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Federal Indian Law: Background and Current Issues

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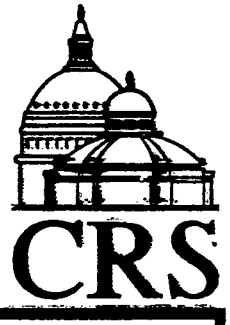

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FEDERAL INDIAN LAW: BACKGROUND AND CURRENT ISSUES

SUMMARY

This report briefly describes some of the fundamentals of federal Indian law, including the concept of tribal sovereignty and the allocation of authority among state, federal, and tribal governments with reference to criminal and civil laws and taxation. It then touches on some of the current issues related to Indian gaming, taxation, land acquisition, and adoption of Indian children.

Indian tribes have been held by the courts to possess certain governmental powers by virtue of their original sovereignty over their land and their people and to retain those powers until the powers have been extinguished by federal law, either explicitly or implicitly. The Supreme Court has indicated that tribal authority is subject to the overriding power of Congress. Some of the areas in which there are legislative proposals respecting tribal authority include gaming, taxation, sovereign immunity, and Indian Child Welfare Act amendments. None of these issues is susceptible of an easy solution; some involve direct conflict between state authority and tribal authority; others may involve conflict between tribal authority and individual rights.

Early decisions of the Supreme Court established the status of tribes as sovereigns dependent on the national government and the paramount power of Congress in Indian affairs. While generalizations in the field of federal Indian law are problematic, it appears that under current law most tribes retain some criminal law jurisdiction over tribal Indians and certain civil jurisdiction over members and non-members on tribal land, including the authority to impose certain taxes. Much of the deciphering of tribal jurisdiction vis-a-vis state jurisdiction has been by way of case law, turning on individualized factual predicates, thus, such questions as tribal taxation authority are often resolved on a case by case basis. In at least two areas there are federal statutes defining the authority of tribes and states: gaming and child custody decisions. In both of these areas there are a multitude of legal disputes that often result in litigation. Congress has before it various proposals attempting to solve some of the issues in contention concerning Indian gaming and adoption of Indian children. There are also proposals regarding taxation and collection of state taxes on tribal land and a measure to waive tribal sovereign immunity. Tribes are generally subject to suit only in tribal courts, provided such courts exist and are empowered by their tribes to hear a particular cause of action.

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TRIBAL SOVEREIGNTY AND FEDERAL POWER

Background

Federal Indian law has it roots in the attitude of the European colonists to the legal status of the native peoples, the Indian tribes, whom they encountered in the Americas. To some extent the legal philosophy that the colonists brought with them and to a greater degree the mere fact that the colonists were outnumbered and had to reach accommodation with the Indian tribes forced them to recognize the right of the tribes to occupy their land and rule over it. Treaties were signed and alliances made with Indian tribes. Eventually Indian wars were fought and treaties concluded to establish peace.

Early decisions of the Supreme Court gave rise to an understanding that the Indian tribes were both sovereign nations and dependant wards of the United States, their trustee. A series of cases in the Supreme Court during Chief Justice John Marshall's era, solidified the status of Indian tribes under the federal Constitution. The federal Constitution confers on Congress the "Power...to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"[1] and on the President and the Senate, the power to make treaties, including treaties with the Indian tribes.[2] In *Cherokee Nation v. Georgia*,[3] the Marshall Court ruled that the Cherokee Indian Nation was not a foreign state within the meaning of Article III, section 2, of the Constitution, so as to give jurisdiction to the Supreme Court over a suit brought by it against the state of Georgia. In so ruling, the Court declared the Indian tribes, which the Court referred to as "domestic dependent nations,"[4] were entitled to the land that they occupied until the national government, which held title against their will, sought possession. He declared that in their relationship to the national government, tribes were in a "state of pupilage" resembling "a ward to his guardian."[5] The following year, in *Worcester v. Georgia*,[6] the Court ruled that the state of Georgia could not maintain a

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[1] U.S. Constitution, Art. I, sec. 8, cl. 3.6

[2] U.S.Constitution, Art. II, sec. 2, cl. 2.

[3] 30 U.S. (5 *Pet.*) 1 (1831).

[4] 30 U.S. (5 *Pet.*), at 17.

[5] 30 U.S. (5 *Pet.*) at 17.

[6] 31 U.S, (6 *Pet.)* 515 (1832).

prosecution against a minister residing in Cherokee country for failing to take out a state license. State laws could not be applied to activity in Indian country where federal law, by virtue of the Supremacy Clause, ruled; federal power was paramount and plenary in Indian country. From these cases are derived certain principles that have guided court decisions in the field of federal Indian law:

> (1) by virtue of aboriginal political and territorial status, Indian Tribes possessed certain incidents of preexisting sovereignty;[7] (2) such sovereignty was subject to diminution or elimination by the United States[8] but not by the individual states; and (3) the tribes' limited inherent sovereignty and their corresponding dependency on the

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[7] Addressing "The Powers of Indian Tribes," a memorandum, dated October 25, 1934, from the Solicitor of the Interior, approved by the Assistant Secretary, stated:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty, which has never been extinguished.*. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limits of tribal sovereignty rather than to determine its sources or its positive content.
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> *****
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> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles; An Indian tribe possesses, in the first instance, all the powers of any sovereign State. Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*,, it power of local self-government. These powers are subject to be qualified by treaties and by express legislation of Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.
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> I *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs: 1917-1974* 445, 447, 449. (|Emphasis in original.)

[8] In *Johnson v. McIntosh*, 21 U.S. (8 *Wheat.*) 543 (1823), the Court recognized that the sovereignty that the Indian tribes had prior to colonization was diminished. In this case, the court held that tribes could not alienate their land.

> United States for protection imposed on the latter a trust responsibility.[9]

Federal Power

From the earliest days of the nation, federal power has been interpreted broadly and used to enact statutes to regulate trade and commerce, define and punish crimes, prohibit liquor traffic, and dispose of Indian lands and property.[10] The Supreme Court has upheld this broad exercise of power in Indian affairs and referred to it as "plenary,"[11] and has only recently recognized constitutional limits on it, when it acknowledged that the Fifth Amendment, for example, places limits on that power.[12]

Tribal Sovereignty

The Supreme Court, in *Montana v. United States*, 450 U.S. 544 (1981), provided an authoritative statement of tribal sovereignty. The case involved the question of whether the Crow Tribe could impose license fees on non-members hunting and fishing within the reservation on a riverbed that the Court determined to be owned by the State of Montana, rather than the Crow Tribe. The Court drew a distinction between tribal sovereign powers that have been retained and those that have been divested. Divestment may occur either explicitly by federal statute or implicitly as inconsistent with a tribe's status as subject to the sovereign authority of the United States. According to the Court, authority over internal tribal affairs and relations among tribal members fall into the category of powers that have been retained, while those directed outside the tribe are of the type that may have been divested:

> ...Indian tribes retain sovereign power to exercise some form of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate through taxation, licensing, or other means nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other

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[9] Conference of Western Attorneys General, *American Indian Law Deskbook* 4 (1993).

[10] See *Felix S. Cohen's Handbook of Federal Indian Law* 212 (1982 ed.).

[11] *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977).

[12] In *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), the Court ruled that even though Congress could dispose of Indian property or change it from one form to another, when it took land from a tribe for a public purpose, the Fifth Amendment required just compensation. Courts having to determine if legislation providing special treatment to Indians is within Congressional power look to whether the special treatment "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). This case upheld statutes providing preferential treatment for Indians in hiring for the for preference in hiring.

> arrangements....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.[13]

CRIMINAL JURISDICTION

Tribal sovereignty has been diminished by treaties, statutes, and by the existence of the sovereignty of the United States. In the field of administration of justice, there has been considerable dilution of tribal authority. Prior to the treaties, tribes could exert civil and criminal jurisdiction to prescribe rules of conduct and maintain law and order. They could define and punish malfeasance and crime within their territory, a power that sometimes extended to non-members.[14] The Supreme Court, in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978), which involved a non-Indian, ruled that there has been a complete extinguishment of inherent tribal criminal authority over non-members, finding the notion of tribes' retaining any power to try non-members to be "inconsistent with their status." Tribes do retain criminal law power over their members,[15] however, unless it has been expressly removed or found to be inconsistent with tribal status as subject to the jurisdiction of the United States.[16]

Tribal criminal law jurisdiction has been limited in at least three ways: (1) by federal statutes extending federal criminal law jurisdiction over Indian country; (2) by the Indian Civil Rights Act,[17] limiting tribal power to impose

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[13] *Montana v. United States*, 450 U.S. 544, 565 (footnotes omitted).

