SPIRIT OF JUSTICE

Terrence Guardipee and Catherine Black Horse donated this original work of art to the Center for Indian Law and Policy in November 2012 in appreciation for the work the Center engages in on behalf of Indian and Native peoples throughout the United States, including educating and training a new generation of lawyers to carry on the struggle for justice. The piece was created by Mr. Guardipee, who is from the Blackfeet Tribe in Montana and is known all over the country and internationally for his amazing ledger map collage paintings and other works of art. He was among the very first artists to revive the ledger art tradition and in the process has made it into his own map collage concept. These works of art incorporate traditional Blackfeet images into Mr. Guardipee’s contemporary form of ledger art. He attended the Institute of American Indian Arts in Sante Fe, New Mexico. His work has won top awards at the Santa Fe Market, the Heard Museum Indian Market, and the Autrey Museum Intertribal Market Place. He also has been featured a featured artists at the Smithsonian’s National Museum of the American Indian in Washington, D.C., along with the Museum of Natural History in Hanover, Germany, and the Hood Museum at Dartmouth College.
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# Table of Contents

1. The Man Who Sold the World: The Long Con of Discovery
   Jessica Buckelew ................................................................. 358

   Erin D. Brock ........................................................................... 381

3. “For Indian Purposes:” Exploring the Role of Water as a Cultural Resource in Securing a Right to Groundwater for the Agua Caliente Band of Cahuilla Indians
   Courtney Cole .......................................................................... 409

   Angelique Townsend EagleWoman (Wambdi A. WasteWin) ................. 424

5. August 2013-August 2014 Case Law on American Indians
   Thomas P. Schlosser .................................................................. 452

6. Placing Land Into Trust in Alaska: Issues and Opportunities
   Geoffrey D. Strommer, Stephen D. Osborne, Craig A. Jacobson ........... 508

7. Use of Native American Tribal Names as Marks
   Brian Zark .................................................................................. 537
THE MAN WHO SOLD THE WORLD: THE LONG CON OF DISCOVERY
Jessica Buckelew

Con: (from: confidence trick)
Noun 1. An instance of deceiving or tricking someone by gaining their trust
Verb 2. Persuade to do or believe something by use of deception

The grifter hall of fame is filled with a myriad of unbelievable stories (albeit only in hindsight). Frank Abagnale, during the 1960s, passed more than 2.5 million dollars in forged checks. George Parker made his living selling public landmarks to tourists, including the Brooklyn Bridge, Statue of Liberty, and Grant’s Tomb. Edurado de Valiferno (the Marquis) masterminded the theft of the Mona Lisa then proceeded to sell six forgeries after word spread of the heist. Victor Lustig not only conned Al Capone out of fifty thousand dollars, he sold the Eiffel Tower for scrap... twice. But the world seems to overlook what is surely the greatest heist in all of history. The longest con ever played, spanning centuries, with the largest take on record. The Doctrine of Discovery was the rouse by which the rulers of Christian Europe were able to lay claim, not to priceless art or an architectural masterpiece, but to the entire world.

The Doctrine of Discovery, which forms the foundation of federal Indian law in the United States, is the longest running con in history. Tactics have evolved, and various ringleaders have taken their turns rigging the decks; popes, princes, presidents. The game has changed, but the story is the same. The world can legally be bought and sold, from under the feet of those who inhabit it, by the leaders of the western Christian nations simply because this is, was, and always shall be. Oftentimes, this concept has been taken as a given, as a product of the xenophobic days of old without any deeper look at the political gameplay that brought it about. This paper seeks to contextualize Discovery from its earliest constructs to show that it was more than the overriding sentiment of Christian nations: it was a conscious positivist construct created by and for politics to achieve political ends.

* Jessica Buckelew is a graduating third-year law student at Seattle University School of Law and an Articles’ Editor for Seattle University’s American Indian Law Journal. I want to thank all of the dedicated staffers of AILJ who helped get this article to its present state. Special thanks to Jessica Barry and Hannah Nicholson for their editing prowess and careful attention to detail, Professor Eric Eberhard for his guidance and constructive criticism, and to Nancy Mendez and Jocelyn McCurtain for whipping our journal into shape, sometimes literally.

3 Id.
4 A member of the Marquis’ gang was eventually caught trying to sell the true Mona Lisa and it was returned to The Louvre in 1913. Id.
5 Id.
Discovery is a legal fiction, which has been perpetuated time and again to champion political ends, to the detriment of the aboriginal populations of the planet. In the twelfth century the Catholic Church convinced the leaders of Christian Europe to leave their kingdoms for a fabricated war, and when the leaders weren’t looking they pickpocketed the sovereignty of Europe. During the Age of Discovery, the Church and its Christian rulers played a game of bait and switch with the laws of war and property in order to legitimize spurious claims to territory in the New World. And, in 1823 this legal fiction was indoctrinated into black letter law as the United States hurtled toward Manifest Destiny. In truth, Discovery had very little to do with the populations that it dispossessed, they were merely collateral damage in a game of political warfare.6

Recently, the United Nations has turned its attention to the doctrine, officiating a committee to substantiate the extent of the damage that has befallen indigenous people in the name of the Doctrine.7 Further, the United Nations has begun to put pressure on the United States to formally reject the doctrine, which, according to the Special Rapporteur to the United States, James Anaya, “can only be described as racist.”8 Anaya calls for the United States, in accordance with its commitment to the United Nations Declaration on the Rights of Indigenous Peoples,9 to “reinterpret relevant doctrine... in light of the Declaration.”10

Following and expanding upon Anya’s recommendation, this paper seeks to wipe the paint off the Doctrine of Discovery to reveal the forgery underneath. By tracing the Doctrine back to its roots in pre-Crusades Europe and the papal revolution, it can be seen how the “doctrine” has been molded and reconstructed to justify claims or ends that were categorically illegitimate. Part I will discuss how the Doctrine was formulated by the Catholic Church in a misdirected attempt to oust the rulers of Europe from seats

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6 For an in depth discussion of this practice, from antiquity to the modern practices of the Supreme Court, in choosing Indian cases in order to champion unrelated, non-tribal, political interests see, Fletcher, Mathew L.M., *The Supreme Court’s Indian Problem*, 59 HASTINGS L.J. 579, 580 (2008) (“Indian law disputes are often mere vessels for the Court to tackle larger questions; often these questions have little to do with federal Indian law”).


10 Anaya, supra note 8 at ART. 105.1
of power held over the Church and unify spiritual and political power in the Pope. Part II follows the doctrine to the colonization of the New World, where tenets of “discovery” and “conquest” were reformed to justify the creation of the Empire of Christendom. Finally, this article will discuss the iniquitous application of stare decisis in federal Indian law, and the necessity of formally disavowing the Doctrine of Discovery as unconstitutional and unsound.

I. Fool’s Errand: The Piracy of Empires

A. The Set-up:

Feudal Europe in the tenth century was far more concerned with preventing incursions into its territory than it was with expansion.\(^{11}\) The idea of Empire was something explored in bedtime stories telling of the forgotten times of Caesar and Alexander the Great. Functioning under a system of vassalage, the “cities” of Europe were only loosely tied together by allegiance to their respective kings, who were constantly at war with one another.\(^{12}\) During this time period Europe was known as the “poor relation of Byzantium,” because both the Greek and Islamic systems were more powerful and sophisticated.\(^{13}\)

A similar lack of unity existed within the Catholic Church during this period, as well as a similar system of reliance; monks were beholden to their bishop in the same way serfs were reliant upon their lords.\(^{14}\) Bishops were members of the aristocracy, by birth or by marriage, and were reliant upon the king.\(^{15}\) Therefore, the clergy was entirely bound by the whims and wishes of the secular ruler of the state; the Pope was appointed, and could be deposed, by the Emperor.\(^{16}\) Accordingly, the rulers of Europe were considered both secular and spiritual authorities, which placed the Catholic Church in a precarious position; many bishops were weakly situated under one King.\(^{17}\)

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\(^{11}\) Europe was under constant threat of attack from Norsemen in the north, Slavs and Magyars in the east, and Arabs from the south. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 102 (Harvard Univ. Press) (1985).

\(^{12}\) The “cities” were more correctly called strongholds, known as fiefs. Property was owned by a lord, typically a knight, to whom all those living and working on the property, serfs, owed fealty in exchange for protection. The lords of a state all owned their property by the grace of their king, prince, or emperor. Id. at 104.

\(^{13}\) Id.

\(^{14}\) Bishops usually owned the land where priories were situated and pledged allegiance to the states ruler in the same way as the lords. Id. at 104.

\(^{15}\) Often bishops would use marriage as a way to gain power and political favor with the king, when the papal revolution takes hold one of the main changes will be that bishops will no longer be able to marry, thus separating them from political life. Id. at 104.

\(^{16}\) William the Conqueror, in 1067, declared that it was the King that determined whether or not the Pope should be acknowledged and who would decide all secular and spiritual issues of law. Id. at 92.

\(^{17}\) BERMAN, supra note 11 at 104.
This power was further compounded by a belief that God himself ordained the king.\textsuperscript{18} This backdrop set the stage for the papal revolution of the 11\textsuperscript{th} and 12\textsuperscript{th} centuries, where the Church’s mission was to unify the church and all of Europe’s many kings under one Pope. In undertaking this mission the seeds of “discovery” were planted, both theoretically and physically,\textsuperscript{19} in conquest and crusade.

\textbf{B. The Con: The Fool’s Errand}

Send the secular rulers of Europe off to the Holy Land to reclaim Jerusalem for Christianity, and when they aren’t looking: steal their watches (by watches, I mean kingdoms).

This mission began, in part, with an idea to unify the Church, originating with the Abbot of Cluny\textsuperscript{20}. The Cluniacs pushed for the unification of the Church under the Pope, who they believed should be able to appoint the Emperor, and not the reverse. Under their guidance, the church embarked upon a campaign of propaganda that began by forbidding Priests and Bishops to marry\textsuperscript{21} and ended by denouncing the secular ruler’s place in the spiritual realm. The Cluniac reformists also believed something else that was novel in the life of the church thus far: the idea that “progress could be made in this world toward achieving some of the preconditions for salvation in the next” through a “mission to reform the world.”\textsuperscript{22} Within this concept, they found both a pathway towards the freedom they sought, as well as towards the power to control an empire.

Pope Gregory VII, in 1045, was the first to contemplate the notion of “crusade.”\textsuperscript{23} He had witnessed the unifying power of a common enemy. He believed that by giving the secular princes and knights a common enemy in the eastern Moslem empire, he could create a united Europe that would recognize the power of the papacy\textsuperscript{24}. Pope

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Not only will the same rhetoric of Crusade provide justification for seizing territory in the New World, but the early precursors of the Crusades, against Muslims on the Iberian peninsula, will leave the Mediterranean Sea, once a defensive barrier, open and beckoning for discovery. Berman, supra note 11 at 104.
\item Id. at 116
\item This prevented political marriages between leaders of the clergy with females of the ruling classes, which were prevalent at the time. Id. at 117.
\item Berman, supra, note 11 at 118.
\item Pope Gregory issued a decree in 1045 to “all who are willing to defend the Christian faith, greeting and apostolic benediction,” which went on to describe the “cruelty and devastation” of Constantinople by the Muslims. In Minge, Patrologia Latina, 148:329, trans. Oliver J. Thatcher and Edgar Holmes McNeal, eds., A Source Book for Medieval History 512-13 (New York: Scribners) (1905).
\item Berman, supra note 11 at 105-112. Pope Gregory IV became embroiled in a struggle for power with Emperor Henry IV over investiture rights and was never successful in carrying out his plan of crusade. He would die penniless and exiled, but his notion of crusade would carry on to his successor. H.G.
\end{enumerate}
\end{footnotesize}
Gregory was also likely prompted by the favorable situation that would result if the ruling class, knights and warrior kings, were far from home; the door for the clergy to take power in their place would be left wide open. Pope Gregory was unsuccessful in actualizing a crusade to free Byzantium from the Moslems, yet the idea would be kept alive until Urban II was able to successfully implement it in 1095.

C. The Mark: Kings and Princes of Europe

Pope Urban had a better grasp of politics than his predecessors and was able to tempt his constituency to crusade with more than just indulgences. A population surge in Europe at the time of his reign allowed Pope Urban to appeal to a younger generation of nobility; these men had too many successors in front of them to ever hope to inherit fiefs of their own and could, therefore, be tempted with high-ranking titles in crusading armies. He used this reality to urge Europe’s surplus of nobility to crusade and implement feudal society in the “lands of the infidel.”

As predicted, the Crusades greatly increased the speed with which the papal revolution progressed. The princes were gaining territory for the Holy Empire, which then vested more and more power in the church that had acted as the unifier of Europe. Additionally, there was great wealth in crusading, especially when the wars shifted to the “holy lands” near Jerusalem. Since the Pope had the final say in whether or not a particular prince could go to war, the ruling power of Europe shifted to the papacy, who effectively controlled who was able to earn their share of foreign wealth. The Church also reaped the spoils of the war more directly through gifts of gold “relics” from the Holy Land. By the culmination of the Crusades, the Catholic Church was the predominant ruler of Europe, the sole legal vessel of Europe, and owned one-third of all the lands in all of Europe. Conquest also left Europe herself hungry for expansion; the Mediterranean Sea, once a natural safeguard against Moslem invasions, opened with the promise of wealth and adventure.


25 Pope Urban II’s speech calling for crusade promised “all who die by the way, whether by land or by sea, in the battle against the pagans, shall have immediate remission of sins.” Bongars, Gesta Dei per Francos, 1, pp. 382 f., trans. in THATCHER AND MCNEAL, supra note 23 at 513-17.

26 In exchange for going to fight the holy war, Urban granted a “plenary indulgence” or absolution for all sins committed prior to going to war. Id. at 118.


28 Id.

29 Formerly Islamic or pagan states (Greece, Hungary, Scandinavian lands) quickly shifted to Christian domination. Id.

30 Crusades were carried out “under the banner of heaven,” and were commissioned by God. The act of killing, and thus the act of war, was a sin and therefore one had to get the papal “okay” in order to participate, otherwise, to go to war without papal approval would be to condemn oneself to eternal damnation. Id. at 24-25.
D. The Misdirect: Legitimizing Conquest and Crusade

Despite these benefits, the implementation of the Crusades was not an easy feat for the Church because strictly speaking, they were illegal. The prevailing humanitarian laws of the era espoused the “just war” principle of St. Augustine, Justinian, and Grotius; which explained that wars were only “just” and legitimate if they were a response to a “grave injury” by another. Therefore, being a holy authority that ascribed to these laws, the Church first required crusaders to justify their aggression.

Until this point in time, Europe had only ever participated in defensive wars, those to protect territory or regain what had been taken. Accordingly, a war of aggression was difficult to contemplate. The church then needed to twist the concept of “just war” to fit their policy of conquest. They did this in three ways: 1) by claiming that this was not a war of conquest but one to reclaim land that belonged to Christians by right and was dispossessed of them by the Moslems, as well as one to aid the Christian Byzantines, 2) by claiming that Moslems, as non-Christians, were enemies of Christ and that therefore, war against them was “just;” and 3) by claiming that crusaders were going to war for the benefit of the Moslems, to save their souls for Christ and convert them to Christianity. This begins the Doctrine’s methodology of “legal” argumentation, where concepts and maxims are manipulated to suit an economic and political goal.

It is clear from the outset that the actual goal of the Crusades did not adhere to the above claims. First, crusaders did not aid the Christian Byzantines who had been forced from their homelands. Instead the Church encouraged the surplus of young nobles to recreate feudal society by establishing fiefs of their own in the east. These knights would routinely refuse to fight under Byzantine lords and upon suppression of the enemy infidels, they would refuse to cease occupation of the land or turn it over to the “rightful” Byzantines. They instead created Crusader States, a further outpost of the Holy Roman Empire’s domination, making the crusader knights as “unjust” as the Moslems under the Church’s definition.

Second, the idea of Moslems as enemies of Christ is an equally faulty conclusion, both in practice and in theory. It is clear from the practice of nations at the time that the people did not consider Moslems, by virtue of their lack of Christianity, to be their enemies. For example, European lords of Crusader States frequently intermarried with Moslem women. Crusader knights with new eastern fiefs were also

32 MONOHAN, supra note 27 at 60-65.
33 Id.
reticent to actually “cast out” the conquered Moslems in their newly acquired territory as Crusader States required serfs to work the land and Moslems were frequently admitted to fill these positions.\textsuperscript{34} Christian princes would routinely hold court with Moslem rulers and in the society of the time, Moslems were considered to be worthy of respect and cohabitation, just as the Jewish people were.\textsuperscript{35} The concept of a religious “enemy” was further illegitimated when the “Crusades” spilt over into the conquest of Ireland by the English.\textsuperscript{36}

According to the predominant canonists of the time, conquest could not be justified on the Church’s grounds. While a few canonical scholars claimed that conquest could be predicated on lack of Christianity\textsuperscript{37} most did not see it as a “just” reason to strip a people of their sovereignty or territory.\textsuperscript{38} This included Pope Innocent IV, who said that he “did not believe that Christians could take land and power from people just because they were non-Christian.”\textsuperscript{39} Although he believed that the Crusades were justified to protect and defend the faithful who lived in the Holy Land, he did not believe that conquest, or assertion of dominion over the infidels was proper.\textsuperscript{40} Pope Innocent IV further posited that because the conception of “sovereignty, possessions, and jurisdiction” existed for infidels, absent sin, it was “not lawful for the Pope or for the faithful to take sovereignty or jurisdiction from infidels,”\textsuperscript{41} and that therefore the

\textsuperscript{34} They were employed in the same way European serfs were employed and there were no connotations of slavery or forced servitude by conquest. \textit{Id.} at 73-74.

\textsuperscript{35} Alfonso X of Castile: “Moors shall live among Christians in the same way that Jews shall do, by observing their own law and not insulting ours.” \textit{Id} at 95.

\textsuperscript{36} The justification for this conquest is that the Irish still followed the traditional Catholic practices and not those of the Gregorian reform church. \textit{Id.} at 127.

\textsuperscript{37} See, Hostiensis (Bishop of Ostia, 1200-1271), \textit{LECTURA QUINQUE DECRETALIUM}, 2 vols., trans. James Muldoon (1512) (“the right of sovereignty was taken from all non-Christians with the coming of Christ”).

\textsuperscript{38} Paulus Vladimiri, a noted canonist, considered the Crusades to be illegal. He claimed that those who espoused the idea of “infidel enemies” were allowing “for people to commit murder and rapine…Christians can sin, steal, rob, ravish, occupy and invade the possessions and territories of infidels who do not recognize the Roman Church or Empire, even if the infidels wish to live at peace with Christians. He believed that letters from the Emperor or Pope granting the right to occupy infidel lands were “without legal value” since “neither the Emperor nor the Roman Pontiffs can give what he does not possess… especially as it is against natural and divine law,” \textit{JAMES MULDOON} (TRANS.), \textit{PAULUS VLADIMIRI, Opinio Hostiensis in HERMANNUS VON DER HARDT MAGNUM OECUMENICUM CONSTANTIENSE CONCILII, 7 vols.,} 203 (Frankfurt and Leipzig,1696). St. Augustine, had long prior to this time, thrown out the idea that God could grant temporal dominion to his chosen people. “The claim that the God’s fostered the remarkable extension of the Roman Empire is refuted by the reference to the growth of the Assyrian Empire without the help from the Roman dieties. Similar arguments are based on the martial successes of the Persians and Alexander the Great.” \textit{ST. THOMAS AQUINAS, CITY OF GOD, TRANS. GERALD G. WALSH 89 (Image Books) (1958). “Disagreement between the faithful and infidel, considered in itself, does not invalidate the government or dominion of infidels” “in case of pre-existing government, divine law does not abolish human law”}

\textsuperscript{39} Pope Innocent IV, \textit{Commentaria Doctissima in QUINQUE LIBROS DECRETALIUM}, 176-77 (1256).

\textsuperscript{40} “Men can select rulers for themselves as [the Israelites] selected Saul and many others… sovereignty, possessions, and jurisdiction can exist, without sin, among infidels, as well as among the faithful” \textit{Id}.

\textsuperscript{41} \textit{Id}.
Crusades could only be justified to “reclaim” the land possessed by the infidels illegally.\textsuperscript{42} This shows that he espoused the “just war” theory of Augustine, the only war that was just was a war to right an affirmative wrong.

Third and finally, there was the idea of the aggressive evangelism that the Crusaders were to save the souls of the Moslems and convert them to Christianity; this argument is equally untenable, and again was not a predominant motive in practice. There are numerous cases of crusaders continuing crusades even in areas where the “enemy” had submitted and been entirely converted to Catholicism.\textsuperscript{43} For example, in Prussia, the Teutonic Knights “made it a habit to crusade at least twice a month even after the enemy had been fully vanquished and converted.”\textsuperscript{44}

It was also clear from the writings of the era, from both canonical legal scholars and crusading leaders alike, that it was not permissible to conquer in order to convert. In fact, the opinions of these scribes suggest a universal understanding that conversion through coercion and fear was unjust and unlawful. Pope Innocent IV said, “Infidels should not be forced to become Christians because all should be left to their own free will in this matter.”\textsuperscript{45} The devoutly Catholic ruler, Alfonso X of Castile, wrote in his Charter to his Crusading Knights that they should not use violence or compulsion to convert the infidels, “If God desires compulsion he shall use it. He is not pleased with service through fear but that which men come to on their own.”\textsuperscript{46} While Thomas Aquinas, the foremost legal thinker and theologian of the time,\textsuperscript{47} was clear that “belief depends on the will” and that force was futile since “even if [the crusaders] were to conquer them and bring them captive, the latter would still be at liberty to believe or not.”\textsuperscript{48} Further, in \textit{City of God}, St. Augustine\textsuperscript{49} clearly denounces the idea of empires building, which he considered “robbery on a grand scale.”\textsuperscript{50}

\textsuperscript{42} Id.
\textsuperscript{43} These included Hungary, Prussia, Iberian Peninsula. MONAHAN, supra note 27 at 126.
\textsuperscript{44} MULDOON, supra note 37 at 187.
\textsuperscript{45} Pope Innocent IV, supra note 39.
\textsuperscript{46} Muldoon, supra note 37 at 191-2.
\textsuperscript{47} St.Thomas Aquinas (1225-1274) was a Dominican priest and one of the most important Medieval philosophers and theologians of his time, pioneering the interrelation of philosophy and religion in the concept of Natural Law, his ideas have formed the basis of much of our modern law. He was canonized by Pope John XXII in 1323. Bio., St. Thomas Aquinas, available at http://www.biography.com/people/st-thomas-aquinas-9187231 (last visited March 21, 2015).
\textsuperscript{49} A preeminent theologian and scholar, St. Augustine of Hippo is one of the originators of the “Just War” theory, and the father of humanitarian law. REFLECTIONS ON LAW AND ARMED CONFLICTS; THE SELECTED WORKS ON THE LAWS OF WAR, Gerald Irving Anthony Dare Draper (Kluwer Law International, 1998), 2-3.
\textsuperscript{50} AUGUSTINE, supra note 36.
For elegant and excellent was the pirate’s answer to the great Macedonian Alexander: the King asked him how he durst molest the seas, so he replied with a free spirit: ‘How darest thou molest the whole world? But because I do it with a little ship only, I am called a thief: thou, doing it with a great navy, art called an Emperor.’

St. Augustine then asks “whether it is fitting for good men to rejoice in extended empire” and then uses the “just war” theory to prove that it is not: conquest is only legal in a just war; therefore, if “peace and justice with neighbors had not by any wrong provoked” then “all kingdoms would have been small.” “Your wishes are bad” he says, “when you desire that one you hate or fear should be in such a state that you can conquer him.”

St. Augustine’s writing represents the dominant opinion in an overwhelming amount of discourse on the subject: that the right of conquest was not a given. In fact, it seems clear that it was a known illegality. Accordingly, the Church knew that it needed to skew the facts to legitimize the acts of conquest that would increase its power.

E. The Score: European Christian Empire

Europe, once a fractured set of middling fiefs at war with one another, had now surpassed the power and wealth of the great Islamic states. United under the Pope, and working as a unit, Europe, of the Family of Nations, had become a full-fledged empire that had tasted the sweetness of conquest and was hungry for more territory.

In 1455, Pope Nicholas V issued the papal bull Romanus Pontifex, which officially condoned the Crusades and advocated that King Alfonso of Portugal “invade, search out, capture, vanquish, subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed.” He advocated for an empire, an “increase of the faith” in order to “cause the most glorious name of the said Creator to be published, extolled, and revered throughout the whole world, even in the most remote and undiscovered of places.” The bull exemplifies the careful rhetoric extolled by the Church throughout the Crusades: the infidels are savage and cruel, they have unjustly deprived Christians of their rightful domain; they have murdered and sinned against Christian Byzantines. However, this rhetoric did not represent the existing passions or true beliefs of the Church. Instead, it was merely meant to circumnavigate the legal

51 Dawsson, Supra note 48 at 72.
52 Id. at 73.
54 Id. (talking about the war in Ceuta, Africa against Saracens).
tenets of “just war” and the illegality of wars of conquest in place at the time. The Church therefore, was masterfully able to transform a lust for gold into a desire to help Christians and Moslems alike that was carried through the next four centuries. This would be the first of several papal bulls that would come into play in the founding of the “New World” that would become America, as the crusading spirit began to morph into the Age of Discovery.

II. SNAKE OIL AND SOVEREIGNTY IN THE NEW WORLD

A. The Set-up

The Crusades had not only united Europe, but had also made it the predominant world power. Massive wealth was gleaned from the conquered territories in the east, which bolstered the European nation states as well as the Church. The Pope had solidified himself as the foremost authority on matters spiritual as well as secular; the nature of the “Holy War” was such, through the genius invention of the church, that only the Pope could declare an act of war “just,” thus permitting the State to invade and gain territory through acts that would otherwise have been considered illegitimate. This relationship between the Pope and the State was a reciprocal one. It was in the interest of the nation states to align with Rome because they were able to gain power through the papacy; in exchange, the Church was able to gain authority and wealth from the crusades it authorized.

The crusading spirit shifted to a colonizing zeal in the early fifteenth century, as the wealth of the east began to be tapped out, and Europe looked to expand its growing wealth in other locales. United by the Crusades, Europe was now reverting back to nationalistic tendencies and new power struggles were taking shape between the nation states, who engaged in a race to appropriate riches available in the un-colonized world.

For example, Portugal under the Romanus Pontifex was beginning to reap the benefits of her “missions” on the west coast of Africa, which would eventually be the start of the slave trade. And although the great Catholic nations of Portugal and Spain

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57 Davenport, supra note 53.
59 Muldoon, supra note 37 at 207.
60 Winger, Clark, Alpers, eds., Africa and the West: Vol. I From the Slave Trade to Conquest, 1441-1905 (Oxford University Press 2010).
would lead the way to the New World, they would merely be cutting the trail for the secular states of Great Britain, France, and Holland to reap the rewards of colonization.

**B. The Con: Bait and Switch (Conquest for Discovery)**

Although many justifications were posited for the Crusades, the only one that remained legitimate at this time was the idea that Christians were acting to reclaim their rightful territory that they were unjustly dispossessed of during the Muslim wars of expansion. As discussed earlier, wars for the purpose of acquiring territory were still considered unjust. However, the Christian explorers of Europe were discovering lands they had not known existed previously, and therefore could lay no claim to them by right of religious inheritance. For this reason, the Catholic rhetoric regarding acquisition of territory had to expand along with the Catholic empire.

So began the writing of the bulls. Following the precedent set out by the Romanus Pontifex, Pope Alexander VI issued the first of three *Inter Caetera* bulls in the early sixteenth century. The first bull reiterated the *Romanus* and gave Portugal the right to “invade, search out, capture, vanquish and subdue all Saracens and pagans whatsoever, and other enemies of Christ,” thus extending the Crusades into discovery. Subsequent bulls would transfer the power of discovery in the New World from Portugal to Spain by drawing a line of demarcation (cutting the world in half) and allotting the lands west of the Azores to Spain.

Despite these bulls, the secular powers became more active in acquiring lands in the New World, and more willing to reject the authority of the Pope. Accordingly, they issued their own charters granting power of discovery in the New World. For example, John Cabot, who would settle America for England, was issued a charter by King Henry VII “to find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels, in whatever part of the world placed, which before this time were unknown to all Christians.”

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61 DAVENTPORT, *supra* note 53 at 22.
62 *Id.*
63 The shift in power is attributable to papal politics, the final *Inter Caertera* was issued by Pope Nicholas VI, a native of Castile and friend of Ferdinand and Isabella. The Pope was also reaping the riches of the New World and Spain, being a larger power with a more equipped military strength, would be able to subjugate more lands more efficiently. *Id.* at 26.
64 THE CABOT VOYAGES AND BRISTOL DISCOVERY, 2nd Ser., No. CXX, Haklyut Society (Cambridge University Press, 1961)[HEREINAFTER CABOT VOYAGES].
There were a few justifications posited for acquiring and settling the New World for Europe, most still based off of “just war” theory. 65 1) The Pope, by virtue of being God’s hand on earth, has rightful jurisdiction over the entire world; therefore wars to preserve this power, or punish those who deny that power, are “just.” 2) When Jesus came to earth he transferred all sovereignty and jurisdiction to Christians. 3) By bringing Christianity to the indigenous populations of the New World, Europe made adequate payment in the form of salvation and thus may take ownership. Finally, 4) Non-Christians are not “people” in the eyes of the law and have no rights of sovereignty or property; therefore, Christian nations can claim the land as if it was *terra nullius*, desert land void of inhabitants.

In addition to these four justifications, was the idea that performing certain rituals could grant to a discovering explorer the right of ownership of the discovered land. 66 When a discovering explorer made first contact, setting foot on new soil, he would place two flags into the ground, one for Church and one for country, claiming the land for his sovereign. 67 These rituals were considered legal acts of “discovery,” and show the beginning of the amalgamation of two concepts: justifications of conquest being used to facilitate tenets of discovery. This is important because, in point of law, the indigenous people were never “conquered” in a technical sense. Although skirmishes broke out between settlers and natives, and certainly some treaties were entered into under threat of military strength, there was not a full-scale campaign against the indigenous people in the same way the Crusades were waged against the Muslim nations. In other words, this was not a war per se; instead the discovering explorers attempted to make a conquest, a right typically pertaining to war, valid under discovery.

**C. The Mark: Indigenous Populations the World Over**

The settlers of Europe did not come into the New World with guns ablaze; in fact, the reality was quite the opposite. The nation states, with knowledge of their precarious legal quandary, were eager to seal their acquisitions with more legitimate means than the precarious construct afforded them. Therefore, treaties and alliances were made with the Native populations of the New World; the majority of the land acquisitions in the New World were solidified by treaty and payment. 68 By and large, the Natives were

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67 Id.
treated as possessors of all the sovereignty and rights of any nation state. However, it seems many of these treaties and rights were “for show,” and held little legal value that the European powers were willing to recognize.

In these dealings with the Natives, the European powers acted as if the Native peoples were sovereign nations that deserved treaty rights and were worth forming alliances with. However, these “negotiations” were conducted more for the purpose of solidifying claims against other European powers than for the purpose of recognizing the ownership rights of the Natives. These dealings began a trend that carried through to modern times— the practice of using Natives as instruments to promote unrelated interests.69 Making treaties and buying land from the Natives became just another ritual of “discovery.”

D. The Misdirect: Exclusion Becomes Acquisition

Since this ritual served as the “well established” principle that John Marshall will use to extinguish all sovereignty from the Native population, it is important to look at what rights actually were “well established” concerning both conquest and discovery. It is also necessary to examine the justifications given for European expansion to determine which, if any, were legitimate at the time.

1. Conquest and Discovery

Conquest has long been a source of debate among legal scholars, going back to the time of the Greeks. As far back as Hugo Grotius,70 it was held that land was not considered captured merely by its occupation.71 Thomas Hobbes72 echoed the same sentiment, writing: “It is not, therefore, Victory, that giveth the right of Dominion over the Vanquished, but his own Covenant.”73 The one notion that has been consistently agreed

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69 L.C. GREEN & OLIVE P. DICKASON, THE LAW OF NATIONS AND THE NEW WORLD, 225-226 (University of Alberta Press) (1989). This strategy can be seen in the practice of allying with Natives in the New World, as during the War of 1812, and then at the cessation of hostilities ceding land that was inhabited (and never sold or ceded by treaty) by a nations’ so-called allies to the other nation state without consulting the Natives whose land they had ceded.


71 For proof Grotius cites an instance where Hannibal held full occupation of a tract of land by his army and, even so, it was sold by the conquered nation for the same price it was originally bought for. Hugo Grotius, THE RIGHTS OF WAR AND PEACE, M. Walter Dunne trans., 667 (London, 1979).


upon is that conquest does not vest title in itself, but is a means of “creating a favorable situation for the acquisition of title.” Therefore, sovereignty and title did not “give the conqueror plenary power” until the land had been ceded by treaty or formally annexed. Officially, according to noted political scholar Jean-Jacques Burlamanqui, moreover, sovereignty must be consensual because “without consent, the state of war always subsists between two enemies, and one is not obliged to obey the other.” One of the foremost legal thinkers of the era, the Abbe de Mably, very simply noted that “if conquests by their nature form a legitimate right of possession, it would be ridiculous for a victor to demand a cession from the conquered, as he would be demanding what is already his.”

If conquest vests only a limited amount of power in the conqueror, then discovery vests even less. Discovery grants rights only if the land discovered is terra nullius, which translates to desert wasteland, or “land belonging to no one.” In other words, if the land “discovered” was already inhabited, discovery was not a valid means of acquisition. Therefore, a new version of discovery was constructed to facilitate the founding of the New World colonies. This new doctrine was not a power of sovereignty or property but an exclusionary principle. If one nation were afforded the right of discovery in the form of a papal bull, all the other European nations were excluded from discovering those lands; however, this did not grant the land itself but merely the right to attempt to discovery or conquer the land. A great Papal “dibs.”

The language of the bulls, and of subsequent charters of the secular nations that would follow, clearly show that they don’t transfer title or property rights from the Natives to the Conquerors, instead, they merely permit the right of “discovery,” the possibility to acquire. Specifically, the bulls called for the discoverer to “seize, punish, subdue.” For example, King Henry of France relied on the “defense of the faith… where war is not only necessary but just and holy,” while John Cabot’s charter called for him to “conquer, occupy, and possess.” These examples show that the leaders of Europe clearly did not see “discovery” as an instrument for obtaining title, but an instrument that gave them

74 ROBERT J. MILLER, DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES (Oxford University Press, 2010).
75 J. J. BURLAMANQUI, THE PRINCIPLES OF NATURAL AND POLITICAL LAW, Vol. 1, Mr. Nugent trans., 42 (Larkin & White eds.) (1792). He went on to say that very few if any conquests were truly lawful since conquest should be a last resort whereby.
79 CABOT VOYAGES, supra note 64.
the sole power, to the exclusion of the other members Europe, to acquire territory by conquest or other legitimate means.

Discovery did not pertain to the Natives. It was “the law of Christendom; as little applicable to infidels as was the ‘common law’ of the Greek cities to societies of barbarians,” therefore, it was only powerful when used against other members of the European nations. The nation that was granted the right of discovery then had the right to acquire territory by valid means. In this way, discovery was the new name given to the banner of the Crusades. However, in secular nations, those who did not recognize the power of the papal bulls, the tenets of discovery operated by excluding others who might happen upon settlements. Accordingly, the setting of flags and ensigns was a way of signaling to other European nations that this land had already been discovered by a nation, who then held the sole option of acquiring said land from the Natives.

2. Justifications

Having laid out the contradictions between the legal understanding of discovery of the time and the practical application of the concept, it is important to now return to the four principle means of justification used during the time to permit a country to acquire territory belonging to indigenous peoples. As stated earlier, there were four theories used predominantly to justify the taking of land; however, as shall be shown below, there remain inherent clashes between the understood legal meaning behind the justifications and how they were twisted to achieve political means in practice.

a. The Pope, by virtue of being God’s hand on earth, has rightful jurisdiction over the entire world; therefore wars to preserve his power, or to punish those who deny that power, are “just.”

This theory can be disproved simply by the fact that the vast majority of Europe, France, Great Britain, Holland, Germany, and Russia did not believe it. The idea that the Pope could cut the world in half and gift it to particular nations was as preposterous then as it is now. The secular nations of Europe disregarded the papal bulls entirely and there was no asserting them as true power from Portugal or Spain to prove their holdings. For example, when explorer Juan de Grijalva tried to claim Cozumel in the Yucatan for the Spanish by affixing a Spanish coat of arms to a Mayan tower, (considering the Mayans vassals of the Spanish King by virtue of the papal bull), the

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80 THOMAS ERSKIND HOLLAND, STUDIES IN INTERNATIONAL LAW (1898).
81 There is no record of the bulls in any archives but that of Portugal and Spain, and no reason to believe that any other nations were even made aware of them. DAVENPORT, supra note 53.
incident was considered a great source of embarrassment for the Spanish crown that
did its best to play it down.82 Additionally, it was also clear that the Natives did not
acquiesce to this theory; in Martin Fernandez Encisco’s account of his travels to the
New World he describes the reaction by a group of Natives to being told of the papal
donation; “they thought it was funny that the Pope was so liberal with what was not
his.”83

In reality, the only power the Pope had was as an arbiter “less those numerous
spiritual evils should befall which are the inevitable result of a war between Christian
princes.”84 In other words, he had no temporal power to grant dominion or land rights.
The Pope “cannot give what he does not possess,” was the contention of the great
teologian and jurist Paulus Vladimiri85, “it is against natural and divine law.”86 A
distinction was made between the Pope’s spiritual authority and his lack of secular
authority. Francisco de Vitoria, often considered the father of international law, noted
that the Pope was not able to give away towns or houses at his pleasure because his
power was not one of ownership but of spiritual jurisdiction87. Vitoria went on to explain
that, even assuming the Pope held secular power over the earth, that power was
derivative (from God) and held in the office of the Pope and not in his person. Thus, he
could not grant the power of his own office to secular princes.88

b. When Jesus came to earth he transferred all sovereignty
and jurisdiction to Christians.

While the Christian nations of Europe may have believed that God was the ruler
of heaven and earth, that belief did not extend to God granting the temporal power of
law and jurisdiction to Christian rulers. Hobbes said “it is true, that God is King of all the
Earth” but he also found the idea that God was King of a particular nation to be as
absurd as “that he hath the general command of a whole Army, and Should have withal
a peculiar Regiment, or Company of his own.”89 He also made note of the separation of
God’s spiritual power and the secular power of nations, saying that “God is the King of

82 GREEN, supra note 69 at 233.
83 Id.
84 James Brown Scott, THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW, 9 (Georgetown University
Press, 1934).
85 Paulus Vladimiri (latin translation of Pawel Wlodkowic)(1370-1435) was a professor of law, priest, and
rector at the University of Crakow. He espoused the Augustinian notions of Just War in his teachings
related to the acquisition of pagan nations. Stanislaus F. Belch, Paulus Vladimiri and His Doctrine
86 MULDOON, supra note 37 at 24.
87 SCOTT, supra note 84 at 7.
88 Id.
89 HOBBES, supra note 73 at 90.
all the Earth by his Power: but of his chosen people, he is King by Covenant. 90 This explains that God’s sovereignty on Earth was by choice, not by a matter of inherent law.

What is even more persuasive is that even the Church did not believe in taking sovereignty from the Natives. For example, Pope Paul III was outspoken about the atrocities taking place in the New World, 91 and issued a proclamation that “the Indians or any other peoples who may be hereafter discovered by Catholics, although they be not Christians, must in no way be deprived of their liberty or their possessions.” 92 He felt strongly that the Catholics would be punished for their misdeeds against the Natives; he told the Spanish council in 1537, with Diego Columbus standing by:

If the blood of one man never ceased crying to God until it was avenged, what Shall not the blood of thousands do, who have perished by our tyranny and Oppression now cry to God: ‘Vindica sanguinem nostrum Deus noster!’ By the Blood of Jesus Christ, and by the stigmata of St. Francis, I beg and beseech Your Majesty to put a stop to that torrent of crime and murdering of people, in Order that the anger of God may not fall upon us all. 93

Pope Paul III was not the only outspoken member of the Church who was against the injustice committed in the New World in the name of Catholicism. In the dictation of his last will and testament, Las Casas, a theologian monk and early advocate of indigenous rights, asked that the volume of his experiences in the New World, which he bequeathed to the College of St. Gregory at Valladolid, be forever placed in a focal area of the library so, “should God decide to destroy Spain, it may be readily seen that the punishment is caused by our own destruction in the Indies and thus the reason of His justice will be made apparent.” 94 Likewise, Pope Benedict XVI bemoaned the fact that “there are still men found confessing the true faith who have the audacity… to deprive of their possessions the poor Indians.” 95

c. By bringing Christianity to the indigenous populations of the New World, Europe made adequate payment in the form of salvation and thus may take ownership.

90 Id.
91 More than 12 Million died during the first 40 years after Columbus. More than 72 million may have inhabited the western hemisphere circa 1492 but it declined to 4M in a few centuries (a loss of 1M /century. WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED, 15 (Fulcrum Pub.) (2010).
93 Id. at 409.
94 Id. at 409.
95 Id. at 423.
This was the same argument that was rejected for use during the Crusades; the idea that the great nations of Europe were “saving” the heathen populations of the earth from eternal damnation. This notion was, again, theoretically untrue as well as untrue in practice.

Instead, the dominant maxim of the time was that non-Christians could not be converted by force: this remained the maxim of the time. While proselytizing was encouraged, the use of force was not. For example, Burlamanqui condoned trying to “bring the vanquished to the true religion” but not by the use of means “contrary to humanity.” He was adamant that the Natives be allowed the “exercise of their religion, unless they happen to be convinced of the truth of that which [we] profess.”

Furthermore, it was also not permissible to punish or go to war with the Natives for failure to believe. Explaining this, Vitoria noted that Natives “were not guilty of what they didn’t know.” Vitoria went on to explain that feigned belief out of fear of violence and war was not true belief and was, moreover, “monstrous and a sacrilege.”

Additionally, it is also clear that missionary work was not the true motivation of the rulers of Europe. While Churches were built and missionaries were sent out to preach the gospel to the Natives, the powers of Europe were far more concerned with reaping the earthly riches of the New World. The King’s Charter for the Colonization of Jamestown described the purpose of colonization as to “bring Christianity to the heathen savages who live in darkness and miserable Ignorance of the true Knowledge and Worship of God,” but, a mere sentence after, the charter instructs the settlers not to build churches or preach but to “dig, mine and search for all Manner of Mines with Gold, Silver, and Copper and Yeild a cut to the King.” Therefore, the European conquerors could not claim to have made a payment of salvation that they made little effort to bestow.

What’s more, even if the conquerors had in fact made this effort, it would have made little difference when the Natives didn’t consider the salvation of Jesus to be just compensation. For example, Herrera of Tabasco noted in his journals that the Natives laughed at the missionaries, asking why they would want another Lord when they already had one; while the Maya in the Yucatan stated outright that they did not desire Christianity.

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96 BURNES, supra note 92 at 387.
97 Id.
98 ECHO-HAWK, supra note 91 at 13.
99 Id.
100 Id at 20.
101 Id. at 12.
d. Non-Christians are not “people” in the eyes of the law and have no rights of sovereignty or property; therefore, Christian nations can claim the land as if it was terra nullius, desert land void of inhabitants.

It is clear from the teachings of the time and the practice of nations that the Natives were considered people. Las Casas issued a “categorical denial” that difference in race, social organization, or ignorance of Christianity can “destroy the fundamental character of a man and of civil society, or the rights which they derive from the Natural Law.” He believed that the Natives’ Chiefs possessed true authority and that Native peoples had a right to property and a right to develop as they chose. Further examples echoing this sentiment include Spanish canonist Diego Leyva who came to the conclusion that,

War cannot be declared justly against the heathen simply because they are heathen even by the authority of the Pope… for unbelief does not deprive the heathen of their dominion, which they have by natural law [nor do they] lose their dominion over things or territories which they hold and have come to possess by human law.”

Vitoria espoused this understanding as well, and explained that the Natives were “true owners in both public and private law,” and that their chiefs were “true princes and overlords” prior to the Spanish arrival. He believed it was robbery to deprive them of their lands or possessions, no less than if they were taken from Christians.

Although much of this land was systematically robbed from the Natives, the bulk of the land in the New World was acquired by treaty, making it apparent that the settlers and their sovereigns were aware of the humanity of the Natives, insomuch as they were worth making treaties with. Many nations, especially the Netherlands, treated the Natives the same way they would have treated any nation state; the United Netherlands instructed the Dutch East India Company in 1630 to only obtain land for settlement with the consent of the Natives. These instructions were indoctrinated into the law of the New Netherlands. The Dutch were also very clear that all cessions be made voluntarily. Similarly, William Penn, who founded Pennsylvania, insisted that land only be purchased from tribes who sold it willingly.

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102 EPPSTEIN, supra note 92 at 409-410.
103 Id.
104 GREEN, supra note 69 at 159.
105 FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, Lexis-Nexis, Introduction.
106 Id.
However, not all nations were so concerned with the appearance of propriety or voluntariness. While England required a formal purchase of land from tribal governments, that purchase did not always come absent coercion; in 1624, the Virginia Assembly, settled under Great Britain wrote:

We never perceived that the natives of the Countrey did voluntarily yield themselves subjects of our gracious Sovraigne, neither that they took any pride in that title, nor paid at any tyme any contribution for sustenation of the Colony, nor could we at any tyme keepe them is such good respect of correspondency as we became mutually helpful each to the other but contrarily what at any [time] was done proceeded from fear and not love, and their corne procured by trade or the sworde.\(^{107}\)

However, even when taken through coercion, the land was not assumed to be under the jurisdiction of the foreign power until it was annexed or ceded. Therefore, land was obtained by purchase, not by discovery. For example, Roger Williams, who founded Rhode Island, noted that “the Natives are very exact and punctuall in the bounds of their Lands, belonging to this or that Prince or People.”\(^{108}\) Accordingly, treaties had to recognize the sovereignty of the tribes as separate nations and not conquered peoples.

e. The Score: World Domination

After examining the justifications, which attempted to legitimize discovery, and the existing scholarship of the times, it becomes clear that discovery was legally illegitimate. Discovery could only be applied by fabricating non-existent injuries, either to nation or to God, or by using the ethnocentric idea of *terra nullius*, which was a hackneyed concoction of the Church that wasn’t truly accepted by the rulers and legal thinkers of the time period. What’s more, these concepts could only be stretched to pertain to land rights and property and were never conceived to be used to extinguish the sovereignty of the Natives. Discovery and conquest do not, in themselves, vest title in the nations employing them, but merely provide a platform for acquiring said title by another means. Therefore, Natives retain all sovereignty and property not officially ceded by treaty or subjugation.

Unfortunately, however, legal thought and physical practice are two different things. Despite that the leading jurists of the era believed that “discovery” as applied

\(^{107}\) Lyon Gardiner Tyler ed., NARRATIVES OF EARLY VIRGINIA 1606-1625, 23 and 233 (New York) (1907).

was not legitimate, the nations of Europe continued to “discover.” The wealth and power that acquisitions in the New World afforded was too much to give up, and thus, the legal fiction of discovery was acquiesced to. A form of legalism took shape in regard to Native policy, whereby the most powerful nations would get to make the rules for everyone else. Adherence to this fiction developed via the positivist concept that because a number of nations engage in an activity, that activity is then legal. In other words, this idea explains that the dominant power decides what the law will be and all subordinate powers are bound by it, or at least live amongst it. Therefore, natural law and an inherent concept of fairness was no longer the rule of the day; instead positivist notions of “might makes right” dictated the actions of nations.

III. Pulling Back the Cuff-Links on Federal Indian Law

*Button, Button. Whose Got the Button?*

A simulacrum is a concept in philosophy used to describe a representation without an original, a copy of a copy. It first entered the etymological landscape in the sixteenth century and was usually used to describe depictions of God. In philosophy it stands for something that gives the pretense of reality while bearing no relation to reality, whatsoever. Nietzsche suggested it was what happened when people "ignored the reliable input of their sense and resorted to the constructs of language and reason to arrive at a distorted copy of reality."\(^{109}\) Discovery is just this, a simulacrum, a theoretical fallacy given legitimacy by rhetoric. The Doctrine will eventually become law in 1823, when Justice John Marshall, under pressure to legitimize the land claims of a nation struggling free herself from colonial domination, will indoctrinate it into law in *Johnson v. M’Intosh.*\(^ {110}\) After this case, a concept that has been questioned and argued for centuries will become a legal maxim and *stare decisis,* literally translated “to stand by things decided,” will allow the court to rely on the ruling as fact, and never again need to question the legality of the underlying concept. The simulacrum is never that which conceals the truth- it is the truth that conceals that there is none.\(^ {111}\)

The United Nations Preliminary Study on the Doctrine of Discovery found that it “lies at the root of these human rights violations,” and that it has resulted in “mass appropriation of the lands, territories and resources of indigenous peoples. Indian nations have been denied their most basic rights simply because, at the time of Christendom’s arrival in the Americas, they did not believe in the God of the Bible.”\(^ {112}\) President Obama, when signing the United Nations Declaration on the Rights of

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110 21 US 543 (1823).
Indigenous Peoples in 2010, committed the United States to “supporting tribal self-determination, security and prosperity for all Native Americans.” He also asserted that the United States was “committed to serving as a model in the international community in promoting and protecting the collective rights of indigenous peoples.” This cannot be achieved without disavowing the Doctrine of Discovery, which James Anaya has determined to be “out of step with contemporary human rights values.” The purpose of this paper is to show that this statement has been true since time immemorial.

Many might wonder why this is an important step. It is not about land rights, most of which were acquired via treaty or prescription and not discovery. It is not about reparations or Constitutional challenges. At its heart, it is simply about coming clean and recognition of a historic wrong. What is at issue is the continued disenfranchisement of a people, the continued subjugation of a nation, and the continued assertion of illegitimate power. Discovery has taken more than land rights from Native Americans; it has taken their identity as a distinct nation. It was relied upon to steal ancestral homelands and resources without compensation; it has taken away Native’s ability to protect themselves by pulling jurisdiction over non-Indians away from them. Disavowing discovery is a symbolic move with perhaps no tangible gain but a moral victory. For this reason, the United Nations and Native groups have sought disavowal from multiple Popes of the underlying Bulls which would produce no change in circumstance but is greatly sought after despite the fact.

In accordance with the recommendation of Mr. Anaya, the “federal court should discard [this] colonial era doctrine in favour of an alternative jurisprudence infused with the contemporary human rights values that have been embraced by the United States.” If the United States is truly committed to its obligations to Native Americans, the Supreme Court will formally disinherit the ethnocentric, racist and discriminatory Doctrine of Discovery. The Court will act in accordance with the United Nations Declaration and “affirm… that all doctrines… based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.” As this paper has shown, this was true when the doctrine was first concocted as an instrument of war and it is equally true now. The nation had fallen for

113 Id.
114 Id. at 2.
115 ANAYA supra note 8 at Art. 16.
116 Id. ART. 104.
the hoax, and what’s more, they preferred the illusion to the reality. It is truly time we pulled back the curtain.
BETTING ON THE TRIBES: UNITED STATES ENDORSEMENT OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE AND THE INDIAN REGULATORY ACT

Erin D. Brock*

The first Americans--the Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement--employment, income, education, health--the condition of the Indian people ranks at the bottom.

This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny. Even the Federal programs which are intended to meet their needs have frequently proven to be ineffective and demeaning.

But the story of the Indian in America is something more than the record of the white man’s frequent aggression, broken agreements, intermittent remorse and prolonged failure. It is a record also of endurance, of survival, of adaptation and creativity in the face of overwhelming obstacles. It is a record of enormous contributions to this country—to its art and culture, to its strength and spirit, to its sense of history and its sense of purpose.

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.¹

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I. INTRODUCTION

It is common knowledge that Native Americans, as well as indigenous peoples from all corners of the globe, have been subjected to genocide, forced assimilation, and oppression for centuries. “In the United States in particular, Native Americans have historically been discriminated against. The injustices they suffered have never been adequately addressed, and they continue to struggle for redress and full recognition of their group and cultural identity.” Historically, indigenous peoples have been viewed as “savage nations” to be conquered and Christianized. Early European colonization forced many native peoples to flee their lands or face extinction at the hands of the civilized world. This continued marginalization has lead to the degradation of Native populations into impoverished conditions and mental suffering.

In the 1970s, President Nixon addressed Congress and ushered in the Era of Self-Determination for Native Americans. Prior to this, federal policy towards Native Americans had been one of termination. Native American peoples were pushed into adopting the culture of white America and eschewing their own traditional ways. President Nixon rejected this forced assimilation and his policies in the 1970s helped further human rights causes in Native America. However, the 1980s saw the Supreme Court and Congress turning back toward legal decisions that threatened tribal self-determination.

In 1988, Congress passed the Indian Gaming Regulatory Act. The act set forth guidelines by which gaming would be allowed to continue in Indian Country and imposed a federal regulatory scheme that included federal oversight and approval, organizational requirements, and forced state interaction with regard to certain classes of gaming. The act placed restrictions on what had previously been an area entirely

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3 The societal trauma in Native American history is brought on by the successive march of war, disease, mass population loss, conquest, colonization, dispossession, subjugation, and marginalization. Left unhealed, the trauma is deposited by intergenerational means into the culture and socio-economic indicators that characterize Native American communities today. WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, 104 (2013).
4 See Nixon, supra note 2.
6 Id.
regulated by tribes. Tribes were forced to subjugate portions of their sovereignty in the hopes of continuing tribal gaming that had been in place for nearly a decade.

Also in 1988, in response to the growing swell of indigenous voices demanding protection of their basic human rights, the United Nations completed the first complete draft of the Declaration on the Rights of Indigenous People. While the draft would go through several incarnations, this initial draft began a global conversation regarding the fundamental rights that had been denied to indigenous peoples the world over, including the United States. Though initially the United States participated in the revision process of the Declaration, it would be the last UN State to endorse the final version. In December of 2012, President Obama formally issued a statement that, in response to Native American outcry and “to further United States policy on indigenous issues”, the United States would join the more than 140 other UN States in endorsing the Declaration.

