). They point out that North Dakota estimates that “as many as 5,000 wells may now be shut-in” because of “the current economic situation,” North Dakota Br. at 3 n.4, noting that this is more than the number of wells Dakota Access claimed would be affected by a DAPL shutdown. See Tribes Remedy Br. at 22–23; see also *id.* at 23 (citing news articles reporting that North Dakota well shut-ins have now increased to 7,000). Other briefs allude to the pandemic, admitting some effect on the oil market but maintaining more optimism than realism. See, e.g., N.D. Petroleum Council Br. at 8 (“In recent weeks, of course, the coronavirus pandemic has turned the nation’s economy and the oil industry upside down. Nevertheless, NDPC continues to hope and expect that our country’s economy and the industry will recover in coming months.”); North Dakota Br. at 12 (“[T]he potential impacts of the COVID-19 pandemic are impossible to quantify due to rapidly changing oil prices, employment numbers, and capital investment plans”). The Tribes further claim that this drop in production may mean that there will be “little or no increase in rail transportation.” Tribes Remedy Br. at 25

(citing ECF No. 527-2 (Declaration of Marie Fagan), ¶ 5). And to the extent that a DAPL shutdown causes crude-oil demand to drop even further or its transportation to switch to railroads, the Tribes argue that with “some participants in the North Dakota oil market [facing] increased costs,” “other participants,” such as railroads and other oil-producing states, would “benefit from the shift.” Tribes Remedy Br. at 26 (citing ECF No. 272-2 (Third Declaration of Richard Krupewicz), ¶ 30; then citing Fagan Decl., ¶ 7). Defendant-Intervenors, for their part, dismiss the Tribes’ take on the pandemic, calling their analysis of the continuing effects of a pandemic-depressed oil market “bearish” and “erroneous[.]” DAPL Remedy Rep. at 17–18.

The Court need not pick apart the various positions in these disputes, for it is clear that at least some immediate harm to the North Dakota oil industry should be expected from a DAPL shutdown, even if its effects are tempered by a decreased demand for oil. See DA Remedy Rep. at 18 (averring that “demand for [the pipeline]’s services has remained strong”). Indeed, the Court does not take lightly the serious effects that a DAPL shutdown could have for many states, companies, and workers. Losing jobs and revenue, particularly in a highly uncertain economic environment, is no small burden. Ultimately, however, these effects do not tip the scales decisively in favor of remanding without vacatur.

Standing Rock Sioux Tribe v. United States Army Corps of Engineers, 471 F.Supp.3d 71, 82-84 (D.D.C. 2020). The D.C. Circuit affirmed the district court on the merits, but reversed on the remedy. 985 F.3d 1032, 1039 (D.C. Cir. 2021).

After the notes page 413, add

PART 4. INDIAN COUNTRY VOTING RIGHTS

In recent years, Indian country voting rights have become a hot topic. Until the early years of the 21st century, American Indian voters made much impact on only a few federal and state elections. This part surveys the history and law of Indian country voting rights.

*The History of American Indian Citizenship and Voting Rights.**

In the original text of the Constitution, now repealed by the Reconstruction Amendments, Article I, Section 2, provided in relevant part:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. . . .

The passive voice of the Constitution authorizes an unnamed entity to determine apportionment of congressional representatives and direct taxes by counting “free Persons” and “three fifths” of the persons who were then enslaved, and excluding “Indians not taxed.” The entity, government, or official that “shall ... determine” is unnamed in the text, but since the requirement is included in Article I, presumably Congress must make the enumeration. Scholars sometimes gloss over the passive voice in the text by inserting Congress as an entity via brackets into the Constitution’s text: “To be sure, the Census Clause goes on to vest in Congress the authority to effect the actual enumeration ‘in such Manner as [it] shall by Law direct.’” Thomas R. Lee, *The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an “Actual Enumeration,”* 77 Wash. L. Rev. 1, 21 n.94 (2002).

The meaning of the phrase “Indians not taxed” was never definitively determined by the Supreme Court, nor could it have been. The Framers never defined the phrase, and there is virtually no discussion in the political world of the ratification era parsing through its terminology. However, the Court in the notorious *Dred Scott* case, 60 U.S. (19 How.) 393 (1857), arguably added a gloss to the meaning of the Indians Not Taxed Clause. *Dred Scott* involved a claim to individual rights by a Black person, a former slave, alleging his freedom. Justice Taney’s opinion held that the Constitution contained no text authorizing Black persons, enslaved or free, to become American citizens eligible for individual rights protections. *Id.* at 404. Taney compared Black persons to Indians. Taney asserted that Indians were loyal to their tribes and not the United States

* Excerpted from Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 Calif. L. Rev. 495, 528-31 (2020).

or any State, and savage. Taney argued, however, that Congress possessed the power, if it chose, to recognize Indians as citizens. Out of this horror show of legal analysis, there is a gloss on the meaning of the Indians Not Taxed Clause: *Dred Scott* generally implies that the “taxed” language of the clause is akin to American (or federal) citizenship.

States and lower courts in the antebellum era tended to acknowledge a difference between Indians as well, usually focusing on the relative civilization of an Indian person, whether the Indian person had abandoned their tribal relations, and whether the Indian person had given up their treaty rights. See, e.g., *United States v. Elm*, 25 F. Cas. 1006, 1007 (N.D.N.Y. 1877) (“If defendant’s tribe continued to maintain its tribal integrity, and he continued to recognize his tribal relations, his status as a citizen would not be affected by the fourteenth amendment; but such is not his case. His tribe has ceased to maintain its tribal integrity, and he has abandoned his tribal relations, as will hereafter appear”); *Anderson v. Mathews*, 163 P. 902, 906 (Cal. 1917) (“Neither the members of the group nor, so far as known, the members of the tribe, were subject to, or owed allegiance to, any government, except that of the United States and the state of California, and, prior to 1848, that of Mexico.”); *Bd. of Comm’rs of Miami County v. Godfrey*, 60 N.E. 177, 180 (Ind. App. 1901) (“So long as he remained an Indian, he was under the control of the United States as an Indian. But he voluntarily does what the law says makes him a citizen. This change of his tribal condition into individual citizenship was primarily his own voluntary act. He cannot be both an Indian, properly so called, and a citizen.”); *In re Liquor Election in Beltrami County*, 163 N.W. 988, 989 (Minn. 1917) (noting that the right to vote in state and local elections extended to “[p]ersons of mixed white and Indian blood, who have adopted the customs and habits of civilization” and “[p]ersons of Indian blood ... who have adopted the language, customs and habits of civilization, after an examination before any district court of the state, in such manner as may be provided by law, and shall have been pronounced by said court capable of enjoying the rights of citizenship within the state”).

State citizenship and federal citizenship were separate questions under the Constitution before the Reconstruction Amendments and, in regards to Indian citizenship, after the Reconstruction Amendments. Under that regime, states could, and occasionally did, extend the suffrage or other rights to Indians, offering up their own definitions of “Indian.” The State of Michigan, for example, in 1850 recognized Indians as citizens, so long as they became “civilized.” MICH. CONST.. art. 7, § 1 (1850).

The original Article I text that included the Indians Not Taxed Clause was repealed by the Reconstruction Amendments. However, Section 2 of the Fourteenth Amendment retained the Indians Not Taxed language. That section provides, “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”

The Framers of the Fourteenth Amendment certainly understood that the Amendment was never intended to change the legal status of Indians. This is why Section 2 retains the “Indians Not

Taxed” phrase. Congress debated the status of Indians extensively during the debates around the 1866 bill that granted citizenship to freed slaves, with the large majority of the members refusing to extend citizenship to Indians. George Beck, *The Fourteenth Amendment as Related to Tribal Indians: Section I, “Subject to the Jurisdiction Thereof” and Section II, “Excluding Indians Not Taxed,”* 28 *Am. Indian Culture & Res. J.* 37, 37-38 (2004); R. Alton Lee, *Indian Citizenship and the Fourteenth Amendment*, 4 *S.D. Hist.* 198, 212 (1974). During the debates on the Fourteenth Amendment that followed shortly thereafter, Congress reconfirmed its intent to preclude Indian citizenship.

Finally, after the ratification of the Fourteenth Amendment, the Senate issued a report confirming its understanding that the ratification did not affect Indians at all:

It is worthy of mention that those who framed the fourteenth amendment, and the Congress which proposed it, as well as the legislatures which adopted it, understood that the Indian tribes were not made citizens, but were excluded by the restricting phrase, “and subject to the jurisdiction,” and that such has been the universal understanding of all our public men since that amendment because a part of the Constitution

During the war slavery had been abolished, and the former slaves had become citizens of the United States; consequently, in determining the basis of representation in the fourteenth amendment, the clause “three-fifths of all other persons” is wholly omitted; but the clause “excluding the Indians not taxed” is retained.

S. Rep. 41-268, at 10 (Dec. 14, 1870).

The main conclusion of that report was that the Fourteenth Amendment did not unintentionally abrogate Indian treaties. The Committee on the Judiciary, the authors of the opinion, concluded that Indian tribes, still listed in the Commerce Clause, remained sovereign nations with which the United States might still enter into treaties. Thus, the sovereign-to-sovereign relationship remained intact and undisturbed by the Fourteenth Amendment, even if there was still no consensus about the meaning of the Indians Not Taxed Clause. The primary purpose was to deny citizenship to Indians.

The Supreme Court confirmed that understanding in *Elk v. Wilkins*. In the case, an Indian person who lived among white people, spoke English, and was educated attempted to vote. The Court held that Indians could not vote unless Congress enacted a statute authorizing Indians to vote, or, perhaps, extending citizenship to Indians. Just as the *Dred Scott* Court assumed Congress had the power to create a class of taxable Indians, the *Elk* Court agreed that Congress had that power. The Court listed numerous treaties and statutes that conferred American citizenship on Indian people. Unfortunately, Congress had not done so for John Elk. Congress did extend

citizenship to all Indian people born in the United States by statute in 1924 to “member[s]” of “tribe[s],” 18 U.S.C. § 1401(b).

Elk v. Wilkins

United States Supreme Court, 1884

112 U.S. 94; 5 S.Ct. 41; 28 L.Ed. 643 (1884)

Justice GRAY delivered the opinion of the Court.

[In 1880, John Elk attempted to vote in the city council election in Omaha, Nebraska. Charles Wilkins, the clerk, refused to register him as a voter because Elk was an Indian. Elk claimed to have “severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States, and still so continues subject to the jurisdiction of the United States; and avers that, under and by virtue of the fourteenth amendment to the constitution of the United States, he is a citizen of the United States, and entitled to the right and privilege of citizens of the United States.”]

By the constitution of the state of Nebraska, art. 7, § 1, ‘every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector: First, citizens of the United States; second, persons of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election.’ * * *

The plaintiff, in support of his action, relies on the first clause of the first section of the fourteenth article of amendment of the constitution of the United States, by which ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside;’ and on the fifteenth article of amendment, which provides that ‘the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.’ * *

* The petition, while it does not show of what Indian tribe the plaintiff was a member, yet, by the allegations that he ‘is an Indian, and was born within the United States,’ and that ‘he had severed his tribal relations to the Indian tribes,’ clearly implies that he was born a member of one of the Indian tribes within the limits of the United States which still exists and is recognized as a tribe by the government of the United States. Though the plaintiff alleges that he ‘had fully and completely surrendered himself to the jurisdiction of the United States,’ he does not allege that the United States accepted his surrender, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen by the state or by the United States. Nor is it contended by his counsel that there is any statute or treaty that makes him a citizen.

The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the fourteenth amendment of the constitution. Under the constitution of the United States, as originally established, ‘Indians not taxed’ were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several states; and congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the states of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the president and senate, or through acts of congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupillage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any state. General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. Const. art. 1, §§ 2, 8; art. 2, § 2; *Cherokee Nation v. Georgia*, 5 Pet. 1; *Worcester v. Georgia*, 6 Pet. 515; *U. S. v. Rogers*, 4 How. 567; *U. S. v. Holliday*, 3 Wall. 407; *Case of the Kansas Indians*, 5 Wall. 737; *Case of the New York Indians*, Id. 761; *Case of the Cherokee Tobacco*, 11 Wall. 616; *U. S. v. Whisky*, 93 U. S. 188; *Pennock v. Commissioners*, 103 U. S. 44; *Crow Dog’s Case*, 109 U. S. 556; *S. C. 3 SUP. CT. REP.* 396; *Goodell v. Jackson*, 20 Johns. 693; *Hastings v. Farmer*, 4 N. Y. 293.

The alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization and satisfactory proof of fitness for civilized life; for examples of which see treaties in 1817 and 1835 with the Cherokees, and in 1820, 1825, and 1830 with the Choctaws, * * * in 1855 with the Wyandotts, * * * in 1861 and in March, 1866, with the Pottawatomies, * * * in 1862 with the Ottawas, * * * and the Kickapoos, * * * and acts of congress * * * concerning the Brothertown Indians; and * * * concerning the Stockbridge Indians[.] * * *

Chief Justice TANEY, in the passage cited for the plaintiff from his opinion in *Scott v. Sandford*, 19 How. 393, 404, did not affirm or imply that either the Indian tribes, or individual members of those tribes, had the right, beyond other foreigners, to become citizens of their own will, without being naturalized by the United States. His words were: ‘They’ (the Indian tribes) ‘may without doubt, like the subjects of any foreign government, be naturalized by the authority

of congress, and become citizens of a state, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.’ But an emigrant from any foreign state cannot become a citizen of the United States without a formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required law.

* * *

[The Fourteenth Amendment] contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared to be citizens are ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof.’ The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. * * * Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indiana tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more ‘born in the United States and subject to the jurisdiction thereof,’ within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. * * * Slavery having been abolished, and the persons formerly held as slaves made citizens, this clauses fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens. * * *

* * *

The treaty of 1867 with the Kansas Indians strikingly illustrates the principle that no one can become a citizen of a nation without its consent, and directly contradicts the supposition that a member of an Indian tribe can at will be alternately a citizen of the United States and a member of the tribe. That treaty not only provided for the naturalization of members of the Ottawa, Miami, Peoria, and other tribes, and their families, upon their making declaration, before the district court of the United States, of their intention to become citizens, * * * but, after reciting that some of the Wyandotts, who had become citizens under the treaty of 1855, were ‘unfitted for the responsibilities of citizenship,’ * * * and that such persons, and those only, should thereafter constitute the tribe, it provided that ‘no one who has heretofore consented to become a citizen, nor the wife or children of any such person, shall be allowed to become members of the tribe, except by the free consent of the tribe after its new organization * * *.

Since the ratification of the fourteenth amendment, congress has passed several acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become without any action of the government, citizens of the United States. [The Court describes Acts of Congress granting citizenship to “any of the Winnebago Indians in the state of Minnesota”; “any adult members of the Miami tribe in Kansas, and of their minor children”; and “any of the chiefs, warriors, or heads of families of the Stockbridge Indians.”]

* * * The national legislation has tended more and more towards the education and civilization of the Indians, and fitting them to be citizens. But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself. * * *

* * *

The law upon the question before us has been well stated by Judge Deady in the district court of the United States for the district of Oregon. In giving judgment against the plaintiff in a case resembling the case at bar, he said: ‘Being born a member of ‘an independent political community’ – the Chinook – he was not born subject to the jurisdiction of the United States-not born in its allegiance.’ *McKay v. Campbell*, 2 Sawy. 118, 134. And in a later case he said: ‘But an Indian cannot make himself a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form. The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since.’ *U. S. v. Osborne*, 6 Sawy. 406, 409. * * * The plaintiff, not being a citizen of the United States under the fourteenth amendment of the constitution, has been deprived of no right secured by the fifteenth amendment, and cannot maintain this action. Judgment affirmed.

HARLAN, J., dissenting.

* * *

At the adoption of the constitution there were, in many of the states, Indians, not members of any tribe, who constituted a part of the people for whose benefit the state governments were established. This is apparent from that clause of article 1, § 3, which requires, in the apportionment of representatives and direct taxes among the several states ‘according to their respective numbers,’ the exclusion of ‘Indians not taxed.’ This implies that there were, at that time, in the United States, Indians who were taxed; that is, were subject to taxation by the laws of the state of which they were residents. Indians not taxed were those who held tribal relations, and therefore

were not subject to the authority of any state, and were subject only to the authority of the United States, under the power conferred upon congress in reference to Indian tribes in this country. The same provision is retained in the fourteenth amendment; for, now, as at the adoption of the constitution, Indians in the several states, who are taxed by their laws, are counted in establishing the basis of representation in congress. * * * Surely every one must admit that an Indian residing in one of the states, and subject to taxation there, became, by force alone of the act of 1866, a citizen of the United States, although he may have been, when born, a member of a tribe. The exclusion of Indians not taxed evinced a purpose to include those subject to taxation in the state of their residence. Language could not express that purpose with more distinctness than does the act of 1866. * * *

* * *

NOTES

1. *Elk* was a companion case of sorts to the saga of Standing Bear.* *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (D. Neb. 1879) (No. 14,891). Many of the same lawyers participated in both cases.

Federal district court Judge Elmer Scipio Dundy, Nebraska's first federal district court judge, held that Standing Bear, a Ponca tribal leader, and of his co-petitioners, were entitled to petition for a writ of habeas corpus in federal court. In May 1877, the United States military forced the Ponca Nation, including Standing Bear's family, at gunpoint to leave their Nebraska homelands on the Niobrara River and walk to Oklahoma in the Ponca Trail of Tears. In Oklahoma, one-quarter of survivors perished from a malaria outbreak, including Standing Bear's son, Bear Shield. Standing Bear had already lost his daughter, Prairie Flower, on the deadly walk south. In January 1879, Standing Bear took his son's bones and left Oklahoma to return to the Niobrara River to bury his son. General Sherman ordered Standing Bear to be arrested and imprisoned. General Crook reluctantly did so.

Standing Bear's speech after the hearing before Judge Dundy is the stuff of legend. Ultimately, the court concluded that Standing Bear possessed the legal capacity to bring a petition for a writ of habeas corpus. The court also concluded that no Act of Congress or treaty authorized the federal government to forcibly remove the Ponca Nation. Judge Dundy later would rule that the Ponca removal was illegal.

Standing Bear's loudest proponent, Thomas H. Tibbles, would later persuade John Elk into attempting to cast a vote in a federal election in Omaha, which led to *Elk v. Wilkins*. Adrea Korthase, Judge Richard G. Kopf—Deconstructing the Mythology of the Standing Bear Case,

* This Note is excerpted from Matthew L.M. Fletcher, Federal Indian Law § 3.8, at 94 (2016). The authors thank Adrea Korthase, alum of Michigan State University College of Law, for her research on *Elk* and *Standing Bear*.

Turtle Talk blog post (May 11, 2013), <https://turtletalk.wordpress.com/2013/05/11/judge-richard-g-kopf-deconstructing-the-mythology-of-the-standing-bear-case/>.

2. By World War I, Congress had made about half of American Indians citizens. A very high percentage of eligible American Indian men served in the armed forces during the war, which became a fact point that led Congress to enact the Indian Citizenship Act of 1924, 43 Stat. 253, codified as amended at 8 U.S.C. § 1401(b). See Granting Citizenship to Certain Indians, S. Rep. No. 66-122, at 1; S. Rep. No. 66-122, at 1 (1919) (noting 10,000 of 33,000 eligible Indians served in the armed forces during World War I).*

American Indian citizenship under state law after 1924 was, perhaps, more complicated than under federal law. For many courts, Indian citizenship meant the extension of state criminal and regulatory jurisdiction over Indian off-reservation activities. E.g., *State v. Big Sheep*, 243 P. 1067 (Mont. 1926) (criminal jurisdiction); *Red Hawk v. Joines*, 278 P. 572 (Or. 1929) (action in replevin). In *People v. Chosa*, 233 N.W. 205 (Mich. 1930), for example, decided six years after the citizenship act, the Michigan Supreme Court held that Indians who had become citizens had necessarily abandoned their off-reservation treaty rights and could be prosecuted under state law. Forty years later, the Michigan Supreme Court would reverse *Chosa* to hold that Indian people retained treaty rights absent congressional abrogation. *People v. Jondreau*, 185 N.W.2d 375, 380 (Mich. 1971) (“[T]he foundations upon which *Chosa* rested have not stood the test of time.”).

Other state courts, however, would hold that the United States retained its “guardianship” over American Indian trust and reservation property. E.g., *In re Long’s Estate*, 249 P.2d 103 (Okla. 1952) (barring probate of Indian trust property). The Supreme Court of Idaho, for example, rejected a Fourteenth Amendment constitutional challenge to a ban on liquor sales to Indians, holding that Indians were a group of people “genetic[ally]” inclined to be harmed by liquor. *State v. Rovick*, 277 P.2d 566, 569 (Idaho 1959) (“It is unnecessary to review the genetics or to indulge in a scientific analysis or discussion of anthropogeny to discover the reasons for the interdictions. Suffice to say that the historic background of laws prohibiting sale of intoxicants to Indians is well recognized and must now be considered as firmly established.”).

Some states, such as Michigan, authorized Indians to vote even before the Reconstruction but imposed vague obligations on Indians based on the “civilized” character of an Indian, whether the Indian was a ward of the federal government, or whether the Indian had renounced tribal status or treaty rights. By the early twentieth century, the remaining states that resisted allowing Indians to vote concluded that reservation Indians were not residents of the state in which the reservation was located. E.g., *Allen v. Merrell*, 305 P.2d 490 (Utah 1956) (rejecting Indian voting rights claim because he was not a resident of non-reservation lands), vacated, 353 U.S. 932 (1957); *Porter v. Hall*, 271 P. 411 (Ariz. 1928) (same). Contra *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948)

* The material in this Note is excerpted from Matthew L.M. Fletcher, *States and Their American Indian Citizens*, 41 *Am. Indian L. Rev.* 319, 331-32 (2017).

(holding reservation Indians were residents). In 1962, New Mexico became the last state to recognize voting rights for American Indians when its supreme court held that Navajo Nation members are entitled to vote in state elections, rejecting the residence claim. *Montoya v. Bolack*, 372 P.2d 387 (N.M. 1962). Several counties in areas of high American Indian population and land ownership remain covered by the Voting Rights Act and subject to suit. Jeanette Wolfley, *You Gotta Fight for the Right to Vote: Enfranchising Native American Voters*, 18 U. Pa. J. Const. L. 265 (2015).

TESTIMONY BEFORE THE HOUSE COMMITTEE ON ADMINISTRATION SUBCOMMITTEE ON ELECTIONS

HEARING ON NATIVE AMERICAN VOTING RIGHTS: EXPLORING BARRIERS AND SOLUTIONS

Patty Ferguson-Bohnee, February 11, 2020

* * *

III. Voting Barriers

Barriers to voting include isolating conditions that reduce opportunities and participation, structural or institutional barriers that limit voter participation through the passage of laws or policies that reduce voter participation, and election administration issues.

Isolating conditions such as language barriers, socioeconomic disparities, lack of access to transportation, lack of residential addresses, lack of access to mail, and the digital divide limit Native American political participation. These isolating conditions limit the ability of Native Americans to participate in elections and run for office. Today, states and counties either fail to consider these realities or intentionally exploit them in ways that gives rise to the modern forms of voter suppression we see in Indian Country. These include closing and moving polling locations out of reservation communities where transportation is limited, limiting access to voting in Indian Country based on a lack of permanently Americans with Disabilities Act compliant buildings on Tribal lands, adopting strict voter ID laws, and the push towards vote by mail, among others.

Poverty

Native Americans face obstacles in voting as a part of their socioeconomic reality. The poverty rate at 7.8%, compared to the national average of 4.4%. Native Americans also have the lowest labor force participation rate.

Language Barriers

Many Native Americans also face language barriers when it comes to voting. Some Native Americans have limited English proficiency and require language assistance. There are over 370,000 Native American language speakers. Of these, about 84,000 Native Americans report speaking English “less than very well.” Only a handful of Native languages are written and not every speaker can read their native language. Without adequate translations, both oral and written, Native language speakers are at a disadvantage when trying to participate in the electoral process.

Section 203 of the Voting Rights Act requires language assistance to be effective. Specifically, Section 203 mandates “[w]henver any State or political subdivision [covered by the section] provides registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language.” 52 U.S.C. § 10503(c). As of 2016, jurisdictions in ten states must provide language assistance to Native American and Alaska Native voters under Section 203.

However, not all jurisdictions provide adequate language assistance. Despite the lack of compliance, the Department of Justice has only brought one case to enforce Section 203 in the last ten years. *United States v. Shannon County* (D.S.D., April 23, 2010), available at https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/shannon_moa.pdf. However, during the same period, several tribes brought litigation to enforce the provisions of Section 203, and several jurisdictions admitted to doing nothing to comply with Section 203. In 2014, San Juan County, Utah, moved to an all vote-by-mail system that did not account for translations for Navajo language speakers. Navajo voters who needed language assistance were required to travel several hours round trip to the sole in-person voting location to obtain assistance. In Alaska, two separate lawsuits were filed to secure language assistance for rate for Native Americans in the US is 26.2%, while the national poverty rate is 14.0%. Native Americans are also more likely to be unemployed and have the highest unemployment rate of any Yu’pik language speakers under Section 203. *Nick v. Bethel*, No. 3:07-cv-00098, 2010 WL 11639983, at *1–2 (D. Alaska Jan. 20, 2010); *Stipulated Judgment and Order, Toyokak v. Mallott*, No. 3:13-cv-00137-SLG-LCL (D. Alaska 2014) available at https://www.narf.org/nill/documents/20150910_alaska_voting_settlement.pdf. After a lawsuit, the government the state of Alaska agreed via a settlement to comply with Section 203 for the purposes of providing language assistance to Native American language speakers. Even though Yu’pik is a written language, state officials were refusing to both written and oral materials in the Yu’pik language.

Infrastructure

As a part of their unique reality, many Tribal communities do not have the same infrastructure and access to information as other Americans. Some of these limitations in

infrastructure include lack of paved roads and a digital divide, including the lack of broadband, telephone services, and electricity generally.

The lack of paved roads on reservation lands hinders access to voting locations, including early voting locations, polling locations and voter registration sites. During inclement weather, unpaved roads may become impassable and further impede voters. The Indian Reservation Roads (IRR) program has reported that they take care of more than 144,000 miles of roads and over 60% of those roads are unpaved. According to the BIA, approximately 17,130 miles of existing roads in the National Tribal Transportation Facility Inventory are unimproved and earth surface roads. When considering only BIA and tribal roads, the percent of unpaved roads increases to 80%. In addition, 27% of all the bridges in the IRR system are deficient.

Another unique barrier Native Americans face is the lack of broadband available on reservations. Only 58.3% of all Tribal lands have the option to connect to high-speed broadband, while 97.3% of urban areas have access to high speed broadband. Without internet, Native Americans cannot easily access online voter registration or election polling locations, ballot or even candidate information. Many states mandate polling locations have electricity, which can be problematic for tribes because 14% of homes on reservations have no access to electricity, compared to the national rate of 1.4%. Accordingly, elections administrators may not provide a polling location on reservations in areas lacking electricity or be forced to rely on generators to sustain the polling location for long periods of time. This creates an added difficulty because the Help America Vote Act (HAVA) statutorily mandates accessible voting machines at every polling location.

Nontraditional Addresses and Home Mail Delivery

While 84% of the U.S. population lives in urban areas, many Native Americans and Alaska Natives live in rural communities. These communities lack traditional street addresses, and locations for homes are usually described in terms of landmarks, cross roads, and directions. Numerous roads on reservations are unimproved dirt or gravel roads, and “many miles of these roads are impassable after rain or snow. Because of the poor quality of the road systems on Indian reservations, many of the roads are unnamed and not serviced by the U.S. Postal Service. . . . A significant number of these reservation residents have no traditional street addresses.” Brief for National Congress of American Indians as Amici Curiae supporting Petitioners, Crawford v. Marion County at 11-12 (2008), available at https://sct.narf.org/documents/crawford/merits/amicus_ncai.pdf.