[14] The early treaties recognized the power of tribes to punish whites within their territory. See Treaty of July 2, 1791, with the Cherokee Nation, 7 *Stat.* 40 "If any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokee lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not as they please."

[15] *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

[16] *United States v. Wheeler*, 435 U.S. 313 (1978). The Court also ruled that tribes retain no inherent criminal jurisdiction over Indians enrolled in other tribes on their reservations. *Duro v. Reina*, 495 U.S. 676 (1990). To address this, Congress amended the Indian Civil Rights Act by including in the definition of "powers of self-government," "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." Added to the definition of "Indian," is "any person who would be subject to the jurisdiction of the United States as an Indian under § 1153, title 18, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies." Pub. L. 101-511, § 8077(b) - (c), 104 *Stat.* 1892 - 1893, 25 U.S.C. §§ 1301(2) and (4).

[17] 25 U.S.C. § 1301, *et. seq.*

sentences or fines; and (3) by delegation of criminal law jurisdiction over Indians and reservations to states.

In addition to the federal criminal statutes that are generally applicable throughout the United States, there are certain statutes that apply only in "Indian country." "Indian country" is broadly defined to include: all land within the exterior limits of an Indian reservation, all dependent Indian communities, and all Indian allotments.[18] Certain statutes define specific crimes in Indian country, such as gambling[19] or introducing liquor into Indian country in violation of state or tribal law.[20] Others assert federal criminal law jurisdiction broadly over offenses committed in "Indian country"; exempt offenses committed by Indians against one another's property, offenses committed by Indians already punished by their tribes, or offenses committed to tribal jurisdiction by treaty; and, essentially reassert jurisdiction over a list of major crimes when committed in Indian country by Indians against persons or property.[21]

Another limitation on tribal governments' criminal law powers stems from the Indian Civil Rights Act. Tribal governments operate apart from the constraints of the federal bill of rights, since the Supreme Court has ruled that tribal governments do not derive their power from the federal Constitution and are not directly subject to the prohibitions of the federal Constitution.[22] Tribal governments, therefore, may take many forms. Some tribes retain traditional tribal institutions; others have constitutions that direct their exercise of self-government but that may not contain all of the safeguards found in federal or state constitutions. Many tribal governments are not subject to as strict a separation of powers as is the federal government; tribal councils may perform mixtures of legislative, judicial, and executive functions, for example.

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[18] 18 U.S.C. § 1151.

[19] 18 U.S.C. § 1166.

[20] 18 U.S.C. §§ 1154, 1155, 1156, and 1162.

[21] The General Crimes or Indian Country Crimes Act, 18 U.S.C. § 1152, makes federal criminal law applicable in Indian country "[e]xcept as otherwise provided by law." It exempts from its provisions "offenses committed by one Indian against the person or property of another Indian," and "any Indian committing any offense in Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." The Major Crimes Act, 18 U.S.C. § 1153, asserts federal criminal law jurisdiction over Indians committing any crime in a specified list of offenses against persons or property.

[22] In *Talton v. Mayes*, 163 U.S. 376, 384 (1896), the Supreme Court ruled that a grand jury convened by a tribal court was not subject to attack as violative of the Fifth Amendment since it was not exercising power under the Constitution, delegated by the national government, but "powers of local self-government...[which] existed prior to the Constitution."

Concerned about the exercise of arbitrary and uncontestable power by tribal governments, Congress in 1968, passed the Indian Civil Rights Act, which subjects tribal governments to some of the types of restrictions found in the federal Bill of Rights.[23] For example, its version of the First Amendment contains a free exercise clause but no establishment clause; its version of the Fifth Amendment contains no grand jury requirement. Its version of the Sixth Amendment makes it clear that the right to counsel is at the defendant's own expense. This bill of rights contains no requirement for a jury trial in civil suits and limits the right to jury trial in criminal cases to offenses punishable by imprisonment. The major limitations on tribal government authority, in this legislation, however, pertains to criminal cases. The Indian Bill of Rights forbids tribes from imposing "for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both"[24] and authorizes federal courts to issue *habeas corpus* petitions "to test the legality of ...detention by order of an Indian tribe."[25]

What has been perceived as a weakness in the Indian Civil Rights Act is the relative lack of enforceability other than in the tribal courts. The Supreme Court ruled in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that the only federal court remedy for a violation of the Indian Civil Rights Act is its one explicit enforcement mechanism, the writ of habeas corpus. Since this writ is generally only available in criminal proceedings, it appears that there is no remedy for violations in civil situations.

Although Congress has not unequivocally transferred criminal law power over Indian lands to the states,[26] there are some specific statutes that delegate authority over individual lands or tribes or states. There is also a statute that authorizes any state to assume criminal law jurisdiction, provided tribes assent. Public Law 280[27] authorizes any state to assume any portion of jurisdiction over Indian offenses committed within Indian country within the state provided tribal consent is obtained. As originally enacted, the statute delegated criminal law jurisdiction to California, Minnesota (except for the Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), and Wisconsin (except Menominee Reservation) and offered other states the option of accepting jurisdiction or any portion thereof. Subsequent amendments added Alaska as

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[23] Act of April 11, 1968, Pub. L. No. 90-284, tit. II, 82 *stat.* 73, (codified at 25 U.S.C. §§ 1301 - 1303).

[24] 25 U.S.C. § 1302(7).

[25] 25 U.S.C. § 1303.

[26] Under the Act of July 2, 1948, ch. 809, 60 *Stat.* 1224, 25 U.S.C. § 232, jurisdiction is given to New York State over offenses committed by or against Indians on Indian reservations within the state, with the exception of treaty guaranteed hunting and fishing rights.

[27] Act of August 15, 1953, ch. 505, 67 *Stat.* 588, 18 U.S.C. § 1162, 25 U.S. C. § 1321.

a mandatory state, permitted retrocession of jurisdiction, and required tribal consent for assumption of jurisdiction.

CIVIL JURISDICTION

Over the course of time, the reservations lost their character as exclusively Indian settlements. At the end of the nineteenth century, federal Indian policy espoused breaking up the reservations and assimilation of tribal Indians into the general culture. Under this policy, particularly with the enactment of the Dawes Act or General Allotment Act of 1887,[28] many reservations were broken up into small tracts, some of which were allotted to individual Indians, with the remaining declared surplus and eligible for settlement under the homestead laws. This policy was ultimately reversed with the enactment of the Wheeler-Howard or Indian Reorganization Act of 1934,[29] which prohibited further allotment of tribal lands to individuals, extended trust periods of existing allotments, provided for consolidation of tribal lands, encouraged tribal formation of governments based on constitutions, and authorized incorporation of tribal business corporations under federal law.[30] The legacy of the allotment era survives to this day, however, with many reservations checkerboards of tribal land, individual Indian trust allotments, and non-Indian owned fee land.

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[28] Act of Feb 18, 1887, ch. 119, 24 *Stat.* 388.

[29] Act of June 18, 1934, ch. 576, 48 *Stat.* 984, codified at 25 U.S.C. §§ 461-479.

[30] This was part of a series of laws passed in the 1930's to change federal Indian policy, in part motivated by a desire to "right past wrong" and end the dissolution of the reservation system. break up of reservations. F.Cohen, *Handbook of Federal Indian Law* 84 (1934). Its main objects, as summed up by Senator Wheeler, a sponsor of the legislation, and Chairman of the Senate Committee that reported it favorably, were:

> (1) To stop the alienation, through action by the Government or the Indian, of such lands belonging to ward Indians, as are needed for the present and future support of these Indians.
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> (2) To provide for the acquisition, through purchase, of land for Indians, now landless, who are anxious and fitted to make a living on such land.
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> *Id.*, quoting Sen. Rep. 73-1039, 73d Cong. 2d Sess. (1934).