The endorsement of the Declaration by the United States is reminiscent of Nixon’s initial promotion of self-determination. The Declaration calls for a review of laws and policies that are not in line with the ideals set forth in the Articles of the Declaration. One of the major areas of concern addressed by the Declaration is the need for indigenous peoples to have control of their own economic development, free from outside interference. This policy challenges several, long-standing, United States legal principles and will require a review of current law regarding tribal issues. The Indian Gaming Regulatory Act, with its federal and state involvement in tribal economic affairs, must be examined for inconsistencies with the United Nations’ Declaration and new United States indigenous policy, and significant steps will need to be taken to protect the basic rights of Native Americans as indigenous peoples within the United States.

15 Id. at ART. 3.
II. UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

A. The History of the United Nations Declaration on the Rights of Indigenous People.

The United Nations General Committee officially adopted the United Nations Declaration on the Rights of Indigenous Peoples on September 13, 2007.\(^{16}\) While seemingly modern, the Declaration had roots in early human rights policies of the mid-20th century.\(^ {17}\)

“At the close of World War II the international system had instituted the United Nations Charter and incorporated human rights precepts among its foundational elements. The reformed system joined the revolutionary movements that fought colonialism where it continued to exist in its classical form and urged self-government in its place.”\(^ {18}\)

These early attempts to battle colonization did not take into account the traditional indigenous government systems, but marked the early recognition of the need for intervention in the colonial systems that had previously existed. This recognition was the beginning of the shift towards recognition of indigenous rights.\(^ {19}\)

While the initial human rights charter provisions ignored indigenous peoples, in 1957 the International Labour Organization (ILO) Convention No. 107 noticed the vulnerability of indigenous peoples with regard to unfair labor practices and lack of adequate training.\(^ {20}\) The ILO conducted studies regarding these perceived vulnerabilities, but still ignored the indigenous peoples' “designated representatives”, thus never fully addressing the desires and needs the indigenous peoples voiced.\(^ {21}\) This investigation by the ILO was one of the first to focus on the need for attention to indigenous people and their rights as individuals; however, it ignored their distinct cultural natures.\(^ {22}\) These policies mirrored the assimilation approach practiced within the United States at that time because they neglected to perceive indigenous nations outside the confines of western ideals. The belief that it was in the best interest of native

\(^ {16}\) See ECHO-HAWK, supra note 4 at 4.
\(^ {17}\) See ANAYA, supra note 12 at 53-54.
\(^ {18}\) Id.
\(^ {19}\) Id.
\(^ {20}\) Id. at 54-55.
\(^ {21}\) See ANAYA, supra note 12 at 54-55.
\(^ {22}\) “This Convention applies to . . . members of tribal or semi-tribal populations.” Convention No. 107 ART. 1, para 1.
groups to be wholly integrated into the “larger social and political order” was pervasive and had deep impacts on international policy.\textsuperscript{23}

By 1960, the UN had “officially repudiated colonialism.”\textsuperscript{24} The 1960s and 1970s were known for their activist nature, which spread into the indigenous populations. The Aboriginal People of Australia completed a “Freedom Ride” in 1965 through the most racist portions of the Australian countryside in an effort to raise awareness for Aboriginal issues.\textsuperscript{25} This action helped push forth a victory for the 1967 Referendum that counted Aboriginal People in the Australian Census and allowed for the Commonwealth to pass laws dealing with Aboriginal peoples and issues.\textsuperscript{26} This measure was passed with a 91 percent approval rating and marked the starting place for true discussion of Aboriginal Rights in Australia.\textsuperscript{27}

Meanwhile, Native Americans were engaging in their own awareness campaigning. “In 1961, a militant new Indian organization, the National Indian Youth Council, appeared and began to use the phrase ‘Red Power.’ They sponsored demonstrations, marches, and ‘fish-ins’ to protest state efforts to abolish Indian fishing rights guaranteed by federal treaties.” This early movement helped spawn several more groups that began to take action with regard to protecting rights that were promised decades before by the federal government. “In 1964, Native Americans in the San Francisco Bay area established the Indian Historical Society to present history from the Indian point-of-view. At the same time, the Native American Rights Fund brought several legal suits against states that had taken Indian land and abolished Indian hunting, fishing, and water rights in violation of federal treaties.\textsuperscript{28} One of the most infamous and public displays of Native American activism followed closely behind these initial efforts:

“If November 1969, some 200 Native Americans seized the abandoned federal penitentiary on Alcatraz Island in San Francisco Bay. For 19 months, Indian activists occupied the island to draw attention to conditions on the nation's Indian reservations. Alcatraz, the Native Americans said, symbolized conditions on reservations: ‘It has no running water; it has inadequate sanitation facilities; there is no industry, and so unemployment is very great; there are no health care facilities; the soil is rocky and

\textsuperscript{23} Convention No. 107 ART. 1, at 56.
\textsuperscript{24} See ECHO-HAWK, supra note 4 at 29.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
This new, powerful voice among Native American activists helped spark new discussion into the rights and needs of indigenous peoples globally.

President Nixon’s 1970 speech was one of many acts that would help shape international view of indigenous rights and work towards the eventual drafting of the United Nations Declaration on the Rights of Indigenous Peoples. The United Nations’ attention turned toward indigenous rights within the framework of defeating racism in 1971. A study was authorized by the UN to investigate the discrimination against indigenous peoples globally. The study took more than a decade to complete and the results were dismal. Morbidity, lack of access to health care, poverty and lack of decent housing were among the issues noted in the report. In America alone, the life expectancy for Native Americans in the 1970s was 44 years compared to the national average of the mid-60s. “The UN Economic and Social Council (UNECOSOC) responded to these findings by creating the Working Group on Indigenous Populations (WGIP), comprised of five independent experts as well as Indigenous advisors, in order to focus exclusively on Indigenous issues worldwide. Its role was to make recommendations to the Commission of Human Rights through the Subcommission.”

The working group has acted as a conduit for information between the indigenous populations of the world, other interested groups, and as an instrument of change. While initially confined to a very limited set of tasks, the working group was expanded multiple times and allowed for open participation in its annual sessions. The working group’s most vital work has been through its “standard-setting mandate” which

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29 Id.
30 See ECHO-HAWK, supra note 4 at 30.
31 Id.
33 “In 1970 . . . 40 percent of the Native American population lived below the poverty line. In that year, Native American life expectancy was just 44 years, a third less than that of the average American . . . Conditions on many of the nation’s reservations were not unlike those found in underdeveloped areas of Latin America, Africa, and Asia. The death rate among Native Americans exceeded that of the total U.S. population by a third. Deaths caused by pneumonia, hepatitis, dysentery, strep throat, diabetes, tuberculosis, alcoholism, suicide, and homicide were 2 to 60 times higher than the entire U.S. population. Half a million Indian families lived in unsanitary, dilapidated dwellings, many in shanties, huts, or even abandoned automobiles.” See The Native American Power Movement, supra note 6.
35 See ANAYA, supra note 12 at 63.
36 Id.
led the sub-commission to approve the drafting of a declaration on indigenous rights for adoption by the U.N. General assembly. This draft was produced with minimal revisions by the chair in 1989. It was then further reviewed and developed over several years before it was finally submitted to the committee in 1993. This draft reflected the concerns of indigenous peoples along with proposals submitted by their representatives as well as comments made by interested governments.

After years of revisions the declaration was finally adopted by the sub-commission in 1994 and was submitted for approval to the U.N. Commission on Human Rights. That Commission then developed its own working group to review the submission’s draft. This ad hoc working group consisted of human rights experts and over 100 Indigenous organizations. This group worked tirelessly on the draft declaration, subjecting the draft to a series of extensive reviews “to assure U.N. member states that it remained consistent with established human rights, and did not contradict nor override them.”

After nearly a quarter of a century of debate the U.N. Declaration on the Rights of Indigenous Peoples, referred to by many as the UNDRIP, was finally adopted by the U.N. General Assembly in September of 2007. While widely accepted as the new normative standard for the treatment of indigenous peoples; several major states refused to commit to the adoption of the UNDRIP. Canada, New Zealand, Australia, and

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38 See ANAYA, supra note 12 at 63.
40 “Through the process of drafting a declaration, the [WGIP] engaged states, indigenous peoples, and others in an extended multilateral dialogue on the specific content of norms concerning indigenous peoples and their rights . . . The working group provided important means for indigenous peoples to promote their own conceptions about their rights within the international arena.” See ANAYA, supra note 12 at 63-64.
41 Id.
42 See Hanson, supra note 35.
43 “The process moved very slowly because of concerns expressed by States with regard to some of the core provisions of the draft declaration, namely the right to self-determination of indigenous peoples and the control over natural resources existing on indigenous peoples’ traditional lands. The need to accommodate these issues led to the creation, in 1995, of the open-ended intersessional working group to consider and elaborate on the 1994 draft” Historical Overview, UNITED NATIONS, PERMANENT FORUM ON INDIGENOUS ISSUES, http://undesadspd.org/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples/HistoricalOverview.aspx (last visited Mar. 19, 2015).
44 “In 2006, the draft was accepted by the UN Human Rights Council, and the following year, it was adopted by a majority of the UN. General Assembly.” Id.
the United States all refused to endorse the UNDRIP, citing their respective positions with regard to native rights.\textsuperscript{45} These four states,

“have all pointed to their track records in upholding human rights, including the recognition of Indigenous rights within their own national governance systems, as a justification for their reluctance to endorse the UNDRIP. They have noted that many nations that have signed on to the UNDRIP do not appear to uphold these minimum standards.” \textsuperscript{46}

The initial rejection of the UNDRIP by these four states has been reversed in all cases, with the United States being the last of the four to announce their full endorsement in December of 2010.\textsuperscript{47} While all four states continue to point out the “aspirational” nature of the UNDRIP, President Obama has stated publicly that actions are the key to the success of the UNDRIP and that is the standard to which his administration will be held.\textsuperscript{48}

\section*{B. The Structure and Mission of The United Nations Declaration On The Rights Of Indigenous People.}

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) consists of a Preamble and 46 articles.\textsuperscript{49} The UNDRIP addresses a comprehensive list of indigenous issues ranging from the protection of religious freedoms in Article 12 to issues regarding labor laws in Article 17.\textsuperscript{50} The text lists the human rights that constitute

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\textsuperscript{45}“The Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly on Thursday, 13 September 2007, by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).” \textit{Peoples, UNITED NATIONS, PERMANENT FORUM ON INDIGENOUS ISSUES}, http://undesadspd.org/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx (last visited Mar. 19, 2015).
\textsuperscript{46}See Hanson, \textit{supra} note 35.
\textsuperscript{47}“The United States government announced its decision to review its stance on the Declaration in April 2010, and at various times, President Barack Obama has expressed interest in supporting it. In November 2009, Obama signed a presidential memorandum to begin consultations with tribal leaders, non-governmental organizations and government representatives on how the UNDRIP may be effectively implemented in the United States. In April 2010, the United States announced that it would hold a formal review of the UNDRIP, and, in December 2010, after several months of consultations, Obama announced that the US fully endorsed the UNDRIP.” \textit{Id}.
\textsuperscript{48}“But I want to be clear: What matters far more than words -- what matters far more than any resolution or declaration — are actions to match those words. And that’s what this conference is about. That’s what this conference is about. That’s the standard I expect my administration to be held to.” Pres. Barak Obama, \textit{Remarks by the President at the White House Tribal Nations Conference}, \textit{WHITE HOUSE OFFICE OF THE PRESS SECRETARY} (Dec. 16, 2010), available at http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference.
\textsuperscript{49}\textit{Supra} note 15.
\textsuperscript{50}\textit{Id}.
“minimum standards” for the ‘survival, dignity and well-being of indigenous peoples of the world,’ and it also defines the obligations of nations toward their indigenous peoples and provides guidelines for implementing and interpreting the rights and obligations contained in the instrument.\(^{51}\) The UNDRIP is a basic set of human rights principles and guidelines for the international community to implement those rights. The UNDRIP does not purport to grant any new rights to indigenous peoples, but instead recognizes basic rights that arise from “norms and obligations that are generally applicable” to the all people under basic international law.\(^{52}\)

One of the primary purposes of the UNDRIP is to “connect the human rights of indigenous peoples to the larger body of international human rights law and make that body of law more accountable to the needs and circumstances of indigenous peoples.”\(^{53}\) The UNDRIP “protects collective rights that may not be addressed in other human rights charters that emphasize individual rights” which is key to protecting indigenous peoples traditional cultural norms.\(^{54}\) This approach, unlike the relationship between the United States federal government and Indians, takes into account not just the societal norms of western civilization but also the inherent character of indigenous peoples, as Congressman Dawes noted in 1885.

Of particular interest are the sections dealing with indigenous peoples’ rights to self-determination and to their pursuit of economic development projects free from interference.\(^{55}\) Article 3 of the UNDRIP “recognizes Indigenous peoples’ right to self-determination, which includes the right ‘to freely determine their political status and freely pursue economic, social and cultural development.’... and Article 5 protects their right to ‘maintain and strengthen their distinct political, legal, economic, social and cultural institutions.’\(^{56}\) These sections illustrate the importance of sovereignty to indigenous people on an international level. Under the principles lined out in the UNDRIP, self-determination and economic development are basic, fundamental human rights for indigenous communities.

The UNDRIP also recognizes the tremendous harms done to indigenous peoples throughout their histories. “The Declaration has a distinct remedial purpose. It is driven by the persistent denial of basic human rights of indigenous peoples by entrenched forces of colonialism, dispossession, discrimination, and assimilation practices that are

\(^{51}\) See ECHO-HAWK, supra note 4, at 39.
\(^{52}\) Id.
\(^{53}\) Id. at 40.
\(^{54}\) See Hanson, supra note 35.
\(^{55}\) See ECHO-HAWK, supra note 4, at 40.
\(^{56}\) See Hanson, supra note 35.
justified by nefarious legal doctrines from a bygone era." The General Assembly, in drafting the preamble, highlights these issues, which it found to be so pervasive. The UNDRIP was adopted with the hope that some of these deep seated and long standing animosities and grievances could be addressed and corrected so that the future of indigenous peoples did not follow the same bloody and dark pathways from the last several centuries.

C. The Endorsement of the United Nations Declaration on the Rights of Indigenous People by the United States.

The idea that the UNDRIP’s goal of recognizing indigenous rights as a worthy endorsement was not clear in a nation where equality is one of the founding tenets. The United States was the last major nation to endorse the UNDRIP, nearly 3 full years after 144 other states had already signed off on its principles. Even after Canada, Australia, and New Zealand, countries with huge indigenous populations and complex legal and historical relations, all reversed their earlier refusal to endorse the UNDRIP. While the United States espoused several reasons for its hesitance to sign, the most likely is that they feared that the recognition of external standards for the treatment of native populations within their borders might upset the current balance of power.

After the United States’ initial rejection of UNDRIP, indigenous people throughout America began calling for the United States to reconsider its position. In April of 2010, in “response to calls from many tribes, individual Native Americans, civil society, and others in the United States”, the United States began an extensive review of the UNDRIP. This review was led by the State Department and consisted of a series of “tribal and NGO consultations to review what endorsement of the international human rights declaration would mean for indigenous populations in the United States” Reviewing the Declaration included three rounds of consultations with tribal leaders, both in D.C. and in Rapid City, South Dakota, as well as the review of more than 3,000 written comments. The State Department declared that endorsement of the UNDRIP would “further United States Policy on indigenous issues” and that such support goes

57 See ECHO-HAWK, supra note 4, at 40.
58 “Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources” which have prevented their “development in accordance with their own needs and interests.” See UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, supra note 15, at Preamble.
59 See Hanson, supra note 35.
60 Id.
61 See OBAMA, supra note 14.
63 See OBAMA, supra note 14.
“hand in hand with the United States commitment to address the consequences of a history in which . . . few have been more marginalized and ignored by Washington for as long as Native Americans.”\(^{64}\) The President also stated that supporting the UNDRIP “reflects the United States Commitment to work with [America’s 565 federally recognized] tribes . . . to address the many challenges they face.”\(^{65}\)

The endorsement of the UNDRIP by the United States carries some interesting obligations. While the UNDRIP operates as an international charter for human rights, it is not actually legally binding on the states that endorse it, as the United States has continually pointed out.\(^{66}\) Although technically true, the UNDRIP does appear to have force within legal community. “Many leading legal experts believe that numerous provisions of the Declaration constitute customary international law.”\(^{67}\) Further, “[k]ey provisions of the Declaration are linked to treaties ratified by the United States and are therefore the supreme law of the land.”\(^{68}\) Whether these provisions are tied to a treaty or merely recognized as international law in a customary sense, they lend legal weight to the Declaration itself proving that there are legal ramifications regardless of the lack of legally binding terms. It is obvious that “contemporary international law now includes broad moral precepts among its constitutional elements, particularly within the rubric of human rights” and, as such, the “legal character of the obligation [to uphold the terms of the UNDRIP] can thus be seen to attach to all the subjectivities of obligation that surface within the realm of human rights.”\(^{69}\) While the United States professes that its endorsement of the UNDRIP is purely “aspirational” in nature; it is impossible to believe that there are no tangible, legal obligations to abide by the terms set out in the UNDRIP under international common law.

### III. **Indian Gaming Regulatory Act**

#### A. A Brief History of the Tribal Sovereignty and Indigenous Rights in the United States

In order to fully grasp the struggle between states and tribes over tribal gaming, it is important to first understand the framework of tribal sovereignty in the United States. The nature of the relationship of tribes to the federal government is entirely unique. Tribes were present on the American continent long before westerners began colonizing this area and did not readily submit to outside authority. As initial explorations gave way

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\(^{65}\) See Obama, supra note 14.

\(^{66}\) See UN Declaration on the Rights of Indigenous Peoples Review, supra note 65.

\(^{67}\) See ECHO-HAWK, supra note 4 at 40.

\(^{68}\) Id. at 91-93.

\(^{69}\) See Anaya, supra note 12 at 69.
to more permanent government, westerners began to treat the indigenous tribes of America as conquered peoples.

In 1823, Chief Justice Marshall of the United States Supreme Court fashioned what is known as the “Doctrine of Discovery”. In *Johnson v. M’Intosh*, Chief Justice Marshall wrote that all lands were acquired by the conquering force in this country, the westerners, and “maintained by force”. This gave absolute power to the conquering power to prescribe the limits of that power. "This rule flew in the face of international law, since bare conquest has never been considered sufficient to convey good title under the law of nations . . . Thus, Marshall had to craft an exception to the hard and fast rule that conquerors must respect property rights in the lands they invaded." Marshall used flagrant and unjust depictions of native peoples as wild, savage, and incapable of being ruled under normal circumstances to justify his new doctrine. Most importantly, Marshall’s opinion in *Johnson v. M’Intosh* forever established the way Indian title to lands is treated in the United States. Marshall stated that,

“[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.”

This case set the tone for the country and it gave the federal government absolute power of Indian nations. States quickly followed suit and began issuing decisions that reflected the same concepts of “right by conquest” espoused by the Marshall Court. During the Removal Era of Federal Indian Policy, the Alabama Supreme Court held that they had “clear proof, that, in the understanding of all the civilized worlds, a discovered Indian country was a conquered country: that the new sovereign always so considered it, and exercised the rights of a conqueror over his new subjects…" The Alabama Court continued to use this doctrine to "sanction state power over the Creek Nation", and it “did not mince words about the fate of the Creek Indians under state rule.” The South had equated Indians with a pestilence to be exterminated and Alabama’s Court “looked forward with confidence to the time when the whole state

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70 Johnson v. M’Intosh, 21 U.S. 543 (1823).
71 Id. at 589.
72 Id.
73 See ECHO-HAWK, supra note 4 at 106.
74 Johnson v. M’Intosh, 21 U.S. at 588-589.
75 Caldwell v. State, 1Stew. & P. 327,1832 WL 545 (Ala. 1832) at *45.
76 See ECHO-HAWK supra note 4 at 108.
would be freed from its Indian Population.”77 Tennessee’s Supreme Court went a step further and specifically stated that Indian tribes must “accept a master or perish.”78

During the Removal period there was tension between the Supreme Court and the Executive and Legislative branches of the federal government. President Andrew Jackson pressured Congress to pass the Removal Act of 1830. This set the stage for President Jackson to begin the process of systematically forcing tribal groups from their traditional homes to lands west of the Mississippi.79 While Jackson was successful in moving 50,000 Indians west of the Mississippi to what became known as “Indian Territory”, he faced opposition from the Cherokee Nation of Georgia.80 The Cherokee Nation sued Georgia and Chief Justice Marshall produced a second decision affirming the status of tribes as subservient beings and bolstering Jackson’s position. Marshall stated plainly “the Indian territory is admitted to compose a part of the United States.”81 He reiterated his earlier position that tribes constituted “domestic dependent nations” and set forth the trust doctrine holding that tribes “relation to the United States resembles that of a ward to his guardian.”82

While initially appearing to support Jackson’s position that tribes could be forced by states and the Executive Branch to submit to their authority, Marshall quickly reversed his position. In 1832, Marshall decided the last of his famous “trilogy” of cases, Worcester v. Georgia. Marshall held that the Cherokee Nation was a sovereign power unto itself and was free from the laws of Georgia regarding activities occurring within the borders of its territory.83 President Jackson, however, refused to follow the Court’s

77 Caldwell v. State, 1832 at *53.
78 State v. Foreman, 1835 WL 945, 16 Tenn. 256, at *8-9.
79 The Act established a process whereby the President could grant land west of the Mississippi River to Indian tribes that agreed to give up their homelands. As incentives, the law allowed the Indians financial and material assistance to travel to their new locations and start new lives and guaranteed that the Indians would live on their new property under the protection of the United States Government forever. With the Act in place, Jackson and his followers were free to persuade, bribe, and threaten tribes into signing removal treaties and leaving the Southeast.” Milestones: 1830-1860: Indian Treaties and the Removal Act of 1830, U.S. DEPARTMENT OF STATE, https://history.state.gov/milestones/1830-1860/indian-treaties (last visited Mar. 20, 2015).
80 Id.
81 Cherokee Nation v. State of Ga., 30 U.S. 1, 17 (1831).
82 Id.
83 “The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States. The act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity. The acts of the legislature of Georgia interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, is committed exclusively to the government of the union.” Worcester v. State of Ga., 31 U.S. 515, 520 (1832).
holding. Jackson has apocryphally been attributed with saying "John Marshall has made his decision, now let him enforce it" but there has been no conclusive evidence of that.  
Jackson did, however, flaunt his presumed authority and ignored Marshall. Jackson did the following:

[He] obtained the signature of a Cherokee chief agreeing to relocation in the Treaty of New Echota, which Congress ratified . . . in 1835. The Cherokee signing party represented only a fraction of the Cherokee, and the majority followed Principal Chief John Ross in a desperate attempt to hold onto their land. This attempt faltered in 1838, when, under the guns of federal troops and Georgia state militia, the Cherokee tribe were forced to the dry plains across the Mississippi. The best evidence indicates that between three and four thousand out of the fifteen to sixteen thousand Cherokees died en route from the brutal conditions of the ‘Trail of Tears.’”

The Indian nations continued to experience similar forms of degradation while the government continued to struggle with the place of Indians in America. The Dawes Act of 1887 allowed the Executive Branch to break apart the reservations that had been promised to the tribes into small, individual parcels of land. Ostensibly this was intended to promote farming among the tribes and push them towards assimilating with the western culture that was quickly taking over. However, this forced assimilation completely ignored tribal mentality and disregarded any possibility of tribal self-determination or sovereignty. Dawes himself noted that Indians appeared to lack the “selfishness” that is at the heart of civilization.

87 “The act, also known as the General Allotment Act, was named for Massachusetts Congressman Henry Dawes, who declared that private property had the power to civilize. To be civilized, he said, was to “wear civilized clothes, cultivate the ground, live in houses, ride in Studebaker wagons, send children to school, drink whiskey (and) own property.” Dawes’s plan was to extend the protection of the nation’s laws to American Indians by allotting reservation land in parcels of 40 to 160 acres to individuals and heads of households.” Alysa Landry, Native History: Dawes Act Signed Into Law to ‘Civilize’ Indians, INDIAN COUNTRY TODAY, (Feb. 18, 2014), http://indiancountrytodaymedianetwork.com/2014/02/08/native-history-dawes-act-signed-law-civilize-indians-153467 (last visited Mar. 20, 2015).
88 “The head chief told us that there was not a family in that whole nation that had not a home of its own. There was not a pauper in that nation, and the nation did not own a dollar. It built its own capitol, and it built its schools and its hospitals. Yet the defect of the system was apparent. They have got as far as they can go because they own their land in common … there is no enterprise
In 1903, the Supreme Court again affirmed the position that indigenous peoples were weak and in need of protection. 89 When the Kiowa Chief Lone Wolf sued the government on behalf of his people to enforce their treaty rights, the Supreme Court found that Congress had “plenary authority,” power over tribes, and could change the terms, “abrogate,” the treaty at any time without fear of repudiation from the Court. 90 The Court held that addressing the claim of Lone Wolf would, in effect, limit Congress’ power over the tribes, power that Marshall had earlier established was limitless. 91 Yet again tribal interests were subsumed by their “conquerors.”

In the 1950s, Congress again turned its attention towards termination of the tribes. The goal was to begin assimilating them into white society to get them from the poor management of the Bureau of Indian Affairs (BIA) and to help them achieve the same levels of prosperity as the rest of the nation. 92 Congress agreed by resolution to make it the official policy of the United States to “make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives to make your home any better than that of your neighbour’s. There is no selfishness, which is at the bottom of civilization. Till this people will consent to give up their lands, and divide them among their citizens so that each can own the land he cultivates, they will not make much more progress.”


89 It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They own no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen. Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903).

90 Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. Id. at 222.

91 “To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress . . . of all power to act, if the assent of the Indians could not be obtained.” Id. at 221.

92 “In 1943 the United States Senate conducted a survey of Indian conditions. The living conditions on the reservations were found to be horrific, with the residents living in severe poverty. The Bureau of Indian Affairs and the federal bureaucracy were found to be at fault for the troubling problems due to extreme mismanagement.” HISTORY AND CULTURE, TERMINATION POLICY: 1953-1968. AMERICAN INDIAN RELIEF COUNCIL. http://www.nrcprograms.org/site/PageServer?pagename=airc_hist_terminationpolicy.
pertaining to American citizenship." Further, Congress wanted this completed "as rapidly as possible." The termination of indigenous peoples special status was to be affected by the abolishment of the BIA and a massive overhaul of all federal policy including treaties and legislation currently in place.

In the same year, Congress passed what is commonly referred to as Public Law 280. Public Law 280 was enacted in the hopes of combating what was considered the rampant "lawlessness" present within Indian Country. Originally six states were given jurisdiction over criminal offenses committed by or against Indians in their respective states regardless of where the offenses took place. This allowed state law to replace any form of tribal law that may have been in existence at the time and forced tribes under the rule of a separate sovereign. Not all states were happy about this development, as the federal government did not allow for any additional funding for states to enforce their new jurisdiction creating additional antagonism between the tribes and the states.

Congress also granted limited, civil regulatory jurisdiction in the same six states. These two provisions were a departure from the traditional, purely federal regulation that had been exercised until that point. Public Law 280 marked the beginning of true

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94 Id.
95 "[The] offices of the Bureau of Indian Affairs whose primary purpose was to serve any Indian tribe or individual Indian freed from Federal supervision should be abolished. It is further declared to be the sense of Congress that the Secretary of the Interior should examine all existing legislation dealing with such Indians, and treaties between the Government of the United States and each such tribe, and report to Congress at the earliest practicable date, but not later than January 1, 1954, his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution." Id.
97 "In Pub.L. 280, the primary concern of which was combating lawlessness on reservations, California [along with five other states] was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State but more limited, nonregulatory civil jurisdiction." Cal. v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).
98 "Initially, Public Law 280 transferred all criminal jurisdiction over tribes in California, Minnesota, Nebraska, Oregon, and Wisconsin to those states. Congress added Alaska shortly thereafter. These six states are collectively known as the "mandatory Public Law 280" states, as their assumption of jurisdiction was dictated by Congress." Daniel Twetten, Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever Be Made into A Right?, 90 J. CRIM. L. & CRIMINOLOGY 1317, 1323 (2000).
99 Id. at 1322.
100 "In discharging its duty to care for the tribes, the federal government struck a balance with tribes regarding tribal justice systems. After the passage of the Major Crimes Act in 1885, the Bureau of Indian Affairs, through the Courts of Indian Offenses, maintained jurisdiction over major crimes committed on Indian lands. Tribes retained exclusive jurisdiction over lesser crimes and exercised concurrent jurisdiction over many of the major crimes. However, Congress wiped out this arrangement in 1953 when it passed Public Law 280" Id. at 1323.
state authority over tribes and was eventually expanded to include an additional 10 states. It was not until 1968 that Congress limited the state’s power over tribes by requiring tribal consent to additional exercises of jurisdiction. The amendment also allowed for states to “retrocede” jurisdiction back to the federal government. Several states took the opportunity to return jurisdiction to the federal courts in some small part, but tribes still remained under the rule of the states. This abdication of power left tribes at a serious disadvantage as sovereigns with no real sovereignty and states that refused to administer justice for crimes committed in Indian country due to a lack of funding.

While the landscape of Indian sovereignty appeared bleak at the end of the 1960s, there were some who were fighting to protect the native population in America from outright extinction. The 1968 Indian Civil Rights Act forced the interest of protecting individual tribal members rights on tribes by imposing similar protections on tribes as the Bill of Rights imposed on the federal government. While forcing tribal governments to submit to more outside interference, this act marked a step away from assimilation and back towards self-determination. Two years later, President Nixon furthered this end and promulgated a new era of tribal self-determination and respect. Calling for an end to paternalism, Nixon urged Congress to “return control of federal Indian programs to tribes.” While these steps seemed to be leading the country back towards recognizing the inherent sovereignty of tribal nations, “one critic observed, the federal government’s self-determination policy ‘involve[d] contracting with tribes, rather than actually transferring power to them’.”

B. The Rise of Tribal Gaming In The United States.

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102 Twetten, supra note 99 at 1324.
103 “The 1968 amendments also allowed states to retrocede jurisdiction back to tribes. Five states have returned jurisdiction to certain tribes pursuant to this amendment. Minnesota, Wisconsin, and Nebraska each returned complete jurisdiction over crimes on one reservation to the federal government. In addition, Washington returned jurisdiction to two tribes, and Nevada returned jurisdiction to nearly all tribes.” Id. at 1323.
104 “In 1968, President Lyndon Johnson identified the “new goal” of federal Indian policy as one of “partnership and self help.” This policy was meant to allow Indians to either retain their traditional homelands or to move into cities with adequate skills to live alongside the white Americans successfully. Steven Andrew Light and Kathryn R.L. Rand, Indian Gaming and Tribal Sovereignty: The Casino Compromise, 33 (2005).
106 See Nixon, supra note 2.
107 Id. at 34.
108 Id. (quoting Paul H. Stuart, Organizing for Self-Determination: Federal and Tribal Bureaucracies in an Era of Social and Policy Change, in American Indians, 95 (Green and Tonnesen, eds.).
Many people believe that tribal gaming came into existence with the passage of the Indian Gaming Regulatory Act (IGRA) in 1988. However, Indian gaming predates IGRA by nearly a decade and was a flourishing economic endeavor long before Congress took notice. Tribes, spurred on by the success of state lotteries and charity bingo games, began looking to gambling as a potential source of revenue to bolster their impoverished economies. As with any flourishing economic endeavor there were detractors who attempted to stifle this new source of economic growth. The very first casinos in Florida and California brought with them some of the most ferocious battles regarding sovereignty between states and tribal governments. These court cases set the stage for the federal recognition of Indian gaming and for the creation of the IGRA in 1988.

“The Seminole Tribe opened a high-stakes bingo hall on their reservation at Hollywood, Florida on December 14, 1979 and the state tried immediately to shut it down. A final decision by the United States Supreme Court in 1983 was made after a series of court battles. The Court ruled in favor of the Seminoles affirming their right to operate their bingo hall.” The case centered on whether or not the tribes could operate bingo halls in a Public Law 280 state, which allowed for some forms of gambling, like horse races and charity bingo, but provided criminal penalties for violations of certain regulations. Both parties agreed “that forms of gambling such as horse racing are regulated in Florida, and indeed the petitioner admits that the Indians could engage in the operation of horse racing activities without interference by the state. Petitioner suggests that the distinction between bingo and horse racing lies within the licensing requirements; however, we find that argument without merit. Regulation may appear in forms other than licensing, and the fact that a form of gambling is self-regulated as opposed to state-regulated through licensing does not require a ruling that the activity is prohibited.” Once the court determined that gaming was a regulated activity not a prohibited activity, the state no longer had civil authority over the tribes under Public Law 280.

\[110\] Harvey, supra note 10, at 15
\[111\] “Indians in Florida and California began to raise revenue by offering bingo with larger prizes than were allowed under state law. The states threatened to sue if the tribes did not stop their gaming. The tribes, in turn, sued in federal court.” Id. at 15-16.
\[114\] Referencing Bryan v. Itasca County, the court stated: “that if Congress in enacting Pub.L. 280 had intended to confer upon the States general civil regulatory powers, including taxation over reservation Indians, it would have expressly said so.” . . .Although the Supreme Court was interpreting the language of Public Law 280 as directed at the six mandatory states, it is clear that these same limitations on civil jurisdiction would apply to a state that assumed jurisdiction pursuant to Section 7 of the former Public Law
The court in *Seminole Tribe of Florida v. Butterworth* considered the public policy behind the gaming laws in Florida, which would become a key portion of the analysis in other major gaming cases. The court found that the prohibition on gambling in Florida was against lotteries, but that exceptions had been made for bingo, horse-racing, and a few other forms of gambling. These exceptions were enough to indicate that bingo was a regulated industry and not against Florida public policy. While the court reasoned that its decision could technically go either way, all ambiguities must be resolved in the favor of the tribes.

The preeminent gaming case, *California v. Cabazon Band of Mission Indians*, was decided just six years later and spawned the development of federal regulations regarding tribal gaming. After the success of the Seminole tribes case, more than 80 tribes across the nation opened bingo halls to help generate revenue for their tribes and further their economic development. Two of these tribes, the Cabazon and Morongo Bands of Mission Indians, operated both bingo halls and a poker room as their sole source of revenue. The Cabazon Band was a tiny tribe, boasting only 25 members at the time, while the Morongo band has less than 750 enrolled members, and the small gambling operations they ran were within the confines of their federally recognized reservations in the Indio and Riverside areas of California.

The Supreme Court in this case also dealt with the issue of Public Law 280 jurisdiction and came to the same conclusion. The regulatory nature of California’s laws made them inapplicable to the tribes. California threatened to shut down the tribes'...
gaming operations on their reservations and the tribe sued to protect them from closure. The tribes were adamant that their bingo halls and card room fell outside the scope of California’s authority. California claimed that its interests in protecting the public from organized crime under the Organized Crime Control Act [OCCA] were superior to the tribes’ need for income and made its restriction of “no limit” bingo prohibitory in nature, which would give them jurisdiction over enforcing "no limit bingo" as a crime under Public Law 280 and the OCCA. While the Court recognized that a regulatory law could be enforced as a criminal law it held that a regulatory law enforced with criminal penalties “an otherwise regulatory law . . . does not necessarily convert it into a criminal law within the meaning of Pub.L. 280. Otherwise, the distinction between § 2 and § 4 of that law could easily be avoided and total assimilation permitted.”

The Court also found that California was attempting to burden the tribe in regards to their non-Indian patrons. While in some extreme cases, states can exercise regulatory authority over tribes without express congressional authorization. The Court found that the state’s attempt to penalize non-Indian gamers on tribal land was pre-empted by both the tribal and federal interests in “self-sufficiency” and “economic development.” In this case, the tribe had no other means to support themselves; there were no natural resources or other means by which to pursue economic development, and the federal government’s policy of tribal self-government outweighed any interest California may have in preventing Organized Crime.

C. The Indian Gaming Regulatory Act

the present case, the court reexamined the state law and reaffirmed its holding in Barona, and we are reluctant to disagree with that court's view of the nature and intent of the state law at issue here. Id. at 1088-89.

121 “California sought to apply to the Tribes its statute governing the operation of bingo games. Riverside County also sought to apply its ordinance regulating bingo, as well as its ordinance prohibiting the playing of draw poker and other card games. The Tribes instituted an action for declaratory relief in Federal District Court.” Id. at 1084.

122 Id.

123 “California argues, however, that high stakes, unregulated bingo, the conduct which attracts organized crime, is a misdemeanor in California and may be prohibited on Indian reservations.” Id. at 1089.

124 Id.

125 LIGHT, supra note 105, at 41.

126 This case also involves a state burden on tribal Indians in the context of their dealings with non-Indians since the question is whether the State may prevent the Tribes from making available high stakes bingo games to non-Indians coming from outside the reservations. Decision in this case turns on whether state authority is pre-empted by the operation of federal law; and “[s]tate jurisdiction is pre-empted ... if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.” New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-34 (1983).

127 LIGHT, supra note 105, at 41.
Cabazon marked a huge victory for Indian gaming because it determined that states had no authority to regulate gaming on Indian lands.128 Sadly, it was a hollow victory because it also forced Congress to take a role in regulating gaming on a federal level. As early as 1985, Congress began hearings on tribal gaming when lobbying for federal legislation came from both tribal and state sources.129 The tension between state interest and tribal interests was intense.130 The states wanted Congress to “limit tribal sovereignty” and extend state power over tribes by allowing state regulation of gaming.131 Tribes, on the other hand, wanted to continue their sole dominion over gaming enterprises, free from outside regulation.132 The federal government was concerned about the unregulated nature of cash games and jackpots in Indian gaming.133

Since the late 70s, competing interests with regard to gaming had played out in the courts, requiring Congress to step in.134 Representative Morris Udall introduced the first Indian gaming bill, H.R. 4566, in 1983.135 Congress began drafting the gaming bill in the hopes that they could “maintain Indian gaming as a means of tribal economic development by preemtping state regulation.”136 The Cabazon decision rendered that step unnecessary and reaffirmed the right of the tribes to regulate bingo on their lands. After Cabazon the same senators who opposed Udall’s initial bill began clamoring for federal regulation.

The bill that eventually became the federal governing law over Indian Gaming was dubbed the Indian Gaming Regulatory Act (IGRA) and was enacted on October 17, 1988.138 Though controversial in nature, IGRA was the Legislature’s attempt at a reasonable compromise between state and tribal interests.139 While most states were supportive of the final version of IGRA, most tribes went “on records” opposing the bill

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128 Id.
129 Id.
130 HARVEY, supra note 10 at 18.
131 LIGHT, supra note 105 at 42.
132 Id.
133 Marion Black Horn, the principal deputy solicitor of the Department of the Interior (DOI), testified that tribes; unregulated gambling held an unfair, competitive advantage over the states’ regulated gambling. She continued, stating that there were no state imposed limits on the size of the jackpots, no limits on the hours of operation, no licensing fees, and no state-imposed taxes.” HARVEY, supra note 10, at 19.
134 U.S. Senator Harry Reid (D-New.) stated that post Cabazon “there was little choice except for Congress to enact laws regulating gaming on Indian lands. The alternative would have been for the rapid and uncontrolled expansion of unregulated casino-type gaming” LIGHT, supra note 105 at 42.
135 Alex Tallchief Skibine, The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, and Dilemmas, FED. LAW. April 2013, at 35.
136 HARVEY, supra note 10, at 19.
137 Skibine, supra note 136.
138 Id.
139 LIGHT, supra note 105, at 43.
because “[m]ost of the tribal leadership believed IGRA represented a serious infringement on tribal sovereignty.”

One of the most innovative features of the bill was to assign regulatory authority based on the classification of the games being played. “IGRA divides all gambling into three classes: Class I encompasses social and traditional games; Class II is limited to bingo [in various forms] and non-banking card games like poker; Class includes primarily slot machines, casino banking and percentage games, off-track betting, and lotteries.” This breakdown allowed Congress to separate the authority to regulate gaming into multiple areas. Games that fell under Class I gaming were to remain sole under tribal oversight and not subject to IGRA’s requirements, Class II and III gaming would be subject to the provisions of IGRA and would require varying levels of federal and state oversight.

Class III, or “casino style” gaming was viewed as the most dangerous and states pushed the hardest for regulation of these games. Several states, most notably Nevada, pushed for heavy involvement in the operation, licensing, and management of Indian gaming within their borders, citing the same concerns about organized crime previously raised in Cabazon. The belief was that “as a ‘cash-business’…casino gaming necessarily attracted crime, whether organized or unorganized.” This heightened concern over casino style gaming nearly choked IGRA prior to its enactment, until Congress developed a key compromise.

The tribal-state compact system was Congress’s answer for the “logjam” created by states “holding up federal legislation.” Under IGRA, tribes who wished to pursue Class III gaming could only do so under an official contract, or “compact”, approved by the state in which the tribe intended to operate such gaming. The compact system allowed for states to have some control over what they considered were dangerous activities within their borders. The provision requires states to negotiate their compacts in “good faith” with the tribes and, initially allowed tribes to pursue legal remedies when this provision was not properly followed. The compromise helped IGRA pass through

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140 Skibine, supra note 136, at 36.
141 Id.
142 HARVEY, supra note 10, at 23.
143 LIGHT, supra note 105, at 43-45.
144 Id. at 43.
145 HARVEY, supra note 10, at 22.
146 LIGHT, supra note 105, at 43.
147 Id. at 44.
149 “Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the
the Legislature at the cost of tribal sovereignty." 150 A deal was made wherein Indians set aside some of their sovereignty in return for what Congress and the tribes thought would be a "rational scheme of management of gaming activities in Indian lands." 151 This compromise extended state authority beyond the Public Law 280 restrictions to any tribe that operated gaming within state borders to the detriment of tribal self-determination. 152

The passage of IGRA did not mark the end of conflict over Indian gaming, as many believed it would. In 1992, four years after IGRA was enacted, Congress held hearings on issues arising from the implementation of IGRA. 153 There were issues with what constituted Class II and Class III gaming. 154 There had never been a federal act of this nature and the explosive growth of the gaming enterprise had far outstripped anyone’s expectations. 155 The Gaming Act crossed multi-departmental boundaries, requiring the Department of the Interior to submit management plans, the Department of Justice to enforce violations, and the Federal Bureau of Investigation to conduct background checks. Furthermore, all of these activities had to comply with at least seven separate acts of Congress on topics from Freedom of Information to Paperwork Reduction. 156 Finally, the boom in gaming coincided with a technological revolution that further complicated implementation. 157

The most devastating blow to tribal sovereignty came in the form of a Supreme Court decision over tribal gaming compacts. The 1996 case, Seminole Tribe of Florida v. Florida, was originally over “good faith” negotiations between the Governor of Florida, Lawton Chiles, and the tribes. 158 Governor Chiles refused to negotiate any compact that would allow for Class III gaming on the Seminole Reservation. The State of Florida was successfully able to argue that IGRA’s provision which allowed tribes to sue for enforcement of the “good faith” requirement in negotiations was a violation of the States’ Eleventh Amendment immunity. 159 This allowed states to refuse to approve any conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710.

150 “Inouye . . . had to urge Indian governments to accept this new idea of negotiating with states instead of the federal government.” HARVEY, supra note 10, at 25.

151 Id.

152 LIGHT, supra note 105, at 44.

153 HARVEY, supra note 10, at 22.

154 “The Department of Justice was awaiting finalization on the definitions of Class II and Class III gaming before it pursued violations of the Act.” Id. at 23

155 Id. at 26.

156 Id.

157 Id. at 27.

158 LIGHT, supra note 105, at 48.

159 The Indian Gaming Regulatory Act provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. 102 Stat. 2475, 25 U.S.C. § 2710(d)(1)(C). The Act, passed by
compact for over two years after the decision was handed down.\textsuperscript{160} The increase in tribal gaming and the intensification of public debate has allowed states to use this immunity from prosecution to influence Indian gaming policy within their borders and to impact tribal sovereignty by granting states the upper hand in negotiations. States can now bargain for larger revenue sharing agreements and to hold compacts until tribes capitulate with more increasing state demands.\textsuperscript{161}

\section*{IV. United Nations Declaration On The Rights Of Indigenous People Vs. The Indian Gaming Regulatory Act}

The UNDRIP outlines several key issues in indigenous rights but the most important of those in the context of IGRA are the right to self-determination and economic development. It is without question that Indian gaming has been the single most successful economic endeavor pursued by the tribes of the United States. The question is whether IGRA allows tribes the sovereign control that UNDRIP outlines or whether it forces indigenous peoples under the thumb of outside sovereigns and restricts their ability to fulfill their own economic agendas.

IGRA has been able to further tribal sovereign interests in limited ways.\textsuperscript{162} IGRA is in full compliance with the UNDRIP in several respects and some scholars feel that decisions like \textit{Cabazon} are totally in line with the UNDRIP's principles.\textsuperscript{163} Class I gaming is still within the full province of tribal entities and Class II gaming is under the jurisdiction of tribes with minimal federal interference and no state jurisdiction whatsoever.\textsuperscript{164} Further, IGRA removes the prohibitions of the Johnson Act and the OCCA, as long as tribes operate within the confines of state compacts.\textsuperscript{165} All of these things are in compliance, at least to a degree, with Article 20 of the UNDRIP which states that: “Indigenous peoples have the right to maintain and develop their political, economic, and social systems or institutions, to be secure in the enjoyment of their own

\begin{thebibliography}{99}
\bibitem{L1} Congress under the Indian Commerce Clause, \textit{U.S. Const., Art. I, § 8, cl. 3}, imposes upon the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact, 25 U.S.C § 2710(d)(3)(A), and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty, 25 U.S.C § 2710(d)(7). We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and, therefore, 25 U.S.C § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued. \textit{We further hold that the doctrine of Ex parte Young, 209 U.S. 123 (1908), may not be used to enforce 25 U.S.C § 2710(d)(3) against a state official. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47, 116 S. Ct. 1114, 1119, 134 L. Ed. 2d 252 (1996).}
\bibitem{L2} \textit{Light}, \textit{supra} note 105, at 50.
\bibitem{L3} \textit{Skibine}, \textit{supra} note 136, at 37.
\bibitem{L4} \textit{Skibine}, \textit{supra} note 136, at 36.
\bibitem{L5} \textit{Echo-Hawk}, \textit{supra} note 4, at 164.
\bibitem{L7} \textit{Skibine, supra} note 136 at 36.
\end{thebibliography}
means of subsistence and development, and to engage *freely* in all their traditional and other economic activities."  

While Bingo had been fully regulated by tribes before and is now under the oversight of the federal government, it is still primarily under native control and therefore seems to be in compliance, particularly regarding the ability of tribes to become self-regulating after meeting a series of standards. By allowing tribes to continue to monitor their own activities, Congress is acknowledging the success that was shown in the decade prior to their involvement.

While IGRA has accomplished a few steps forward for tribal sovereignty, it has hampered tribes far more than it has helped them and there are significant ways in which it does not comport with the UNDRIP. The most notable is the forced interaction between states and tribes in the compacting provisions. Tribes are forced to submit to two separate sovereigns when forced under federal law to gain the permission of the states to conduct casino style gaming. When IGRA was in the hearing stages, even though organized crime seemed like a pressing issue, it came to light only one of the more than 100 tribes engaged in gaming had any ties to organized crime. It was found that the tie was both accidental and secondary because it existed through the management company they had hired. There has been no evidence presented that organized crime is now or has ever been a serious problem in Indian gaming. This grant of power to states over tribes is in direct conflict with Article 23 of the UNDRIP as it interferes with their ability to “administer [economic] programs through their own institutions.” The federal government’s forced subjugation of tribes to state authority flies in the face of the principles acknowledged by the United States endorsement of UNDRIP. It demeans tribal sovereignty by forcing a nation to beg for permission from an entity which has no true power over them outside this inexplicable grant from the federal government. If tribes were instead allowed to regulate Class III gaming in the same manner as Class I gaming, or even Class II gaming, it would satisfy the UNDRIP’s

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166 UNDRIP, *supra* note 15, at ART. 20. (emphasis added)

167 (4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has-- (A) conducted its gaming activity in a manner which--(i) has resulted in an effective and honest accounting of all revenues;(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and (iii) has been generally free of evidence of criminal or dishonest activity; (B) adopted and is implementing adequate systems for--(i) accounting for all revenues from the activity;(ii) investing, licensing, and monitoring of all employees of the gaming activity; and(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and (C) conducted the operation on a fiscally and economically sound basis.

25 U.S.C.A. § 2710

168 "By mid-1986, 108 tribes had gaming facilities and 104 of these conducted bingo. The combined receipts for these gaming activities were estimated to be $100 million annually." HARVEY. *supra* note 10 at 21.

169 HARVEY, *supra* note 10 at 27.

requirements for self-administration and free economic development and it would recognize what should be the obvious authority of tribes over their own businesses.

Several other provisions are also flawed in the same manner as the tribal compact provisions with regard to federal interference as opposed to state interference. Article 4 guarantees indigenous people the right to autonomy in their internal affairs. IGRA has provisions severely limiting the ways in which tribes may spend their gaming revenues, while also allowing for revenue sharing with the states. This not only infringes on tribes right to autonomy with regard to their spending but opens the door for additional interference by states in the tribes’ ability to run their economic endeavors. By allowing for revenue sharing with the states, IGRA gives the states a means to leverage capital out of tribal programs and into state coffers in exchange for an agreed compact.

Also, federal government agency’s implementation of Minimum Internal Control Standards (MICS) for Class II operations infringes on tribal autonomy and the right to run their own programs. This implementation allows the federal government to reach into tribal casinos and require specific policies and practices to be followed by the employees and managers of the casinos. In effect, the federal government is attempting to write the employment policies of the tribes without their input or consent. The same could be said for the need for approval of Management Contracts under IGRA. Tribes cannot contract with outside management companies without submitting to a complicated process with heavy restrictions and several hoops. This process severely stifle tribes’ ability to freely choose the ways in which they pursue their economic development under the UNDRIP by forcing them to allow the federal government to dictate the terms of the contracts tribes may enter for the management of their casinos.

When looking at the IGRA it becomes clear that the benefits to tribes are, at best, minimal and that they could be accomplished by repealing the IGRA, removing the Johnson Act and OCCA from tribal lands, and allowing tribes to determine their own economic destiny. Under the UNDRIP, international law and, by its late endorsement, the United States, have recognized that indigenous peoples should be allowed the maximum freedoms possible. Indigenous peoples should be given the ability to forge

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171 Id.
172 “Net revenues from any tribal gaming are not to be used for purposes other than--(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies;” 25 U.S.C.A. § 2710.
173 “Through IGRA, Congress established the National Indian Gaming Commission (NIGC) . . . in 1999 the commission promulgated . . .(MICS) for tribal gaming operations . . .these highly detailed standards [cover] aspects of gaming, ranging from mandating that a bingo ball be displayed to patrons . . . to requiring two employees to initial a corrected error on a slot machine count. ” LIGHT, supra note 105, at 52.
their own destinies, free from discrimination, oppression, coercion, or fear of retribution. Native Americans are a distinct people within both the federal and the international context and their rights, both as a collective and as individuals, must be protected from unwarranted restrictions placed on them without their consent or knowledge. 175 Under IGRA, tribes were coerced into a compromise that they believed would protect their right to game in the most ‘rational’ way possible. 176 When the Seminole Tribe of Florida v. Florida case was decided and their only form of redress against states was removed, tribes were no longer operating under the arrangement they believed they were initially entering. Furthermore, tribes are not actually granted the opportunity to vote in the Legislature on any of these matters because tribes do not have elected Congressional representatives separate from those of the states in which they live. This regulation without adequate representation or input undermines the sovereignty of the tribes and reduces tribal authority to that of a figurehead. The federal government allows tribes to claim they are a sovereign people but refuses to allow them the autonomy to determine for themselves the best means to provide for their people’s economic growth.

V. CONCLUSION

The United States’ endorsement of the United Nations Declaration on the Rights of Indigenous Peoples marks a huge victory for the rights of Native Americans. While Native Americans have long been forced to comply with federal laws and regulations that they had no true voice in creating, there is now a moral and international imperative to change. This current trend of forced subjugation to the whims of a government that does not allow tribes to speak for themselves must end. If the United States truly intends to support the principles set out by the United Nations, it must take a closer look at the policies and laws that currently shape tribal law and make radical changes.

While the Indian Gaming Regulatory Act has some sections that comply with the United Nations declaration, the majority of the Act stifles tribal self-determination and the rights of Native Peoples to forge their own economic path, free of outside interference. The United States must step away from the role of guardian to a weaker class and allow Native Americans to regulate their own economic endeavors by abolishing the Indian Gaming Regulatory Act in favor of tribal self-regulation. The notion that tribes are no more than a collection of ignorant, inept people lacking political savvy is both insulting and outdated. The tribes have shown through decades of success, in bingo and Class II gaming, that they are intelligent business people, capable of leading their own corporations and deciding their own fates. As President Nixon said in 1970, “It

175 See UNDRIP, supra note 15.
176 See LIGHT, supra note 105, at 43.
is long past time that the Indian policies of the federal government began to recognize and build upon the capacities and insights of the Indian people.”\footnote{Gerhard Peters and John T. Woolley, Nixon: Special Message to the Congress on Indian Affairs (July 8, 1970), THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=257.}
“FOR INDIAN PURPOSES:” EXPLORING THE ROLE OF WATER AS A CULTURAL RESOURCE IN SECURING A RIGHT TO GROUNDWATER FOR THE AGUA CALIENTE BAND OF CAHUILLA INDIANS
Courtney Cole*

I. INTRODUCTION

This paper examines the role of water as a cultural resource in bolstering claims by American Indian tribes to reserved groundwater rights. Though federal Indian law has long acknowledged the right of tribes to use surface water on their reservations through the so-called Winters doctrine, courts have been less willing to recognize a tribal reserved right to groundwater. In a time of severe water scarcity, particularly in the American Southwest, this issue is at the forefront of tribal water claims, including a case brought recently by the Agua Caliente Band of Cahuilla Indians. The Agua Caliente and their ancestors, who have inhabited southern California’s Coachella Valley for millennia, utilized groundwater for traditional cultural, domestic, and subsistence agricultural purposes. More recently, however, a dramatic increase in the Valley’s population and a series of poor municipal decisions have overdrawn and contaminated the Coachella Valley Aquifer. Without a right to the groundwater, the Agua Caliente are currently unable to enjoin local regulatory agencies from further compromising the source of water they all share. This paper argues that highlighting the role of groundwater as a tribal cultural resource may assist the Agua Caliente in securing a right to water in the Coachella Valley Aquifer.