Due to the lack of traditional addresses, “[m]ost reservation residents do not receive mail at their homes and either pay to maintain a post office box in a nearby town or receive their mail by general delivery at a trading post or other location. Some reservation residents have to travel up to seventy miles in one direction to receive mail.” Id. at 12. In Arizona, for example, only 18% of reservation voters outside of Maricopa and Pima Counties have physical addresses and receive

mail at home. The Navajo Nation, the largest reservation in the United States—the size of West Virginia, does not have an addressing program, and most people live in remote communities. The Navajo Reservation has over 10,000 miles of road, 86% of which are unpaved. Residents have “little to no vehicle access, only post office boxes, sometimes shared by multiple families.” Similarly, “[t]here is no home delivery in the Tohono O’odham Nation, where there are 1,900 post office boxes and some cluster mail boxes. . . . Residents come to the post office every two or three weeks to get their mail. Due to the lack of transportation, the condition of the roads, and health issues, some go to post office only once per month.”

The lack of traditional addresses can create barriers related to voter registration, voter ID requirements, and the implementation of voting by mail. Native American voters should not face these barriers for the sole reasons of not having a traditional street address or not being able to receive home mail delivery. However, the lack of formal addresses in Indian Country makes it especially hard for voters to comply with address requirements to register to vote or to produce identification in order to vote on election day. Voters may be placed in the wrong precinct, their ID address may not match the voter rolls, and voters may not receive their election mail timely, if at all. Further, they may not receive election mail because they may only check their mailbox once a month due to the distance they must travel to pick up their mail.

Housing

Intertwined with many aspects of the inherent barriers that Native Americans face in voting is the nationwide housing crisis affecting many tribal communities. In a 2017 report, HUD notes that housing availability on reservations and in other tribal communities are considered “extreme by any standard.” Homelessness amongst Native Americans has largely taken the form of overcrowding. Homeless Native Americans living on Tribal lands depend upon couch surfing as their primary source of shelter. HUD found that between 42,000 and 85,000 people in Tribal areas are couch surfers, staying with friends or relatives only because they had no place of their own. As a result, nearly 16% of Tribal households experience overcrowding compared to the national rate of 2%.

The lack of housing in tribal communities directly affects the ability of Native Americans to register and to vote. In particular, state and local governments structure many of their voting procedures and policies around requirements of voters proving a physical address. This becomes problematic when registering to vote, complying with voter ID laws, receiving official election mail, and verifying your voter registration against the voter roll at the polls.

Access to Polling Locations

Increasing accessibility to voting locations, early voting and election day polling locations, is crucial to the protection of Native American voting rights. In a 2018 survey conducted by the Native American Voting Rights Coalition, 10% of respondents in New Mexico, 15% in Arizona, 7% in Nevada, and 29% in South Dakota identified distance from polling locations as one of the

many problems associated with in-person voting. Early voting opportunities with polling locations hours away effectively amount to no access to in-person early voting in light of the practical effects of requiring voters to travel such distances. The federal district court in Nevada acknowledged the reality that these distances impede voting when it found that a polling location 16 miles away from the Pyramid Lake Paiute Reservation constituted an unburden on voters. This undue burden is not unique to voters living on the Pyramid Lake Paiute Reservation. For example, in Mohave County, Arizona there were only three in-person early voting locations countywide. Most residents of the County lived near one of these locations, however, for the Kaibab-Paiute Tribe the closest of the three locations was located 285 miles away, and required on-reservation voters to travel for five to seven hours if they wanted to vote early in person. These distances and compounded by the socioeconomic difficulties Native American voters face because of a decreased access to public transportation, personal transportation, or requisite funds to travel such distances simply to vote.

Vote by Mail

Vote by mail is not a simple or easy task for Native American voters. Native Americans are less likely to have mail delivered to their homes, especially when living on tribal lands. Many onreservation voters live in rural areas where it is common for mail to arrive late or not at all. Reservation residents often rely on post office boxes that may be 45 minutes to a 2-hour drive away. The difficulties accessing mail make voting by mail difficult because traveling to the P.O. Box to pick up your ballot and then returning it can be an all-day task, without a car, it may be impossible. Voting early by mail on-reservation is largely unreliable. Thus, vote by mail is not as accessible for Native Americans living on reservation as it is for off-reservation voters.

Vote-by-mail can effectively eliminate voting opportunities for some Native American and Alaska Native Communities if no polling locations are available within the tribal communities. In 2008, the Alaskan government eliminated polling locations for Alaska Native villages as part of a “district realignment” that resulted in voters having to travel by plane in order to vote. Alaska contemplated moving to a vote-by-mail system and Alaskan Native voters responded with extreme concerns. Because mail is delivered via plane, Alaska Natives already have to wait two to three weeks to receive mail, and even longer if service is delayed by weather conditions. With federal elections taking place in October and November, delays caused by inclement weather render mailin elections impracticable in Alaska. In 2016, the Pyramid Lake and Walker River Paiute Tribes in Nevada filed a lawsuit prior to the 2016 general election in order to get polling locations on the reservation. In 2016, San Juan County, Utah switched a mail-only voting system and offered inperson early voting only in the majority white part of the County; the Navajo Nation sued to ensure in-person locations and compliance with the language assistance requirements under Section 203 of the Voting Rights Act. In North Dakota, closure of polling locations on the Mandan Hidatsa Reservation resulted in voters having to travel 80-100 miles in order to cast a ballot. For the Kaibab Paiute Tribe in Arizona, voters had to travel 280 miles one way in 2016 and 2018 in order to vote early in person. When Pima County closed early voting on the Pascua Yaqui

Reservation in 2018, Pascua Yaqui voters reported that it took over two hours to participate in early voting using public transportation.

Moving to vote by mail will preclude Native Americans and Alaska Natives living in communities with unreliable mail delivery systems. Native Americans in many states, including Arizona, New Mexico, Nevada, and South Dakota, do not trust mail-in voting systems. Mail in tribal communities is untimely and inconsistent, creating a preference for Native American and Alaskan Native voters to vote in person.

Voter Identification Barriers

As a natural consequence of the socioeconomic conditions already mentioned, Native Americans are less likely to have the forms of identification that satisfy state law. Thirty-six states have laws requiring voters to show some form of identification at the polls. Of these thirty-six states, only nine (Alabama, Arizona, Idaho, Michigan, North Carolina, South Dakota, Utah, Virginia and Washington) explicitly allow tribal identifications as a form of identification. Of the nine states that allow tribal identifications, four explicitly require tribal identifications to have photos.

Although many Tribes issue IDs, not all Tribes do, and even if they do, they may lack a residential address or a photo.

A voter ID law requiring a residential address went into effect in North Dakota right before the 2018 midterm elections. This law expressly excluded the use of PO Boxes as residential addresses. Over 5,000 Native Americans lacked the requisite form of ID to participate in elections, and none of the six reservations has residential addresses. While Tribes took actions to try to issue free Tribal IDs meeting the new requirements, they often expended resources they did not have.

During the 2006 election, 428 Navajos in Arizona voted provisional ballots that were never counted because they did not present identification at the polls. The Navajo Nation sued alleging that the voter ID law violated Section 2 of the Voting Rights Act; the parties settled expanding the acceptable forms of identification to include certain forms of tribal ID. Despite the settlement, valid forms of tribal identification poll workers continue to reject acceptable tribal IDs in each election due to insufficient poll worker training or because of problems arising with non-traditional reservation addresses.

Lack of Access to Voter Registration

Online voter registration is a tool that states continue to adopt and currently thirty-nine states and Washington D.C. employ this new technology. If a Native American voter living on Tribal lands has access to the Internet, many states offering online registration require that a state-issued ID be utilized in the process thus excluding on-reservation voters who lack state identification.

In several areas throughout the United States, Native Americans report lower awareness of how and where to register to vote and in general, report lower levels of activity by third party groups to conduct registration drives. In a recent survey, ten percent of Native Americans cited long distance travel as a factor in their decisions to not register to vote.

Discrimination

In some areas of the country, Native Americans face discrimination in voting. In San Juan County, nonIndians called Navajo voters “savage,” and made other racist comments when they secured an additional representative on the county board of supervisors. In a recent survey conducted by NPR and the Robert Wood Johnson Foundation, they found that “[o]ne in ten Native Americans say they have been personally discriminated against because they are native when trying to vote or participate in politics.” *Discrimination in America: Experiences and Views of Native Americans* (Nov. 2017), available at https://www.rwjf.org/content/dam/farm/reports/surveys_and_polls/2017/rwjf441678/. In this survey, 15% of Native Americans reported that they observed discrimination when Native Americans tried vote.

A recent decision by the Ninth Circuit Court of Appeals found that specific election laws, one discarding ballots cast out of precinct and one prohibiting ballot collection drives, had a discriminatory impact against Native Americans. *Democratic National Committee v. Hobbs*, 948 F.3d 989 (9th Cir. 2020). Furthermore, the court found that the ban on ballot collection was specifically passed with discriminatory intent to eliminate voting efforts utilized by minority communities, including Native Americans. The Ninth Circuit found that the ballot collection law disenfranchised Native Americans and held that it violated Section 2 of the Voting Rights Act and the 15th Amendment.

* * *

NOTES

1. Professor Ferguson-Bohnee’s testimony ended with reference to the Ninth Circuit’s recent decision involving Native disenfranchisement in Arizona. That opinion recounted the lengthy history of aggressive state and local discrimination against Native voters:

In 1912, when Arizona became a State, Indians were not citizens of Arizona or of the United States. In 1924, Congress passed the Indian Citizenship Act, declaring all Indians citizens of the United States and, by extension, of their States of residence. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)).

Indian voting had the potential to change the existing white political power structure of Arizona. See Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 *Ariz. St. L.J.* 1099, 1103–04 (2015) (Ferguson-Bohnee). Indians comprised over 14 percent of the population in Arizona, the second-highest percentage of Indians in any State. *Id.* at 1102 n.19, 1104. Potential power shifts were even greater at the county level. According to the 1910 Census, Indians comprised over 66 percent of the population of Apache County, over 50 percent of Navajo County, over 34 percent of Pinal County, and over 34 percent of Coconino County. *Id.* at 1104.

Enacted under the Fourteenth and Fifteenth Amendments, the Indian Citizenship Act should have given Indians the right to vote in Arizona elections. The Attorney General of Arizona initially agreed that the Act conferred the right to vote, and he suggested in 1924 that precinct boundaries should be expanded to include reservations. *Id.* at 1105. However, in the years leading up to the 1928 election, Arizona’s Governor, county officials, and other politicians sought to prevent Indians from voting. *Id.* at 1106–08. The Governor, in particular, was concerned that Indian voter registration—specifically, registration of approximately 1,500 Navajo voters—would hurt his reelection chances. *Id.* at 1107–08. The Governor sought legal opinions on ways to exclude Indian voters, *id.*, and was advised to “adopt a systematic course of challenging Indians at the time of election.” *Id.* at 1108 (quoting Letter from Samuel L. Pattee to George W.P. Hunt, *Ariz. Governor* (Sept. 22, 1928)). County officials challenged individual Indian voter registrations. *Id.* at 1107–08.

Prior to the 1928 election, two Indian residents of Pima County brought suit challenging the county’s rejection of their voter registration forms. *Id.* at 1108. The Arizona Supreme Court sided with the county. The Arizona constitution forbade anyone who was “under guardianship, non compos mentis, or insane” from voting. *Ariz. Const. art. VII, § 2* (1910). The Court held that Indians were “wards of the nation,” and were therefore “under guardianship” and not eligible to vote. *Porter v. Hall*, 34 *Ariz.* 308, 271 P. 411, 417, 419 (1928).

Arizona barred Indians from voting for the next twenty years. According to the 1940 census, Indians comprised over 11 percent of Arizona’s population. Ferguson-Bohnee at 1111. They were the largest minority group in Arizona. “One-sixth of all Indians in the country lived in Arizona.” *Id.*

After World War II, Arizona’s Indian citizens returned from fighting the Axis powers abroad to fight for the right to vote at home. Frank Harrison, a World War II veteran and member of the Fort McDowell Yavapai Nation, and Harry Austin, another member of the Fort McDowell Yavapai Nation, filed suit against

the State. In 1948, the Arizona Supreme Court overturned its prior decision in *Porter v. Hall. Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456, 463 (1948). Almost a quarter century after enactment of the Indian Citizenship Act of 1924, Indian citizens in Arizona had the legal right to vote.

* * *

For decades thereafter, however, Arizona's Indian citizens often could not exercise that right. The Arizona Supreme Court's decision in *Harrison v. Laveen* did not result in "a large influx" of new voters because Arizona continued to deny Indian citizens—as well as Hispanic and African American citizens—access to the ballot through other means. Berman at 15.

The biggest obstacle to voter registration was Arizona's English literacy test. In 1948, approximately 80 to 90 percent of Indian citizens in Arizona did not speak or read English. Tucker et al., *Voting Rights* at 285; see also Berman at 15. In the 1960s, about half the voting-age population of the Navajo Nation could not pass the English literacy test. Ferguson-Bohnee at 1112 n.88. For Arizona's Indian—and Hispanic and African American—citizens who did speak and read English, discriminatory administration of the literacy test by county registrars often prevented them from registering. See, e.g., Berman, *Arizona Politics* at 75 ("As recently as the 1960s, registrars applied the test to reduce the ability of blacks, Indians and Hispanics to register to vote.").

Voter intimidation during the 1950s and 60s often prevented from voting those American Indian, Hispanic, and African American citizens who had managed to register. According to Dr. Berman:

During the 1960s, it was ... clear that more than the elimination of the literacy test in some areas was going to be needed to protect minorities. Intimidation of minority-group members—Hispanics, African Americans, as well as Native Americans—who wished to vote was ... a fact of life in Arizona. Anglos sometimes challenged minorities at the polls and asked them to read and explain "literacy" cards containing quotations from the U.S. Constitution. These intimidators hoped to frighten or embarrass minorities and discourage them from standing in line to vote. Vote challenges of this nature were undertaken by Republican workers in 1962 in South Phoenix, a largely minority Hispanic and African-American area. ... [In addition,] [p]eople in the non-Native American community, hoping to keep Native Americans away from the polls, told them that involvement could lead to something detrimental, such as

increased taxation, a loss of reservation lands, and an end to their special relationship with the federal government.

Berman at 14–15.

Hobbs, 948 F.3d at 1019-21. The court concluded that those attitudes remained in Arizona, contributing to voting rights discrimination into the third decade of the 21st century.

2. Navajo Nation Attorney General Doreen McPaul also testified about the *Hobbs* case. She explained how Arizona’s voting laws impacted Navajo Nation citizens.

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HEARING ON NATIVE AMERICAN VOTING RIGHTS: EXPLORING BARRIERS AND SOLUTIONS

Doreen McPaul, February 11, 2020

* * *

While the Navajo Nation did not participate directly in *DNC v. Hobbs*, a number of its citizens were involved in the case and the decision has a direct impact on Navajo citizens being able to exercise their right to vote. * * * [T]he decision by the 9th Circuit in *Hobbs* focused exclusively on the application of Section 2 of VRA to laws passed by the Arizona legislature.

Out of Precinct Voting

Arizona allows its counties to choose a vote-center or a precinct-based system for in-person voting. In counties that use vote-center system, registered voters may vote at any polling location in the county. In counties using the precinct-based system, registered voters may vote only at the designated polling place in their precinct. Approximately 90 percent of Arizona’s population lives in counties using the precinct-based system.

On the Navajo Nation, Apache and Coconino county use a precinct-based system and Navajo county uses a vote-center system. If a Navajo voter tries to vote in Apache or Coconino county, she must vote at her precinct voting location in order for her vote to be counted. If she attempts to vote at a polling location outside of her precinct on election day, she can only cast a

provisional ballot. After election day, if election officials determine the voter voted outside of her precinct, prior to the Hobbs decision, they would discard the provisional ballot in its entirety.

Provisional ballots are commonly used by voters in Arizona. In the 2012 general election, more than 22 percent of all in-person ballots cast were provisional ballots. Arizona is at the top of the list of States that cast provisional ballots. Arizona is also the State that rejects the highest percentage of provisional ballots. One of the most frequent reasons for rejecting provisional ballots in Arizona is that they are cast out-of-precinct.

Native Americans are over-represented among out-of-precinct voters by a ratio of 2 to 1, with 1 in every 100 Native American casting a provisional ballot. During the 2014 and 2016 general elections in Apache, Navajo, and Coconino counties, the vast majority of out-of-precinct ballots were in areas that were almost entirely Native American.

Minority voters often vote out-of-precinct ballots due to their high mobility, fluidity in residential locations, and frequent changes to the precinct and polling place schemes. In addition, a majority of Navajo citizens residing on the reservation do not have traditional street addresses. Of the Navajo Nation's 110 chapters, about 70 of them do not have street names or numbered addresses, which adds up to at least 50,000 unmarked properties. Navajo voters' lack of standard addresses can cause their precinct assignment to be based on guesswork. While state registration forms allow a space for an individual to draw a map location of their resident, these maps often do not allow for sufficient detail to properly locate the residence. In 2012, Apache County, Arizona purged 500 Navajo voters because their addresses were deemed "too obscure."

If the location of a voter's residence is unclear, it can result in counties assigning voters to the wrong precincts. If a voter is placed in the wrong precinct, it can lead to confusion about the voter's correct polling place, longer travel times for the voter to find her correct polling place, and to the county ultimately rejecting the ballot if it determines the voter cast her ballot in the wrong precinct.

Another reason Navajo voters may vote out of precinct is that their precinct polling location is different than their Navajo elections polling location for. For Navajo elections, Navajo voters must vote at the chapter house where they are registered. For example, if a Navajo voter is registered with Fort Defiance Chapter her polling location for all Navajo elections will be at the Fort Defiance chapter house. However, even though the Fort Defiance chapter house is a precinct polling location for Apache County, the individual may actually have to go to another precinct polling location because her residence is not in Apache County's Fort Defiance precinct.

In the 2018 general election, a voter casted her ballot at the Fort Defiance Chapter House for the Navajo elections. She then attempted to cast her ballot in the state elections but was told by the poll workers that she was not registered to vote at that precinct. The poll worker did not inform the voter of her correct precinct polling location. Instead, the voter had to retrieve the information from a volunteer outside of the polling location. The volunteer informed the voter that her precinct

polling location was at the Navajo Nation Museum in Window Rock, 6.3 miles away. If the volunteer had not been present it is unclear how the voter would have learned about her polling location.

The difference in tribal and state polling locations causes confusion, and results in voters casting ballots in the wrong precinct. It also results in voters having to drive to multiple locations to vote in tribal and state elections. Another example is the Coal Mine Mesa Chapter in Coconino County. Coal Mine Mesa Chapter is divided among several county voting precincts. A member of the Coal Mine Mesa Chapter may reside in the Cameron precinct or the Coal Mine Mesa precinct depending on the location of their residence. If this individual wants to vote in both the tribal and state election on election day, she would first have to cast her ballot at the Coal Mine Mesa Chapter house. She would then have to drive 43 miles one way to the Cameron Chapter house to vote in the state election.

For all of these reasons, Navajo voters are more likely than their white counterparts to vote out-of-precinct and cast a provisional ballot. Arizona's policy of rejecting a provisional ballot, cast out of precinct, in its entirety has a disparate impact on Navajo voters. The 9th Circuit's decision found that Arizona's policy of entirely discarding out-of-precinct ballots results in disparate burden on minority voters causing in a substantially higher percentage of minority votes than white voters being discarded.

Criminalization of Ballot Collection Assistance

Prior to Arizona's criminalization of ballot collection, it was common for Navajo voters to provide their ballots to third parties. As the 9th Circuit stated, the criminalization of ballot collection has a pronounced effect in rural counties with significant Native American populations who disproportionately lack reliable mail and transportation services.

Many Navajo individuals live far off main roads, on dirt roads that are not easily accessible. There is no public transportation that allows for the pick-up of citizens at their place of residence. Therefore, if an individual did want to take public transport, she would need to first get from her residence to a pick up site. This severely limits the transportation options for elderly and disabled citizens, who are reliant on relatives or friends for rides. In some parts of the Nation, only one in ten families own a vehicle which further limits transportation options.

In addition, Navajos do not have access to reliable mail service. Due to the remote location and lack of traditional addresses on the Nation, many Navajo citizens must utilize P.O. Boxes to receive their mail. Because the Nation spans three states, three counties in Arizona, one county in Utah, and four counties in New Mexico, an individual's P.O. Box location may be in a different state or county than the individual's residence. A person may reside in Arizona but their P.O. Box and Chapter House is in New Mexico (i.e. Red Lake Chapter and Crystal Chapter) or reside in Utah and their P.O. Box in Arizona (Navajo Mountain Chapter). Some individuals reside in Navajo

County but their P.O. Box and local Chapter House is in Coconino County. (i.e. Birdsprings Chapter).

P.O. Boxes are usually shared by multiple family members. Multiple family members will utilize one box because some family members may not be able to afford their own P.O. Box. The sharing of P.O. Boxes by multiple individuals can lead to lost or delayed ballots and voter notifications, as one family may not provide the other individuals on the P.O. Box with their mail in a timely manner, if at all. Even with multiple family members on one P.O. Box, there are not enough P.O. Boxes to serve the community; there are only a limited number of P.O. Boxes available at each location. The post office limits the number of people that can be listed on a P.O. Box, causing individuals who do share P.O. Boxes with their family to be removed from the box.

If an individual is not able to secure a P.O. Box, or is removed from their family box, they may have to travel 30 to 40 miles to the next closest post office. At times this can be in addition to the 30 miles they traveled to reach their local post office. Long travel times to P.O. Boxes make checking the mail a hardship for individuals who are elderly or disabled. It also results in individuals checking their mail less frequently. Some citizens are only able to check their P.O. box once a week or even as little as once every three to four weeks.

For all these reasons many individuals rely on others to help them pick up and drop off mail. These individuals may be related by blood to the voter, or they may be a clan relation. They may also be a non-relation community member who happens to assist the individual at their house. The limitations placed on who can transport a ballot under Arizona law places the burden on low-income, isolated, elderly voters, who may not speak English as a first language, to find a way to get their ballot to a mail-box possibly as far as 30 miles away, in a timely manner.

* * *

NOTES

1. At the same hearing, the Native American Rights Fund provided maps exemplifying the “tyranny of distance” that Alaska Natives and Navajo Nation citizens must travel to vote. We reproduce them here:

Figure 7. Distances from Selected Alaska Native Communities. Graphic by James Tucker

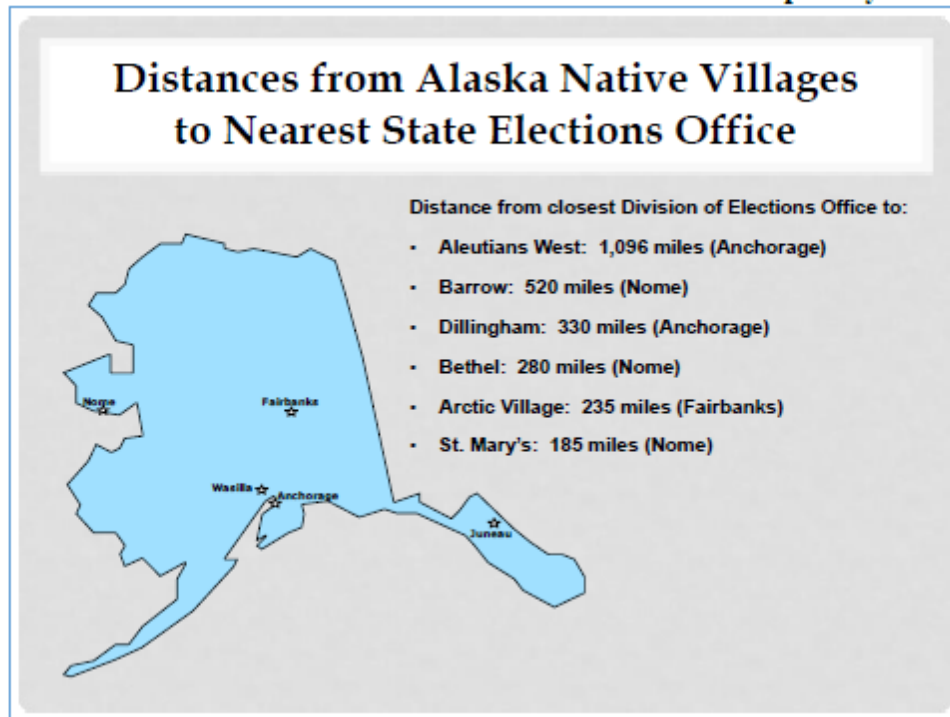


Figure 8. Travel times from the Duckwater Reservation to Nye County, Nevada elections offices. Map by James Tucker



2. The Native American Rights Fund also testified about widespread and specific instances of the overt racism that Indian voters face:

In the fall of 2016 and spring of 2017, NAVRC [Native American Voting Rights Coalition] oversaw one of the most comprehensive in-person surveys ever conducted in Indian Country about barriers faced by Native voters. A total of 2,800 Native voters in four states completed the in-person survey. In all four states, Native voters expressed the greatest trust in their tribal governments.

Although the federal government was identified by respondents as the most trusted of nontribal governments (federal, state, local), the level of trust ranged from a high of just 28 percent in Nevada to a low of only 16.3 percent in South Dakota. Trust of local government in South Dakota was notably bad with only 5.02% of respondents indicating they most trusted the local government, which is especially significant considering it is the local governments that are most often responsible for the administration of elections.

Native Americans have faced sustained assaults against their sovereignty and their right to vote. States ratified Constitutions that specifically excluded Native people from voting, established cultural purity tests to determine if Native people had sufficiently assimilated before granting them the right to vote, and argued Native self-governance was incompatible with participation in state run elections. This legacy of equating voting with an abandonment of cultural and political sovereignty has resulted in a continued skepticism toward voting within Native communities.

Furthermore, states often made the experience of voting embarrassing for Native voters. Not only would states demand that Native vote disavow and prove they were no longer culturally Native American, states would also impose literacy tests that were impossible for Native voters to pass given their lack of fluency in English.

Clerks also turned away Native voters alleging they were incompetent to vote because of the federal trust responsibility over tribes which was referred to in legalese as a “guardianship.” The Arizona Supreme Court accepted this reasoning – that Native Americans were incompetent to vote – in a case that stood for twenty years. [*Porter v. Hall.*] To this day, some elders that can recall humiliating voter experiences discourage younger generations from voting out of disregard for federal and state systems that were cruel to them and a lingering fear that participation in these systems will undermine tribal sovereignty. As one community member explained “People are still apprehensive because it’s been taught we can participate in our elections but that’s not our election. So if there is a county election

or a state election or a federal election, elders tell their children and it's still true today they don't participate in voting because they feel it's an infringement on our sovereignty."

Consequently, distrust between Native Americans and local, state, and federal governments abounds and was testified to throughout the field hearings. A sampling of these sentiments:

- And I think in general, just a lack of, distrust, of government. Years of discrimination and injustice support that American Indians don't trust government and don't want to participate in this government process.
- Why it's so hard for Native Americans to vote in local elections in Los Angeles is . . . just issues between the United States government and Native Americans and how every promise that was made to us has always been broken. So the amount of distrust among Native Americans and the government is not really good.
- Isolating, keeping isolated, because a lot of it was no trust was really in between from the federal, the state, and county side.

Not only do many Native Americans not trust the local, state, and federal governments, they also do not feel supported by these institutions.

As one community member recounted, "[O]ur lives have been severely compromised by the racists and discriminatory impact of boarding schools, public education, and the harmful federal and state policies that go towards Indian families. Colonization for us meant the control of tribal people by the appropriation of our lands. State and federal jurisdictions over our children and the suppression of our tribal traditions and culture."

As these injustices continue to manifest themselves in present day inequities – poverty, lack of housing, inadequate roads and infrastructure, to name a few – voters disengage from the political process and become apathetic, firm in the belief that nothing will ever change. One witness described how his parents would tell him "We don't get no help from the county. Why should I vote? . . . Leave them alone. Don't bother. That's their system, don't bother."

A tribal councilman explained how "we are from a very rural area, the poorest county in California. We, like most poor communities, have an issue with people wanting to vote. It's not the access to vote. It is the desire to vote. There's no passion their vote sometimes." A tribal member reflected how "[y]ou know, alcoholism, high unemployment and things like that that just affect our ability to feel good about ourselves and really want to voice our opinions and vote."