Speaking of shifts in federal Indian policy over the years--from recognizing sovereignty, forcing allotment and assimilation, authorizing reorganization into constitutional governments, to the present policy of self-determination--one writer refers to tribal status as confused:

> ...throughout the federal government's policy vacillations, the status of tribal sovereignty has never been purely sovereign or dependent. While tribes retain vestiges of aboriginal sovereignty, they still must submit to the plenary power of Congress....The confused status of tribes in the American system may currently be the most definitive characteristic of federal Indian policy.
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> Christian M. Freitag, "Putting *Martinez* to the Test: Tribal Court Disposition of Due Process, 72 *Ind. L. J.* 831, 835 (1997) (footnote omitted).

The allocation of government power within reservations among federal, state, and tribal governments primarily rests upon decisional law. The mode of analysis for any jurisdictional allocation of governmental authority within Indian reservations often fits into the following framework:

- If Congress asserts an authority, unless the Constitution forbids it, that authority is valid.[31]

- If a state is asserting authority over reservations or reservation Indians, a federal statute or some form of federal acquiescence in the assertion of state authority must be found unless it can be shown that the state's assertion of jurisdiction does not interfere with reservation Indians.[32]

- If a tribe is asserting authority over its members or its own land, that authority is presumed valid unless inconsistent with a federal statute or with the status of the tribe as an entity within the United States and subject to the sovereignty of the national government.[33]

- If a tribe is asserting authority over non-members, unless there is a clear federal statute speaking to the issue, case-by-case adjudication will weigh the amount of consensual relation with the tribe and the effect upon essential tribal political, economic, or social interests.[34]

- Where state and tribal governments are asserting the same type of authority over non-Indian interests within a reservation, until recently the cases suggested a two-pronged test:[35] is the state law preempted by federal law or does it infringe on tribal self-government? The test involves a focused inquiry by the courts into the particular interests of each sovereign--state, federal, and tribal. With recent cases, however, the Court appears to be moving in the direction of upholding

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[31] See *Worcester v. Georgia*, 31 U.S. (6 *Pet.) 515.*

[32] See *United States v. McBratney*, 104 U.S. 631 (1881); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *Montana v. United States*, 450 U.S. 544 (1981); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

[33] See *Montana v. United States*, 450 U.S. 544 (1981).

[34] See *Montana v. United States*, 450 U.S. 544 (1981). In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), the Court upheld the exclusive authority of tribes over hunting and fishing by members and non-members within the reservation.

[35] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

state authority over non-Indian activity within reservations and away from upholding tribal authority over non Indians.[36]

Recent Supreme Court cases suggest a narrow view of tribal jurisdiction over non-Indians. *National Farmers Union Insurance Companies v. Crow Tribe of Indians*,[37] had ruled that a state would have to exhaust its remedies in tribal court before contesting that court's jurisdiction over a tort action for a claim arising on a state-operated school within the reservation. In *Strate v. A-1 Contractors*,[38] decided in 1997, the Court ruled that a tribal court has no jurisdiction over a tort action between a non-Indian owned tribal contractor and a non-Indian injured in a motor vehicle accident occurring on a state highway operated under a right-of-way over tribal land within a reservation. In reaching the decision, the Court made it clear that the *National Farmer's Union* rule was merely a prudential rule and not jurisdictional. While federal courts are required, as a matter of comity, to refuse jurisdiction in order to permit a tribal court to rule on whether it has jurisdiction over a matter, if the tribal court erroneously asserts jurisdiction over non-Indians or non-members, the issue is ripe for federal court jurisdiction. On the substantive issue, the Court ruled that the inherent adjudicatory authority of a tribe over non-Indians is coextensive with its regulatory authority and is, thus, subject to the *dictum* in *Montana v. United States.* The Court reiterated the *Montana* ruling with respect to the general lack of tribal authority over activity of nonmembers on alienated, non-Indian land within a reservation, and tribal retention of considerable authority over non-member activity on tribal land. It found, however, that the state highway's right-of-way made the area the functional equivalent of land alienated to non-Indians and that tribal authority could only be upheld over non-Indian activity on the highway if a consensual relationship or threat to tribal integrity could be shown.

In *Cotton Petroleum v. New Mexico*,[39] the Court ruled that even though there was no explicit federal authorization, the State of New Mexico was entitled to impose a mineral severance tax on minerals withdrawn from Indian lands within the Jicarilla Apache Reservation by a non-Indian concern under contract with the Tribe.[40] The Court had previously upheld tribal mineral

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[36] See *County of Yakima v. Confederated Tribes and Bands of the yakima Indian Nation*, 502 U.S. 251 (1992); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Strate v. A-1 Contractors*,__ U.S. __, 117 S.Ct. 1404 (1997).

[37] 471 U.S. 854 (1985).

[38] __ U.S. __, 117 S.Ct. 1404 (1997).

[39] __ U.S. __, 109 S.Ct. 1698 (1989). This decision was issued after the *Brendale* decision. It, more, than *Brendale*, however, explicitly employs the preemption analysis.

[40] Aside from its impact on the *White Mountain Apache* preemption test, this decision may have serious implications for Indian tribal governments. While the decision (continued...)

severance taxes under similar circumstances.[41] The Supreme Court examined the issue in terms of whether Congress had preempted the right of the state to tax non-Indians dealing with the tribe and reiterated the traditional Indian preemption test. [42] The Court's review of the applicable legislative history led it to infer from the silence of the federal statute authorizing mineral leasing on state taxation, Congressional acquiescence therein. It, then, looked to a second traditional test, whether the state taxation infringed on tribal self-government. In its exposition of this test and its analysis of the case, it seems to have concluded that only substantial interference would serve to invalidate the state tax.[43] The Court saw *Cotton Petroleum*, therefore, in terms of what it was not. It was not a case involving an exorbitant state tax; it did not involve a tax that imposed a substantial burden on a tribe; it did not tax reservation activities with which the state had no involvement other than taxing.

The Court also differentiated the situation from one involving an activity subject to taxation by multiple *states*. That circumstance demands apportionment of taxes in proportion to the income attributable to activity within each state.[44] Where the issue of double taxation involves an Indian reservation, the Court emphasized the fact that while two taxing jurisdictions were involved, there were not two *states*. According to the Court, when a state seeks to impose taxes on activities conducted by non-Indians on an Indian reservation, if the state's tax is not preempted by federal law, the state may tax all of the income of that activity. Likewise the federal government and the tribal government may tax the activity. When the amount of the state tax is being contested, a question arises under the Due Process Clause of the Constitution,[45] but that Clause has not been held to require that benefits to

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[40](...continued)
is likely to affect Indian mineral development efforts, a strong possibility exists that the decision may have a wider impact upon tribal taxing efforts and upon questions of civil jurisdiction within Indian reservations. If states as well as tribes may impose taxes on minerals extracted from Indian lands under contract with tribes, tribes may be forced to eschew their legitimate right in order to induce outsiders to develop their mineral resources.

[41] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

[42] Such preemption, according to the Court could either be explicit or implicit. In deciding whether there is a legislative intent to preempt, according to the Court, the legislative history must be viewed against a background of tribal sovereignty; and, federal, state, and tribal interests must be weighed. If the federal law is ambiguous, moreover, the ambiguity must be resolved to favor tribal sovereignty.

[43] See Susan M. Williams, "State Taxation on Indian Reservations: The Impact of *Cotton Petroleum Corporation v. New Mexico*," 36 *Federal Bar News and Journal* 431 (1989).

[44] *Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207 (1980).

[45] U.S.Const., Amend. XIV, § 1.

the taxpayer equal the amount of the tax.[46] The Court did suggest, however, that if a state tax on activities performed under a contract with a tribe is shown to impose more than the indirect burden of limiting profitability to the extent shown in *Cotton Petroleum*, the state tax may be impermissible.