This paper proceeds as follows. Part II describes the historical use of groundwater by the Agua Caliente Band of Cahuilla Indians and the present-day status of the Coachella Valley Aquifer, which underlies the Agua Caliente Reservation. Part III explains the Winters doctrine and its extension to groundwater, details the ways in which courts have defined the purposes of Indian reservations in order to quantify tribal reserved water rights, and explores the legal options available for protecting water as a tribal cultural resource. Part IV applies the Winters doctrine to the Agua Caliente and examines Winters’ role in protecting the cultural use of groundwater on the Agua Caliente Reservation as their homeland. Finally, part V concludes by discussing the implications of this analysis for tribes in southern California and beyond that may one day seek recognition of their reserved rights to groundwater.

II. THE COACHELLA VALLEY AND THE AGUA CALIENTE BAND OF CAHUILLA INDIANS

* J.D. Candidate, University of Colorado Law School, 2015. The author would like to thank Professor Kristen Carpenter of the University of Colorado Law School and Steve Moore of the Native American Rights Fund for their guidance as well as the staff of the Seattle University American Indian Law Journal for their editorial assistance.
According to Cahuilla bird songs – the oral literature of the Cahuilla people, from whom members of the Agua Caliente Band are descended – the Cahuilla have occupied the region now known as the Coachella Valley since time immemorial.¹ Recent archaeological excavations mirror these stories, revealing evidence of human habitation in the area as early as 3,000 BCE.² The Coachella Valley is a 45-mile-long stretch of southern California desert flanked on all sides by mountains.³ Elevations on the Valley floor range from 1600 feet above sea level at its northwestern end, near the City of Palm Springs, to 250 feet below sea level at the Salton Sea.⁴ Most precipitation falls during the winter months, and some mid-summer storms may produce flash floods, but the Valley regularly receives less than five inches of rain per year and temperatures reach over 100 degrees Fahrenheit.⁵

Prior to the arrival of non-Indians, the Cahuilla people prospered in this arid environment by sustainably harvesting water from the Coachella Valley’s canyons, springs, and aquifer.⁶ The Coachella Valley Aquifer lay under the ancestral territory of the Cahuilla, about 600 square miles centered on present-day Palm Springs, and today underlies the Agua Caliente Reservation, which consists of approximately 31,396 acres carved from that ancestral territory.⁷ Pre-contact Cahuilla adapted to drought cycles by developing groundwater wells for use in times of scarcity.⁸ Their walk-in wells, for example, were dug by hand and often reached thirty feet in depth.⁹ The Cahuilla also drew water from naturally occurring springs, which, though common year round, varied in location.¹⁰ Permanent Cahuilla villages were often sited near sources of water, which was essential to many aspects of Cahuilla life.¹¹ Water was used for personal

² Id.
⁸ Id.
⁹ Id.
¹¹ Id.
consumption, food processing and preparation, personal hygiene, medicinal uses, spiritual and ceremonial uses, production of household items (including pottery and basketry), construction of dwellings, and agricultural practices.\textsuperscript{12}

Groundwater, particularly from the area’s hot mineral springs, played an important role in the spiritual life of the ancestral Cahuilla.\textsuperscript{13} Both the Agua Caliente Band and the City of Palm Springs derive their names from the famous Agua Caliente Hot Spring.\textsuperscript{14} Cahuilla oral literature tells of the Spring’s creation in the beginning by a powerful elder who fashioned it as a perpetually enduring place to heal.\textsuperscript{15} As was later retold by Agua Caliente elder Francisco Patencio:

The head man, \textit{Tu-to-meet}, was tired and sick and lame, so he took his \textit{whō-ya-no-hut} (staff of power), which he struck in the ground. He twisted it around, and caused the water of a spring to come out – now Palm Springs Hot Spring. He named it \textit{Sec-he}, meaning boiling water, which is up to the earth and on the earth, which is to be for ever, never to dry up, never to go away, but to be there for ever and always for the sick.\textsuperscript{16}

The first Cahuilla to live in the area dared not dwell near the Hot Spring.\textsuperscript{17} In the same way a stranger is treated with a cautious sense of distance, it was considered a sentient and unfamiliar entity.\textsuperscript{18} Although the people came to bathe in its warm mineral waters, the Spring was treated with the respect of a living being.\textsuperscript{19} If the Spring’s waters were to be utilized or disturbed in any way, food and prayers were offered to it within the \textit{kishumna’a}, or ceremonial house.\textsuperscript{20} By doing so, the Hot Spring could be used without any harm coming to the people.\textsuperscript{21} Bathing in the Spring eventually played a central feature in traditional Cahuilla life.\textsuperscript{22} As instructed by \textit{Menil}, the Cahuilla Moon Maiden, bathing once in the morning and once towards evening was practiced.\textsuperscript{23}

\begin{itemize}
  \item \textsuperscript{12} \textit{Id.} at 2 n. 1 (internal citations omitted).
  \item \textsuperscript{13} \textit{See} Agua Caliente Cultural Museum, \textit{Agua Caliente Band of Cahuilla Indians}, http://www.accmuseum.org/About-the-Tribe (last visited May 21, 2015).
  \item \textsuperscript{16} \textit{Id.}
  \item \textsuperscript{16} Agua Caliente Cultural Museum, \textit{supra} note 14, at 4.
  \item \textsuperscript{17} \textit{Id.} at 1.
  \item \textsuperscript{18} \textit{Id.}
  \item \textsuperscript{19} \textit{Id.}
  \item \textsuperscript{20} \textit{Id.}
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{22} Agua Caliente Cultural Museum, \textit{supra} note 14, at 1.
  \item \textsuperscript{23} \textit{Id.}
\end{itemize}
The Hot Spring’s importance, however, was not limited to its material gifts. It also represented a meeting place between the physical world and a supernatural underworld imbued with i’va’a (power) – the basic generative force from which all things were created. Beneath the waters was a subterranean realm populated by powerful sacred beings called nukatem, remnants from the beginning of time with the ability to accomplish both good and evil. Cahuilla shamans utilized this space in order to consult with the nukatem and the knowledge they obtained was used to cure the sick. The Spring’s powerful curative properties became known to the outside world in the 1850s, and individuals suffering from pulmonary and tubercular conditions were quickly drawn to its waters.

The non-Indian presence in the Coachella Valley grew during the 1870s with the extension of rail lines into the area. In response, most of the present-day Agua Caliente Reservation was set aside through two executive orders. Their issuance, in fact, marked the culmination of a prolonged effort by the United States and various federal Indian agents to provide for the Agua Caliente, along with the other Indians of southern California, in the face of ever-increasing encroachment by white settlers. Agent D.A. Dryden, head of the Mission Indian Agency, envisioned that the Reservation would serve as a permanent homeland for the Agua Caliente. He explained that “by giving them exclusive and free possession of these lands . . . [t]hey will be encouraged to build comfortable houses, improve their acres, and surround themselves with home comforts.” The homeland that the federal government foresaw for the Agua Caliente was necessarily dependent on access to an adequate supply of water. As Agent John Ames wrote in 1874:

The great difficulty . . . arises not from any lack of unoccupied land, but from lack of well-watered land. Water is an absolutely indispensable requisite for an Indian settlement, large or small. It would be worse than folly to attempt to locate them on land destitute of water . . .

After years of reports from Agents Dryden, Ames, and others, President Ulysses S.
Grant issued an executive order on May 15, 1876 reserving lands “for the permanent use and occupancy” of the Agua Caliente and other Mission Indians in southern California.\textsuperscript{36} It quickly became apparent to those in the area, however, that the lands set aside were insufficient as tribal homelands.\textsuperscript{37} In July of 1877, newly appointed Mission Indian Agent J.E. Colburn received instructions from the Commissioner of Indian Affairs to “at the earliest possible date” make “strenuous efforts” to identify and reserve “every available foot of vacant arable land” for the “permanent occupation” of the Agua Caliente and other Southern California tribes.\textsuperscript{38} Agent Colburn subsequently recommend for inclusion in the Agua Caliente Reservation some thirty-five additional sections of land near those withdrawn in 1876. On September 29, 1877, President Rutherford B. Hayes issued an executive order setting the additional lands aside “for Indian purposes.”\textsuperscript{39}

White settlement, and consequent water use, in the Coachella Valley increased dramatically during the twentieth century.\textsuperscript{40} In particular, significant groundwater extraction began after World War II during a period of rapid regional population growth.\textsuperscript{41} Between 1940 and 1950, the population of Riverside County, within which the Agua Caliente Reservation is located, grew by over 60 percent.\textsuperscript{42} In response, two state agencies, the Coachella Valley Water District (CVWD) and the Desert Water Agency (DWA), were created to supply water to the citizens of the Coachella Valley for both domestic and agricultural purposes. Today, the CVWD extracts more than 100,000 acre feet of water per year from the Coachella Valley Aquifer and the DWA extracts approximately 43,000 acre feet.\textsuperscript{43} The Aquifer is currently in a state of overdraft\textsuperscript{44} and has been for many years.\textsuperscript{45} In 2010, the CVWD estimated that the overdraft totaled more than 5.5 million acre feet and was continuing at an average of approximately 239,000 acre feet per year.\textsuperscript{46} In an attempt to decrease the overdraft, both the CVWD and the DWA inject the Aquifer with imported Colorado River water at a rate of approximately 51,000 acre feet per year.\textsuperscript{47} This water, however, is of significantly lesser quality than that existing in the Aquifer, containing a higher percentage of total dissolved

\begin{footnotes}
\item 36 Id.
\item 37 Id.
\item 38 Id.
\item 39 Id. at 4.
\item 40 Complaint, supra note 6, at 8.
\item 41 Id.
\item 42 Id.
\item 43 Id. at 4-5.
\item 44 An aquifer is in a state of “overdraft” when “more water is used each year than can be replaced by natural or artificial means.” Motion for Summary Judgment, supra note 7, at 4.
\item 45 Id.
\item 46 Motion for Summary Judgment, supra note 7, at 4at 4-5.
\item 47 Complaint, supra note 6, at 11.
\end{footnotes}
solids, nitrates, pesticides, and other contaminants.\textsuperscript{49} Thus, the water underlying the Agua Caliente Reservation is decreasing in both quantity and quality each year.

Since 1996, the Agua Caliente Band of Cahuilla Indians and others, including the United States, have urged the CVWD and DWA to take action to stop the overdraft of the Coachella Valley Aquifer.\textsuperscript{49} The Band has repeatedly asked the agencies to recognize its reserved water rights and work collaboratively to improve their shared stewardship of the Coachella Valley’s water resources.\textsuperscript{50} Responses, however, have been dismissive both of the Band’s rights and of any possibility of collaboration.\textsuperscript{51} Committed to protecting the Aquifer not only for its members, but for all residents of the Valley, Agua Caliente brought suit against the CVWD and DWA in federal court in May of 2013.\textsuperscript{52} The Band has requested that the court declare its priority water rights, and enjoin the agencies from continuing to overdraft the Aquifer and degrade the quality of existing groundwater.\textsuperscript{53}

III. TRIBAL RESERVED WATER RIGHTS

The legal basis for the Agua Caliente Band of Cahuilla Indians’ suit against the CVWD and DWA is the doctrine of federal reserved water rights. The doctrine was established by the Supreme Court in 1908, and has since been interpreted by both federal and state courts to apply to surface water as well as groundwater. Reserved rights are quantified based on the purposes for which a reservation was created, which a court may determine is to serve as a tribal homeland.

A. The Winters Doctrine

It has long been settled that the creation of an Indian reservation impliedly reserves a right to the use of water sufficient to fulfill the purposes of the reservation.\textsuperscript{54} This principle was established by the Supreme Court in the seminal case of \textit{Winters v. United States}, 207 U.S. 564, 595-96 (1908). See \textit{generally} Felic Cohen’s HANDBOOK OF FEDERAL INDIAN LAW § 19.03 (Nell Jessup Newton ed., 2005). See also, \textit{e.g.}, Cappaert v. United States, 426 U.S. 128, 138-43 (1976); Arizona v. California, 373 U.S. 546, 598-600 (1963).

\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{53} Agua Caliente Band of Cahuilla Indians, \textit{supra} note 48.
\textsuperscript{54} \textit{Winters v. United States}, 207 U.S. 564, 595-96 (1908).
and is thus known as the Winters doctrine. Winters involved water rights associated with the Fort Belknap Indian Reservation in Montana, which was created by the United States in 1888 as “a permanent home and abiding place” for tribes in the territory. Relevant legislation designated the Milk River as the Reservation’s northern boundary, but made no mention of rights to use of the water. Portions of the Reservation potentially suitable for agriculture were “of dry and arid character, and, in order to make them productive, require[d] large quantities of water for the purpose of irrigating them.” To make use of that acreage, Indians living on the Fort Belknap Reservation began diverting water from the Milk River in 1898. When settlers upstream also began diverting, the United States sued to enjoin their interference with the Indians’ water rights. The settlers contended that they had acquired vested rights by appropriating water after the Reservation was established but before the Indians began doing so. The Winters Court rejected this argument, however, and held that when the Fort Belknap lands were reserved, water rights for the Indians were also reserved by necessary implication. The Court recognized that the Reservation was but a small part of a much larger area previously occupied by the Indians and thought it unreasonable to assume that they would reserve lands for agricultural purposes without also reserving the water to make those uses possible.

The Supreme Court affirmed the Winters doctrine in the landmark case of Arizona v. California. There, the Court was charged with determining whether water rights had accrued to five tribes along the Colorado River when their reservations were established by executive order. The Arizona Court found it “impossible to believe” that the President would have created the reservations “unaware that most of the lands were of the desert kind . . . and that water from the river would be essential to the life of the Indian people . . . and the crops they raised.” Accordingly, the Court held that the United States had reserved water rights for the tribes effective at the time the reservations were created and that the water was intended to satisfy “the future as well as the present needs of the Indian Reservations.” Emphasizing the fact that reserved rights must encompass both current and future needs, the Court concluded that water

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55 207 U.S. 564 (1908).
56 Id. at 565.
57 Id.
58 Id. at 566.
59 Id.
60 Id. at 657.
61 Id. at 568-69.
62 Id. at 567-77.
63 Id.
65 Id. at 595-96.
66 Arizona v. California, 373 U.S. at 599.
67 Id. at 600.
was reserved in an amount sufficient “to irrigate all of the practicably irrigable acreage on the reservations.”

**B. Winters Rights to Groundwater**

Both federal and state courts have held that the Winters doctrine applies equally to surface water and groundwater. The Court of Appeals for the Ninth Circuit addressed the applicability of Winters rights to groundwater in *United States v. Cappaert*, which was subsequently affirmed by the Supreme Court. At issue in *Cappaert* was whether the United States could invoke reserved water rights associated with Devil’s Hole, a limestone pool within the Death Valley National Monument that served as habitat for the endangered pupfish, to prevent surrounding landowners from extracting groundwater through wells. The United States argued that groundwater pumping lowered the level of Devil’s Hole, threatening its pupfish population. The Ninth Circuit, finding that the purpose of Devil’s Hole’s reservation was to protect pupfish, held that the United States “implicitly reserved enough groundwater to assure [their] preservation” and that it could invoke its reserved rights to enjoin other landowners from pumping groundwater in amounts that adversely affected them. The Supreme Court, in affirming the Ninth Circuit’s judgment, reiterated that the United States could enjoin groundwater pumping that interfered with its reserved water rights. The *Cappaert* Court held that “since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation . . . the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.”

Other federal courts have similarly supported the extension of Winters rights to groundwater. In *Tweedy v. Texas Company*, the surface owners of land within the Blackfeet Indian Reservation brought suit against the parcel’s mineral lessee alleging that his groundwater extraction for the purposes of oil and gas development infringed

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68 Id.
70 United States v. Cappaert, 508 F.2d 313 (9th Cir. 1974).
72 508 F.2d at 315-316.
73 Id. at 316.
74 Id. at 317-320.
75 426 U.S. at 143.
76 Id.
upon their reserved water rights.\textsuperscript{77} The District Court for the District of Montana held that the creation of the Blackfeet Reservation reserved underground waters to the same extent, and with the same limitations, as surface waters.\textsuperscript{78} The court noted that although \textit{Winters} dealt only with surface water, “the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid – water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference.”\textsuperscript{79}

State courts, with one exception, have also concluded that the \textit{Winters} doctrine applies to groundwater. The Arizona Supreme Court, relying on \textit{Winters}, held in \textit{In re General Adjudication of All Rights to Use Water in the Gila River System and Source} that when the United States establishes Indian reservations on arid land, it likewise intends a “reservation of water to come from whatever particular sources each reservation had at hand.”\textsuperscript{80} The court also found the fact that the United States Supreme Court declined in \textit{Cappaert} to differentiate surface from groundwater in the context of diversion instructive.\textsuperscript{81} Using \textit{Winters} and \textit{Cappaert} as “guideposts,” the Arizona Supreme Court concluded that “[t]he significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.”\textsuperscript{82} Similarly, in \textit{Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Stults}, the Montana Supreme Court held that the treaty establishing the Flathead Indian Reservation implicitly reserved groundwater underlying the Reservation.\textsuperscript{83} Relying on the authorities noted above, including \textit{Cappaert}, the court found “no distinction between surface water and groundwater for purposes of determining what water rights are reserved because those rights are necessary to the purpose of an Indian reservation.”\textsuperscript{84}

The sole outlier is a 1988 decision by the Wyoming Supreme Court, \textit{In re All Rights to Use Water in the Big Horn River System}, in which it refrained from recognizing claims of reserved rights to groundwater.\textsuperscript{85} There, the court acknowledged that “[t]he

\begin{footnotes}
\item[78] Id. at 385.
\item[79] Id.
\item[81] “That federal reserved rights law declines to differentiate surface and groundwater... when addressing the diversion of protected waters suggests that federal reserved rights law would similarly decline to differentiate surface and groundwater when identifying the water to be protected.” \textit{Id.} at 747 (citing \textit{Cappaert}, 426 U.S. at 142-43).
\item[82] \textit{Id.} at 747.
\item[83] \textit{Confederated Salish and Kootenai Tribes of the Flathead Reservation v Stults}, 59 P.3d 1093, 1098-99 (Mont. 2002).
\item[84] \textit{Id.} at 1098.
\item[85] \textit{In Re All Rights to Use Water in the Big Horn River Sys.}, 753 P.2d 76, 100 (Wyo. 1988).
\end{footnotes}
logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater," but at the time no court had expressly extended Winters to groundwater and the court refused to be the first to confirm such rights.  

The Arizona Supreme Court later declined to follow this approach:

We can appreciate the hesitation of the Big Horn court to break new ground, but we do not find its reasoning persuasive. That no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so. Moreover, as the Big Horn court acknowledged, we do not write on a blank slate.

C. Defining the Purposes of a Reservation

Under the Winters doctrine, tribal water rights are reserved to carry out the particular purposes for which an Indian reservation was established. In Winters itself, the Supreme Court found that the tribes were entitled to water for agricultural uses because the government’s purpose in creating the Fort Belknap Reservation, consistent with the general purpose of federal reservation policy, was to transform the tribes into agrarian societies.  

As the Court began to apply the reserved rights doctrine to federal lands other than Indian reservations, however, the purposes-of-the-reservation limitation was transferred to federal enclaves.  

In United States v. New Mexico, which involved water rights associated with the Gila National Forest, the Court distinguished for the first time between the primary and secondary purposes for which federal lands were reserved.  

The New Mexico Court held that water is impliedly reserved only for the primary purposes of federal reservations.  

If the government needs water for the secondary purposes, those water rights must be acquired under state law.

The Supreme Court has not ruled on whether the New Mexico distinction between primary and secondary purposes applies to tribal water rights, but state courts have weighed in. Based on the substantial differences between federal enclaves and Indian lands, the Arizona Supreme Court rejected the application of New Mexico’s primary-versus-secondary-purposes approach to tribal water rights, holding that the

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86 Id. at 99-100.
87 In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 989 P.2d at 745.
88 207 U.S. at 576.
89 See, e.g., Cappaert, 426 U.S. at 141.
91 Id.
92 Id. at 702.
93 See, e.g., Judith V. Royster & Michael C. Blumm, NATIVE AMERICAN NATURAL RESOURCES LAW, 413 (2d ed. 2008).
The purpose of Indian reservations is to provide tribes with a homeland.94 The court noted that the needs of a reservation, based on its purpose as a homeland, should be established by considering tribal history and culture, reservation geography and water availability, the tribal economic base, past water use, and (with a caution that it should never be the only factor considered) present and projected reservation population.95 The Wyoming Supreme Court, in contrast, has rejected the homeland concept for the Wind River tribes.96 Despite recognizing that the relevant treaty “clearly contemplates” activities other than agriculture, the court held that the primary purpose of the reservation was agricultural.97 The court thus found that the tribes were entitled to water to fulfill the agricultural purpose of the Wind River Reservation, which included not only irrigation rights, but also such "subsumed" uses as livestock watering, and municipal, domestic, and commercial uses.98 The court expressly rejected a number of other purposes for the reservation, however, including mineral development, industrial development, wildlife preservation, aesthetics, and fisheries.99

D. Protecting Water as a Tribal Cultural Resource

In applying the Winters doctrine, a majority of federal and state courts quantify tribal water rights based on the number of reservation acres that are “practically irrigable.”100 Though this standard often results in rights to a substantial amount of water, it limits the proposed uses a court may consider in quantifying a tribe’s water right to those pertaining to agriculture. This fails to account for the role of water as a tribal cultural resource, which contravenes the internationally recognized human rights of indigenous peoples.101 Water is central to the existence, continuity, and culture of all indigenous peoples.102 Its myriad uses are intrinsically tied to the distinctiveness of indigenous peoples and, as such, their sovereignty over it is acknowledged as a human right under international customary law. Indigenous peoples’ right to water is recognized most directly in the 2007 United Nations Declaration on the Rights of Indigenous

95 Id. at 79-80.
96 In re All Rights to Use Water in the Big Horn River System, 753 P.2d 94-95.
97 Id. at 97.
98 Id. at 99.
99 Id. at 98-99.
100 Arizona v. California, 373 U.S. at 600. See also Barton H. Thompson et al. LEGAL CONTROL OF WATER RESOURCES 1088-89 (5th ed. 2013).
Peoples (UNDRIP). The UNDRIP identifies the right of indigenous peoples to “own, use, develop and control” their water resources and to set “priorities and strategies” as to how those resources will be managed. This affords protection for traditional methods of water use, including use for cultural purposes. In fact, the UNDRIP explicitly recognizes indigenous peoples’ right to “practice and revitalize their cultural traditions and customs” and to “maintain and strengthen their distinctive spiritual relationship with their . . . waters.”

Though the UNDRIP is non-binding, a trend toward domestic recognition of the indigenous human rights asserted therein has emerged. The United States, which became a signatory in 2010, has indicated that the UNDRIP “has both moral and political force” and that it expresses “aspirations that [the nation] seeks to achieve.” The United States has also emphasized its commitment to “serving as a model in the international community in promoting and protecting the collective rights of indigenous peoples as well as the human rights of all individuals.” In light of that pledge, the UNDRIP’s protections for cultural water use by indigenous peoples should be incorporated into the system through which tribal water rights are recognized in the United States.

The homeland purpose standard developed by the Arizona Supreme Court in In re General Adjudication of All Rights to Use Water in the Gila River System and Source, introduced in part III(C), could facilitate the recognition of water as a tribal cultural resource. Based on the premise that the purpose of an Indian reservation is to provide the tribe with a homeland, the Gila River court held that tribal reserved water rights should be quantified based on factors pertaining to that purpose – including tribal history and culture, reservation geography and water availability, the tribal economic base, past water use, and (though it should never be the only factor considered) present and projected reservation population. Expounding on the tribal history and culture factor, the court stated that water uses with “particular cultural significance” should be

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105 Id., ART. 32.
106 Id., ART. 11.
107 Id., ART. 25.
110 Id. at 2.
111 In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 35 P.3d at 79-80.
respected, and that “the length of time a practice has been engaged in, its nature (i.e. religious or otherwise), and its importance in a tribe’s daily affairs” may all be relevant to the inquiry.112 The court also noted that:

Deference should be given to practices requiring water use that are embedded in Native American traditions. Some rituals may date back hundreds of years, and tribes should be granted water rights necessary to continue such practices into the future. An Indian reservation could not be a true homeland otherwise.113

The homeland purpose standard, therefore, empowers courts to protect the right to groundwater that may have been reserved for a tribe specifically for cultural use.

IV. TOWARD A RESERVED RIGHT TO GROUNDWATER FOR THE AGUA CALIENTE

Applying the doctrine presented in part III, the district court could find that the Agua Caliente Band of Cahuilla Indians has a federal reserved right to water in the Coachella Valley Aquifer. If it does so, the court will be called upon to quantify that right in the next phase of the Band’s litigation against the CVWD and DWA. Here, the Agua Caliente should advocate for quantification of their reserved water right using the homeland purpose standard established in In re General Adjudication of All Rights to Use Water in the Gila River System and Source if they are interested in having groundwater available for cultural use in the future.

A. The Agua Caliente Have a Federal Reserved Right to Groundwater

Under the Winters doctrine, it is likely that a right to water in the Coachella Valley Aquifer was reserved for the Agua Caliente Band at the time its reservation was created. As discussed in part II, the executive orders that established most of the Agua Caliente Reservation explicitly set lands aside “for Indian purposes”114 and “for the permanent use and occupancy” 115 of the Band. Furthermore, correspondence surrounding the creation of the Reservation repeatedly referenced preserving the existing homes of southern California’s Indians, providing for their future by placing them in permanent possession of lands, and ensuring that they were given the land and water necessary to sustain themselves into the future.116 In particular, the order that Mission Indian Agent J.E. Colburn received to identify and secure “every available foot

112 Id. at 80.
113 Id. at 79.
114 Motion for Summary Judgment, supra note 7, at 4.
115 Id.
116 Motion for Summary Judgment, supra note 7 at 17.
of vacant arable land” for the tribes’ “permanent occupation” confirms that these issues were at the forefront of the United States’ considerations in creating the Agua Caliente Reservation.\textsuperscript{117} It is clear, therefore, that the United States intended the Reservation to serve as a permanent homeland for members of the Band and that groundwater is necessary to fulfill that purpose.\textsuperscript{118}

**B. The Agua Caliente’s Groundwater Right May Be Quantified Using the Homeland Purpose Standard**

Of the options currently available for quantifying a reserved water right, the homeland purpose standard is best able to account for the role of groundwater as a tribal cultural resource. Established by the Arizona Supreme Court in *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, the homeland purpose standard relies upon a “fact-intensive inquiry . . . made on a reservation-by-reservation basis” \textsuperscript{119} in order to determine the amount of water necessary to fulfill a reservation’s purpose as a tribal homeland. As reviewed in part III(D), the court identified several factors that should be part of this inquiry: tribal history and culture, reservation geography and water availability, the tribal economic base, past water use, and (though it should never be the only factor considered) present and projected reservation population.\textsuperscript{120} Obviously, the tribal history and culture factor is most relevant to concerns regarding the preservation of groundwater as a tribal cultural resource. In describing that factor, the *Gila River* court stated that “practices requiring water use that are embedded in Native American traditions” should receive deference.\textsuperscript{121} “Some rituals,” the court noted, “may date back hundreds of years, and tribes should be granted water rights necessary to continue such practices into the future. An Indian reservation could not be a true homeland otherwise.”\textsuperscript{122}

This guidance may be particularly relevant to the Agua Caliente, whose ancestors utilized groundwater in the Coachella Valley for spiritual and ceremonial purposes for thousands of years (see part II). The current extent of the Band’s interest in groundwater as a cultural resource is not clear. However, if the Agua Caliente would

\textsuperscript{117} *Id.* at 18.
\textsuperscript{118} Having drawn this conclusion, the district court recently held that the Band’s federally reserved water rights encompass groundwater underlying the Reservation. *See Order Granting in Part and Denying in Part Plaintiffs’ and Defendants’ Motions for Partial Summary Judgment at 10, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, No. ED CV 13-00883-JGB-SPX (C.D. Cal. E.D. May 14, 2013).*
\textsuperscript{119} *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d at 79.
\textsuperscript{120} *Id.* at 79-80.
\textsuperscript{121} *Id.* at 79.
\textsuperscript{122} *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d at 79.
like to have groundwater\textsuperscript{123} available to them in the future specifically for cultural use, they should advocate for quantification of their reserved water right based on the homeland purpose standard.

V. CONCLUSION

In one sense, the situation at Agua Caliente is not unique. Communities throughout southern California and across the American Southwest are increasingly finding their aquifers overdrafted, contaminated, or both – threatening their water supplies for domestic, recreational, and agricultural use. Fortunately, however, the Agua Caliente’s experience is shared in another sense. Many tribes in the region have over millennia developed ways of life that are intricately connected to and dependent upon groundwater. If these tribes have reservation lands, it is likely that they were set aside as tribal homelands even if such a purpose was not made explicit. Therefore, under the Winters doctrine, they may be able to secure reserved rights quantifiable using the homeland purpose standard and thus ensure that groundwater is available to sustain their cultures for future generations. In addition, these tribes may be able to provide water to their non-Indian neighbors and, as the Agua Caliente have done, partner with them to promote sustainable groundwater management practices from which the entire community could benefit.

\textsuperscript{123} Because the homeland purpose standard has yet to be applied, the quantity of groundwater in which it would result is currently unknown. See Charles Carvell, \textit{Indian Reserved Water Rights: Impending Conflict or Coming Rapprochement Between the State of North Dakota and North Dakota Indian Tribes}, 85 N.D. L. REV. 1, 35-36 (2009).
THE ONGOING TRAUMATIC EXPERIENCE OF GENOCIDE FOR AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES: THE CALL TO RECOGNIZE FULL HUMAN RIGHTS AS SET FORTH IN THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Angelique Townsend EagleWoman* (Wambdi A. WasteWin)**

INTRODUCTION: MYTHS OF SUBJUGATION

The power of myth and storytelling is well-known in American Indian communities. Oral traditions continue to have vitality and relevance in those communities as a means of providing instruction on the tribal worldview, philosophy and the accepted norms of human behavior in relation to each other and to other living beings. In the relationships between Tribal Nations and the United States, myth and storytelling have been and continue to be powerful tools in perpetuating the subjugation of and human rights violations against American Indians in judicial decisions, American history textbooks, and the mainstream media. The dehumanization of American Indians is a tradition that stems from the founding of the United States. The so-called "founding fathers" engaged in myth and storytelling at the creation of the new settler nation-state on North American soil. For Native peoples, the challenge in correcting foundational governmental and nation-building myths is ongoing and at times, deeply frustrating. However, the consequence for Native peoples not taking up the challenge is to succumb to externally imposed derogatory labeling, that results in self-denigration, and ultimately, lifelong victimization.

By bringing the principles in the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)† to life in the United States, American Indians and Alaska Natives can address the derogatory myth and storytelling at the core of U.S. history. The UN Declaration sets forth a minimum standard of human rights for Indigenous peoples around the globe. Some of the most powerful principles in the UN Declaration include the rights for Indigenous peoples to counter settler-nation myths

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**This article is dedicated to the truth-tellers in Indigenous communities. In the Dakota way, the sacred seventh generation prophesied by the White Buffalo Calf Woman has been born. Those who are the parents and teachers of this generation are part of the sacred sixth generation. It is our responsibility as the sixth generation to hold on to our ways, histories, cultures, and ways of life to instruct this special sacred seventh generation to bring the strength back to our Tribal peoples.

with their own version of history and truth telling.\(^2\) Additionally, nation-states, such as the United States, have an affirmative obligation under the UN Declaration to prevent "[a]ny form of propaganda designed to promote or incite racial or ethnic discrimination directed against" Indigenous peoples.\(^3\) Most students in the United States can graduate from high school without ever learning about contemporary tribal governments, the eras of United States Indian policy, or the ongoing human rights issues that impact American Indians over generations.\(^4\) By actively seeking out American Indian Studies courses on university campuses, a small number of college students can gain basic knowledge on the history, literature, and legal relationships of American Indians in the United States. According to an informal survey conducted by the author on the American Associations of Law Schools (AALS), out of 202 ABA accredited law schools 94 offered an Indian Law course on a regular basis in 2012-2013, roughly 46.5%.\(^5\) The importance of this subject area cannot be overstated for American Indians in the United States. Most United States citizens do not know that a basic principle of federal Indian law is that the United States Congress exercises plenary authority over American Indians. Although United States citizens elect members of Congress to represent them, most United States citizens know very little about this authority or how it is asserted over American Indians.

Part I of this article will discuss the early contact between Native Americans and Europeans. The European and, later, United States justifications for the genocide, dispossession and impoverishment of Native Americans will be discussed. Part II will review the legal justifications employed by United States Presidents and leaders to systematically dispossess American Indians of their lands and resources. The shift from political alliances to military massacres of American Indians signaled the next phase of dehumanization. Following military domination, the United States has imposed a perpetual incompetency on American Indians and asserted trusteeship. This policy frames the contemporary relationship between American Indians and the United States. Part III will examine the genocidal acts perpetrated by the United States to oppress American Indians and Alaska Natives. The section will conclude with the resistance efforts of Native Americans. In Part IV, the application of the UN Declaration on the Rights of Indigenous Peoples will provide human right standards for re-

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\(^2\) See id., Articles 8, 12, 13, and 14.

\(^3\) Id. at Article 8(2)(e).

\(^4\) See Alysa Landry, 'All Indians Are Dead?' At Least That's What Most Schools Teach Children, INDIAN COUNTRY TODAY MEDIA NETWORK (November 17, 2014), http://indiancountrytodaymedianetwork.com/2014/11/17/all-indians-are-dead-least-thats-what-most-schools-teach-children-157822. "The study also revealed that all 50 states lack any content about current Native events or challenges. 'Nothing about treaties, land rights, water rights,' Shear said. 'Nothing about the fact that tribes are still fighting to be recognized and determine sovereignty.'" Id.

\(^5\) Results on file with the author. Survey conducted on the "NDNLAWPROF" list from March 29, 2013 to April 4, 2013 (email list for those teaching in the field of Indian law, law professors across the country responded to the question of whether an Indian law course was offered at their law school).
establishing basic human rights for American Indians through the international evolution of Indigenous peoples' collective rights.

I. THE U.S. COLUMBUS DAY CELEBRATION OF THE GENOCIDE OF NATIVE AMERICANS

One of the formal federally recognized holidays in the United States is "Columbus Day" purporting to celebrate the Italian colonizer who was the catalyst to long term Spanish subjugation and genocide of Natives in the Americas. The betrayal of the United States government in holding up for heroism a known masochistic murderer and subjugator of Indigenous Americans cuts deep as a symbolic statement. In addition, this United States celebration and myth-propagation is grounded in the ideals of European supremacy, rights of conquest over foreign peoples, and greed for others' natural resources, particularly gold. The Spanish rulers, who authorized Columbus' invasion, and later governorship, relied on the Christian Church doctrine of the late 1400s establishing the right to enslave non-Christians and exploit their resources. A review of the actual tyranny of Christopher Columbus reveals his complete disregard for the humanity of Native Americans and his greed for gold.

It was Christopher Columbus as the named Governor of the Spanish "discovery" that attempted to enslave 500 Arawak tribal peoples in the Americas and send them to Spain, but two hundred died on the voyage. His intense quest for gold began to satisfy the Spanish financiers of his voyages. He then set in motion the cruel and inhumane punishment system for the Arawak tribal peoples to deliver gold or have their hands cut off.

When it became clear that there was no gold left, the Indians were taken as slave labor on huge estates, known later as encomiendas. They were worked at a ferocious pace, and died by the thousands. By the year 1515, there were perhaps fifty thousand Indians left. By 1550, there were five hundred. A report of the year 1650 shows none of the original Arawaks or their descendants left on the island.

The actions of the Spaniards under the Italian governor, Christopher Columbus, can only be viewed as outright genocide as the policy of the first Europeans in the Americas.

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8 See Zinn, supra note 6 at 4. "In the year 1495, they went on a great slave raid, rounded up fifteen hundred Arawak men, women, and children, put them in pens guarded by Spaniards and dogs, picked the five hundred best specimens to load onto ships."
9 See Zinn, supra note 6 at 4.
10 Zinn, supra note 6 at 5.
In the books of the first priest in the Americas, Bartholome de las Casas, the atrocities of the Spaniards were documented and described the complete disregard for the human life and dignity of Native Americans.\(^{11}\) De Las Casas spent his life advocating for the freeing of Native Americans from the encomienda system, preaching the immorality of the Spanish conquest and genocide, and asserting the property rights of the Natives.\(^{12}\)

Another prominent Spanish intellectual figure that advocated for the human status of American Indians was Franciscus de Victoria. In 1532, Victoria argued that American Indians had property rights, the right not to be enslaved, and could only be subject to a just war by the Spaniards if in violation of Victoria's universal laws.\(^{13}\) He opined that should American Indians prevent the Spaniards from proselyting Natives to Christianity or engaging in economic activity, then a just war could be declared by the Spanish. Also, he asserted that the Spaniards could place Indians under a guardianship for their best interests.\(^{14}\) Three centuries later, this line of reasoning would be used in judicial decisions to justify the actions of the United States towards American Indians; relying upon the "doctrine of discovery"\(^{15}\) and asserting a "ward/guardian" relationship over American Indians.\(^{16}\)

When Indigenous peoples’ populations diminished or they resisted being enslaved for sex and labor, Europeans turned to the trans-Atlantic slavery system

\(^{11}\) Id. at 6-7.


\(^{13}\) Id. at 152 (pointing to the difference in views between De Las Casas and Victoria over the requirements for just war to be waged against American Indians).


\(^{15}\) See Johnson v. McIntosh, 21 U.S. 543 (1823). "The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise." Id. at 587.

\(^{16}\) See Cherokee Nation v. Georgia, 30 U.S. 1 (1831). "They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state or the citizens thereof, and foreign states."; Id. at 13.
forcing Africans to involuntarily relocate to the Western Hemisphere. This same mentality occurred along the eastern seaboard of the newly-formed United States. In contradiction to the well-known United States myth of democratic white settler farmers, Euro-Americans re-established aristocracy hierarchies and forced other cultural and racial groups to become their laborers or be subjected to genocidal violence.

From this history of devastation of Native Americans, the United States has sounded a national unifying common cause for celebration of "Columbus Day". This United States celebration has been paired since 1892 with the first national "pledge of allegiance" recitation by schoolchildren.

A former Baptist minister named Francis Bellamy wrote the original Pledge of Allegiance in 1892. It was first published in Youth's Companion, a children-oriented magazine that had hired Bellamy shortly after his resignation from his religious post. Bellamy also served as chairman of a committee of the National Columbian Public School Celebration in connection with his service to Youth's Companion. As chairman, he was charged to develop a program to celebrate the 400th anniversary of Christopher Columbus's landing in the Americas. Bellamy's program centered on a flag-raising ceremony that included his new salute to the flag, the "Pledge of Allegiance." During the summer months before his

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18 See Jenny S. Martinez, Antislavery Courts and the Dawn of International Law, 117 YALE L.J. 550, 555 (2008). "In 1800, slavery was a fundamental part of the world's economic and social order. Though not practiced in Europe itself, European colonies in the Western Hemisphere relied heavily on slave labor to support their plantation economies. Slave trading ships crossed the Atlantic flying the flags of all the seafaring European nations, as well as the newly independent United States of America. In the first decade of the nineteenth century, an estimated 609,000 slaves arrived in the New World." Id.

19 See DIRK HOERDER, CULTURES IN CONTACT: WORLD MIGRATIONS IN THE SECOND MILLENNIUM 215 (2002). "In agricultural North America, south of the fur empire, developments differed from the Spanish and Portuguese quest for riches, which had turned into settler colonization almost inadvertently. The Jamestown, Virginia, colonists of 1607 stood halfway between both types of settlement. When expectations of an abundance of precious stones and of First Peoples' (forced) labor did not materialize, the gentlemen adventurers among the 600 first arrivals did not deign to work. Most starved, some 10 percent survived...While the French state attempted to replicate feudal society, the English Pilgrim fathers and mothers, after their stopover in the Netherlands, by compact established governmental structures semi-independent from Great Britain, but they retained social hierarchies between masters and servants modeled on British society."; Id.

20 See Lilian Handlin, Discovering Columbus, 62 AMERICAN SCHOLAR (Issue 1) 81 (1993). "Americans who eventually named more than sixty places in the United States after Columbus, did so in spite of a confused and controversial record. They shaped his image in accordance with their own needs. Hence popularizers with their own ideas about the mariner's utility proved more influential than scholars in defining his features."; Id.

flag ceremony, Bellamy successfully petitioned President Benjamin Harrison and Congress to issue a proclamation in observance of the Columbus Day celebration. While the Pledge of Allegiance was first recited in public schools as part of a Columbus Day Celebration on October 12, 1892, thousands of other public and private schools participated in the Pledge during the official Columbus Day Celebration on October 21, 1892.  

Spanish authorized genocide of Native Americans carried out by Columbus was fueled by greed, perversion and the ability to dehumanize and deny human status to others from a different culture. This is what the celebration of Columbus Day represents in reality.

Historian Howard Zinn detailed a "Columbus Day" speech by railroad official Chauncey DePew in 1892, in Albany, New York that celebrated United States wealth, civilization and power.

The "patriotism" that Chauncey DePew invoked in celebrating Columbus was profoundly tied to the notion of the inferiority of the conquered peoples. Columbus' attack on the Indians was justified by their status as sub-humans. The taking of Texas and much of Mexico by the United States just before the Civil War was done with the same racist rationale. Sam Houston, the first governor of Texas, proclaimed: 'The Anglo-Saxon race must pervade the whole southern extremity of this vast continent. The Mexicans are no better than the Indians and I see no reason why we should not take their land."

For tribal peoples in mid-North America, the United States aggrandizement of Columbus as a celebrated historical figure perpetuates a myth intended to convey European and white superiority over Native Americans. Further, embedding this aggrandizement in the public school curriculum in the United States signals to American Indian children, and all children, in those classrooms that the United States upholds the genocidal actions of Columbus, and later the U.S., as necessary and worthwhile for the expansion of white Western civilization. This disregard for the human rights of non-

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22 Id.
24 See Theresa DeLeane O'Neill, Disciplined Hearts: History, Identity, and Depression in an American Indian Community 23 (1996), (reviewing Indian-white interactions on the Flathead Indian Reservation in Montana). "Less overt racism takes many forms. For example, a fifth grade class with both Indian and white students performed a pioneer game task over several weeks in which the children formed wagon trains and planned their trips westward into the 'uninhabited' land west of the Mississippi."
Christians/non-whites, and particularly American Indians, seems inconsistent with the principles taught as embodied in the United States Constitution, United States public policy, and United States jurisprudence.

II. FROM COLUMBUS TO THE U.S. "FOUNDING FATHERS": EXPOSING INHUMANE ACTIONS AGAINST AMERICAN INDIANS

The glorification of historical figures like Columbus committing aberrant tortuous, murderous behavior is not uncommon in the United States. In fact, many of the so-called "founding fathers" who established the settler nation-state propagated enduring political opinions that Native Americans in their homeland were less than human, were not worthy of land ownership,25 deserved to die if they refused to meet United States official demands, and that the white man's God actively killed off Natives to clear the land for the Euro-Americans. Schoolchildren are taught the praiseful myths of individuals and are not taught the true opinions of these Euro-American men regarding Native Americans as evidenced in their writings, documented speeches, and military commands.

Humanizing the United States "founding fathers" could be an exercise in revealing a cautionary tale of the discriminatory racist intentions brought over from Europe towards Native peoples that are no longer acceptable or desirable in the United States consciousness. This discussion will compare the myths and reality of the following prominent U.S. political figures: A) Benjamin Franklin; B) George Washington; C) Thomas Jefferson; D) Andrew Jackson; E) Abraham Lincoln; and F) Theodore Roosevelt.

A. Benjamin Franklin and Native Political Principles

Lobbying for the adoption of the Iroquois Confederacy model of government, Benjamin Franklin had observed the alliance of the Six Nations as superior to the divine

25 The justification of dispossession of American Indians and Alaska Natives appears in U.S. Supreme Court decisions using derogatory language about tribal peoples. See for example, Johnson v. M'Intosh, 21 U.S. 543 (1823). "But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness, to govern them as a distinct people was impossible, because they were brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence."); Id. at 590; Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral by force and that, even when the Indians ceded millions of acres by treaty in return for food, blankets, and trinkets, it was not a sale but the conquerors' will that deprived them of their land."); Id. at 289-90.
monarchy concept from European governmental principles. Although admiring the alliance, his word choice belied the deep-rooted racism he adhered to in speaking of the democratic system developed by Native Americans. In 1751, Franklin gave a speech to a group of colonists on the wisdom of the Iroquois Confederacy while at the same time denouncing them as "savages."

It would be a strange thing...if Six Nations of Ignorant savages should be capable of forming such a union and be able to execute it in such a manner that it has subsisted for ages and appears indissoluble, and yet that a like union should be impractical for ten or a dozen English colonies, to whom it is more necessary and must be more advantageous, and who cannot be supposed to want an equal understanding of their interest.

This is an example of exploiting the conceptual governmental system of the Iroquois while at the same time devaluing the leadership embodying that system. By dehumanizing Native Americans, Euro-Americans were able to perpetuate all manner of immoral and genocidal acts on people held to a lesser status. The exploitation of Native intellectualism, creativity, and resources has been a constant theme starting with the men glorified as the "founding fathers" of the United States.

**B. George Washington's Plan to Dispossess Native Americans of their Lands**

From the very first United States President, the intent to dispossess and relegate American Indians to an inferior status is evidenced in the writings of George Washington. In a letter dated September 7, 1783 from George Washington to James Duane following the colonial rebellion from Great Britain, Washington set forth his views on how to establish new western states as part of the United States and at the same time to claim those lands from Native Americans.

At first view, it may seem a little extraneous, when I am called upon to give an opinion upon the terms of a Peace proper to be made with the Indians that I should go into the formation of New States; but the Settlemt. of the Western Country and making a Peace with the Indians are so analogous that there can be no definition of the one without involving considerations of the other. for I repeat it, again, and I am clear in my opinion, that policy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing

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27 *Id.* at 242.
their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expence, and without that bloodshed, and those distresses which helpless Women and Children are made partakers of in all kinds of disputes with them...28

With the goal in mind to establish new states from Native American lands, George Washington as the first U.S. President set the plan in motion that would continue for the next century and a half.

**C. Thomas Jefferson's "American Empire" building from Native American Lands**

In another example, Thomas Jefferson published a book where he set out to describe American Indians in a section on "animals" engaging in comparisons between the productions of the environment in Europe to that in North America.29 Jefferson positions himself as defending the American Indian male who is denigrated in the writings of French naturalist Georges Louis Leclerc (Count de Buffon).30 And yet, he states that Native Americans are a "barbarous people" and characterized Native women as "submitted to unjust drudgery" as a result.31 His discourse continues hypothesizing on the "child-bearing" habits of American Indians and stating that when women are married to white men they have as many children as white women.32 He further discussed the amount of hair on the bodies of Indians. His final thought in the section on Indians is that "[b]efore we condemn the Indians of this continent as wanting genius, we must consider that letters have not yet been introduced among them."33

Later in the work, Jefferson opined that Indians engaged in carving designs and eloquent oratory.34 His statements are made in the context of finding African-descended people lacking in those regards, so there is an underlying racial hierarchy to his positive statements about American Indians. These opinions held by Thomas

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29 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 62-63 (1853).
30 Id.
31 Id. at 65.
32 Id. at 65-66.
33 Id. at 69.
34 Id. at 151.
Jefferson directly from his own writings are not taught to public schoolchildren. Rather, the myth of Jefferson as the drafter of the Declaration of Independence is exalted along with the idea of being a well-educated "founding father." In truth, he was steeped in racism as an aristocratic slavery overseer that deliberately denied the right to due process and equal treatment to anyone who was not a white male.

Further, Jefferson developed the plan to dispossess Tribal Nations of their lands through legal agreements to pave the way for his agricultural plan for the lands west of the Mississippi River. In 1803, in a private letter to the governor of the Indiana Territory, William Henry Harrison, Jefferson expressed the following plan to decimate tribal governments, gain ownership of tribal lands, and assimilate American Indians into his version of the United States Empire.

To promote this disposition to exchange lands, which they have to spare and we want, for necessaries, we shall push our trading houses, and be glad to see the good and influential individuals among them run in debt, because we observe that when these debts get beyond what the individuals can pay, they become willing to lop them off by a cession of lands. At our trading houses, too, we mean to sell so low as merely to repay us cost and charges, so as neither to lessen nor enlarge our capital. This is what private traders cannot do, for they must gain; they will consequently retire from the competition, and we shall thus get clear of this pest without giving offence or umbrage to the Indians. In this way our settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi. The former is certainly the termination of their history most happy for themselves; but, in the whole course of this, it is essential to cultivate their love. As to their fear, we presume that our

36 See JEFFERSON, supra note 29, at 155. "I advance it therefore as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind. It is not against experience to suppose that different species of the same genus, or varieties of the same species, may possess different qualifications. Will not a lover of natural history then, one who views the gradations in all the races of animals with the eye of philosophy, excuse an effort to keep those in the department of man as distinct as Nature had formed them? This unfortunate difference of color, and perhaps of faculty, is a powerful obstacle to the emancipation of these people."
strength and their weakness is now so visible that they must see we have only to shut our hand to crush them…

Thus, Thomas Jefferson revealed his truest intent to economically cripple tribal communities and force land cessions. He went on to carry out his plans beyond the Mississippi River to gain tribal territories.

Two major actions were initiated by Jefferson to seize American Indian lands: the 1803 Louisiana Purchase and the expedition of Lewis and Clark with the authority to declare United States sovereignty over tribal lands. "The Expedition" was part of Jefferson's plan to assimilate Indians and their assets into American society, to remove the Indian tribes from America's path to continental expansion, and to exterminate Indians and tribes if necessary to advance American empire.

D. Andrew Jackson - The "Indian Killer"

Following the empire-building path of Jefferson, Andrew Jackson became one of the U.S. Presidents. As a general, he had developed a reputation for killing hundreds of Native Americans in their villages and divvying up their lands to his cronies.

President Andrew Jackson had been a successful and prolific crusader against Indian tribes throughout his military career and, though the Cherokee pleaded with him to honor peace treaties signed by previous administrations guaranteeing protection, Jackson supported Georgia's depredations against the tribe in that state. Jackson had long been an advocate of Indian removal and his blood-stained resume in previous Indian wars--including the killing of 800 traditionalist Creek Indians at Hors[e]hoe Bend in 1814 and the razing of over 300 Seminole homes in the First Seminole War in 1818--was well-known by Americans of every race. Jackson is America's quintessential Indian killer. Though he has been celebrated in recent years with a spate of biographies written by award-winning authors whose works minimize his malevolence and in places border on hagiography, he is considered “the equivalent of Hitler”

38 PRUCHA, supra note 28 at 22
40 See Robert J. Miller, Agents of Empire, 64-MAR OR. ST. B. BULL. 35, (Feb., 2004).
41 Id.
to scholars like Donna Akers, whose great-great-great grandmother walked the Trail of Tears.  

His administration was responsible for the formal Indian Removal Act of 1830 that violated every legal treaty entered into with Tribal Nations in eastern and southeastern lands. He dealt in the slave trade, knowingly lied to Tribal leaders, and enriched himself by taking tribal lands. In elementary schoolbooks, he is depicted as "Jackson the frontiersman, soldier, democrat, man of the people - not Jackson the slaveholder, land speculator, executioner of dissident soldiers, exterminator of Indians."

E. Abraham Lincoln and Mass Execution of the Dakota Peoples

Countless memorials, school buildings, streets and other public dedications have been made to United States President Abraham Lincoln without reference to his inhumane treatment of American Indians. His biographers often gloss over the facts surrounding the largest mass execution in the United States perpetrated in Mankato, Minnesota on December 26, 1862 under the authority of President Lincoln. Thirty-eight Dakota Sioux men were hung on a specially built scaffold in front of a crowd of whites for the resistance efforts made during the Dakota War of 1862 in response to sham treaties and starvation conditions. The list of men to be hung were reviewed and personally approved by Lincoln. The charges brought against the men were part of an impromptu panel of five military officers that allowed any white to testify to witnessing a crime committed by any of the men held in a concentration camp at Fort Snelling. Most of those confined at Fort Snelling had protected white settlers from the anger of the younger men resisting further United States governmental orders to remain starving on the small strip of reservation or be considered hostile.

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44 Act of May 28, 1830, 4 Stat. 411.
45 See ANGELIQUE TOWNSEND EAGLEWOMAN & STACY LEEDS, MASTERING AMERICAN INDIAN LAW 11-12 (2013).
46 See Paul Finkelman, "I Could Not Afford to Hang Men for Votes." Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons, 39 WM. MITCHELL L. REV. 443, 447-448 (2013)(attempting to justify and excuse the mass execution of the thirty-eight Dakota men wrongfully hung in Mankato, Minnesota by focusing on the potential for Lincoln to order the execution of more than three hundred men).
49 Id. at 22-28.
F. Theodore Roosevelt Pulverizing Tribal Community and Culture

Another glorified United States President that systematically violated treaties and declared tribal lands as federal public lands across the country was Theodore Roosevelt. Schoolchildren are educated on how the "Teddy bear" is his namesake, but are not told of his racist views towards American Indians. In fact, he was responsible for the loss of the reserved lands belonging to tribal peoples through treaty relations with the United States, and he was fervent in his actions to break up the tribal family. One of his most oft-quoted statements was made in 1886: "I don't go so far as to think that the only good Indians are dead Indians, but I believe that nine out of ten are, and I shouldn't like to inquire too closely into the case of the tenth. The most vicious cowboy has more moral principle than the average Indian." 52 The other most widely known quotation is from the Dec. 3, 1901 State of the Union address to the United States Congress where he characterized the General Allotment Act of 1887 53 (commonly referred to as the Dawes Act after its sponsor, Senator Henry Dawes) "as a mighty pulverizing machine to break up the tribal mass. It acts directly upon the family and the individual." 54

Under the General Allotment Act, the United States President was empowered to declare a legally reserved land base by a Tribal Nation as "open" for allotment, and divide up the lands into small parcels; selling off the "surplus" at the government determined price to the federal government. 55

Between 1887 and 1934, the tribal lands of 118 reservations were allotted, although many reservations, particularly in the Southwest, escaped allotment. From 1887 to 1900, the federal government approved 53,168 allotments, totaling nearly 5 million acres, and almost 36 million acres were allotted by 1920. By 1934, approximately 27 million acres, or two-thirds of all the land allotted to tribal members, had passed by sale or involuntary transfer from the Indian fee owner into non-Indian ownership. 56

This led to the creation of the national parks and forests from the tribal lands designated "surplus;" and has been attributed to Theodore Roosevelt as a policy of "preserving" the natural features of the country for the United States public. In reality, this was an illegal, unconsented to land grab from the Tribal Nations, and then a re-appropriating of those lands owned by tribal peoples to the ownership of the United States on a might makes right basis.