But discrimination is not just a relic of the past or the effects of past wrongs. Native Americans continue to experience overt discrimination in their everyday lives and when they attempt to vote. In Arizona, racial tensions are so fraught between the Kaibab Band of Paiute Indians and the border town that the pipes sending water to the reservation are regularly blocked by border town residents. In Utah, a witness' Native grandson attempted to play baseball and was accosted by a non-Native woman who "started screaming at him, 'Who in the hell do you think you are? You think you're that good? You damn welfare people are starting to take over.'"

Paternalistic racist attitudes are also prevalent. A Native high-schooler was denied a place on the school volleyball A team because, although she was better than girls on the A team, "the coach said he thought she would feel more comfortable on the B team. And she was so angry . . . she ended up quitting."

These racist attitudes did not stop at residents. Voting officials also displayed racist attitudes, whether intentionally or not. In South Dakota, a poll worker described as a "[n]ice little old lady" was concerned about where she would be sitting while servicing a Native American community and asked field organizers where's a place "that's going to be safe? We don't want to be around people who are drinking. We don't want to be around, you know people who are going to harass us."

Racist attitudes tangibly effect the ability for Native Americans to vote, forcing voters to register and cast their ballots in substandard facilities and hostile conditions. For example:

- In South Dakota, voters were forced to vote in a repurposed chicken coop
- In Montana, the number of registration cards accepted by county officials from Native community organizations was arbitrarily limited to 70 after community organizers were hassled and given "dirty looks" for bringing in too many at a time.
- In South Dakota, the Buffalo County Seat was located Gann Valley which had a population of 12 and was the smallest county seat in the nation. As county seat, the residents of Gann Valley were provided a fully funded polling place that offers early voting and registration opportunities in line with the rest of the state. Twenty-five miles away on the Crow Creek reservation, however, Fort Thompson's 1,200 residents had no early voting location in 2014 and only one satellite voting site open on 2014 Election Day. Despite calls from activists to provide a polling location in Fort Thompson and despite HAVA funding being available to open a polling location in Fort Thompson, the county auditor refused to open a polling location and instead decided to forgo usage of the funds.

- Voters are regularly forced to travel to border towns to cast a vote where there are “issues” and “hostile attitude[s]” and “racist stereotypes” where community members describe being “too intimidated to get the nearest polling” location⁸³ since the county seat “may or may not be welcoming to Native Americans coming from a reservation community.”

These negative experiences are exacerbated and reinforced today when Native Americans are denied equal opportunities to register to vote and to cast ballots that are counted. An on-reservation polling place would mean Native Americans would not need to interact with communities and county officials who are hostile toward them. It would also mean tribal officials would not need to rely on the goodwill of a county official in order to secure equal access to the ballot box for their tribal members. Indeed, it is these local discriminatory actions that call out for federal relief.

Not only would federal relief prevent some of the intentional and unintentional barriers to the ballot box facing Native Americans today, federal action would also result in significant savings. Today, discrimination is only addressed on an ad hoc basis, usually through litigation. Native activists have a stunning record of success. Indeed, this success is only partly attributable to the skill of their lawyers. Most often, however, it is the dismal facts and stark injustices – which judges who hail from all geographic and political backgrounds – have been unable to ignore. In the past 12 years there have been 18 cases involving Indian voting rights. Of these eighteen cases, the Native plaintiffs either won or settled to their satisfaction all but one or two. When combined with the cases prior to 2008, the total number of cases is 92 at the time of the printing of our Field Hearing Report, with victories or successful settlements in 85 cases and partial victories in two cases. That is a success rate of 92 percent. As a result, states and local budgets often face not only the cost of ensuring equal access to the ballot box for their Native constituents, but also hefty attorneys’ fees when a case is proved. Federal action would clarify responsibilities toward Native constituents and save resources.

In sum, as one tribal member explained “[s]o, yes, I would like you, person at the poll, to respect me as a Native American, respect my culture. But if you can’t do that, because if you’re going to tell me, say: Well I’m going to have to learn about African-Americans, Hispanics, Mexicans, or whatever they’re calling us, then do this. Treat me as a human being and be respectful to my elders, respectful to my children.” Likewise, we ask for no more, and no less, than an equal opportunity to vote for all Native Americans.

* * *

Written Statement of Jacqueline De León, Staff Attorney for the Native American Rights Fund, Before the Subcommittee on Elections Committee on Administration, United States House of Representatives, at 13-17 (February 11, 2020).

2. On July 1, 2021, the Supreme Court issued *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021). The Court reversed *Hobbs*, holding that vote denial by states based on partisanship did not violate Section 2 of the Voting Rights Act even though it disproportionately affects voters on the basis of race.

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 claims ordinances, a potentially very regressive move under established nation-building theory. Tribes that have purchased liability

* 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>.

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 potentially 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.

Since the Court’s decision in *Upper Skagit*, lower courts have held that tribal immunity bars quiet title actions and municipal foreclosure proceedings related to lands owned by tribes in

fee. *E.g.*, *Cayuga Indian Nation of N.Y. v. Seneca County, N.Y.*, 978 F.3d 829 (2d Cir. 2020), cert. denied., 2021 WL 2301979 (June 7, 2021); *Self v. Cher-Ae Heights Indian Community of Trinidad Rancheria*, 274 Cal.Rptr.3d 255 (Cal. Ct. App. 2021).

6. In *In re Greektown Holdings, LLC*, 917 F.3d 451 (6th Cir. 2019), the court held that the Bankruptcy Act did not unequivocally abrogate tribal immunity. *Id.* at 460-63. The court relied on *Upper Skagit* and *Bay Mills*:

“Determining the limits on the sovereign immunity held by Indians is a grave question; the answer will affect all tribes, not just the one before us.” *Upper Skagit Indian Tribe v. Lundgren*, — U.S. —, 138 S.Ct. 1649, 1654, 200 L.Ed.2d 931 (2018). It is the graveness of this question that led to the requirement that Congress unequivocally express its intent in order to abrogate tribal sovereign immunity. And that requirement “reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.” *Bay Mills*, 572 U.S. at 790, 134 S.Ct. 2024. Thus, the Supreme Court has repeatedly reaffirmed the requirement, and warned lower courts against abrogating tribal sovereign immunity if there is any doubt about Congress’ intent. See *id.* at 800, 134 S.Ct. 2024 (“[I]t is fundamentally Congress’ job, not ours, to determine whether or how to limit tribal immunity.”); *Kiowa*, 523 U.S. at 759, 118 S.Ct. 1700 (“The capacity of the Legislative Branch to address [this] issue by comprehensive legislation counsels some caution by us in this area.”); *Santa Clara Pueblo*, 436 U.S. at 60, 98 S.Ct. 1670 (“[A] proper respect both for tribal sovereignty and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.”). We heed those warnings, and hold that Congress did not unequivocally express an intent to abrogate tribal sovereign immunity in 11 U.S.C. §§ 106, 101(27).

Id. at 462-63. The court rejected the reasoning of a case decided by the Ninth Circuit prior to *Bay Mills* that held the opposite. See *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1061 (9th Cir. 2004). A similar case is pending in the First Circuit. See *In re Coughlin* (1st Cir.) (No. 21-1153). Briefs are available here: <https://turtletalk.blog/2021/07/26/first-circuit-briefs-in-challenge-to-tribal-immunity-under-bankruptcy-act/>.

After the notes on page 507, add:

SECTION F.

INDIAN COUNTRY HEALTH CARE

[Review the Health Care Note from pages 431-433.]

RESTATEMENT OF THE LAW OF AMERICAN INDIANS

American Law Institute, 2015

Tentative Draft No. 1, § 4, Reporters' Notes, at 81-82

[T]reaties provided, at least in part, for the health care of the tribe. See, for example:

- Treaty with the Makah, art. 11, Jan. 31, 1855, 12 Stat. 939 (“And the United States further agree to employ a physician to reside at the said central agency, or at such other school should one be established, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States and not deducted from the annuities.”);

- Treaty with the Klamath, etc., art. 5, Oct. 14, 1864, 16 Stat. 707 (“The United States further engage to furnish and pay for the services and subsistence ... for the term of twenty years of one physician....”);

- Treaty with the Kiowa and Comanche, art. 14, Oct. 21, 1867, 15 Stat. 581 (“The United States hereby agrees to furnish annually to the Indians the physician..., and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such [person].”).

Courts also recognized a federal government duty to provide health care to Indians. E.g., *United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyoming*, 304 U.S. 111, 113-36 114 (1938) (“The United States also agreed to provide . . . a physician. . . .”); *United States v. Michigan*, 471 F. Supp. 192, 234 (W.D. 1979) (“Money was provided to purchase ... medicine [and] the services of a physician....”), modified, 653 F.2d 277 (6th Cir.), cert. denied, 454 U.S. 1124 (1981). Congress also provided health care for specific tribes in special statutes. E.g., *United States v. State Tax Commission of the State of Mississippi*, 535 F.2d 300, 303 (5th Cir. 1976) (“The entire statute (40 Stat. at 573) reads as follows . . . ; For the relief of distress among the full-blood Choctaw Indians of Mississippi, including the pay of one special agent, who shall be a

physician. . . .”); *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1377 (Fed. Cir. 2000) (“These Acts appropriated funds . . . to pay a physician. . . .”), cert. denied, 532 U.S. 941 (2001).

Congress’s provision of health-care services to Indians began in the earliest decades of the American republic. See Betty Pfefferbaum, Rennard Strickland, Everett R. Rhoades and Rose L. Pfefferbaum, *Learning How to Heal: An Analysis of the History, Policy, and Framework of Indian Health Care*, 20 *Am. Indian L. Rev.* 366, 368-369 (1995/1996); Indian Health Care Improvement Act, Hearings before the Subcommittee on Health and the Environment of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 65 (1976) (Statement of Everett R. Rhoades, M.D., President, Assn. of American Indian Physicians).

The primary Congressional authorization for the expenditure of federal resources for the general welfare of American Indians remains the Snyder Act of 1921, Pub. L. 67-85, Nov. 21, 1921, 42 Stat. 208, codified at 25 U.S.C. § 13. See also Koral E. Fusselman, Note, *Native American Health Care: Is the Indian Health Care Reauthorization and Improvement Act of 2009 Enough to Address Persistent Health Problems within the Native American Community?*, 18 *Wash. & Lee J. Civil Rts. & Soc. Just.* 389, 395 (2012). Congress transferred primary federal responsibility for Indian health-care administration to the Indian Health Service in 1955. See Transfer Act, Pub. L. 83-568, § 1, 68 Stat. 674 (1954). See also Betty Pfefferbaum, Rennard Strickland, Everett R. Rhoades and Rose L. Pfefferbaum, *Learning How to Heal: An Analysis of the History, Policy, and Framework of Indian Health Care*, 20 *Am. Indian L. Rev.* 366, 382 (1995/1996).

The modern federal statutory framework in which Congress fulfills its trust obligations to provide health care to American Indians is the Indian Health Care Improvement Act of 1976. See Pub. L. 94-437, 90 Stat. 1400, codified in part at 25 U.S.C. § 1601 et seq. * * *

NOTES

1. In 1921, Congress passed the Snyder Act, the general federal appropriations authority for Indian affairs programs and services. It provides in relevant part:

The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:

General support and civilization, including education.

For relief of distress and conservation of health.

* * *

25 U.S.C. § 13.

2. In general, American Indians who are members of federal recognized Indian tribes are eligible to receive health services from any Indian health care facility so long as they reside “on or near” an Indian reservation.

Morton v. Ruiz

United States Supreme Court, 1974

415 U.S. 199; 94 S.Ct. 1055; 39 L.Ed.2d 270

Justice BLACKMUN delivered the opinion for a unanimous Court.

This case presents a narrow but important issue in the administration of the federal general assistance program for needy Indians:

Are general assistance benefits available only to those Indians living on reservations in the United States (or in areas regulated by the Bureau of Indian Affairs in Alaska and Oklahoma), and are they thus unavailable to Indians (outside Alaska and Oklahoma) living off, although near, a reservation?

* * *

I

The pertinent facts are agreed upon, although, as to some, the petitioner Secretary denies knowledge but does not dispute them. App. 45—48. The respondents, Ramon Ruiz and his wife, Anita, are Tohono O’odham* Indians and United States citizens. In 1940 they left the Tohono O’odham Reservation in Arizona to seek employment 15 miles away at the Phelps-Dodge copper mines at Ajo. Mr. Ruiz found work there, and they settled in a community at Ajo called the ‘Indian Village’ and populated almost entirely by Tohono O’odham Indians. Practically all the land and most of the homes in the Village are owned or rented by Phelps-Dodge. The Ruizes have lived in Ajo continuously since 1940 and have been in their present residence since 1947. A minor daughter lives with them. They speak and understand the O’odham language but only limited English. Apart from Mr. Ruiz’ employment with Phelps-Dodge, they have not been assimilated into the dominant culture, and they appear to have maintained a close tie with the nearby reservation.

* Editors’ Note: The original Supreme Court opinion referred to the “P*ago Indians” and the “P*ago Indian Reservation.” It is our understanding that the word “P*ago” is a racial epithet. The relevant tribe is now known as the Tohono O’odham Nation. We will use this name and its variations in our edited text.

In July 1967, 27 years after the Ruizes moved to Ajo, the mine where he worked was shut down by a strike. It remained closed until the following March. While the strike was in progress, Mr. Ruiz' sole income was a \$15 per week striker's benefit paid by the union. He sought welfare assistance from the State of Arizona but this was denied because of the State's apparent policy that striking workers are not eligible for general assistance or emergency relief.

On December 11, 1967, Mr. Ruiz applied for general assistance benefits from the Bureau of Indian Affairs (BIA). He was immediately notified by letter that he was ineligible for general assistance because of the provisions (in effect since 1952) in 66 Indian Affairs Manual 3.1.4 (1965) that eligibility is limited to Indians living 'on reservations' and in jurisdictions under the BIA in Alaska and Oklahoma. An appeal to the Superintendent . . . was unsuccessful. A further appeal to the Phoenix Area Director of the BIA led to a hearing, but this, too, proved unsuccessful. The sole ground for the denial of general assistance benefits was that the Ruizes resided outside the boundaries of the Tohono O'odham Reservation.

* * *

II

The Snyder Act,⁷ 42 Stat. 208, 25 U.S.C. § 13, approved November 2, 1921, provides the underlying congressional authority for most BIA activities including, in particular and importantly, the general assistance program. Prior to the Act, there was no such general authorization. As a result, appropriation requests made by the House Committee on Indian Affairs were frequently stricken on the House floor by point-of-order objections. See H.R.Rep.No. 275, 67th Cong., 1st Sess. (1921); S.Rep.No.294, 67th Cong., 1st Sess. (1921); 61 Cong.Rec. 4659—4672 (1921). The Snyder Act was designed to remedy this situation. It is comprehensively worded for the apparent purpose of avoiding these point-of-order motions to strike. Since the passage of the Act, the BIA has presented its budget requests without further interruption of that kind and Congress has enacted appropriation bills annually in response to the requests.

* * *

* * * It is to be that neither the language of the Snyder Act nor that of the Appropriations Act imposes any geographical limitation on the availability of general assistance benefits and does not prescribe eligibility requirements or the details of any program. Instead, the Snyder Act states that the BIA (under the supervision of the Secretary) 'shall direct, supervise, and expend . . . for the benefit, care, and assistance of the Indians throughout the United States' for the stated purposes including, as the two purposes first described, '(g)eneral support' and 'relief of distress.' This is broadly phrased material and obviously is intended to include all BIA activities.

The general assistance program is designed by the BIA to provide direct financial aid to needy Indians where other channels of relief, federal, state, and tribal, are not available. Benefits generally are paid on a scale equivalent to the State's welfare payments. Any Indian, whether

living on a reservation or elsewhere, may be eligible for benefits under the various social security programs in which his State participates and no limitation may be placed on social security benefits because of an Indian claimant's residence on a reservation.

* * *

III

We are confronted, therefore, with the issues whether the geographical limitation placed on general assistance eligibility by the BIA is consistent with congressional intent and the meaning of the applicable statutes, or, to phrase it somewhat differently, whether the congressional appropriations are properly limited by the BIA's restrictions, and, if so, whether the limitation withstands constitutional analysis.

* * *

IV

There is, of course, some force in the Secretary's argument and in the facts that the BIA's budget requests consistently contained 'on reservations' general assistance language and that there was testimony before successive appropriations subcommittees to the effect that assistance of this kind was customarily so restricted. Nonetheless, our examination of this and other material leads us to a conclusion contrary to that urged by the Secretary.

A

In actual practice general assistance clearly has not been limited to reservation Indians. Indeed, the Manual's provision, . . . so heavily relied upon by the Secretary, itself provides that general assistance is available to nonreservation Indians in Alaska and Oklahoma. The rationale proffered for this is:

'The situation of Indians in Alaska and Oklahoma has historically been unique. Much of Oklahoma was once set aside as an Indian Territory, and though most of the reservations have been abolished, there remains a large area of concentrated Indian population with tribal organization, living on land held in trust by the United States A similar situation of large concentrations of native Americans, with few reservations and substantial separate legislation prevails in Alaska The responsibilities of the Bureau of Indian Affairs in these jurisdictions are substantially similar to the Bureau's responsibilities on the reservations.' Brief for Petitioner 21.

While this exception is not necessarily irrational, it definitely demonstrates that the limitation in the budget requests is not rigidly followed by the BIA, inasmuch as most off-reservation Indians in the two named States are regarded as eligible for general assistance funds.

If, as the Secretary urges, we are to assume that Congress has been aware of the Manual's provision, Congress was just as clearly on notice that the words 'on reservations' did not possess their literal meaning in that context. Surely, some of the reasons for the Alaska-Oklahoma exception are equally applicable to Indians of the Ruiz class.

B

There was testimony in several of the hearings that the BIA, in fact, was not limiting general assistance to those within reservation boundaries and, on more than one occasion, Congress was notified that exceptions were being made where they were deemed appropriate. Notwithstanding the Manual, at least three categories of off-reservation Indians outside Alaska and Oklahoma have been treated as eligible for general assistance. The first is the Indian who relocates in the city through the BIA relocation program and who then is eligible for general assistance for the period of time required for him, under state law, to establish residence in the new location. The second evidently is the Indian from the Turtle Mountain Reservation in North Dakota who lives on trust land near but apart from that reservation. The third appears to be the Indian residing in Rapid City, South Dakota.

In addition, although not controlling, it is not irrelevant that the 'on reservations' limitation in the budget requests has never appeared in the final appropriation bills.

C

Even more important is the fact that, for many years, to and including the appropriation year at issue, the BIA itself made continual representations to the appropriations subcommittees that nonurban Indians living 'near' a reservation were eligible for BIA services. Although, to be sure, several passages in the legislative history and the formal budget requests have defined eligibility in terms of Indians living 'on reservations,' the BIA, not infrequently, has indicated that living 'on or near' a reservation equates with living 'on' it.

* * *

Thus, the usual practice of the BIA has been to represent to Congress that 'on or near' is the equivalent of 'on' for purposes of welfare service eligibility, and that the successive budget requests were for a universe of Indians living 'on or near' and not just for those living directly 'on.' In addition, the BIA has continually treated persons 'off' the reservations as not 'on or near.' In the light of this rather consistent legislative history, it is understandable that the Secretary now argues that general assistance has not been available to those 'off' the reservation. We do not accept the argument, however, that the history indicates that general assistance was thereby restricted to those within the physical boundaries. To the contrary, that history clearly shows that Congress was led to believe that the programs were being made available to those unassimilated needy Indians living near the reservation as well as to those living 'on.' Certainly, a fair reading of the congressional proceedings up to and including the fiscal 1968 hearing can lead only to the

conclusion that Indians situated near the reservation, such as the Ruizes, were covered by the authorization.

* * *

D

Wholly aside from this appropriation subcommittee legislative history, the Secretary suggests that Congress, each year since 1952, appropriated only in accord with the ‘on reservations’ limitation contained in the BIA Manual. By legislating annually ‘in the light of (this) clear provision,’ the Secretary argues, Congress implicitly ratified the BIA policy. This argument, also, is not convincing. The limitation has not been published in the Federal Register or in the Code of Federal Regulations, and there is nothing in the legislative history to show that the Manual’s provision was brought to the subcommittees’ attention, let alone to the entire Congress. To assume that Congress was aware of this provision, contained only in an internally circulated BIA document, would be most strained. But, even assuming that Congress was fully cognizant of the Manual’s limitation when the 1958 appropriation was made, the language of geographic restriction in the Manual must be considered in conjunction with the representations consistently made. There is no reason to assume that Congress did not equate the ‘on reservations’ language with the ‘on or near’ category that continuously was described as the service area. In the light of the Manual’s particular inclusion of Oklahoma and Alaska off-reservation Indians, it would seem that this interpretation of the provision would have been the logical one for anyone in Congress, who in fact was aware of it, to accept.

V

* * *

The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296 . . . (1942); *Board of County Comm’rs v. Seber*, 318 U.S. 705 . . . (1943). Particularly here, where the BIA has continually represented to Congress, when seeking funds, that Indians living near reservations are within the service area, it is essential that the legitimate expectation of these needy Indians not be extinguished by what amounts to an unpublished ad hoc determination of the agency that was not promulgated in accordance with its own procedures, to say nothing of those of the Administrative Procedure Act. The denial of benefits to these respondents under such circumstances is inconsistent with ‘the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.’ *Seminole Nation v. United States*, 316 U.S., at 296 . . . , see *Squire v. Capoeman*, 351 U.S. 1 . . . (1956). Before benefits may be denied to these otherwise entitled Indians, the BIA must first promulgate eligibility requirements according to established procedures.

* * *

In view of our disposition of the statutory issue, we do not reach the respondents' constitutional arguments. We intimate no views as to them.

The judgment of the Court of Appeals is affirmed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Affirmed and remanded.

NOTES

1. The *Ruiz* Court agreed with the Secretary of the Interior that the agency was free to limit its services to Indian people provided the agency made such a request to Congress in the appropriations process.

2. Nearly two decades later, in *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court held, seemingly contrary to *Ruiz*, that the Indian Health Service could terminate its Indian Children's Program without complying with the Administrative Procedures Act (APA), 5 U.S.C. § 701 et seq. The children's program provided services to disabled children, but had never been explicitly authorized or mandated by Congress. Instead, the Service funded the program from lump sum funding appropriated by Congress.

The Court distinguished *Ruiz* on the ground that the earlier case did not involve an APA challenge:

Nor, finally, do we think that the Court of Appeals was on solid ground in holding that *Morton v. Ruiz*, 415 U.S. 199 . . . (1974), required the Service to abide by the APA's notice-and-comment provisions before terminating the Program. Those provisions were not at issue in *Ruiz*, where respondents challenged a provision, contained in a Bureau of Indian Affairs manual, that restricted eligibility for Indian assistance. Although the Bureau's own regulations required it to publish the provision in the Federal Register, the Bureau had failed to do so. *Id.*, at 233–234 We held that the Bureau's failure to abide by its own procedures rendered the provision invalid, stating that, under those circumstances, the denial of benefits would be “inconsistent with ‘the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.’” *Id.*, at 236 . . . (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 . . . (1942)). No such circumstances exist here.

Lincoln, 508 U.S. at 199.

3. Even where Congress has authorized programs, chronic underfunding is endemic. In two important reports, the United States Commission on Civil Rights condemned the United States for its failures in adequately fulfilling its trust duties to Indian people, particularly in the health care context. United States Commission on Civil Rights, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* (Dec. 2018); *A Quiet Crisis: Federal Funding and Unmet Needs In Indian Country* (July 2003).

4. Federal courts have not ordered the government to provide adequate services to Indian people. E.g., *Gilbert v. Weahkee*, 441 F.Supp.3d 799, 813 (D.S.D. 2020) (rejecting claim by individual Indians for additional health care services: “Plaintiffs have not successfully stated a breach of trust claim as individuals. . . . Stated differently, plaintiffs have not shown the treaty—or any other source of law—creates an individual trust duty the United States breached by entering into a self-determination contract with the Health Board.”), appeal docketed (8th Cir.) (No. 20-1484); *Hammitte v. Leavitt*, 2007 WL 3013267, at *8 (E.D. Mich., Oct. 11, 2007) (rejecting urban Indians’ claim to essential health care services: “Congress makes a lump sum appropriation for Indian health services and Indian services to the IHS and it is up to IHS to allocate the funds in accordance with the statutory obligations and objectives, including funding for urban Native Americans. In other words, Congress has left to the IHS’s discretion the allocation of appropriated funds among its units that provide health care services to Native Americans. This includes tribally operated programs and urban Indian programs.”).

5. The consequences of underfunding and poor health care services for American Indians are felt daily, but national health crises have brought those inequities into sharp – and tragic – relief:

The 1918 and 1919 influenza pandemic devastated American Indian communities. In several states in the west and southwest – Arizona, Colorado, Mississippi, New Mexico, and Utah – 4% to 6% of American Indian people died. “Among Alaskan Natives, entire communities were stricken, and some towns were abandoned.” Nearly 3,400 Diné (Navajo) people walked on during this time. Overall, 2% of American Indian people walked on because of the pandemic.

A century ago, the federal government treated Indian people as wards of the United States under a repressive guardianship concocted by Congress and the Executive branch. Many Indians couldn’t vote. It was a crime to sell liquor to an Indian. Allotment of Indian reservations, and its aftermath, was in full force. Tribal property rights were still considered inferior to those of federal, state, and local property rights.

When the 1918 pandemic hit Indian country, the federal government’s response was abysmally inadequate, bordering on non-existent. Locals in Anderson, California forced Indian people into isolation in order to protect themselves. More than 100 students were sick at Stewart Indian School in Nevada,

and the matron of the school died (no word in local news about how many Indian children walked on). More than 300 students were sick at Greenville Indian School in California, with at least one death reported. This is just a snapshot of the horror show that was Indian country public health a century ago.

Perhaps the worst part of the story was how the federal government congratulated itself on a job well done, gaslighting writ large. In early 1919, the spokesman for the United States Public Health Service, Dr. Grady Shytle, claimed the mortality rate of Indian people was less than 2%. But by December of 1919, the government admitted that at least 6,000 Indian people died during the pandemic of 1918 and 1919, meaning that a horrific rate of 9% of all Indian cases resulted in death (while worldwide only 2.8% of cases resulted in death).

It appears the COVID-19 pandemic sadly may have a similar impact on Indian people once again. Indian people are disproportionately poor and unhealthy, the awful consequence of centuries of colonialism. Many Indian people live in rural areas, where American health care services are weakest. Professor Kirsten Carlson reported that there is a drastic shortage of intensive care beds in Indian Health Service hospitals. Many Indian tribes depend heavily on gaming and other enterprises to supplement federal self-determination appropriations. The pandemic forced the closure of virtually all Indian gaming facilities, strangling the major revenue stream for tribes. Add in the closure of tribal government operations, and the vast majority of Indian country workers are currently furloughed.

Matthew L.M. Fletcher, *Indian Lives Matter: Pandemics and Inherent Tribal Powers*, 73 *Stan. L. Rev.* Online 38, 42-44 (2020), available at <https://www.stanfordlawreview.org/online/indian-lives-matter/>. See also Kirsten Carlson, *Tribal Leaders Face Great Need and Don't Have Enough Resources To Respond to the Coronavirus Pandemic*, *Conversation* (Mar. 25, 2020), available at <https://theconversation.com/tribal-leaders-face-great-need-and-dont-have-enough-resources-to-respond-to-the-coronavirus-pandemic-134372>.

The National Indian Health Board provided testimony to Congress detailing the impact of the COVID-19 disease on Indian country:

The Numbers: COVID-19 in Indian Country

As of June 24, IHS has reported 18,240 positive cases, with roughly 67% of positive cases being reported out of the Phoenix and Navajo IHS Areas alone. However, IHS numbers are highly likely to be underrepresented because case reporting by Tribal health programs, which constitute roughly two-thirds of the Indian health system, are voluntary. According to data analysis by APM Research Lab, AI/Ns are experiencing the second highest aggregated COVID-19 death rate at 36 deaths per 100,000. The CDC reported that from March through June 13, 2020

age-adjusted COVID-19 hospitalization rates among AI/ANs were higher than any other ethnicity, at 221.2 per 100,000. Reporting by state health departments has further highlighted disparities among AI/ANs.