Another issue that has been aired in the courts is zoning authority over reservation lands. The first Supreme Court case on this issue is *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). While it is of limited precedential value because it is a plurality decision, there is significance in the fact that no more than four of the Justices ruled in favor of tribal zoning authority over reservation land that had been opened up to non-Indian settlement.

TAXATION

No federal statute defines taxing authority within Indian country. Because the law in this area is decisional, controversies arise continually. The caselaw indicates that some basic principles, not unlike those outlined in *Montana*, govern:

- Tribes have authority to tax members and their property on reservations.[47]

- In situations where tribes are attempting to tax nonmembers, two issues will be whether or not the activity is occurring on tribal or individual trust land and whether or not the persons to be taxed have entered into consensual relations with the tribe.[48]

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[46] *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 491, n.21 (1987), citing *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521 (1937): "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied."

[47] A 1934 Opinion of the Solicitor of the department of the Interior, 55 I..D. 14 (October 25, 1934), I *Opinions of the Solicitor, Department of the Interior, Indian Affairs* 445, 465, described the taxing powers of an Indian tribe as follows:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

[48] In *Washington v. Confederated Colville Tribes*, 447 U.S. 135, 152 (1980), the Court upheld the authority of tribes to impose taxes on reservation cigarette sales to members and non-members , saying" "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary (continued...)

- On-reservation activities of Indian tribes or their members are generally immune to state taxation.[49]

- States may tax off-reservation activity of tribes and individual Indians.[50]

- When on-reservation activity is the focus of state taxation, the question involves whether or not there has been federal preemption of the state's taxing authority. This, in turn, involves examining the relevant treaties and statutes.[51]

- When the activity or property on the reservation is not that of the reservation's tribe or its members, state taxing authority has generally been upheld.[52] When the state's tax reaches to persons or businesses

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[48](...continued)
implications of their dependent status." In *Merrion v. Jicarilla Apache Tribe*, 445 U.S. 130 (19820, the Court upheld the authority of tribes to impose severance taxes on minerals withdrawn from tribal land. The Court found that statutes giving states the authority to impose severance taxes did not impliedly divest tribes of the authority to tax such minerals. In *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 1985, the Court upheld a possessory interest tax and a business activity tax on mineral production within its reservation even though the tribal ordinance had not been approved by the Secretary of Interior.since the tribe had not constitution requiring such approval.

[49] *Montana v. Blackfeet Tribe of Indians*, 471 U.S.759 (1985) held that a state may not tax tribal royalties from reservation mineral leases.

[50] The leading case is *Mescalero-Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973), in which the Court stated a standard: "[a]bsent express federal law to the contrary, Indians going beyond reservations boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." Income generated by tribal members on the reservation is immune to state taxation as is what property they hold on the reservation. Public Law 280's delegation of civil jurisdiction, moreover, does not alter this. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989), the Court stated that the "tax immunity of the United States is shared by the Indian tribes for whose benefit the United States hold reservation lands in trust." See also, *Bryan v. Itasca County*, 426 U.S. 373 (1976).

[51] In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1972), holding that a state could not tax reservation Indians for income earned on-reservation, the Court cautioned that Indian sovereignty was not to be the governing concern. Finding no treaty or federal statute authorizing state taxation, it held that such taxation was preempted.

[52] In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 464 (1976), the Court held that state personal property and cigarette sales taxes could not be applied to tribal members living on a reservation. It upheld the authority of the state to impose sales taxes on sales to non-members and to impose minimal recordkeeping burdens on tribes in connection with those taxes. In *County of Yakima v. Confederated Tribes and*
(continued...)

interacting with tribes, courts may focus on a preemption analysis and a balancing test.[53]

Some recent clashes involving state assertions of taxing authority and tribes have centered on retail sales taxes. The Supreme Court has repeatedly upheld state authority to tax on-reservation retail sales to non-members and to impose minimal burdens on tribes in collecting the taxes.[54] The problem, however, is in compelling tribes to collect the taxes. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, __ U.S. _ , 111 S.Ct. 905 (1991), the Court reiterated the holding of *Washington Tribes of Colville Reservation* and *Moe* that Indian retailers could be required to collect state cigarette sales taxes on sales to non-tribal members. It also held, however, that tribal sovereign immunity[55] barred a state suit against a tribe to recover cigarette taxes owed for sales to non-Indians and suggested that there were other avenues of collecting such taxes, including collection from wholesalers. New York State seems to have followed that suggestion. In *Department of Taxation and Finance of New York v. Milhelm Attea & Brothers, Inc.,*[56] the Court upheld a New York State statute providing for collecting a cigarette tax on sales to non-members on a reservation that provided for either an agreement with tribes or a requirement that wholesalers affix state cigarette tax stamps to a predetermined quantity of cigarettes for sale on the reservation. In *Oklahoma*

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[52](...continued)
Bands of the Yakima Indian Nation, 502 U.S. 51 (1992), the Court ruled that a state could impose ad valorem property taxes on fee land within a reservation because the allotment statute authorized state taxation when fee title was passed to the allottees. On the other hand, the Court refused to permit the state to impose an excise tax on the sale of the land because no federal statute granted *in personam* taxing authority to the state.

[53] See *Cotton Petroleum*, 490 U.S. 163 (1989).

[54] In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 464 (1976), the Court found state sales taxes as applied to retail sales of cigarettes sold to non-Indians on the reservation to be valid and also upheld the requirement that tribal sellers collect such state taxes. In *Department of Taxation and Finance of New York v. Milhelm Attea & Brothers, Inc.*, __ U.S. __, 114 U.S. 2028 (1994), the court upheld a state retail cigarette sales tax as applied to sales to non-tribal members on Indian reservations and also the requirement that such taxes must be collected by tribal retailers. In *Rice v. Rehmer*, 463 U.S. 713 (1983), the Court upheld a state tax on reservation sales of alcoholic beverages on the basis of a federal statute that required alcohol sales on Indian reservations to conform to both state and tribal law. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 135, 142, 151 (1980), the Court reiterated the *Moe* holding that states may impose sales taxes on cigarettes sold to non-members on an Indian reservation and to impose "'minimal' burdens on the Indian retailer to aid in enforcing and collecting the tax." It, thus, upheld state recordkeeping requirements as well as precollecting the tax and affixing stamps to non-exempt purchases.

[55] See "Tribal Sovereign Immunity,' American Law Division Memorandum (September 6, 1997).

[56] 512 U.S. 61 (1994).

Tax Commission v. Chickasaw Nation, __ U.S. __, 132 L.Ed. 2d 400 (1995), the Court upheld state beer taxes on all beer sales within Chickasaw Indian country on the authority of a federal statute as interpreted in *Rice v. Rehmer*. With respect to cigarette taxes, however, it held that under Oklahoma's tax law, the legal incidence of the tax fell upon the Indian retailer rather than the non-Indian consumer and was, thus, invalid. The implication of that decision is that had Oklahoma written its law differently, in a manner similar to New York's cigarette tax law, for example, it would have been upheld.

Legislative Proposal: Collection of State Taxes

In the 105th Congress, an amendment to H.R. 2107, offered by Mr. Istook, would have prohibited the use of Bureau of Indian Affairs funds to transfer any new land into trust for an Indian tribe unless the tribe had entered into an agreement with state and local government units regarding the collection of state and local retail sales taxes on transactions occurring on the land. This measure was defeated on the House floor.[57] Rep. Istook has also introduced H.R. 1168, a parallel free-standing measure.

INDIAN GAMING

Exploring ways to use their governmental power and noting the possible inapplicability of state regulation within Indian reservation lands, tribes in the 1980's began conducting high stakes bingo games and other gambling activities that did not conform to state law. The courts began to uphold tribal power and deny states the authority to enforce their gambling laws on reservations absent a clear federal delegation.[58]

When the issue was aired in the Supreme Court, in *California v. Cabazon Band of Mission Indians,*[59] the question was whether Indian tribes in California had authority to authorize bingo and card games that did not conform to California law. Although California allowed some bingo and some card games, the tribal gaming exceeded the state's authorization. The Supreme Court looked to see if Public Law 280, 18 U.S.C. § 1162(a), delegating criminal law jurisdiction over Indian country to California, authorized the state to enforce its gaming laws on the Cabazon Reservation. Because Public Law 280 cedes criminal and not civil jurisdiction, the issue was whether California's

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[57] 143 *Cong. Rec.* H52268 (July 15, 1997).