Theodore Roosevelt served as United States President from 1901 to 1909, one of the worst United States Indian policy eras, referred to as the allotment and assimilation era. This era is where social experimentation was perpetuated on American Indian children and tribal lands forcibly taken in violation of treaties signed with the United States. While the tribal lands are absolutely necessary to the spirituality and continued existence of American Indians, Roosevelt was also a proponent of the military and religious boarding school model of education for American Indian children which authorized the kidnapping of the children from their families and kept them against their will in government authorized schools. "Throughout the late 1800s and up through the mid-1900s, the United States Indian policy on education was to remove children from tribal communities and send them to distant boarding schools to receive educational, vocational, and 'civilization' training. The trauma experienced by the tribal community in having their children taken and the trauma experienced by the children, some as young as 4 years old, to be taken to the a foreign military-style boarding school environment was intense and long lasting." To add insult to injury, the funding for many of the government boarding schools was federally appropriated under the so-called United States trustee function from the treaty payments owed to the Tribal Nations.

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58 See EAGLEWOMAN & LEEDS, supra note 45 at 12-15.

59 See Theodore Roosevelt, First Annual Message, supra note 54. "In the schools, the education should be elementary and largely industrial. The need of higher education among the Indians is very, very limited." Id.

60 EAGLEWOMAN & LEEDS, supra note 45 at 90-91.

61 See Andrew K. Frank, Indian Civilization Fund Act, AMERICAN INDIAN HERITAGE MONTH: COMMEMORATION VS. EXPLOITATION (2011), available at http://www.historyandtheheadlines.abc-clio.com/contentpages/ContentPage.aspx?entryId=1171801&currentSection=1161468&productid=5. "In 1824, the Indian Civilization Fund subsidized thirty-two schools and contributed to the ostensible education of more than 900 Indians. Funds allocated from various Indian treaties helped augment the program, and, by 1830, the Indian Civilization Fund helped support fifty-two schools with 1,512 enrolled students." Id.
The irony and tyranny of the United States in the Mount Rushmore Monument with the faces of George Washington, Thomas Jefferson, Abraham Lincoln and Theodore Roosevelt in the sacred Paha Sapa (Black Hills) of the Dakota/Lakota/Nakota serves as a reminder that the settler-nation myths persist. In the 1980 United States Supreme Court case, *United States v. Sioux Nation*, the Court held that the Dakota/Lakota/Nakota had their sacred lands in the Black Hills illegally taken by the federal government. Rather than return the stolen lands, the United States Supreme Court opined that the federal government must pay the value of the lands. All of the contemporary Tribal Nations involved in the litigation have unanimously refused any money and stand united that the Paha Sapa were never sold to the United States.

To begin humanizing Native peoples within the settler-nation myths, exposure of the "founding fathers" and historical top federal officials in the United States must be initiated. What consequences flow from the acknowledgment that less than heroic altruistic motives guided the architects of the formation and implementation of the United States of America as a new nation-state? From a Native perspective, the storytelling of United States ideals has had a hollow ring due to the many broken promises, violations of legal agreements and outright military attacks by the United States towards tribal peoples. The men holding the position of United States President, in the history described above, all engaged in the policy of the United States to dispossess American Indians of their homelands and kill those in resistance to that plan. Negative actions by the United States are often referred to as "blemishes" on the

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64 *Id.* at 423-424. "In sum, we conclude that the legal analysis and factual findings of the Court of Claims fully support its conclusion that the terms of the 1877 Act did not affect 'a mere change in the form of investment of Indian tribal property.' LoneWolf v. Hitchcock, 187 U.S. at 568. Rather, the 1877 Act effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid." *Id.*

65 U.N. Doc. A/HRC/21/47/Add.1, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, The situation of indigenous peoples in the United States of America (Aug. 30, 2012). "The Lakota and other Sioux tribes have refused to accept payment required in accordance with a 1980 Supreme Court decision and continue to request the return of the Black Hills; this is despite the fact that the people of these tribes are now scattered on several reservations and are some of the poorest among any group in the country." *Id.* at 11.; See also, John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RESOURCES J. 40, 63-64 (2001).

national reputation by U.S. historians, rather than appropriately calling for a deep reconsideration of the creation myth and the ongoing subjugation resulting therefrom.

For American Indians, real consequences flow from these subjugation myths as detailed throughout this article. The contemporary lives of Native Americans are absent from public schoolbooks for the most part and as one elementary social studies book summed up "Native Americans lost the animals they used for food, lost their land, caught diseases, and were sent to reservations."\(^6^7\) By teaching this type of erroneous closed chapter summary to schoolchildren, the present day lives of tribal peoples are absent from the mainstream knowledge base.\(^6^8\) Tribal leaders asserting tribal sovereignty and the rights to full jurisdiction in tribal territories are marginalized and Native American issues are without context.\(^6^9\) While mainstream United States citizens believe the chapter was closed and they have little contemporary information on the trust status imposed on American Indians and Alaska Natives, the United States Congress claims and exercises plenary power over tribal peoples and the power is upheld by the United States Supreme Court.\(^7^0\)

III. THE SURVIVAL OF TRIBAL NATIONS IN MID-NORTH AMERICA IN RESISTANCE TO U.S. GENOCIDAL POLICIES

Since the formation of the United States on July 4, 1776, the settler-nation\(^7^1\) has engaged in a long term and persistent policy of genocide against American Indians. This policy was carried over from the European norms of religiously approved wars against non-Christians. Through the few centuries of interaction with the United States, American Indians have consistently battled the genocide that continues to undergird U.S. Indian policy.\(^7^2\) In this section, the United States actions against tribal peoples in

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\(^6^8\) See Cindy Long, \textit{Celebrating American Indian Heritage Boosts Achievement: Learning and preserving their history and culture is key to Native American student success}, NATIONAL EDUCATION ASSOCIATION available at http://www.nea.org/home/37093.htm. "Too often the history, culture and contributions of American Indians and Alaska Natives are absent from the curricula taught in many school systems across the country, even in districts with a high population of Native American students." \textit{Id.}

\(^6^9\) See Landry, \textit{supra} note 4.

\(^7^0\) See Michigan v. Bay Mills Indian Community, 134 S.Ct. 2024 (2014). "Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.' As dependents, the tribes are subject to the plenary control by Congress." \textit{Id.} at 2030.

\(^7^1\) See Kristen A. Carpenter & Angela R. Riley, \textit{Indigenous Peoples and the Jurisgenerative Movement in Human Rights}, 102 CAL. L. REV. 173, 201 (2014). "In the past twenty years, most prominently in the so-called settler nations of Canada, Australia, New Zealand, and the United States, indigenous studies scholars have increasingly engaged decolonization theory." \textit{Id.} at 201.

mid-North America will be reviewed through the definition of genocide under international law.

The term genocide was formally defined in 1948, in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. The definition contained in Article II is as follows:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

This UN Convention went into effect in 1951, as an international legal agreement in opposition to the Nazi Germany Holocaust, which resulted in the deliberate and systematic killing of six million Jewish people. The United States officially signed on to this Convention on December 11, 1948. The Convention was domestically ratified almost forty years later on November 25, 1988, with filed reservations and understandings that deny the International Court of Justice jurisdiction over the United States for the crimes listed in the Convention unless consent is given by the federal government.

In reviewing each of the categories that compose the definition of genocidal acts, the United States has perpetrated each type of act against American Indians. In the first section (a) Killing members of the group, the United States military, under official orders, killed unarmed men, women and children that were American Indian as a general practice since the formation of the United States in 1776 up through the early

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term as: "An international crime involving acts causing serious physical and mental harm with the intent to destroy, partially or entirely, a national, ethnic, racial, or religious group." Id.  
74 Id.  
1900s. The targeted killing of American Indians is less documented after the Wounded Knee Massacre on December 29, 1890.

In section (d), preventing the births of members of the group is included as a genocidal act. Killing women able to give birth fits within that category. Additionally, many American Indian women were sterilized in United States Indian Health Service facilities without their knowledge or consent as late as the 1960s and 1970s.77 "Various studies reveal that the Indian Health Service sterilized between 25 and 50 percent of Native American women between 1970 and 1976."78 In the Nov. 4, 1976 Government Accountability Office (GAO) report titled, "Investigation of Allegations Concerning Indian Health Service," a reported 3,046 sterilizations of American Indian women occurred in four IHS regions: Aberdeen, Albuquerque, Oklahoma City and Phoenix during the fiscal years 1973-1976.79 The sterilizations were performed on women between the ages of 15 and 44 often with improper consent forms that did not meet Indian Health Service regulations.80

Recently, the violence and, particularly, sexual violence experienced by American Indian women has garnered national and international attention as the United States has failed to implement appropriate law enforcement responses on and near reservations.81 The protection of healthy childbearing Native American women is key to the continued survival of Tribal Nations. From sterilization to lack of law enforcement protection,82 Native American women remain vulnerable to genocidal actions and omissions of the United States government. The 2007 Amnesty International Report, "Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA," squarely placed the responsibility for the shocking rate of victimization of Native American women on the United States government.

Indigenous peoples in the USA face deeply entrenched marginalization - the result of a long history of systemic and pervasive abuse and persecution. Sexual violence against Indigenous women today is

77 See Jane Lawrence, _The Indian Health Service and the Sterilization of Native American Women_, THE AMERICAN INDIAN QUARTERLY 400 (2000).
78 _Id._ at 410.
80 _Id._ at 4.
82 To understand the intricacies of the jurisdictional issues with criminal prosecution for violence against Native Americans, see EAGLEWOMAN & LEEDS, _supra_ note 45 at Chapter 3.
informed and conditioned by this legacy of widespread and egregious human rights abuses. It has been compounded by the federal government’s steady erosion of tribal government authority and its chronic under-resourcing of those law enforcement agencies and service providers which should protect Indigenous women from sexual violence. It is against this backdrop that American Indian and Alaska Native women continue to experience high levels of sexual violence, a systemic failure to punish those responsible and official indifference to their rights to dignity, security and justice.\textsuperscript{83}

According to the Amnesty Report, the rates of violence against Native American women indicate that one in three women will be raped in their lifetime.\textsuperscript{84} Further, the Amnesty Report details that reported statistics by the United States Department of Justice are not accurate as most women do not trust law enforcement enough to report the crime.\textsuperscript{85}

Amnesty International has documented many incidents of sexual violence against American Indian and Alaska Native women but the great majority of stories remain untold. Violence against women is characteristically underreported. Barriers to reporting include fear of breaches in confidentiality, fear of retaliation, and a lack of confidence that reports will be taken seriously. For Native American and Alaska Native women, historical relations with federal and state government agencies also affect the level of reporting sexual violence.\textsuperscript{86}

Thus, Native American women under the trusteeship of the United States have been subjected to genocidal acts inherently harming the ability to give birth to the next generations of Natives.

Grouping together Article II Sections (b) and (c) of the UN Convention, U.S. Indian policy has caused all manners of trauma and mental harm to American Indians and has imposed measures to bring about the physical destruction of American Indians. When United States leaders set out to destroy tribal cultures and take tribal lands, they employed a variety of tactics that went to the heart of tribal cultural.\textsuperscript{87} One tactic was to

\textsuperscript{83} Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA 1, AMNESITY INTERNATIONAL USA (2007) available at http://www.amnestyusa.org/pdfs/mazeofinjustice.pdf.
\textsuperscript{84} \textit{Id.} at 2.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.} at 4.
\textsuperscript{87} See Robert B. Porter, The Demise of the Ongwehoveh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples, 15 HARV. BLACKLETTER L.J. 107, 167 (1999) (asserting that the Indian Citizenship Act of 1924 was a genocidal act
generate debt knowing that tribal leaders would feel that it was part of their integrity to honor their debts and thus be forced into land cessions. Another favored tactic in early United States history was to kill, in massive numbers, the animal food sources indigenous to North America. In this way, the buffalo, deer, elk, moose, and other native populations were slain to gain control over tribal territories by forcing the tribal peoples to relocate where hunting was possible. AA third tactic was through the reservation policy; the United States government confined tribal peoples to a smaller and smaller portion of their reserved homelands and declared those who left the reservation "hostile" to be shot at will.

In contemporary times, the inability of tribal peoples to live from the resources of the land has caused directly and indirectly widespread health conditions, a decreased life expectancy, and diminished the cultural standard of physical fitness. "One of the more obvious manifestations of colonization is the extreme change in health conditions (obesity, diabetes, heart disease, etc.) of Natives brought on by regressing from a diet of vegetables, fruits, game meats and active hunting/gathering/cultivating lifestyle to a daily routine consuming a diet of processed, fatty, salted diet, and sitting still." The decline in Native American health and the consequences of poverty under the United States trusteeship was detailed in the 2003 United States Commission on Civil Rights report, "A Quiet Crisis: Federal Funding and Unmet Needs in Indian

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89 See Larry Sager, Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations, 76 U. DET. MERCY L. REV. 745, 754 (1999). "Alexis de Tocqueville commented on the non-violent use of the law in the United States to control the indigenous population. ‘Nowadays, the dispossession of the Indians is accomplished in a regular and, so to say, quite legal manner.’ Tocqueville was referring to the practice of whites buying land after the game had fled or been destroyed, which was considered a more convenient and agreeable form of justice than the sword. “By this means, former Secretary of War Louis Cass predicted the diminution and eventual extinction of the American Indian.” Id.

90 See SARAH PENMAN, HONOR THE GRANDMOTHERS: DAKOTA AND LAKOTA WOMEN TELL THEIR STORIES 56-57 (2000). "Our ancestors wanted to just be free to travel because if you put them on the reservations, they said, ‘We’re gonna starve’ and that’s what they did they [the government] rationed food to them. The soldiers were dipping hard-tack in coffee or tea and then eating it in front of our ancestors while they were hungry. They’d eat a piece of meat and instead of giving it to them they’d throw it out to the dogs.

There was no circle of life; it was slowly breaking apart. They were starving because they couldn’t go plant corn, and they couldn’t go make tea, they couldn’t dig up turnips, they couldn’t get cherries, they couldn’t get anything because if you leave the reservation you get punished and it was always the soldiers that were the killers.” Id. [interview with Stella Pretty Sounding Flute].

91 DEVON A. MIHESUAH, RECOVERING OUR ANCESTORS’ GARDENS: INDIGENOUS RECIPES AND GUIDE TO DIET AND FITNESS 50 (2005).
Country.”

According to the Civil Rights report, Native Americans have a much lower life expectancy than all other groups in the United States and a greater affliction of disease. The poverty level of American Indians/Alaska Natives has not been well-documented in the United States, but the statistics that are currently available illustrate American Indians as having the highest rate of poverty.

On a spiritual and social level, the genocidal acts of the United States in the destruction of the natural world are ongoing. The stewardship of Mother Earth is also central to the positive mental and physical health of American Indians. Central to tribal worldviews is the relationship between American Indians/Alaska Natives and all living beings including birds, animals, fish, and many others. "In the Pacific Northwest, where salmon are a fundamental part of tribal cultures, salmon populations have drastically declined over the past century due to dams, loss of habitat, pollution, deforestation, and other factors. The impacts of climate change will put additional stresses on salmon populations, as ocean water temperature rises and streamflow patterns change in response to reduced mountain snowpack and earlier spring snowmelt." With the clearcutting of forests, paving over of lands, polluting of waterways, and the resulting consequences of climate change, the United States continues to cause trauma and physical harm to American Indians through the loss of other living beings and the degradation of the natural world.

Finally, the United States has violated Article II Section (e) of the UN Convention by forcibly transferring American Indian children from their families to non-Indian

93 Id. at 34.
95 See Angelique EagleWoman, Cultural and Economic Self-Determination for Tribal Peoples in the United States Supported by the UN Declaration on the Rights of Indigenous Peoples, 28 PACE ENVTL. L. REV. 357, 362 (2010)(discussing the shared Indigenous history of loving Mother Earth).
97 Daniel Cordalis and Dean B. Suagee, The Effects of Climate Change on American Indian and Alaska Native Tribes, 22-WTR NAT. RESOURCES & ENV’T 45, 46 (2008).
98 For the failure of the U.S. federal courts to protect tribal sacred sites and cultural landscapes, see Lyng v. Northwest Indian Cemetery Association, 485 U.S. 439 (1988); Navajo Nation v. United States Forest Service, 535 F.3d 1058 (9th Cir. 2008)(en banc).
families. American Indian children have suffered through all of the actions of the United States and have been, at times, specially targeted as a population.

Over multiple generations, American Indian/Alaska Native people have survived an onslaught of traumatic assaults that have had enduring consequences for individuals, families, and communities. These assaults include the violence of massacres, pandemics, forced relocation and genocidal policies, as well as more subtle and equally destructive practices of spiritual and cultural prohibition, and the removal of children to Indian boarding schools.99

The kidnapping of American Indian children and forcibly containing them in military-style government and government-sanctioned religious boarding schools qualifies as another act of genocide the United States government has perpetrated.100 It is difficult to overestimate the severe and long lasting impacts of the United States policy to assimilate American Indian children into a white model. The accounts of mental, physical and sexual abuse from boarding school survivors are horrific and have been largely undocumented to date.101

Virtually imprisoned in the schools, children experienced a devastating litany of abuses, from forced assimilation and grueling labor to widespread sexual and physical abuse. Scholars and activists have only begun to analyze what Joseph Gone (Gros Ventre), a psychology professor at the University of Michigan, Ann Arbor, calls "the cumulative effects of these historical experiences across gender and generation upon tribal communities today."102

In the aftermath of the boarding school experiences, the United States engaged in a federally funded project known as the "Indian Adoption Project" in the late 1950s to remove American Indian children from their homes and place them up for adoption to white families. The Bureau of Indian Affairs partnered with the United States Children's

99 Christopher D. Campbell and Tessa Evans-Campbell, Historical Trauma and Native American Child Development and Mental Health: An Overview, AMERICAN INDIAN AND ALASKAN NATION CHILDREN AND MENTAL HEALTH: DEVELOPMENT, CONTEXT, PREVENTION, AND TREATMENT 1 (2011).
101 Id. at 72.
102 Id. "Rampant sexual abuse at reservation schools continued until the end of the 1980s, in part because of pre-1990 loopholes in state and federal law mandating the reporting of allegations of child sexual abuse." Id.
Bureau and private adoption agencies to "systematically place an entire child population across lines of nation, culture, and race." The pervasive policy of the United States to break apart American Indian and Alaska Native families by removing the children has been relentless.

A partial reform of this policy was the passage of the 1978 Indian Child Welfare Act (ICWA), intended to set a high barrier for state social workers and courts to overcome prior to removing an American Indian or Alaska Native child from his/her home. As recently as 2013, the United States Supreme Court failed to uphold the provisions of the ICWA for the parental rights of a Cherokee father to custody of his Cherokee daughter, who was put up for voluntary adoption by her non-Indian mother to a white couple. In the state of South Dakota, a class action lawsuit has been filed by the Oglala Sioux Tribe and American Indian parents asserting that the state's courts followed a systemic pattern of terminating parental rights to American Indian children and placing the children into white adoptive homes. All of these examples amount to a perpetual act of genocide by the United States government to forcibly remove American Indian children from their tribal communities, cultures, and nationalities.

In resistance to all of the genocidal acts of the United States, Native Americans still assert their rights to dignity, stewardship of the indigenous homelands, rights to follow tribal practices in educating and nurturing their children, rights to raising their children in tribal homes and communities, and rights to govern through tribal processes. Living in resistance to the United States imposed trusteeship, acts of genocide, and plenary authority, Native Americans continue to assert the tribal viewpoints on history, European invasions, culture clash, and the experiences of contemporary American Indians and Alaska Natives. Through organizations like the American Indian Movement, Idle No More, the International Indian Treaty Council, the National Indian Education Association and many others, the contemporary rights of American Indians and Alaska Natives to live as tribal peoples in

their homelands are persistently raised. These rights became more apparent in 2007 with the passage of the UN Declaration on the Rights of Indigenous Peoples.\footnote{U.N. Declaration, supra note 1.}

IV. **COLLECTIVE HUMAN RIGHTS - THE PROMISE OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES FOR NATIVE AMERICANS**

With the adoption of the UN Declaration on the Rights of Indigenous Peoples (UN Declaration) in the UN General Assembly on September 13, 2007,\footnote{See CHARMMAINE WHITE FACE, ZUMILA WOBAGA, INDIGENOUS NATIONS’ RIGHTS IN THE BALANCE: AN ANALYSIS OF THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 1-4 (2013) (detailing the changes to the text in violation of agreements with Indigenous drafters and the revised version that was ultimately adopted by the UN General Assembly).} a new era was ushered in for Indigenous populations across the globe with the shared history of resisting genocide, colonization, and forced removal. In the UN Declaration, collective rights were recognized for Indigenous peoples as a group entitled to protections, self-governance, and minimum human rights. Four nations voted to oppose the UN Declaration: Australia, Canada, New Zealand, and the United States.\footnote{See General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, GENERAL ASSEMBLY PRESS RELEASE (Sept. 13, 2007), available at http://www.un.org/press/en/2007/ga10612.doc.htm.} The United States was the last to officially reverse its opposition to the UN Declaration, approving it on Dec. 16, 2010 in remarks delivered by President Barack Obama.\footnote{See Remarks by the President at the White House Tribal Nations Conference, DEPT. OF THE INTERIOR, WASHINGTON, D.C., available at http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference. “And as you know, in April, we announced that we were reviewing our position on the UN Declaration on the Rights of Indigenous Peoples. And today I can announce that the United States is lending its support to this declaration.” Id.; See also, UN Declaration on the Rights of Indigenous Peoples Review, U.S. DEPARTMENT OF STATE available at http://www.state.gov/s/tribalconsultation/declaration/.} Applying many of the provisions of the UN Declaration would drastically stem the tide of genocidal acts the United States has committed against American Indians and Alaska Natives. The UN Declaration sets a floor of minimum collective human rights for Indigenous peoples. Enforcing the UN Declaration would bring about a greater humanity for United States citizens and would lend greater credibility to the professed ideals of the United States government as a protector of human rights.\footnote{See General Assembly Adopts Declaration, supra note 111. In the opposition vote to the UN Declaration, the U.S. representative provided a statement on the U.S. role for promoting Indigenous rights. “At the same time, the United States would continue its work to promote indigenous rights internationally. In its diplomatic efforts, it would continue its opposition to racial discrimination against indigenous individuals and communities and continued to press for full indigenous participation in democratic electoral processes throughout the world.” Id.}

To right the wrongs of the past in relation to American Indians and Alaska Natives, the United States government, through its three branches of the executive, legislative, and judicial, would need to recognize a full self-determination principle for
tribal peoples. This would mean revoking the Christian doctrine of discovery conveying any property right over tribal lands to the United States government, fully relinquishing the trusteeship imposed on Tribal Nations in the United States, and annulling the plenary power doctrine claimed by the United States Congress. In the treaties entered into by the United States in the late 1700s and 1800s, a majority contained the promise by the United States of perpetual peace and friendship. In the 2000s, it is time for the United States government to recognize that it exists with permanent Tribal Nation neighbors within mid-North America and that the United States must act with basic nation-to-nation respect in its dealings.

On the most basic level, Article 3 of the UN Declaration provides that "Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development." Implementing this right in the United States would require relinquishment of the United States trust system and plenary doctrine over tribal governments and lands. In 1871, contrary to the United States Constitution, Congressman Henry Dawes of Massachusetts added a rider to a United States Congressional appropriations act to prohibit further treaty-making with Indian Tribes. This federal law could not override the powers granted the United States President and

116 See Johnson v. M'Intosh, supra note 15 at 576. "The right of discovery given by this commission, is confined to countries 'then unknown to Christian people,' and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery." Id.

117 See COHEN'S, supra note 56 at § 5.04[3][a].

118 See Michigan v. Bay Mills Indian Community, supra note 70 at 2030.


120 As noted in the dissent by Justice Hugo Black in Federal Power Commission v. Tuscarora Indian Nation, 362. U.S. 99, 142 (1960), "Great nations, like great men, should keep their word."


the United States Senate to enter into and ratify treaties with other governments under the United States Constitution.\textsuperscript{123} A return to treaty-making would be an important step in rebuilding the nation-to-nation perpetual peace and friendship relations promised by the United States.

To address the settler-nation myths of subjugation that have led to the justifications for the genocidal acts by the United States, specific provisions of the UN Declaration should be implemented to reframe teaching materials in the United States public school curricula about Native Americans. In Article 8(2)(e) of the UN Declaration, nation-states are directed to prevent and provide redress for "[a]ny form of propaganda designed to promote or incite racial or ethnic discrimination against [Indigenous peoples]."\textsuperscript{124} Surely, the teachings that American Indians and Alaska Natives deserved to be killed by the United States military, have their lands taken, and be subjected to forced assimilation would be propaganda intended to bias the United States citizenry against Native Americans.

On the proactive side, the UN Declaration includes provisions intended to give voice to Indigenous peoples' viewpoints, cultures, and own history in the educational realm. First, Article 14 focuses on the rights of Indigenous children to culturally appropriate instruction with delivery in their own language.\textsuperscript{125} Second, Article 15 addresses some of the issues raised in prior sections about the nation-state curricula in public schools concerning Native Americans.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.\textsuperscript{126}

To implement Article 15 in the United States, public school districts would need to reach out to local Tribal Nations and develop appropriate curricula for their social studies and United States history lessons at the elementary school, middle school, high

\textsuperscript{123} See U.S. v. Lara, 541 U.S. 193, 218 (2004) (concurrence by Justice Thomas) (noting "the Act as constitutionally suspect" as the U.S. President is vested with the authority under the U.S. Constitution Art. II § 2 cl. 2 to make treaties).
\textsuperscript{124} UN Declaration, Article 8(2)(e).
\textsuperscript{125} Id. at Article 14.
\textsuperscript{126} Id. at Article 15.
school, and college levels of instruction. This would serve to counteract the mainstream ignorance and misconceptions about the governance, cultures and humanity of American Indians and Alaska Natives.

Two other major provisions of the UN Declaration that would greatly assist in bringing justice to the lives of American Indians and Alaska Natives are: 1) Article 26 setting forth Indigenous peoples land rights; \(^{127}\) and 2) Article 19 that articulates the standard of "free, prior and informed consent" required before nation-states adopt or implement any legislative or administrative measures that may affect Indigenous peoples. \(^{128}\) The repudiation of the doctrine of discovery and the acceptance that Native Americans own their homelands would bring about a lasting security for future generations and fulfillment of the tribal commitment to land stewardship. Implementing the "free, prior and informed consent" standard of Article 19 would in effect displace the imposed United States trusteeship and allow Tribal Nations to exercise their self-determination fully. \(^{129}\)

Finally, a dispute resolution process is sorely needed to resolve issues in forums not under the control of the United States. The UN Declaration Article 40 states the right to dispute resolution processes for Indigenous peoples with nation-states or other parties. In Larry Sager’s 1999 article, he posits that "[t]he Indian Nations of the United States would benefit from an independent and neutral international forum, providing a fair and just adjudication of claims. Such a forum enhances the possibility that traditional notions of fairness will be achieved in a dispute between two sovereign nations." \(^{130}\)

The United States has refused to submit to any international or regional judicial authority. In furtherance of perpetual peace and friendly relations, the United States must recognize the necessary step of authorizing jurisdiction for a neutral forum to settle disputes between Tribal Nations and the United States. The domestic courts of the United States have been the forums to, in essence legislate and uphold the doctrine of discovery, and uphold the ward/guardianship relationship and plenary authority of the United States Congress. Thus, another neutral forum must be assented to.

\(^{127}\) Id. at Article 26.
\(^{128}\) Id. at Article 19.
\(^{129}\) "Until we develop the scholarly literature that can transform consent into a legal requirement, we will not have made much progress in Indian law. Contemporary Indian leaders must understand the necessity of producing a large body of literature that will inform law clerks, judges, and justices of the Indian side of the story." Vine Deloria, Jr. (Standing Rock Sioux), The Passage of Generations, NATIVE VOICES: AMERICAN INDIAN IDENTITY & RESISTANCE 321 (2003).
\(^{130}\) Sager, supra note 89 at 747-48.
V. CONCLUSION: THE U.S. MUST ADOPT THE UN DECLARATION AND REVISE EDUCATION POLICY ON INDIAN HISTORY

The genocide of American Indians and Alaska Natives will not stop until major reformations are implemented in the United States. The UN Declaration is a huge step in the right direction to curtail the racial discrimination and genocidal justifications aimed at Native Americans in the United States. As Walter Echo-Hawk asserts, "The seeds of change must be planted in the United States. To become operational and enforceable in our own land, the provisions of the Declaration cannot be realized until they are fully incorporated into our domestic legal system."  

131

It is this call to fully realize human rights that Native Americans will continue to sound until the ears of United States citizens, lawmakers, judges, and leaders fill with the urgency of our tribal peoples to be free of the outdated and demeaning legal doctrines of past centuries. The seventh generation yet to be born is counting on the tribal peoples now alive to sound the call for the betterment of their lives.

We all know the thought that Indian people always think about the impact of their decision-making on the next seven generations ahead. Well, the seventh generation, since the American Indian holocaust in the nineteenth century, are probably among us now. If they are not, they soon will be. This generation of young children really are that seventh generation, and I think that it is helpful for us to think that, and ask ourselves, are these children the seventh generation, are they what our ancestors must have wanted them to be when they were going through the most grim time of Indian history. I think if we focus on that, and ask ourselves, "What can I do today to try to help these children get to the place that our ancestors must have wanted for them?" Then we will do well, things will get better, and in the future, we will see a healthier and more prosperous Native American people.  

132

In support of these future generations of Native Americans, we must continue to seek full human rights as tribal peoples to our culture, our lands, our governments, our history, and our ways of life.


132 Kevin Gover, "There is Hope": A Few Thoughts on Indian Law, 24 AMER. IND. L. REV. 219, 228 (2000).
AUGUST 2013-AUGUST 2014
CASE LAW ON AMERICAN INDIANS

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### TABLE OF CONTENTS

**UNITED STATES SUPREME COURT** ................................................................. 454

**OTHER COURTS** .......................................................................................... 454

A. **ADMINISTRATIVE LAW** ........................................................................ 454

B. **CHILD WELFARE LAW AND ICWA** ...................................................... 460

C. **CONTRACTING** ....................................................................................... 465

D. **EMPLOYMENT** ........................................................................................ 465

E. **ENVIRONMENTAL REGULATIONS** ......................................................... 466

F. **FISHERIES, WATER, FERC, BOR** ......................................................... 470

G. **GAMING** ................................................................................................ 473

H. **JURISDICTION, FEDERAL** .................................................................... 474

I. **RELIGIOUS FREEDOM** .......................................................................... 479

J. **SOVEREIGN IMMUNITY** ......................................................................... 483

K. **SOVEREIGNTY, TRIBAL INHERENT** ...................................................... 491

L. **TAX** ........................................................................................................ 497

M. **TRUST BREACH AND CLAIMS** ............................................................. 500

N. **MISCELLANEOUS** .................................................................................. 505
I. UNITED STATES SUPREME COURT

1. Michigan v. Bay Mills Indian Community, et al., No. 12–515, 134 S. Ct. 2024 (2014). State of Michigan brought an action to enjoin an Indian tribe from operating casino on land located outside its reservation that it had purchased with earnings from a congressionally established land trust. The district court granted a preliminary injunction, and the tribe appealed. The appellate court, 695 F.3d 406, vacated the injunction and remanded. Certiorari was granted. The Supreme Court, Justice Kagan, held that the suit was barred by tribal sovereign immunity. Affirmed.

II. OTHER COURTS

A. Administrative Law

2. California Valley Miwok Tribe v. Jewell, No. 11–00160, 2013 WL 6524636, __ F. Supp. 2d __ (D.D.C. 2013). This matter was before the Court on cross motions for summary judgment. Plaintiffs, led by Yakima Dixie, claim to be members of the California Valley Miwok Tribe (Tribe). They challenged the August 31, 2011 final decision of Larry Echo Hawk, the Assistant Secretary of the Bureau of Indian Affairs (BIA) that reached the following conclusions: (1) the Tribe is a federally recognized tribe; (2) the BIA cannot compel the Tribe to organize under the IRA and will cease all efforts to do so absent a request from the Tribe; (3) the BIA cannot compel the Tribe to expand its membership and will cease all efforts to do so absent a request from the Tribe; (4) as of the date of the Decision, the Tribe’s entire citizenship consisted of Yakima, Burley, Burley’s two daughters, and Burley’s granddaughter; and (5) the November 1998 Resolution established a General Council comprised of all of the adult citizens of the Tribe, with whom BIA may conduct government-to-government relations. Federal Defendants Sally Jewell, Secretary of the DOI, Michael Black, Director of BIA, and Larry Echo Hawk (collectively “the Federal Defendants”) opposed Plaintiffs’ motion and requested that the Court affirm the August 31, 2011 decision.

At the Court’s request, Intervenor–Defendant, another group of individuals who claimed to be members of the Tribe and who are led by Silvia Burley, filed a brief in support of the Federal Defendants’ summary judgment motion. The Court concluded that the Assistant Secretary erred when he assumed that the Tribe’s membership is limited to five individuals and further assumed that the Tribe is governed by a duly constituted tribal council, thereby ignoring multiple administrative and court decisions that express concern about the nature of the Tribe’s governance.
The Court granted Plaintiffs’ motion for summary judgment that sought remand of the August 2011 Decision and denied the Federal Defendants’ cross motion for summary judgment.

3. *Picayune Rancheria of Chukchansi Indians v. Henriquez*, No. CV–13–01917, 2013 WL 6903750 (D. Ariz. 2013); 25 U.S.C. § 4101 et seq.; 25 C.F.R. § 2.6. Before the court was defendants’ motion to dismiss. The Chukchansi Indian Housing Authority (CIHA) is the housing entity of the Picayune Tribe of Chukchansi Indians (Tribe) established by tribal ordinance to operate the tribe’s federally assisted housing programs. CIHA operates as a non-profit tribal corporation, governed by a Board of Commissioners appointed by the Tribal Council. CIHA administers annual block grants from the Southwest Office of Native American Programs (SWONAP) of the United States Department of Housing and Urban Development (HUD). The block grants are provided through the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. § 4101 et seq., which requires that grants be paid by HUD “directly to the recipient for the tribe.” Individuals authorized to receive the funds are given access to an automated Line of Credit Control System (LOCCS), and can access and withdraw NAHASDA funds through that system.

In January 2013, a leadership dispute arose among the members of the Tribal Council, and various members of the Tribal Council attempted to suspend other members. Three separate factions emerged from the leadership dispute, each claiming to represent the government of the Tribe. The BIA advised HUD that the intra-tribal dispute was currently the subject of an appeal and that, pursuant to 25 C.F.R. § 2.6, there was no final BIA determination regarding the appropriate tribal government. As a result, HUD informed CIHA, with copy to the heads of all three factions that, “all current LOCCS users are hereby prohibited from accessing LOCCS.” HUD emphasized that it was not suspending the Tribe’s funds, but rather revoking access to the LOCCS system, and that access by new users would be allowed if HUD became “satisfied that CIHA’s Board of Commissioners is in fact authorized and designated by a recognized Tribal government.” CIHA initiated a suit against HUD, SWONAP, and their respective representatives on behalf of itself and the Tribe.

The suit asserted that: (1) HUD suspended funds in violation of NAHASDA because it had not shown that CIHA failed to “comply substantially” with statutory requirements; (2) HUD’s suspension of funding violated the Administrative Procedures Act because it was arbitrary, capricious and contrary to applicable law; (3) HUD violated Plaintiff’s due process rights under the Fifth Amendment by failing to provide proper notice or hearing prior to revoking CIHA’s access to LOCCS; (4) HUD violated federal common law by failing to acknowledge the elected tribal council at the last undisputed election; (5) Plaintiffs were entitled to declaratory relief regarding the recognition of tribal
court orders which recognized the Ayala faction as the lawful governing body of the Tribe; and (6) the government breached its fiduciary duty to the Tribe under NAHASDA. Plaintiff filed a motion for a temporary restraining order and a preliminary injunction, seeking to have access to LOCCS restored “for the CIHA officials who had that access on and before August 22, 2013.” Plaintiffs thus sought to have the Ayala faction granted exclusive access to the HUD funds.

The court found that Plaintiffs could not meet the burden of showing their injury by Defendants' actions. The Court also opined that Plaintiff's injury could not be redressed by a court order without asking the Court to resolve matters of intra-tribal governance. Plaintiffs therefore cannot show that they have standing to pursue this action. The Court found Plaintiffs' arguments and authorities unpersuasive, and elected to follow cases that have dismissed similar claims.

The court granted Defendants’ motion to dismiss.

4. Alto v. Black, No. 12–56145, 738 F.3d 1111 (9th Cir. 2013). Descendants of Indian tribal members filed suit seeking declaratory and injunctive relief from the Bureau of Indian Affairs' (BIA) order upholding the tribe's decision to disenroll descendants from tribal membership. After granting intervention by the tribe to file jurisdictional motions and after granting the descendants' motion for preliminary injunction, preventing enforcement of the disenrollment order, pending completion of litigation, the District Court, 2012 WL 2152054, denied the tribe’s motion to dissolve the preliminary injunction and the tribe’s motions to dismiss, for failure to join the tribe as the required party and for lack of subject matter jurisdiction. Tribe appealed. The appellate court held that: (1) descendants’ challenges to disenrollment order were reviewable, and (2) tribe was not a required party. Affirmed in part, dismissed in part, and remanded.

5. Hester v. Jewell, No. 13–4142, 2014 WL 211868, __ Fed. Appx. __ (10th Cir. 2014). Job applicant brought a pro se Title VII action against the Secretary of the Department of Interior (DOI) and Department officials. The District Court, 2013 WL 5322625, dismissed sua sponte, and the applicant appealed. The appellate court held that the application of Indian Preference to job postings within the DOI was not racial discrimination under Title VII. Affirmed.

6. Nambe Pueblo Housing Entity v. United States Dep’t of Housing and Urban Dev., No. 11–CV–01516, 2014 WL 901511 (D. Colo. 2014). (From the opinion.) This action is one of several related actions pending in this court involving challenges to HUD’s reductions of the plaintiffs’ Indian Housing Block Grant (IHBG) awards pursuant to 24 C.F.R. § 1000.318 and HUD’s authority to recapture purported grant overfunding. The procedural history of the plaintiffs’ challenges to HUD’s elimination of Mutual Help
units from their Formula Current Assisted Stock (FCAS) is described in this court’s Memorandum Opinion dated August 31, 2012 in Fort Peck Housing Authority v. HUD et al., Civil Action No. 05–cv–00018–RPM, which was also made applicable in this civil action. This action is unique because Nambe Pueblo Housing Entity (Nambe) filed this action in 2011, after the Native American Housing and Assistance and Self-Determination Act of 1996 (NAHASDA) was amended by the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110–411, 122 Stat. 4319 (the “Reauthorization Act”).

The court found that HUD’s disallowance of FCAS funding for 23 units was arbitrary and capricious, explaining that those units could not have been conveyed to the homebuyers due to a title impediment created by the failure of the Bureau of Indian Affairs (BIA) to record a master lease for the projects where the units are located. The court ruled that the amended version of NAHASDA governs this action because the agency actions challenged in this suit occurred after the effective date of the 2008 amendments.

The court also found and concluded that with respect to FCAS funding for FY 2006, HUD lacked recapture authority because HUD did not “take action” within the 3-year limitation provided by 24 C.F.R. § 1000.319. It is FURTHER ORDERED that on or before April 15, 2014, Plaintiff Nambe Pueblo Housing Entity shall submit a proposed form of judgment, specifying the amounts to be paid to it and the asserted sources of the payment; and it is FURTHER ORDERED that if Plaintiff Nambe Pueblo Housing Entity claims entitlement to payment for underfunding because HUD excluded those units from its FCAS in a particular year, the proposed form of judgment should include a separate itemization for those amounts, which may be submitted by May 15, 2014. The Plaintiff’s request for attorney’s fees and costs will be addressed after entry of judgment.

7. Tlingit-Haida Regional Housing Authority v. United States Department of Housing and Urban Development, No. 08–cv–00451, 2014 WL 2781728 (D. Colo. Jun 19, 2014). On March 4, 2008, Plaintiff Tlingit–Haida Regional Housing Authority (Tlingit–Haida or Tribe) filed an action for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., claiming that the Defendants (collectively “HUD”) violated the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. § 4101 et seq., by reducing the number of housing units counted as Formula Current Assisted Stock (FCAS) for the calculation of the Tribe’s share of the annual Indian Housing Block Grant (IHBG) and recapturing IHBG funds which the Tribe had received in past years for those units. This action is governed by the version of NAHASDA that existed before it was amended by the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110–411, 122 Stat. 4319 (2008).
Legal issues common to this action and related actions were determined in two previous memorandum opinions and orders in *Fort Peck Housing Authority v. HUD et al.*, Civil Action No. 05–cv–00018–RPM, dated August 31, 2012, and March 7, 2014.

Tlingit–Haida has established its right to an affirmative injunction requiring HUD to restore to it the amount of $1,139,658. Final judgment was entered requiring the Defendants to restore to Plaintiff Tlingit–Haida Regional Housing Authority the amount of $1,139,658, for Indian Housing Block Grant funds that were illegally recaptured from the Plaintiff for fiscal years 1998 through 2002. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to the Plaintiff under the Native American Housing Assistance and Self–Determination Act (“NAHASDA”) in a given fiscal year as calculated without application of the amount of the Judgment.

8. *Choctaw Nation of Okla. v. United States Dep’t of Housing and Urban Dev.*, No. 08–cv–02577, 2014 WL 2883456 (D. Colo. 2014). On November 25, 2008, Plaintiffs Choctaw Nation of Oklahoma and the Housing Authority of the Choctaw Nation of Oklahoma (collectively, Choctaw or the Tribe) filed this action for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., claiming that the Defendants (collectively HUD) violated the Native American Housing Assistance and Self–Determination Act of 1996 (“NAHASDA”), 25 U.S.C. § 4101 et seq., by reducing the number of housing units counted as Formula Current Assisted Stock (FCAS) for the calculation of the Tribe’s share of the annual Indian Housing Block Grant (IHBG) and recapturing IHBG funds which the Tribe had received in past years.

This action is governed by the version of NAHASDA that existed before it was amended by the Native American Housing Assistance and Self–Determination Reauthorization Act of 2008, Pub. L. No. 110–411, 122 Stat. 4319 (2008). Legal issues common to this action and related actions were determined in two previous memorandum opinions and orders in *Fort Peck Housing Authority v. HUD et al.*, Civil Action No. 05–cv–00018–RPM, dated August 31, 2012, and March 7, 2014. Choctaw has established that it is entitled to restoration of the recaptured funds in the amount of $841,316.00.

Defendants shall restore to Plaintiffs Choctaw Nation of Oklahoma and Housing Authority of the Choctaw Nation of Oklahoma (“Plaintiff Choctaw”) the amount of $841,316.00. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to Plaintiff Choctaw under the Native American Housing Assistance and Self–Determination Act (“NAHASDA”) in a given fiscal year as calculated without application of the amount of the Judgment.

Tribes (Tribes) to a regulation promulgated by the Secretary of the Interior (Secretary) regarding taking land into trust on behalf of all Indian Tribes, 25 C.F.R. § 151.1, pursuant to § 5 of the Indian Reorganization Act, 25 U.S.C. § 465. Pending before the court was the State of Alaska’s (“Alaska”) Motion for a Stay and Injunction pending appeal of the Court’s September 30, 2013 Order in the D.C. Circuit. The Court concluded on March 31, 2013, the Alaska exception within the rule was arbitrary and capricious and violated the Indian Reorganization Act (IRA), 25 U.S.C. § 476(g).

The case is currently on appeal in the D.C. Circuit. Meanwhile, on April 30, 2014, the Bureau of Indian Affairs published a Proposed Rule, proposing to formally remove the Alaska exception from 25 C.F.R. § 151.1, and begin considering the acquisition of lands into trust on behalf of Alaska Native Tribes and individuals. In this case, Alaska filed a motion for a Stay and Injunction pending appeal. Alaska specifically asked this Court to stay its September 30, 2013 Order and to “enjoin the Secretary’s rulemaking activities, including accepting comments on the recently proposed rule, and enjoin the Secretary from accepting and processing applications to take land into trust for Alaska tribes, pending resolution of the appeal.”

The court granted Alaska’s motion for stay and injunction pending appeal in part, denied in part, and enjoined the Secretary of the Interior from taking land into trust in Alaska (except for the Metlakatla Indian Community of the Annette Island Reserve or its members) until the D.C. Circuit issues a ruling and mandate resolving Alaska’s appeal.

10. **Navajo Housing Auth. v. United States Dep’t of Housing and Urban Dev.**, No. 08–CV–00826, 2014 WL 2936924 (D. Colo. 2014). On April 22, 2008, Plaintiff Navajo Housing Authority (Navajo or Tribe) filed an action for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., claiming that the Defendants (collectively “HUD”) violated the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. § 4101 et seq., by reducing the number of housing units counted as Formula Current Assisted Stock (FCAS) for the calculation of the Tribe’s share of the annual Indian Housing Block Grant (IHBG) and recapturing IHBG funds which the Tribe had received in past years. Defendants shall restore to Plaintiff Navajo Housing Authority the amount of $6,165,842 for Indian Housing Block Grant (“IHBG”) funds that were illegally recaptured from Plaintiff Navajo. Any such restoration shall be in addition to the full IHBG allocation that would otherwise be due to the Plaintiff under the Native American Housing Assistance and Self-Determination Act (NAHASDA) in a given fiscal year as calculated without application of the amount of the Judgment.

federal agencies, alleging that issuance of drilling leases and permits on land violated the Administrative Procedure Act and federal common law. The government moved to dismiss for lack of subject matter jurisdiction. The District Court, 2013 WL 1279033, adopted the report and recommendation of Roy S. Payne, United States Magistrate Judge, 2013 WL 1279051, and granted the motion to dismiss. Tribe appealed. The Court of Appeals held that federal court lacked subject matter jurisdiction over Tribe’s claims. Affirmed.

B. Child Welfare Law And ICWA

12. Thompson, et al. v. Fairfax Cnty. Dept. of Family Services, et. al, Nos. 2185-12-4, 2232-12-4, 2217-12-4, 2216-12-4, 2013 WL 4799747 (Va. Ct. App. 2013). County Department of Family Services filed a petition to terminate parental rights of both parents of an Indian child. The Circuit Court held that the guardian ad litem and foster parents had not established good cause to retain jurisdiction and ordered the case transferred to tribal court, but granted a stay pending appeal. The guardian ad litem and foster parents appealed, and parents appealed an order granting stay. The appellate court held that: (1) the appropriate standard of review was an abuse of discretion; (2) existing Indian family exceptions would not be adopted; (3) the tribal court had jurisdiction over both parents; (4) the best interests of the child were relevant in considering the transfer; (5) the proceedings were not at an advanced stage; and (6) the transfer would not cause undue hardship to parties. Reversed and remanded.

13. In the Matter of E.G.M., No. 13–584, 2013 WL 5913807 (N.C. Ct. App. 2013). County department of social services (DSS) filed a petition alleging the child was a neglected juvenile and was subject to the Indian Child Welfare Act (ICWA). The district court granted legal custody of the child to DSS, ordered child’s continued placement with family friend, established a plan of reunification with mother, and relieved DSS of further efforts towards reunification with father. Mother and father appealed.

The appellate court held that: (1) remand was required to provide for a redetermination of the trial court’s subject matter jurisdiction over neglect proceeding involving an Indian child; (2) the Court of Appeals could not take judicial notice of memorandum of agreement (MOA) Indian tribe and DSS signed; (3) qualified expert testimony which would continue custody of the Indian child, by the parent or Indian custodian, was likely to result in serious emotional or physical damage to the child, was to be introduced at the hearing which resulted in foster care placement of the Indian child; and (4) as a matter of first impression, a trial court may order the cessation of reunification efforts in Indian Child Welfare Act cases if the court finds that such efforts would clearly be futile. Vacated and remanded.
14. **In re Autumn K. v. Patricia M.**, No. A136586, 2013 WL 6092859, __ Cal. Rptr. 3d __ (Cal. Ct. App. 2013). County Health and Social Services Department commenced child dependency proceeding, alleging jurisdiction based on parents’ substance abuse problems, and the Indian tribe intervened. Following the termination of reunification services, the Superior Court denied the maternal grandmother’s request to be designated as a de facto parent, denied the mother’s request for reinstatement of reunification services, terminated parental rights, and ordered adoption as permanent plan. Both parents appealed. The appellate court held that: (1) grandfather’s misdemeanor conviction for contributing to the delinquency of a minor was not a non-exemptable offense; (2) the Department was required by statute to evaluate the maternal grandfather’s request for exemption to allow placement of Indian child in the grandparents’ home; (3) the tribal custody forms, which the mother and grandmother executed upon child’s birth, did not grant the grandmother custody over the Indian child; and (4) the court did not improperly apply the existing Indian family doctrine. Reversed and remanded.

15. **Dep’t of Health and Human Services v. J.G.**, Nos. 0400574JV4; 0900378M; A153864, 2014 WL 25206 (Or. Ct. App. 2014). Department of Human Services moved to appoint Indian child’s current foster parent as the child’s legal guardian. The Circuit Court granted motion. Mother appealed. The appellate court held that: (1) as a matter of first impression, a section of the Indian Child Welfare Act (ICWA) allowing any court of competent jurisdiction to invalidate foster care actions that contravened ICWA was in conflict with the state appellate rule requiring the preservation of claim of error to raise error on appeal, and therefore the ICWA section preempted state rule; (2) durable guardianship established by trial court was a foster care placement as could require the court to make a finding under the ICWA as to whether active efforts had been made to prevent breakup of Indian family; but (3) in instant action, court was not required to make an active effort finding in guardianship judgment. Affirmed.

16. **In re Jayden D. and Dayten J.**, No. A-13-193, 2014 WL 116032 (Neb. Ct. App. 2014). *(From the Opinion)* “Yolanda W., formerly known as Yolanda O., appeals from the decision of the separate juvenile court of Lancaster County, which denied her motion to transfer the termination of parental rights proceeding in this juvenile case to tribal court. Because we find that the State failed to establish good cause to deny the transfer, we conclude that the juvenile court abused its discretion in denying the motion to transfer.”

relating to the removal of Native American children from their homes during 48-hour hearings, violated the Fourteenth Amendment’s due process clause and the Indian Child Welfare Act (ICWA). Defendants moved to dismiss. The District Court held that: (1) Younger abstention did not apply; (2) Rooker-Feldman abstention doctrine did not deprive district court of subject matter jurisdiction; (3) tribes had parens patriae standing; (4) allegations were sufficient to plead judge and officials were policymakers; (5) ICWA provision provided substantive rights; (6) allegations were sufficient to state a claim for ICWA violations; and (7) allegations were sufficient to plead denial of their Fourteenth Amendment due process rights. Motions denied.

18. **In the Matter of Abbigail A.**, No. C074264, 2014 WL 2705177 (Cal. Ct. App. 2014). The county department of health and human services filed dependency petitions as to two children. The Superior Court directed counsel to make reasonable efforts to enroll the children and their father in a tribe which had notified the court that they were eligible for membership, concluded it was required to treat the eligible minors as Indian children under Indian Child Welfare Act (ICWA), but made jurisdictional findings and placed the children in the custody of their maternal grandmother. The appellate court held that court rules extending ICWA protections to children merely eligible for tribal membership are invalid. Reversed with directions.

19. **In re I.P. v. M.P.**, No. E060213, 226 Cal. App. 4th 1516 (Cal. Ct. App. 2014). Children and Family Services (CFS) filed a dependency petition alleging that the child, age four, came within the jurisdiction of the juvenile court. Indian tribe responded indicating that the child was eligible for membership and that the tribe was intervening. The Superior Court found that the child was adoptable and terminated parental rights, and also found, inter alia, that CFS had complied “with the noticing requirements” of the Indian Child Welfare Act (ICWA). Mother appealed. The appellate court held that the mother failed to show a reasonable probability that compliance with the procedural requirements of tribal customary adoption would have resulted in an outcome more favorable to her. Affirmed.

20. **In re Interest of Mischa S.**, No. A–13–265, 22 Neb. App. 105, __ N.W. 2d __ (Neb. Ct. App. 2014). State filed a petition to have a child adjudicated as lacking proper parental care. Parents, one of whom was member of Indian tribe, entered a no contest admission to petition, and the child was allowed to remain at home, under supervision. Guardian ad litem (GAL) subsequently moved to remove child from home. Following a hearing, the County Court ordered the child to be placed in foster care and declared a provision of the Nebraska Indian Child Welfare Act (ICWA) unconstitutional. Parents appealed.
The appellate court held that: (1) there was not clear and convincing expert evidence that serious emotional damage would result if child, who became subject of original adjudication petition because of excessive school absences, were not removed from parents’ home, as required for foster care placement under Nebraska Indian Child Welfare Act (ICWA); (2) juvenile court's sua sponte determination, that provision of Nebraska Indian Child Welfare Act (ICWA) was unconstitutional as applied, was void; and (3) in proceedings under the Nebraska ICWA for foster placement of, or termination of parental rights to, an Indian child, proof by a preponderance of the evidence is the standard for satisfying the court of active efforts to prevent the breakup of Indian family. Reversed and remanded.