- In New Mexico, AI/ANs represent roughly 8% of the population, yet account for over 53% percent of all COVID-19 cases.
- As of this writing, the Oyate Health Center in South Dakota has conducted 544 COVID-19 tests, with 114 confirmed positive case results (20.9%). Of those 114 cases, 13 were reported between June 10 and June 16.
- In Wyoming, AI/ANs account for over 27% of all COVID-19 cases statewide despite representing only 2.9% of the state population.
- Similarly in Montana, where AI/ANs constitute about 6.6% of the state population, over 13% of confirmed COVID-19 cases are among AI/ANs.
- In Arizona where AI/ANs account for roughly 5% of the state population, as of June 28, 2020 they represented 15% of those hospitalized for COVID and roughly 9% of all COVID cases statewide.

Most poignantly, in a data visualization of COVID-19 case rates per 100,000 by Tribal Nation created by the American Indian Studies Center at the University of California Los Angeles, it was found that if Tribes were states, the top five infection rates nationwide would all be Tribal Nations.

The COVID-19 pandemic has further exposed the vast deficiencies in health care access, quality, and availability that exists across the Indian health system. Prior to COVID-19, the Indian health system was beset by an average 25% clinician vacancy rate, and a hospital system that remains over four times older than the national hospital system. Limited intensive care unit (ICU) capacity to address a surge of COVID cases across many IHS and Tribal facilities has strained limited Purchased/Referred Care (PRC) dollars, creating further challenges that are contributing to rationing of critical health care services. Overall, per capita spending within IHS (\$3,779) is at only 40% of national health spending (\$9,409), making IHS the most chronically underfunded federal health care entity nationwide and thus severely ill-equipped to respond to COVID-19.

For example, while CDC has noted that hand-washing is the number one way of protecting against a COVID-19 infection, water and sanitation infrastructure in Indian Country is significantly underdeveloped. Approximately 6% of AI/AN households lack access to running water, compared to less than half of one percent of White households nationwide. In Alaska, the Department of Environmental Conservation reports that over 3,300 rural Alaskan homes across 30 predominately

Alaskan Native Villages lack running water, forcing use of “honey buckets” that are disposed in environmentally hazardous sewage lagoons.

Because of the sordid history of mineral mining on Navajo lands, groundwater on or near the Navajo reservation has been shown to have dangerously high levels of arsenic and uranium. As a result, roughly 30% of Navajo homes lack access to a municipal water supply, making the cost of water for Navajo households roughly 71 times higher than the cost of water in urban areas with municipal water access. In fact, in a new peer-reviewed study of 287 Tribal reservations and homelands, COVID-19 cases were found to be 10.83 times more likely in homes without indoor plumbing.

Gaps in COVID-19 AI/AN Public Health Data

These existing capacity and resource shortages meant that the Indian health system was woefully unprepared to prepare, prevent, and respond to the COVID-19 pandemic. Available data on AI/AN COVID-19 health disparities reaffirms this central point. Unfortunately, because of high rates of misclassification and undersampling of AI/AN populations in federal, state, and local public health disease surveillance systems, available data likely significantly underrepresents the scope of the impact in Indian Country. To be clear, misclassification of AI/ANs on disease surveillance systems is not unique to COVID-19.

Previous studies have found significantly higher rates of misclassification outside of IHS Contract Health Service Delivery Areas (CHSDA); for all-cause mortality rates in states like Oklahoma; for HIV infections among AI/ANs across five states; and on death certificates reported to CDC. However, the issue has taken a new level of urgency given the unprecedented devastation of this pandemic on underserved communities.

Multiple states with large AI/AN populations including but not limited to Minnesota, Michigan, New York and California are reporting thousands of COVID cases without any information on patient ethnicity, or categorizing cases as “other” on demographic forms. In California for instance, the state has noted that race/ethnicity data is missing for nearly 30% of reported cases. Multiple studies have demonstrated that AI/ANs are more likely to be misclassified as “other” or are omitted from surveillance systems entirely.

Thus, these structural challenges in data reporting only serve to render invisible the disparate impact of COVID19 in Indian Country. Relatedly, Tribal Epidemiology Centers (TEC) continue to face significant barriers in exercising their statutory public health authorities by facing major hurdles in accessing federal and state public health surveillance systems, including for COVID-19 data. These

issues continue to have a direct negative effect on health outcomes for AI/AN Peoples, and are exacerbating the impact of COVID-19 in Indian Country.

Unfortunately, the adverse impacts of COVID-19 in Indian Country extend far beyond these sobering public health statistics. Tribal economies have been shuttered by social distancing guidelines that have also severely strained Tribal healthcare budgets. Because of the chronic underfunding of IHS, Tribal governments have innovatively found ways of maximizing third party reimbursements from payers like Medicare, Medicaid, and private insurance. For many self-governance Tribes, third party collections can constitute up to 60% of their healthcare operating budgets. However, because of cancellations of non-emergent care procedures in response to COVID-19, many Tribes have experienced third party reimbursement shortfalls ranging from \$800,000 to \$5 million per Tribe, per month. In a hearing before House Interior Appropriations on June 11, 2020, HIS Director Rear Admiral (RADM) Weahkee stated that third party collections have plummeted 30-80% below last year's collections levels, and that it would likely take years to recoup these losses.

These funding shortfalls have forced Tribes across the lower 48 and Alaska to furlough hundreds of workers, curtail available healthcare services, or close down clinics entirely. For example, Tribes in the Bemidji Area reported that nearly 20% of their healthcare system and 35% of their government services staff were forced to be furloughed due to revenue shortfalls. Meanwhile, Tribal business closures have compounded the devastation of the COVID pandemic in Indian Country. According to the Harvard Project on American Indian Economic Development (HPAIED), before COVID-19 hit, Tribal governments and businesses employed 1.1 million people and supported over \$49.5 billion in wages, with Tribal gaming enterprises alone responsible for injecting \$12.5 billion annually into Tribal programs. During the six week period (through May 4, 2020) whereby all 500 Tribal casinos were closed in response to COVID-19 guidelines, Tribal communities lost \$4.4 billion in economic activity, with 296,000 individuals out of work and nearly \$1 billion in lost wages.

Extrapolated across the entire U.S. economy, collectively \$13.1 billion in economic activity was lost during the same time period, in addition to \$1.9 billion in lost tax revenue across federal, state and local governments. In a new visualization created by NIHB, over 193,000 AI/ANs have become uninsured as a result of COVID-19 job losses, with the vast majority of these individuals (72%) lacking access to IHS as well.

Such astronomical losses in Tribal healthcare and business revenue are exacerbating the already disproportionate impact of COVID-19 infections in Indian

Country, and are further reducing available resources for Tribes to stabilize their health systems and provide critical COVID-19 and related health services to their communities.

Testimony of the National Indian Health Board, Lisa Elgin, Secretary, before the Senate Committee on Indian Affairs, Oversight Hearing On ‘Evaluating The Response And Mitigation To The Covid-19 Pandemic In Native Communities’, at 5-8 (July 1, 2020).

6. In response to the COVID-19 pandemic that hit the United States in 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) and appropriated \$8 billion in relief funding to “tribal governments.” The Secretary of the Treasury set aside a large amount of that funding for Alaska Native Corporations (“ANCs”). Numerous federally recognized Indian tribes brought suit to challenge the Secretary’s determination, reasoning that ANCs are not “tribal governments.” In *Yellen v. Confederated Tribes of the Chehalis Reservation* (see page 152), the Supreme Court confirmed the Secretary’s decision and authorized about \$500 million to be distributed to the ANCs.

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 Chief Justice stated the case would be held over for reargument, but that reargument never happened. Instead, the Court granted cert. in *McGirt v. Oklahoma*, a case with the same legal issues as *Murphy*, but one in which Justice Gorsuch was not recused. Because of the 2020 pandemic, the Court heard oral argument by telephone.

On the dramatic last day of the 2019 Term, the Court held 5-4 that Congress had never terminated the Creek Reservation.

McGirt v. Oklahoma

United States Supreme Court, 2020

__ U.S. __, 140 S.Ct. 2452 (2020)

Justice GORSUCH delivered the opinion of the Court.

On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding “all their land, East of the Mississippi river,” the U. S. government agreed by treaty that “[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians.” Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty). Both parties settled on boundary lines for a new and “permanent home to the whole Creek nation,” located in what is now Oklahoma. Treaty With the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty). The government further promised that “[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves.” 1832 Treaty, Art. XIV, 7 Stat. 368.

Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.

I

At one level, the question before us concerns Jimcy McGirt. Years ago, an Oklahoma state court convicted him of three serious sexual offenses. Since then, he has argued in postconviction proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation of Oklahoma and his crimes took place on the Creek Reservation. A new trial for his conduct, he has contended, must take place in federal court. The Oklahoma state courts hearing Mr. McGirt’s arguments rejected them, so he now brings them here.

Mr. McGirt’s appeal rests on the federal Major Crimes Act (MCA). The statute provides that, within “the Indian country,” “[a]ny Indian who commits” certain enumerated offenses “against the person or property of another Indian or any other person” “shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.” 18 U.S.C. § 1153(a). By subjecting Indians to federal trials for crimes committed on tribal lands, Congress may have breached its promises to tribes like the Creek that they would be free to govern themselves. But this particular incursion has its limits—applying only to certain enumerated crimes and allowing only the federal government to try Indians. State

courts generally have no jurisdiction to try Indians for conduct committed in “Indian country.” *Negonsott v. Samuels*, 507 U.S. 99, 102–103 . . . (1993).

The key question Mr. McGirt faces concerns that last qualification: Did he commit his crimes in Indian country? A neighboring provision of the MCA defines the term to include, among other things, “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.” § 1151(a). Mr. McGirt submits he can satisfy this condition because he committed his crimes on land reserved for the Creek since the 19th century.

The Creek Nation has joined Mr. McGirt as *amicus curiae*. Not because the Tribe is interested in shielding Mr. McGirt from responsibility for his crimes. Instead, the Creek Nation participates because Mr. McGirt’s personal interests wind up implicating the Tribe’s. No one disputes that Mr. McGirt’s crimes were committed on lands described as the Creek Reservation in an 1866 treaty and federal statute. * * *

At another level, then, Mr. McGirt’s case winds up as a contest between State and Tribe. The scope of their dispute is limited; nothing we might say today could unsettle Oklahoma’s authority to try non-Indians for crimes against non-Indians on the lands in question. See *United States v. McBratney*, 104 U.S. 621, 624, 26 L.Ed. 869 (1882). Still, the stakes are not insignificant. If Mr. McGirt and the Tribe are right, the State has no right to prosecute Indians for crimes committed in a portion of Northeastern Oklahoma that includes most of the city of Tulsa. Responsibility to try these matters would fall instead to the federal government and Tribe. Recently, the question has taken on more salience too. While Oklahoma state courts have rejected any suggestion that the lands in question remain a reservation, the Tenth Circuit has reached the opposite conclusion. *Murphy v. Royal*, 875 F.3d 896, 907–909, 966 (2017). We granted certiorari to settle the question. * * *

II

Start with what should be obvious: Congress established a reservation for the Creeks. In a series of treaties, Congress not only “solemnly guarantied” the land but also “establish[ed] boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians.” 1832 Treaty, Art. XIV, 7 Stat. 368; 1833 Treaty, preamble, 7 Stat. 418. The government’s promises weren’t made gratuitously. Rather, the 1832 Treaty acknowledged that “[t]he United States are desirous that the Creeks should remove to the country west of the Mississippi” and, in service of that goal, required the Creeks to cede all lands in the East. Arts. I, XII, 7 Stat. 366, 367. Nor were the government’s promises meant to be delusory. Congress twice assured the Creeks that “[the] Treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the United States.” 1832 Treaty, Art. XV, *id.*, at 368; see 1833 Treaty, Art. IX, 7 Stat. 420 (“agreement shall be binding and obligatory” upon ratification). Both treaties were duly ratified and enacted as law.

Because the Tribe's move west was ostensibly voluntary, Congress held out another assurance as well. In the statute that precipitated these negotiations, Congress authorized the President "to assure the tribe ... that the United States will forever secure and guaranty to them ... the country so exchanged with them." Indian Removal Act of 1830, § 3, 4 Stat. 412. "[A]nd if they prefer it," the bill continued, "the United States will cause a patent or grant to be made and executed to them for the same; Provided always, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same." *Ibid.* If agreeable to all sides, a tribe would not only enjoy the government's solemn treaty promises; it would hold legal title to its lands.

It was an offer the Creek accepted. The 1833 Treaty fixed borders for what was to be a "permanent home to the whole Creek nation of Indians." 1833 Treaty, preamble, 7 Stat. 418. It also established that the "United States will grant a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty." Art. III, *id.*, at 419. That grant came with the caveat that "the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them." *Ibid.* The promised patent formally issued in 1852. See *Woodward v. De Graffenried*, 238 U.S. 284, 293–294 . . . (1915).

These early treaties did not refer to the Creek lands as a "reservation"—perhaps because that word had not yet acquired such distinctive significance in federal Indian law. * * * In 1866, the United States entered yet another treaty with the Creek Nation. This agreement reduced the size of the land set aside for the Creek, compensating the Tribe at a price of 30 cents an acre. Treaty Between the United States and the Creek Nation of Indians, Art. III, June 14, 1866, 14 Stat. 786. But Congress explicitly restated its commitment that the remaining land would "be forever set apart as a home for said Creek Nation," which it now referred to as "the reduced Creek reservation." Arts. III, IX, *id.*, at 786, 788. Throughout the late 19th century, many other federal laws also expressly referred to the Creek Reservation. See, e.g., Treaty Between United States and Cherokee Nation of Indians, Art. IV, July 19, 1866, 14 Stat. 800 ("Creek reservation"); Act of Mar. 3, 1873, ch. 322, 17 Stat. 626; (multiple references to the "Creek reservation" and "Creek India[n] Reservation"); 11 Cong. Rec. 2351 (1881) (discussing "the dividing line between the Creek reservation and their ceded lands"); Act of Feb. 13, 1891, 26 Stat. 750 (describing a cession by referencing the "West boundary line of the Creek Reservation").

There is a final set of assurances that bear mention, too. In the Treaty of 1856, Congress promised that "no portion" of the Creek Reservation "shall ever be embraced or included within, or annexed to, any Territory or State." Art. IV, 11 Stat. 700. And within their lands, with exceptions, the Creeks were to be "secured in the unrestricted right of self-government," with "full jurisdiction" over enrolled Tribe members and their property. Art. XV, *id.*, at 704. So the Creek were promised not only a "permanent home" that would be "forever set apart"; they were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State. Under any definition, this was a reservation.

III

A

While there can be no question that Congress established a reservation for the Creek Nation, it's equally clear that Congress has since broken more than a few of its promises to the Tribe. Not least, the land described in the parties' treaties, once undivided and held by the Tribe, is now fractured into pieces. While these pieces were initially distributed to Tribe members, many were sold and now belong to persons unaffiliated with the Nation. So in what sense, if any, can we say that the Creek Reservation persists today?

To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566–568 . . . (1903). But that power, this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach once Congress has established a reservation. *Solem v. Bartlett*, 465 U.S. 463, 470 . . . (1984).

Under our Constitution, States have no authority to reduce federal reservations lying within their borders. Just imagine if they did. A State could encroach on the tribal boundaries or legal rights Congress provided, and, with enough time and patience, nullify the promises made in the name of the United States. That would be at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the “supreme Law of the Land.” Art. I, § 8; Art. VI, cl. 2. It would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.

Likewise, courts have no proper role in the adjustment of reservation borders. Mustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution. Faced with this daunting task, Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges—facing no possibility of electoral consequences themselves—will deliver the final push. But wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives. “[O]nly Congress can divest a reservation of its land and diminish its boundaries.” *Solem*, 465 U.S., at 470 So it's no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so.

History shows that Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided an “[e]xplicit reference to cession” or an “unconditional

commitment ... to compensate the Indian tribe for its opened land.” Ibid. Other times, Congress has directed that tribal lands shall be “ ‘restored to the public domain.’ “ [*Hagen v. Utah.*] Likewise, Congress might speak of a reservation as being “ ‘discontinued,’ “ “ ‘abolished,’ “ or “ ‘vacated.’ “ [*Mattz v. Arnett.*] Disestablishment has “never required any particular form of words[.]” But it does require that Congress clearly express its intent to do so, “[c]ommon[ly with an] ‘[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.’ “ [*Nebraska v. Parker.*]

B

In an effort to show Congress has done just that with the Creek Reservation, Oklahoma points to events during the so-called “allotment era.” * * *

The Creek were hardly exempt from the pressures of the allotment era. In 1893, Congress charged the Dawes Commission with negotiating changes to the Creek Reservation. Congress identified two goals: Either persuade the Creek to cede territory to the United States, as it had before, or agree to allot its lands to Tribe members. * * * A year later, the Commission reported back that the Tribe “would not, under any circumstances, agree to cede any portion of their lands.” * * * At that time, before this Court’s decision in *Lone Wolf*, Congress may not have been entirely sure of its power to terminate an established reservation unilaterally. Perhaps for that reason, perhaps for others, the Commission and Congress took this report seriously and turned their attention to allotment rather than cession.

The Commission’s work culminated in an allotment agreement with the Tribe in 1901. Creek Allotment Agreement, ch. 676, 31 Stat. 861. With exceptions for certain pre-existing town sites and other special matters, the Agreement established procedures for allotting 160-acre parcels to individual Tribe members who could not sell, transfer, or otherwise encumber their allotments for a number of years. §§ 3, 7, *id.*, at 862–864 (5 years for any portion, 21 years for the designated “homestead” portion). Tribe members were given deeds for their parcels that “convey[ed] to [them] all right, title, and interest of the Creek Nation.” § 23, *id.*, at 867–868. In 1908, Congress relaxed these alienation restrictions in some ways, and even allowed the Secretary of the Interior to waive them. Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312. One way or the other, individual Tribe members were eventually free to sell their land to Indians and non-Indians alike.

Missing in all this, however, is a statute evincing anything like the “present and total surrender of all tribal interests” in the affected lands. Without doubt, in 1832 the Creek “cede[d]” their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma. 1832 Treaty, Art. I, 7 Stat. 366. And in 1866, they “cede[d] and convey[ed]” a portion of that reservation to the United States. Treaty With the Creek, Art. III, 14 Stat. 786. But because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment.

In saying this we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument. Remember, Congress has defined “Indian country” to include “all land within the limits of any Indian reservation ... notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation.” 18 U.S.C. § 1151(a). So the relevant statute expressly contemplates private land ownership within reservation boundaries. Nor under the statute’s terms does it matter whether these individual parcels have passed hands to non-Indians. To the contrary, this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others. See *Mattz*, 412 U.S., at 497 . . . (“[A]llotment under the ... Act is completely consistent with continued reservation status”); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356–358 . . . (1962) (holding that allotment act “did no more than open the way for non-Indian settlers to own land on the reservation”); *Parker*, 136 S.Ct., [1072,] 1079–1080 [2016] (“[T]he 1882 Act falls into another category of surplus land Acts: those that merely opened reservation land to settlement.... Such schemes allow non-Indian settlers to own land on the reservation” (internal quotation marks omitted)).

* * *

Oklahoma reminds us that allotment was often the first step in a plan ultimately aimed at disestablishment. As this Court explained in *Mattz*, Congress’s expressed policy at the time “was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing.” 412 U.S. at 496 Then, “[w]hen all the lands had been allotted and the trust expired, the reservation could be abolished.” *Ibid.* This plan was set in motion nationally in the General Allotment Act of 1887, and for the Creek specifically in 1901. No doubt, this is why Congress at the turn of the 20th century “believed to a man” that “the reservation system would cease” “within a generation at most.” *Solem*, 465 U.S., at 468 Still, just as wishes are not laws, future plans aren’t either. Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.

* * *

C

If allotment by itself won’t work, Oklahoma seeks to prove disestablishment by pointing to other ways Congress intruded on the Creek’s promised right to self-governance during the allotment era. It turns out there were many. For example, just a few years before the 1901 Creek Allotment Agreement, and perhaps in an effort to pressure the Tribe to the negotiating table, Congress abolished the Creeks’ tribal courts and transferred all pending civil and criminal cases to the U. S. Courts of the Indian Territory. Curtis Act of 1898, § 28, 30 Stat. 504–505. Separately, the Creek Allotment Agreement provided that tribal ordinances “affecting the lands of the Tribe,

or of individuals after allotment, or the moneys or other property of the Tribe, or of the citizens thereof “ would not be valid until approved by the President of the United States. § 42, 31 Stat. 872.

Plainly, these laws represented serious blows to the Creek. But, just as plainly, they left the Tribe with significant sovereign functions over the lands in question. For example, the Creek Nation retained the power to collect taxes, operate schools, legislate through tribal ordinances, and, soon, oversee the federally mandated allotment process. §§ 39, 40, 42, *id.*, at 871–872; *Buster v. Wright*, 135 F. 947, 949–950, 953–954 (C.A.8 1905). And, in its own way, the congressional incursion on tribal legislative processes only served to prove the power: Congress would have had no need to subject tribal legislation to Presidential review if the Tribe lacked any authority to legislate. Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land.

* * *

[In] 1906 . . . , Congress adopted the Five Civilized Tribes Act. But instead of dissolving the tribal government as some may have expected, Congress “deem[ed] proper” a different course, simply cutting away further at the Tribe’s autonomy. Congress empowered the President to remove and replace the principal chief of the Creek, prohibited the tribal council from meeting more than 30 days a year, and directed the Secretary of the Interior to assume control of tribal schools. §§ 6, 10, 28, 34 Stat. 139–140, 148. The Act also provided for the handling of the Tribe’s funds, land, and legal liabilities in the event of dissolution. §§ 11, 27, *id.*, at 141, 148. Despite these additional incursions on tribal authority, however, Congress expressly recognized the Creek’s “tribal existence and present tribal governmen[t]” and “continued [them] in full force and effect for all purposes authorized by law.” § 28, *id.*, at 148.

In the years that followed, Congress [limited the Creek Nation’s access to certain resources and money claims]. * * * But Congress never withdrew its recognition of the tribal government, and none of its adjustments would have made any sense if Congress thought it had already completed that job.

Indeed, with time, Congress changed course completely. Beginning in the 1920s, the federal outlook toward Native Americans shifted “away from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture.” 1 Cohen § 1.05. Few in 1900 might have foreseen such a profound “reversal of attitude” was in the making or expected that “new protections for Indian rights,” including renewed “support for federally defined tribalism,” lurked around the corner. *Ibid.*; see also M. Scherer, *Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945–1995*, pp. 2–4, (1999). But that is exactly what happened. Pursuant to this new national policy, in 1936, Congress authorized the Creek to adopt a constitution and bylaws, see Act of June 26, 1936, § 3, 49 Stat. 1967, enabling the Creek government to resume many of

its previously suspended functions. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1442–1447 (C.A.D.C. 1988).⁶

The Creek Nation has done exactly that. In the intervening years, it has ratified a new constitution and established three separate branches of government. *Ibid.*; see Muscogee Creek Nation (MCN) Const., Arts. V, VI, and VII. Today the Nation is led by a democratically elected Principal Chief, Second Chief, and National Council; operates a police force and three hospitals; commands an annual budget of more than \$350 million; and employs over 2,000 people. Brief for Muscogee (Creek) Nation as Amicus Curiae 36–39. In 1982, the Nation passed an ordinance reestablishing the criminal and civil jurisdiction of its courts. * * * The territorial jurisdiction of these courts extends to any Indian country within the Tribe’s territory as defined by the Treaty of 1866. MCN Stat. 27, § 1–102(A). And the State of Oklahoma has afforded full faith and credit to its judgments since at least 1994. See *Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994); Full Faith and Credit of Tribal Courts, Okla. State Cts. Network (Apr. 18, 2019), <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458214>.

Maybe some of these changes happened for altruistic reasons, maybe some for other reasons. * * * But whatever the confluence of reasons, in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation. In the end, Congress moved in the opposite direction.

D

Ultimately, Oklahoma is left to pursue a very different sort of argument. Now, the State points to historical practices and demographics, both around the time of and long after the enactment of all the relevant legislation. These facts, the State submits, are enough by themselves to prove disestablishment. Oklahoma even classifies and categorizes how we should approach the question of disestablishment into three “steps.” It reads *Solem* as requiring us to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third. On the State’s account, we have so far finished only the first step; two more await.

This is mistaken. When interpreting Congress’s work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. * * * That is the only “step” proper for a court of law. To be sure, if during the course of our work an

⁶ The dissent calls it “fantasy” to suggest that Congress evinced “any unease about extinguishing the Creek domain” because Congress “did what it set out to do: transform a reservation into a State.” . . . The dissent stresses, too, that the Creek were afforded U. S. citizenship and the right to vote. . . . But the only thing implausible here is the suggestion that “creat[ing] a new State” or enfranchising Native Americans implies an “intent to terminate” any and all reservations within a State’s boundaries. . . . This Court confronted—and rejected—that sort of argument long ago in *United States v. Sandoval*, 231 U.S. 28, 47–48 . . . (1913). The dissent treats that case as a one-off: special because “the tribe in *Sandoval*, the Pueblo Indians of New Mexico, retained a rare communal title to their lands.” . . . But *Sandoval* is not only a case about the Pueblos; it is a foundational precedent recognizing that Congress can welcome Native Americans to participate in a broader political community without sacrificing their tribal sovereignty.

ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment. . . . But Oklahoma does not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment. Nor may a court favor contemporaneous or later practices instead of the laws Congress passed. As *Solem* explained, “[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.” * * *

Still, Oklahoma reminds us that other language in *Solem* isn’t so constrained. In particular, the State highlights a passage suggesting that “[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred.” 465 U.S. at 471, 104 S.Ct. 1161. While acknowledging that resort to subsequent demographics was “an unorthodox and potentially unreliable method of statutory interpretation,” the Court seemed nonetheless taken by its “obvious practical advantages.” *Id.*, at 472, n. 13, 471

Out of context, statements like these might suggest historical practices or current demographics can suffice to disestablish or diminish reservations in the way Oklahoma envisions. But, in the end, *Solem* itself found these kinds of arguments provided “no help” in resolving the dispute before it. * * *

This Court has already sought to clarify that extratextual considerations hardly supply the blank check Oklahoma supposes. In *Parker*, for example, we explained that “[e]vidence of the subsequent treatment of the disputed land ... has ‘limited interpretive value.’” * * * [W]hat value such evidence has can only be interpretative—evidence that, at best, might be used to the extent it sheds light on what the terms found in a statute meant at the time of the law’s adoption, not as an alternative means of proving disestablishment or diminishment.

To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute’s terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help “clear up ... not create” ambiguity about a statute’s original meaning. * * * And, as we have said time and again, once a reservation is established, it retains that status “until Congress explicitly indicates otherwise.” *Solem*, 465 U.S., at 470

The dissent charges that we have failed to take account of the “compelling reasons” for considering extratextual evidence as a matter of course. . . . But Oklahoma and the dissent have cited no case in which this Court has found a reservation disestablished without first concluding that a statute required that result. Perhaps they wish this case to be the first. To follow Oklahoma and the dissent down that path, though, would only serve to allow States and courts to finish work Congress has left undone, usurp the legislative function in the process, and treat Native American

claims of statutory right as less valuable than others. None of that can be reconciled with our normal interpretive rules, let alone our rule that disestablishment may not be lightly inferred and treaty rights are to be construed in favor, not against, tribal rights. *Solem*, 465 U.S., at 472

To see the perils of substituting stories for statutes, we need look no further than the stories we are offered in the case before us. Put aside that the Tribe could tell more than a few stories of its own: Take just the evidence on which Oklahoma and the dissent wish to rest their case. First, they point to Oklahoma’s long historical prosecutorial practice of asserting jurisdiction over Indians in state court, even for serious crimes on the contested lands. If the Creek lands really were part of a reservation, the argument goes, all of these cases should have been tried in federal court pursuant to the MCA. Yet, until the Tenth Circuit’s *Murphy* decision a few years ago, no court embraced that possibility. See *Murphy*, 875 F.3d 896. Second, they offer statements from various sources to show that “everyone” in the late 19th and early 20th century thought the reservation system—and the Creek Nation—would be disbanded soon. Third, they stress that non-Indians swiftly moved on to the reservation in the early part of the last century, that Tribe members today constitute a small fraction of those now residing on the land, and that the area now includes a “vibrant city with expanding aerospace, healthcare, technology, manufacturing, and transportation sectors.” Brief for Petitioner in *Carpenter v. Murphy*, O. T. 2018, No. 17–1107, p. 15. All this history, we are told, supplies “compelling” evidence about the lands in question.