[58] See *Seminole Tribe of Florida v. Butterworth,* 91 F. Supp. 1015 (S.D. Fla. 1980), *aff'd* 658 F. 2d 310 (5th Cir. 1981), *cert. denied* 455 U.S. 1020 (1982). On the other hand, in *Penobscot Nation v. Stephen*, 461 A. 2d 478 (Me Sup. Jud. Ct. 983), *app. dismissed*, 464 U.S. 923 (1983),a state anti-gaming law was upheld as precluding gaming on an Indian reservation by virtue of a clear Congressional grant to the state of jurisdiction under the Maine Indian Settlement Act, 25 U.S.C. §§ 1721 et seq.

[59] 480 U.S. 202 (1987).

gaming laws were criminal or civil. The test the Court used to resolve this issue was "whether the conduct at issue violates the State's public policy":[60]

> if the intent of a State law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation.[61]

In *Cabazon*, the Court of Appeals had ruled that the California law was regulatory in nature because of the extent to which it permitted some forms of gaming. The Supreme Court found that conclusion fair and would not set it aside and would not hold that the mere fact that criminal penalties attached to a law meant that the law was a criminal law within the meaning of Public Law 280.

The Supreme Court also looked to see if state law should apply because the gaming involved activity of non-members or because the situation was one of the exceptional ones in which states could assert jurisdiction over activity of tribal members on reservations without express Congressional permission. To resolve this, the Court looked to see if the state action were preempted by the operation of federal law. It, thus, engaged in a balancing test and found that the federal interests in tribal economic growth and development which the federal government had fostered through various kinds of financial assistance that was used to build bingo facilities, and the tribe's interest in developing sources of income were not outweighed by the only interest that the state had asserted: prevention of infiltration by organized crime. It, thus, held that state regulation would be an impermissible infringement on tribal government and was, thus, preempted by federal law.

It was against this background that the Indian Gaming Regulatory Act (IGRA)[62] was enacted. Its enunciated purposes include the establishment of "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development..." and "for the regulation of gaming by an Indian tribe adequate to shield it from organized crime ...[and] to ensure that the Indian tribe is the primary beneficiary of the gaming operation."[63] It establishes a National Indian Gaming Commission with authority to issue regulations, monitor activities, approve tribal gaming ordinances and conduct investigations of Indian gaming operations. It requires tribal ordinances for any form of gaming and creates a three-tiered system with respect to the degree of

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[60] 480 U.S. 202, 209.

[61] *Id.*

[62] Pub. L. 100-497, 102 *Stat.* 2467; 25 U.S.C. §§ 2701 - 2721.

[63] 25 U.S.C. §§ 2702(1) and (2).

state and federal input into tribal gaming: class I gaming--social gaming for nominal amounts--is regulated by tribes; class II gaming--bingo and nonbanked card games--is regulated by the tribes and the Commission; and class III gaming--all other kinds of gambling--requires a tribal state compact. It sets up an elaborate system for compacting for class III gaming with the state and requires Secretary of the Interior approval for compacts. It prohibits Indian gaming on lands acquired after October 17, 1988, with certain exceptions including an exception for when the Secretary of the Interior, after consultation with appropriate state and local and nearby tribal officials finds such operations to be in the best interest of the tribe and its members and not detrimental to the surrounding community and the consent of the appropriate governor is obtained.[64]

Some of the issues that have emerged include:

(1) the requirement for a tribal-state compact in light of the Supreme Court's ruling in *Seminole Tribe v. Florida*, __ U.S. __, 116 S.Ct. 1114 (1996), holding unconstitutional, as violating the Eleventh Amendment, the provisions of the Indian Gaming Regulatory Act authorizing tribes to bring suit in federal court to compel negotiation of a tribal state compact.[65]

(2) the failure of the federal government to tax tribal income from gambling.

(3) the acquisition of new lands by Indian tribes both for gambling purposes and for other purposes that take them off state tax rolls.

(4) the kinds of protections available to persons who work in tribal gaming on reservation land, i.e., the applicability of various federal laws.[66]

(5) tribal sovereign immunity.[67]

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[64] 25 U.S.C. § 2719(b)(A).

[65] On May 10, 1996, the Department of the Interior issued a notice of proposed rulemaking seeking comments on its authority to promulgate procedures to authorize Class III gaming on Indian lands when a State raises an Eleventh Amendment defense to a suit to compel it to negotiate a compact.

[66] See G. William Rice, "Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship," 72 *North Dakota Law Review* 27 (1996); "Applicability of Various Labor Laws to Indian Gaming," American Law Division Memorandum (February 24, 1994).

[67] See discussion, *infra,* at pp. 25 ff.

Legislative Proposals: Amending IGRA

In the 105th Congress there are at least 6 bills that would amend IGRA:

- H.R. 334, introduced by Rep. Solomon would raise the burden on tribes suing states for failure to negotiate a compact in good faith and seeking to take land into trust for gaming purposes. It would restrict Indian gaming to that which is allowed in the state for commercial purposes, require physical presence for gaming operations and prohibit broadcast gaming. It would include a 2 year moratorium on new class III operations, make the Attorney General responsible for background investigations, and authorize increased fees.

- H.R. 452, introduced by Rep. Torres, would set up procedures for mediating compact negotiations between tribes and states, institute procedures for the Secretary to approve procedures for class III gaming when a compact fails, eliminate the requirement of gubernatorial concurrence for acquisition of lands to be taken into trust for gaming; clarify tribal exemption from federal taxes; authorize gaming for the Narragansett Indian Tribe; and, grandfather some gaming for specific tribes that do not presently have tribal-state compacts

- S. 962, introduced by Senator Bond, would specify that the authorization found in the Missouri State Constitution for riverboat gambling is not to be construed to authorize land based gaming; prohibit gaming on a tribe's out-of-state lands; and, prohibit gaming on newly acquired lands unless the trust acquisition application indicates the intent to conduct gaming.

- S. 1130, introduced by Senators Campbell and Inouye, would provide for further assessment of fees in connection with Indian gaming.

- H.R. 325, introduced by Rep. Solomon, would apply § 511a of the Internal Revenue Code to impose the tax on unrelated business income on Indian tribal gaming.[68]

- S. 1077, introduced by Senators McCain and Inouye, would establish a Federal Indian Gaming Regulatory Commission, as an independent agency, with authority to establish minimum federal standards in the regulation and licensing of class II and class III gaming. It would authorize, in instances in which a state does not negotiate a compact, the Secretary of the Interior to negotiate a compact that would permit tribal class III gaming.

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[68] H.R. 2554, introduced by Rep. Hutchinson would apply the unrelated business income tax to Indian tribes' commercial activities.

LAND ACQUISITION

Congress ultimately has the power to determine whether to take tribal land into trust. There are, thus, many federal statutes by which Congress requires the Department of the Interior to take land into trust for a tribe or an individual Indian. For example, as part of the Navajo-Hopi Resettlement Act, Pub. L. 93-531, 88 *Stat.* 1712, 25 U.S.C. §§ 640d et seq., the Secretary is required to take into trust for the benefit of the Navajo Tribe or the Hopi Tribe, land that has been partitioned as that tribe's portion of disputed land and lands designated for transfer to one or the other of the tribes under the provision of the legislation. Some authorize land transfers through other federal agencies. For example, 40 U.S.C. § 483(a)(1), a provision of the Federal Property and Administrative Services Act, provides a mechanism by which the Administrator of the General Services Administration is to transfer excess federal real property to the Secretary of the Interior to be held in trust for Indian tribes land within the reservation of the tribe or, in the case of Oklahoma tribes, land located within the boundaries of a former reservation in Oklahoma or contiguous to real property presently held in trust for an Oklahoma tribe. 40 U.S.C. § 483(a)(2).