21. In re Alexandria P., No. B252999, 2014 WL 4053054, __ Cal. Rptr. 3d __ (Cal. Ct. App. 2014). (From the opinion.) This case involved the placement preferences set forth in the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). At issue is whether the dependency court properly applied the ICWA in finding that the foster parents of an Indian child failed to prove good cause to deviate from the ICWA’s adoptive placement preferences. A 17-month–old Indian child was removed from the custody of her mother, who has a lengthy substance abuse problem and has lost custody of at least six other children, and her father, who has an extensive criminal history and has lost custody of one other child. The girl’s father is an enrolled member of an Indian tribe, and the girl is considered an Indian child under the ICWA. The tribe consented to the girl’s placement with a non-Indian foster family to facilitate efforts to reunify the girl with her father. The girl lived in two foster homes before she was placed with de facto parents at the age of two. She bonded with the family and has thrived for the past two and a half years. After reunification efforts failed, the father, the tribe, and the Department of Children and Family Services (Department) recommended that the girl be placed in Utah with a non-Indian couple who were extended family of the father. De facto parents argued good cause existed to depart from the ICWA’s adoptive placement preferences and it was in the girl’s best interests to remain with de facto family. The child’s court-appointed counsel argued that good cause did not exist.

The court ordered the girl placed with the extended family in Utah after finding that the de facto parents had not proven by clear and convincing evidence that it was a certainty the child would suffer emotional harm by the transfer. De facto parents also contend that the ICWA’s adoptive placement preferences do not apply when the tribe has consented to a child’s placement outside of the ICWA’s foster care placement preferences. The court disagreed with their interpretation of the statutory language. De facto parents further contend that the court erroneously applied the clear and convincing standard of proof, rather than a preponderance of the evidence, a contention we reject based upon the overwhelming authority on the issue.
Finally, the de facto parents contend that the court erroneously interpreted the "good cause" exception to the ICWA’s adoptive placement preferences as requiring proof of a certainty that the child would suffer emotional harm if placed with the Utah couple, and failed to consider the bond between Alexandria and her foster family, the risk of detriment if that bond was broken, and Alexandria’s best interests. The court agreed with this last contention and reversed the placement order because the court’s error was prejudicial. The order transferring custody of the minor to the R.s was reversed. The cause was remanded to determine if good cause existed to deviate from the ICWA’s adoptive placement preferences.

22. In re Candace A., No. S–15251, 2014 WL 4160043, __ P.3d __ (Alaska 2014). The superior court adjudicated Candace, a child in need of aid, because she had been sexually abused by her adoptive brother. The Superior Court nonetheless ordered that Candace be returned to her parents’ home, holding that the Department of Health and Social Services, Office of Children’s Services (OCS), had failed to present “qualified expert testimony” as required by the Indian Child Welfare Act (ICWA) to support a finding that she would likely suffer serious physical or emotional harm in her parents’ custody. The Superior Court held an adjudication hearing to determine whether Candace was a child in need of aid and whether removal from her family home could be justified. OCS called Barbara Cosolito to provide the expert testimony. ICWA was required to show “that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.” The Bureau of Indian Affairs (BIA) had defined the ICWA phrase “qualified expert witnesses” to include lay persons with “substantial experience and knowledge regarding relevant Indian social and cultural standards” and “professional persons” who have “substantial education in the area of [their] specialty.” It was against these BIA standards that the Superior Court judged the qualifications of OCS’s proposed experts. Social work in Alaska has all the earmarks of a profession. The law requires a state license for the practice of social work. A licensed clinical social worker must have a master’s or doctoral degree in social work, must have completed at least two years of continuous full-time employment in post-graduate clinical social work, must have good moral character and be “in good professional standing,” must provide “three professional references” acceptable to the licensing board, and must pass the licensing examination. Social workers are subject to a code of ethics, including confidentiality requirements, and must maintain their licenses by continuing education courses, including “professional ethics.” Social workers who do not conform to “minimum professional standards” are subject to discipline. Alaska statutes and rules reflect a common understanding that social workers are professionals. And in our case law, we have strongly implied that social workers may be qualified experts under the third BIA guideline as long as they have “expertise beyond the normal social worker qualifications.”
The Supreme Court reversed the Superior Court's rulings on whether OCS’s two proffered witnesses were qualified experts for purposes of 25 U.S.C. § 1912(e); vacated the portion of the adjudication order placing Candace with her parents; and remanded for further proceedings consistent with this opinion.

C. Contracting

23. Healy Lake Village v. Mt. McKinley Bank, No. S–14987, 2014 WL 1408554, __ P.3d __ (Alaska 2014). Tribal members who claimed to constitute newly elected tribal councilmen brought a declaratory judgment action against a bank to determine who was authorized to act on behalf of the tribe and to access the tribe’s accounts. A second group of tribal members who claimed to represent the tribe based on a competing election was granted intervention to challenge the Superior Court's jurisdiction. The Superior Court dismissed for lack of jurisdiction, and the members who brought the initial action appealed. The Supreme Court held that: (1) the Superior Court did not commit reversible error by failing to convert bank’s motion to dismiss to a motion for summary judgment; (2) any inquiry into the legitimacy of competing tribal elections was solely within tribe’s retained inherent sovereignty; and (3) the Superior Court lacked subject matter jurisdiction over tribal member’s declaratory judgment action against bank. Affirmed.

D. Employment

24. South v. Lujan, No. 32,015, 2014 WL 3908038, __ P.3d __ (N.M. Ct. App. 2014). Plaintiff-Appellant Tiffany South, a former officer with the Sandia Pueblo Police Department, (Plaintiff) filed a complaint for violation of the New Mexico Human Rights Act (NMHRA), retaliatory discharge, and tortious inference with contract against Defendants-Appellees Isaac Lujan, William Duran, and Mary–Alice Brogdon (collectively, Defendants) in their individual capacities. The district court granted Appellees’ motion to dismiss based on lack of jurisdiction. Plaintiff, who had been an officer with the Sandia Pueblo Police Department (the Department), alleged that Defendants Lujan and Duran, the Chief and Captain of the Department, respectively, had sexually harassed her and that, together with Defendant Brogdon, the employee relations manager for Sandia Pueblo, had retaliated against her after she complained of the sexual harassment. She also maintained that the Defendants interfered with her employment contract with Sandia Pueblo “with the explicit motive of terminating [her employment] for false reasons[.]”

Plaintiff is not Indian. Defendant Lujan is Indian and a member of the Pueblo. Defendants Duran and Brogdon are neither Indian nor members of the Pueblo. Sandia Pueblo is not named as a party in the complaint. Defendants moved for dismissal of the complaint, arguing that the NMHRA did not apply to the Pueblo and its employees and
that Plaintiff’s claims were barred by the Pueblo’s sovereign immunity and, therefore, the District Court lacked jurisdiction to hear the complaint. They also argued that the suit must be dismissed because the Pueblo is a necessary party to the suit, which cannot be joined. After a hearing, the District Court granted the Defendants’ motion and dismissed the complaint with prejudice. Plaintiff appealed.

The overarching question presented—does the state court have subject matter jurisdiction over these claims?-depended on the answers to a number of components: including whether the conduct complained of occurred on the reservation, whether the conduct complained of occurred within the scope of employment, whether the Pueblo is a necessary party, and to what extent the Pueblo has sought to regulate disputes between its employees when employees are sued in tort in their individual capacities.

Here, there are two important issues that are inadequately developed for review. The first is whether the Defendants’ alleged conduct occurred within the scope of employment by the Pueblo. The second issue is whether state court jurisdiction would infringe on the Pueblo’s sovereignty under the facts of this case. Being no factual basis for the District Court’s ruling in the record, the Court reversed and remanded the case to the District Court for further proceedings consistent with this Opinion.

E. Environmental Regulations

25. Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis., No. 12 3419, 2013 WL 5692337 (7th Cir. 2013). An Indian tribe filed action seeking a declaratory judgment that the village lacked authority to impose charges under its storm water management utility ordinance on parcels of land held in trust by the United States for the tribe located on reservation and within village. The tribe also sought injunctive relief enjoining the village from attempting to enforce its ordinance upon tribal lands. The tribe filed motion for summary judgment. The United States filed a motion for summary judgment on village’s third-party complaint against the United States, alleging that the United States, as holder of the bare title to the tribal trust lands, had to pay the storm water fees if the tribe was not responsible for doing so. The District Court, 891 F. Supp. 2d 1058, granted motions. Village appealed. The appellate court held that: (1) the Clean Water Act (CWA) did not authorize village to impose storm water management charges upon property held in trust for the benefit of Indian tribe; (2) the village’s storm water management charges constituted an impermissible tax upon tribal trust property; and (3) the United States was not obligated to pay storm water management taxes imposed by village upon tribal lands. Affirmed.

Air Act (CAA), which established a federal implementation plan for the attainment of national air quality standards in Indian country. The Appellate Court held that: (1) Oklahoma had standing to bring petition; (2) Oklahoma’s petition was not time-barred; (3) Oklahoma did not forfeit its claim that state implementation plan presumptively applied in non-reservation Indian country; and (4) EPA had no authority under the CAA to issue the rule. Petition granted.

27. HonoluluTraffic.com v. Federal Transit Admin., No. 13–15277, 2014 WL 607320, __ F.3d __ (9th Cir. 2014). Consortium of interest groups and individuals opposing high-speed rail project filed action against Federal Transit Administration (FTA), Department of Transportation (DOT), municipality, and various federal and local administrators asserting challenges under National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), and Department of Transportation Act. The District Court, 2012 WL 5386595, entered summary judgment in the defendants’ favor on most claims, but enjoined construction of the project’s fourth phase pending remand to agency. Plaintiffs appealed. The Appellate Court held that: (1) district court’s order was final reviewable decision; (2) statement of purpose in project’s final environmental impact statement (FEIS) did not unreasonably restrict project’s purpose and need; (3) FEIS adequately considered alternatives; (4) FTA’s finding that managed lanes alternative (MLA) and bus rapid transit alternatives were not prudent was not arbitrary or capricious; and (5) FTA and city were not required to complete their identification and evaluation of Native Hawaiian burial sites before approving project. Affirmed.

28. Public Employees for Envtl. Responsibility v. Beaudreu, Nos. 10–1067, 10–1073, 10–1079, and 10–1238, 2014 WL 985394, __ F. Supp. 2d __ (D.D.C. 2014). In consolidated cases, individuals and environmental groups brought interrelated claims concerning several administrative decisions made by federal agencies approving construction of various aspects of offshore wind energy project in Nantucket Sound. Wind energy contractor intervened, and parties moved and cross-moved for summary judgment. The District Court held that: (1) Coast Guard’s terms and conditions for project were reasonable under Coast Guard and Maritime Transportation Act of 2006; (2) United States Bureau of Ocean Energy Management (BOEM) did not violate Outer Continental Shelf Lands Act; (3) Endangered Species Act (ESA) required United States Fish and Wildlife Service (FWS) to independently make determination to discard operational adjustment; (4) biological opinion of National Marine and Fisheries Service (NMFS) was not arbitrary and capricious; (5) NMFS violated ESA by failing to include incidental take statement concerning North Atlantic right whales in its biological opinion; (6) NMFS appropriately considered project’s potential impact on listed sea turtles; (7) Migratory Bird Treaty Act did not require BOEM to obtain FWS permit to take migratory birds prior to approving project; (8) BOEM appropriately conducted consultation process under National Historic Preservation Act;
(9) BOEM’s final environmental impact state (EIS) was not arbitrary and capricious; and
(10) BOEM was not required to prepare new or supplemental EIS. Motions granted in
part and denied in part.

of the Interior, No. 12-15412, 2014 WL 1244275 (9th Cir. 2014). Indian tribes brought
action challenging Bureau of Land Management’s (BLM) approval of mining project on
federal land, alleging violations of Federal Land Policy and Management Act (FLPMA)
and National Environmental Policy Act (NEPA). Project owner intervened. The District
Court, 2012 WL 13780, granted summary judgment in favor of BLM and project owner.
Tribes appealed. The Appellate Court held that: (1) BLM did not act arbitrarily or
capriciously when it determined further accommodation of Indian tribes’ religious use of
pediment area of piñon-juniper groves at base of mountain in project area was not
practicable, and (2) BLM did not act arbitrarily or capriciously in analyzing project’s
impacts on water resources. Affirmed.

30. El Paso Natural Gas Co. v. United States, Nos. 12–5156, 12–5157,
2014 WL 1328164 (D.D.C. 2014). The natural gas company brought action against the
United States and other federal entities, alleging failure to fulfill obligations under
Uranium Mill Tailings Radiation Control Act (UMTRCA), Resource Conservation and
Recovery Act (RCRA), and Administrative Procedure Act (APA) in connection with
certain properties alleged to be contaminated with residual radioactive waste. The
Indian tribe intervened, asserting claims under UMTRCA and federal and tribal law.
Defendants moved to dismiss. The District Court, 774 F. Supp. 2d 40 and 847 F. Supp.
2d 111, granted motions. Defendants appealed. The Appellate Court held that:
(1) Comprehensive Environmental Resources, Compensation, and Liability Act
(CERCLA) barred court’s jurisdiction over RCRA claims related to landfill site;
(2) dismissal of RCRA claims under CERCLA should have been without prejudice;
(3) tribe’s RCRA claims in relation to other site were not moot; (4) as matter of first
impression, governmental agencies are persons entitled to bring citizen suits under
RCRA; (5) UMTRCA did not preclude judicial review of tribe’s APA claims; (6) tribe
failed to state “failure to act” claims under APA; and (7) tribe did not have cause of
action against United States for breach of trust duties. Affirmed in part, reversed in part,
and remanded.

31. Confederated Tribes and Bands of Yakama Nation v. U.S. Fish and
2014). Before the court was plaintiff’s motion for a temporary restraining order. This
case concerns guided bus tours for members of the general public on Rattlesnake
Mountain in the Hanford Reach National Monument conducted by Defendant United
States Fish and Wildlife Services (“USFWS”). Plaintiff Confederated Tribes and Bands
of the Yakama Nation ("the Yakama Nation") sought judicial review of the USFWS's agency decision and actions that the guided tours will have no adverse effect on the site, which has been designated a Traditional Cultural Property (TCP) under the National Historic Preservation Act (NHPA). Rattlesnake Mountain, overlooking the Hanford Site in Benton County, Washington, is known to the Yakama Nation as Laliik, and means "standing above the water."

Laliik has cosmological, religious, and cultural significance for the Yakama Nation and other Indian tribes. The Yakama Nation ceded the land on which Laliik is situated to the United States under the Treaty of 1855. In 2007, Laliik was designated as a Traditional Cultural Property (TCP) pursuant to § 101(d)(6)(A) of the NHPA. A TCP is a "property of traditional religious and cultural importance to an Indian tribe" and is thereby eligible for listing on the National Register of Historic Places. USFWS issued a finding that the wildflower tours presented "no adverse effect" on the Laliik TCP. State Historic Preservation Officer Allyson Brooks notified the USFWS that she did not concur with the finding of no adverse effect. USFWS informed the Tribe that it would have the Advisory Council on Historic Preservation review the new proposal because the Tribe and the State Historical Preservation Office had not concurred with the USFWS. The Tribe told the ACHP that it did not concur with the new tours proposal. The ACHP recommended to USFWS that it consult further with the Tribe prior to any further wildflower tours on the Laliik TCP, citing the allegedly unfollowed work controls and the Tribe's belief that there was an adverse effect. The Yakama Nation was told that the USFWS had made a final agency decision to proceed with eight wildflower tours and then filed its complaint. After the first two days of tours occurred, the Tribe moved the Court for a temporary restraining order prohibiting the tours scheduled for May 8 and 10, 2014.

The Court found that the record before the Court does not support the issuance of such a "drastic remedy" as a TRO provides and denied Plaintiff's Motion for a Temporary Restraining Order.

32. WaterLegacy Advocacy v. U.S. E.P.A., No. 13–1323, 2014 WL 2462852 (D. Minn. 2014). Non-profit environmental organizations and Indian tribes brought action for declaratory judgment and injunctive relief pursuant to the Clean Water Act (CWA) and the Administrative Procedure Act (APA), challenging Environmental Protection Agency’s (EPA) approval of a water quality standards variance for a commercial-scale iron nugget production facility. EPA filed unopposed motion to vacate its approval of variance and remand the matter to the agency for further consideration, and facility owner moved to intervene. The District Court held that: (1) facility owner was not required to specify whether it sought intervention as a plaintiff or defendant in motion to intervene; (2) intervention motion was not moot; (3) timeliness factors
weighed in favor of intervention of facility owner; and (4) district court would not vacate EPA’s approval of variance on remand to agency for further consideration. Motions granted.

33. *Nat’l Wildlife Fed’n, et al. v. Dep’t Of Environmental Quality*, No. 307602, 2014 WL 3928563, __ N.W. 2d __ (Mich. Ct. App. 2014). Appellants appealed by leave granted from the circuit court’s order affirming the decision of the Department of Environmental Quality (DEQ) to grant a mining permit to the Kennecott Eagle Minerals Company. At issue is appellee Kennecott Eagle’s proposal to develop an underground mine to extract nickel and copper from the sulfide ores beneath the headwaters of the Salmon Trout River. The Keweenaw Bay Indian Community intervened in this case over its concerns over the impacts of mining operations on the cultural traditions associated with Eagle Rock. Appellees objected to further development of this issue below on the ground that appellants had stipulated to limit such advocacy to the issue of the Keweenaw Bay Indian Community’s standing to intervene. The ALJ, however, reached the issue on its merits, and determined that further findings were in order. The DEQ’s final decision-maker, however, alternatively concluded that a stipulation kept the issue off the table, and that “place of worship” for purposes of Rule 425.202(2)(p) referred to buildings for human occupancy, not purely outdoor locations. The circuit court in turn affirmed the DEQ on those alternative grounds.

The court affirmed on still other grounds. Kennecott submitted its EIA in February 2006, and public hearings on the mining application were held in September of that year. In their brief on appeal, appellants advise that Kennecott and the DEQ “were informed of the significance of Eagle Rock during the Part 632 public comment period,” thus admitting that Kennecott had no knowledge of any such customs when it submitted its EIA. Appellants nowhere suggest that any investigation or inquiry on Kennecott’s part in those early stages of the proceedings was deficient, nor do they cite any authority for the proposition that a mining applicant is obliged to update its EIA throughout the whole review process to take account of newly acquired information. Accordingly, assuming without deciding that no stipulation prevented litigation of this issue, and also that “places of worship” for purposes of Rule 425.202(2)(p) include such outdoor locations as Eagle Rock, we nonetheless hold that Kennecott Eagle’s EIA was not deficient for want of consideration of Eagle Rock as a place of worship, because it neither knew, nor should have known, of such traditional cultural uses of that location when it offered its EIA. For the reasons stated, we affirm the decision of the circuit court affirming the DEQ’s decision to grant Kennecott Eagle a Part 632 mining permit. Affirmed.

*F. Fisheries, Water, FERC, BOR*
34. **Squaxin Island Tribe v. Wash. State Dept. of Ecology**, No. 42710–9–II, 312 P.3d 766 (Wash. Ct. App. Nov. 13, 2013). Indian tribe sought review of Department of Ecology’s denial of its rulemaking petition, which sought amendments to watershed management rules to protect minimum instream flows of creek. The Superior Court found that denial of petition was arbitrary and capricious. Department appealed. The appellate court held that: (1) Department’s written denial of tribe’s rulemaking petition satisfied statute that required agency to provide reasons for rejecting a rulemaking request, and (2) decision to deny tribe’s rulemaking petition was not arbitrary and capricious. Reversed.

35. **U.S. v. Brown; U.S. v. Jerry A. Reyes, a/k/a Otto Reyes, Marc L. Lyons, and Frederick W. Tibbetts, a/k/a Bud Tibbetts**, Nos. 13–68 and 13–70, 2013 WL 6175202 (D. Minn. 2013). Defendants Michael Brown, Jerry Reyes, Marc Lyons, and Frederick Tibbetts were indicted for violating the Lacey Act by transporting and selling fish in violation of tribal law. 16 U.S.C. § 3372(a).1 Defendants moved to dismiss their respective indictments on the grounds that, as members of the Leech Lake and White Earth bands of Chippewa Indians, their right to fish on the Leech Lake Reservation is protected by the 1837 Treaty with the Chippewa, 7 Stat. 536, July 29, 1837, such that the federal prosecution violated their treaty rights. U.S. Magistrate Judge Brisbois issued a Report and Recommendation (R&R) in each case, recommending that the Court deny Defendants’ motions to dismiss. Defendants objected to the R&Rs. The Court sustained the objections. The Court dismissed Defendants’ indictments because the 1837 Treaty protects Defendants’ right to fish on the reservation and Congress has not specifically abrogated that right.

36. **Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Black**, No. 06-2248, 2013 WL 6796423 (D. Kan. 2013). Before the court were cross motions for summary judgment filed by defendant Nemaha Brown Watershed Joint District No. 7 and plaintiff Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas. The Tribe and the District entered into the Watershed Plan and Environmental Impact Statement for the Upper Delaware and Tributaries Watershed (Agreement) in 1994 to serve as co-sponsors of a project aimed to carry out works of improvement for soil conservation and for other purposes, including flood prevention. The parties agreed to co-sponsor the project after failed attempts by each party to sponsor the project on its own. In addition to twenty floodwater retarding dams and other various improvements, the Agreement included plans for a multipurpose dam with recreational facilities, otherwise known as the “Plum Creek Project.” The Tribe asked the District multiple times to exercise its power of eminent domain to condemn non-Indian-owned land for the Plum Creek Project that the Tribe had been unable to acquire on its own. The District declined the Tribe’s request each time. In essence, the Tribe claimed that the Agreement is a binding contract that obligates the District to condemn 1,200 acres of
land on the Tribe’s behalf to build the Plum Creek Project. The court granted summary judgment in the District’s favor and against the Tribe based on its determination as a matter of law that the Agreement does not obligate the District to condemn on the Tribe’s behalf.

37. **Skokomish Indian Tribe v. Goldmark**, No. C13–5071, 2014 WL 119022, __ F. Supp. 2d __ (W.D. Wash. 2014). An Indian tribe brought action against government officials, seeking to protect the privilege of hunting and gathering roots and berries on open and unclaimed lands, guaranteed by Treaty. Defendants moved to dismiss. The District Court held that: (1) Indian tribe established a cognizable injury for purposes of Article III standing; (2) Eleventh Amendment did not bar Indian tribe's claims against county prosecutors; (3) Eleventh Amendment did not bar Indian tribe's claims against Director of Washington Department of Fish and Wildlife (WDFW) and Chief of WDFW Enforcement; (4) Eleventh Amendment did not bar Indian tribe’s claims against Washington State Attorney General; (5) Eleventh Amendment barred Indian tribe’s claims against the Washington State Commissioner of Public Lands and Administrator for the Department of Natural Resources (DNR) and the Supervisor for DNR; (6) other signatory Indian tribes to Treaty were necessary parties; and (7) prejudice to other signatory Indian tribes to Treaty, who were necessary parties and who could not be joined due to their sovereign immunity, warranted dismissal. Motion granted.

38. **U.S. v. Lummi Nation**, No. 12–35936, 2014 WL 4067168, __ F.3d __ (9th Cir. 2014). In proceedings to adjudicate fishing rights reserved by 1855 Treaty of Point Elliott, Lower Elwha Band of S'Klallams, Jamestown Band of S'Klallams, Port Gamble Band of S’Klallams, and Skokomish Indian Tribe sought determination that the Lummi Indian Tribe was violating 1974 District Court opinion in *United States v. Washington* by fishing in areas outside its adjudicated usual and accustomed grounds and stations. The District Court dismissed the action following the entry of summary judgment order in favor of plaintiff tribes, determining that the 1974 opinion did not intend to include disputed areas within Lummi tribe’s usual and accustomed grounds and stations. Plaintiff tribes appealed. The Appellate Court, 235 F.3d 443, affirmed in part and reversed in part. On remand, the District Court, 2012 WL 4846239, entered summary judgment on Klallam tribes’ request for determination that Lummi tribe’s usual and accustomed grounds did not include eastern portion of Strait of Juan de Fuca or waters west of Whidbey Island. Lummi tribe appealed. The Appellate Court held that law of the case doctrine did not control determination of Lummi tribe’s usual and accustomed grounds. Reversed and remanded.
G. Gaming

39. **State ex rel. Dewberry v. Kitzhaber**, No. A146366, 2013 WL 6022097, __ P.3d __ (Or. Ct. App. 2013). Residents near site of proposed casino brought action as relatoors for a writ of mandamus, challenging the Governor’s authority to enter into a gaming compact with tribes under the Indian Gaming Regulatory Act (IGRA). The Circuit Court dismissed the petition, and residents appealed. The Appellate Court, 187 P.3d 220, reversed and remanded, and the State appealed. The Supreme Court, 346 Or. 260, 210 P.3d 884, affirmed and remanded. On remand, the Circuit Court entered summary judgment in favor of Governor and tribes. Property owners appealed. The Appellate Court held that: (1) State statute governing agreements by the state and local governments with American Indian tribes conferred authority on Governor to enter into gaming compact with Indian tribes under IGRA; (2) the state constitutional ban on the operation of casinos in the state does not apply on Indian lands located within state’s borders; and (3) the statute authorizing the Governor to enter into gaming compact with Indian tribes did not improperly delegate legislative functions to the Governor in violation of separation of powers doctrine. Affirmed.

40. **Big Lagoon Rancheria v. California**, Nos. 10–17803, 10–17878, 2014 WL 211763 (9th Cir. 2014). An Indian tribe brought action alleging that the State violated the Indian Gaming Regulatory Act (IGRA) by failing to negotiate in good faith for a casino on a particular 11-acre parcel of land. The District Court granted summary judgment for the tribe, 759 F. Supp. 2d 1149, but, subsequently, granted the State’s motion for a stay pending appeal, 2012 WL 298464. Both parties appealed. The Appellate Court held that: (1) the tribe’s right to request negotiations under the IGRA depends on it having jurisdiction over Indian lands on which it proposed to conduct gaming; (2) the State could waive the IGRA’s “Indian lands” requirement; (3) the State’s challenge to entrustment of 11-acre parcel of land to tribe was timely; and (4) the 11-acre parcel of land did not constitute “Indian lands” over which tribe could demand negotiations. Reversed and remanded.

41. **Friends of Amador County v. Salazar**, No. 11–17996, 2014 WL 308560 (9th Cir. 2014). An advocacy organization and its members brought action against the State of California and its Governor, the Department of the Interior (DOI) and its Secretary, and the National Indian Gaming Commission (NIGC) and its Acting Chairman, challenging the state’s gaming compact with an Indian Tribe, and the federal recognition of the Tribe. The Indian tribe intervened. The District Court, 2011 WL 4709883, granted the Tribe’s motion to dismiss, and denied a motion to vacate the dismissal, 2011 WL 6141291. The advocacy organization and its members appealed. The Appellate Court held that: (1) the District Court did not abuse its discretion in determining that the Indian Tribe was a required party; (2) the District Court did not
abuse its discretion in determining that it would not be feasible to join the Indian Tribe; (3) the District Court did not abuse its discretion in determining that the Indian Tribe was an indispensable party; and (4) the public rights exception to joinder did not apply. Affirmed.

42. *Catawba Indian Nation v. State*, No. 2012–212118, 2014 WL 1307180, __ S.E. 2d __ (S.C. 2014). An Indian tribe brought a declaratory judgment action against the state to determine the effect of Gambling Cruise Act on its gambling rights. The Circuit Court granted state summary judgment. Tribe appealed. The Supreme Court held that: (1) declaratory judgment action was not precluded by doctrine of collateral estoppel; (2) action was not precluded by doctrine of res judicata; but (3) Act did not authorize tribe to offer video poker on its reservation. Affirmed in part and reversed in part.

43. *Alabama v. PCI Gaming Authority*, No. 2:13–CV–178, 2014 WL 1400232 (M.D. Ala. 2014). (From the opinion.) The State of Alabama brought an equity action under state-nuisance law and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721, 18 U.S.C. §§ 1166–1168, to prevent allegedly unlawful gaming at three Indian-run casinos in Alabama: Creek Casino in Elmore County; Wind Creek Casino in Escambia County; and Creek Casino in Montgomery County. Defendants are PCI Gaming Authority, the commercial entity through which the Poarch Band of Creek Indians ("Poarch Band") operates the casinos, and members of PCI Gaming Authority and of the Poarch Band Tribal Council in their official capacities. After careful consideration of the arguments of counsel, the pertinent law, and the pleadings, as supplemented by the undisputed evidence, the court found that the Defendants' motion to dismiss was due to be granted.

H. Jurisdiction, Federal

44. *U.S. v. Zepeda*, No. 10-10131, __ F.3d __, 2013 WL 5273093, (9th Cir. 2013). On October 25, 2008, Damien Zepeda was charged with conspiracy to commit assault, assault with a deadly weapon, and use of a firearm during a crime of violence. The indictment alleged that Zepeda was an “Indian [ ].” Following a jury trial, Zepeda was convicted of all counts. Zepeda's appeal called upon the court to decide whether a Certificate of Enrollment in an Indian tribe, entered into evidence through the parties' stipulation, was sufficient evidence for a rational juror to find beyond a reasonable doubt that the defendant was an Indian for the purposes of § 1153 where the government offers no evidence that the defendant's bloodline is derived from a federally recognized tribe. At Zepeda's trial, the government introduced into evidence a document entitled “Gila River Enrollment/Census Office Certified Degree of Indian Blood.” The document bore an “official seal” and stated that Zepeda was “an enrolled member of the Gila River
Indian Community,” and that “information [wa]s taken from the official records and membership roll of the Gila River Indian Community.” It also stated that Zepeda had a “Blood Degree” of “1/4 Pima [and] 1/4 Tohono O’Odham” for a total of 1/2. The prosecutor and Zepeda’s attorney stipulated to admission of the Certificate into evidence without objection. On appeal, Zepeda argued inter alia, that the government failed to prove beyond a reasonable doubt that he was an Indian under § 1153.

The Appellate Court held that the Tribal Enrollment Certificate was insufficient to establish that Zepeda was an Indian for the purposes of federal jurisdiction under § 1153 because the government introduced no evidence that Zepeda’s bloodline was derived from a federally recognized tribe. The court reversed Zepeda’s convictions under § 1153, in counts 2 through 9 of the indictment. Zepeda’s conviction for conspiracy in violation of 18 U.S.C. § 371 was unaffected by this disposition. Reversed in part and remanded for resentencing.

45. **Trazell v. Wilmers**, No. 12–01369, 2013 WL 5593042 (D.D.C. 2013). Car owner, a member of the Cherokee-Choctaw nation, brought action against bank, its director, and bank employee, alleging that the defendants repossessed his vehicle in violation of Treaty of Watertown, Fourth and Fifth Amendments, several of his statutory rights, international resolutions, and District of Columbia Municipal Regulations. The defendants moved to dismiss and the owner moved for summary judgment. The District Court held that:  (1) owner's complaint failed to state claim for violation of Treaty of Watertown; (2) the complaint failed to state claim for violation of Fourth Amendment, Fifth Amendment Due Process Clause, and section 1983; (3) the complaint failed to state claim for violation of statute providing protection to foreign officials, official guests, and internationally protected persons from physical attack or imprisonment; (4) the complaint failed to state claim for violation of statute governing loans by a bank on its own stock; (5) the complaint stated claim for violation of municipal regulation requiring holder to retain or store repossessed vehicle for 15 days; and (6) the genuine dispute of material fact existed as to whether defendants had valid security interest in owner's vehicle. Defendants' motion was granted in part, denied in part and the owner's motion denied.

46. **Brenner v. Bendigo**, No. CIV 13–0005, 2013 WL 5652457 (D.S.D. 2013). Plaintiff Michelle Brenner (Brenner) filed an Affidavit for Garnishment (Affidavit) seeking to enforce a tribal court judgment in Federal District Court pursuant to a state garnishment statute. Garnishees Beau Bendigo, Larry Bendigo, and Bendigo Ranch filed a Motion to Dismiss arguing that this Court lacks subject matter and personal jurisdiction to enforce the tribal court judgment, that the Affidavit failed to state a claim upon which relief can be granted, and that Brenner had not complied with South Dakota Codified Law (SDCL) 21–18–9. Brenner brought a wrongful death action against Cody
Bendigo in Cheyenne River Sioux Tribal Court. In an Order on Damages dated December 20, 2006, the Cheyenne River Sioux Tribal Court awarded Brenner a $3,000,000.00 judgment against Cody Bendigo. It does not appear that Brenner has sought first to enforce this judgment in the Cheyenne River Sioux Tribal Court before attempting the collection proceeding before this Court. Beau Bendigo is an enrolled member of the Cheyenne River Sioux Tribe who lives with his father, Larry Bendigo, on tribal trust land within the boundaries of the Cheyenne River Indian Reservation. Beau Bendigo's ranch, called Bendigo Ranch, and ranching equipment are on tribal trust land that he leases from the Cheyenne River Sioux Tribe and the United States Bureau of Indian Affairs and sit within the confines of the Cheyenne River Indian Reservation. Thus, it appears that all the property that Brenner seeks to execute upon is either tribal trust land held in trust by the Bureau of Indian Affairs for the Cheyenne River Sioux Tribe or assets located on tribal trust property within the Cheyenne River Indian Reservation. The court granted the defendant's Motion to Dismiss and dismissed the plaintiff's Affidavit for Garnishment.

47. Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation, No. 13-00123, 2013 WL 5954391 (D. Utah 2013). This matter was before the court on defendants’ motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendants moved to dismiss Plaintiff Becker’s amended complaint, which stated three causes of action: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; and (3) accounting. Becker’s claims arose from a dispute over an agreement he entered into with one or more of the defendants. Because plaintiff’s complaint did not, on its face, plead causes of action created by federal law, and because the plaintiff’s causes of action did not include, as an essential element, any right or immunity created by federal law, the court concluded that plaintiff’s claims did not meet the “arising under” standard for federal-question jurisdiction and that the court was without jurisdiction to hear plaintiff’s claims. Accordingly, the court granted defendants’ motion to dismiss for lack of subject-matter jurisdiction and dismissed plaintiff’s amended complaint.

recommended an order granting in part and denying in part the FTC’s Motion for Partial Summary Judgment and granting in part and denying in part the Tribal Chartered Defendants’ Motion for Legal Determination and defendant Little Axe’s Cross-Motion for Legal Determination. Defendant Little Axe filed an Objection in which he argues that the Magistrate Judge erred in finding that the FTC does have authority under the FTC Act to regulate Indian tribes, arms of Indian tribes, employees of arms of Indian tribes, and contractors of arms of Indian tribes and in failing to apply Indian law canons and certain Supreme Court opinions that defendant Little Axe asserted are controlling on this issue. The Tribal Chartered defendants filed an Objection in which they argued that the Magistrate Judge erred in his conclusion that (1) the defendants bear the burden of proving whether the FTC Act applies to the Tribal Chartered Defendants and that (2) the FTC has authority under the FTC Act to regulate Indian tribes, arms of Indian tribes, employees of arms of Indian tribes, and contractors of arms of Indian tribes. The court found that the Magistrate Judge correctly found that the FTC Act is a federal statute of general applicability that under controlling Ninth Circuit precedent grants the FTC authority to regulate arms of Indian tribes, their employees, and their contractors. The court accepted and adopted in full, to the extent it is not inconsistent with this opinion the Magistrate Judge’s Recommendations.

49. Tavares, et al. v. Whitehouse, et al., No. 2:13–cv–02101, 2014 WL 1155798 (E.D. Cal. 2014). This matter was before the Court on Respondents’ Motion to Dismiss for lack of jurisdiction. Petitioners are members of the United Auburn Indian Community (“Tribe”). Petitioners challenged punishment imposed on them by the Tribal Council of the United Auburn Indian Community. Respondents, members of the Tribal Council, sought dismissal, arguing the case concerned internal tribal matters, and therefore the Court lacked jurisdiction. Petitioners opposed dismissal arguing their petition was within the Court’s jurisdiction under the Indian Civil Rights Act of 1968 (“ICRA”), 25 U.S.C. § 1303, because their exclusion from tribal lands and suspension of per capita gaming benefits. Although temporary, it still constituted “detention” within the meaning of the statute. This case arose from a dispute over tribal management. Petitioners initiated an unsuccessful recall campaign attempting to remove Respondents, members of the Tribal Council, from office. Afterward, the Tribal Council determined Petitioners had violated a Tribal ordinance prohibiting defamation. Petitioners alleged their punishment was imposed in retaliation for the recall campaign. Petitioners argued their punishment constituted banishment, invoking this Court’s ICRA habeas jurisdiction. The Court analyzed the issue raised by Respondents' motion: whether Petitioners’ punishment was so severe a restraint on liberty it constituted “detention” sufficient to invoke the Court’s federal habeas corpus jurisdiction under ICRA. The Petition for Writ of Habeas Corpus under the Indian Civil Rights Act was dismissed.

51. **E.E.O.C. v. Forest County Potawatomi Community**, No. 13–MC–61, 2014 WL 1795137 (E.D. Wis. 2014). The Equal Employment Opportunity Commission filed this action to enforce a subpoena it served pursuant to the Age Discrimination in Employment Act (ADEA or the Act) on the Forest County Potawatomi Community (Tribe) in its capacity as proprietor of Potawatomi Bingo Casino. The subpoena sought information relating to a charge of discrimination filed by Federico Colón, who was not a member of the Tribe but who was employed at the Casino as a “security shift manager.” The Tribe contended that it was not subject to the ADEA and that therefore the subpoena was invalid. It also contended that the subpoena should not be enforced because the EEOC had failed to conciliate and because the subpoena sought irrelevant information. The Tribe’s primary argument as to why it was not covered by the ADEA was that it was not an “employer” within the meaning of the Act. The court concluded that the ADEA was generally applicable and therefore presumed to apply to Indian tribes; that the Tribe’s relationship with Colón was covered by the ADEA; that the EEOC was not bound by a statement made in a dismissal determination; that sovereign immunity does not prevent the Tribe from having to comply with the EEOC’s subpoena; and that information relating to age-based complaints made by employees other than Colón around and after the time of his termination is relevant. The court ordered that the Tribe shall comply with the subpoena within thirty days.

52. **Bodi v. Shingle Springs Band of Miwok Indians**, No. S-13-1044, 2014 WL 1922783 (E.D. Cal. 2014). Tribe member brought California state court action against tribe and tribal health program and board, alleging, inter alia, that tribe member was wrongfully terminated due to her illness in violation of the Family and Medical Leave Act (FMLA). Following removal, tribe moved to dismiss. The district court held that tribe waived sovereign immunity by removing action to federal court. Motion granted in part and denied in part.

53. **Caddo Nation of Okla. v. Court of Indian Offenses for the Anadarko Agency**, No. 14-281, 2014 WL 3880464 (W.D. Okla. 2014). Before the Court was Defendant’s Motion to Dismiss. This action arose out of a dispute between two competing factions, each claiming, to the exclusion of the other, to have leadership of and control over the Caddo Nation of Oklahoma. A faction supporting Vice–Chairman Phillip Smith, on behalf of the Caddo Nation of Oklahoma, filed suit on March 13, 2014,
in the Court of Indian Offenses for the Caddo Nation of Oklahoma, Anadarko, Oklahoma. That faction obtained emergency injunctive relief to enjoin Plaintiff Brenda Edwards from acting as Chairperson for the Caddo Nation. The Court of Indian Offenses for the Caddo Nation, Anadarko, Oklahoma is the Defendant in this action. Defendant is one of the courts established by the United States Department of the Interior pursuant to 25 C.F.R. Part 11. On March 20, 2014, Plaintiffs, a faction supporting Brenda Edwards, commenced this action on behalf of the Caddo Nation of Oklahoma and moved for issuance of a temporary restraining order. Plaintiffs sought to enjoin the enforcement of the Emergency Order issued by the CFR Court against Plaintiff Brenda Edwards.

The Court denied the request for issuance of a temporary restraining order, finding Plaintiffs failed to meet their burden pursuant to Fed.R.Civ.P. 65(b). It was well-established that as a matter of comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies. Plaintiffs contended the tribal exhaustion requirement should not apply because the CFR Court was not a tribal court and further, because the CFR Court lacked subject matter jurisdiction to consider the dispute. The Court rejected Plaintiffs’ contentions and found that Plaintiffs’ contentions are based on the false presumption that the CFR Court clearly lacks jurisdiction over the dispute between the two factions.

The proceedings in the CFR Court were the first to be filed and a factual record has been made in those proceedings addressing the jurisdictional issue. Plaintiffs have the opportunity to be heard in that forum, to raise the jurisdictional challenges there, and to appeal any adverse determination. The Court found it should abstain from exercising jurisdiction until Plaintiffs have fully exhausted the remedies available to them in the tribal courts. When tribal remedies are fully exhausted, Plaintiffs may then, if necessary, proceed in federal court. The Court granted Defendant’s Motion to Dismiss and dismissed the action without prejudice to refiling.

I. Religious Freedom

54. Chance v. Tex. Dep’t of Criminal Justice, et al., No. 12-41015, 2013 WL 4517263 (5th Cir. 2013). State prisoner brought action against prison officials, challenging restrictions on his Native American religious practices under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The District Court, 2012 WL 3257836, adopted report and recommendation of Magistrate Judge, 2012 WL 3257813, and granted defendants’ motion for summary judgment. Prisoner appealed. The Appellate Court held that: (1) prison’s complete ban on communal pipe-smoking did not violate RLUIPA; (2) prison’s schedule of Native American religious services did not
violate RLUIPA; (3) prison policy limiting Native American Smudging ritual to outdoor ceremonies did not violate RLUIPA, but (4) genuine issue of material fact with regard to whether prison’s refusal to allow prisoner to possess locks of relatives’ hair in accordance with his Native American religious practice was least restrictive means of furthering prison’s compelling interests precluded summary judgment. Affirmed in part, vacated in part, and remanded.

55. **Yellowbear v. Lampert**, No. 12–8048, 2014 WL 241981 (10th Cir. 2014). State prisoner commenced action against individual prison officials, seeking prospective injunctive relief against them for violations of Religious Land Use and Institutionalized Persons Act (RLUIPA). The District Court granted summary judgment for prison personnel. Prisoner appealed. The Appellate Court held that factual issue existed as to whether preventing state prisoner from exercising his sincerely held religious belief that using sweat lodge cleansed and purified his mind, spirit, and body served compelling governmental interest and that it was least restrictive means of furthering that interest. Vacated and remanded.

56. **State v. Armitage**, Nos. SCWC–29794, SCWC–29795, SCWC–29796, 2014 WL 305638, __ P.3d __ (Haw. 2014). Three defendants, all native Hawaiians, were each charged by complaint with entering the Kahojolawe island reserve without authorization, a petty misdemeanor. The cases were consolidated. The parties entered into a stipulation as to evidence, and the District Court found defendants guilty as charged. Defendants appealed. The Intermediate Court of Appeals, 2013 WL 1829663, affirmed. Defendants filed an application for writ of certiorari, which the Supreme Court accepted. The Supreme Court held that: (1) complaints did not allege the requisite state of mind, requiring dismissal without prejudice; (2) statute of limitations did not bar the prosecution from refiling complaints against defendants; (3) evidence was sufficient to support the convictions; (4) native Hawaiian privilege did not bar the convictions; (5) defendants had standing to challenge the constitutionality of the administrative rule prohibiting a person from entering the reserve without authorization; (6) expressed purpose of defendants in entering the reserve involved conduct that did not constitute speech protected under the First Amendment; and (7) defendants did not show that the exercise of their religion was substantially burdened by the prohibition rule or a related procedure rule. Vacated and remanded.

The Court of Appeals granted petitions and certified case. The Supreme Court held that: (1) notice about public comment period satisfied procedural due process; (2) the listing satisfied Act requirements on maintenance, inspection, and integrity; (3) land grant common lands did not constitute “state land” subject to regulation under Act; (4) substantial evidence supported Committee’s findings on historic eligibility; (5) Committee had discretion to fine-tune boundaries during course of Committee’s investigation of request for a permanent listing; (6) Committee’s apparent clerical error in calculating total number of acres did not render the listing arbitrary and capricious; and (7) the listing did not violate Establishment Clause. Affirmed in part, reversed in part, and remanded.

58. **Native American Council of Tribes v. Weber**, Nos. 13–1401, 13–2745, 2014 WL 1644130, 750 F.3d 742 (8th Cir. 2014). Native American organization and inmates brought action against prison officials, claiming that the prison’s policy of prohibiting tobacco use by Native American inmates during religious activities substantially burdened the exercise of their religious beliefs in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The District Court, 897 F. Supp. 2d 828, found the restrictions violated RLUIPA and ordered parties to confer. After the parties failed to agree on a new tobacco policy, the District Court, 2013 WL 310633, entered a remedial order granting injunctive relief. The prison officials appealed. The Appellate Court held that: (1) the inmates’ use of tobacco during Native American ceremonies was a religious exercise; (2) the prison’s complete ban on tobacco use substantially burdened the exercise of the inmates’ religious beliefs; (3) a complete ban was not the least restrictive means of furthering the prison’s interest in order and security; and (4) the District Court’s remedial order was narrowly tailored to remedy the violation of inmates’ rights. Affirmed.

59. **Sharp v. Gay**, No. 2:11 CV 925, 2014 WL 3556341 (D. Ariz. 2014). Plaintiff Gabriel Sheridan Sharp, a Mojave Indian and an inmate at the Central Arizona Correctional Facility (CACF), brought suit against Charles Ryan, Director of the Arizona Department of Corrections (ADOC). Invoking 42 U.S.C. § 1983, Sharp claimed all defendants denied him equal protection by refusing to allow Native American inmates an additional weekly “turnout,” the prison’s term for a scheduled inmate religious activity. Sharp also claimed that ADOC policy regarding inmate access to firewood, the fuel for Native American sweat ceremonies, violated RLUIPA. The Court denied Sharp’s Equal Protection Clause claim but his RLUIPA claim was granted. ADOC was directed to establish a group religious account.

requests to practice their Native American faith and some related to a request for clergy visits. Three inmates claimed that prison officials violated the Act by denying them access to a sweat lodge for religious ceremonies and refusing to provide traditional foods for Native American religious ceremonies. The inmates offered to pay for the lodge. The state commissioner promised a decision “in the near future,” more than four years ago and since has not issued a decision yet. The three inmates also requested Native American foods for their annual powwow.

The District Court granted summary judgment to the prison officials on the sweat-lodge and ceremonial-foods requests, holding that the inmates failed as a matter of law to support their claims under RLUIPA. The second group of inmates contends that prison officials violated RLUIPA when they failed to facilitate inmate access to visiting clergy members. Before June 2010, the Kentucky State Penitentiary had regularly granted visiting clergy members the opportunity to see prison inmates under a “special visit” exception to the prison visitation policy. But the practice changed when prison officials discovered that it conflicted with statewide prison procedures. The Religious Land Use and Institutionalized Persons Act prohibits state and local governments from placing “a substantial burden” on the “religious exercise” of any inmate unless they establish that the burden furthers a “compelling governmental interest” and does so in the “least restrictive” way. 42 U.S.C. § 2000cc–1(a).

The appeal presented three questions: (1) Is there a triable issue of fact over whether RLUIPA gives the inmates a right to have access to a sweat lodge for faith-based ceremonies? (2) Is there a triable issue of fact over whether RLUIPA gives the inmates a right to buffalo meat and other traditional foods for a faith-based once-a-year powwow? (3) Does RLUIPA permit inmates to collect money damages from prison officials sued in their individual capacities?

The answers, respectively, were yes, yes and no. RLUIPA applies to prisons that receive federal funds and prohibits state and local governments from placing “a substantial burden” on the “religious exercise” of any inmate unless they establish that the burden furthers a “compelling governmental interest” and does so in the “least restrictive” way. 42 U.S.C. § 2000cc–1(a). To establish a cognizable claim under RLUIPA, the inmate must first demonstrate that a prison policy substantially burdens a religious practice. So long as the practice is traceable to a sincerely held religious belief, see Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005), it does not matter whether the inmates’ preferred exercise is “central” to his faith, 42 U.S.C. § 2000cc–5(7)(A). Once an inmate makes this showing, the prison policy survives only if it serves a compelling governmental interest in the least restrictive way. Id. § 2000cc–1(a).
61. **White v. University of California**, No. 12–17489, 2014 WL 4211421, 765 F.3d 1010 (9th Cir. 2014). Scientists brought declaratory judgment action against a tribal repatriation committee, university, its regents, and certain of its officials, opposing repatriation of aboriginal human remains that had been possessed by federally funded museums and educational institutions since their discovery on university property during archaeological field excavation project. The District Court dismissed the complaint. Scientists appealed. The Appellate Court held that: (1) scientists had standing to bring action seeking a declaration that the remains were not “Native American” within meaning of the Native American Graves Protection and Repatriation Act (NAGPRA); (2) NAGPRA did not abrogate tribes’ sovereign immunity from suit; (3) the tribal repatriation committee was entitled to tribal sovereign immunity as an arm of the tribe; (4) the tribal repatriation committee did not waive its sovereign immunity; (5) the tribes and repatriation committee were necessary parties; (6) the tribes and repatriation committee were indispensable parties; and (7) the public rights exception to compulsory joinder rule did not apply. Affirmed

**J. Sovereign Immunity**

62. **Swanda Bros., Inc. v. Chasco Constructors, Ltd., L.L.P, et al.**, No. CIV–08–199–D, 2013 WL 4520203 (W.D. Okla. 2013). Before the Court was the renewed motion of Defendant Kiowa Casino Operations Authority (KCOA) to dismiss the claims due to lack of subject matter jurisdiction. KCOA argued that the Court lacked subject matter jurisdiction because KCOA was entitled to tribal sovereign immunity from liability on the claims asserted by plaintiff because it was an instrumentality of the Kiowa Indian Tribe of Oklahoma (KIC). Evidence was presented which referenced a July 9, 2005 meeting at which the KIC considered a ballot initiative authorizing KCOA to enter into financing and other agreements with regard to the construction of a gaming facility. Because KCOA had previously represented to the Court that no election had taken place, the Court determined the new evidence warranted reopening the matter. The Court further found that the KIC validly authorized KCOA to consent to jurisdiction in the state and federal courts, and to thereby waive tribal sovereign immunity, by authorizing it to execute agreements containing mandatory arbitration clauses and/or agreements to consent to federal and state court jurisdiction. The Court found that KCOA validly waived tribal sovereign immunity in executing the Chasco Construction Agreement. Accordingly, the renewed motion to dismiss was denied.

63. **Carsten v. Inter-tribal Council of Nevada et al.**, No. 3:12–cv–00493, 2013 WL 4736709 (D. Nev. 2013). Before the Court was defendants’ Motion to Dismiss and Motion to Dismiss the Amended Complaint. Plaintiff was employed by ITCN as the program director for the Women, Infants and Children (WIC) program until she was terminated on or about July 9, 2012. Plaintiff alleged that, prior to termination, she had
a serious medical condition that made her eligible for time off under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 et seq. Plaintiff claimed that defendants violated the FMLA by: (1) refusing to let the plaintiff leave; and (2) terminating her for requesting leave. Defendants argued that the ITCN is entitled to sovereign immunity. They moved to dismiss for lack of subject matter jurisdiction under Rule 12(b) and offered affidavits in support.

As there is no clear waiver or congressional abrogation in this case, the question the Court faces is whether the ITCN, as an inter-tribal council and not a tribe itself, can rightfully be entitled to sovereign immunity. Sovereign immunity is not limited to the tribe itself. “When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe.” Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006) (citations omitted). Sovereign immunity thus exists where the relevant entity’s activities can be properly attributed to the tribe. While the Ninth Circuit has not ruled on whether an inter-tribal council is entitled to sovereign immunity, in Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1188 (9th Cir. 1998), the Ninth Circuit held that a non-profit inter-tribal council is properly considered a tribe for the purposes of the Indian tribe exception of Title VII. In so holding, the Ninth Circuit looked to the reasoning in Dille v. Council of Energy Res. Tribes, 801 F.2d 373, 375–76 (10th Cir. 1986), which held that Congress intended to exempt individual tribes and collective efforts by Indian tribes because “the purpose of the tribal exemption, like the purpose of sovereign immunity itself, was to promote the ability of Indian tribes to control their own enterprises.” See Pink, 157 F.3d at 1188. Tribal immunity extended to employees of a tribe “acting in their official capacity and within the scope of their authority.” Cook v. AVI Casino Enter., Inc., 548 F.3d 718, 727 (9th Cir. 2008). Plaintiff sued Sterns and Crawford in their official capacity only. Plaintiff argued that the FMLA applies to the ITCN but the Court need not reach that argument. Absent clear waiver or congressional abrogation, the Court did not have the subject matter jurisdiction to consider this case. The cases cited by plaintiff in support of its argument that the ITCN is an employer subject to the FMLA were inapplicable. Those cases considered whether a general federal statute applied to a tribe or tribal entity in suits brought by the tribes or the federal government. Therefore, sovereign immunity was not an issue in those cases. The Court granted the defendants’ Motion to Dismiss the Amended Complaint with prejudice and denied the defendants’ Motion to Dismiss as moot.

64. Martin v. Quapaw Tribe of Oklahoma, No. 13–CV–0143, 2013 WL 5274236 (N.D. Okla. 2013). (From the opinion.) Before the Court were the Motion of the Defendant to Dismiss for Lack of Subject Matter Jurisdiction and plaintiff’s Motion for Leave to Amend Petition. The Quapaw Tribe of Oklahoma (the Tribe), defendant, argued that it had not waived its sovereign immunity from suit for tort claims arising at its gaming facilities and that plaintiff must pursue his claim against the Tribe’s
subdivisions in tribal court. Plaintiff responded that sovereign immunity was waived or should be treated as though it had been waived. On October 9, 2012, Todd Martin filed this case in the District Court of Ottawa County, Oklahoma, alleging that the Tribe operates the Downstream Casino and Resort (the Casino) in Ottawa County, Oklahoma, and that he was harmed on January 19, 2011, by a dangerous condition on the property when he was a Casino patron. A compact was entered into between the Tribe and the State of Oklahoma regulating gaming on tribal land, entitled “Tribal–State Gaming Compact Between the Quapaw Tribe of Oklahoma and the State of Oklahoma” (the Compact). The Casino is operated and managed by the Downstream Development Authority of the Quapaw Tribe of Oklahoma (Development Authority). Because the Development Authority manages the Casino (and the games played within), it is the relevant “enterprise” under the Compact. The Development Authority carries the insurance required by the Compact. Defendant argues that plaintiff’s petition should be dismissed for lack of subject matter jurisdiction based on the Tribe’s sovereign immunity. The Compact does not unequivocally waive the Tribe’s sovereign immunity. It waives only the enterprise’s sovereign immunity, and only in limited cases.