Maybe so, but even taken on its own terms none of this evidence tells the story we are promised. Start with the State’s argument about its longstanding practice of asserting jurisdiction over Native Americans. Oklahoma proceeds on the implicit premise that its historical practices are unlikely to have defied the mandates of the federal MCA. That premise, though, appears more than a little shaky. In conjunction with the MCA, § 1151(a) not only sends to federal court certain major crimes committed by Indians on reservations. Two doors down, in § 1151(c), the statute does the same for major crimes committed by Indians on “Indian allotments, the Indian titles of which have not been extinguished.” Despite this direction, however, Oklahoma state courts erroneously entertained prosecutions for major crimes by Indians on Indian allotments for decades, until state courts finally disavowed the practice in 1989. See *State v. Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989) (overruling *Ex parte Nowabbi*, 60 Okla.Crim. 111, 61 P.2d 1139 (1936)); see also *United States v. Sands*, 968 F.2d 1058, 1062–1063 (C.A.10 1992). And if the State’s prosecution practices disregarded § 1151(c) for so long, it’s unclear why we should take those same practices as a reliable guide to the meaning and application of § 1151(a).

Things only get worse from there. Why did Oklahoma historically think it could try Native Americans for any crime committed on restricted allotments or anywhere else? Part of the explanation, Oklahoma tells us, is that it thought the eastern half of the State was always categorically exempt from the terms of the federal MCA. So whether a crime was committed on a restricted allotment, a reservation, or land that wasn’t Indian country at all, to Oklahoma it just didn’t matter. In the State’s view, when Congress adopted the Oklahoma Enabling Act that paved the way for its admission to the Union, it carved out a special exception to the MCA for the eastern

half of the State where the Creek lands can be found. By Oklahoma’s own admission, then, for decades its historical practices in the area in question didn’t even try to conform to the MCA, all of which makes the State’s past prosecutions a meaningless guide for determining what counted as Indian country. As it turns out, too, Oklahoma’s claim to a special exemption was itself mistaken, yet one more error in historical practice that even the dissent does not attempt to defend.

* * *

To be fair, Oklahoma is far from the only State that has overstepped its authority in Indian country. Perhaps often in good faith, perhaps sometimes not, others made similar mistakes in the past. But all that only underscores further the danger of relying on state practices to determine the meaning of the federal MCA. * * *

* * *

We are also asked to consider commentary from those outside the Tribe. In particular, the dissent reports that the federal government “operated” on the “understanding” that the reservation was disestablished. . . . In support of its claim, the dissent highlights a 1941 statement from Felix Cohen. Then serving as an official at the Interior Department, Cohen opined that “ ‘all offenses by or against Indians’ in the former Indian Territory ‘are subject to State laws.’ ” Ibid. (quoting App. to Supp. Reply Brief for Petitioner in *Carpenter v. Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum for Commissioner of Indian Affairs (July 11, 1941))). But that statement is incorrect. As we have just seen, Oklahoma’s courts acknowledge that the State lacks jurisdiction over Indian crimes on Indian allotments. See *Klindt*, 782 P.2d at 403–404. And the dissent does not dispute that Oklahoma is without authority under the MCA to try Indians for crimes committed on restricted allotments and any reservation. All of which highlights the pitfalls of elevating commentary over the law.¹³

Finally, Oklahoma points to the speedy and persistent movement of white settlers onto Creek lands throughout the late 19th and early 20th centuries. But this history proves no more helpful in discerning statutory meaning. Maybe, as Oklahoma supposes, it suggests that some white settlers in good faith thought the Creek lands no longer constituted a reservation. But maybe,

¹³ Part of the reason for Cohen’s error might be explained by a portion of the memorandum the dissent leaves unquoted. Cohen concluded that Oklahoma was free to try Indians anywhere in the State because, among other things, the Oklahoma Enabling Act “transfer[red] ... jurisdiction from the Federal courts to the State courts upon the establishment of the State of Oklahoma.” App. to Supp. Reply Brief for Petitioner in *Carpenter v. Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum for Commissioner of Indian Affairs (July 11, 1941)). Yet, as we explore below, the Oklahoma Enabling Act did *not* send cases covered by the federal MCA to state court. . . . Other, contemporaneous Interior Department memoranda acknowledged that Oklahoma state courts had simply “assumed jurisdiction” over cases arising on restricted allotments without any clear authority in the Oklahoma Enabling Act or the MCA, and much the same appears to have occurred here. App. to Supp. Reply Brief for Respondent in *Carpenter v. Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum from N. Gray, Dept. of Interior, for Mr. Flanery (Aug. 12, 1942)). So rather than Oklahoma and the United States having a “shared understanding” that Congress had disestablished the Creek Reservation, post, at 2496–2497, it seems more accurate to say that for many years much uncertainty remained about whether the MCA applied in eastern Oklahoma.

too, some didn't care and others never paused to think about the question. Certain historians have argued, for example, that the loss of Creek land ownership was accelerated by the discovery of oil in the region during the period at issue here. A number of the federal officials charged with implementing the laws of Congress were apparently openly conflicted, holding shares or board positions in the very oil companies who sought to deprive Indians of their lands. A. Debo, *And Still the Waters Run* 86–87, 117–118 (1940). And for a time Oklahoma's courts appear to have entertained sham competency and guardianship proceedings that divested Tribe members of oil rich allotments. *Id.*, at 104–106, 233–234; Brief for Historians et al. as Amici Curiae 26–30. Whatever else might be said about the history and demographics placed before us, they hardly tell a story of unalloyed respect for tribal interests.¹⁴

In the end, only one message rings true. Even the carefully selected history Oklahoma and the dissent recite is not nearly as tidy as they suggest. It supplies us with little help in discerning the law's meaning and much potential for mischief. If anything, the persistent if unspoken message here seems to be that we should be taken by the “practical advantages” of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might. But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law.

IV

Unable to show that Congress disestablished the Creek Reservation, Oklahoma next tries to turn the tables in a completely different way. Now, it contends, Congress never established a reservation in the first place. Over all the years, from the federal government's first guarantees of land and self-government in 1832 and through the litany of promises that followed, the Tribe never

¹⁴ The dissent asks us to examine a hodge-podge of other, but no more compelling, material. For example, the dissent points to later statutes that do no more than confirm there are former reservations in the State of Oklahoma. . . . It cites legislative history to show that Congress had the Creek Nation—or, at least, its neighbors—in mind when it added these in 1988. . . . The dissent cites a Senate Report from 1989 and post-1980 statements made by representatives of other tribes. . . . It highlights three occasions on which this Court referred to something like a “former Creek Nation,” though it neglects to add that in each the Court was referring to the loss of the Nation's communal fee title, not its sovereignty. * * * The dissent points as well to a single instance in which the Creek Nation disclaimed reservation boundaries for purposes of litigation in a lower court, post, at 2499, but ignores that the Creek Nation has repeatedly filed briefs in this Court to the contrary. This is thin gruel to set against treaty promises enshrined in statutes.

received a reservation. Instead, what the Tribe has had all this time qualifies only as a “dependent Indian community.”

Even if we were to accept Oklahoma’s bold feat of reclassification, however, it’s hardly clear the State would win this case. “Reservation[s]” and “Indian allotments, the Indian titles to which have not been extinguished,” qualify as Indian country under subsections (a) and (c) of § 1151. But “dependent Indian communities” also qualify as Indian country under subsection (b). So Oklahoma lacks jurisdiction to prosecute Mr. McGirt whether the Creek lands happen to fall in one category or another.

About this, Oklahoma is at least candid. It admits the entire point of its reclassification exercise is to avoid *Solem*’s rule that only Congress may disestablish a reservation. And to achieve that, the State has to persuade us not only that the Creek lands constitute a “dependent Indian community” rather than a reservation. It also has to convince us that we should announce a rule that dependent Indian community status can be lost more easily than reservation status, maybe even by the happenstance of shifting demographics.

To answer this argument, it’s enough to address its first essential premise. Holding that the Creek never had a reservation would require us to stand willfully blind before a host of federal statutes. Perhaps that is why the Solicitor General, who supports Oklahoma’s disestablishment argument, refuses to endorse this alternative effort. It also may be why Oklahoma introduced this argument for affirmance only for the first time in this Court. And it may be why the dissent makes no attempt to defend Oklahoma here. * * *

* * *

By now, Oklahoma’s next move will seem familiar. Seeking to sow doubt around express treaty promises, it cites some stray language from a statute that does not control here, a piece of congressional testimony there, and the scattered opinions of agency officials everywhere in between. See, e.g., Act of July 31, 1882, ch. 360, 22 Stat. 179 (referring to Creek land as “Indian country” as opposed to an “Indian reservation”); S. Doc. No. 143, 59th Cong., 1st. Sess., 33 (1906) (Chief of Choctaw Nation—which had an arrangement similar to the Creek’s—testified that both Tribes “object to being classified with the reservation Indians”); Dept. of Interior, Census Office, Report on Indians Taxed and Indians Not Taxed in the U. S. 284 (1894) (Creeks and neighboring Tribes were “not on the ordinary Indian reservation, but on lands patented to them by the United States”). Oklahoma stresses that this Court even once called the Creek lands a “dependent Indian community,” though it used that phrase in passing and only to show that the Tribe’s “property and affairs were subject to the control and management of that government”—a point that would also be true if the lands were a reservation. . . . Unsurprisingly given the Creek Nation’s nearly 200-year occupancy of these lands, both sides have turned up a few clues suggesting the label “reservation” either did or did not apply. One thing everyone can agree on is this history is long and messy.

But the most authoritative evidence of the Creek's relationship to the land lies not in these scattered references; it lies in the treaties and statutes that promised the land to the Tribe in the first place. And, if not for the Tribe's fee title to its land, no one would question that these treaties and statutes created a reservation. So the State's argument inescapably boils down to the untenable suggestion that, when the federal government agreed to offer more protection for tribal lands, it really provided less. All this time, fee title was nothing more than another trap for the wary.

V

That leaves Oklahoma to attempt yet another argument in the alternative. We alluded to it earlier in Part III. Now, the State accepts for argument's sake that the Creek land is a reservation and thus "Indian country" for purposes of the Major Crimes Act. It accepts, too, that this would normally mean serious crimes by Indians on the Creek Reservation would have to be tried in federal court. But, the State tells us, none of that matters; everything the parties have briefed and argued so far is beside the point. It's all irrelevant because it turns out the MCA just doesn't apply to the eastern half of Oklahoma, and it never has. That federal law may apply to other States, even to the western half of Oklahoma itself. But eastern Oklahoma is and has always been exempt. So whether or not the Creek have a reservation, the State's historic practices have always been correct and it remains free to try individuals like Mr. McGirt in its own courts.

Notably, the dissent again declines to join Oklahoma in its latest twist. And, it turns out, for good reason. In support of its argument, Oklahoma points to statutory artifacts from its territorial history. The State of Oklahoma was formed from two territories: the Oklahoma Territory in the west and Indian Territory in the east. Originally, it seems criminal prosecutions in the Indian Territory were split between tribal and federal courts. See Act of May 2, 1890, § 30, 26 Stat. 94. But, in 1897, Congress abolished that scheme, granting the U. S. Courts of the Indian Territory "exclusive jurisdiction" to try "all criminal causes for the punishment of any offense." Act of June 7, 1897, 30 Stat. 83. These federal territorial courts applied federal law and state law borrowed from Arkansas "to all persons ... irrespective of race." *Ibid.* A year later, Congress abolished tribal courts and transferred all pending criminal cases to U. S. courts of the Indian Territory. Curtis Act of 1898, § 28, 30 Stat. 504–505. And, Oklahoma says, sending Indians to federal court and all others to state court would be inconsistent with this established and enlightened policy of applying the same law in the same courts to everyone.

Here again, however, arguments along these and similar lines have been "frequently raised" but rarely "accepted." *United States v. Sands*, 968 F.2d 1058, 1061 (C.A.10 1992) (Kelly, J.). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 ... (1945). Chief Justice Marshall, for example, held that Indian Tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive ... which is not only acknowledged, but guaranteed by the United States," a power dependent on and subject to no state authority. *Worcester v. Georgia*, 6 Pet. 515, 557 ... (1832); see also *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168–169 ... (1973).

And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves. For all these reasons, this Court has long “require[d] a clear expression of the intention of Congress” before the state or federal government may try Indians for conduct on their lands. *Ex parte Crow Dog*, 109 U.S. 556 . . . (1883).

Oklahoma cannot come close to satisfying this standard. * * *

Left to hunt for some statute that might have rendered the MCA inapplicable in Oklahoma after statehood, the best the State can find is the Oklahoma Enabling Act. Congress adopted that law in preparation for Oklahoma’s admission in 1907. Among its many provisions sorting out the details associated with Oklahoma’s transition to statehood, the Enabling Act transferred all nonfederal cases pending in territorial courts to Oklahoma’s new state courts. Act of June 16, 1906, § 20, 34 Stat. 277; see also Act of Mar. 4, 1907, § 3, 34 Stat. 1287 (clarifying treatment of cases to which United States was a party). The State says this transfer made its courts the inheritors of the federal territorial courts’ sweeping authority to try Indians for crimes committed on reservations.

But, at best, this tells only half the story. The Enabling Act not only sent all nonfederal cases pending in territorial courts to state court. It also transferred pending cases that arose “under the Constitution, laws, or treaties of the United States” to federal district courts. § 16, 34 Stat. 277. Pending criminal cases were thus transferred to federal court if the prosecution would have belonged there had the Territory been a State at the time of the crime. § 1, 34 Stat. 1287 (amending the Enabling Act). Nor did the statute make any distinction between cases arising in the former eastern (Indian) and western (Oklahoma) territories. So, simply put, the Enabling Act sent state-law cases to state court and federal-law cases to federal court. And serious crimes by Indians in Indian country were matters that arose under the federal MCA and thus properly belonged in federal court from day one, wherever they arose within the new State.

Maybe that’s right, Oklahoma acknowledges, but that’s not what happened. Instead, for many years the State continued to try Indians for crimes committed anywhere within its borders. But what can that tell us? The State identifies not a single ambiguous statutory term in the MCA that its actions might illuminate. And, as we have seen, its own courts have acknowledged that the State’s historic practices deviated in meaningful ways from the MCA’s terms. . . . So, once more, it seems Oklahoma asks us to defer to its usual practices instead of federal law, something we will not and may never do.

That takes Oklahoma down to its last straw when it comes to the MCA. If Oklahoma lacks the jurisdiction to try Native Americans it has historically claimed, that means at the time of its entry into the Union no one had the power to try minor Indian-on-Indian crimes committed in Indian country. This much follows, Oklahoma reminds us, because the MCA provides federal jurisdiction only for major crimes, and no tribal forum existed to try lesser cases after Congress abolished the tribal courts in 1898. Curtis Act, § 28, 30 Stat. 504–505. Whatever one thinks about

the plausibility of other discontinuities between federal law and state practice, the State says, it is unthinkable that Congress would have allowed such a significant “jurisdictional gap” to open at the moment Oklahoma achieved statehood.

But what the State considers unthinkable turns out to be easily imagined. Jurisdictional gaps are hardly foreign to this area of the law. See, e.g., *Duro v. Reina*, 495 U.S. 676, 704–706 . . . (1990) (Brennan, J., dissenting). Many tribal courts across the country were absent or ineffective during the early part of the last century, yielding just the sort of gaps Oklahoma would have us believe impossible. Indeed, this might be why so many States joined Oklahoma in prosecuting Indians without proper jurisdiction. The judicial mind abhors a vacuum, and the temptation for state prosecutors to step into the void was surely strong. . . .

With time, too, Congress has filled many of the gaps Oklahoma worries about. One way Congress has done so is by reauthorizing tribal courts to hear minor crimes in Indian country. Congress chose exactly this course for the Creeks and others in 1936. Act of June 26, 1936, § 3, 49 Stat. 1967; see also *Hodel*, 851 F.2d at 1442–1446. Another option Congress has employed is to allow affected Indian tribes to consent to state criminal jurisdiction. 25 U.S.C. §§ 1321(a), 1326. Finally, Congress has sometimes expressly expanded state criminal jurisdiction in targeted bills addressing specific States. See, e.g., 18 U.S.C. § 3243 (creating jurisdiction for Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (same for a reservation in North Dakota); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (same for certain reservations in Iowa); 18 U.S.C. § 1162 (creating jurisdiction for six additional States). But Oklahoma doesn’t claim to have complied with the requirements to assume jurisdiction voluntarily over Creek lands. Nor has Congress ever passed a law conferring jurisdiction on Oklahoma. As a result, the MCA applies to Oklahoma according to its usual terms: Only the federal government, not the State, may prosecute Indians for major crimes committed in Indian country.

VI

In the end, Oklahoma abandons any pretense of law and speaks openly about the potentially “transform[ative]” effects of a loss today. Brief for Respondent 43. Here, at least, the State is finally rejoined by the dissent. If we dared to recognize that the Creek Reservation was never disestablished, Oklahoma and dissent warn, our holding might be used by other tribes to vindicate similar treaty promises. Ultimately, Oklahoma fears that perhaps as much as half its land and roughly 1.8 million of its residents could wind up within Indian country.

It’s hard to know what to make of this self-defeating argument. Each tribe’s treaties must be considered on their own terms, and the only question before us concerns the Creek. Of course, the Creek Reservation alone is hardly insignificant, taking in most of Tulsa and certain neighboring communities in Northeastern Oklahoma. But neither is it unheard of for significant non-Indian populations to live successfully in or near reservations today. See, e.g., Brief for National Congress of American Indians Fund as Amicus Curiae 26–28 (describing success of Tacoma, Washington,

and Mount Pleasant, Michigan); see also *Parker*, . . . 136 S.Ct., at 1081–1082 (holding Pender, Nebraska, to be within Indian country despite tribe’s absence from the disputed territory for more than 120 years). Oklahoma replies that its situation is different because the affected population here is large and many of its residents will be surprised to find out they have been living in Indian country this whole time. But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there.

What are the consequences the State and dissent worry might follow from an adverse ruling anyway? Primarily, they argue that recognizing the continued existence of the Creek Reservation could unsettle an untold number of convictions and frustrate the State’s ability to prosecute crimes in the future. But the MCA applies only to certain crimes committed in Indian country by Indian defendants. A neighboring statute provides that federal law applies to a broader range of crimes by or against Indians in Indian country. See 18 U.S.C. § 1152. States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. . . . And Oklahoma tells us that somewhere between 10% and 15% of its citizens identify as Native American. Given all this, even Oklahoma admits that the vast majority of its prosecutions will be unaffected whatever we decide today.

Still, Oklahoma and the dissent fear, “[t]housands” of Native Americans like Mr. McGirt “wait in the wings” to challenge the jurisdictional basis of their state-court convictions. Brief for Respondent 3. But this number is admittedly speculative, because many defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver. Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings.¹⁵

In any event, the magnitude of a legal wrong is no reason to perpetuate it. When Congress adopted the MCA, it broke many treaty promises that had once allowed tribes like the Creek to try their own members. But, in return, Congress allowed only the federal government, not the States, to try tribal members for major crimes. All our decision today does is vindicate that replacement promise. * * *

What’s more, a decision for either party today risks upsetting some convictions. Accepting the State’s argument that the MCA never applied in Oklahoma would preserve the state-court

¹⁵ For example, Oklahoma appears to apply a general rule that “issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review.” *Logan v. State*, 2013 OKCR 2, ¶ 1, 293 P.3d 969, 973. Indeed, Justice THOMAS contends that this state-law limitation on collateral review prevents us from considering even the case now before us. . . . But while that state-law rule may often bar our way, it doesn’t in this case. After noting a potential state-law obstacle, the Oklahoma Court of Criminal Appeals (OCCA) proceeded to address the merits of Mr. McGirt’s federal MCA claim anyway. Because the OCCA’s opinion “fairly appears to rest primarily on federal law or to be interwoven with federal law” and lacks any “plain statement” that it was relying on a state-law ground, we have jurisdiction to consider the federal-law question presented to us. See *Michigan v. Long*, 463 U.S. 1032, 1040–1041, 1044 . . . (1983).

convictions of people like Mr. McGirt, but simultaneously call into question every federal conviction obtained for crimes committed on trust lands and restricted Indian allotments since Oklahoma recognized its jurisdictional error more than 30 years ago. . . . It's a consequence of their own arguments that Oklahoma and the dissent choose to ignore, but one which cannot help but illustrate the difficulty of trying to guess how a ruling one way or the other might affect past cases rather than simply proceeding to apply the law as written.

Looking to the future, Oklahoma warns of the burdens federal and tribal courts will experience with a wider jurisdiction and increased caseload. But, again, for every jurisdictional reaction there seems to be an opposite reaction: recognizing that cases like Mr. McGirt's belong in federal court simultaneously takes them out of state court. So while the federal prosecutors might be initially understaffed and Oklahoma prosecutors initially overstaffed, it doesn't take a lot of imagination to see how things could work out in the end.

Finally, the State worries that our decision will have significant consequences for civil and regulatory law. The only question before us, however, concerns the statutory definition of "Indian country" as it applies in federal criminal law under the MCA, and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law. Of course, many federal civil laws and regulations do currently borrow from § 1151 when defining the scope of Indian country. But it is far from obvious why this collateral drafting choice should be allowed to skew our interpretation of the MCA, or deny its promised benefits of a federal criminal forum to tribal members.

It isn't even clear what the real upshot of this borrowing into civil law may be. Oklahoma reports that recognizing the existence of the Creek Reservation for purposes of the MCA might potentially trigger a variety of federal civil statutes and rules, including ones making the region eligible for assistance with homeland security, 6 U.S.C. §§ 601, 606, historical preservation, 54 U.S.C. § 302704, schools, 20 U.S.C. § 1443, highways, 23 U.S.C. § 120, roads, § 202, primary care clinics, 25 U.S.C. § 1616e-1, housing assistance, § 4131, nutritional programs, 7 U.S.C. §§ 2012, 2013, disability programs, 20 U.S.C. § 1411, and more. But what are we to make of this? Some may find developments like these unwelcome, but from what we are told others may celebrate them.

The dissent isn't so sanguine—it assures us, without further elaboration, that the consequences will be "drastic precisely because they depart from ... more than a century [of] settled understanding." . . . The prediction is a familiar one. Thirty years ago the Solicitor General warned that "[l]aw enforcement would be rendered very difficult" and there would be "grave uncertainty regarding the application" of state law if courts departed from decades of "long-held understanding" and recognized that the federal MCA applies to restricted allotments in Oklahoma. Brief for United States as Amicus Curiae in *Oklahoma v. Brooks*, O.T. 1988, No. 88-1147, pp. 2, 9, 18, 19. Yet, during the intervening decades none of these predictions panned out, and that fact stands as a note of caution against too readily crediting identical warnings today.

More importantly, dire warnings are just that, and not a license for us to disregard the law. By suggesting that our interpretation of Acts of Congress adopted a century ago should be inflected based on the costs of enforcing them today, the dissent tips its hand. Yet again, the point of looking at subsequent developments seems not to be determining the meaning of the laws Congress wrote in 1901 or 1906, but emphasizing the costs of taking them at their word.

Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, *res judicata*, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. * * *

In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. See Okla. Stat., Tit. 74, § 1221 (2019 Cum. Supp.); Oklahoma Secretary of State, Tribal Compacts and Agreements, www.sos.ok.gov/tribal.aspx. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. See Brief for Tom Cole et al. as Amici Curiae 13–19. No one before us claims that the spirit of good faith, “comity and cooperative sovereignty” behind these agreements, *id.*, at 20, will be imperiled by an adverse decision for the State today any more than it might be by a favorable one. And, of course, should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any time. It has no shortage of tools at its disposal.

The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

The judgment of the Court of Criminal Appeals of Oklahoma is
Reversed.

[Chief Justice ROBERTS' and Justice THOMAS' dissenting opinions omitted.]

NOTES

1. Within a few weeks of the *McGirt* decision, the Seventh Circuit reversed a lower court decision holding the Wisconsin Oneida reservation had been disestablished. *Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020), rev’g, 371 F.Supp.3d 500 (E.D. Wis. 2019). The court relied on *McGirt*’s limitation on the importance of the second and third *Solem* factors:

To resolve this dispute, we must trace the history of the Oneida Reservation from its establishment by treaty in 1838 through a series of allotment acts passed by Congress around the turn of the twentieth century. If the Reservation remains intact, then federal law treats the land at issue as Indian country not subject to most state and local regulation. The Village argues that the Reservation was diminished piece by piece when Congress allotted the Reservation among individual tribe members and allowed the land to be sold eventually to non-Indians. The district court agreed and granted summary judgment in favor of the Village.

We reverse. The Reservation was created by treaty, and it can be diminished or disestablished only by Congress. Congress has not done either of those things. The governing legal framework—at least when the issue was decided in the district court and when we heard oral argument—was clear. Under *Solem v. Bartlett*, 465 U.S. 463 . . . (1984), we look—from most important factor to least—to statutory text, the circumstances surrounding a statute’s passage, and subsequent events for evidence of a “clear congressional purpose to diminish the reservation.” *Id.* at 476 After this case was argued, the Supreme Court decided *McGirt v. Oklahoma*, — U.S. —, 140 S. Ct. 2452, — L.Ed.2d — (2020). We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation. The Oneida Nation prevails under both the *Solem* framework and the adjustments made in *McGirt*.

The undisputed facts show no congressional intent to diminish. First, the statutory texts provide no clear indication that Congress intended to eliminate all tribal interests in allotted Oneida land. Second, the Supreme Court has rejected—time and time again—the Village’s argument that diminishment can be the result of Congress’s general expectation in the late nineteenth and early twentieth centuries that its actions would lead eventually to the end of the reservation system. These general expectations do not show an “unequivocal[]” contemporary understanding that the statutes would diminish the Reservation and effectively abrogate the United States’ treaty with the Oneida. *Solem*, 465 U.S. at 471 The Village’s argument that Congress intended to diminish the Reservation by allowing land to pass out of Indian hands is antithetical to *Solem* and the well-established legal framework for diminishment. Third, events following Congress’s enactment

of the relevant statute (or statutes) cannot alone support a finding of diminishment in the absence of textual or contextual support. Even if they could, the evidence offered by Village is so inconclusive that it could not justify a finding that the United States unilaterally broke the 1838 Treaty.

Id. at 667-68.

2. Additionally, the first of several criminal appellants and petitioners seeking relief from Oklahoma prosecutions hit the Oklahoma Court of Criminal Appeals. See *Bosse v. State*, 484 P.3d 286 (Okla. Ct. Crim. App. 2021). That case involved a crime committed against Chickasaw Nation members and arose on the Chickasaw Reservation. Briefs are on Turtle Talk here: <https://turtletalk.blog/2020/08/05/oklahoma-criminal-appellate-court-asked-to-address-impact-of-mcgirt-on-crime-committed-on-chickasaw-reservation-with-chickasaw-victims/>. As was apparent to those on the ground, the Chickasaw, Choctaw, Cherokee, and Seminole nations have very similar histories to that the Creek Nation. As expected, the reasoning of the *McGirt* opinion applied to all of the Five Tribes. E.g., *Ryder v. State*, 489 P.3d 528 (Okla. Ct. Crim. App. 2021) (Choctaw); *Spears v. State*, 485 P.3d 873 (Okla. Ct. Crim. App. 2021) (Cherokee); *Grayson v. State*, 485 P.3d 250 (Okla. Ct. Crim. App. 2021) (Seminole).