What might be seen as the principal general statute authorizing taking land in trust for Indian tribes is the Wheeler-Howard, or Indian Reorganization Act of 1934, ch. 576, § 5, 48 *Stat.* 985, 25 U.S.C. § 465, authorizes the Secretary to take to take land--off-reservation or on-reservation, into trust "for the purpose of providing land for Indians," and specifies that such land "shall be exempt from State and local taxation."[69]

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[69] In *Florida v. United States Department of the Interior*, 768 F. 2d 1228 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011, the court ruled that the United States was immune to suit by state agencies challenging the Secretary's decision to take land into trust for an Indian tribe when there was no claim that the action was ultra vires or unconstitutional. The case involved land acquisition for a tribe to open a museum to house antiquities in which the Secretary had waived the requirements of 25 C.F.R. Part 151. After the land had been taken into trust the tribe had opened the museum but had also opened a smoke shop on the premises. The court examined various authorities for waiving sovereign immunity and found none applicable. One of its reasons for upholding sovereign immunity was that the Quiet Title Act, 28 U.S. C. § 2409a, which permits various suits against the United States to challenge title to land, specifically excludes trust or restricted Indian lands from the waiver. In the course of the decision the court reviewed the Indian Reorganization Act's language, legislative history, and context, and concluded that it granted broad discretion to the Secretary to review applications for trust acquisitions for Indians. *South Dakota v. United States*, 69 F. 3d 878 (8th Cir. 1995) held this provision unconstitutional because of the broad discretion conferred upon the Secretary. The Supreme Court vacated the judgment and remanded the case with instructions to the court to remand the matter to the Secretary of the Interior for reconsideration of his administrative decision, *Department of the Interior v. South Dakota*, __ U.S. __, 117 S.Ct. 286 (1996). This result occurred in view o f the fact that the new regulations were promulgated that would permit an opportunity for judicial review prior to finalization of the land transfer. 61 *Fed. Reg.* 18082 (April 24, 1996), 25 C.F.R. § 151.12.

The Department of Interior's land acquisition regulations require it to consider many factors in deciding whether or not to accept land in trust, including the statutory authority cited and several factors that may well be the chief object of all of the statutes providing for taking land into trust, i.e., whether or not the acquisition will be for the benefit of the tribe. Among the factors to be considered are:

> (a) The existence of any statutory authority for the acquisition and any limitations contained in such authority;
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> (b) The need of the individual Indian or tribe for additional land;
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> (c) The purposes for which the land will be used;
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> (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs.
>
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls.
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> (f) Jurisdictional problems and potential conflicts of land use which may arise, and
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> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of land in trust status.
>
> (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2.Land Acquisitions: Hazardous Substances Determinations.
>
> 25 C.F.R. § 151.10

If the land to be acquired is located within or contiguous to an Indian reservation,[70] the Secretary is required to notify "the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation," and to give them "30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. § 151.10. The applicant is to be given a copy of the comments and 30 days in which to reply or request that the Secretary issue a decision.

If the land is outside of and not contiguous to the tribe's reservation and the acquisition is not mandated by statute, the following further criteria are to be considered by the Secretary:

> (b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to

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[70] The regulation specifies that, "[u]nless another definition is required by the act of Congress authorizing a particular trust acquisition, 'Indian reservation' means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma, or where there has been a final judicial determination that a reservation has been disestablished or diminished, 'Indian reservation' means that area of land constituting the former reservation of the tribe as defined by the Secretary." 25 C.F.R. § 151.2(f).

> be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.
>
> (c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.
>
> (d) Contact with state and local governments pursuant to 151.10(3) and (f) shall be completed as follows upon receipt of the tribe's written request to have land's taken in trust, and the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.
>
> 25 C.F.R. § 151.11.

The commentary provided with the promulgation of 25 C.F.R. § 151.11 (relating to acquisition of off-reservation lands) as a final rule, 60 *Fed. Reg.* 32874 (June 23, 1995), indicates that the Department of Interior is attempting to avert problems raised by taking land from state regulatory control and tax rolls by instructing its field offices to scrutinize proposals for commercial use and to consult with state and local officials to avoid jurisdictional conflicts. As originally proposed, the rule for off-reservation acquisitions would not have permitted acquisitions out-of-state. Objections were raised in the public comments citing historical or economic importance and disparity with acquisitions for gaming which are covered by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq., (IGRA), which permits out-of-state acquisitions. The Department chose to defer promulgating regulations relating to land acquisitions for gaming purposes.

The Department of the Interior has to date issued no explicit regulations governing land acquisitions for gaming purposes.[71] The general land acquisition regulations, thus, apply. When land is proposed to be taken into trust for gaming purposes, there is one additional requirement over and above those specified in the land acquisition regulations--approval of the governor of

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[71] The Department of the Interior proposed regulations for land acquisitions for Indian gaming purposes that would have been more stringent than those applicable to acquisitions for other purposes. 57 *Fed. Reg.* 51487 (July 15, 1991). No such regulations have been promulgated to date. The changes to the land acquisition regulations recently promulgated did not include any gaming-specific provisions although one commentator had suggested that all out-of-state acquisitions be prohibited if the land was to be used for gaming purposes

the state in which the gaming is to be located. [72] That requirement is currently being challenged in litigation. [73]

Litigation[74] that questions the constitutionality of delegating to the Secretary such broad authority to take land in trust has been responsible for a further modification of the land acquisition regulations. On April 24, 1996, 61 *Fed. Reg.* 10802, 25 C.F.R. § 151.12(b), was issued. It requires the Secretary of the Interior to publish, in the *Federal Register* or in a newspaper of general circulation serving the area affected by a decision to take land into trust for an Indian tribe or individual, a notice. That notice is to state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published. It requires a 30-day waiting period after a Secretarial decision to acquire land in trust for an Indian tribe or individual to allow parties so desiring to seek judicial or administrative review. The Department of the Interior deemed such a waiting period necessary because the Quiet Title Act, 28 U.S.C. § 240a, precludes judicial review after the United States acquires title.[75]

INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act (ICWA),[76] regulates child custody, adoption, and foster care placement of Indian children, with "Indian child" defined broadly to include a member of a tribe, one who is eligible for membership in a tribe, and one who is the biological child of a tribal member.[77] Among other things, it provides a mechanism for tribal intervention in child custody proceedings in state courts, including voluntary adoptions, involving Indian children. It establishes a requirement that preference be given to an Indian child's extended

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[72] IGRA limits the authority of tribes to conduct gaming on land acquired after 1988 and requires gubernatorial approval before land may be acquired in trust for such purposes. 25 U.S.C. § 2719(b)91).

[73] In *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688 (9th Cir. 1997), a federal appellate upheld a Department of the Interior denial of an application by a tribe for a trust acquisition for gaming purposes on the ground of gubernatorial nonconcurrence. It ruled that the requirement for the governor to concur in a tribe's application was neither an impermissible delegation of executive authority nor violative of the Appointments Clause of the Constitution.

[74] *South Dakota v. United States*, 69 F. 3d 878 (8th Cir. 1995), *vacated and remanded with instruction to remand to the Department of the Interior for reconsideration of administrative decision, Department of the Interior v. South Dakota*, _ U.S. __, 117 S.Ct. 286 (1996).

[75] *United States v. Mottaz*, 476 U.S. 834 (1986); *North Dakota v. Block*, 461 U.S. 273 (1983); *Florida v. Department of Interior*, 768 F.2d 1248 (11th Cir. 1985).

[76] Pub. L. 95-608, 92 *Stat.* 3069 (1978); codified at 25 U.S.C. §§ 1901 - 1963.