Because the Tribe had not consented to suit and there was no congressional authorization for suit, the Tribe was entitled to sovereign immunity. Even if the enterprise could be sued, any such waiver of sovereign immunity was not imputed to the Tribe. The petition was dismissed for lack of subject matter jurisdiction.

65. Sheffer, et al. v. Buffalo Run Casino, PTE, Inc., et al, No. 109265, 315 P.3d 359, 2013 WL 5332615 (Okla. 2013). The driver of a tractor trailer and passengers in tractor trailer sued Native American tribe and its casino under a theory of dram-shop liability. The parties were injured when a tractor trailer collided with the vehicle driven by the driver defendant. The driver of the tractor trailer was allegedly intoxicated from drinking alcohol at a gaming casino. The District Court dismissed, sua sponte, owner, determining that existing injunctions prohibited suit for any tort claims against a tribe or a tribal entity. Plaintiffs appealed. The Supreme Court held that: (1) the tribe was immune from suit in state court for compact-based tort claims, overruling Griffith v. Choctaw Casino of Pocola, 2009 OK 51, 230 P.3d 488; Dye v. Choctaw Casino of Pocola, 2009 OK 52, 230 P.3d 507, Cossey v. Cherokee Nation Enters, 2009 OK 6, 212 P.3d 447; (2) the tribe did not expressly waive its sovereign immunity from state dram shop claims when it applied for and received a state liquor license, overruling Bittle v. Bahe, 2008 OK 10, 192 P.3d 810. Affirmed.

66. Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians, No. 13–cv–372, 2013 WL 5803778 (W.D. Wisc. 2013). Non-Indian brokerage firm and bondholders, which were involved in a commercial transaction with a tribal economic development corporation, brought an action seeking declaration that a
tribal court lacked subject matter jurisdiction over them and an injunction preventing any further action by the tribe and its economic development corporation in a pending matter against them in that forum. Tribal defendants moved to dismiss. The District Court held that: (1) if forum selection clauses in documents created in connection with non-Indians’ commercial transaction with tribal economic development corporation were valid, exhaustion of tribal remedies doctrine would not preclude federal court from exercising jurisdiction over the suit; (2) tribal sovereign immunity did not preclude district court from resolving suit; and (3) the Court would not decline to exercise declaratory jurisdiction over non-Indians’ suit.

67. *Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, No. 13–1438, 2013 WL 6645395, 737 F.3d 1075 (6th Cir. 2013). State brought action to enjoin Indian tribe from applying to have land taken into trust by Interior Secretary pursuant to Michigan Indian Land Claims Settlement Act. The District Court granted the state’s motion for preliminary injunction, and the tribe appealed. The Appellate Court held that: (1) the state’s claim that tribe’s trust submission would violate the tribal–state compact was barred by tribe’s sovereign immunity, and (2) the state’s claim that Indian tribe’s conduct of class III gaming on trust property would violate the tribal–state compact and Indian Gaming Regulatory Act (IGRA) was not ripe for adjudication. Reversed.

68. *MM & A Productions, LLC v. Yavapai-Apache Nation*, No. 2 CA–CV 2013–0051, 2014 WL 185396 (Ariz. Ct. App. 2014). An event production company filed complaint against the Indian tribe and tribe’s casino, alleging breach of exclusive entertainment and production agreement and associated claims. The Superior Court, No. C20085949, dismissed the complaint for lack of subject matter jurisdiction. Company appealed. The Appellate Court held that: (1) the alleged apparent authority to waive the tribe’s sovereign immunity by signing agreement did not constitute valid waiver; (2) the Trial Court did not abuse its discretion in concluding that further discovery was unnecessary to determine that agreement did not waive immunity; and (3) the waiver of sovereign immunity signed prior to execution of agreement was insufficient to waive immunity as to agreement. Affirmed.

dismissed the case for lack of subject matter jurisdiction. The People appealed. The Court of Appeal held that: (1) the tribal economic development authority was protected by tribal sovereign immunity, and (2) the tribal corporation was protected by tribal sovereign immunity. Affirmed.

70. **Bonnet v. Harvest (U.S.) Holdings, Inc.**, No. 12–4068, 2014 WL 292616 (10th Cir. 2014). Petroleum landman, and his sole proprietorship, brought action against various companies and individuals arising from Tribe’s termination of his contract to provide independent consultant services. Plaintiff served Tribe with non-party subpoena duces tecum requesting documents. The District Court, 2012 WL 994403, denied the Tribe’s motion to quash based on tribal immunity. Tribe appealed. The Appellate Court held that: (1) the denial of motion to quash based on tribal immunity was an immediately appealable collateral order, and (2) as matter of first impression in Circuit, the subpoena itself was “suit” against Tribe triggering tribal sovereign immunity. Reversed.

71. **In re Grand Jury Proceedings**, No. 13–2498, 2014 WL 702193 (1st Cir. 2014). Government moved to compel compliance by Indian tribe’s historic preservation office with subpoena duces tecum that was issued by since-defunct grand jury, representing that investigation had been transferred to a newly-empanelled grand jury. The preservation office objected and moved to quash subpoena on grounds of tribal sovereign immunity and unreasonableness. After granting the motion to compel and issuing a show cause order due to preservation office’s noncompliance, the District Court held the preservation office in civil contempt. Preservation office appealed. The Appellate Court held that: (1) the subpoena could not be enforced by civil contempt sanctions after expiration of issuing grand jury; (2) the exception to mootness doctrine applied to warrant review of preservation office’s additional challenges to subpoena; (3) tribal sovereign immunity provided no refuge from subpoena power of federal grand jury; and (4) denial of motion to quash subpoena as unreasonable was not abuse of discretion. Vacated.

72. **City of Duluth v. Fond du Lac Band of Lake Superior Chippewa**, No. A12–1324, 2014 WL 949284, 843 N.W. 2d 577 (Minn. 2014). (from the opinion) In April 2012, respondent City of Duluth (the City) commenced an action in state District Court against appellant Fond du Lac Band of Lake Superior Chippewa (the Band), alleging breach of a 1986 contract regarding a casino in Duluth. The District Court dismissed the lawsuit after concluding that it lacked subject matter jurisdiction because the Band had only consented to suit in Federal Court in a 1994 agreement amending the 1986 contract. The Court of Appeals reversed after concluding that Minnesota courts have subject matter jurisdiction over the dispute. The Court granted review and
reversed the Court of Appeals’ decision and reinstated the District Court’s judgment for the Band.

73. **Miccosukee Tribe of Indians of South Florida v. Bermudez**, No. 3D13–2153, 2014 WL 2965411, 143 So. 3d 157 (Fla. Ct. App. 2014). The Miccosukee Tribe of Indians of South Florida appeals from a final judgment of $4.1 million. This matter began when Carlos Bermudez sued two members of the Tribe, Tammy Gwen Billie and Jimmie Bert, for damages resulting from an automobile accident in which a car driven by Billie and owned by Bert crashed into Bermudez’s car, killing Bermudez’s wife and injuring Bermudez and his son. Following a jury verdict, a final judgment was entered against Billie and Bert for $3.177 million. The Tribe was not a party when the final judgment was entered. Bermudez has yet to collect the judgment, as Billie and Bert assert they have no assets. Several years after the first final judgment was entered, Bermudez filed a motion to add the Tribe as a judgment debtor in the matter because the Tribe had funded and guided Billie and Bert’s defense in the lawsuit. The Tribe objected on several grounds, including sovereign immunity. Following an evidentiary hearing, the Trial Court entered an order granting Bermudez’s motion and the Trial Court accordingly entered a second final judgment in favor of Bermudez and solely against the Tribe for the full amount of the original final judgment, plus interest, for a total judgment of just over $4.1 million.

That final judgment did not reference the earlier final judgment against Billie and Bert, which remains in effect. This appeal followed. Because Bermudez had not established some cognizable legal basis to add the Tribe as a judgment debtor, the Court did not address the Tribe’s claim of sovereign immunity. Reversed and remanded.

74. **Black v. U.S.**, No. C13–5415, 2014 WL 3337466 (W.D. Wash. 2014). Before the Court was the Joint Motion to Dismiss Plaintiff’s claims under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction filed by defendants Suquamish Indian Tribe, Suquamish Tribal Police, Port Gamble S’Klallam Indian Tribe (PGST), PGST Tribal Police (collectively, Tribes), PGST Detective Greg Graves, and 25 John Doe Officers. The Tribes contended that tribal sovereign immunity shielded them and their officers from suit in federal court. Plaintiff Sherri Black claimed that neither the Tribes, nor their officers, were entitled to tribal sovereign immunity because they were acting under the color of state law when they entered the Blacks’ home, or alternatively, that they waived this immunity through treaty.

In December 2011, Suquamish and Port S’Klallam tribal police officers jointly executed a tribe-issued misdemeanor arrest warrant for PGST member Stacy Stanley Callihoo. Shortly after he entered the home, Tribal Officer Greg Graves shot Thomas
Black five times as he was lying on a couch. The unique complexities of tribal sovereignty rendered the Court an inappropriate forum for Ms. Black to seek relief against the Indian tribes themselves. Her Complaint’s allegations failed to strip the Tribes of their sovereign immunity. Black pleaded sufficient facts to state a viable § 1983 claim against the tribal police acting in their individual capacities, under color of state law. For these reasons, defendant Tribes’ Motion to Dismiss Black’s claims against the Suquamish and Port Gamble S’Klallam Indian Tribes for lack of subject matter jurisdiction was granted. Black’s Motion to Amend was denied, so her only remaining claims against tribal Defendants were against Greg Graves.

The Motion to Dismiss Black’s claims against Graves was denied.

75. **Cayuga Indian Nation of New York v. Seneca Cnty, N.Y., No. 12–3723, 2014 WL 3746795, __ F.3d __ (2nd Cir. 2014).** A Native-American tribe brought action seeking permanent declaratory and injunctive relief against the county’s attempts to collect property taxes on five parcels of land purchased by tribe. The District Court, 890 F. Supp. 2d 240, granted the tribe’s motion for preliminary injunction to enjoin the county from foreclosing on properties pursuant to New York law. County appealed. The Appellate Court held that tribal sovereign immunity protected the tribe from suit. Affirmed.

76. **Chavez v. Morongo Casino Resort & Spa, No. E056191, 2014 WL 4053805 (Cal. Ct. App. 2014).** Six former employees of Morongo Casino Resort & Spa (Employees) are non-Indians who were employed by Morongo in the security department. Employees were terminated at different times during the years 2010 and 2011. Employees sued (1) Morongo Casino Resort & Spa (Morongo), also known as Morongo Gaming Agency, and also known as Morongo Band of Mission Indians; (2) Jerry Schultze, the Executive Director for the Morongo Gaming Agency; as well as (3) various Morongo management members, for (1) retaliation based upon discrimination; (2) discrimination; (3) age discrimination; (4) sexual discrimination; (5) harassment, in violation of the Fair Employment and Housing Act (FEHA); (6) wrongful termination, in violation of FEHA and public policy; (7) failure to prevent workplace discrimination; (8) intentional infliction of emotional distress; (9) negligent infliction of emotional distress; (10) defamation; and (11) breach of contract. The Trial Court ordered the complaint and service of the summons be quashed because the Trial Court lacked jurisdiction over Morongo, due to Morongo being “immune to unconsented” lawsuits, and not having consented to Employees’ suit. Therefore, the Trial Court ordered the Employees’ lawsuit dismissed in its entirety without leave to amend.

On appeal Employees contended the Trial Court erred because 28 U.S.C. § 1360 abrogated Morongo’s sovereign immunity in relation to civil claims. Second, in
the alternative, Employees asserted the Trial Court erred because, in Morongo’s 2008 Amended Compact with the State of California, Morongo expressly agreed to waive its sovereign immunity in relation to bodily injury, property damage, or personal injury arising out of operating the casino. Third, Employees asserted the Trial Court erred by (a) preventing Employees from petitioning the court for an order compelling arbitration, and (b) not ordering the parties to participate in arbitration. Morongo and the individual defendants specially appeared at the Trial Court, moving the court to quash the complaint and service of summons because “Morongo Band is a federally-recognized American Indian tribe [citation] that is immune from unconsented suit and has not consented either to the creation of the purported causes of action alleged against it or to this Court’s jurisdiction to adjudicate those purported causes of action against any of the defendants . . . .” Morongo asserted the individual defendants were sued in their official capacities, and thus were “cloaked with the Morongo Band’s sovereign immunity,” and therefore were also not subject to the Trial Court’s jurisdiction. Morongo argued that it could only be subject to the Trial Court’s jurisdiction if it expressly waived its sovereign immunity, and no waiver was made that would allow for jurisdiction in Employees’ lawsuit. The appellate affirmed the judgment.

77. Mastro v. Seminole Tribe of Florida, No. 13–13886, 2014 WL 4085819, 578 Fed. Appx. 801 (11th Cir. 2014). Stephanie Mastro appealed the District Court’s dismissal of her amended complaint for lack of subject matter jurisdiction and failure to state a claim. Ms. Mastro, formerly employed as a card dealer at Seminole Indian Casino—Immokalee, sued the Seminole Tribe of Florida, d/b/a Seminole Indian Casino—Immokalee, for gender discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 and the Florida Civil Rights Act. The Tribe moved to dismiss, arguing that Ms. Mastro failed to state a claim and that the District Court lacked subject matter jurisdiction because the Tribe and Casino were entitled to tribal immunity. The District Court agreed and granted the Tribe’s motion. It held that, because Congress did not abrogate tribal immunity with regard to Title VII, sovereign immunity barred Ms. Mastro’s claims against the Tribe. It likewise extended this logic to shield the Casino; it concluded that because it was wholly owned, operated by the Tribe, and formed pursuant to the Indian Gaming Regulatory Act, the Casino constituted a subordinate arm of the Tribe and was therefore immune from suit. The District Court’s dismissal of Ms. Mastro’s complaint was affirmed.

78. Outsource Services Mgmt, LLC v. Nooksack Bus. Corp., No. 88482–0, 2014 WL 4108073, 181 P.3d 272 (Wash. 2014). Washington State courts have jurisdiction over civil cases arising on Indian reservations as long as they do not infringe on the sovereignty of the tribe. At issue in this case is whether Washington State courts have jurisdiction over a civil case arising out of a contract in which the tribal corporation waived its sovereign immunity and consented to jurisdiction in Washington State courts.
Nooksack Business Corporation (Nooksack), a tribal enterprise of the Nooksack Indian Tribe, signed a contract with Outsource Services Management LLC to finance the renovation and expansion of its casino. The contract contained a clause related to sovereign immunity and jurisdiction.

Outsource and Nooksack executed three successive forbearance agreements, but after Nooksack failed to make required payments, Outsource filed suit in Whatcom County Superior Court for breach of the loan agreement. Nooksack acknowledged that it had waived sovereign immunity but argued that nonetheless, Whatcom County Superior Court did not have subject matter jurisdiction over the case because it involved a contractual dispute with a tribal enterprise that occurred on tribal land. The Trial Court denied Nooksack's motion to dismiss, ruling that it had subject matter jurisdiction because Nooksack both waived sovereign immunity and consented to the jurisdiction of Washington State courts. The Trial Court also certified its order for interlocutory appeal.

Nooksack appealed, and the Court of Appeals found that review of the jurisdictional issue was justified. The Court of Appeals issued a broader holding than the Trial Court, concluding that the waiver of sovereign immunity alone was sufficient to give the Superior Court subject matter jurisdiction in the case. Nooksack petitioned for review, which was granted. The Supreme Court addressed the broad scope of the Court of Appeals opinion, which held that Nooksack's waiver of sovereign immunity was enough – in and of itself – to confer subject matter jurisdiction on Washington State courts.

Such a broad holding is not necessary to resolve this case, where Nooksack both waived sovereign immunity and consented to state court jurisdiction. The issue of whether state court jurisdiction can be based solely on a waiver of sovereign immunity is not presented in this case, and thus we take no position on it. The Court found that Nooksack consensually entered into a contract in which it waived sovereign immunity and consented to the jurisdiction of Washington State courts. It held that State Court jurisdiction does not infringe on tribal sovereignty. The Court affirmed the Court of Appeals.

K. Sovereignty, Tribal Inherent

79. North Cent. Elec. Co-op., Inc. v. North Dakota Pub. Serv. Comm’n, et al., No. 20130075, 837 N.W. 2d 138, 2013 WL 4714327 (N.D. 2013). Electric utility appealed order of the Public Service Commission, dismissing utility's complaint challenging competing electric utility's extension of electric service to a facility owned by Indian tribe on tribal trust land within Indian reservation. The District Court affirmed the Commission order, and utility appealed. The Supreme Court held that Commission lacked authority to regulate the tribe's decision to have competing utility provide electric service to a tribal-owned facility on tribal-owned land within the reservation. Affirmed.
80.  **St. Isidore Farm LLC, et al. v. Coeur d’Alene Tribe of Indians, et al.**, No. 2:13–CV–00274, 2013 WL 4782140 (D. Idaho 2013).  Plaintiffs St. Isidore Farm, LLC and Gobers, LLC asked the Court to enjoin and restrain the Coeur d’Alene Tribe of Indians and the Coeur d’Alene Tribal Court from levying civil fines, placing liens on the real property owned by Plaintiff St. Isidore Farm LLC and pursuing criminal actions against the Plaintiffs for the land application of domestic sewage sludge (septage) to non public contact sites from which there is no discharge into waterways.  Plaintiffs alleged they are in compliance with all federal and state regulations for the discharge of septage and received approval from the Idaho Department of Environmental Quality for human waste application on the non-Indian fee land.  It is undisputed that the Tribe adopted a resolution on March 6, 2013, enacting Chapter 57 of the Coeur d’Alene Tribal Code entitled “Tribal Waste Management Act” which appears to prohibit the septage disposal process being used by Plaintiffs.  Plaintiffs argued the Tribe’s more restrictive discharge provisions were not applicable to non Indian land owned by non Indians located within the boundaries of the Coeur d’Alene Reservation.  Plaintiffs alleged they were being fined by the Tribe for their actions and were facing criminal liability as well as liens being placed on their property for not being in compliance with the Tribe’s laws and regulations.  Plaintiffs filed a motion for injunctive relief in this Court to enjoin the defendants from attempting to enforce Tribal ordinances against them.  The Tribe filed suit in Tribal Court against the Plaintiffs on June 3, 2013.  Plaintiffs appeared and answered the Complaint in Tribal Court, but contest the Tribal Court’s jurisdiction over this matter.  Defendants filed declarations indicating that no criminal prosecutions have been initiated against Plaintiffs.  The Court granted defendants’ Motion to Dismiss as Plaintiffs must first exhaust their claims in Tribal Court before coming to Federal Court.  The Court found that the matter is administratively terminated with leave granted to the parties move to reopen this matter if the Tribal Court determines it does not have jurisdiction over the actions.

81.  **In re Estate of Gopher**, No. DA 12–0719, __ P.3d __, 2013 WL 5205233 (Mont. 2013).  Son of mother, an enrolled member of Indian tribe who died intestate, filed application for informal probate proceedings.  Son’s siblings filed motion to dismiss, asserting that jurisdiction over the matter lay with the Tribal Court.  The District Court denied motion and imposed a constructive trust on mother’s estate.  Siblings appealed.  The Supreme Court held that District Court’s assumption of subject matter jurisdiction over mother’s estate did not unlawfully infringe on tribe’s right of tribal self-government. Affirmed.

82.  **Evans v. Shoshone-Bannock Land Use Policy Comm’n**, No. 13-35003, 2013 WL 6284359 (9th Cir. 2013).  Property owner, contractor, and subcontractor commenced action against Indian tribe, seeking declaratory judgment that tribal court lacked jurisdiction over his construction of single family dwelling within reservation and
preliminary injunction barring further tribal court proceedings against them. The District Court, 2012 WL 6651194, dismissed action. Plaintiff appealed. The Appellate Court held that: (1) construction of single-family house on land owned in fee simple by non-Indian in area that already had seen comparable development on reservation did not threaten or have any direct effect on political integrity, economic security, or health or welfare of tribe and (2) construction did not pose catastrophic risks, and thus tribe did not have authority over nonmember’s construction. Affirmed in part, reversed in part, and remanded.

83. Belcourt Pub. School Dist. v. Davis, Nos. 4:12–cv–114, 4:12–cv–115, 4:12-cv-116, 4:12–cv–117, 4:12–cv–118, 2014 WL 458075 (D.N.D. 2014). A number of lawsuits have been commenced against the Belcourt Public School District (“School District”) and its employees in Turtle Mountain Tribal Court. The Turtle Mountain Tribal Court of Appeals has concluded that jurisdiction properly lies in tribal court. The School District commenced actions, seeking a declaration that the tribal court lacks jurisdiction over the School District and its employees. The limited jurisdictional issue before this Court was whether a state political subdivision may be subjected to suit in a tribal forum when it enters into a consensual agreement with a tribe to operate a high school on tribal trust land. The Court found that Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) is inapplicable when determining the adjudicatory authority over nonmembers who consensually agree to operate and conduct business in conjunction with the tribe on tribal trust land. Even if Montana applies, the result would be the same. The “first exception” in Montana allows tribal courts to exercise jurisdiction when a nonmember has entered into a consensual relationship with a tribe or its members, through commercial dealing, contracts, leases, or other arrangements. This case fits squarely within the plain language of the exception. The Court denied Plaintiffs’ motions for summary judgment and remanded the cases to the Turtle Mountain Tribal Court for consideration on the merits.

84. Fort Yates Public School Dist. No. 4 v. Murphy ex rel. C.M.B., No. 1:12-cv-135, 2014 WL 458054, 997 F. Supp. 2d 1009 (D.N.D. 2014). Plaintiff Fort Yates Public School District #4 (“School District) filed a Complaint against Jamie Murphy for C.M.B. (a minor) and Standing Rock Sioux Tribal Court seeking declaratory relief in the form of an Order declaring that the Standing Rock Sioux Tribal Court lacked jurisdiction over public school districts and school district employees acting in their official capacity, and an injunction prohibiting tribal court from adjudicating the claims brought against the school by Jamie Murphy on behalf of her daughter C.M.B. Pending before the Court was a motion by defendant Jamie Murphy to dismiss the action under Fed.R.Civ.P. 12(b)(7). The limited jurisdictional issue before the Court was whether a state political subdivision may be subjected to suit in a tribal forum when it enters into a consensual agreement with a tribe to operate a school on tribal trust land. The Court
found that *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) was inapplicable when determining the adjudicatory authority over nonmembers who consensually agreed to operate and conduct business in conjunction with the tribe on tribal trust land. Even if *Montana* applied, the result would be the same. The “first exception” in *Montana* allowed tribal courts to exercise jurisdiction when a nonmember entered into a consensual relationship with a tribe or its members, through commercial dealing, contracts, leases, or other arrangements. The Court found that Standing Rock Sioux Tribal Court has jurisdiction to adjudicate claims against the School District, whether the framework set forth in *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) applied or not and that the record was sufficiently developed to decide the jurisdictional issue. The Court dismissed the action and remanded the case to the Standing Rock Sioux Tribal Court for consideration on the merits. Jamie Murphy’s motion to dismiss under Rule 12(b)(7) was dismissed as moot.

85. *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, No. 12–60668, 2014 WL 994936, 746 F.3d 167 (5th Cir. 2014). (From the opinion.) The Court previously issued its opinion in this case on October 3, 2013. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 732 F.3d 409 (5th Cir. 2013). We hereby withdraw the previous opinion and substitute the following. Dolgencorp, Inc. and Dollar General Corp. (collectively “Dolgencorp”) brought an action in the District Court seeking to enjoin John Doe, a member of the Mississippi Band of Choctaw Indians, and other defendants (collectively “the tribal defendants”) from adjudicating tort claims against Dolgencorp in the Choctaw tribal court. The District Court denied Dolgencorp’s motion for summary judgment and granted summary judgment in favor of the tribal defendants, concluding that the Tribal Court may properly exercise jurisdiction over Doe’s claims. Because the Court agreed that Dolgencorp’s consensual relationship with Doe gave rise to Tribal Court jurisdiction over Doe’s claims under *Montana v. United States*, 450 U.S. 544, 564-66 (1981), the Court affirmed the District Court’s judgment.

86. *Las Vegas Tribe of Paiute Indians v. Phebus*, No. 2:13–CV–02000, 2014 WL 1199593 (D. Nev. 2014). After Tribal Court of Appeals ruled that the Indian Tribe lacked criminal jurisdiction over the defendant, who had been a member of the Tribe before being disenrolled, the Tribe brought action seeking declaratory judgment that it could assert criminal jurisdiction over any person satisfying the definition of “Indian” under the Indian Civil Rights Act (ICRA), including the defendant. The defendant failed to appear, and the Tribe moved for summary judgment. The District Court held that: (1) the Indian Tribe had authority to assert criminal jurisdiction over any person qualifying as an Indian under the Indian Civil Rights Act (ICRA), so long as it proved the defendant’s Indian status beyond a reasonable doubt, but (2) the Tribal Court erred in declaring the defendant to be an Indian for purposes of tribal criminal
jurisdiction without submitting the question to a jury for a finding beyond a reasonable doubt. Motion granted in part and denied in part.

87. **Kelsey v. Pope**, No. 1:09–CV–1015, 2014 WL 1338170 (W.D. Mich. 2014). (From the opinion.) The issue in this case was whether a Tribal Court has jurisdiction over a misdemeanor crime between an accused Indian perpetrator, the Petitioner Norbert J. Kelsey, that allegedly occurred during a tribal meeting in a building owned by the tribe but located off the tribe's reservation and wherein the alleged victim was also a tribal member. The Magistrate Judge opined in a Report and Recommendation that tribal courts do not have jurisdiction to prosecute crimes outside of Indian country, and also found that Kelsey's due process rights were violated when the tribal court expanded its jurisdiction in the criminal ordinance. The Court agrees with the Magistrate Judge's conclusion that the tribal courts lacked jurisdiction in this case. This conclusion is supported by Supreme Court precedent, as well as the legislative framework for concurrent jurisdiction in Indian country. Accordingly, the Court granted the Petition for Habeas Corpus.

88. **State v. Lang**, No. 1 CA–CV 12–0629, 2014 WL 1691613, 323 P.3d 457 (Ariz. Ct. App. 2014). State Bar brought action against nonmember, alleging unauthorized practice of law. The Superior Court, Maricopa County, No. CV2009–012054, granted State Bar's motion for summary judgment and entered permanent injunction restraining nonmember from performing acts constituting the practice of law in Arizona. Nonmember appealed. The Appellate Court held that: (1) the nonmember, who had a law degree and was admitted to practice law in tribal court, engaged in unauthorized practice of law in representation of three clients; (2) injunction was not unconstitutionally overbroad in restricting nonmember from maintaining a business address for a law practice anywhere within state of Arizona other than within boundaries of a tribal jurisdiction in which he was admitted to practice; and (3) the injunction was not unconstitutionally overbroad in barring nonmember from referring to himself as a “J.D.” or “attorney” and required him to disclaim State Bar membership in his letterhead and advertising material. Affirmed.

89. **Billie v. Stier**, No. 3D13–3180, 2014 WL 1613661(Fla. Dist. Ct. App. 2014). (From the opinion.) “This Petition for a Writ of Prohibition evolves out of a custody dispute between the mother, who was a member of the Miccosukee Tribe of Indians, and the father, who was not a member of the tribe or of Native American heritage. The issue was whether the Miccosukee Tribal Court or the Circuit Court of the Eleventh Judicial Circuit had the jurisdiction to decide the custody dispute. The mother petitioned for a writ prohibiting the Circuit Court from exercising jurisdiction over the custody matter. Based on the facts of this case and the Uniform Child Custody, Jurisdiction, and Enforcement Act (“UCCJEA”), the Court concluded that the Circuit
Court was correct in determining that it, and not the Tribal Court, has jurisdiction to decide the custody issues and we therefore deny the petition.

90. *Simmonds v. Parks*, No. S–14103, 2014 WL 3537863, 329 P.3d 995, (Alaska 2014). A father, whose parental rights were terminated by the Minto Tribal Court, filed a complaint with the Alaska Superior Court requesting physical custody of child. The Superior Court concluded that the Minto Tribal Court’s judgment was not entitled to full faith and credit because the father had been denied minimum due process. Foster parents filed petition for review. The Supreme Court granted the petition and remanded the case. On remand, the Superior Court concluded that it was not harmless error for the Minto Tribal Court to have failed to provide a meaningful opportunity for father to challenge Minto’s jurisdiction over him. Foster parents filed petition for review. The Supreme Court held that: (1) because the father failed to exhaust available tribal court remedies by appealing to the Minto Court of Appeals, the father was not permitted to relitigate his minimum due process and jurisdictional claims, and therefore, the Supreme Court would accord full faith and credit to the Minto Tribal Court’s judgment terminating father’s parental rights, and (2) the Indian Child Welfare Act’s (ICWA) full faith and credit mandate applied to the Minto Tribal Court’s order which terminated the parental rights of parents of Indian child.

91. *Jackson v. Payday Financial, LLC*, No. 12–2617, 2014 WL 4116804, 764 F.3d 765 (7th Cir. 2014). Deborah Jackson, Linda Gonnella, and James Binkowski (collectively “the Plaintiffs”) initially brought this action in Illinois state court against Payday Financial, LLC, and other defendant entities owned by, or doing business with, Martin A. Webb, an enrolled member of the Cheyenne River Sioux Tribe. The Plaintiffs alleged violations of Illinois civil and criminal statutes related to loans that they had received from the Loan Entities. After the Loan Entities removed the case to the District Court, that court granted the Loan Entities' motion to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3). It held that the loan agreements required that all disputes be resolved through arbitration conducted by the Cheyenne River Sioux Tribe on the Cheyenne River Sioux Tribe Reservation, located within the geographic boundaries of South Dakota. The Plaintiffs timely appealed. Following oral argument, the Appellate Court ordered a limited remand to the District Court for further factual findings concerning (1) whether the tribal law was readily available to the litigants and (2) whether the arbitration under the auspices of the Cheyenne River Sioux Tribe, as set forth in the loan documents, was available to the parties. The District Court concluded that, although the tribal law could be ascertained, the arbitral mechanism detailed in the agreement did not exist. Based on these findings, the Court concluded that the Plaintiffs' action should not have been dismissed because the arbitral mechanism specified in the agreement is illusory. The Court cannot accept the Loan Entities' alternative argument for upholding the District Court's dismissal: that the loan
documents required any litigation to be conducted by a tribal court on the Cheyenne River Sioux Tribe Reservation. As the Supreme Court explained most recently in Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008), tribal courts have a unique, limited jurisdiction that does not extend generally to the regulation of nontribal members whose actions do not implicate the sovereignty of the tribe or the regulation of tribal lands. The Loan Entities have not established a colorable claim of tribal jurisdiction, and, therefore, exhaustion in tribal courts is not required. The arbitration provision contained in the loan agreements is unreasonable and substantively and procedurally unconscionable under federal, state, and tribal law. The District Court, therefore, erred in granting the Defendants' motion to dismiss for improper venue based on that provision. Additionally, the courts of the Cheyenne River Sioux Tribe do not have subject matter jurisdiction over the Plaintiffs' claims. Nor have the defendants raised a colorable claim of tribal jurisdiction necessary to invoke the rule of tribal exhaustion. We therefore reverse the judgment of the District Court.

L. Tax

92. State ex rel. Wasden v. Native Wholesale Supply Co., No. 38780, 2013 WL 5642799, 312 P.3d 1257 (Idaho 2013). The state brought an action against an out-of-state Indian-owned wholesaler for operating as a cigarette wholesaler without a permit and for selling cigarettes that were unlawful for sale in Idaho. The District Court enjoined the wholesaler from selling wholesale cigarettes without a wholesale permit and assessed civil penalties. Wholesaler appealed. The Supreme Court held that: (1) the wholesaler was not required to obtain wholesaler permit; (2) the State had subject matter jurisdiction to prevent non-compliant cigarettes from being imported; (3) the Indian Commerce Clause did not preclude regulation; (4) the Trial Court had personal jurisdiction over wholesaler pursuant to long-arm statute; and (5) the exercise of personal jurisdiction comported with due process. Affirmed in part, reversed in part, and remanded.

93. HCI Distribution, Inc. v. New York State Police, 2013 WL 5745376 (N.Y. App. Div. 2013). Appeal from a judgment of the Supreme Court, which granted petitioner's application, in a proceeding pursuant to CPLR article 78, to direct immediate release of seized property. Petitioner is an “economic and political subdivision” of a federally recognized Indian tribe located in Nebraska. In January 2012, petitioner purchased, among other things, more than 26,000 cartons of cigarettes and cigars from a manufacturer located on the St. Regis Mohawk Indian Reservation in St. Lawrence County and owned by the St. Regis Mohawk Tribe. The tobacco products were then consigned to a common carrier to be delivered to petitioner in Nebraska. During transport, the truck carrying the cigarettes was stopped at a United States Border Patrol
checkpoint in St. Lawrence County and the Border Patrol authorities contacted the New York State Police. The Court found that inasmuch as petitioner demonstrated neither a clear legal right to the extraordinary remedy of prohibition nor the absence of an adequate alternative remedy, the petition must be dismissed. The judgment was reversed, on the law, without costs, and petition was dismissed.

94. **King Mountain Tobacco Co., Inc. v. Alcohol and Tobacco Tax and Trade Bureau**, No. 11-3038, 2014 WL 267160, 996 F. Supp. 2d 161 (E.D. Wash. 2014). An Indian tribe, tribal corporation, and tribe member brought action seeking declaratory judgment that the corporation was not subject to payment of excise taxes on tobacco products, a declaration that the tribe was entitled to meaningful consultation and resolution of disputes with executive branch, and an injunction prohibiting Alcohol and Tobacco Tax and Trade Bureau (TTB) from preventing sale of corporation's products. United States moved for summary judgment. The Court held that: (1) the tobacco products were subject to federal excise tax; (2) the 1855 Yakama Treaty did not exempt tribal corporation’s manufactured tobacco products from federal excise taxes; and (3) the provision of Internal Revenue Code exempting articles of native Indian handicraft did not exempt manufactured tobacco products. Motion granted.

95. **Smith v. Parker**, No. 4:07CV3101, 2014 WL 558965, 996 F. Supp. 2d 815, (D. Neb. 2014). Owners of businesses and clubs that sold alcoholic beverages brought action against Omaha Tribal Council members in their official capacities for prospective injunctive and declaratory relief from the tribe’s attempt to enforce its liquor-license and tax scheme on owners. The state of Nebraska and the United States intervened. Parties cross-moved for summary judgment. The District Court held that the Omaha Reservation was not diminished by the 1882 Act ratifying agreement for sale of tribal lands to non-Indian settlers. The plaintiffs’ motion denied; defendants’ motion granted.

96. **U.S. v. Puyallup Tribe of Indians**, No. C13–5122, 2014 WL 1386553 (W.D. Wash. 2014). This matter was before the Court on plaintiff United States of America's ("Government") motion for summary judgment and defendant Puyallup Tribe of Indians' ("Tribe") motion for summary judgment. The Government filed a complaint against the Tribe asserting a claim for the alleged failure to honor an Internal Revenue Service ("IRS") Tax Levy. Joshua D. Turnipseed ("Turnipseed") is an enrolled member of the Tribe and owed back taxes to the Government. The Tribe, at the Tribal Council's discretion, distributes per capita payments each month to qualified members such as Turnipseed. The Government issued a levy to the Tribe for Turnipseed's wages, salary, or other income in an attempt to collect Turnipseed's liabilities. The Tribe issued per capita payments to Turnipseed despite the levy, and the Government filed this action. The parties disputed whether the per capita payments were "property" or "rights to
property” and whether the per capita payments were “fixed and determinable” under federal law. The parties also disputed the applicable law (state, tribal, or federal) and the characterization of future per capita payments. The Court granted the Tribe's motion for summary judgment and denied the Government's motion for summary judgment.

97. **Seminole Tribe of Florida v. Florida Dept. of Revenue**, No. 13–10566, 2014 WL 1760855, 750 F.3d 1238 (11th Cir. 2014). An Indian tribe brought an action seeking declaratory judgment that the tribe was exempt from paying state tax on fuel and injunction requiring refund of taxes paid. The District Court, 917 F. Supp. 2d 1255, dismissed the complaint, and the tribe appealed. The Appellate Court held that: (1) the state's sovereign immunity barred action, and (2) the action did not fall within scope of *Ex parte Young* exception to state's Eleventh Amendment immunity. Affirmed.

98. **State, ex rel. Pruitt v. Native Wholesale Supply**, No. 111985, 2014 WL 2620019, 338 P.3d 613 (Okla. 2014). Attorney General initiated proceeding against cigarette importer and distributor, which was a tribally-chartered corporation wholly owned by an individual of Native American ancestry, alleging violations of the Oklahoma Master Settlement Agreement Complementary Act. The importer/distributor filed a motion to dismiss based on lack of personal jurisdiction and subject matter jurisdiction. The District Court denied the motion as to personal jurisdiction, but granted motion upon finding that enforcement of the Complementary Act against importer/distributor would have violated the Indian Commerce Clause, depriving the court of subject matter jurisdiction. Both parties appealed. The Supreme Court, 237 P.3d 199, affirmed in part, reversed in part, and remanded. On remand, the District Court granted summary judgment in favor of the Attorney General. Importer/distributor appealed. The Supreme Court held that: (1) the district court was bound on remand by facts supporting Supreme Court’s jurisdictional holdings in previous appeal; (2) the importer/distributor was not entitled to jury trial; and (3) the importer/distributor’s actions violated the Oklahoma Master Settlement Agreement Complementary Act. Affirmed.

99. **Westmoreland Resources Inc. v. Dep’t of Revenue**, No. DA 13–0547, 2014 WL 3842978, 330 P.3d 1188 (Mont. 2014). Coal producer and Department of Revenue filed joint petition for interlocutory adjudication of substantive question of law, requesting determination as to whether it was proper to have deduction taken from the producer for coal severance and gross proceeds taxes paid to Indian tribe, as owner of coal, to reduce the amount owing under Resource Indemnity Trust and Ground Water Assessment Tax. The First Judicial District Court held in favor of Department. Producer appealed. The Supreme Court held that taxes that producer paid to tribe were not taxes paid on production subject to deduction from contract sales price. Affirmed.
M. Trust Breach and Claims

100. Klamath Claims Comm. v. U.S., No. 2012–5130, 2013 WL 4494383 (Fed. Cir. 2013). The Klamath Claims Committee (KCC) appealed two judgments of the Court of Federal Claims. The first was the Court’s decision to dismiss the third and fourth claims of the KCC’s first amended complaint pursuant to Rule 19 of the Court of Federal Claims. The Appellate Court affirmed that judgment. The second was the Court’s dismissal of the KCC’s motion seeking leave to amend its complaint for the second time. The Court affirmed that decision, but write briefly to address its reasoning for doing so. The Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians comprise one federally-recognized tribal government (the “Tribes”). Pursuant to its constitution and by-laws, the Tribes passed a resolution in 1952 to create the KCC. At that time, the Tribes anticipated the termination of its federal recognition, which later occurred through the Klamath Termination Act of 1954. The KCC’s purpose was to represent the interests of the Tribes’ final enrollees (the “1954 Enrollees”) in claims against the United States filed before and after termination. A “reserve of necessary funds for prosecution” of such claims (the “Litigation Fund”) was created in 1958 from monies due under the Termination Act. In 1986, the Tribes regained federal recognition under the Klamath Indian Tribe Restoration Act. After the federally-recognized sovereignty of the Tribes was restored, the KCC continued to exist. The Tribal Council (the elected governmental body for the Tribes) appears to have supervised the KCC’s post-restoration activities, including the disbursement of money from the Litigation Fund. The present suit began with a complaint filed by the KCC in February 2009. An amended complaint included four claims. The first two alleged wrongdoings by the government related to funds payable to the Tribes and its members under Section 13 of the Termination Act. The third and fourth claims asserted a taking of private property and breach of fiduciary duty arising from the removal of the Chiloquin Dam – an act that allegedly affected water flow and fishing in waterways used by the Tribes. Shortly after the amended complaint was filed, the government moved to dismiss all four claims, arguing that the KCC lacked standing to bring its claims. It asserted that the KCC did not have a legally cognizable interest in the Section 13 funds, the Chiloquin Dam, or the tribal water and fishing rights that were apparently affected by the dam’s removal.

According to the government, the KCC failed to show that “it, instead of the Tribes, [was] the proper entity to assert [its] claims.” Shortly after the KCC filed its motion to amend, the Court of Federal Claims ruled that dismissal under Rule 19 was appropriate because the Tribes was an indispensable party for the third and fourth claims of the amended complaint. In addition to citing concerns and respect for the Tribes’ sovereignty and the risk of “multiple and conflicting claims” against the government, the Court reasoned that the resolution of the third and fourth claims in the amended complaint required adjudication of substantial tribal interests in water and
fishing rights that “might be impaired by an adverse ruling.” The KCC filed a timely appeal. Applying Rule 19 factors here, the Court held that the Tribes were an indispensable party for the claims the KCC sought to add in its motion to amend. The Tribes were clearly a required party for those claims, and the first Rule 19 factor weighed quite heavily in favor of dismissal. The resolution of the KCC’s new claims would necessarily implicate significant sovereign interests of the Tribes and risk substantial prejudice to it.

101. **Fletcher v. United States**, No. 12–5078, 2013 WL 5184985 (10th Cir. 2013). Tribal members brought an action against the federal government, seeking an accounting to determine whether the federal government had fulfilled the fiduciary obligations it chose to assume, as trustee, to oversee the collection of royalty income from oil and gas reserves and its distribution to tribal members. The District Court, 2012 WL 1109090, dismissed the tribal members’ claims, and they appealed. The Appellate Court held that American Indian Trust Fund Management Reform Act imposed on the federal government a duty to provide an accounting of royalty income from oil and gas reserves held in trust and its distribution to tribal members. Reversed and remanded.

102. **Wolfchild, et al. v. U.S.**, Nos. 2012–5035, 2012–5036, 2012–5043, 2013 WL 5405505 (Fed. Cir. 2013). (From the opinion.) The United States currently holds certain tracts of land in Minnesota in trust for three Indian communities. It originally acquired some of that land in the late 1800s, using funds appropriated by Congress to help support a statutorily identified group of Indians, and held it for the benefit of those Indians and their descendants for decades. As time passed, that beneficiary group and the three present-day communities that grew on these lands overlapped but diverged: many of the beneficiary group were part of the communities, but many were not; and the communities included many outside the beneficiary group. In 1980, Congress addressed the resulting land use problems by putting the lands into trust for the three communities that had long occupied them. Ever since, proceeds earned from the lands—including profits from gaming—have gone to the same three communities. The discrepancy between the makeup of the three communities and the collection of descendants of the Indians designated in the original appropriations acts underlies the present dispute, which was before this court once before. Claimants alleged that they belonged to the latter group and that they, rather than the communities, held rights to the land at issue and any money generated from it. Four years ago, based on an extensive analysis of the relevant laws and history, the Court rejected what was then the only live claim, which got to the heart of their assertion: that the appropriations acts created a trust for the benefit of the statutorily designated Indians and their descendants. Wolfchild v. United States, 559 F.3d 1228 (Fed. Cir. 2009). On remand, claimants advanced several new claims, some of which seek proceeds generated from the lands, others of which seek more. Again unable to find that claimants have stated a
claim that meets the standards of governing law, we now reject these new claims, including the one that the Court of Federal Claims held valid in the judgment the Courts reviewed. We therefore reversed the Claims Court’s judgment against the United States on the claim to pre 1980 money and affirmed its judgment against claimants on the remainder of the proposed claims.

103. **Hopi Tribe v. United States**, No. 12–45, 2013 WL 5496957 (Fed. Cl. 2013). Plaintiff, an Indian tribe, brought suit to recover damages for breach of trust. The alleged breach consisted of defendant’s supposed failure to ensure that the water supply on the plaintiff’s reservation contained safe levels of arsenic. Before the Court was the defendant’s motion to dismiss for lack of subject-matter jurisdiction, in which the defendant asserted that the plaintiff failed to identify an applicable fiduciary duty. Plaintiff was a federally recognized Indian Tribe residing on the Hopi Reservation (the “Reservation”) in Arizona. Although the land was uninhabitable without drinking water, the public water systems serving villages on the eastern portion of the Reservation contained levels of arsenic higher than what Environmental Protection Agency (EPA) regulations permit. Plaintiff brought this suit claiming that defendant, through the Bureau of Indian Affairs (BIA) committed a breach of trust by failing to provide plaintiff with an adequate supply of drinking water. Plaintiff claimed that defendant’s trust duties flowed from an executive order creating the Reservation (the “Executive Order of 1882”) and a subsequent Act of Congress incorporating the requirements of that Executive Order by reference (the “Act of 1958”). According to plaintiff, by establishing the Reservation and holding the land in trust, the Executive Order of 1882 and the Act of 1958 created a duty on the part of defendant to protect the trust property, including the Reservation’s water supply. Plaintiff asserted that defendant breached this duty by failing to ensure that the arsenic level in the water supply complied with EPA standards. Defendant filed a motion to dismiss the complaint for lack of subject-matter jurisdiction, contending that plaintiff failed to identify a source of law creating a legally enforceable duty, requiring defendant to provide a certain quality of drinking water to the Reservation.

According to defendant, neither the Executive Order of 1882 nor the Act of 1958 imposes such a duty. Defendant conceded that it held plaintiff’s water rights in trust but argues that this general trust relationship does not suffice to establish a specific trust duty to maintain water quality. Defendant also argued that the sources of law plaintiff identified in its complaint cannot “fairly be interpreted” as mandating compensation. Finally, defendant averred that that Congress has provided a civil remedy for violations of the Safe Drinking Water Act and that the Court ought not interpret a statute or regulation to be money-mandating where, “Congress has provided an alternative remedy for the alleged wrongful conduct.” The Court found that neither the Executive Order of 1882 nor the Act of 1958 expressly imposed a duty on defendant to protect the
quality of plaintiff’s water supply and that because the plaintiff failed to clear the first “hurdle” in establishing this Court’s jurisdiction, the Court need not consider whether any provision plaintiff cited can “fairly be interpreted” as mandating compensation.

The Court granted the defendant’s motion to dismiss for lack of subject-matter jurisdiction.

104.  **Beattie v. Smith**, No. 13–3053, 2013 WL 5995621 (10th Cir. 2013). After being arrested at a resort operated by Native American tribe and charged with lewd and lascivious behavior and disorderly conduct, arrestee was tried and acquitted in state court, and subsequently brought civil rights action against the tribe, its Tribal Police Department, certain tribal police officers and resort security personnel, asserting claims under § 1983 and Kansas law. The District Court granted tribal entities’ motion to dismiss and granted the individual defendants’ motion for judgment on the pleadings. Arrestee appealed. The Appellate Court held that: (1) the tribal police officers had probable cause to arrest; (2) the arrestee’s state law claim that officers’ investigation before arresting him was inadequate was barred by discretionary function exception of Kansas Tort Claims Act; (3) the allegation that security personnel caused officers to conduct an abbreviated investigation, leading to arrest, was insufficient to support claim for false arrest under Kansas law; (4) the allegation that security personnel “expressly requested [his] arrest” by officers was insufficient to support claim for false arrest against security personnel under Kansas law; and (5) the allegation that security personnel possessed information that tended to discredit the witness’s claim that she saw him masturbating in front of hotel window, but never requested that officers drop criminal case against him, was insufficient to support claim for malicious prosecution against security personnel under Kansas law. Affirmed.

105.  **Loya v. Gutierrez**, No. 32,405, 2013 WL 6044354, 319 P.3d 656 (N.M. Ct. App. 2013). Arrestee brought a § 1983 action against a tribal police officer, alleging false arrest, malicious prosecution, and excessive force. Officer filed third-party declaratory judgment action against the county, alleging the county was required to defend and indemnify him. The District Court granted summary judgment for the county. Officer appealed. The Appellate Court held that: (1) the officer was not law enforcement officer under the Tort claims Act, and (2) the officer was not a public employee. Affirmed.

106.  **Wyandot Nation of Kansas v. United States**, No. 06–919, 2014 WL 1379106, 115 Fed. Cl. 595 (Fed. Cl. 2014). Before the Court was the defendant's motion to dismiss for lack of subject-matter jurisdiction, pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims. The government argued that the pendency of a previously filed case in a U.S. District Court precluded the Court’s
jurisdiction under 28 U.S.C. § 1500. On December 28, 2006, plaintiff, Wyandot Nation of Kansas (Wyandot Nation), brought a claim in the Court of Federal Claims against the government. Plaintiff sought money damages to compensate it for various breaches of fiduciary duty that it claimed the government committed as trustee of a trust holding assets for its benefit. On December 30, 2005, before filing its action in the Court of Federal Claims, plaintiff filed a case in the United States District Court for the District of Columbia seeking relief for the government's alleged breach of fiduciary duty in connection with the same trust. On July 13, 2006, the plaintiff filed an amended complaint in the District Court alleging defective trust accounting. In the District Court, the plaintiff sought declaratory and injunctive relief to compel a proper accounting and injunctive relief to compel proper management of its trust accounts. Several months later, the plaintiff brought its claim against the United States for money damages in the Court of Federal Claims. Plaintiff sought consequential damages, incidental damages, compound interest, pre-judgment interest, court costs, and attorneys’ fees – all related to the defendant's breach of the fiduciary duties outlined above. The Court concluded that the plaintiff's previously-filed district court complaint contained operative facts which substantially overlapped those of the above-captioned case and that § 1500 precluded the Court’s jurisdiction. The Court granted the government's motion to dismiss.

107. Stockbridge-Munsee Cmty v. New York, No. 13–3069, 756 F.3d 163, 2014 WL 2782191 (2d Cir. 2014). An Indian tribe brought an action against the State of New York and certain state officials and agencies, counties, towns, and villages, alleging the tribe, and not the State, had title to 36 square mile tract of land in upstate New York. The District Court, 2013 WL 3822093, granted the defendants’ motions to dismiss, and the tribe appealed. The Appellate Court held that equitable principles of laches, acquiescence, and impossibility barred tribe’s claims. Affirmed.

108. Winnemucca Indian Colony v. United States, No. 13–874, 2014 WL 3107445 (Fed. Cl. 2014). Before the Court was an action for breach of trust brought by plaintiffs, Winnemucca Indian Colony and Chairman Willis Evans (the Colony). Defendant, the United States, (government) moved to dismiss the complaint. In their complaint, plaintiffs alleged that the United States has committed a breach of trust and a breach of fiduciary duty in connection with actions taken by the United States Bureau of Indian Affairs in failing to recognize the Colony’s tribal government and, inter alia, for allowing non-Colony members to occupy and use Colony land. As a result of these alleged breaches, plaintiffs sought $108,000,000 and a declaratory judgment entitling the Colony to past, present, and future compensation, among other relief. In August 2011, the Winnemucca Colony filed a case against the United States in the United States District Court for the District of Nevada that raised similar claims. The Court agreed with the government that § 1500 bars the Court from considering Counts One, Two, and Three of plaintiffs’ complaint and that Counts Three and Four also must be
dismissed as seeking relief outside the jurisdiction of the court. The government’s motion to dismiss the complaint was granted.

N. Miscellaneous

109. *Gabrielino-Tongva Tribe v. St. Monica Dev.*, No. B238603, 2013 WL 5976240 (Cal. Ct. App. 2013). In 1994, the Gabrielino–Tongva people were recognized by the State of California as “the aboriginal tribe of the Los Angeles Basin.” Currently in California there are several associations of descendants of this historic Native American tribe. This appeal concerned two different groups of people claiming the right to control one such association, the Gabrielino–Tongva Tribe. One of these two factions (appellant) initiated the lawsuit against defendants (respondents); the other tribal entity settled the claims against defendants. Defendants moved for summary judgment based on that settlement. The Trial Court determined there was no triable issue of material fact concerning the authority of the settling faction to act on behalf of the Tribe and entered judgment for defendants. The Appellate Court determined there were triable issues of material fact preventing a summary disposition of the matter. The Appellate Court reversed the judgment and the order granting respondents’ motion for summary judgment.

110. *W.I.H. ex rel. Heart v. Winner School Dist.* 59-2, No. CIV 06–3007 (D.S.D. 2014). Plaintiffs instituted this action contending that the defendants punish Native American students more harshly and more frequently than similarly situated Caucasian students, that the defendant District maintains a racially hostile educational environment, and engages in racially discriminatory policies, customs, and practices. This matter was certified as a class action pursuant to Fed.R.Civ.P. 23 on behalf of the following class of plaintiffs: All Native American students currently enrolled or who will in the future enroll in Winner Middle School or Winner High School. Class counsel and counsel for the defendants filed a joint motion for approval of a settlement and proposed consent decree. Notices of the proposed settlement and of a fairness hearing were given to the class members. A consent decree was entered on December 10, 2007. Counsel filed a joint motion for approval of an amended consent decree. Notices of the proposed amended consent decree and of a fairness hearing were given to the class members. No objections were filed. The original consent decree set forth a plan for developing and implementing certain “benchmarks,” i.e., programs or objectives designed to remedy the claimed hostile environment at the Winner Schools. The original consent decree was to remain in effect until the defendants complied with all benchmarks for four consecutive school years, at which time the decree would automatically terminate. The benchmark committee met in May and July of 2013, and determined that the benchmarks should be revised. The parties have agreed to amend the original consent decree to refer to “benchmarks” as “actions,” and “item goals” as
“outcome measures.” The proposed amendment to the consent decree was contemplated by the original consent decree as part of continuing monitoring of the District's compliance and the parties desire to remedy the conditions existing at the time the class action was filed. The amendments are consistent with the original consent decree's purpose. The amended consent decree is fair, reasonable, and adequate to continue to redress the claims of current and future class members and is approved.