3. Leading scholarship on the impacts of *McGirt* include Maggie Blachawk, On Power & the Law: *McGirt v. Oklahoma*, 2021 Sup. Ct. Rev. ____ (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3846344; Dylan R. Hedden-Nicely & Stacy L. Leeds, A Familiar Crossroads: *McGirt v. Oklahoma* and the Future of the Federal Indian Law Canon, 51 N.M. L. Rev. 300 (2021); and Stacy Leeds & Lonnie Beard, A Wealth of Sovereign Choices: Tax Implications of *McGirt v. Oklahoma* and the Promise of Tribal Economic Development, 56 Tulsa L. Rev. 417 (2021). See also Special *McGirt* Issue, 56 Tulsa L. Rev. 363-530 (2021).

After note 1 on page 539, add:

The North Carolina Supreme Court held in *State v. Nobles*, 838 S.E.2d 373 (N.C.), cert. denied, 141 S. Ct. 365 (2020), that a non-enrolled Cherokee Indian was not an “Indian” under the Major Crimes Act, 18 U.S.C. § 1153. As the foregoing federal cases allow for, however, an unenrolled “Indian” may still be an “Indian” for purposes of exclusive federal jurisdiction.

CHAPTER 8

TRIBAL AND STATE CONFLICTS OVER CIVIL REGULATORY AND ADJUDICATORY JURISDICTION

SECTION A.

CIVIL REGULATORY JURISDICTION IN INDIAN COUNTRY

At the end of page 617, add:

United States v. Cooley

United States Supreme Court, 2021

___ U.S. ___, 141 S.Ct. 1638

Justice BREYER delivered the opinion of the Court.

The question presented is whether an Indian tribe’s police officer has authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation. The search and detention, we assume, took place based on a potential violation of state or federal law prior to the suspect’s transport to the proper nontribal authorities for prosecution.

We have previously noted that a tribe retains inherent sovereign authority to address “conduct [that] threatens or has some direct effect on . . . the health or welfare of the tribe.” *Montana v. United States*, 450 U.S. 544, 566 . . . (1981); see also *Strate v. A–1 Contractors*, 520 U.S. 438, 456, n. 11 . . . (1997). We believe this statement of law governs here. And we hold the tribal officer possesses the authority at issue.

I

Late at night in February 2016, Officer James Saylor of the Crow Police Department was driving east on United States Highway 212, a public right-of-way within the Crow Reservation, located within the State of Montana. Saylor saw a truck parked on the westbound side of the highway. Believing the occupants might need assistance, Saylor approached the truck and spoke to the driver, Joshua James Cooley. Saylor noticed that Cooley had “watery, bloodshot eyes” and “appeared to be non-native.” App. to Pet. for Cert. 95a. Saylor also noticed two semiautomatic rifles lying on the front seat. Eventually fearing violence, Saylor ordered Cooley out of the truck and conducted a patdown search. He called tribal and county officers for assistance. While waiting for the officers to arrive, Saylor returned to the truck. He saw a glass pipe and plastic bag that

contained methamphetamine. The other officers, including an officer with the federal Bureau of Indian Affairs, then arrived. They directed Saylor to seize all contraband in plain view, leading him to discover more methamphetamine. Saylor took Cooley to the Crow Police Department where federal and local officers further questioned Cooley.

In April 2016, a federal grand jury indicted Cooley on drug and gun offenses. See 21 U.S.C. § 841(a)(1); 18 U.S.C. § 924(c)(1)(A). The District Court granted Cooley’s motion to suppress the drug evidence that Saylor had seized. It reasoned that Saylor, as a Crow Tribe police officer, lacked the authority to investigate nonapparent violations of state or federal law by a non-Indian on a public right-of-way crossing the reservation.

The Government appealed. See 18 U.S.C. § 3731. The Ninth Circuit affirmed the District Court’s evidence-suppression determination. The Ninth Circuit panel wrote that tribes “cannot exclude non-Indians from a state or federal highway” and “lack the ancillary power to investigate non-Indians who are using such public rights-of-way.” 919 F.3d 1135, 1141 (2019). It added that a tribal police officer nonetheless could stop (and hold for a reasonable time) a non-Indian suspect, but only if (1) the officer first tried to determine whether “the person is an Indian,” and, if the person turns out to be a non-Indian, (2) it is “apparent” that the person has violated state or federal law. *Id.*, at 1142. Non-Indian status, the panel added, can usually be determined by “ask[ing] one question.” *Ibid.* (internal quotation marks omitted). Because Saylor had not initially tried to determine whether Cooley was an Indian, the panel held that the lower court correctly suppressed the evidence.

The Ninth Circuit denied the Government’s request for rehearing en banc. We then granted the Government’s petition for certiorari in order to decide whether a tribal police officer has authority to detain temporarily and to search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law.

II

Long ago we described Indian tribes as “distinct, independent political communities” exercising sovereign authority. *Worcester v. Georgia*, 6 Pet. 515, 559 . . . (1832). Due to their incorporation into the United States, however, the “sovereignty that the Indian tribes retain is of a unique and limited character.” *United States v. Wheeler*, 435 U.S. 313, 323 . . . (1978). Indian tribes may, for example, determine tribal membership, regulate domestic affairs among tribal members, and exclude others from entering tribal land. See, e.g., *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327–328 . . . (2008). On the other hand, owing to their “dependent status,” tribes lack any “freedom independently to determine their external relations” and cannot, for instance, “enter into direct commercial or governmental relations with foreign nations.” *Wheeler*, 435 U.S. at 326 Tribes also lack inherent sovereign power to exercise criminal jurisdiction over non-Indians. See *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 212 . . .

(1978). In all cases, tribal authority remains subject to the plenary authority of Congress. See, e.g., *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 . . . (2014).

Here, no treaty or statute has explicitly divested Indian tribes of the policing authority at issue. We turn to precedent to determine whether a tribe has retained inherent sovereign authority to exercise that power. In answering this question, our decision in *Montana v. United States*, 450 U.S. 544 . . . (1981), is highly relevant. In that case we asked whether a tribe could regulate hunting and fishing by non-Indians on land that non-Indians owned in fee simple on a reservation. We held that it could not. We supported our conclusion by referring to our holding in *Oliphant* that a tribe could not “exercise criminal jurisdiction over non-Indians.” *Montana*, 450 U.S. at 565 We then wrote that the “principles on which [*Oliphant*] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Ibid*.

At the same time, we made clear that *Montana*’s “general proposition” was not an absolute rule. *Ibid*. We set forth two important exceptions. First, we said that a “tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Ibid*. Second, we said that a “tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation *when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe*.” *Id.*, at 566 . . . (emphasis added).

The second exception we have just quoted fits the present case, almost like a glove. The phrase speaks of the protection of the “health or welfare of the tribe.” To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats. Such threats may be posed by, for instance, non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation. As the Washington Supreme Court has noted, “[a]llowing a known drunk driver to get back in his or her car, careen off down the road, and possibly kill or injure Indians or non-Indians would certainly be detrimental to the health or welfare of the Tribe.” *State v. Schmuck*, 121 Wash.2d 373, 391, 850 P.2d 1332, 1341, cert. denied, 510 U.S. 931, 114 S.Ct. 343, 126 L.Ed.2d 308 (1993).

We have subsequently repeated *Montana*’s proposition and exceptions in several cases involving a tribe’s jurisdiction over the activities of non-Indians within the reservation. . . . Most notably, in *Strate v. A-1 Contractors*, 520 U.S. 438, 456–459 . . . (1997), we relied upon *Montana*’s general jurisdiction-limiting principle to hold that tribal courts did not retain inherent authority to adjudicate personal-injury actions against nonmembers of the tribe based upon automobile accidents that took place on public rights-of-way running through a reservation. But we also said:

“We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law. Cf. *State v. Schmuck*, 121 Wash.2d 373, 390, 850 P.2d 1332, 1341 (en banc) (recognizing that a limited tribal power ‘to stop and detain alleged offenders in no way confers an unlimited authority to regulate the right of the public to travel on the Reservation’s roads’), cert. denied, 510 U.S. 931 [114 S.Ct. 343, 126 L.Ed.2d 308] (1993).” 520 U.S. at 456, n. 11, 117 S.Ct. 1404.

We reiterated this point in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651 . . . (2001), there confirming that State “did not question the ability of tribal police to patrol the highway.”

Similarly, we recognized in *Duro* that “[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.” 495 U.S. at 697 The authority to search a non-Indian prior to transport is ancillary to this authority that we have already recognized. Cf. *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180–1181 (CA9 1975). Indeed, several state courts and other federal courts have held that tribal officers possess the authority at issue here. See, e.g., *Schmuck*, 121 Wash.2d at 390, 850 P.2d at 1341; *State v. Pamperien*, 156 Ore.App. 153, 155–159, 967 P.2d 503, 504–506 (1998); *State v. Ryder*, 98 N.M. 453, 456, 649 P.2d 756, 759 (NM App. 1982); see also *United States v. Terry*, 400 F.3d 575, 579–580 (CA8 2005); *Ortiz-Barraza*, 512 F.2d at 1180–1181; see generally F. Cohen, *Handbook of Federal Indian Law* § 9.07, p. 773 (2012). To be sure, in *Duro* we traced the relevant tribal authority to a tribe’s right to exclude non-Indians from reservation land. See 495 U.S. at 696–697 But tribes “have inherent sovereignty independent of th[e] authority arising from their power to exclude,” *Brendale*, 492 U.S. at 425 . . . (plurality opinion), and here Montana’s second exception recognizes that inherent authority.

We also note that our prior cases denying tribal jurisdiction over the activities of non-Indians on a reservation have rested in part upon the fact that full tribal jurisdiction would require the application of tribal laws to non-Indians who do not belong to the tribe and consequently had no say in creating the laws that would be applied to them. See *Duro*, 495 U.S. at 693 . . . (noting the concern that tribal-court criminal jurisdiction over nonmembers would subject such defendants to “trial by political bodies that do not include them”); *Plains Commerce Bank*, 554 U.S. at 337 . . . (noting that nonmembers “have no part in tribal government” and have “no say in the laws and regulations that govern tribal territory”). Saylor’s search and detention, however, do not subsequently subject Cooley to tribal law, but rather only to state and federal laws that apply whether an individual is outside a reservation or on a state or federal highway within it. As the Solicitor General points out, an initial investigation of non-Indians’ “violations of federal and state laws to which those non-Indians are indisputably subject” protects the public without raising “similar concerns” of the sort raised in our cases limiting tribal authority. Brief for United States 24–25.

Finally, we have doubts about the workability of the standards that the Ninth Circuit set out. Those standards require tribal officers first to determine whether a suspect is non-Indian and, if so, allow temporary detention only if the violation of law is “apparent.” 919 F.3d at 1142. The first requirement, even if limited to asking a single question, would produce an incentive to lie. The second requirement—that the violation of law be “apparent”—introduces a new standard into search and seizure law. Whether, or how, that standard would be met is not obvious. At the same time, because most of those who live on Indian reservations are non-Indians, this problem of interpretation could arise frequently. See, e.g., Brief for Former United States Attorneys as Amici Curiae 24 (noting that 3.5 million of the 4.6 million people living in American Indian areas in the 2010 census were non-Indians); Brief for National Indigenous Women’s Resource Center et al. as Amici Curiae 19–20 (noting that more than 70% of residents on several reservations are non-Indian).

III

In response, Cooley cautions against “inappropriately expand[ing] the second *Montana* exception.” Brief for Respondent 24–25 We have previously warned that the *Montana* exceptions are “limited” and “cannot be construed in a manner that would swallow the rule.” *Plains Commerce Bank*, 554 U.S. at 330 . . . (internal quotation marks omitted). But we have also repeatedly acknowledged the existence of the exceptions and preserved the possibility that “certain forms of nonmember behavior” may “sufficiently affect the tribe as to justify tribal oversight.” *Id.*, at 335 Given the close fit between the second exception and the circumstances here, we do not believe the warnings can control the outcome.

Cooley adds that federal cross-deputization statutes already grant many Indian tribes a degree of authority to enforce federal law. See Brief for Respondent 28–30; see generally 25 U.S.C. §§ 2803(5), (7) (Secretary of the Interior may authorize tribal officers to “make inquiries of any person” related to the “carrying out in Indian country” of federal law and to “perform any other law enforcement related duty”); § 2805 (Secretary of the Interior may promulgate rules “relating to the enforcement of” federal criminal law in Indian country); 25 C.F.R. § 12.21 (2019) (Bureau of Indian Affairs may “issue law enforcement commissions” to tribal police officers “to obtain active assistance” in enforcing federal criminal law). Because Congress has specified the scope of tribal police activity through these statutes, Cooley argues, the Court must not interpret tribal sovereignty to fill any remaining gaps in policing authority. See Brief for Respondent 12.

We are not convinced by this argument. The statutory and regulatory provisions to which Cooley refers do not easily fit the present circumstances. They are overinclusive, for instance encompassing the authority to arrest. See § 2803(3). And they are also underinclusive. Because these provisions do not govern violations of state law, tribes would still need to strike agreements with a variety of other authorities to ensure complete coverage. See Brief for Cayuga Nation et al. as Amici Curiae 7–8, 25–27. More broadly, cross-deputization agreements are difficult to reach, and they often require negotiation between other authorities and the tribes over such matters as

training, reciprocal authority to arrest, the “geographical reach of the agreements, the jurisdiction of the parties, liability of officers performing under the agreements, and sovereign immunity.” Fletcher, Fort, & Singel, *Indian Country Law Enforcement and Cooperative Public Safety Agreements*, 89 Mich. Bar J. 42, 44 (2010).

In short, we see nothing in these provisions that shows that Congress sought to deny tribes the authority at issue, authority that rests upon a tribe’s retention of sovereignty as interpreted by Montana, and in particular its second exception. To the contrary, in our view, existing legislation and executive action appear to operate on the assumption that tribes have retained this authority. See, e.g., Brief for Current and Former Members of Congress as Amici Curiae 23–25; Brief for Former U. S. Attorneys as Amici Curiae 28–29.

* * *

For these reasons, we vacate the Ninth Circuit’s judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, concurring.

I join the opinion of the Court on the understanding that it holds no more than the following: On a public right-of-way that traverses an Indian reservation and is primarily patrolled by tribal police, a tribal police officer has the authority to (a) stop a non-Indian motorist if the officer has reasonable suspicion that the motorist may violate or has violated federal or state law, (b) conduct a search to the extent necessary to protect himself or others, and (c) if the tribal officer has probable cause, detain the motorist for the period of time reasonably necessary for a non-tribal officer to arrive on the scene.

NOTES

1. The Supreme Court, for the first time, held that nonmember actions satisfied the second exception to the *Montana* test. Normally, the *Montana* general rule and its exceptions are considered a civil jurisdiction test, but this situation appears to involve criminal activity. Moreover, the *Montana* rubric usually differentiates between members and nonmembers, while Indian country criminal jurisdiction (see Chapter 7) differentiates between Indians and non-Indians. E.g., 25 U.S.C. § 1301(2) (recognizing the “inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all Indians*”) (emphasis added). *Cooley* involved a non-Indian in the act of committing serious crimes over which the Crow Nation possessed no criminal jurisdiction, but now (it is clear) possesses civil jurisdiction.

The implications of the Supreme Court’s decision may be that Indian tribes that attempt to regulate non-Indian criminal conduct (and nonmember Indian criminal conduct as well) through the imposition of civil fines and civil forfeiture laws, for example, are safe in doing so. E.g., *Wilson v. Horton’s Towing*, 906 F.3d 773 (9th Cir. 2018) (remanding a nonmember’s challenge to the Lummi Tribe’s exercise of civil forfeiture over their truck, requiring exhaustion of tribal remedies); *Miner’ Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007) (affirming the civil forfeiture of a nonmember’s truck on the grounds of sovereign immunity).

2. What is the purpose of Justice Alito’s concurrence? Could it be that the *Cooley* reasoning could be used by lower courts to confirm inherent tribal powers over nonmembers beyond this limited criminal context? Could *Oliphant v. Suquamish Indian Tribe* (see page 575) be subject to reconsideration given the impact of non-Indian/nonmember conduct on Indian tribes and individual Indians? See generally Matthew L.M. Fletcher, *Muskrat Textualism*, 115 Nw. U. L. Rev. (forthcoming 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3767096.

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 . . . ; *Seufert Brothers Co. v. United States*, 249 U.S. 194, 196–198 . . . (1919); *Tulee*, 315 U.S. at 683–685 . . . ; *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 677–678 . . . (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 . . . ; *Seufert Brothers*, 249 U.S. at 198–199 . . . ; *Tulee*, 315 U.S. at 684 . . . ; *Fishing Vessel*, 443 U.S. at 679, 684–685

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 Confederate 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-emptes 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 horrors 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 horrors 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.]

NOTE

The votes of the Court in *Cougar Den* and *McGirt* placed Justice Gorsuch squarely in the middle of Indian law, seemingly the swing vote. In most matters of law, Gorsuch is a reliable conservative. But Gorsuch’s brand of conservatism – textualism – seems to work to the benefit of tribal interests:

Justice Gorsuch, in his *Washington State Department of Licensing v. Cougar Den* concurrence, seems to have employed what could be called Indian law

originalism. In that case, which involved the interpretation of an Indian treaty, Gorsuch relied exclusively on evidence of the understanding of that treaty by the Indians who negotiated that treaty, and representations made by those on the American side consistent with the Indian understanding. Gorsuch casually tossed aside any modern understanding that differed or modified the original understanding, framing the issue as “adopting the interpretation most consistent with the treaty’s original meaning.” Significantly, while dissenters raised the specter of horrific policy consequences flowing from the interpretation of the treaty favored by the majority, Gorsuch was having none of it. Gorsuch’s nascent theory of Indian law originalism took the discipline demanded by aspects of Scalia’s textualism, most notably the separation of text from judicial policy preferences, and applied it simply.

It is now clear that *Cougar Den* wasn’t a one-time-only deal with Justice Gorsuch. Any textual theory that prioritizes text over the policy preferences of unelected judges – preferences that likely arise from the various structural, institutional, and cognitive biases of the judiciary – is an improvement, perhaps even a paradigmatic improvement. That Justice Ginsburg – the author of *City of Sherrill*, an opinion that pointedly discarded the text in favor of policy preferences – joined Gorsuch’s *Cougar Den*’s concurrence and his *McGirt* majority opinion is also suggestive that she shares his views on textualism in the Indian law context.

In short, the deeply split *McGirt* decision shows that the Court still has no dominant theory. Textualism is on the minds of the judges, but the discipline to accept the outcomes that textualism brings prevailed by a solitary vote.

Matthew L.M. Fletcher, *Textualism’s Gaze*, 25 MICH. J. RACE & L. 111, 136-37 (2020).

SECTION D.

THE INDIAN CHILD WELFARE ACT OF 1978

After note 3 on page 713, add:

Brackeen v. Haaland

United States Fifth Circuit Court of Appeals, 2021, en banc

994 F.3d 249

Per Curiam:

This en banc matter considers the constitutionality of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq., and the validity of implementing regulations promulgated by the Bureau of Indian Affairs (BIA) in its 2016 Final Rule (Final Rule). Plaintiffs are several couples who seek to adopt or foster Indian children, a woman who wishes for her Indian biological child to be adopted by non-Indians, and the States of Texas, Louisiana, and Indiana. Defendants are the United States, federal agencies and officials charged with administering ICWA and the Final Rule, as well as several Indian tribes that intervened in support of ICWA. The district court granted Plaintiffs summary judgment in part, declaring that ICWA and the Final Rule contravene multiple constitutional provisions and the Administrative Procedure Act (APA). Defendants appealed. A panel of this court reversed and rendered judgment for the Defendants. See *Brackeen v. Bernhardt*, 937 F.3d 406, 414 (5th Cir. 2019). One panel member partially dissented, concluding that several provisions of ICWA violated the Tenth Amendment’s anticommandeering doctrine. See *id.* at 441–46 (OWEN, J., concurring in part and dissenting in part). This case was then reconsidered en banc.

Neither JUDGE DENNIS’S nor JUDGE DUNCAN’S principal opinion nor any of the other writings in this complex case garnered an en banc majority on all issues. We therefore provide the following issue-by-issue summary of the en banc court’s holdings, which does not override or amend the en banc opinions themselves.

First is the issue of standing. The en banc court unanimously holds that at least one Plaintiff has standing to challenge Congress’s authority under Article I of the Constitution to enact ICWA and to press anticommandeering and nondelegation challenges to specific ICWA provisions. The en banc court also unanimously holds that Plaintiffs have standing to challenge the Final Rule as unlawful under the APA. The en banc court is equally divided as to whether Plaintiffs have standing to challenge two provisions of ICWA, 25 U.S.C. §§ 1913 and 1914, on equal protection grounds, and the district court’s conclusion that Plaintiffs can assert this claim is therefore affirmed

without a precedential opinion. An en banc majority also holds that Plaintiffs have standing to assert their equal protection challenges to other provisions of ICWA.

On the merits, an en banc majority agrees that, as a general proposition, Congress had the authority to enact ICWA under Article I of the Constitution.² An en banc majority also holds that ICWA's "Indian child" classification does not violate equal protection. The district court's ruling to the contrary on those two issues is therefore reversed. The en banc court is equally divided, however, as to whether Plaintiffs prevail on their equal protection challenge to ICWA's adoptive placement preference for "other Indian families," 25 U.S.C. § 1915(a)(3), and its foster care placement preference for a licensed "Indian foster home," § 1915(b)(iii). The district court's ruling that provisions of ICWA and the Final Rule are unconstitutional because they incorporate the "Indian child" classification is therefore reversed, but its ruling that § 1915(a)(3) and (b)(iii) violate equal protection is affirmed without a precedential opinion.

The court's holdings on Plaintiffs' various anticommandeering claims are more intricate. An en banc majority holds that ICWA's "active efforts," § 1912(d), expert witness, § 1912(e) and (f), and recordkeeping requirements, § 1915(e), unconstitutionally commandeer state actors.⁵ The district court's judgment declaring those sections unconstitutional under the anticommandeering doctrine is therefore affirmed. However, the en banc court is equally divided on whether the placement preferences, § 1915(a)–(b), violate anticommandeering to the extent they direct action by state agencies and officials⁶; on whether the notice provision, § 1912(a), unconstitutionally commandeers state agencies⁷; and on whether the placement record provision, § 1915(a), unconstitutionally commandeers state courts.⁸ To that extent, the district court's judgment declaring those sections unconstitutional under the anticommandeering doctrine is affirmed without precedential opinion.

Furthermore, an en banc majority holds that several challenged ICWA provisions validly preempt state law and so do not commandeer states. Those are provisions granting certain private rights in state child custody proceedings—namely, the right to intervene, § 1911(c), to appointed counsel, § 1912(b), to examine documents, § 1912(c), to explanation of consent, § 1913(a), to withdraw consent, § 1913(b), (c), and (d), to seek invalidation, § 1914, to seek return of custody, § 1916(a), and to obtain tribal information, § 1917.⁹ In addition, an en banc majority holds that the following provisions validly preempt contrary state law to the extent they apply to state courts (as opposed to state agencies): the placement preferences, § 1915(a) and (b), and the placement and termination standards, § 1912(e) and (f).¹⁰ The district *269 court's rulings to the contrary are therefore reversed.

Next, an en banc majority holds that § 1915(c), which permits Indian tribes to establish an order of adoptive and foster preferences that is different from the order set forth in § 1915(a) and (b), does not violate the nondelegation doctrine. The district court's ruling to the contrary is therefore reversed.

Last are Plaintiffs’ claims that the Final Rule violates the APA. An en banc majority holds that the BIA did not violate the APA by concluding in the Final Rule that it may issue regulations binding on state courts.¹² But an en banc majority also holds that—consistently with the en banc court’s holding that §§ 1912(d), 1912(e), and 1915(e) commandeer states—the Final Rule violated the APA to the extent it implemented these unconstitutional provisions.¹³ Finally, an en banc majority determines that 25 C.F.R. § 23.132(b)—the part of the Final Rule interpreting § 1915’s “good cause” standard to require proof by clear and convincing evidence—violated the APA.¹⁴ An en banc majority holds that the Final Rule did not violate the APA in any other respect. The district court’s grant of relief under the APA is affirmed to the extent it is consistent with these holdings and reversed to the extent it is inconsistent with these holdings.

The judgment of the district court is therefore AFFIRMED in part and REVERSED in part, and judgment is accordingly RENDERED.

* * *

NOTES

1. The Fifth Circuit partially affirmed and partially reversed *Brackeen v. Zinke*, 338 F.Supp.3d 514 (N.D. Tex. 2018), which had struck down the entirety of the Indian Child Welfare Act on a wide variety of questionable constitutional grounds. The *en banc* stage briefs are here: <https://turtletalk.blog/icwa/texas-v-zinke-documents-and-additional-materials/texas-v-zinke-fifth-circuit-document/>. Of the six opinions that used up 200+ pages in the Federal Reporter, none of them garnered an en banc majority.
2. Judge Costa’s opinion, the final opinion reported, argued that the decision applied to no live controversy and bound no state courts:

Such ironies abound in this case. The most astonishing irony results from this being a federal court challenge to laws that apply in state adoption proceedings. It will no doubt shock the reader who has slogged through today’s lengthy opinions that, at least when it comes to the far-reaching claims challenging the Indian Child Welfare Act’s preferences for tribe members, this case will not have binding effect in a single adoption. That’s right, whether our court upholds the law in its entirety or says that the whole thing exceeds congressional power, no state family court is required to follow what we say. See, e.g., *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam) (noting that Texas state courts are “obligated to follow only higher Texas courts and the United States Supreme Court”); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 . . . (1989) (recognizing that

state courts “render binding judicial decisions that rest on their own interpretations of federal law”).

* * *

There is a term for a judicial decision that does nothing more than opine on what the law should be: an advisory opinion. That is what the roughly 300 pages you just read amount to. . . . Justiciability doctrines, with their various elements and exceptions, have one underlying aim: ensuring federal courts only hear cases that actually decide concrete disputes. Decide is the key word here. When a judicial opinion does not actually resolve a dispute, it has no more legal force than a law review article.

Brackeen, 994 F.3d at 445 (Costa, J., concurring in part).

Kate Fort and Monica Williamson of Michigan State University’s Indigenous Law and Policy Center and Indian Law Clinic put together a chart that explains what, if at all, the impact of the *Brackeen* en banc decision has on a given ICWA matter. That chart is available here: <https://turtletalk.blog/2021/04/13/brackeen-decision-tree/>.

3. 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) should apply to

² 25 U.S.C. § 415(a).

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. Lobbitt*, 334 F.Supp. 665 (D.Mont.1971).

After the *Lobbitt* 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.

* * *

* * * 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.

* * *

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. * * *

* * *

* * * 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 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

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 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).

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.

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).

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

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 Env'tl. 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.bearscoalition.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>.

The Biden Administration is looking into reversing the Trump Administration's actions to shrink the monument. Zak Podmore, Indigenous leaders call on Biden to enlarge Bears Ears as 25-foot totem pole travels from Washington state to Washington, D.C., *SALT LAKE TRIB.*, July 18, 2021, <https://www.sltrib.com/news/2021/07/18/indigenous-leaders-call/>.

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.

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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 inquiries 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 “remain 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.]

NOTE

1. On remand, the trial level court in Wyoming issued an order adopting the theory of the dissenters in *Herrera* that tribal members cannot benefit from the decision on the basis of claim preclusion. *State of Wyoming v. Herrera*, CT-2014-2687 & 2688 (4th Jud. Dist. Cir. Ct., June 11, 2020), available at <https://turtletalk.files.wordpress.com/2020/06/herrera-circuit-court-remand-order.pdf>.
2. The Crow Nation sought to re-open the *Crow Tribe v. Repsis* decision in federal court, but the effort failed. Order on Relief from Judgment, No. 92-CV-1002-ABJ (D. Wyo., July 1, 2021), available at <https://turtletalk.files.wordpress.com/2021/07/84-dct-order.pdf>.