[77] 25 U.S.C. § 1903(4).

family or Indian homes and institutions in foster care or adoptive placement of Indian children. Among its purposes are the preservation of tribal and Indian cultural values. In enacting ICWA, Congress declared:

> that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[78]

The law was enacted in response to findings of a high rate of separation of Indian children from their homes and cultural environments resulting in problems for the children, their families, and the tribes and an acknowledgement of the federal role in contributing to this situation through the history of separating Indian children from their families in boarding schools.[79] There was also some discussion as to the apparent inability of social workers to give proper weight to factors in Indian environments tending to mitigate the severe economic deprivations found on many reservations.[80] ICWA establishes tribal court as the appropriate forum for adjudicating child custody proceedings involving an Indian child domiciled within the reservation[81] and authorizes transfer of jurisdiction from state to tribal court of child custody proceedings involving an Indian child upon a petition by the tribe unless either biological parent objects.[82] It authorizes the tribe to intervene in any state court proceeding for foster care placement or termination of parental rights to an Indian child.[83] It establishes an order of preference for adoptive placement of an Indian child under state law, "in the absence of good cause to the contrary," that requires placing the child with extended family members, other members of the tribe, or other Indian families. It also provides various kinds of procedural protections for parents or Indian custodians of children who are the subject of child custody proceedings, including notice, appointment of council, remedial services and rehabilitative programs "to prevent the breakup of the Indian family," and strict evidentiary standards regarding the need for removal

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[78] 25 U.S.C. § 1902.

[79] H.Rep. 95-1386, 95th Cong., 2d Sess 9 (1978).

[80] H.Rep. 95-1386, at 10.

[81] 25 U.S.C. §§1911.

[82] 25 U.S.C. § 1911(b).

[83] 25 U.S.C. § 1911(c).

from parental custody.[84] With respect to voluntary termination of parental rights, as in a voluntary adoption proceeding, for example, ICWA specifies that a parent may withdraw consent any time prior to the entry of a final decree.[85]

Several sections of ICWA have been the subject of litigation with some differences in the way various state courts have analyzed the issues. Only one case has been fully aired by the Supreme Court, *Mississippi Band of Choctaw Indians v. Holyfield*.[86] The case involved twin girls born to enrolled members of an Indian tribe who lived on the reservation but took care that the children were born off the reservation and voluntarily surrendered the children for adoption under state, rather than tribal law. Since ICWA gives tribal courts exclusive jurisdiction over adoptions of Indian children "domiciled" on the reservation, the issue was whether the twins met that criterion. The Court disagreed with the Mississippi Supreme Court and refused to permit the meaning of that word to depend upon state law. It found that the twins were domiciled on the reservation, the domicile of their parents at the time of their birth, and that the tribal court was the proper forum for any adoption proceedings. The adoption was invalidated.[87]

Among other controversies in interpreting ICWA are the judicially crafted "existing family exception," by which some courts have refused to apply ICRA in situations involving illegitimate children of non-Indian mothers.[88] Another provision that has resulted in conflicting interpretations is that establishing preferences for placement with a child's extended family, tribe, or other Indian families, except for "good cause."[89]

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[84] 25 U.S.C. § 1912. ICWA requires proof beyond a reasonable doubt for any termination of parental rights. 25 U.S.C. § 1912(d).

[85] 25 U.S.C. § 1913.

[86] 490 U.S. 30 (1989).

[87] Ultimately, the tribal court awarded custody to the same adoptive parents whose adoption had been challenged.

[88] Compare, e.g., *In re Adoption of Bay Boy L,* 643 P.2d 168 (Kan. 1982), in a voluntary adoption situation, authorizing adoption of an illegitimate child over the objections of the Indian father and his tribe, and *In re Adoption of a Child of Indian Heritage*, 111 N.J. 155, 153 A. 2d 925 (N. J. 1988) (applying ICWA to an Indian child without reference to whether the child has lived with an Indian parent).

[89] See Erik W. Aamot-Snapp, "When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the 'Good Cause' Exception in Indian Child Welfare Act Adoptive Placements," 79 *Minnesota Law Review* 1167 (1995); Denise L. Stiffarm, "The Indian child Welfare Act: Guiding the Determination of Good Cause to Depart from the Statutory Placement Preferences," 70 *Washington L. Review* 1151 (1995); Christine D. Bakeis, "The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe," 10 *Notre Dame Journal of Law, Ethics & Public Policy* 543 ('996).

One of the factors energizing a movement to amend ICWA has been the amount of publicity given to a case involving tribal intervention over a California adoption by an Ohio couple of twin girls who had been born to parents of Indian descent who were not enrolled in an Indian tribe. The tribe intervened at the behest of the child's maternal grandmother, claiming that the children were eligible for membership in the tribe, and that the adoption was subject to the procedures of ICWA, which had not been followed. Eventually the Indian parents enrolled in the tribe and joined the action seeking to undo the state adoption. Ultimately the state court ruled in favor of the adoptive parents. The case, *In re Bridget R*,[90] included some evidence that one of the biological parents intentionally failed to disclose the possible applicability of ICWA when an attorney he consulted told him that the adoption would be delayed if ICWA were involved. The litigation was protracted; had the ruling been that ICWA applied, there might have been disruption of the only home that the twins had known for several years. Under California law the adoption would have been final at a very early stage--when the documents evidencing the biological parents' relinquishment of parental rights were filed with the Department of Social Services. Under ICWA, however, if an Indian child is the subject of the proceedings and ICWA has not been followed, there is a possibility of invalidating a state adoption proceeding after it has become final.[91]

At least two approaches have been espoused in proposed legislation: limiting the reach of ICWA or adding more procedural protections and cutting down on the time during which the tribe may intervene if all the necessary steps have been followed. The first approach is found in H.R. 1957, the Voluntary Adoption Protection Act. It proposes to remove all voluntary adoptions, child custody, and placement proceedings from the purview of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 et. seq., as of January 1, 1992.[92] A parent or legal guardian (other than an Indian tribe) could provide non-revocable written consent to a child custody proceeding after which ICWA would not apply. The bill would limit the reach of ICWA to "involuntary" situations by defining "involuntary" as follows:

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[90] 49 *Cal. Rptr.* 2d 507 (Cal. Ct. App. 1996), *cert. denied* __ U.S__, 117 S.Ct. 1460.

[91] Such was the case in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), in which the Supreme Court ruled that the children of Indian parents who had removed themselves from the reservation prior to their birth were domiciled within a reservation within the meaning of ICRA and, thus, subject to the exclusive jurisdiction of a tribal court in an adoption proceedings.

[92] The 1992 date may be a typographical error or may have been employed to address adoptions currently under litigation.

> 'involuntary,' with respect to a child custody proceeding, means the absence of written consent by a parent or legal guardian (other than a tribal court) of the Indian child.[93]

Legislative Proposals: Amending ICWA

H.R. 1082/S. 569, which is identical to the measure reported by the Senate on July 26, 1996,[94] takes a different approach. According to its sponsor, Senator McCain:

> This legislation would achieve greater certainty and speed in the adoption process for Indian children by providing new guarantees of early and effective notice in all cases involving Indian children. The bill also establishes new, strict time restrictions on both the right of Indian tribes and families to intervene and the right of Indian birth parents to revoke their consent to an adoptive placement. Finally, the bill includes a provision which would encourage early identification of the relatively few cases involving

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[93] It would do so by adding language to the Congressional findings sections, 25 U.S.C. § 1901, to indicate an intent to prevent "involuntary" removal of Indian children from the Indian community. It would amend the jurisdictional section. 25 U.S.C. S 1911, to limit tribal exclusive jurisdiction to "involuntary" child custody proceedings, "involuntary" foster care placement of, or termination of parental rights. It would amend the section on pending court proceedings, 25 U.S.C. § 1912, to limit the procedural requirements to "involuntary" proceedings; and, amend the current section on parental rights, 25 U.S.C. § 1913, to provide that once a parent or legal guarding of an Indian child has provided written consent to a voluntary child custody proceeding, IGWA will not apply. Written consent would be irrevocable. It would amend the section permitting a petition to invalidate an action to actions involving involuntary foster care placement or termination of parental rights. It would limit the adoptive placement section of ICWA, 25 U.S.C. § 1915; the section dealing with a petition for return of custody, 25 U.S.C. § 1916; the section dealing with supplying information to an adopted Indian child, 25 U.S.C. § 1917; and the section dealing with jurisdiction following improper removal of an Indian child, 25 U.S.C. § 1920.