111. First Citizens Bank & Trust Co. v. Harrison, Nos. 43451-2-II, 43751-1-II, 2014 WL 2547601 (Wash. Ct. App. 2014). Lender brought breach of contract action against borrowers for failure to pay promissory note based on a line of credit. The Superior Court granted summary judgment in favor of lender in the amount of $161,831.97, but ruled that the borrower's personal bank account containing proceeds from the sale of her Indian trust land were exempt from garnishment. Lender appealed. The Appellate Court held that: (1) the lender was judicially estopped from arguing on appeal that borrowers failed to prove the factual basis for their exemption, i.e., that the funds in the Native American borrower's bank accounts derived from leases of Indian trust land; (2) the Superior Court had the jurisdiction to resolve the issue of whether the statute excluded proceeds from the sale of Indian trust land, from liability for the payment of a debt that arose during the trust period, continued to protect any such moneys that had been placed in a Native American's personal bank account; (3) the federal statute that provided that moneys from the lease or sale of Indian trust lands was not liable for certain debts provided protection against the garnishment of the money in the borrower's bank accounts that had accrued from the lease of borrower's Indian trust lands, regardless of whether the moneys accrued to an Individual Indian Money (IIM) account or directly to the Native American borrower; and (4) the lender was entitled to recover its attorney fees and costs incurred in responding to borrowers' appeal. Affirmed.

112. Pederson v. Arctic Slope Regional Corp., No. S–15056, 2014 WL 3883431, 331 P.3d 384 (Alaska 2014). Arctic Slope Regional Corporation is an Alaska Native Regional Corporation organized under the Alaska Native Claims Settlement Act and AS 10.06.960 and incorporated under the Alaska Corporations Code, AS 10.06. At the time of trial, the Corporation took in about $2.5 billion in revenue each year, employed about 10,000 people, and had operations across the country and around the world. The Corporation had about 11,000 shareholders in 2012, about 6,000 of whom were adults holding voting shares. Rodney Peterson is an original shareholder of the Corporation, holding 100 Class A shares. An attorney and a member of the Alaska bar, Pederson worked as assistant corporate counsel to the Corporation and later as an executive for one of the Corporation's subsidiaries. The employment relationship soured. Pederson sought to exercise his statutory right to inspect books and records of account and minutes of board and committee meetings relating to executive
compensation and an alleged transfer of equity in corporate subsidiaries to executives. The Corporation claimed that the materials were confidential and sought to negotiate a confidentiality agreement prior to release of any documents. This appeal presented several issues of first impression in Alaska.

The court held that (1) the statutory phrase “books and records of account” includes electronically maintained books and records of account; (2) the statutory phrase also goes beyond mere annual reports and proxy statements; and (3) the statutory phrase at least encompasses monthly financial statements, records of receipts, disbursements and payments, accounting ledgers, and other financial accounting documents, including records of individual executive compensation and transfers of corporate assets or interests to executives. The Court further held that (4) the statutory category “minutes” does not encompass all presentations or reports made to the board but rather merely requires a record of the items addressed and actions taken at the meeting, as have been faithfully recorded after the meeting. Finally, the Court held that (5) a corporation may request a confidentiality agreement as a prerequisite to distributing otherwise-inspectable documents provided that the agreement reasonably defines the scope of confidential information subject to the agreement and contains confidentiality provisions that are not unreasonably restrictive in light of the shareholder’s proper purpose and the corporation’s legitimate confidentiality concerns. The Court concluded that the Corporation’s proffered confidentiality agreement in this case was not sufficiently tailored or limited in scope and thus Pederson’s refusal to sign it could not serve as a legal basis for avoiding liability for denying his inspection claims. The Appellate Court reversed the Superior Court’s judgment, vacated the Superior Court’s findings of fact and conclusions of law, and remanded for further proceedings consistent with this opinion.
I. Introduction

Federal law authorizes the Secretary of the Interior to acquire lands in trust “for the purpose of providing land for Indians.”¹ This authority helps tribes in many ways; for example, by facilitating tribal land restoration and economic development, insulating tribes from state and local jurisdiction and taxation, and protecting land with historical and cultural significance. However, the fee-to-trust regulations found in 25 C.F.R. Part 151 have excluded Alaska tribes (except for the Metlakatla Indian Community) from this process for decades.² In 2013, a Federal court struck down the “Alaska exception,” holding that it discriminated against Alaska tribes.³ The court subsequently determined that the appropriate remedy was for the Department of the Interior (hereafter “Department,” “Interior,” or “DOI”) to simply strike the offending language and make available the trust application process to Alaska tribes just like tribes in the lower 48 states.⁴

On December 23, 2014, the Department implemented this remedy when it published the Federal Register Final Rule that omitted the “Alaska exception” from the Land-into-Trust regulations in 25 C.F.R. Part 151.⁵ On June 8, 2014, as part of the rulemaking process, the Department had held a tribal consultation in Anchorage, Alaska where 106 written comments were submitted. Tribal governments overwhelmingly supported the proposed rule. The State of Alaska nevertheless opposed it, along with others. Some Alaska Native corporations expressed deep reservations about how the rule would be implemented in the context of the unique land ownership regime imposed by the Alaska Native Claims Settlement Act (ANCSA).

In the Akiachak case, the court later issued a stay preventing the Department from issuing any decisions on Alaska land-into-trust applications pending the outcome...

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¹ This program was a key element of the Indian Reorganization Act of 1934. See 25 U.S.C. § 465 (§ 473(a) for Alaska tribes) and Bureau of Indian Affairs (BIA) regulations at 25 C.F.R. Part 151.
of the State of Alaska’s appeal in the Ninth Circuit. Assuming the decision is upheld on appeal, Alaska tribes will be able to apply to place land into trust. This prospect opens up opportunities for Alaska tribes to expand tribal jurisdiction and potentially expand economic development. It also raises questions about how the application criteria in Part 151 will be applied in the context of the unique history and status of Alaska tribal lands. In this article, we first present a preliminary and partial discussion of some of these issues and opportunities. Part II lays out a brief history of Alaska Native land tenure for context. Part III discusses why placing land-into-trust in Alaska is important. Part IV provides a description of the current process and a checklist for Land-into-Trust applications. Part V then discusses the Alaska-specific issues that may arise when the current process and checklist are utilized for Alaska applications. While many questions still need to be addressed and resolved, the inclusion of Alaska tribes in the regulatory land-to-trust process represents a historic opportunity to strengthen Alaska tribal sovereignty.

II. BACKGROUND ON ALASKA NATIVE LANDS AND LAND TENURE

The potential significance of the Final Rule cannot be fully appreciated without a brief look at the history of Alaska Native land tenure, ANCSA, and the Supreme Court’s decision in Venetie. Currently, Alaska tribes generally (aside from the Metlakatla Indian Community) remain “sovereigns without territorial reach.” That is, without the territorial jurisdiction required to carry out ordinary governmental functions such as protecting public safety and regulating environmental and other activities. To the extent that trust acquisitions in Alaska can expand tribal territorial jurisdiction, they will likewise expand Alaska tribes’ ability to exercise sovereignty and self-determination on par with other federally recognized tribes.

A. Occupation Since Time Immemorial

Alaska Natives have occupied the lands and waters now known as the State of Alaska since time immemorial, pre-dating any Russian or United States governance of the region. Nonetheless, a complex history surrounds the 1867 Treaty of Cession.

8 Id. at 526 (quoting Alaska ex rel. Yukon Flats School Dist. v. Native Vill. of Venetie Tribal Gov’t, 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez, J., concurring)).
9 See Final Rule at 76895 (“By providing a physical space where tribal governments may exercise sovereign powers to provide for their citizens, trust land can help promote tribal self-governance and self-determination.”)
11 Treaty of March 30, 1876, 15 Stat. 539.
wherein the United States purchased from Russia a "quit claim deed" to whatever title Russia had to Alaska. This complex history also included Treaty of Cession language that purportedly did not confer ordinary citizenship "rights" to the Alaska region’s "uncivilized native tribes," and subjected those "uncivilized native tribes" to federal "Indian law" then in place.13

Following the United States’ purchase of the Alaska region, a schizophrenic Federal land policy—made so in part by broader federal Indian policy trends and Alaska-specific factors—has continued to impact Alaska Native land tenure. In 1891, the Metlakatla Indian Community became the first statutorily created reservation in Alaska. Still in existence today, the Metlakatla reservation is now known as the Annette Island Reserve.14 Following the creation of that reservation, another reservation was created in Alaska by statute: Klukwan. Many other reservations created by executive order followed, up until 1919, when Congress revoked the president’s authority to create Alaska Native reserves through Executive Order.15

Following the “Reservation Era,” the assimilationist policies of the Allotment Era (1887-1934) were also extended to Alaska. The Alaska Native Allotment Act of 1906 (ANAA)16 authorized conveyances of up to 160 acres of unappropriated land to eligible Natives. Although the ANAA was repealed in 1971, many allotments continue to be held in restricted status,17 and the Federal government has repeatedly been held to have a fiduciary duty to administer these lands for the benefit of Natives.18

Two Acts in the 1920s and 1930s had large-scale effects on Alaska Native lands and land tenure. The Alaska Native Townsite Act (ANTA) enacted in 1926 allowed conveyance of lots to individuals in certain areas designated as townsites.19 Both Natives and non-Natives were eligible for townsite lots under ANTA, which was repealed in 1976.20 The Natives that received townsite lots received restricted title, alienable only with approval by the Secretary.21 Following the passage of the IRA in 1934, its provisions—aimed at rebuilding tribal governments—were amended and

12 Id., at Article III.
17 Indian Country includes allotments held in trust or in restricted fee. See Oklahoma Tax Comm’n v. Sac and Fox Nation, 508 U.S. 114, 115 (1993).
21 Id. (citing authorities).
extended to Alaska in 1936.\textsuperscript{22} Six additional reservations of varying size and purpose were created in Alaska through the authority of the IRA.\textsuperscript{23} The history and success of placement of these lands into trust for Alaska Natives was severely impacted by the Federal government’s subsequent lack of willingness, and/or capacity, to carry out its fiduciary responsibilities to protect tribal resources from trespass and encroachment, including, but not limited to, tribal fishing rights.\textsuperscript{24} 

The pressures on Alaska Native land ownership—particularly trust land ownership—would only continue to increase with growing non-Native development in the region and coming events. The Alaska region became a state government in 1959 with passage of the Alaska Statehood Act.\textsuperscript{25} Section 6 of the Alaska Statehood Act purported to allow the State to “select” certain “vacant” lands, regardless of Alaska Native occupancy of the entire region since time immemorial. Discovery of major oil fields in Prudhoe Bay in 1968, and the land needed to develop those resources, would lead—along with many other factors—to the development of the Alaska Native Claims Settlement Act (ANCSA) of 1971.\textsuperscript{26}

\textbf{B. ANCSA, Venetie, and “Indian Country” in Alaska}

Congress enacted ANCSA as a “comprehensive statute designed to settle all land claims by Alaska Natives.”\textsuperscript{27} ANCSA revoked all but the Annette Island Reserve belonging to the Metlakatla Indian Community,\textsuperscript{28} repealed the authority for new allotment applications,\textsuperscript{29} and extinguished all aboriginal title (“if any”) in Alaska along with any claims based on such title.\textsuperscript{30} In exchange, Alaska Natives would receive $962.4 million and the rights to select 44 million acres of land.\textsuperscript{31} Rather than replicate the reservation system of the lower 48, Congress directed that the vast majority of these lands go to state-chartered corporations: a village corporation for each village identified in the Act,\textsuperscript{32} and thirteen regional for-profit corporations.\textsuperscript{33} This corporate model reflects the assimilationist policy animating ANCSA, as does the Act’s declaration that the settlement be accomplished “without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying

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\item \textsuperscript{22} Act of May 1, 1936, 49 Stat. 1250, amending 25 U.S.C.A § 461.
\item \textsuperscript{23} Supra note 14 at 106; citing Alaska Native Management Report, Volume 2, No. 9 (May 15, 1973) at 5.
\item \textsuperscript{24} Supra note 14 at 97-106.
\item \textsuperscript{26} David Case & David Voluck, ALASKA NATIVES AND AMERICAN LAWS 167 (3d ed. 2012).
\item \textsuperscript{27} Alaska v. Native Village of Venetie, 522 U.S. 520, 523 (1998).
\item \textsuperscript{28} 43 U.S.C. § 1618 (1971).
\item \textsuperscript{29} 43 U.S.C. § 1617 (1971).
\item \textsuperscript{30} 43 U.S.C. § 1603(b) & (c) (2015).
\item \textsuperscript{31} 43 U.S.C. § 1605.
\item \textsuperscript{32} 43 U.S.C. § 1607 (1971); 43 U.S.C. § 1610(b) (1971).
\item \textsuperscript{33} 43 U.S.C. § 1606(a) & (c) (1971).
\end{itemize}
special tax privileges.” This statement would inform the Department’s reading of ANCSA when crafting the Alaska exception, as well as the Supreme Court’s interpretation in the landmark Venetie decision that continues to undermine the authority of Alaska tribal governments to this day.

The Supreme Court has recognized that “there is a significant territorial component to tribal power.” Typically, tribes exercise jurisdiction only within “Indian Country.” Subject to limitations Congress has imposed, “Indian tribes within ‘Indian Country’...possesses attributes of sovereignty over both their members and their territory.” Generally speaking, the Federal government and tribes have primary jurisdiction within Indian Country, while, states have primary jurisdiction outside Indian Country, unless Federal law provides otherwise. Moreover, within Indian Country, tribes have greater authority over members and their property, including limited authority over non-members, while the state has correspondingly less authority.

In Venetie, the status of ANCSA lands and the extent of Alaska tribal governmental authority, if any, over them were at issue. Federal law defines Indian Country as comprised of: (1) reservation lands; (2) “dependent Indian communities”; and (3) allotments. The Venetie Tribal Council sought to collect tax from non-tribal members doing business on Venetie tribal lands. In Venetie, the Supreme Court considered whether ANCSA lands conveyed to the Tribal Government by the village corporation fit within the second category of Indian Country as “dependent Indian communities.” The Court found they did not. The Court found that ANCSA’s purpose was to avoid a “lengthy wardship or trusteeship,” and the ANCSA lands were not set aside for use by tribes, but rather by state-chartered corporations. Nor were such lands

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34 43 U.S.C. § 1601(b).
35 Final Rule at 76889 (describing genesis of Alaska exception in Solicitor’s opinion relying on ANCSA declaration); Venetie, 520 U.S. at 533 (quoting § 1601(b) in support of proposition that ANCSA “ended federal superintendence” over Venetie’s lands). The State of Alaska opened its comments opposing the Proposed Rule by quoting the same ANCSA policy declaration. State of Alaska, Dep’t of Law, Comments on Land Acquisitions in the State of Alaska at 2 (July 31, 2014), available at http://www.regulations.gov/#docketBrowser;pp=25;po=0;dct=PS;D=BIA-2014-0002.
37 Merrion, 455 U.S. at 140 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).
38 For example, in companion cases involving application of Alaska’s fish trap laws to Native communities, the United States Supreme Court held those laws inapplicable within the Annette Island Reserve but applicable to Natives in non-reservation communities. Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962); Organized Village of Kake v. Egan, 369 U.S. 60 (1962).
39 See Montana v. United States, 450 U.S. 544, 565-6 (1981) (tribes retain authority over non-Indians in Indian Country when (1) the non-Indian has entered into a consensual relationship with the tribe, or (2) the tribe is regulating conduct that threatens or directly affects “the political integrity, the economic security, or the health and welfare of the Tribe”); see also United States v. Lara, 541 U.S. 193 (2004) (affirming tribe’s inherent authority to assert criminal jurisdiction over non-member Indians).
subject to federal superintendence. Thus, the Native Village of Venetie lacked jurisdiction to impose a business tax on a private contractor hired by the state to build a public school. ANCSA did not terminate tribal sovereignty, but it left Alaska tribes “sovereigns without territorial reach.” Consequently, Venetie established that the territorial jurisdiction of Alaska tribes does not extend to the 45 million acres of land affected by ANCSA—the vast majority of Native lands in Alaska—even when those lands are owned by tribal governments.

Native allotments, and possibly restricted townsites, are the only Native lands in Alaska that may still qualify as Indian Country, beside the Annette Island Reserve. In the absence of territorial jurisdiction, tribes in Alaska may still exercise governmental powers deriving from membership-based jurisdiction. As the Alaska Supreme Court concluded in John v. Baker, Alaska Native villages have the inherent sovereign power to adjudicate child custody disputes between tribal members, even in the absence of Indian Country. While member-based jurisdiction is significant, the expansion of tribal territorial jurisdiction through trust acquisitions would help tribes in Alaska assert governmental authority over tribal members and, in some cases, non-members to address public safety and other governmental responsibilities in their ancestral

42 Id. at 526 (quoting Alaska ex rel. Yukon Flats School Dist. v. Native Vill. of Venetie Tribal Gov’t, 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez, J., concurring)); see also Alyeska Pipeline Serv. Co. v. Klutikaah Native Vill. of Copper Ctr., 101 F.3d 610 (9th Cir. 1996) (invalidating tribal tax on ANCSA lands held by village corporation because such lands were not Indian Country).
44 John v. Baker, 982 P.2d 738, 748 (Alaska 1999). The father John Baker, a Northway Village member, challenged the order granting shared custody with Anita John, a member of the Mentasta Village. Id. at 744-5. The Supreme Court premised tribal court jurisdiction on the membership, or eligibility for membership, of the children, and remanded to the superior court to determine, using tribal law, the children’s membership status. Id. at 764. If the children were members, or eligible to be members, of Northway Village, the tribal court’s subject matter jurisdiction would have been proper and the state court should defer to the tribal court decision under the doctrine of comity. Id. at 763-65. The Alaska Supreme Court suggested tribal authority beyond membership and child custody, holding that Alaska Native villages have “non-territorial sovereignty” to resolve child custody matters as part of “the core of sovereignty – a ‘tribe’s inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.’” Id. at 758 (quoting Montana v. United States, 450 U.S. 544, 564 (1981)).
territory.\textsuperscript{45} For many years, however, the established regulatory trust acquisition process was not available to Alaska tribes.

\textbf{C. The Alaska Exception and the Akiachak Case}

The Secretary’s general discretionary authority to acquire land in trust for tribes derives from the Indian Reorganization Act (IRA) enacted in 1934.\textsuperscript{46} Repudiating the assimilationist allotment policy that resulted in the loss of 90 million acres of Indian land since 1887, Congress enacted the IRA to revive tribal governments and restore their land bases. Section 5 of the IRA authorizes the Secretary of the Interior to acquire lands-in-trust “for the purpose of providing land for Indians.”\textsuperscript{47} This authority has proven critical to tribes, facilitating tribal land restoration and economic development, insulating tribes from state and local jurisdiction and taxation, and maintaining protection for land with historical and cultural significance.

In 1936, Section 5 was expressly extended to Alaska.\textsuperscript{48} This provision has never been repealed. Nevertheless, in 1978 the Interior Solicitor issued an opinion concluding that given Congress’s stated intentions in ANCSA to avoid “trusteeship,” accepting Alaska lands into trust would be an abuse of the Secretary’s discretion, given Congress’s stated intentions.\textsuperscript{49} Two years later, the Department slipped the “Alaska exception” into the land-to-trust regulations.\textsuperscript{50} As recounted in the preamble to the Final Rule, the Department has questioned the validity of the 1978 Solicitor’s Opinion, and rescinded it in 2001.\textsuperscript{51} Nonetheless, that same year, DOI still published proposed revisions of the Part 151 regulations that would have kept the Alaska exclusion. Those proposed rules were subsequently withdrawn, and the exclusion remains in place.\textsuperscript{52}

In 2006, four Native Villages, including the Akiachak Native Community, and one individual Native brought suit against the Interior, arguing that the Alaska exclusion violates the IRA, which states that any regulation "that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe"

\textsuperscript{45} See Indian Law and Order Commission, \textit{A Roadmap For Making Native America Safer: Report to the President and Congress of the United States} at 52-53 (Nov. 2013).
\textsuperscript{46} 25 U.S.C. § 465, et. seq.
\textsuperscript{47} This program was a key element of the Indian Reorganization Act of 1934. See 25 U.S.C. § 465 (§ 473(a) for Alaska tribes) and Bureau of Indian Affairs (BIA) regulations at 25 C.F.R. Part 151.
\textsuperscript{49} Final Rule at 76889.
\textsuperscript{50} \textit{Id.}; 45 Fed. Reg. 62034 (Sept. 18, 1980).
\textsuperscript{51} Final Rule at 76889.
\textsuperscript{52} \textit{Id.}
relative to those of other federally recognized tribes "shall have no force or effect." The plaintiffs argued that by excluding Alaska tribes from the administrative land-into-trust process the DOI had created an illegal classification that diminished the rights of every Alaska tribe (save Metlakatla) compared to all others in the United States. The State of Alaska viewed Akiachak as a potential avenue for expanding tribal jurisdiction and correspondingly weakening the State’s, so it intervened to defend the regulation.

The court in Akiachak agreed with the tribal plaintiffs and struck down the regulation. First, the court determined that the Secretary retained authority, under the 1936 Alaska extension of the IRA, to take land into trust for Alaska tribes. The creation of new trust property would be in “tension” with ANCSA’s revocation of reservations and elimination of most trust property. But the court found creation of new trust property would not be “irreconcilable” with ANCSA, as would be required in order to hold that ANCSA implicitly repealed the 1936 statute. While ANCSA said the settlement itself did not create a "trusteeship," ANCSA did not prohibit the creation of trusteeship in Alaska outside the settlement. As the Department agreed in the Final Rule, “There is nothing precluding the settlement codified in ANCSA and the Department’s land-into-trust authority under the IRA from coexisting in Alaska.”

Next, the court addressed whether the Alaska exclusion was legal. On this issue, the court held that the regulation, by creating a distinct classification of Alaska tribes and diminishing their rights compared to other tribes, runs afoul of 25 U.S.C. § 476(g), and therefore, "shall have no force or effect." Following further briefing on the scope of the remedy, the court issued a second decision, holding that the Alaska exception could be severed by deleting the last sentence of 25 C.F.R. § 151.1 and leaving the remainder of the trust acquisition regulations unchanged.

The State of Alaska appealed the district court’s decision on the propriety of the Alaska exception to the United States Court of Appeals for the D.C. Circuit. Interior did not join in the appeal. Instead, following the district court’s ruling and its own internal

54 Akiachak, 935 F. Supp. 2d at 210.
55 Id. at 207.
56 Id.
57 Final Rule at 76890.
58 Akiachak, 935 F. Supp. 2d at 211 (quoting 25 U.S.C. § 476(g)).
59 Akiachak Native Cmty. v. Jewell, 2013 U.S. Dist. LEXIS 141120 (D.D.C. 2013) at *10–*16. The tribal plaintiffs argued for a remand to DOI to draft regulations taking into account the Alaska-specific factors discussed below in section V. The State of Alaska and DOI urged the court to simply sever the Alaska exception, which the court did.
60 Id.
review, the Department issued a notice of proposed rulemaking to remove the Alaska exception from the regulations.\(^61\) The State then sought, and the district court granted, an injunction prohibiting the Secretary from taking any land into trust in Alaska pending the outcome of the appeal.\(^62\) The court held that DOI may continue with its rulemaking, and even process applications, provided no final decisions on the applications are made.\(^63\) The Department did proceed with the rulemaking, issuing a notice of proposed rulemaking on May 1, 2014.\(^64\) The Department subsequently held three tribal consultation sessions and received 105 written comments.\(^65\) On December 23, 2014, DOI issued the Final Rule.

Assuming that the Akiachak decision is upheld on appeal, the Final Rule opens the door to Alaska trust applications, providing the opportunity to develop a land base over which Alaska tribes can exercise territorial jurisdiction. Importantly, the Final Rule does not require the Secretary to take any land into trust in Alaska; it simply allows the Secretary to do so, at her discretion, based on the criteria set forth in Part 151.\(^66\) Therefore tribes need to understand those criteria and the components of a successful land-to-trust application, which we discuss in section IV below. First we address some of the reasons Alaska tribes may wish to have lands placed in trust.

### III. TRIBAL RIGHTS AND JURISDICTION IN INDIAN COUNTRY—WHY PLACE LAND INTO TRUST?

Trust lands would constitute Indian Country.\(^67\) As explained above, there are several benefits for tribes who reside in “Indian Country.” Generally, in Indian Country tribes have greater authority over members and their property, and some authority over non-members when they are within Indian Country, while the state has correspondingly less authority. For example, trust lands are generally beyond the reach of state and


\(^{63}\) Id. at 15-16.

\(^{64}\) 79 Fed. Reg. 24648 (May 1, 2014) (hereinafter “Proposed Rule”) at 24649.

\(^{65}\) Final Rule at 76890.

\(^{66}\) Final Rule at 76889 (executive summary of rule).

\(^{67}\) See Final Rule at 76893 (“The Department’s position has been that land held in trust by the United States on behalf of a federally recognized Indian tribe is ‘Indian Country.’”). See also COHEN 193 (“Notwithstanding the Venetie decision, off-reservation trust or restricted lands set aside for Indian use should be considered Indian Country under the dependent Indian community section of the statute. They are by definition set aside for Indian use and subject to pervasive federal control...”) The State of Alaska, in its comments on the Proposed Rule, disputes that trust lands necessarily become Indian Country. State of Alaska, Dep’t of Law, Comments on Land Acquisitions in the State of Alaska 79 Fed. Reg. 24,648 (proposed May 1, 2014) Amending 25 C.F.R. part 151 (July 31, 2014) (hereinafter State of Alaska Comments), available at http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=BIA-2014-0002. The State quotes United States v. Stands, 105 F.3d 1565, 1572 (8th Cir. 1997): “For jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian Country.” But as explained in COHEN 193 n.426, this statement is dictum and conflicts with U.S. Supreme Court precedent.
local laws, including taxing authority. Trust status also brings federal protections and may confer eligibility for certain federal funds.\textsuperscript{68} In this section, we explore some of the benefits of trust land in more detail, often citing the comments of Alaska tribes and tribal organizations on the Proposed Rule published in May 2014, along with the Department’s response to those comments in the Final Rule. The examples here do not comprise a complete or exhaustive list of the benefits of placing land into trust.\textsuperscript{69}

\textbf{A. Taxation}

Trust lands in Alaska would not be completely insulated from state jurisdiction, but they would have significant protections in the areas of taxation and other state authority. This freedom from regulation enhances self-determination. As Chief Justice Marshall remarked long ago, “the power to tax involves the power to destroy.”\textsuperscript{70} As the \textit{Akiachak} litigation illustrates, in Alaska, the State and tribes have maintained a contentious history.\textsuperscript{71}

The IRA specifies that lands acquired pursuant to the Act “shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.”\textsuperscript{72} Several tribes pointed to this benefit in voicing their support for the Proposed Rule. For example, the Native Village of Perryville stated that taxation by the Lake & Peninsula Borough hinders the Village’s ability “to exercise its governmental functions and responsibilities in a number of ways.”\textsuperscript{73} Even the State of Alaska conceded that trust lands would not be subject to taxation by the State or any of its political subdivisions: “Trust land alone, even if not considered Indian Country, will preempt state and local tax laws.”\textsuperscript{74}

On the positive side, tribes possess their own taxation authority, an inherent part of their sovereignty, so the potential impacts of trust land in Alaska need to be

\textsuperscript{68} See, e.g., EPA Region 10 Regional Tribal Operations Committee, Comments on Potential Rule Removing Prohibition on Taking Land into Trust in Alaska, (“Allowing lands to be taken into trust will greatly expand funding available from EPA. . . .”), \textit{available at} http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=BIA-2014-0002.

\textsuperscript{69} For a good summary of the potential benefits and drawbacks of trust land based on comments received during the rulemaking, see \textit{Final Rule} at 76891-93.

\textsuperscript{70} \textit{McCulloch v. Maryland}, 17 U.S. 316, 431 (1819).

\textsuperscript{71} See also \textit{State of Alaska Comments}. Predictably, the State opposes the Proposed Rule and decries the potential creation or expansion of Indian Country in the state.

\textsuperscript{72} 25 U.S.C. § 465 (emphasis added)

\textsuperscript{73} Comments of the Native Village of Perryville, \textit{available at} http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=BIA-2014-0002. The Native Village of Port Graham described defending itself against foreclosure actions by the Kenai Peninsula Borough for failure to pay assessed taxes. \textit{Id.}

\textsuperscript{74} \textit{State of Alaska Comments supra} note 67 at 15.
understood within this context.\textsuperscript{75} Within Indian Country, this authority extends to the activity and property of non-members and non-Indians.\textsuperscript{76} Thus, Alaska tribes with trust lands would be able to impose a tax on parties doing business on those lands—the type of tax the Supreme Court invalidated in the \textit{Venetie} case solely because the activity was not in Indian Country.\textsuperscript{77} Several tribes pointed out the benefits of a potential tax base to provide revenue for education, health care, law enforcement, and other governmental services.\textsuperscript{78}

\section*{B. Land Use}

Trust lands would be free from not only taxation but other regulation by state and local authorities, such as zoning and land-use laws. For example, the Craig Tribal Association stated its current efforts to provide tribal housing and economic development “are hampered because the tribe is at the mercy of the City of Craig’s zoning, land use, and land development laws.”\textsuperscript{79} The Tribe supported the Proposed Rule as a way to create tribal opportunities notwithstanding those restrictions. As a general rule, the State and its political subdivisions do not have zoning authority over Indian-owned lands in Indian Country, even in a P.L. 280 state such as Alaska.\textsuperscript{80}

While the State of Alaska has no zoning authority, tribes can impose their own land use regulations on trust lands and other Indian Country in Alaska. Tribes have the inherent sovereign authority to regulate land use within their territory, but this authority generally does not extend to non-Indian owned fee land, even within Indian Country.\textsuperscript{81} In comments on the Proposed Rule, some tribes anticipated benefits from environmental and other land use regulation,\textsuperscript{82} while some ANCSA corporations and the State of Alaska feared the same regulatory authority.\textsuperscript{83}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{75} Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137–40 (1982).
\item \textsuperscript{76} \textit{Id.} at 135. \textit{Cf.} Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 (2001) (invalidating tax on non-Indian activity on fee land within reservation, but noting that \textit{Merrion} involved activity on trust land).
\item \textsuperscript{77} Alaska v. Native Village of Venetie, 522 U.S. 520 (1997). \textit{See supra} notes 28 and accompanying text in that section.
\item \textsuperscript{78} E.g., Comments of Organized Village of Kasaan; Comments of Craig Tribal Ass'n at 3.
\item \textsuperscript{79} Comments of the Craig Tribal Association. \textit{See also} Comments of Native Village of Port Graham (anticipating trust application to relieve Tribe from Borough’s taxing authority and land-use restrictions).
\item \textsuperscript{80} Santa Rosa Band of Indians v. King County, 532 F.2d 655 (9th Cir. 1975), \textit{cert. denied}, 429 U.S. 1038 (1977).
\item \textsuperscript{81} \textit{See} Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (plurality opinion holding that tribe could zone non-Indian lands only in the “closed” portion of the reservation, where the vast majority of the land was tribal-owned and few non-Indians lived).
\item \textsuperscript{82} Comments of Craig Tribal Ass’n at 2-3 (explaining that trust lands would allow Association to develop its own environmental quality standards for resource extraction projects affecting tribal land).
\item \textsuperscript{83} Comments of Doyon at 3; Comments State of Alaska at 6-8. Alaska’s Department of Natural Resources (DNR) submitted comments separate from those of the Department of Law just cited. DNR opposed the Proposed Rule on many of the same grounds, recognizing for example that “this proposed rulemaking would provide for territorial jurisdiction by tribes.”
\end{itemize}
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Non-Native trade associations and recreational sports organizations adamantly opposed the Proposed Rule, arguing that DOI should not “create ‘indian [sic] country’ by bureaucratic fiat,” and worrying that villages imposing fishing and hunting regulations would upset the carefully crafted conservation regime and “inflame tensions between groups.” Both supporters and opponents of the Proposed Rule recognized its potential to expand tribal regulatory jurisdiction in Alaska.

The DOI responded to the concerns of opponents in the Final Rule by pointing out that the regulations not only allow but also require the Secretary to consider jurisdictional issues when considering a trust application. The Department addresses such issues on a case-by-case basis during each application review.

C. Gaming

The Indian Gaming Regulatory Act (IGRA) permits tribes to conduct gaming “on Indian lands.” The statute defines Indian lands as (1) land within the limits of a reservation, or (2) land over which a tribe exercises governmental power and that is held in trust or restricted status by the United States for the benefit of the tribe or an individual. While the Annette Island Reserve clearly qualifies as “Indian lands” under IGRA, allotments and townsites may or may not constitute Indian lands under the Act. Lands acquired in trust for a tribe would undoubtedly constitute “Indian lands” under IGRA, but the statute prohibits the conduct of gaming on lands acquired in trust after 1988 unless one of several exceptions is met. A detailed discussion of potential gaming rights is beyond the scope of this article.

84 Comments of Territorial Sportsmen, Inc. at 1.
85 Comments of Safari Club International Alaska Chapter at 2.
86 See 25 C.F.R. § 151.10(f); id. § 151.11.
87 Final Rule at 76893.
89 Id. § 2703(4); 25 C.F.R. § 502.12.
90 An informal opinion of the Interior Office of the Solicitor issued before the Venetie case was decided questioned whether the Native Village of Akiachak exercised jurisdiction over a townsit. Letter from Scott Keep, Assistant Solicitor, to Michael Cox, General Counsel, National Indian Gaming Commission (June 2, 1995), available at http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f01_akiachkntvecomnty.pdf&tabid=120&mid=957. The opinion stated that the question presented factual issues, and it made no decision on the matter. The National Indian Gaming Commission also ruled that the Native Village of Barrow did not have jurisdiction over a townsit allotment. Letter from Philip Hogen, Commissioner of the NIGC, to Hans Walker (Feb. 1, 1996), http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f31_nativevillageofbarrowal1996.pdf&tabid=120&mid=957. See also Letter from Michael J. Anderson, Associate Solicitor, to Michael Cox, NIGC General Counsel (Nov. 15, 1993) (Native Village of Kwalock could not game on townsites, but could game on trust lands). None of these opinions were challenged in court.
D. Authority Over Non-Members

In Montana, the Supreme Court set forth “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,” on non-Indian fee land within a reservation.\(^92\) Tribes may regulate non-Indians on such lands only if one of two exceptions applies: (1) the non-Indian has entered a consensual relationship with the Tribe or tribal member, such as a contract having to do with the land; or (2) the non-Indian activity threatens “the political integrity, the economic security, or the health and welfare of the Tribe.”\(^93\) In addition to this common law test for jurisdiction over non-Indians, some Federal statutes specifically provide for tribal jurisdiction over non-Indians. Under the Clean Water Act, for example, tribes can exercise Clean Water Act jurisdiction over non-Indians, even on non-Indian-owned fee land, where necessary to protect the health and welfare of the tribe.\(^94\) The Clean Water Act authority is premised on the tribe “exercising governmental authority over a Federal Indian reservation,” however, and thus would not apply in Alaska outside the Annette Island Reserve unless amended.\(^95\)

E. Law Enforcement

For years tribal advocates have called for establishing (or affirming) tribal territorial jurisdiction to improve public safety in remote rural villages where the tribe is typically the only governmental presence.\(^96\) In November 2013, the Indian Law and Order Commission (ILOC), a bipartisan, blue-ribbon panel appointed by Congress and the Administration, issued a detailed report aimed at strengthening tribal law enforcement and justice systems.\(^97\) The report dedicated an entire chapter to Alaska—the only state to warrant such extensive concern.\(^98\) The ILOC recommended, among other things, that Congress overturn the Venetie decision and amend ANCSA to allow transferred lands to be put into trust and included within the definition of “Indian Country.”\(^99\) The Commission found that expanding Alaska tribal land bases would

\(^93\) Id. at 565-66.
\(^95\) 33 U.S.C. § 1377(h) (Clean Water Act definition of “Indian tribe” for purposes of treating tribes as states).
\(^97\) Indian Law and Order Commission, A Roadmap For Making Native America Safer: Report to the President and Congress of the United States (Nov. 2013).
\(^98\) Id. at 33-61.
\(^99\) Id. at 45, 51-2.
improve not only public safety, but subsistence and other environmental and economic activities.\textsuperscript{100}

The Final Rule echoes the ILOC report, as well as a similar recommendation made by the Commission on Indian Trust Administration and Reform.\textsuperscript{101} This commission was formed under President Obama and former Secretary of the Interior, Ken Salazar, to look at the Department’s management of trust funds, lands, and resources.\textsuperscript{102} On December 10, 2013 the commission issued a report that included substantial testimony from Alaska Natives and conclusions that trust land acquisition in Alaska was an important prerequisite to greater tribal sovereignty within the State.\textsuperscript{103}

Tribal comments on the Proposed Rule regularly invoked this same theme. For example, the comments on behalf of the Organized Village of Kasaan discussed the ILOC report and noted that trust lands “would provide the jurisdictional basis and additional authority for Alaska tribal governments to address public safety issues, including domestic abuse, sexual violence and other offenses that disproportionately affect Native Alaskan women and children.”\textsuperscript{104} As the Native Village of Tetlin put it, “placing land in trust in Alaska is necessary to ensure that tribes have the requisite authority to protect their Native women.”\textsuperscript{105}

The State of Alaska would share jurisdiction within this new Indian Country under the terms of Public Law 83-280, enacted in 1953. In P.L. 280, as it is commonly known, Congress extended the civil and criminal jurisdiction of certain states over the “Indian Country” within their borders.\textsuperscript{106} After the Venetie decision, P.L. 280 has had very little relevance in Alaska due to the general absence of Indian Country outside of the Annette Islands Reserve. That would change if Alaska tribes expand their trust land base.

In the Final Rule, the DOI acknowledged the concerns of the State and other opponents, but found that the “acute public safety problems” documented in the ILOC report constituted a compelling public policy consideration in favor of deleting the Alaska

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\textsuperscript{100} \textit{Id.} at 53.
\textsuperscript{101} \textit{Final Rule} at 76892.
\textsuperscript{103} \textit{DEP’T OF THE INTERIOR REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM} 59-67 (2013/\textit{Id.}).
\textsuperscript{104} \textit{Land Acquisitions In Alaska, REGULATIONS.GOV, available at http://www.regulations.gov/#docketBrowser;ppp=25;po=0;dct=PS;D=BI-2014-0002.}
\textsuperscript{105} \textit{Id.}

\textsuperscript{106} See 18 U.S.C. § 1162 (1954)(criminal jurisdiction); 28 U.S.C. § 1360 (civil jurisdiction). Alaska was added to these lists upon statehood.
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Exception. The Department sensibly concluded that tribal governments are in the best position to decide whether trust lands would provide a helpful “jurisdictional underpinning” to help address public safety challenges. The State will retain concurrent criminal jurisdiction under P.L. 280, the Department noted, so the rule potentially increases federal resources and opportunities for tribal-state collaboration without significantly reducing state jurisdiction.

In sum, the benefits of new tribal trust land in Alaska do not inure solely to tribal communities and Alaska Natives, but also to Alaska residents more broadly, as is made abundantly clear in the context of public safety related issues.

IV. CURRENT PROCESS AND CHECKLIST FOR A LAND-INTO-TRUST APPLICATION WITH THE DOI

The Final Rule, though beneficial to tribal self-governance, leaves some uncertainty as to how the Department will implement the Land-into-Trust application process for Alaska. The Final Rule strikes the “Alaska exception” and leaves the remainder of the Part 151 regulations unchanged. There are, however, several incongruities between the Land-into-Trust Regulations and the realities of land tenure within Alaska. For example, the regulations assume that the applicant has a reservation and that the land to be acquired is either “on” or “off” that reservation. These Alaska-specific issues will be discussed below in Part V, following this more general discussion of the Land-into-Trust process in Part IV.

Nevertheless, even if all the implementation details are not yet known, there are elements of the Land-into-Trust process in the existing regulations that will apply to Alaska tribes just as they have for several decades to other tribes. What follows below is a brief summary of the Land-into-Trust application process—a checklist tracking the regulations and DOI’s Fee-to-Trust Handbook. We do not include discussion of gaming acquisitions, but note that they entail additional requirements. Where there are inconsistencies with the existing Land-into-Trust process, or concerns about Land-into-Trust implementation in Alaska, those are pointed out.

In general, a Land-into-Trust application includes the following:

107 Final Rule at 76892.  
108 Id.  
109 Id.  
110 25 C.F.R. Part 151 (Land Acquisitions); Dep't of Interior, Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee to Trust Handbook), Version III 7-10 (June 16, 2014) (hereinafter, Fee-to-Trust Handbook).
1. A written request identifying the parties and describing the land.\textsuperscript{111} The request that BIA take the land into trust generally must include a description of the land [list regulatory requirements] and include the following information and documents:

- a physical description of the location of the land; the present and past uses of the land; a proof of present ownership, or a description of the circumstances which will lead to tribal ownership;
- a legal description supported by a survey or other document; an indication of the location and proximity to the Tribe’s reservation, the reservation boundaries or to trust lands (as discussed above, this requirement will need to be addressed for Alaska in the implementation phase of the Proposed Land-into-Trust Rule);
- a plat/map indicating such location and proximity of the land to the reservation\textsuperscript{112}; and
- the DOI Regional Solicitor generally requires that the request contain a memo from the Area Director requesting a preliminary title opinion (PTO).\textsuperscript{113}

2. A Description of the Tribal authority for the trust acquisition.\textsuperscript{114} The Tribe must include a copy of the resolution of the governing body of the Tribe authorizing the trust acquisition request. The resolution should include a request to take the land into trust, the exact legal description of the property, the location, the intended purpose of the trust acquisition, and a citation to the portion of the Tribe’s governing document (i.e. Constitution), if any, which permits the governing body to make the request. In addition, the Tribe should include a copy of the Tribe’s governing organic documents, if any, which identify the scope of authority for the action.

3. Statutory authority for the acquisition.\textsuperscript{115} Usually this will be the IRA, 25 U.S.C. § 465.\textsuperscript{116} As discussed below in Section V.E, however, this authority extends only to

\textsuperscript{111} 25 C.F.R. § 151.9; Fee-to-Trust Handbook at 8-9 and 45.
\textsuperscript{112} Fee to Trust Handbook at 7-10.
\textsuperscript{113} Field Solicitor, DOI, Checklist for Non-Gaming Trust Acquisition Preliminary Title Opinions (April 20, 2001).
\textsuperscript{114} 25 C.F.R. § 151.9; Id..
\textsuperscript{115} 25 C.F.R. §151.10(a).
\textsuperscript{116} This is the general authority within the IRA for tribal trust land acquisition. There are other federal authorities for tribal trust land acquisition (tribal recognition legislation is an example), and Alaska tribes may want to determine if there are, in the region, federal enactments that provide for discretionary, or mandatory, acquisition of tribal land and whether those enactments will bear on the Land-into-Trust process.
tribes that were “under federal jurisdiction” in 1934, and it may be argued that tribes in Alaska were not.

4. *Explanation of the need of the Tribe for the additional land.* The Tribe must explain the need for the additional land, why current land holdings are inadequate to fulfill that need, and why trust status is needed. For example, the Tribe or its members may be eligible for certain federal programs—e.g. Housing and Urban Development (HUD) financing, certain types of mortgage insurance, etc.—only if the land is held in trust status. The Tribe should *not* simply state that it wishes to avoid taxes through trust status, as the DOI has generally not found that to be, on its own, a compelling enough reason to acquire a trust interest in land.

5. *Purposes for which the land will be used.* The purposes will reflect the needs identified in #4 above, so these two requirements overlap somewhat. There are three primary reasons for which tribes take land into trust:

   a) to facilitate tribal self-determination—for instance, using the property for governmental offices, healthcare, or public services;
   b) for economic development—e.g., for an industrial use, a business venture, or gaming; and
   c) for tribal housing.

There are many other valid purposes for acquiring land in trust—expansion of tribal jurisdiction, protection of sensitive lands, etc. The Tribe’s application should state which purposes the acquisition will fulfill.

6. *Impact on the State and its political subdivisions.* If the land to be acquired is in unrestricted fee status, placing it in trust will remove it from the tax rolls, to the extent there are any. Therefore the county, the borough, the municipality and/or the state will often resist land in its jurisdiction being taken into trust. Once it has received the Tribe’s application, the BIA must notify the state and local governments having regulatory jurisdiction over the land to be acquired, and give those governments 30 days to comment on potential impacts of the acquisition. The Tribe should submit any evidence indicating that loss of tax revenue to the state or local government will be minimal. In some cases, the state or local government may even benefit from the trust acquisition—e.g., if the proposed use

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117 25 C.F.R. § 151.10(b).
118 25 C.F.R. § 151.10(c).
119 25 C.F.R. § 151.3(a)(3).
120 25 C.F.R. § 151.10(e).
generates jobs producing taxable income or other taxable revenues, or if the tribe assumes authority to provide services that the State cannot or does not provide.

7. **Jurisdictional problems and potential conflicts of land use.** As noted above, the BIA must provide affected state and local governments notice of, and an opportunity to comment on, proposed trust acquisitions. The Tribe should submit evidence, if possible, that the proposed use is already permitted under the local government’s zoning or land use regime, is allowed as a conditional use, and/or will not conflict with existing uses in the surrounding area. Any cooperative agreements entered into, or voluntary actions taken, by the Tribe to address jurisdictional and/or land use conflicts, should be submitted. Potential issues to be addressed include law enforcement, utilities, and emergency services such as fire protection and ambulance service. In the lower 48 states, some BIA Regions also consider the proposed acquisition’s impact, if any, on adjoining tribes. These nearby tribes are then made aware of the proposed transaction, and possible impacts on them are to be considered in the application. It is again unclear what approach would be taken in Alaska to this consideration.

8. **BIA’s ability to discharge additional responsibility resulting from the acquisition.** The Tribe should set forth facts indicating that BIA will need to devote few if any resources to oversight of the land to be held in trust. The Tribe may consider the distance of the land from the BIA office, and whether the BIA office has sufficient staff to conduct inspections, etc. This issue will be discussed further below in section V.C.

9. **Environmental impact documentation.** To help ensure approval and speed the process, the Tribe should provide information that helps the BIA comply with (a) the National Environmental Policy Act (NEPA), and (b) 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. Tribes can prepare their own NEPA documentation, which begins with an environmental assessment (EA) examining the potential environmental impacts of the proposed action, and can lead, where the impacts are significant, to a full environmental impact statement (EIS). With respect to potential contamination, the United States government’s basic concern is potential liability for contamination from leaking gas or oil tanks or other pre-existing environmental hazards. If the Tribe can provide evidence of tank decommissioning or a recent environmental inspection, for example, it should do so.

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121 25 C.F.R. § 151.10(f).
122 25 C.F.R. § 151.10(g).
123 25 C.F.R. § 151.10(h).
10. **Title Examination and Draft Deed.** The Tribe should furnish as part of its application a Commitment for Title Insurance or a Certified Abstract meeting the Standards for the Preparation of Title Evidence in Land Acquisitions by the United States. Although an abstract of title may suffice in some cases, getting title insurance is generally better policy and will speed the trust acquisition process. Basically the government wants to identify—and may require the Tribe to eliminate—any liens, encumbrances (such as easements) or other legal infirmities that may exist on the property.

11. **Additional Documents for Preparation.** Over the past twenty years or so, the DOI has often sent Land-into-Trust applications back to the applying Tribe requesting additional information. As a result, most tribes work to eliminate this potential delay by including in their application additional documents that the DOI frequently requests, including: an affidavit acknowledging existing rights of way and easements (statement that existing rights of way and easements will not interfere with the use of the property); a statement that the development of minerals will not interfere with the intended use of the property (this could become a significant issue in Alaska, where surface and sub-surface estates are often split in ownership); an appraisal or other evidence of value of the property (e.g., evidence of consideration paid by current owner or county assessor’s statement of value); proof of payment of taxes (expect to update prior to issuance of the final title opinion); a short plat survey if only a smaller portion of a larger tract is being placed into trust (again, this could be a substantial issue in Alaska where surveyed tracts of land are often huge in comparison to the lower 48); flood certification (if reliable flood information is not otherwise provided, i.e., in the appraisal, by copy of FEMA maps, etc.); and a draft deed using the template developed for trust transfers by the United States.

12. **The location of the land relative to state boundaries, and its distance from the boundaries of the Tribe’s reservation.** Under the regulation, the farther the land is from the reservation, the more closely the BIA will generally scrutinize the Tribe’s justification of the acquisition, and the more weight the BIA will give to concerns of state and local governments. The Tribe generally provides a map showing the location of the land relative to the reservation. As discussed further below, it is

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126 25 C.F.R. § 151.11(b).
unclear how the DOI would apply this “distance from the reservation” criterion in Alaska.

13. A business plan. When the land is being acquired for business purposes, the Tribe must provide a plan specifying the anticipated economic benefits of the proposed use. In the gaming context, the Office of Indian Gaming Management (OIGM) has historically expected this plan to be fairly detailed, referring to it in one previous guidance as “the tribe’s comprehensive economic development plan.” It is likely that the more detailed the economic reasons for trust transfer, the more detailed the BIA will require the business plan to be.

The BIA considers all of the factors in subsections 1-13 above in deciding whether to accept land into trust. As a high-level BIA official has indicated, however, the decision-making process is relatively simple: “Of course, the factors that really matter in these applications are the impact on the state and political subdivisions and the jurisdictional problems.” Since this will be a contentious issue within the State of Alaska, given the Akiachak litigation leading up to the rulemaking, how the Land-into-Trust process moves forward in Alaska may prove unpredictable—specifically with respect to the issues discussed next.

V. ALASKA-SPECIFIC IMPLEMENTATION ISSUES

While the Final Rule simply deletes the sentence setting forth the Alaska exception and leaves the rest of the Part 151 regulations unchanged, both Alaska tribes and the DOI understand that some of the criteria in those regulations may not apply in Alaska in the same way they do in the lower 48. In the written comments and elsewhere, many questions have arisen about how the land-into-trust regulations will be implemented in Alaska, given the unique history sketched above and the resulting Native land tenure system. This Section V discusses some of the most prominent, but by no means all, of these questions.

Due to the uncertainty as to how some of the issues below would be addressed under the current Part 151 application process, many comments on the Proposed Rule called for a second rulemaking that would attempt to spell out exactly how the rule would

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127 25 C.F.R. § 151.11(c).
128 OIGM, CHECKLIST FOR GAMING ACQUISITIONS, GAMING-RELATED ACQUISITIONS AND IGRA SECTION 20 DETERMINATIONS § IX.C (October 2001) (hereinafter OIGM Checklist).
129 Larry E. Scrivner, Acting Director, Office of Trust Responsibilities, BIA, Acquiring Land into Trust for Indian Tribes, 37 NEW ENG. L. REV. 603, 606 (2003).
130 Supra note 3; Final Rule at 76895.
be implemented in Alaska. In the Final Rule, however, the Department explained that it did not believe further revisions were needed. The Secretary’s overarching discretion will allow her to account for the unique aspects of Alaska land tenure within the existing rules and review process. If Alaska-specific issues arise that the existing process cannot handle, DOI will consider additional measures.

A. How will the on-reservation/off-reservation distinction be applied?

A key issue the regulations may address is whether or not the parcel is “on-reservation”—that is, within or contiguous to the applicant’s reservation. If the parcel is on-reservation, the Secretary must still exercise her discretion following a thorough review, but the field is tilted in favor of the land being accepted into trust. However, when the parcel is off-reservation, the regulations require that the application satisfy the on-reservation requirements plus some additional requirements. The Department considers the application according to a sliding scale of scrutiny: the farther the land is from the tribe’s reservation, the greater scrutiny the Department gives to the tribe’s justification of anticipated benefits, and the more weight the Department gives to the concerns of state and local authorities. State and local authorities routinely object to trust applications, claiming devastating effects from loss of tax revenue and regulatory jurisdiction. Consequently, the farther off the reservation the parcel is, the more difficult it is to obtain approval.

As a result of ANCSA, tribes in Alaska (other than the Metlakatla Indian Community) have no reservations. The regulations define “Indian reservation” as, “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 diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary.”

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131 See, e.g., Comments of Sealaska Corporation at 3-4; Comments of State of Alaska at 10-12; Comments of NANA Regional Corp. at 2; Comments of Mike Williams at 3-6 (suggesting several ways to make the final rule “more reflective of the on-the-ground realities in village Alaska”).
132 See Final Rule at 76894.
133 Id.
134 See 25 C.F.R. § 151.10.
135 See 25 C.F.R. § 151.3(a) (setting forth policy that lands may be acquired in trust either if they are within or adjacent to reservation or are “necessary to facilitate tribal self-determination, economic development, or Indian housing”).
136 See 25. C.F.R. § 151.11.
137 25. C.F.R. § 151.11(b).
138 See supra notes 24-26.
139 25 C.F.R. § 151.2(f).
Under this definition, there would appear to be no room for the Department to apply the on-reservation test in Alaska outside Metlakatla—even if, for example, the land to be acquired is within a former reservation, or within the tribe’s village corporation lands. In the Final Rule, the Department confirmed that applications from these tribes will be reviewed under the “off-reservation” criteria—whether or not they previously had reservations. This is not advantageous for Alaska tribes, as the “off-reservation” criteria means greater scrutiny, and more discretion, for Secretarial decisions to place land into trust.

Additionally, the Final Rule did not clarify how the Department will apply the proximity-to-the-reservation factor. One possibility would be to simply disregard this factor, as it cannot be measured. Another possibility, one which recognizes the unique circumstances of tribes in Alaska, would be to apply the sliding scale based on proximity to the tribe’s former reservation (if any), to its traditional homelands, its village corporation lands, or to the Village itself. However, any of these Alaska-specific tests would likely require revision of the regulations, which define “reservation” in a way that excludes virtually all of Alaska. Absent such revision, Part 151 may remain biased against Alaska even with the Alaska exception cut out.