CHAPTER 13

RIGHTS OF ALASKA NATIVES AND NATIVE HAWAIIANS

SECTION A. ALASKA NATIVES: LOOKING FORWARD TO THE PAST?

At the end of page 993, add:

6. ALASKA NATIVE CORPORATIONS

Yellen v. Confederated Tribes of the Chehalis Reservation

United States Supreme Court, 2021

___ U.S. ___, 141 S.Ct. 2434

Justice SOTOMAYOR delivered the opinion of the Court.

In March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 134 Stat. 281. Title V of the Act allocates \$8 billion of monetary relief to “Tribal governments.” 134 Stat. 502, 42 U.S.C. § 801(a)(2)(B). Under the CARES Act, a “Tribal government” is the “recognized governing body of an Indian tribe” as defined in the Indian Self-Determination and Education Assistance Act (ISDA). §§ 801(g)(5), (1). ISDA, in turn, defines an “Indian tribe” as “any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act[,] which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 25 U.S.C. § 5304(e).

The Department of the Treasury asked the Department of the Interior, the agency that administers ISDA, whether Alaska Native Corporations (ANCs) meet that definition. Consistent with its longstanding view, the Interior Department said yes. The Treasury Department then set aside approximately \$500 million of CARES Act funding for the ANCs. The question presented is whether ANCs are “Indian tribe[s]” under ISDA, and are therefore eligible to receive the CARES Act relief set aside by the Treasury Department. The Court holds that they are.

I

This is not the first time the Court has addressed the unique circumstances of Alaska and its indigenous population. See, e.g., *Sturgeon v. Frost*, 587 U.S. —, 139 S.Ct. 1066 . . . (2019); *Sturgeon v. Frost*, 577 U.S. 424 . . . (2016); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 . . . (1998); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 . . . (1962). The “simple truth” reflected in those prior cases is that “Alaska is often the exception, not the rule.” *Sturgeon*, 577 U.S. at 440 To see why, one must first understand the United States’ unique historical relationship with Alaska Natives.

A

When the United States purchased the Territory of Alaska from Russia in 1867, Alaska Natives lived in communities dispersed widely across Alaska’s 365 million acres. In the decades that followed, “[t]here was never an attempt in Alaska to isolate Indians on reservations,” as there had been in the lower 48 States. *Metlakatla Indian Community*, 369 U.S. at 51 As a consequence, the claims of Alaska Natives to Alaskan land remained largely unsettled even following Alaska’s admission to the Union as our 49th State in 1959. See Alaska Statehood Act, § 4, 72 Stat. 339; *Sturgeon*, 577 U.S. at 429

That changed in 1971 with the Alaska Native Claims Settlement Act (ANCSA). 85 Stat. 688, 43 U.S.C. § 1601 et seq. ANCSA officially dispensed with the idea of recreating in Alaska the system of reservations that prevailed in the lower 48 States. It extinguished Alaska Natives’ claims to land and hunting rights and revoked all but one of Alaska’s existing reservations. § 1610. In exchange, “Congress authorized the transfer of \$962.5 million in state and federal funds and

approximately 44 million acres of Alaska land to state-chartered private business corporations that were to be formed pursuant to” ANCSA. *Native Village of Venetie Tribal Government*, 522 U.S. at 524 These corporations are called ANCs.

Relevant here, ANCs come in two varieties: regional ANCs and village ANCs. To form the regional ANCs, the Act directed the Secretary of the Interior to divide Alaska into 12 geographic regions. § 1606(a). Within each region, Alaska Natives were instructed to “incorporate under the laws of Alaska a Regional Corporation to conduct business for profit.” § 1606(d). To form the village ANCs, the Act identified approximately 200 Alaska “Native villages,” a term encompassing any community of 25 or more Alaska Natives living together as of the 1970 census. §§ 1602(c), 1610(b), 1615(a). For each Alaska Native village, ANCSA ordered the “Native residents” to create an accompanying village corporation to “hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf ” of the village. §§ 1602(j), 1607(a). ANCSA then directed the Secretary to prepare a roll showing the region and, if applicable, village to which each living Alaska Native belonged. § 1604. Enrolled Alaska Natives then received shares in their respective ANCs. §§ 1606(g), 1607.

B

In 1975, four years after ANCSA’s enactment, Congress passed ISDA. 25 U.S.C. § 5301 et seq. ISDA answered the call for a “new national policy” of “autonomy” and “control” for Native Americans and Alaska Natives. H.R. Doc. No. 91–363, p. 3 (1970); see also *Menominee Tribe of Wis. v. United States*, 577 U.S. 250, 252 . . . (2016) (“Congress enacted [ISDA] in 1975 to help Indian tribes assume responsibility for aid programs that benefit their members”).

ISDA decentralized the provision of federal Indian benefits away from the Federal Government and toward Native American and Alaska Native organizations. ISDA allows any “Indian tribe” to request that the Secretary of the Interior enter into a self-determination contract with a designated “tribal organization.” § 5321(a)(1). Under such a contract, the tribal organization delivers federally funded economic, infrastructure, health, or education benefits to the tribe’s membership.

As originally drafted, ISDA’s “Indian tribe” definition did not mention ANCs. H.R. 6372, 93d Cong., 1st Sess., § 1(a) (1973) (defining “Indian tribe” to mean “an Indian tribe, band, nation, or Alaska Native Community for which the Federal Government provides special programs and services because of its Indian identity”). Prior to passage, however, the definition was amended twice to include, first, Alaska Native villages and, second, ANCs. See H.R. Rep. No. 93–1600, p. 14 (1974) (“The Subcommittee amended the definition of ‘Indian tribe’ to include regional and village corporations established by [ANCSA]”). Today, ISDA defines an “Indian tribe” as “any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA], which

is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” § 5304(e).

Despite the express inclusion of ANCs in the definition of “Indian tribe,” a question arose in the Interior Department whether the “recognized-as-eligible clause” limits the definition to “federally recognized tribes” only. A federally recognized tribe is one that has entered into “a government-to-government relationship [with] the United States.” 1 F. Cohen, *Handbook of Federal Indian Law* § 3.02[3] (N. Newton ed. 2012). This recognition can come in a number of ways: “from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity.” W. Canby, *American Indian Law in a Nutshell* 4 (7th ed. 2020). As private companies incorporated under state law, ANCs have never been “recognized” by the United States in this sovereign political sense.

In 1976, the year after ISDA’s enactment, the Interior Department’s Assistant Solicitor for Indian Affairs issued a memorandum on the status of ANCs under ISDA. App. 44–48. In the Assistant Solicitor’s view, the express inclusion of ANCs within the definition of “Indian tribe” confirmed that ANCs are Indian tribes under ISDA, even though they are not federally recognized tribes. In the decades since, the Interior Department has repeatedly reaffirmed that position. See, e.g., 60 Fed. Reg. 9250 (1995) (ANCs “ha[ve] been designated as ‘tribes’ for the purposes of some Federal laws,” including ISDA); 58 Fed. Reg. 54364 (1993) (ANCs “are not governments, but they have been designated as ‘tribes’ for the purposes of ” ISDA); 53 Fed. Reg. 52833 (1988) (ISDA “specifically include[s]” ANCs).

C

In 2020, Congress incorporated ISDA’s “Indian tribe” definition into the CARES Act. 42 U.S.C. § 801(g)(1). Title V of the Act allocates \$150 billion to “States, Tribal governments, and units of local government” to compensate for unbudgeted expenditures made in response to COVID–19. § 801(a)(1). Of that \$150 billion, \$8 billion is reserved for “Tribal governments.” § 801(a)(2)(B). A “Tribal government” is the “recognized governing body of an Indian Tribe,” as ISDA defines the latter term. §§ 801(g)(5), (1).

On April 23, 2020, the Treasury Department determined that ANCs are eligible for CARES Act relief, and set aside more than \$500 million for them (since reduced to approximately \$450 million). App. 53–54; Letter from E. Prelogar, Acting Solicitor General, to S. Harris, Clerk of Court (May 12, 2021). Soon after the Treasury Department’s announcement, a number of federally recognized tribes (respondents) sued, arguing that only federally recognized tribes are Indian tribes under ISDA, and thus under the CARES Act. Some Tribes further argued that ANCs do not have a “recognized governing body” for purposes of the CARES Act and are ineligible to receive its funding for that reason as well.

The suits were consolidated in the District Court for the District of Columbia, which ultimately entered summary judgment for the Treasury Department and the ANCs. The Court of

Appeals for the District of Columbia Circuit reversed. *Confederated Tribes of Chehalis Reservation v. Mnuchin*, 976 F.3d 15 (2020). In its view, the recognized-as-eligible clause is a term of art requiring any Indian tribe to be a federally recognized tribe. Because no ANC is federally recognized, the court reasoned, no ANC qualifies for funding under Title V of the CARES Act. In so holding, the D. C. Circuit split with the Ninth Circuit, which had held decades prior in *Cook Inlet Native Assn. v. Bowen*, 810 F.2d 1471 (1987), that ANCs are Indian tribes for ISDA purposes, regardless of whether they have been federally recognized. *Id.*, at 1474.

We granted certiorari, 592 U.S. ___, 141 S.Ct. 976, 208 L.Ed.2d 510 (2021), to resolve the Circuit split and determine whether ANCs are eligible for the CARES Act funding set aside by the Treasury Department.

II

All but one of the respondent Tribes agree that ANCs are eligible to receive the CARES Act funds in question if they are Indian tribes for purposes of ISDA. The primary question for the Court, then, is whether ANCs satisfy ISDA’s definition of “Indian tribe.” The ANCs ask the Court to answer that question by looking to the definition’s plain meaning. Respondents ask the Court to adopt a term-of-art construction that equates being “recognized as eligible for the special programs and services provided by the United States to Indians” with being a “federally recognized tribe,” i.e., a tribe recognized by the United States in a sovereign political sense.

A

Starting with the plain meaning, an “Indian tribe” under ISDA is a “tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 25 U.S.C. § 5304(e). The definition’s first two clauses are straightforward enough. The first lists entities that might count as Indian tribes under the Act (e.g., tribes, bands, nations). The second, “the Alaska clause,” makes clear that Alaska Native villages and ANCs are “includ[ed].” The third, “the recognized-as-eligible clause,” requires more analysis. According to that clause, the listed entities must be “recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”

ANCs, of course, are “established pursuant to” ANCSA within the meaning of the Alaska clause. They are thereby “recognized as eligible” for ANCSA’s benefits. The trickier question is whether eligibility for the benefits of ANCSA counts as eligibility for “the special programs and services provided by the United States to Indians because of their status as Indians.”

It does. Contrary to the dissent’s view, *post*, at 2457 – 2458 (opinion of GORSUCH, J.), ANCSA is readily described as a special program provided by the United States to “Indians” (in this case, Alaska Natives). See 43 U.S.C. § 1626 (describing ANCSA’s relationship to “other

programs”). The scope of that program is substantial: ANCSA made ANCs eligible to select tens of millions of acres of land and receive hundreds of millions of tax-exempt dollars. §§ 1605, 1610, 1611. Not just a one-time payment, ANCSA provides for revenue sharing among the regional ANCs to ensure Alaska Natives across the State benefit from an ongoing equitable distribution of ANC profits. § 1606(i). ANCSA further entrusts ANCs to “hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf” of Alaska Natives, who are the ANCs’ shareholders, as well as to distribute dividends to them. See §§ 1602(j), 1606(j). Moreover, ANCs and their shareholders are “eligible for the benefits of” ANCSA, § 1606(d), precisely because of their status as Indians. See § 1626(e)(1) (“For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives”); note following § 1601, p. 1136 (ANCSA is “ ‘Indian legislation enacted by Congress pursuant to its plenary authority under the Constitution of the United States to regulate Indian affairs’ ”).

Respondents do not deny that the benefits of ANCSA are “a” special program or service provided by the United States to Indians. According to respondents, however, such benefits are not “the” special programs and services provided to Indians (e.g., healthcare, education, and other social services provided by federal agencies like the Bureau of Indian Affairs and the Indian Health Service). “The” special programs and services, respondents assert, are available only to federally recognized tribes (or, more precisely, to members of such tribes). In respondents’ view, ANCs are thus “includ[ed]” in the “Indian tribe” definition’s Alaska clause only to be excluded en masse from that definition by the recognized-as-eligible clause.

That would certainly be an odd result. Fortunately, the text does not produce it. ISDA’s “Indian tribe” definition does not specify the particular programs and services an entity must be eligible for to satisfy the recognized-as-eligible clause. Given that ANCSA is the only statute the “Indian tribe” definition mentions by name, the best reading of the definition is that being eligible for ANCSA’s benefits by itself satisfies the recognized-as-eligible clause.

Consider a similarly worded example. A doctor recommends getting a blood test every six months to “any child, adult, or senior, including anyone over the age of 75 whose blood-sugar levels have tested in the prediabetic range within the last five years, who exhibits the warning signs of Type 2 diabetes.” Without further context, it is unclear exactly which warning signs the doctor is referring to, or how many of those signs a child, adult, or senior must exhibit before warranting biannual testing. But it is fair to say that individuals over 75 with prediabetic blood-sugar levels within the last five years should get tested biannually, even if they exhibit no other warning signs. By expressly “including” individuals with that one warning sign, the doctor’s recommendation makes clear that particular sign, by itself, is warning enough.

Just so here: Congress’ express inclusion of ANCs “established pursuant to [ANCSA]” confirms that eligibility for ANCSA’s benefits alone is eligibility enough to be an Indian tribe. ANCs thus satisfy ISDA’s Indian tribe definition, regardless of whether they and their shareholders are eligible for federal Indian programs and services other than those provided in ANCSA. At any

rate, the one-to-one relationship respondents posit between membership in a federally recognized tribe and eligibility for federal Indian benefits more broadly does not hold in the unique circumstances of Alaska. See Letter from E. Prelogar, Acting Solicitor General, to S. Harris, Clerk of Court (Apr. 22, 2021) (“[T]he federal government has historically provided benefits and services to Alaska Natives who are not enrolled members of a federally recognized Indian tribe”); D. Case & D. Voluck, *Alaska Natives and Americans Laws* 30 (3d ed. 2012) (“[T]he federal government has, at least since the end of the nineteenth century, provided a wide variety of programs and services to Alaska Natives solely because of their status as Natives”). So ANCSA is not, in fact, the only federal Indian program or service for which ANCs and their shareholders are eligible.

It should come as no surprise that Congress made ANCs eligible to contract under ISDA. After all, Congress itself created ANCs just four years earlier to receive the benefits of the Alaska land settlement on behalf of all Alaska Natives. Allowing ANCs to distribute federal Indian benefits more broadly is entirely consistent with the approach Congress charted in ANCSA. Accord, 1 American Indian Policy Review Comm’n, Final Report, 95th Cong., 1st Sess., 495 (Comm. Print 1977) (ANCs “might well be the form or organization best suited to sponsor certain kinds of federally funded programs” in Alaska); 43 U.S.C. § 1606(r) (“The authority of a Native Corporation to provide benefits ... to promote the health, education, or welfare of ... shareholders or family members is expressly authorized and confirmed”).

Under the plain meaning of ISDA, ANCs are Indian tribes, regardless of whether they are also federally recognized tribes. In so holding, the Court does not open the door to other Indian groups that have not been federally recognized becoming Indian tribes under ISDA. Even if such groups qualify for certain federal benefits, that does not make them similarly situated to ANCs. ANCs are sui generis entities created by federal statute and granted an enormous amount of special federal benefits as part of a legislative experiment tailored to the unique circumstances of Alaska and recreated nowhere else. Moreover, with the exception of Alaska Native villages (which are now federally recognized), no entities other than ANCs are expressly “includ[ed]” by name in ISDA’s “Indian tribe” definition. Cf. *Sturgeon*, 577 U.S. at 440 . . . (“All those Alaska-specific provisions reflect the simple truth that Alaska is often the exception, not the rule”).

B

Respondents urge this Court to discard the plain meaning of the “Indian tribe” definition in favor of a term-of-art construction. In respondents’ view, the 69 words of the “Indian tribe” definition are a long way of saying just 8: An “Indian tribe” means a “federally recognized tribe.” If that is right, respondents are correct that ANCs are not Indian tribes, because everyone agrees they are not federally recognized tribes. To prevail on this argument, however, respondents must demonstrate that the statutory context supports reading ISDA’s “Indian tribe” definition as a term of art rather than according to its plain meaning. . . . Their efforts are not persuasive.

In arguing for a term-of-art construction, respondents first rely on a series of Acts that terminated various tribes starting in the late 1950s. Those Acts closed tribal membership rolls, specified the division of tribal assets, and revoked tribal constitutions. See, e.g., Act of Sept. 21, 1959, Pub. L. No. 86-322, 73 Stat. 592. Following termination, the tribe and its members were no longer “entitled to any of the special services performed by the United States for Indians because of their status as Indians.” § 5, *id.*, at 593. As respondents note, this language resembles (although does not mirror precisely) the final words of ISDA’s recognized-as-eligible clause. If being terminated means no longer being “entitled to any of the special services performed by the United States for Indians because of their status as Indians,” the argument goes, then being “recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians” means being a federally recognized tribe.

Respondents misjudge the relevance of these termination statutes. Those statutes do not contain the words “recognized as eligible”; they do not even contain the word “recognized.” Furthermore, the termination statutes use their ISDA-reminiscent phrasing not as a synonym for termination but to describe just one, among other, consequences of a tribe’s constitution being revoked. See, e.g., *ibid.* (“The constitution of the tribe ... shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction”).

Some linguistic similarity between ISDA and the termination statutes does not suggest that the language of the recognized-as-eligible clause was an accepted way of saying “a federally recognized tribe” in 1975. It instead supports a much more limited proposition: A federally recognized tribe that has not been terminated is “entitled” to “special services performed by the United States for Indians,” and thereby satisfies ISDA’s similarly worded recognized-as-eligible clause. But of course, no one disputes that being a federally recognized tribe is one way to qualify as an Indian tribe under ISDA; it is just not the only way.

Nor is the mere inclusion of the word “recognized” enough to give the recognized-as-eligible clause a term-of-art meaning. True, the word “recognized” often refers to a tribe with which the United States has a government-to-government relationship (particularly when it is sandwiched between the words “federally” and “tribe”). That does not mean, however, that the word “recognized” always connotes political recognition.

“Recognized” is too common and context dependent a word to bear so loaded a meaning wherever it appears, even in laws concerning Native Americans and Alaska Natives. . . . Certainly, “recognized” can signify political recognition; it can also refer to something far more pedestrian. See, e.g., *Black’s Law Dictionary* 1436 (rev. 4th ed. 1968) (defining “recognition” as “[r]atification; confirmation; an acknowledgment that something done by another person in one’s

name had one's authority"). The type of recognition required is a question best answered in context. See, e.g., 25 U.S.C. § 3002(a)(2)(C)(1) (providing for control over certain cultural items "in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered"); § 4352(3) (defining a "Native Hawaiian organization" as a nonprofit that, among other things, "is recognized for having expertise in Native Hawaiian culture and heritage, including tourism"). In ISDA, the required recognition is of an entity's eligibility for federal Indian programs and services, not a government-to-government relationship with the United States.

Respondents next rely on sources that postdate ISDA. Ordinarily, however, this Court reads statutory language as a term of art only when the language was used in that way at the time of the statute's adoption. . . . In relying on sources postdating ISDA, respondents must show not only that the language of the recognized-as-eligible clause later became a term of art, but also that this term-of-art understanding should be backdated to ISDA's passage in 1975. They cannot make that showing.

Respondents lean most heavily on the Federally Recognized Indian Tribe List Act of 1994 (List Act), enacted almost 20 years after ISDA. See 25 U.S.C. §§ 5130, 5131. The List Act requires the Secretary of the Interior to publish an annual list of "all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." § 5131(a). According to respondents, ANCs' absence from the Secretary's list confirms that they are not "eligible for the special programs and services provided by the United States to Indians because of their status as Indians," § 5304(e), and thus fail ISDA's recognized-as-eligible clause.

Respondents' cross-referencing argument, however, requires the Court to ignore the reason why ANCs are not on the list. True to its full name, the Federally Recognized Indian Tribe List Act tasks the Secretary with maintaining a "list of federally recognized tribes" only. Note following § 5130, p. 678. The List Act, moreover, lacks language like that in ISDA expressly "including" ANCs "established pursuant to" ANCSA. § 5304(e). The obvious inference, then, is that ANCs are not on the Secretary's list simply because they are not federally recognized.

History confirms as much. In 1979, 15 years before the List Act was passed, the Secretary began publishing a list of Indian tribes "that have a government-to-government relationship with the United States." 44 Fed. Reg. 7235. In 1988, ANCs were added to the Secretary's list, which had been retitled "Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs," because ANCs are "specifically eligible for the funding and services of the [Bureau of Indian Affairs] by statute" and "should not have to undertake to obtain Federal Acknowledgement" (i.e., federal recognition). 53 Fed. Reg. 52829, 52832. In 1993, the Secretary dropped ANCs from the list, concluding that "the inclusion of ANC[s], which lack tribal status in a political sense, called into question the status" of the other entities on the list. 58 Fed. Reg. 54365. In so doing, the Secretary reaffirmed that ANCs "are not governments, but they have been designated as 'tribes' for the purposes of some Federal laws," including ISDA. *Id.*, at 54364.

The List Act, passed the following year, “confirmed the Secretary’s authority and responsibility” to maintain a list of federally recognized tribes. 60 Fed. Reg. 9251. Hence, ANCs remained off the list.

To accept respondents’ argument, then, the Court would need to cross-reference ISDA’s definition of an “Indian tribe” with the Secretary’s list, but ignore why ANCs were excluded from that list in the first place. The Court declines to take that doubtful step.

Despite asking the Court to consider post-ISDA statutes to determine whether ANCs are “Indian tribes” under ISDA, moreover, respondents largely fail to address post-ISDA congressional actions that contradict their position. First, consider Congress’ treatment of the Cook Inlet Region, Inc. (CIRI), the regional ANC for the ANCSA region covering more than half the Alaskan population. See *The Twelve Regions, ANCSA Regional Association* (June 1, 2021), <https://ancsaregional.com/the-twelve-regions>. In 1994, CIRI contracted under ISDA through its designated healthcare provider to offer healthcare benefits to Alaska Natives and American Indians in Anchorage and the Matanuska-Susitna Valley. See *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 988 (CA9 1999). A group of Alaska Native villages sued, arguing that the Federal Government should have first obtained their approval. *Ibid.*; see 25 U.S.C. § 5304(1) (“[I]n any case where [an ISDA contract] benefit[s] more than one Indian tribe, the approval of each such Indian tribe” is required). Congress mooted the dispute by passing a bill that waived ISDA’s normal tribal approval requirement for CIRI’s healthcare contracts. Department of the Interior and Related Agencies Appropriations Act, 1998, § 325(a), 111 Stat. 1597–1598. In so doing, Congress not only assumed CIRI was eligible to enter into ISDA contracts (notwithstanding its lack of federal recognition), but actively cleared the way for it to do so.

Next, consider the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. § 4101 et seq., which incorporates ISDA’s “Indian tribe” definition, see § 4103(13)(B). NAHASDA creates a housing block grant program for Indian tribes. § 4111. The regional ANCs (acting through their designated housing authorities) are among the largest recipients of these grants in Alaska, receiving tens of millions of dollars each year. See Dept. of Housing and Urban Development, FY 2020 Final [Indian Housing Block Grant] Funding by [Tribally Designated Housing Entities] & Regions. For years, Congress has passed appropriations riders requiring that the existing recipients of NAHASDA’s housing block grants in Alaska (including ANCs) continue to receive those grants. See, e.g., Further Consolidated Appropriations Act, 2020, Pub. L. 116–94, Div. H, Tit. II, § 211, 133 Stat. 3003. Following the D. C. Circuit’s decision in this case, Congress awarded additional grants under NAHASDA and emphasized that, “[f]or the avoidance of doubt,” the “Indian tribe[s]” eligible for those grants “shall include Alaska native corporations established pursuant to” ANCSA. Consolidated Appropriations Act, 2021, Pub. L. 116–260, Div. N, Tit. V, Subtit. A, § 501(k)(2)(C), 134 Stat. 2077.

Thus, post-ISDA sources prove no more fruitful to respondents than pre-ISDA ones. Even assuming the Court should look to events after 1975, respondents cannot cherry-pick statutes like

the List Act without explaining postenactment developments that undermine their interpretation. In the end, the various statutes cited do not support respondents' efforts to exclude ANCs from ISDA by use of a term-of-art construction.

C

Even if ANCs did not satisfy the recognized-as-eligible clause, however, they would still satisfy ISDA's definition of an "Indian tribe." If respondents were correct that only a federally recognized tribe can satisfy that clause, then the best way to read the "Indian tribe" definition as a whole would be for the recognized-as-eligible clause not to apply to the entities in the Alaska clause at all (i.e., to "any Alaska Native village or regional or village corporation," 25 U.S.C. § 5304(e)). On this reading, the way to tell whether a tribe, band, nation, or other organized group or community is an "Indian tribe" is to ask whether it is federally recognized, but the way to tell whether an Alaska Native village or corporation is an "Indian tribe" is to ask whether it is "defined in or established pursuant to" ANCSA. *Ibid.* Otherwise, despite being prominently "includ[ed]" in the "Indian tribe" definition, *ibid.*, all ANCs would be excluded by a federal-recognition requirement there is no reasonable prospect they could ever satisfy.

Respondents object (and the dissent agrees) that this construction "produces grammatical incoherence." Brief for Respondents Confederated Tribes of Chehalis Reservation et al. 16; post, at 2454 – 2455. They point out that a modifying clause at the end of a list (like the recognized-as-eligible clause) often applies to every item in the list. . . . The so-called series-qualifier canon can be a helpful interpretive tool, and it supports the idea that the recognized-as-eligible clause applies to every type of entity listed in the "Indian tribe" definition, including ANCs. Given that the entities in the Alaska clause are the closest in proximity to the recognized-as-eligible clause, that canon arguably applies with particular force here.

[H]owever, the series-qualifier canon gives way when it would yield a "contextually implausible outcome." . . . The most grammatical reading of a sentence in a vacuum does not always produce the best reading in context. See, e.g., *Sturgeon*, 577 U.S. at 438 . . . ("Statutory language 'cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme' "); cf. B. Garner, *Modern English Usage* 784 (4th ed. 2016) (noting the "increasingly common" " 'remote relative,' " i.e., the practice of separating "the relative pronoun (that, which, who) from its antecedent").

Consider an example with the same syntax as the "Indian tribe" definition. A restaurant advertises "50% off any meat, vegetable, or seafood dish, including ceviche, which is cooked." Say a customer orders ceviche, a Peruvian specialty of raw fish marinated in citrus juice. Would she expect it to be cooked? No. Would she expect to pay full price for it? Again, no. Under the reading recommended by the series-qualifier canon, however, the ceviche was a red herring. Even

though the 50%-off sale specifically named ceviche (and no other dish), it costs full price because it is not cooked. That conclusion would make no sense to a reasonable customer.

Like applying a “cooked” requirement to ceviche, applying a “federally recognized” requirement to ANC is implausible in context. When Congress enacted ISDA in 1975, not a single Alaska Native village or ANC had been recognized for a government-to-government relationship with the United States. On respondents’ reading, then, the entire Alaska clause originally had no effect. None of its entities qualified as Indian tribes for purposes of ISDA, even though the only entities expressly included in ISDA’s definition of an “Indian tribe” are those in the Alaska clause.

The only explanation respondents offer for this highly counterintuitive result is that Congress included Alaska Native villages and corporations in the “Indian tribe” definition on the possibility they might one day become federally recognized. That is highly unlikely. First, the Alaska clause would be redundant on that account. See Brief for Respondents Confederated Tribes of Chehalis Reservation et al. 31 (“[T]he Alaska [clause] is ... best read as redundant”). A federally recognized Alaska Native village or ANC would presumably already fit into one of the pre-existing ISDA categories of “tribe[s], band[s], nation[s], or other organized group[s] or communit[ies].” 25 U.S.C. § 5304(e).