[94] The bill reported by the Senate Committee on Indian Affairs, S. Rep. 104-335, 11-12, 104th Cong., 2d Sess. (1996), was described as the result of year long deliberations by "several representatives of the adoption community and of Indian tribal governments," including the National Indian Child Welfare Association, the National Congress of American Indians, representatives of the American Academy of Adoption Attorneys, and the Academy of California Adoption Attorneys. Rep. Don Young indicated that he had instituted these discussions and had included the Tanana Chiefs Conference, with the desire "to seek a common approach to avoid prolonged litigation over Native American adoptive placements and promote the stability in Native American adoptions." Testimony, June 18, 1997, Don Young before the Joint Hearing on Indian Child Welfare Act before the Senate Indian Affairs Committee and the House Committee on Resources; available in NEXIS, NEWS Library, CURNWS file.

> controversy and promote the settlement of cases by making visitation agreements enforceable.[95]

TRIBAL SOVEREIGN IMMUNITY AND LEGISLATIVE WAIVER PROPOSAL

Section 120 of the Department of the Interior Appropriations Act for Fiscal Year 1998, as reported by the Senate Appropriations Committee,[96] would stipulate that receipt by an Indian Tribe of tribal priority allocations (TPA) funding from the Bureau of Indian Affairs "Operation of Indian Programs" account under the appropriation would:

> (1) waive any claim of immunity by that Indian tribe;
>
> (2) subject that Indian tribe to the jurisdiction of the courts of the United States, and grant the consent of the United States to the maintenance of suit and jurisdiction of such courts irrespective of the issue of tribal immunity; and
>
> (3) grant United States district courts original jurisdiction of all civil actions brought by or against any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The only explication of this provision is provided in the text of S. Rep. 105-56, which indicates an intent to provide a neutral forum for resolving civil disputes between tribes and non-Indians residing within the external boundaries of reservations.[97]

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[95] 143 *Cong. Rec.* S 3120 (April 14, 1997).

[96] S Rep. 105-56, 105th Cong., 1st Sess. (1997).

[97] The Report states:

> The Committee has included a provision regarding tribal sovereign immunity. The provision would require any Tribe receiving TPA funds to waive any claim of immunity in civil actions in Federal courts. In addition, the provisions would allow non-Indians to bring civil actions against Indian tribes in Federal courts.
>
> The legal doctrine of sovereign immunity permits a government to protect itself from legal challenges or suit. Over the course of the last century, Federal, States, [and] the local governments have either abolished or severely restricted the doctrine of sovereign immunity. Only Indian tribes in the United States use this doctrine to assert complete immunity.

(continued...)

This provision in the appropriation measure seeks to impose a waiver of the sovereign immunity defense upon any tribe accepting TPA funds under the appropriation. Certain questions arise as to the precise reach of this language. The first issue is whether the waiver would be confined to federal court actions. Although the language of the first clause of section 120 appears broad enough to cover waivers in any court, federal, state, or tribal, our assumption is that it will be narrowly construed to apply only to waiver of tribal sovereign immunity in federal court.[98]

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[97](...continued)

> The Committee is concerned that the right to due process, which is guaranteed to all citizens of the United States under the fifth amendment of the Constitution, is denied in civil disputes between Indian tribes and non-Indians because Indian tribes continue to use the doctrine of sovereign immunity to shield themselves and their actions from legal review in neutral courts. This matter is of particular concern in issues concerning individual private property rights.
>
> Citizens of the United States have an inherent right to have their disputes decided by a neutral court or arbitrator. This right is significantly diminished for non-Indian citizens of the United States who live or work on or near Indian reservations and who find themselves in civil disputes with an Indian tribe. According to the 1990 census, there are over 300,000 non-Indians living on fee land within the external boundaries of the reservation. These 300,000 Americans currently lack the right to have their civil claims against an Indian tribe heard before a federal court. This provision will guarantee that the due process rights of all American citizens and their right to be heard before a neutral legal entity is protected.
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> S. Rep. 105-56, at 61.

[98] This assumption is based on the fact that courts generally require specificity for waivers of sovereign immunity, *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986), and have often employed canons of construction in construing federal Indian law statutes in derogation of Indian rights that require strict construction of such legislation. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Santa Clara Pueblo v Martinez*, 436 U.S. 49 (1978). Moreover, sovereign immunity is not the only bar to state court actions involving Indian tribes. Federal law must delegate such authority to the states. One commentator describes the situation as follows:

> The authority of state courts to adjudicate Indian country-related disputes is generally subject to those standards used to determine state regulatory jurisdiction: i.e., a 'particularized inquiry' must be undertaken to determine the nature of the involved state, federal, and tribal interests and whether exercise of such authority would, on balance, interfere more with federal and tribal interests than further state interests. Courts also commonly refer to the infringement standard in *Williams v. Lee* [358 U.S. 317 (1959)]--whether the exercise of state jurisdiction will infringe upon

(continued...)

Another issue is whether the waiver extends only to the tribal government. Many disputes do not involve tribes as parties. Some may involve outsiders, such as Indian traders, to which the waiver of sovereign immunity would be irrelevant.[99] Some disputes may involve tribal corporations, which might not be held to be within the scope of the waiver language in the legislation.

Moreover, even when an actual tribe is a party, the language may not be sufficient to reach many situations. It does not appear to grant federal courts subject matter jurisdiction over all suits against an Indian tribe; essentially, it authorizes federal question suits against Indian tribes and waives tribal sovereign immunity for those suits. Moreover, it does not appear to authorize suits against a tribe under a statute that excludes such suits. Many disputes with tribes involve issues that may not be covered by the proposal's language because they are grounded in state law; others may involve federal statutes that by their own terms preclude Indian tribes as defendants; and, some may require exhaustion of tribal remedies before federal court jurisdiction may be invoked.[100]

Currently, Indian tribes are the beneficiaries of almost total sovereign immunity in federal and state courts. Like the federal and state governments, they may authorize suits against them in their own courts, tribal courts. Some tribes, however, may not have tribal courts; furthermore, tribal courts are not subject to the restraints of the federal Constitution or review by federal courts. With respect to the sovereign immunity defense, it is clear that the federal government and the state government have, over the years, opened up their courts to an array of types of civil actions or suits against them, their officers, or agencies as defendants. Even if a particular tribal government has waived its sovereign immunity, making its tribal courts available to hear tort or contract claims against a tribe or its members, others may not have enacted such a waiver and there is no certainty as to whether any tribe has waived its sovereign immunity to the extent that federal or state governments do. The

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[98](...continued)
the right of tribes to govern themselves and their members...

Conference of Western Attorneys General, *American Indian Law Deskbook* 138 (1993).

[99] *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994), for example, did not involve a tribe as party or a claim of tribal sovereign immunity. Wholesalers licensed by the Bureau of Indian Affairs sought an injunction of the New York State cigarette tax regulations on the grounds that they were preempted by federal law, namely the various statutes that regulate Indian traders. The Court upheld the state's method of assuring that state cigarette taxes were paid by the wholesalers prior to the delivery of cigarettes to on-reservation smokeshops.

[100] Each of these issues is discussed in "Tribal Sovereign Immunity," American Law Division General Distribution Memorandum (September 6, 1997).

restraints imposed upon tribal governments by the Indian Bill of Rights, moreover, are largely unenforceable outside of tribal court.

The extent to which Section 120 would alter this situation is problematic. It does not establish a law of contracts or torts for Indian reservations, nor does it indicate to the federal courts that they have subject matter jurisdiction over such actions.

Section 120 appears to be designed to provide a broad forum for civil disputes with Indian tribes to be aired in federal court. It does so with language that on its face appears to be encompassing a total waiver of tribal sovereign immunity. To the extent that Section 120 would be interpreted by the courts to effectuate a complete waiver of tribal sovereign immunity it differs from the more limited waivers enacted by federal and state governments or crafted by the state judiciary. For this reason this legislation may provoke suits entailing substantial expenses associated with actions in federal court that will ultimately be dismissed. On the other hand, because of the lack of specificity in the language, it is possible that the legislation may not reach many of the situations involving disputes arising within Indian reservations that cannot now be brought in federal or state court. Many of the issues that give rise to civil disputes with Indian tribes, tribal businesses, or individual Indians within reservation boundaries are matters involving issues generally covered by state law or matters involving federal statutes that may specifically exempt Indian tribes.