B. How will the Department handle split estates and subsurface rights?

Trust applications involving ANCSA lands will often raise the issue of whether the title to those lands is sufficiently “clean” to allow for trust transfer. The United States has raised concerns when faced with accepting title to surface rights when another entity owns the sub-surface rights, although this has never been an insuperable barrier to a trust acquisition. ANCSA lands often have such split estates, with the surface typically owned by the village corporation and subsurface rights owned by the regional corporation.

Comments on the Proposed Rule from ANCSA regional corporations expressed great concern about the impact of trust acquisitions on access to, and development of, subsurface resources. For example, Doyon feared that trust acquisition would subject the land to tribal regulatory jurisdiction, impose federal review and approval requirements,

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140 Final Rule at 76894-95.
141 See, e.g., Dep’t of the Interior, Land Acquisitions; Little River Band of Ottawa Indians of Michigan, 63 Fed. Reg. 64,968 (Nov. 24, 1998) (taking 152.8 acres of surface land into trust, subject to existing rights to explore, develop, and market oil, gas, and minerals from subsurface); Dep’t of the Interior, Land Acquisitions; Ione Band of Miwok Indians of California, 77 Fed. Reg. 31,871 (May 30, 2012) (final agency determination to acquire in trust 228.04 acres, excepting certain mineral rights).
143 E.g. Comments of Doyon, Ltd. at 2; Comments of Arctic Slope Regional Corp. at 3; Comments of NANA Regional Corp. at 3. The Alaska Federation of Natives also raised this issue and supported Doyon’s request for further consultation in its comment letter dated June 23, 2014.
or both.\textsuperscript{144} The Arctic Slope Regional Corporation even worried that the Proposed Rule could result in an “unintended ‘taking’ of subsurface estate belonging to [Alaska Native Corporations].”\textsuperscript{145} While a taking seems far-fetched, concerns about tribal and federal regulation and potential impacts on ANCSA corporations and their shareholders are legitimate. As Doyon pointed out, “Tribes can create laws, taxes, policies, ordinances, fees and other requirements which would benefit the tribe and tribal members,” but impose costs on the corporations.\textsuperscript{146} Doyon even argued that a subsequent rulemaking should add a requirement that holders of subsurface rights consent before the surface estate may be taken into trust.\textsuperscript{147}

Even without such a revision, however, the Secretary could—and probably should—favor surface estate trust applications where the tribe has obtained the subsurface owner’s consent and perhaps entered an agreement ensuring access and development subject to reasonable regulation. In the Final Rule, the Department said it would “encourage” surface and subsurface owners to enter into access agreements.\textsuperscript{148} The Department also pointed out that, even absent such an agreement, the mineral estate remains dominant under settled law, the surface estate is subservient, and the subsurface owner has a right of reasonable access to the minerals below.\textsuperscript{149} The concerns of ANCSA corporations with respect to any particular parcel will be heard and addressed as part of the application process.\textsuperscript{150}

\section*{C. Does the BIA Regional Office have sufficient staffing and capacity to handle an influx of Alaska Land-into-Trust applications?}

The answer is, No. As many tribes have experienced with Secretarial elections, Section 17 Corporation applications and various other BIA services that involve internal review, the BIA staffing in Alaska is inadequate to handle its current workload. Adding

\begin{itemize}
\item \textsuperscript{144} Comments of Doyon, Ltd. at 1 (second page of comment letter).
\item \textsuperscript{145} Comments of Arctic Slope Regional Corp. at 3.
\item \textsuperscript{146} E.g., Doyon Comments at 3.
\item \textsuperscript{147} E.g., Doyon Comments at 4 (arguing that regulations should be revised to require “express consent of the owner of the subsurface estate”).
\item \textsuperscript{148} Final Rule at 76893.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Id. In addition to the prevalence of split estates, Alaska also has the unique “section line easement” system. Section line easements are public rights of way of various widths that run along the “section lines” of the rectangular survey system. These easements date back to “Revised Statute 2477” (a part of the 1866 federal Mining Act), and in Alaska, the legislature prohibited local governments (i.e. boroughs) from being able to vacate, or remove, these easements pursuant to AS 29.35.090. It is unclear how a section line easement would be treated by the United States if it were on the title of a parcel of land a tribe sought to place in trust in Alaska, but the issue is worth noting and may require additional analysis. Tribes may want to apply for smaller parcels than are currently surveyed. Short-platting or sub-dividing parcels is a separate process governed by the State, so that may add yet another wrinkle to the process.
\end{itemize}
additional work in the form of potentially contentious land-to-trust applications will only add to the backlog.

For example, while some have predicted that “there will not be a rush to request the Secretary to accept trust lands,” others expect BIA to be flooded with applications. With 229 federally recognized tribes in Alaska, BIA could find itself overwhelmed in fairly short order, particularly given the Regional Office’s lack of experience with trust applications and the pent-up demand caused by four decades of the arbitrary Alaska exception. Processing trust applications can be a slow process even in the lower 48, where the Regional Offices have lots of experience. Note that the BIA frequently requires land-into-trust applicants to re-do environmental documentation if it is older than six months, or sometimes a year. Unless this practice is changed or the BIA acquires substantial staffing to handle applications, a tribe could well find itself paying, and then re-paying, to complete environmental work multiple times. Processing applications in a timely manner takes funding, staff, training, and capacity.

One model to consider is the California Fee-to-Trust Consortium (CFTC) that was formed by tribal governments in the late 1990s to address the unique history of California tribes, many of whom had little to no trust lands due to the termination policy in the state and other historical factors. The CFTC brings together the BIA and over 60 tribes in California in a joint effort to identify opportunities to streamline the land-into-trust process, pool tribal and federal resources to meet staffing needs, produce a uniform application process that eliminates confusion and delay and meet on an ongoing basis to continue to adapt the joint efforts to significantly increase the tribal trust land base within the state. The CFTC and the process by which it was created and successes it has had in placing land into trust in California, has made it a model that is definitely worth considering in Alaska.

An additional capacity-related issue is raised by the regulations themselves. When evaluating an application, the Department must consider “whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the

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151 Comments of Calista Corp. at 2 (June 16, 2014).
152 Final Rule at 76894 (summarizing comments questioning whether BIA has “the resources to handle an influx of these applications”).
153 The testimony provided by Alaska tribes at the June 8, 2014 Proposed Rule consultation in Anchorage made clear that some Alaska tribes already have land-into-trust applications pending with the BIA. It is unclear how previously submitted applications will be addressed by the BIA, but strong policy arguments can be made that those applications that have been pending the longest should be processed first.
154 Supra note 62 at 14.
156 Id.
acquisition of the land in trust status.” The Metlakatla Indian Community—the only tribe in Alaska currently receiving trust land services from BIA—generally supported the Proposed Rule, but questioned whether BIA is “equipped to discharge” the additional duties resulting from trust acquisitions. The Department’s response should be to proactively provide and train staff rather than to use lack of staffing as an excuse to deny applications and preserve a de facto Alaska exception. Nevertheless, funding for such training and capacity within the Department is not apparent. The Final Rule’s response to comments on this issue was also not encouraging. The Department simply acknowledged that the regulations require consideration of whether BIA is equipped to discharge its responsibilities associated with the proposed trust land, and stated that the “Department’s policy is to process trust applications as expeditiously as possible.”

There was no discussion of the resources necessary to meet these responsibilities, let alone a commitment to providing them.

D. How will the Department handle federal lands a tribe wishes to place in trust?

Most trust applications involve lands a tribe owns in fee simple. However, tribes across the country have expressed a desire to have available federal lands transferred directly to tribal trust when the tribal government makes such a request. A resolution was passed at the 2013 National Congress of American Indians (NCAI) Mid-Year Conference requesting that Congress amend and reauthorize a number of federal land management laws and regulations in order to facilitate such land transfers. Given the predominance of federal land in Alaska—63.8% of the State is owned by the United States, according to the Alaska Department of Natural Resources—this could be a significant issue in the implementation of the Proposed Rule. Most, if not all, of this federal land is carved out of Alaska tribes’ ancestral homelands, and much of it abuts village or village corporation lands, making it a natural candidate for expanding tribal trust land bases. Comments on the Proposed Rule illustrate that Alaska tribes and tribal organizations are already contemplating federal-land-to-trust applications.

157 25 C.F.R. § 151.10(g). See also 25 C.F.R. § 151.11(a) (incorporating same consideration into off-reservation acquisition process).
159 Final Rule at 76894.
161 Alaska Dep’t of Natural Resources, Division of Forestry, Who Owns/Manages Alaska?, available at http://forestry.alaska.gov/pdfs/07who_owns_alaska_poster.pdf. Federal agencies managing Alaska lands include the Bureau of Land Management (82.5 million acres), the U.S. Fish & Wildlife Service (78.8 million acres), the National Park Service (52.4 million acres), the U.S. Forest Service (22.3 million acres), and the Department of Defense (1.7 million acres). Id.
162 Sealaska Corporation expressed the hope that federal agencies such as the U.S. Forest Service and National Park Service “will be supportive of and open to the transfer of federal lands to tribes in Alaska to be taken into trust.”
Tribes can acquire federal land through exchanges, legislation, the administrative process for disposal of “excess” or “surplus” lands, or other means. Tribes and tribal organizations have the right to acquire federal excess and surplus properties under the Indian Self-Determination and Education Assistance Act (ISDEAA). In the ISDEAA, tribes step into the shoes of the BIA and the Indian Health Service to provide services to their citizens that the agencies would otherwise have been obligated to provide. Therefore, it makes sense that the same statute effectively affords tribes the status of a Federal agency for the purpose of acquiring federal property, placing tribes in a priority position over non-federal parties. Once the tribe identifies the available property, it submits a request to the Secretary of the Interior describing how the property is appropriate for a purpose authorized by its ISDEAA agreement. These purposes are quite broad, ranging from natural resource management to government capacity building, and are largely determined by the tribe itself, so this requirement should be easily met. The Secretary then requests the property from the holding agency, specifying that the request is on behalf of an Indian tribe pursuant to the ISDEAA, and requesting a waiver of any fees in accordance with applicable regulations.

If the tribe requests that the acquired land be held in trust by the United States, the Secretary must “expeditiously” process the request “in accord with applicable Federal law and regulations.” Thus, the Part 151 process must be followed. But because the land effectively never loses its federal character, a strong policy case can be made that the Part 151 review should be streamlined. The principal objections that state and local authorities raise to trust acquisitions—removal of the property from tax rolls and loss of jurisdiction—do not apply because the land never loses its federal ownership status. Now that the Final Rule has been promulgated, Alaska tribes may wish to advocate for a fast-track federal-land-into-trust process, either as part of revised regulations or simply as part of the implementation policy of the current regulations.

E. Will the Carcieri decision affect land-into-trust applications in Alaska?

163 25 U.S.C. § 450(j)(f); id. § 458ff(c). See also 25 C.F.R. §§ 900.95–.101 (BIA and Indian Health Service property); id. §§ 900.102–.106 (other federal agencies’ property). For a description of this process under the ISDEAA and a Defense Department statute, see Geoffrey D. Strommer & Craig A. Jacobsen, Indian Tribes and the Base Realignment and Closure Act: Recommendations for Future Trust Land Acquisitions, 75 N. Dak. L. Rev. 509 (1999).


165 25 C.F.R. § 900.104(a). Here we focus on the process involving property of federal agencies other than BIA and IHS, as most Alaska acquisitions would likely be from land-management agencies such as the Forest Service, National Park Service, and Bureau of Land Management.

166 25 C.F.R. § 900.104(b)–(e).

167 25 C.F.R. § 900.104(c)(2).

168 See Strommer & Jacobsen, supra note 163, at 530-32.

169 Id. at 531 (noting that such a transfer “has no net impact on state or local government”).
As discussed above, the Part 151 regulations implement the statutory authority conferred on the Secretary by Section 5 of the IRA. In *Carcieri*, the Supreme Court ruled that the Secretary can only take land into trust for tribes that were “under federal jurisdiction” on June 8, 1934, when the IRA was enacted. Currently, tribes seeking to have land taken into trust must present a sufficient legal and factual record that shows they were under federal jurisdiction in 1934—and that requirement applies to Alaska tribes under the Final Rule.

It has been argued that “the *Carcieri* decision had no impact in Alaska” because in *Carcieri* the Court interpreted 25 U.S.C. § 465, while the question of trust acquisition authority in Alaska is governed by the 1936 amendment that applied the IRA to Alaska. However, that amendment applied both section 465 and section 479, containing the “under federal jurisdiction” language, to Alaska tribes. It seems unlikely that Alaska tribes are exempt from the *Carcieri* decision. Opponents of an Alaska trust application could argue that no Alaska tribes were federally recognized for political purposes in 1934 and/or challenge the facts supporting federal jurisdiction in 1934 over an individual tribal applicant.

**F. What will happen to the ANCSA “land bank” protections during pendency of a trust application?**

Under the so-called land bank provisions, ANCSA lands that are not developed, leased, or sold to third parties enjoy exemptions from property taxes, adverse possession, and judgments under federal bankruptcy or other insolvency and creditors’

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171 *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009). The Court decision turned on interpretation of 25 U.S.C. § 479, which defines “Indian” to “include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction.” The Court read the term “now” to mean at the time of the IRA’s enactment in 1934, not the date when the land would be taken into trust. *Id.*
172 See Dep’t of the Interior, Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook) (Version III, June 16, 2014) (advising tribes to submit with application “information in support of the tribal applicant being ‘under Federal jurisdiction’ in 1934”). The Final Rule does not mention *Carcieri* at all.
175 Donald Craig Mitchell, Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts, 14 ALASKA L. REV. 353, 362 (1997). Mr. Mitchell argues that there are no federally recognized tribes, for political purposes, in Alaska, and that the Assistant Secretary of the Interior for Indian Affairs acted unlawfully in recognizing Alaska tribes in 1993 and subsequently.
rights laws. Only federally recognized tribes can apply to have land taken into trust, so any ANCSA corporation lands for which trust status is sought must first be conveyed to a tribe. This conveyance to a “third party” would remove the protections of the ANCSA land-bank provisions. While trust status would eventually confer essentially the same protections, they would be lacking during the pendency of the application, which in some cases can take years. Tribes may wish to pursue an administrative or legislative means of bridging this potentially significant gap.

G. Will the Department undertake an additional rulemaking to address the Alaska-specific implementation issues discussed above?

Comments from a wide range of stakeholders—tribes, ANCSA corporations, private citizens, and the State of Alaska—urged the Department to engage in further rulemaking or policy development to clarify how the trust application process would be implemented given the unique history and status of Alaska lands. The consensus appears to be that the considerations discussed above raise substantial concerns that need to be addressed in a supplemental rulemaking. However, in the Final Rule, the Department made clear it has no plans for further revisions, although it left the door open should Alaska-specific issues arise that cannot be addressed as part of the current discretionary review process under Part 151.

VI. CONCLUSION

The opportunity to potentially place land-into-trust in Alaska could be a game changer: a shift in ownership and land tenure that brings enhanced tribal jurisdiction and opportunities for economic development, cultural resource protection, and the exercise of tribal sovereignty. As discussed above, several implementation issues and concerns will need to be resolved, and Alaska tribes will want to participate in this resolution process and ensure a fair and efficient land-to-trust policy and procedure in Alaska.

176 43 U.S.C. § 1636(d)(1). “‘Developed’ means a purposeful modification of land, or an interest in land, from its original state that effectuates a condition of gainful and productive present use without further substantial modification.” Id. § 1636(d)(2)(A).
177 The Native Village of Port Heiden made this point in its comments on the Proposed Rule.
178 See, e.g., Comments of Sealaska Corporation at 3-4; Comments of State of Alaska at 10-12; Comments of NANA Regional Corp. at 2; Comments of Mike Williams at 3-6 (suggesting several ways to make the final rule “more reflective of the on-the-ground realities in village Alaska”).
179 Final Rule at 76894.
USE OF NATIVE AMERICAN TRIBAL NAMES AS MARKS
Brian Zark*

“Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.” President Barack Obama, November 5, 2009729

I. INTRODUCTION

When the formation of Apache, Black Hawks, and Chinook Helicopters flew over the Superbowl in 2014, Native Americans felt pride in their hearts.730 When Nick Corso and Bill Murray on ESPN’s College Gameday threw an Eagle Staff before a Florida State Football game, a symbol to honor Native American veterans, Native American veterans thought this action to be inappropriate or even offensive.731 When Urban Outfitters unveiled their new products entitled “Navajo hipster brief” and “Navajo fabric wrapped whiskey flask”, Native Americans were angered and outraged.732

All the examples above have the use of a Native American tribal name as a mark in common. American Indian tribes have an interest in protecting their names for two important reasons: tribes do not want their names used for purposes they do not agree with, and tribes want to protect their products in the marketplace.733 This paper will (1) show the current extent of protection available to Native American tribal names734 and some challenges those protections face; (2) discuss how those protections were utilized in one case; and (3) show how minor adjustments in current laws could make a huge difference in the protection of Native American tribal rights.

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733 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §20.02[6][c], at 1312 (Nell Jessup Newton et al. eds., 2012).

II. INDIAN ARTS AND CRAFTS ACT

A. History of the Indian Arts and Crafts Act

The Indian Arts and Crafts Act (IACA) was enacted in 1935 and was later amended in 1990, 2000, and 2010. 735 When IACA was first enacted, it created the Indian Arts and Crafts Board (the Board). 736 The original IACA made it a misdemeanor to willfully misrepresent goods that were not made by Native Americans 737 as Indian produced. 738 For fifty years the United States government did not prosecute a single case under the 1935 IACA. 739

In the 1970s, there was an increase in goods that misrepresented themselves as American Indian products because of the “fashion craze for American Indian style” during that time period. 740 Although change was needed earlier, it finally took place in 1989, when Congressman Kyl introduced amendments to IACA. Congressman Kyl, who had a large Navajo constituency, and Congressman Campbell, a Native American jewelry maker, worked together to produce IACA of 1990. 741 IACA of 1990 was amended to include civil penalties and to increase the criminal misdemeanor to a felony. 742

In 2000, Congress again amended IACA to allow Indian arts and crafts organizations and Indians to file civil suits on their own. 743 In 2010, Congress made amendments to include increased penalties and allow all federal law enforcement the ability to investigate potential violations. 744

B. The Indian Arts and Crafts Board and Indian Arts and Crafts Act

The stated purpose of the Board is “to promote the economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship.” 745 Additionally, the Board was established for the “implementation and enforcement of the Indian Arts and Crafts Act of 1990, a truth-in-advertising law that provides criminal and civil penalties for marketing

736 Id. at 1.
737 Indians are citizens of the United States, 8 U.S.C. §1401(b), citizens of the state wherein they reside, U.S. Const. amend. XIV, and many are citizens of Indian tribes, Cohen’s Handbook of Federal Indian Law §14.01[1], at 922 (Nell Jessup Newton et al. eds., 2012).
738 Id. at 2.
740 Id. at 24.
741 Id.
742 Id. at 11.
743 Mittal, supra note 7, at 2.
744 Id. at 2-3.
products as ‘Indian-made’ when such products are not made by Indians, as defined by the Act.” The Board promotes the economic welfare of Indian tribes and Indian individuals by providing business advice, providing information on IACA, helping with fundraising, and promoting Native American artists. The board accomplishes these tasks by having information about IACA on their website, and going to Native American events such as art fairs and powwows.

In 2013, the Board was scheduled to be at twenty-one events throughout the country from Anchorage, Alaska to Washington D.C.

The Board is not an enforcement agency, but still helps in the enforcement of IACA. The Board helps enforce IACA by having a website to receive complaints over the Internet, a mailing address to receive mail in complaints, and a telephone number to receive violation reports. Once the Board determines a violation may have occurred, it either sends a letter to the party accused of violating IACA stating there is a potential violation, or refers the matter to the authorities.

The stated purpose of the Indian Arts and Crafts Act of 1990 was “to protect Indian artists from unfair competition from counterfeits.” Under IACA, it is unlawful if a person "offers or displays for sale or sells a good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or [tribal] organization, resident within the United States.”

Brian Lewis, an attorney who used IACA in a case against Urban Outfitters, stated “[i]t was non-Indian corporations’ profiting from posing their products as having been made by Native Americans that led to the enactment of the (law) in the first place.”

C. Example of a Significant Industry that IACA Helps Protect

IACA is designed to help the Native American artists by not allowing goods that are not authentic into the marketplace, and by ensuring the consumer is not receiving imitation work. IACA provides protection, for example, to a

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747 Id.
749 Id.
750 Mittal, supra note 7, at 7.
752 Mittal, supra note 7, at 14.
754 25 U.S.C. 305e (b).
Native American Navajo rug maker, by banning the sale of imitation Navajo rugs. A Navajo rug maker starts training as early as the age of four and continues the art tirelessly for sixty years perfecting her craft. A loving mother or grandmother generally trains the young child and directs the young child in the Navajo Rug Making craft. This direction is needed because making a Navajo Rug involves complicated procedures and the designs in the rugs have significant meaning. Each geometric shape, for example has certain meaning. A Navajo Rug imitator would likely not know the significance of the geometric shapes that are contained within the rugs.

The time required to make a good quality Navajo rug depends on many factors including the size of the rug, the intricate designs included in the rug, and other responsibilities a rug maker may have in her personal life. The price for a Navajo rug also depends on multiple factors, including the size and detail of the rug, and where the rug is sold. The rug making and other crafts need to be protected so that the tradition of passing on crafts to younger generations can continue.

D. Extent of Protection Provided by the Indian Arts and Crafts Act

The Board has a budget of 1.2 million dollars, a staff of ten individuals, and is the main point of contact for violation complaints for IACA. As discussed above, one can make a complaint either through an online form, calling the Board, or by writing. From fiscal year 2006 to fiscal year 2010, the Board received 649 complaints. Of these complaints, the Board sent 102 educational letters, 188 warning letters and referred 117 of these complaints to law enforcement agencies. Figures from prior years can be found in the U.S. Government Accountability Office Report, but current data is not accessible. Keeping this information private hinders progress in determining the amount of misrepresentation of Native American arts and crafts in the industry.

Since the Board is not an enforcement agency, it refers the complaints to government enforcement agencies. The Board refers these complaints to the Federal Bureau of Investigation, Interior’s Bureau of Indian Affairs, National Park Services, and state attorney generals. Currently, any federal law enforcement organization can investigate an IACA violation.

E. Challenges to the Indian Arts and Crafts Act and Indian Arts and Crafts Board
IACA and the Board face many challenges in the effort to deter imitation artwork. Some of these challenges include the size of the Board’s budget, the unknown size of the Indian Arts and Crafts market, and determining who IACA protects. As mentioned above, the Board has a budget of $1.2 million dollars a year. This budget covers the staffing of three museums, in addition to handling IACA complaints.\footnote{Mittal, supra note 7, at 5.} The Board has a reimbursable support agreement for one full time investigator at the National Park Services Investigative Services,\footnote{Id. at 7.} but needs eight to ten investigators dedicated to investigating potential IACA violations.\footnote{Id. at 21.} Even though all federal law enforcement agencies have the power to investigate IACA violations\footnote{Id. at 3.}, violations often receive low priority.\footnote{Id. at 21.}

If the Board and law enforcement agencies knew the size of the Indian arts and crafts industry and the amount of misrepresentation that is occurring, IACA violations might receive higher priority by law enforcement agencies. The size of the market and the extent of misrepresentation, however, are unknown.\footnote{Id. at 9.} A 1985 Department of Commerce study\footnote{Study of Problems and Possible Remedies Concerning Imported Native American-Style Jewelry and Handicraft, DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, (Washington, D.C. 1985).} put the market size between $400-800 million, with 10-20% of the goods being misrepresentative, but this study is outdated and unreliable.\footnote{Mittal, supra note 7, at 9.} Even though a more accurate study would be complex, costly, and might not have accurate results\footnote{Id. at 12.}, a redesigned and revised study could determine the extent of misrepresentations of Indian arts and crafts taking place. More accurate data can be used to overcome the challenge of IACA being a low priority for federal prosecutors.\footnote{Id. at 21.}

Another challenge facing IACA is the debate to determine who may market their work as Indian made. IACA is not concerned with the quality of the product but with the origin of the art or craft.\footnote{Suzan Harjo, 2nd Annual Cherry Blossom Symposium – Traditional Knowledge: IP and Federal Policy Panel 1, (March 21, 2014), available at http://www.pijip.org/events/cb2014/ (time period of the video is 2:01).} IACA requires that “[a]ll products must be marketed truthfully regarding the Indian heritage and tribal affiliation of the producers, so as to not mislead the consumer. It is illegal to market an art or craft item using the name of a tribe if a member, or certified Indian artisan, of that tribe did not actually create the art or craft item.”\footnote{The Indian Arts and Crafts Act of 1990, INDIAN ARTS AND CRAFT BOARD, available at http://www.iacb.doi.gov/act.html (last visited March 21, 2014).} This requirement ensures that one be either a member of a tribe or certified Indian artisan to market arts or
crafts with the use of a tribe’s name. To be a certified Indian artisan, “[t]he individual must be of Indian lineage of one or more members of such Indian tribe; and (2) the certification must be documented in writing by the governing body of an Indian tribe or by a certifying body delegated this function by the governing body of the Indian tribe.”

In both situations one must have lineage to a tribe, and that is where controversy arises.

A federally recognized tribe is a tribe that is recognized by statute, administrative process, treaty or other intercourse with the United States. The United States officially acknowledges a federally recognized tribe’s government. Congress has the power to terminate this federal recognition as long as Congress’s action is both clear and specific. Tribal governments have the right to tax, establish laws, and determine citizenship. Tribes have the authority to determine their own membership. Tribal membership requirements are usually found in the individual tribe’s constitution, articles of incorporation, or ordinances. These requirements are usually a certain amount tribal blood quantum or lineal descendency to a tribal citizen.

A tribe can also revoke tribal membership. Tribal disenrollment is a very controversial topic. Through disenrollment, the Chukchansi tribe in California went from approximately 1,800 people to 900 people. This mass disenrollment happened over a ten-year span, after the opening of a casino.

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775 25 C.F.R. § 309.25.
776 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §3.02[3], at 134 (Nell Jessup Newton et al. eds., 2012).
779 Cohen’s Handbook of Federal Indian Law §3.02[8][a], at 164 (Nell Jessup Newton et al. eds., 2012).
781 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) (“[a] tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”), available at http://supreme.justia.com/cases/federal/us/436/49/case.html#F32.
784 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §3.03[3], at 175 (Nell Jessup Newton et al. eds., 2012).
The disenrollment highly favored the remaining tribe members, as the profits from the casino per member rose.

With an understanding of how a federally recognized tribe is defined and the authority granted to a federally recognized tribe, the IACA lineage requirement is understood more clearly. A problem arises because there are Native American artists who are unable to obtain certification. Some barriers to a Native American artist receiving certification include, “belonging to terminated tribes, having been adopted, or being of descent that does not meet the particular tribe’s enrollment criteria.”\textsuperscript{787} If one is not an enrolled member of the tribe and depends on certification, that person is at the mercy of the tribe concerning certification.\textsuperscript{788} The famous artist Willard Stone, who was not an enrolled Cherokee, provides an example of the problem of certification.\textsuperscript{789} Stone was never certified before he died,\textsuperscript{790} but his family and other Cherokee believe that he should be posthumously certified.\textsuperscript{791}

The opposing side believes that tribal affiliation should be required. Senator Campbell, a driving force behind IACA and an artist himself stated, “[i]f he cares so little about his heritage that he never has anything to do with the tribe from which he claims to have been descended except to use it as a marketing ploy, or if the only way he can get his work sold is by advertising that he is Indian, then he should not be validated.”\textsuperscript{792} Senator Campbell’s view is one that should be respected because he has firsthand knowledge of the Indian arts and crafts industry since he is a Native American jewelry maker.\textsuperscript{793}

III. TRADEMARK LAW

A. A Brief History of Trademark Law and a Modern Day Example

Trademarks are “generally a word, phrase, symbol, or design, or a combination thereof, that identifies and distinguishes the source of the goods of one party from those of others.”\textsuperscript{794} A service mark identifies services, is the same as a trademark, and is often referred to as such.\textsuperscript{795}

\textsuperscript{787} Sheffield, supra note 11, at 114-15.
\textsuperscript{788} Id. at 129.
\textsuperscript{790} Sheffield, supra note 11, at 104-05.
\textsuperscript{791} Id. at 105.
\textsuperscript{792} HERMAN J. VIOLA, BEN NIGHTHORSE CAMPBELL: AN AMERICAN WARRIOR, 191, (1st ed. 1993).
\textsuperscript{793} Id. at 171.
\textsuperscript{795} Id.
Early civilizations such as the Greeks, Romans, and Egyptians used trademarks.\textsuperscript{796} Egyptian law required bricks to have the names of both the owner of the brickyard and the slave that made the brick imprinted on the brick so that defective bricks could be traced back and fixed. In the 1300’s, armorers required guilds to mark their products because if anything went wrong with the weapons or armor of the fighting man “his widow or next of kin wanted to find the varlet who was responsible.”\textsuperscript{797}

Over time, certain marks became synonymous with good workmanship.\textsuperscript{798} Others were able to recognize the mark and associate the mark with good products. The mark that was associated with good workmanship therefore had goodwill with others and increased value.\textsuperscript{799}

Different countries, including the United States, eventually enacted trademark statutes. Generally, the purposes of trademark statutes are “to protect the public so it may be confident that, in purchasing a product bearing a particular trademark which it favorably knows, it will get the product which it asks for and wants to get” and to protect the investment of the owner of a trademark who “has spent energy, time, and money in presenting the public the product ...from its misappropriation by pirates and cheats.”\textsuperscript{800} Trademark law therefore protects both the purchasing public and the trademark owner.

The Choctaw Nation of Oklahoma’s “Choctaw Defense” provides a modern day example. Choctaw Defense is a defense company that is wholly owned by the Choctaw Nation of Oklahoma.\textsuperscript{801} Choctaw Defense has a registered trademark at the United States Patent and Trademark Office (PTO). Some of the products that Choctaw Defense makes include shipping and storage containers, all-terrain trailers, and pollution control equipment.\textsuperscript{802} The Choctaw Defense manufacturing facilities are ISO 9001:2000 compliant, which is a high quality assurance standard.\textsuperscript{803} These standards ensure that Choctaw Defense produces high quality parts so its products maintain the reputation of good workmanship, and the company is not associated with “varlets.” The mark can be seen in Figure 1.

\textsuperscript{797} Id.
\textsuperscript{798} Id. at 174.
\textsuperscript{799} Id.
\textsuperscript{800} Id. at 181.
B. Tribal Insignia Protection

Congress ordered the PTO to conduct a study on Native American insignias after the Zia tribe had to face legal battles to protect their sun symbol. The legal battle began in 1992 when the Zia Pueblo attempted to block the Coulston International Corporation, a chemical testing company, from using the Zia’s sun symbol. After three years of legal fighting, Coulston ended up withdrawing its application for a trademark. This was only a small victory because the amount of resources the Zia people had spent to protect their insignia.

In 1998, the Zia engaged in another legal battle for the use of their sun symbol when American Frontier Motorcycle Tours submitted an application for a trademark that included the Zia Pueblo’s sun symbol. This time, the Zia had the support of New Mexico’s Senator Jeff Bingham, and American Frontier Motorcycle Tours withdrew their trademark application. After supporting the Zia in the American Frontier Motorcycle Tours litigation, Senator Bingham additionally helped pass a law requiring the commissioner of the PTO to study the official insignias of Native American tribes.

In response to this law, the PTO conducted a seven month study in which it received comments from the public. These comments varied widely. Daimler Chrysler, for example, wanted the official insignia definition to be defined narrowly so as not to include Native American tribal names. Daimler Chrysler went on to state that, “we believe that any new protection for Native American

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804 Found using the PTO’s Trademark Electronic Search System (TESS). The serial number of the trademark is 86148263. The TESS website can be found at: http://www.uspto.gov/trademarks/.  
806 Id. at 129.  
807 Id.  
808 Id. at 131.  
809 Id.  
810 Id. at 132-33.  
811 Dickinson, supra note 6, at 1.  
tribe insignia should include a grandfather provision for any third party use that exists at the time of enforcement.  

The Zia expressed a different view, and commented that, “[o]fficial insignia should be defined as any insignia used by a tribe signifying its identity and/or insignia identified by the governing body of the tribe as an official symbol.” The Pueblo also stated that the amended law should be retroactive and remove Native American symbols from companies. The Zia Pueblo claimed that, “[n]o business interest should justify the retention of federal registrations in official Native American symbols which Congress decides should not be registrable. By enacting a retroactive law, current trademark owners who use Native American tribal names would not be able to retain their trademark.

In deciding the matter, the PTO took the position that it “does not believe that any statutory changes are necessary to provide adequate protection for the official insignia of Native American tribes.” The PTO’s proposed definition of an insignia for Native American tribes is, “Official Insignia of Native American tribes means the flag or coat of arms or other emblem or device of any federally or State recognized Native American tribe, as adopted by tribal resolution and notified to the U.S. Patent and Trademark Office.” Examples of official insignia that are included in the database can be seen below in figure 2.

![Figure 2: Examples of Native American Tribes' Insignia](image)

The PTO recommended in the study that, “[a]n accurate and comprehensive database containing the official insignia of all state and federally recognized Native American tribes should be created” and the PTO should maintain this

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813 Id. at 3.
815 Id.
816 Dickinson, supra note 6, at 44.
817 Id. at 24.
818 Id. at 29.
database.\textsuperscript{819} The PTO subsequently created a database of Native American Tribal Insignia, and the database is a resource for PTO examining attorneys to use when they receive an application for a mark.\textsuperscript{820} The examining attorney can then use the database to compare the application for a mark with the official insignias in the database to determine if the applicant’s mark impermissibly suggests a connection to a Native American tribe. If the examining attorney does determine the applicant's mark suggests such a connection, the attorney can disallow the registration to the applicant's mark.\textsuperscript{821} Currently, of 565 federally recognized tribes, there are only forty-one registered Native American insignias.\textsuperscript{822} While the database is a good resource for tribes to protect their insignias, the percentage of tribal insignias that are registered is extremely low.

\textbf{C. Current Attempts to Retroactively Remove a Trademark}

The PTO did not recommend a retroactive law that would affect current trademark holders whose trademark was associated with a Native American tribe. This is the type of law for which the Pueblo of Zia fought. There is, however, a movement to remove current Native American trademarks that are offensive and derogatory. This movement has been in the news as a result of the R*dskins trademark.\textsuperscript{823} The attempt to cancel this trademark\textsuperscript{824} was unsuccessful because “the doctrine of laches barred the plaintiffs from bringing their claim.”\textsuperscript{826} Recently, however, the PTO had trademark registration of the R*dskin name and logo removed,\textsuperscript{826} though the team is currently challenging this ruling.\textsuperscript{827} Michael Honda, however, a Congressman from the region where the 2016 Superbowl will be played, introduced a bill that would bar the nickname “R*dskin” from being trademarked presently or in the future.\textsuperscript{828}

\begin{itemize}
\item \textsuperscript{819} Id. at 47.
\item \textsuperscript{820} Native American Tribal Insignia Database, \textit{available at} http://www.uspto.gov/trademarks/law/tribal/. Instruction on how to access the database can be found under question two and three.
\item \textsuperscript{821} Native American Tribal Insignia Database, \textit{available at} http://www.uspto.gov/trademarks/law/tribal/. The answer to question eight states, “[t]he database is used as an aid in the examination of applications for trademark registration.”
\item \textsuperscript{822} Trademark Electronic Search System (TESS), \textit{available at} http://tmsearch.uspto.gov/bin/gate.exe?f=tess&state=4809:x5nnka.1.1 (last visited March 8, 2014).
\item \textsuperscript{823} Amada Blackhorse, \textit{Why the R*dsk*ns Need to Change}, March 8, 2013, HUFFINGTON POST, \textit{available at} http://www.huffingtonpost.com/amanda-blackhorse/washington-nfl-name-change_b_2838630.html.
\item \textsuperscript{824} Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d 96 (2003).
\item \textsuperscript{828} Id.
\end{itemize}
In part because of this new legislation, public perception is changing. If an individual attempted to register the R*dskins trademark today, it would likely be turned denied. Since 1992, at least eleven attempts to register a new trademark with the word R*dskins have been denied.\textsuperscript{829} One refusal letter from the PTO read, “[r]egistration is refused because the applied-for mark REDSKINS HOG RINDS consists of or includes matter which may disparage or bring into contempt or disrepute persons, institutions, beliefs, or national symbols.”\textsuperscript{830}

Public perception has increased the pressure to remove the trademark. President Obama even expressed his personal view, stating that, “[i]f I were the owner of the team and I knew that the name of my team, even if they’ve had a storied history, was offending a sizable group of people, I’d think about changing it.”\textsuperscript{831}

\textbf{D. Trademark Protection: False Connection}

Along with protection provided by tribal insignia, a tribe’s name also has protection from marks that falsely suggest a connection to an Indian tribe. This protection can be found in 15 U.S.C. § 1052 (a), which states:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it

(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or \textbf{falsely suggest a connection} with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 3501(9) of Title 19) enters into force with respect to the United States.

This statute effectively provides the Patent and Trademark office the ability to refuse registration of a trademark that falsely suggests a connection to a Native American tribe.\textsuperscript{832}

\textbf{E. PTO Examining Attorney}


\textsuperscript{830} Id.

\textsuperscript{831} Jessop, supra note 97.

\textsuperscript{832} Dickinson, supra note 6, at 34.
In order to ensure the PTO does not issue trademarks that give a false impression of being connected to an Indian tribe, the Office has assigned an attorney to review “all trademark applications containing tribal names, recognizable likenesses of Native Americans, symbols perceived as being Native American in origin, and any other application which the PTO believes suggests an association with Native Americans in origin, and any other application which the PTO believes suggests an association with Native Americans.”

These examining attorneys have to walk a fine line. For example, an examining attorney rejected a trademark application from Wagner Gourmet Foods, Inc., a North Carolina company, for cocktail mixes because of the “likely false association with the Pueblo of Zia and possible disparagement of the tribe.” Figure three shows the rejected trademark from Wagner Gourmet Foods.

Figure 3: Rejected Trademark Application 75-447770 from Wagner Gourmet Foods.

Figure 4, below, shows the Zia’s flag, which the tribe adopted in 1995.

Figure 4: Flag of the Pueblo of Zia

F. Challenges that Trademark Law Faces

833 Id. at 14.
835 Dickinson, supra note 6, at 14.
Native American tribes face several challenges with trademark law including, the cost of bringing trademark challenges, the possible ignorance of the attorney examining marks that may have tribal connection, and litigating against existing trademark holders. Possibly the biggest challenge is financial. Many Native American tribes are without the financial resources to have trademark attorneys “institute opposition or cancellation proceedings in the PTO, to police unauthorized use of common-law trademarks, and to take advantage of legal options.” 838 Even if a tribe does have the resources, tribal members may feel the time and resources spent were a waste, as was the case with the Zia tribe after it’s batter with Coulston International Co. 839

A second potential challenge faced by tribes attempting to protect their names is that examining attorneys may not be aware that a symbol they are examining is connected to Indian culture. 840 Even though the PTO has one dedicated attorney who is to have expertise and familiarity in Indian marks review all potentially connected marks, this task may be difficult due to the large number (566) of federally recognized tribes. 841

A third potential difficulty faced by tribes, is existing trademark owners who have tribal names as marks of their goods. Non-tribal trademark owners argue that taking away their trademarks would “constitute a taking, and could shake business confidence in the U.S. trademark system.” 842

G. Positive Changes Occurring at the Patent and Trademark Office

Even though Native American tribes encounter difficulty protecting their names with trademark law, the law offers some benefits to protect Native American tribal names. The largest protection is the attorney review by someone who is familiar with all marks that might be considered connected to an Indian tribe. This examining attorney would likely deny any trademark application that falsely suggests a connection to an Indian tribe, such as the one seen above from Wagner Gourmet Foods.

Tribal members also have an advantage in that, “[w]ith respect to federally recognized tribes and their members, statutory authority already exists for waiver of PTO fees charged in connection with obtaining Federal trademark registration for marks that identify Indian arts and crafts products.” 843 Even though this does not pertain to all Indian products, a large number of Native Americans benefit because they work within the arts and crafts industry.

838 Dickinson, supra note 6, at 29.
839 Id. at 129.
840 Id. at 125.
842 Dickinson, supra note 6, at 43.
843 Id. at 31.
Another major benefit is created by the partnership between the PTO and the Native American Intellectual Property Enterprise Council (NAIPEC). The NAIPEC is a nonprofit organization that provides pro bono legal assistance to tribes, tribal businesses, and Native American inventors. The founder of NAIPEC is a successful Native American inventor. The partnership between the PTO and NAIPEC was created in a Memorandum of Understanding in which the two organizations would work “together to research and identify the IP education needs of specific Native American communities, and to provide that education in whatever way works best, our partnership will help provide Native American inventors the tools they need to expand their patent and trademark filings.” The PTO provided NAIPEC an office within the PTO so the Native American community voice can be heard concerning Intellectual Property policies. This relationship between the PTO and NAIPEC is still going strong today, and these changes have the trademark law moving in the right direction.

IV. STATE LAW PROTECTION FOR NATIVE AMERICAN TRIBAL NAMES

In addition to IACA and federal trademark laws, state laws provide additional protections for tribal names. Currently, twelve states have enacted Indian arts and crafts laws. Arizona and New Mexico are two such states. Under Arizona law, it is unlawful to “[s]ell or offer for sale any products represented to be authentic Indian arts and crafts unless the products are in fact authentic Indian arts and crafts.” A violation of this law results in a misdemeanor. New Mexico has a similar law entitled the New Mexico Indian Arts and Crafts Sales Act, which states that, “[i]t is unlawful to barter, trade, sell or offer for sale or trade any article represented as produced by an Indian unless the article is produced, designed or created by the labor or workmanship of an Indian.” The New Mexico Attorney General and the Indian Arts and Crafts Board have worked closely together and have created a brochure titled, “Take Home a Treasure from Indian Country: Buy Authentic New Mexico Indian Arts

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847 Id.
848 E-mail from David Petite, Founder of NAIPEC (March 9, 2014, 11:39 EST) (on file with author).
849 Mittal, supra note 7, at 3.
851 ARIZ. REV. STAT. 44-1231.05.
852 NMSA 1978 §30-33-1.
and Crafts” to help the consumers and the artists of New Mexico. The brochure was created to help solve a common problem, that consumers sometimes buy misrepresented products. With this additional step, not only has New Mexico taken steps to prevent the selling of misrepresented, non-tribal arts and crafts with informational brochures, but New Mexico’s assistant Attorney General, together with the Indian Arts and Crafts Board, has conducted sting operations on stores that sold misrepresented items. This dual strategy is an excellent example of states attempting to protect tribal rights and heritages.

V. **Fundamental Similarities Between IACA and Trademark Laws**

Trademark laws and IACA are fundamentally similar both in what, and whom, they seek to protect. Trademark laws are designed to protect the purchasing public and the trademark owner. IACA is designed to protect Indian artists and “the unsuspecting buyer.” Both can be used against those who market their products as authentic, when in fact, it was not produced by Native Americans. The case below is an excellent example of trademark laws and IACA being used together against a retailer using a Native American tribe’s name in describing its products.

VI. **Urban Outfitters use of “Navajo” in their Products**

Urban Outfitters caused a controversy when the company started using “Navajo” to describe approximately twenty items the company sold. Two items sold by Urban Outfitters especially upsetting to the Native American community, were the “Navajo Print Fabric Wrapped Flask” and the “Navajo Hipster Panty.” There was so much dissatisfaction with Urban Outfitters that Sasha Houston Brown, a Native American, sent the Urban Outfitters’ CEO an open letter expressing her distress over the actions taken by the company.

Urban Outfitters’ use of “Navajo” is not the first time “Navajo” has been used to sell products. Mazda used “Navajo” as the name for one of its earlier SUVs, and clothing lines have used “Navajo” to describe their products.

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854 Id.
855 Mittal, supra note 7, at 16.
856 Viola, supra note 64, at 191.
858 Id.
according to Navajo Times contributor Bill Donovan.\textsuperscript{861} The difference in those previous cases and in Urban Outfitters’ use of “Navajo,” is that those companies requested permission to use the term from the Navajo Nation, and promised to use the term with respect.\textsuperscript{862} Urban Outfitters did not. On the contrary, The Navajo Nation sent Urban Outfitters a cease and desist letter, and while Urban Outfitters stopped using “Navajo” online, the company continued to use “Navajo” or “Navaho” in their retail stores.\textsuperscript{863}

The Navajo Nation brought suit against Urban Outfitters with six claims: (1) trademark infringement, (2) trademark dilution, (3) unfair competition, (4) false advertising, (5) commercial practice laws violations, and (6) violation of the Indian Arts and Crafts Act.\textsuperscript{864} The first and fourth claims will be discussed in this section.

Navajo Nation alleged that Urban Outfitters committed trademark infringement, alleging the infringement occurred when Urban Outfitters used the marks of “Navajo” and “Navaho” in connection with products sold by Urban Outfitters, which caused confusion in the marketplace. According to the Navajo Nation, this confusion occurred when “a buyer exercising ordinary care might be deceived into thinking they were buying a product manufactured by the Navajo Nation or member thereof.”\textsuperscript{865} The Navajo Nation thus claimed that Urban Outfitters violated 15 U.S.C. §§114 and 1117. 15 U.S.C. §1114, which states:

(1) Any person who shall, without the consent of the registrant—
(a) Use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
(b) Reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided.

15 U.S.C. §1117 allows an owner of a trademark “to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the

\textsuperscript{861} Id.
\textsuperscript{862} Id.
\textsuperscript{863} Navajo Nation v. Urban Outfitters, Inc., 935 F. Supp. 2d at 1155.
\textsuperscript{864} Navajo Nation v. Urban Outfitters, Inc., 935 F. Supp. 2d at 1155
\textsuperscript{865} Id. at 1163.
action.” The potential for awards in these types of case can be high. Brian Lewis, an Attorney for the Navajo Nation, stated that, in the Urban Outfitters case, “[t]he tribe is seeking monetary damages from the company of up to seven or eight figures.”

Navajo Nation claims that Urban Outfitters violated IACA by falsely suggesting its products were produced by an Indian tribe. IACA, as discussed above, is a truth-in-advertising law, which ensures that items that are labeled as produced by Indians are actually made by Indians. To support its claim, the Navajo Nation cited the “Navajo Bracelet,” “Vintage Men’s Woolrich Navajo Jacket,” and “Navajo Glove,” all of which were sold at Urban Outfitters. Urban Outfitters countered this argument by saying clothing items, such as the ones mentioned, were not arts and crafts as defined by IACA. The court, however, found that 25 C.F.R. 309.15 applied. Examples of Indian products are given in 25 C.F.R. 309.15 which states that:

(a) Apparel made or substantially decorated by an Indian, including, but not limited to, parkas, jackets, coats, moccasins, boots, slippers, mukluks, mittens, gloves, gauntlets, dresses, and shirts, are Indian products.
(b) Specific examples include, but are not limited to: seal skin parkas, ribbon appliqué dance shawls, smoked moose hide slippers, deer skin boots, patchwork jackets, calico ribbon shirts, wing dresses, and buckskin shirts.

The court found that modern apparel, such as the items being sold by Urban Outfitters with the mark “Navajo,” were “arts” and “crafts” items that were protected by the IACA. In the eyes of the court, the Navajo Nation therefore “sufficiently alleged facts to support a cause of action under the IACA to survive Defendants’ motion to dismiss.” The case is still in litigation but the language from the District Court of New Mexico, quoted above, seems to indicate the Navajo Nation has a very strong case against Urban Outfitters.

VII. **Example of Tribal Name Usage and Solutions**

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867 Id. at 1156.
868 Id. at 1169-70.
869 Id.
870 Id. at 1171.
871 Landry, supra note Id. at 1170
A. Tribal Names Used Successfully and Not Successfully

Native American tribes’ views on their names being used by nontribal third parties vary, and that use has been met with both support and rejection. The Apache Tribal Council supported a Boeing “AH-64D Apache Longbow” by holding a ceremony and blessing the helicopter. The strong support for the helicopter comes from the fact the helicopter is made in Mesa, Arizona, where the Apache are located and a large percentage of Apache are veterans. It must be noted, however, that not all Native Americans support the helicopter being named after the Apache. Vernon Bellecourt, the president of the National Coalition on Racism in Sports and Media, is against naming the helicopter after the Apache but concedes that “[a ]lot of the Apache are veterans who take great pride in their fighting spirit and their military service.”

Additionally, the Seminole tribe allows Florida State University to use “Seminoles” as a mascot. The Seminole Tribe of Florida, Seminole Nation of Oklahoma, and the Miccosukee Tribe of Indians of Florida (a tribe that split from the Seminoles in the 1960’s) all support Florida State University’s use of the “Seminoles” as a mascot. The Seminole Tribe of Florida was involved with the creation of Florida State University’s mascot Chief Osceola. Not all relationships between schools with Native mascots and tribes are so positive. The NCAA had to intervene and ban colleges’ use of hostile and abusive mascots and nicknames from post-season play.

Brian Lewis a Navajo Department of Justice Attorney, made the tribes’ position clear when he stated, “the Navajo name belongs to the people.” As such, The Navajo Nation has allowed non-tribal third parties to use their name, and has also opposed non-tribal third party use. The Navajo Nation allowed Mazda to use “Navajo” after Mazda consulted with the Navajo Nation and gave the Navajo Nation one of the vehicles for its use at its government offices.

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874 Id.
875 Id. at 32, 33.
877 Id.
878 Id.
879 Id.
880 Id.
However, the Navajo Nation sued Urban Outfitters when Urban Outfitters used their name without permission.

Using the examples above, one may conclude that the two biggest factors in determining if tribal names are used successfully and appropriately, are whether the tribe has been consulted about the use of their name and the context in which the tribe’s name is being used. If there is consultation and the use is respectful, then the tribes are more likely to allow a third party to use their name in that third party’s product.

**B. Potential Solution: More Funding for IACA and Minor Changes in Current Law**

The above examples display how a Native American tribe’s name can be used by a non-tribal third party both with and without the support of the tribe. Consultation and context of the use largely determine if the tribe’s name usage is appropriate. If a tribe finds that their name is used inappropriately, they should consider the options available to them just as the Navajo Nation did when they responded to Urban Outfitters’ usage of “Navajo” to label its products.

Potential harm caused by a non-tribal third party’s use of a tribe’s name is a major reason that a tribe should guard against inappropriate usage. This harm can take the form of a major retailer selling an item labeled “Navajo fabric wrapped whiskey flask” which in turn the consumer believes comes from the same source as Navajo rugs. In actuality, the “Navajo fabric wrapped whiskey flask” is not made by an Indian. Another harm is a retailer simply selling a flask with the Navajo name. The sale of this flask is particularly offensive because TheNavajo Nation bans the sale of alcohol within its borders. The Navajo Nation’s driving reasons for this ban are that Native Americans are 514% more likely to die from alcoholism compared to other Americans and the high rate of alcohol related crimes on the Navajo Reservation.

Despite the examples cited above, protection for Native American products has come a long way. A large part of the expansion of those protections is that trademark law and IACA have also come a long way. The original IACA had a minor penalty that was rarely enforced. Today, the Board has a website set up to report violations, and the penalties for violators are heavy. Trademark law has evolved so far as to disallow a trademark for the R*dskins football team, and now applications for a trademark that contain the word R*dskins are turned down.

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883 *Id.*
Even though IACA and trademark law have progressed so far, there are still potential changes that can improve both of them as they relate to tribal names. One potential change that can reap large dividends is to increase the funding of the Board so the Board can hire more investigators and conduct a study of the amount of misrepresentation currently taking place in the Indian arts and crafts industry. Presently, the Board has funding to reimburse one investigator, but more funding would enable the increase of their team of investigators from eight to ten. Additionally, funding is needed to determine just how much misrepresentation is currently taking place in the Indian arts and crafts industry. Once the amount of misrepresentation is determined, the Board can justify giving the Indian arts and crafts industry higher priority when potential violations are reported. Finally, the Board should release the number of complaints they receive each year, so it can be determined whether the misrepresentation of Native American arts and crafts are increasing or decreasing.

Trademark law should allow individual tribes to trademark on their own. This change would force non-tribal third parties to consult with the tribe whose name the third party seeks to use, and the consultation would ensure the tribe’s name is used in the context the tribe determines best. This would, in turn, increase the freedom of tribes to authorize the usage of their names when they believe the usage is appropriate, and would likely have prevented Urban Outfitters’ use of “Navajo” when describing a flask and women’s underwear. Unfortunately, because the law did not give the Navajo Nation ownership of their own name, the tribe ultimately had to go to court and use both trademark and IACA protections available to them.

Both trademark law and the IACA currently provide some level of protection for Native American tribal names, but, as Brian Lewis, attorney with the Navajo Department of Justice, says, the Navajo name belongs to the Navajo people. To that same end, the law should reflect this concept, and should apply to all tribes so a tribe’s name can belong directly to its people.

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884 The idea of allowing the tribe as a group to own their tribe’s trademark instead of an individual is similar to the argument of having Indigenous groups own their Intellectual Property rights which Angela R. Riley argues for in Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities.
The Seattle University Native American Law Students Association and the Seattle University American Indian Law Journal hosted this year's 14th Annual Indian Law Writing Competition.

The purpose of the competition was to recognize excellence in legal research and writing related to Indian law, actively encourage the development of writing skills of NNALSA members, and enhance substantive knowledge in the fields of Federal Indian Law, Tribal Land and traditional forms of governance. The competition was open to matriculated law students at any point in their law school career and regardless of race or tribal membership status. Eligible topics were, Federal Indian law and policy, Tribal law and policy, International law and policy concerning indigenous peoples, and Comparative Law.

We would like to thank this year’s sponsors:

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The featured articles in the publication are:

“For Indian Purposes.” Exploring the Role of Water as a Cultural Resource in Securing a Right to Groundwater for the Agua Caliente Band of Cahuilla Indians

Courtney Cole: University of Colorado Law School
Second Place

Use of Native American Tribal Names as Marks

Brian Zark: Michigan State University School of Law
Third Place

Published in Fall 2015

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The American Indian Law Journal is published by Seattle University Law School students. The Journal publishes two issues each year. Previous issues are available online at the above URL link.

The Journal welcomes the submission of articles and comments addressing Native American law. Please email us at AILJ2@seattleu.edu for more submission information.