Second, it is quite doubtful that anyone in 1975 thought the United States was going to recognize ANCs as sovereign political entities. ANCs are for-profit companies incorporated under state law that Congress itself created just four years prior to ISDA. They are not at all the type of entities normally considered for a government-to-government relationship with the United States. Accord, 25 CFR § 83.4 (1994) (“The Department will not acknowledge,” i.e., federally recognize, “[a]n association, organization, corporation, or entity of any character formed in recent times unless the entity has only changed form by recently incorporating or otherwise formalizing its existing politically autonomous community”). Indeed, at the time ISDA was enacted, some doubted whether even Alaska Native villages could be federally recognized.⁸

Respondents counter by pointing to certain organizations created in Alaska in the 1930s that later became federally recognized tribes. One such organization, the Hydaburg Cooperative Association (HCA), was formed under the 1936 Amendment to the Indian Reorganization Act, which authorized Alaska Natives groups “not heretofore recognized as bands or tribes” to organize based on “a common bond of occupation, or association, or residence.” Ch. 254, 49 Stat. 1250 (codified at 25 U.S.C. § 5119). The HCA organized around “a common bond of occupation in the fish industry.” Constitution and By-Laws of the Hydaburg Cooperative Association, Alaska Preamble (1938). Decades later, the Interior Department acknowledged the HCA as a federally recognized tribe, even though it is of fairly recent vintage and organized around a bond of occupation rather than solely around an ancestral tribal heritage. See 58 Fed. Reg. 54369. If the HCA could be federally recognized, respondents say, some might have thought ANCs could too.

Respondents make too much of the HCA and the small handful of entities like it, which are not comparable to ANCs. Unlike ANCs, the former entities were organized under federally approved constitutions as part of a short-lived attempt to recreate in Alaska a tribal reservation system like that in the lower 48 States. ANCs, by contrast, were incorporated under state law pursuant to legislation that embodied the formal repudiation of that approach. That the Interior Department deemed the HCA and a handful of other entities like it federally recognized tribes decades after ISDA's passage does not mean it was plausible in 1975 to think ANCs would one day become federally recognized tribes, as well.⁹

Ultimately, respondents resort to the argument that, although the idea of ANCs becoming federally recognized tribes might be farfetched, it is not technically impossible. That is, Congress' plenary power over Indian affairs could conceivably permit it to recognize a government-to-government relationship between an ANC and the United States. Perhaps, but possibility is not the same as plausibility, and both are proper concerns of statutory interpretation. Consider again the example of a restaurant advertising "50% off any meat, vegetable, or seafood dish, including ceviche, which is cooked." On respondents' logic, because the restaurant technically could cook its ceviche, the only way to read the advertisement is that ceviche is full price unless the restaurant takes an unexpected culinary step.

That is wrong. The best reading of the advertisement is that ceviche is 50% off even if it is not cooked, just as the best reading of ISDA is that ANCs are Indian tribes even if they are not federally recognized. Any grammatical awkwardness involved in the recognized-as-eligible clause skipping over the Alaska clause pales in comparison to the incongruity of forever excluding all ANCs from an "Indian tribe" definition whose most prominent feature is that it specifically includes them.

D

Respondents make a few final arguments to persuade the Court that ANCs are not Indian tribes under ISDA. None succeeds.

Respondents argue first that the ANCs misrepresent how meaningful a role they play under ISDA because the actual number of ISDA contracts held by ANCs is negligible. The Court does not have the record before it to determine the exact number and nature of ISDA contracts held by ANCs or their designees, either historically or currently. The point is largely irrelevant, however. No one would argue that a federally recognized tribe was not an Indian tribe under ISDA just because it had never entered into an ISDA contract. The same is true for ANCs. To the extent respondents argue that ruling for them would be of little practical consequence given the small number of ISDA contracts held by ANCs, quantity is not the only issue. For example, CIRI contracts through a designee to provide healthcare to thousands of Alaska Natives in Anchorage and the Matanuska-Susitna Valley. Brief for CIRI as Amicus Curiae 9. The loss of CIRI's ability

alone to contract under ISDA would have significant effects on the many Alaska Natives it currently serves.

Respondents further argue that treating ANC's as Indian tribes would complicate the administration of ISDA. If an ISDA contract will benefit multiple Indian tribes, each such tribe has to agree to the contract before it can go into effect. 25 U.S.C. § 5304(l). Because membership in ANC's and federally recognized tribes often overlap, respondents argue that ANC's will be able to veto any ISDA contract sought by a federally recognized tribe in Alaska.

Without discounting the possibility of administrative burdens, this concern is overstated. The Executive Branch has treated ANC's as Indian tribes for 45 years, yet respondents point to no evidence of such a problem ever having arisen. If such a problem does arise, moreover, the Interior Department may be able to craft an administrative solution. Cf. 46 Fed. Reg. 27178, 27179 (1981) (Indian Health Service regulations establishing an "order of precedence" among Alaskan entities "[f]or the purposes of contracting under" ISDA and requiring authorizing resolutions from "[v]illages, as the smallest tribal units under" ANCSA).

Respondents also warn that blessing ANC's status under ISDA will give them ammunition to press for participation in the many statutes besides the CARES Act that incorporate ISDA's "Indian tribe" definition. See, e.g., Indian Health Care Improvement Act, § 4(d), 90 Stat. 1401; Native American Housing Assistance and Self-Determination Act of 1996, § 4(12)(B), 110 Stat. 4019–4020; Indian Tribal Energy Development and Self-Determination Act of 2005, [Title V of the Energy Policy Act of 2005], § 503(a), 119 Stat. 764–765.

As the Government notes, however, there may well be statutes that incorporate ISDA's "Indian tribe" definition but exclude ANC's from participation in other ways. See Brief for Federal Petitioner 33–34 (citing, e.g., 7 U.S.C. §§ 1639o(2), 1639p(a)(1) (defining "Indian tribe" to incorporate the ISDA definition, but also requiring participants to exercise " "regulatory authority over . . . territory of the Indian tribe"")). Moreover, this concern cuts both ways. If respondents' reading prevailed, ANC's would presumably be excluded from all other statutes incorporating ISDA's definition, even those under which ANC's have long benefited. That includes the Indian Tribal Energy Development and Self-Determination Act of 2005, under which ANC's have received millions of dollars of energy assistance. See Brief for Federal Petitioner 33. That also includes NAHASDA, which, as discussed, creates a housing block grant program under which the regional ANC's are some of the biggest recipients in Alaska. See *supra*, at 2446 – 2447. Currently, over 10,000 Alaskans live in housing units built, improved, or managed by these regional authorities. See Brief for Association of Alaska Housing Authorities as Amicus Curiae 15.

All told, the Court's decision today does not "vest ANC's with new and untold tribal powers," as respondents fear. Brief for Respondents Confederated Tribes of Chehalis Reservation et al. 54. It merely confirms the powers Congress expressly afforded ANC's and that the Executive Branch has long understood ANC's to possess.

III

Almost everyone agrees that if ANCs are Indian tribes under ISDA, they are eligible for funding under Title V of the CARES Act. If Congress did not want to make ANCs eligible for CARES Act funding, its decision to incorporate ISDA’s “Indian tribe” definition into the CARES Act would be inexplicable. Had Congress wished to limit CARES Act funding to federally recognized tribes, it could simply have cross-referenced the List Act instead, as it had in numerous statutes before. Instead, Congress invoked a definition that expressly includes ANCs (and has been understood for decades to include them). Today’s ruling merely gives effect to that decision.

Nevertheless, the Ute Indian Tribe of the Uintah and Ouray Reservation argues that the CARES Act excludes ANCs regardless of whether they are Indian tribes under ISDA. Recall that the CARES Act allocates money to “Tribal governments.” 42 U.S.C. § 801(a)(2)(B). A “Tribal government” is “the recognized governing body of an Indian tribe.” § 801(g)(5). According to the Utes, ANCs do not have a “recognized governing body” because that term applies to the governing body of a federally recognized tribe alone.

As the Utes implicitly acknowledge, however, federal recognition is usually discussed in relation to tribes, not their governing bodies. Brief for Respondent Ute Indian Tribe of the Uintah and Ouray Reservation 13 (“The recognized relationship is a political relationship between the United States and the tribe”); see also, e.g., note following 25 U.S.C. § 5130, p. 678 (“‘[T]he United State has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationships with those tribes, and recognizes the sovereignty of those tribes’”). In addition, the CARES Act’s use of the term “recognized governing body” is borrowed from ISDA itself, which lists the “recognized governing body” of an Indian tribe as one type of “tribal organization” empowered to contract with the government on the tribe’s behalf. § 5304(l). In the ISDA context, this term has long been understood to apply to an ANC’s board of directors, the ANC’s governing body as a matter of corporate law. See, e.g., App. 45 (An ANC’s “board of directors . . . is its ‘governing body’ ”); see also Black’s Law Dictionary, at 219 (defining “Board of Directors” as “[t]he governing body of a private corporation”). Indeed, respondents do not dispute that the plain meaning of “recognized governing body” covers an ANC’s board of directors.

Looking to the plain meaning of “recognized governing body” makes even more sense because nothing in either the CARES Act or ISDA suggests that the term “recognized governing body” places additional limits on the kinds of Indian tribes eligible to benefit under the statutes. In both laws, the term instead pinpoints the particular entity that will receive funding on behalf of an Indian tribe. See 42 U.S.C. § 801(g)(5); 25 U.S.C. § 5304(l). Because ANCs are Indian tribes within the meaning of the CARES Act, an ANC’s board of directors is a “recognized governing body” eligible to receive funding under Title V of the Act.

IV

The Court today affirms what the Federal Government has maintained for almost half a century: ANCs are Indian tribes under ISDA. For that reason, they are Indian tribes under the CARES Act and eligible for Title V funding. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GORSUCH, with whom Justice THOMAS and Justice KAGAN join, dissenting.

* * *

I

Everyone agrees that ANCs are entitled to some CARES Act relief. Already, they have received benefits Congress allocated to corporations, like the Paycheck Protection Program. See Brief for Respondent Ute Indian Tribe of Uintah and Ouray Reservation 1 (Brief for Respondent Ute Tribe). Congress also accounted for ANC shareholders, and all Alaskans, when it directed over \$2 billion to the State. In fact, Alaska received more money per capita than all but two other States. *Id.*, at 3; Congressional Research Service, General State and Local Fiscal Assistance and COVID–19: Background and Available Data (Feb. 8, 2021). The Alaska Native Villages received hundreds of millions of those dollars because everyone agrees they qualify as tribal governments for purposes of the CARES Act. See *ibid.* This suit concerns only the ANCs’ claim of entitlement to additional funds statutorily reserved for “Tribal governments.” 42 U.S.C. § 801(a)(2)(B). If that counterintuitive proposition holds true, ANCs will receive approximately \$450 million that would otherwise find its way to recognized tribal governments across the country, including Alaska’s several hundred Native Villages. See Letter from E. Prelogar, Acting Solicitor General, to S. Harris, Clerk of Court (May 12, 2021).

* * *

II

A

Start with the question whether the recognition clause applies to the ANCs. As the nearest referent and part of an integrated list of other modified terms, ANCs must be subject to its terms. Unsurprisingly, the Court of Appeals reached this conclusion unanimously. Lawyers often debate whether a clause at the end of a series modifies the entire list or only the last antecedent. . . . In ISDA, for example, some might wonder whether the recognition clause applies only to ANCs or whether it also applies to the previously listed entities—“Indian tribe[s], band[s], nation[s],” etc. But it would be passing strange to suggest that the recognition clause applies to everything except the term immediately preceding it. A clause that leaps over its nearest referent to modify every other term would defy grammatical gravity and common sense alike. . . .

Exempting ANCs from the recognition clause would be curious for at least two further reasons. First, the reference to ANCs comes after the word “including.” No one disputes that the recognition clause modifies “any Indian tribe, band, nation, or other organized group or community.” So if the ANCs are included within these previously listed nouns—as the statute says they are—it’s hard to see how they might nonetheless evade the recognition clause. Second, in the proceedings below it was undisputed that the recognition clause modifies the term “Alaska Native village[s],” even as the ANCs argued that the clause does not modify the term “Alaska Native . . . regional or village corporation.” *Confederated Tribes of Chehalis Reservation v. Mnuchin*, 976 F.3d 15, 23 (CA9 2020); Brief for Federal Petitioner 46. But to believe that, one would have to suppose the recognition clause skips over only half its nearest antecedent. How the clause might do that mystifies. . . .

* * *

The CARES Act itself offers still further clues. In the provision at issue before us, Congress appropriated money “for making payments to States, Tribal governments, and units of local government.” 42 U.S.C. § 801(a)(1). Including tribal governments side-by-side with States and local governments reinforces the conclusion that Congress was speaking of government entities capable of having a government-to-government relationship with the United States. Recall, as well, that the CARES Act defines tribal governments as the “recognized governing body of an Indian Tribe.” § 801(g)(5). ANCs, like most corporations, have a board of directors, 43 U.S.C. § 1606(f), and a corporate board may well be the governing body of an enterprise. But they do not govern any people or direct any government.

* * *

The Court’s reply creates another anomaly too. If receiving any federal money really is enough to satisfy the recognition clause, many other Indian groups might now suddenly qualify as tribes under the CARES Act, ISDA, and other federal statutes. *2458 A 2012 GAO study, for example, identified approximately 400 nonfederally recognized tribes in the lower 48 States, of which 26 had recently received direct funding from federal programs. GAO, *Indian Issues: Federal Funding for Non-Federally Recognized Tribes* (GAO-12-348, Apr. 2012). This number does not include additional entities that may have received federal benefits in the form of loans, procurement contracts, tax expenditures, or amounts received by individual members. *Id.*, at 35. And still other groups may have federal rights secured by treaty, which may exist even if the tribe is no longer recognized. Cf. *Menominee Tribe v. United States*, 391 U.S. 404, 412–413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). How does the Court solve this problem? With an ipse dixit. See ante, at 2443 (“[T]he Court does not open the door to other Indian groups that have not been federally recognized becoming Indian tribes under ISDA”). The Court’s “plain meaning” argument thus becomes transparent for what it is—a bare assertion that the recognition clause carries a different meaning when applied to ANCs than when applied to anyone else.

III

With its first theory facing so many problems, the Court offers a backup. Now the Court suggests that ANCs qualify as tribes even if they fail to satisfy the recognition clause. Ante, at 2447. Because ISDA’s opening list of entities specifically includes ANCs, the Court reasons, the recognition clause must be read as inapplicable to them alone. Essentially, the Court quietly takes us full circle to the beginning of the case—endorsing an admittedly ungrammatical reading of the statute in order to avoid what it calls the “implausible” result that ANCs might be included in ISDA’s first clause only to be excluded by its second. Ante, at 2448.

But it is difficult to see anything “implausible” about that result. When Congress adopted ANSCA in 1971, it “created over 200 new legal entities that overlapped with existing tribes and tribal nonprofit service organizations.” Brief for Professors and Historians as Amici Curiae 27. At that time, there was no List Act or statutory criteria for formal recognition. Instead, as the Court of Appeals ably documented, confusion reigned about whether and which Alaskan entities ultimately might be recognized as tribes. 976 F.3d at 18; see also Brief for Professors and Historians as Amici Curiae 28; Cohen, *Handbook of Federal Indian Law* 270–271 (1941). When Congress adopted ISDA just four years later, it sought to account for this uncertainty. The statute listed three kinds of Alaskan entities: Alaska Native Villages, Village Corporations, and Regional Corporations. And the law did “meaningful work by extending ISDA’s definition of Indian tribes” to whichever among them “ultimately were recognized.” 976 F.3d at 26. It is perfectly plausible to think Congress chose to account for uncertainty in this way; Congress often adopts statutes whose application depends on future contingencies. . . .

Further aspects of Alaskan history confirm this understanding. Over time, the vast majority of Alaska Native Villages went on to seek—and win—formal federal recognition as Indian tribes. See 86 Fed. Reg. 7557–7558 (2021); Brief for Respondent Confederated Tribes of Chehalis Reservation et al. 23. (It’s this recognition which makes them indisputably eligible for CARES Act relief. See *supra*, at 2453.) By the time it enacted ISDA, too, Congress had already authorized certain Alaska Native groups to organize based on “a common bond of occupation, or association, or residence.” 25 U.S.C. § 5119. This standard, which did not require previous recognition as “bands or tribes,” was unique to Alaska. See *ibid.* And at least one such entity—the Hydaburg Cooperative Association, organized around the fish industry—also went on to receive federal tribal recognition in the 1990s. 86 Fed. Reg. 7558; see also Brief for Respondent Confederated Tribes of Chehalis Reservation et al. 35–36. Though short lived and not a full government-to-government political recognition, the Secretary of the Interior at one point even listed ANCs as “ ‘Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs,’ ” before eventually removing them. Ante, at 2446. And in 1996, Congress considered a bill that would have “deemed” a particular ANC—the Cook Inlet Region, Inc.—“an Indian tribal entity for the purpose of federal programs for which Indians are eligible because of their status as Indians” and required that it be included on “any list that designates federally recognized Indian tribes.” H.R. 3662, 104th Cong., 2d Sess., § 121. Of course, the ANCs before us currently are not

recognized as tribes. But all this history illustrates why it is hardly implausible to suppose that a rational Congress in 1975 might have wished to account for the possibility that some of the Alaskan entities listed in ISDA might go on to win recognition.

* * *

Having said all this, my disagreement with the Court’s “implausibility” argument is a relatively modest one. We agree that linguistic and historical context may provide useful interpretive guidance, and no one today seeks to suggest that judges may sanitize statutes in service of their own sensibilities about the rational and harmonious. Instead, our disagreement is simply about applying the plain meaning, grammar, context, and canons of construction to the particular statutory terms before us. As I see it, an ordinary reader would understand that the recognition clause applies the same way to all Indian groups. And if that’s true, there’s just no way to read the text to include ANCs as “Tribal governments” for purposes of the CARES Act.

* * *

In my view, neither of the Court’s alternative theories for reversal can do the work required of it. The recognition clause denotes the formal recognition between the federal government and a tribal government that triggers eligibility for the full panoply of special benefits given to Indian tribes. Meanwhile, a fair reading of that clause indicates that it applies to ANCs. Accordingly, with respect, I would affirm.

NOTE

There were 17 Indian tribal plaintiffs. Sixteen of the tribes worked together, but a 17th tribe (the Ute Indian Tribe of the Uintah and Ouray Reservation) declined to cooperate with the other tribe and filed its own brief. Normally at the Supreme Court, when one side has multiple parties, the parties work out amongst themselves which parties’ advocate will argue the case. The outlier tribe refused to concede on that question as well. On the Friday before oral argument in the case, scheduled for the next Monday, the Court followed its regular procedures in such a situation – it drew lots. Though it had a 1 in 17 chance of being selected, the Ute Tribe was selected. Leah Litman, Kate Shaw, and Melissa Murray of the Strict Scrutiny podcast described the scene and the consequences of this maneuver:

Kate Shaw:

Sure. Well, actually, just wanted to note something, a procedural wrinkle in that case. So there’s a story that came out about the selection of advocates to actually argue in Yellen right after we recorded our episode with the Appellate Project. So remember, this is the case about whether Alaska native corporations, or ANCs, formed under the Alaska Native Claim Settlement Act, are eligible for funds that

may be given to Indian tribes under the CARES Act. So in that case there were two sets of briefs on behalf of the tribe, so opposing the disbursement of these funds to the ANCs. One brief, which we highlighted, represented 16 tribes. The other brief, which I had actually just failed to notice before we previewed the case, represented a single tribe, the Ute tribe. So the Ute tribe actually filed a motion requesting divided arguments so that they could argue in addition to the lawyer for the 16 other tribes.

The court denied that motion. Usually in those circumstances counsel just works out who will argue, but at least according to Marcia Coyles' reporting the Ute tribe's position was that they would not consent to the other lawyer arguing.

Leah Litman:

So in those circumstances what does the court do? As Marcia Coyle reported, the court literally draws a name out of a hat to decide who argues the case. And here

Melissa Murray:

So fancy, so fancy.

Leah Litman:

Right. They don't even bother doing an automated spreadsheet like you do for Instagram giveaways. Just a hat.

Kate Shaw:

In some states, literally if there's a tie . . . In the Virginia legislative election two or four years ago maybe, they literally tossed a coin when there was an actual tie. So weirdly, this stuff does happen.

Leah Litman:

So here, because the one lawyer represented 16 respondents and the lawyer for the Ute tribe represented one, there was a 16 out of 17 chance that they'd draw the name of the lawyer for the consolidated brief. But they drew the name of the lawyer for the Ute tribe, and so that's who argued the case. I should say as a disclosure that I know, or at least have met the lawyer for the other 16 tribes, Riyaz Kanji. Our listeners might know him as the lawyer who argued on behalf of the tribes and won in *McGirt v. Oklahoma*, a major, hugely significant federal Indian law case. And that is who the tribes could have had arguing the case. But that is not what happened, and I think the argument was much poorer for it.

You all talked last week with Professor Matthew Fletcher about how this is, I think, a hard case. And it's hard because I think assessing the implications of the case requires an understanding of Indian law and how contracts and decision making authority are allocated under or as a result of the Indian Self Determination Act, the statute incorporated into the CARES Act. And here the justices seem to be thinking about the consequences for the CARES Act alone, that is, what if you don't give money to ANCs? And just thinking about the case in those terms is a mistake because the case will also determine whether ANCs would be given decision making authority and veto power over contracts as a result of being recognized as tribes for purposes of ISDA, and that could be really huge since if they are recognized as tribes you could have multiple and potentially conflicting veto authority in separate organizations within Alaska between the ANCs and the federally recognized tribes.

It's also hard because it involves a lot of complex interlocking statutes and competing canons. Would reading ANCs out of ISDA render it superfluous? It depends on your reading about whether Congress thought ANCs might qualify for recognition. Also depends a little bit on your understanding about what ANCs are and what recognition is supposed to serve. And the argument was just a disaster. Justice Sotomayor told the lawyer for the Ute tribe that it was going around in a circle. At one point the advocate conceded he was "having trouble communicating" the dilemma that would be created under the government's determination. Justice Barrett said the case was about only what piece of the pie goes where. And so this to me, just not great.

And I'm not sure how the court's procedures or practices regarding divided argument help or hurt this. If they always grant divided argument or don't consolidate cases, maybe you don't have an incentive to agree to someone else arguing the case. On the other hand, this doesn't seem great either since it effectively gave a holdout considerable power to potentially torpedo a case in the process.

Barking Goldfish, Strict Scrutiny podcast, Transcript at 7-8 (April 26, 2021), available at <https://strictscrutinypodcast.com/wp-content/uploads/2021/04/Barking-Goldfish.pdf>. See also Marcia Coyle, Resolving Stalemate, Supreme Court Picked Lawyer for Key Pandemic Argument, Nat'l L.J., April 20, 2021.

CHAPTER 14

COMPARATIVE AND INTERNATIONAL LEGAL PERSPECTIVES ON INDIGENOUS PEOPLES LEGAL RIGHTS

SECTION B. EMERGING VOICES: INDIGENOUS RIGHTS AND INTERNATIONAL LAW

7. THE UNITED NATIONS HUMAN RIGHTS SYSTEM

NOTES

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1. [ADD TO THE END OF NOTE 1] In 2016, the Human Rights Council expanded the mandate of the Expert Mechanism such that it is charged not only with advising the Council on the human rights' of indigenous peoples but also with assisting member states and indigenous peoples in realizing the aims of the UN Declaration on the Rights of Indigenous Peoples. Now comprised of seven members, one from each of the United Nation's seven socio-cultural regions of indigenous peoples, the Expert Mechanism engages with states, indigenous peoples, UN agencies, and industry to help implement the Declaration. In its first five years under the new mandate, the EMRIP has provided technical advice on application of the Declaration with regard to the Sami Parliament Act in Finland, assisted the Maori people in developing a National Action Plan to implement the Declaration in New Zealand, and facilitated dialogue regarding the application of Mexico City's new constitution, incorporating the Declaration as a matter of law. In 2020, the Expert Mechanism facilitated dialogue between the Yaqui people and government of Sweden leading to an agreement in principle to repatriate the sacred *Maaso Kova*, consistent with Articles 11 and 12 of the Declaration. *See Expert Mechanism on the Rights of Indigenous Peoples*, UNITED NATIONS HUM. <https://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx>. *See also* INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, *THE INDIGENOUS WORLD* 582-588, 613-671 (2019) (current description of UN mechanisms and procedures focused on indigenous people).
2. [ADD AFTER THE LAST LINE OF THE FIRST PARAGRAPH, ADD NOTE 2A] Indigenous peoples in the United States, Canada, and other countries have advocated for implementation of the Declaration as a matter of domestic law. In 2021, Canada passed the "United Nations Declaration on the Rights of Indigenous Peoples Act," which creates a framework to bring national laws into alignment with the Declaration. It calls for the designation of a federal minister to create a national action plan, in consultation and

cooperation with indigenous peoples, to achieve the aims of the Declaration and to provide annual progress reports. For the full text, see <https://parl.ca/DocumentViewer/en/43-2/bill/C-15/first-reading>.

3. The national act in Canada follows activism at the province level. For example in 2019, the Legislative Assembly of British Columbia (B.C.), a province of Canada, unanimously passed the “Declaration on the Rights of Indigenous Peoples Act,” 4th Session, 41st Parliament, British Columbia, 2019. Developed jointly between the B.C. government and the B.C. First Nations Leadership Council, the law requires the government “to take all necessary measures to ensure provincial laws are consistent with the Declaration” through an action plan and annual progress report.
4. In the United States, agencies including the Advisory Council on Historic Preservation have adopted policy and guidelines to implement the Declaration. Several tribes, including the Muscogee (Creek) Nation and Ho-Chunk Nation have adopted the Declaration through tribal law. For a summary of these implementation activities in the United States, see the Tribal Implementation Toolkit (2021), a joint publication of the Native American Rights Fund, University of Colorado Law School, and UCLA Law School, available at <https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf>.
5. Scholars have made arguments for U.S. federal courts to consider using the Declaration as an interpretive device regarding constitutional and statutory claims in the American Indian context. See, e.g., Kristen A. Carpenter, *Religious Freedoms, Sacred Sites, and Human Rights in the United States*, in COMPARATIVE APPROACHES TO IMPLEMENTATION OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (B. Gunn et. al., eds.) (2020) (arguing, among other things, for construction of the First Amendment and Religious Freedom Restoration Act consistent with the Declaration’s recognition of indigenous peoples’ rights to their religious properties and spiritual relationships with traditional lands).
6. [NEW NOTE] The United Nations General Assembly recently proclaimed 2022-2032 as the “International Decade of Indigenous Languages,” to bring awareness to the issue of language discrimination and opportunities for revitalization as experienced by indigenous peoples worldwide. G.A. Res. A/C.3/74/L.19/Rev.1, ¶ 25 (Nov. 6, 2019). The General assembly urged “[s]tates to consider establishing national mechanisms” to realize language rights, including those articulated in the Declaration. How might tribes and their advocates use this General Assembly Resolution and activities of the upcoming Decade to address language loss and revitalization in the U.S., in realms ranging from voting and education to religion and culture? See Kristen A. Carpenter and Alexey Tsykarev, *(Indigenous) Language as a Human Right*, 24 UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS 49 (2020).

**NOTE: ARTICLE 27 OF THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS AND INDIGENOUS PEOPLES' HUMAN RIGHTS**

Add new paragraph after the 2nd full paragraph on p. 1103

Recently the committee has extended its analysis beyond Article 27 and invoked the Declaration in indigenous peoples' cases. In 2019, the Committee wrote in *Tiina Sanila-Aikio v. Finland* that Finland violated the Sami peoples' rights to participate in public life (Article 25) and minority rights (Article 27) as an indigenous people when its Supreme Administrative Court expanded the pool of voters for the Sami Parliament by including individuals who the Sami Parliament had found ineligible to vote. Citing Article 33 of the Declaration, which provides, "indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions . . . and the right to determine the structures and to select the membership of their institutions in accordance with their own procedures," the case is notable for the committee's interpretation of the Covenant "in the light of the United Nations Declaration on the Rights of Indigenous Peoples." *Tiina Sanila Aikio vs. Finland*, CCPR/C/124/D/2668/2015.